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Multiculturalism and Antidiscrimination Law: Comparing the United States and Western Europe

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MULTICULTURALISM AND ANTIDISCRIMINATION LAW: COMPARING THE UNITED STATES AND WESTERN EUROPE

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The relationship between multiculturalism and antidiscrimination is little understood. Contradictory claims and policies to some, they are of the same cloth to others. This article traces overlaps and tensions between both, in a comparison of the United States and Western Europe. Inherent in antidiscrimination is a tension between formal and substantive equality. It is the latter that provides an opening for a multicultural agenda, singling out specific minority groups for protection. In the United States, the domestic race problem has pushed a substantive and hence multicultural understanding of antidiscrimination from early on. By contrast, in Europe, the absence of a victimized minority group largely kept antidiscrimination in a formalistic mode, with an important exception for women. On both sides of the Atlantic, antidiscrimination, as practiced today with respect to racial and immigrant-based diversity, is individualistic and symmetric, and thus averse to multiculturalism. Yet this happened only with a fight in the United States, and quite without one in Europe.

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INTRODUCTION

While multiculturalism has been a declining star for quite some time, antidiscrimination is on the rise, particularly in Europe. None of the political leaders who declared multiculturalism dead in 2010[1] would have dared touching EU antidiscrimination law that had come into existence a decade earlier. Antidiscrimination is notably endorsed by the friends and foes of multiculturalism alike.[2] Kymlicka depicts his liberal multiculturalism as "start[ing] from the anti-discrimination principle"[3], trying to "overcome the deeply entrenched inequalities that have persisted after the abolition of formal discrimination."[4] In this optic, multiculturalism is a second-generation antidiscrimination policy. Quite similarly, while espousing a more radical brand of multiculturalism, Tariq Modood conceives of multiculturalism as addressing "various forms of racism" and the specific "inequalities of post-immigration socio-cultural formations."[5] Evidently, for its proponents from liberal to radical, multiculturalism is inherently wedded to an antidiscrimination agenda. But the reverse is not true: not all who endorse antidiscrimination are also friends of multiculturalism.[6]

The relationship between multiculturalism and antidiscrimination is evidently vexed and in need of clarification. Their divergent fortunes and supporters suggest some deeper differences. At least, one should not axiomatically take them as a joint enterprise, as the multiculturalists are prone to do. As I shall argue in this article, antidiscrimination, as currently practiced with respect to racial and immigrant-based diversity in the United States and Europe, is individualistic and symmetric: it protects everyone. By contrast, multiculturalism, to the degree that the concept is pushed in a

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1 See John Bowen, *Europeans* Against *Multiculturalism*, BOSTON REV. (July 1, 2011), bostonreview.net/john-r-bowen-european-multiculturalism-islam.

2 For a friend, see Will Kymlicka, *The* Rise *and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies*, 199 INT'L. SOC. SCI. J. 97 (2010); for a foe, see PAUL COLLIER, EXODUS: IMMIGRATION AND MULTICULTURALISM IN THE 21ST CENTURY (2013).

3 Kymlicka, *Id.*, at 100.

4 *Id.*, at 102.

5 TARIQ MODOOD, MULTICULTURALISM: A CIVIC IDEA 18 (2008).

6 Apart from Collier, supra note 2, see also Elizabeth Anderson, The IMPERATIVE OF INTEGRATION (2010); DANIEL SABBAGH, EQUALITY AND TRANSPARENCY: A STRATEGIC PERSPECTIVE ON AFFIRMATIVE ACTION IN AMERICAN LAW (2007).

context of antidiscrimination, appears as a collectivistic and asymmetric variant of antidiscrimination: it protects mainly specific minority groups.

Before inquiring into their different accentuations and varying constellations across time and place, it has to be stressed that "equality" is the central principle of both multiculturalism and antidiscrimination, irrespective of the latter`s formalistic or substantive expressions. But what is equality? In contrast to its liberal sister principle of freedom, which is individualistic and free-standing, the principle of equality latently implicates groups or classes as reference point. Equality is a relative principle, an "empty vessel with no substantive moral content of its own."[7] Equality logically requires a comparator—one can only be equal compared to someone else. The Aristotelian principle of equality requires that likes should be treated alike. This necessarily involves classification and thus groups (or "classes"), because "likes" have to be identified and sorted. Consider the very different formulations of constitutional freedom and equality clauses. In the German Basic Law, for instance, the freedom clause (§2) protects the "free development of personality" and the "freedom of the person".[8] The only agent mentioned is "person", without any further qualification—not even that of citizenship. The equality clause (§3) sets out similarly, with "all human beings are equal before the law". But then it brings "men and women" into the picture, as "equal". Furthermore, "No person shall be favoured or disfavoured because of sex, parentage (*Abstammung)*, race, language, homeland and origin (*Heimat und Herkunft)*, faith, or religious or political opinions."[9] One sees: the freedom clause contains no classifications and group references, whereas the equality clause emphatically does. In fact, the equality clause is tantamount to an antidiscrimination clause, prohibiting discrimination on enumerated personal characteristics that mark people as members of certain groups or classes.

Grounded in the principle of equality, antidiscrimination is latently group-oriented. This is why multiculturalism, classically defined by Charles Taylor as a group-level "politics of recognition"[10] to remedy stigmatization and injustice, can warm up to antidiscrimination or even claim to "start" from the "anti-discrimination principle", to reiterate Kymlicka.[11] However, in its dominant understanding in the US

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7 Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982).

8 GRUNDGESETZ [GG] [BASIC LAW], § 2 (*translation at* www.gesetze-im-internet.de/englisch_gg/englisch_gg.html).

9 *Id.*, at §3.

10 Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994).

11 Kymlicka, *supra* note 2, at 100.

and Western Europe (henceforth referred to as "mainstream"), antidiscrimination is at the same time stridently individualistic in *proscribing* to classify individuals on the basis of enumerated group markers – its point being to destroy negative groupness. What defines prohibited group markers is an intricate matter, showing the limits of a formal approach. The "immutability" of a group marker, which is central to American antidiscrimination law, is the most common answer. But it is incomplete. Height, for instance, is immutable too, but mostly not covered, whereas religion is mutable but everywhere protected. Robert Post defines the radius of antidiscrimination law as "stigmatizing attribute[s]" that are "viewed as somehow essential or integral to a person."[12] Similarly, for Deborah Hellman, "wrongful discrimination" is one that "demeans", which is to deny equal moral worth to a person from a position of power.[13] But to redress stigma and demeaning treatment is also the starting point for multiculturalism. Its project of "recognition" is above all a cultural "struggle for a changed self-image, which takes place both within the subjugated and against the dominator", as Charles Taylor put it.[14] Consider for this the seminal US Supreme Court decision *Brown v. Board of Education*,[15] which put an end to American Apartheid: it identified the evil of racial segregation in "generat[ing] a feeling of inferiority"[16] among black schoolchildren. Apparently, the dawn of the civil rights era was in distinctly multicultural colors.

However, mainstream antidiscrimination refuses to see stigma and demeaning treatment in its historical context. Instead, it claims to apply to all persons of all races—including "whites", who are not likely to have suffered from this classification. Accordingly, a second feature of mainstream antidiscrimination, next to being individualistic, is to be symmetric: not only does it prohibit classifying people by certain group markers, but it also prohibits positive discrimination whose intent is not stigmatizing but ameliorative. Note that the mentioned German constitutional equality clause also prohibits "privileging" someone on the basis of the enumerated markers.[17] Affirmative action, or what in Europe is called "positive action" or "positive discrimination", is thus excluded. Title VII of the American civil rights law, which prohibits "unlawful employment practice" on the basis of "race, color, religion,

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12 Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 9 (2000).

13 DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 38 (2008).

14 Taylor, *supra* note 10, at 65.

15 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

16 Quoted in Sandra Fredman, *Substantive Equality Revisited*, 14 INT'L. J. COMP. L. 712, 731 (2016).

17 See *supra* note 8.

sex, or national origin", is negatively formulated, nominally leaving space for affirmative action.[18] But the symmetry enters through also being formulated in a universalistic way, as a law for all, not just for designated minorities. As the American Supreme Court has come to interpret Title VII, it is to "cover white men and white women and all Americans", and it entails an "obligation not to discriminate against whites."[19] Title VII thus can be used by whites to ward off affirmative action schemes favoring blacks and other minorities.

Being individualistic and symmetric, mainstream antidiscrimination thrives on a formal understanding of equality. But never quite to be exorcised from it is an element of substantive equality, which asserts itself in two ways. One is the historical motivation for creating antidiscrimination laws in the first. This historical element is particularly strong in the United States, where to heal the original wound of American society—black slavery—has been the impetus for passing the constitutional 14th Amendment in 1868, with its Equal Protection Clause, and the statutory civil rights laws in the 1960s. These are the two pillars of American antidiscrimination. When the Supreme Court, in a rare moment, interpreted Title VII of the 1964 Civil Rights Act in an asymmetric way, as a statute that protects blacks but not whites, this was because the court saw its purpose in "break[ing] down old patterns of racial segregation and hierarchy"[20], quoting in this context Senator Humphrey`s plain diction of remedying "the plight of the Negro in our economy".[21] Whenever symmetry was shed in favor of asymmetry, as most notably in affirmative action, the reason was a sense of urgency that American blacks needed to be helped. Conversely, asymmetric affirmative action floundered when mostly immigrants came to take advantage of it.[22] Or it never really took off, as in Europe, because immigrants and not a domestic caste have been the primary targets of antidiscrimination there. As immigrants are not slaves, arriving through their own choice, there has been a distinctly lesser sense of obligation toward them. This is the main reason for Europe to mostly keep its antidiscrimination laws in a strictly symmetric mode. Britain "lacks a vanguard group", as one analyst pointed out in a query about the absence of affirmative action east of the Atlantic: "Black and White Britons are early enough in

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18 Civil Rights Act of 1964 tit. VII, § 703(a)(b) (2015).

19 Quoted in Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 339 (1997).

20 United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979).

21 *Id*., at 202.

22 *See* HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE Convergence OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA (2003).

the experience of a multiethnic society to believe that reasonable parity between groups can be established on the basis of individualism, backed by the rule of law."[23]

A second substantive equality element that is inherent in antidiscrimination is more narrowly legal. To the degree that indirect discrimination is recognized, which is the case in most jurisdictions, antidiscrimination turns into a "group-centered, results-oriented policy."[24] Unlike direct discrimination, where an actor discriminates overtly by intention, indirect discrimination is "fair in form, but discriminatory in operation".[25] Indirect discrimination is established whenever there is a mismatch between the demographic availability of a group and its representation in a socially valued position. However, the link to prior discrimination involves a leap of faith, because other factors may have caused the mismatch. This problem moved the American Supreme Court never to endorse indirect discrimination in its constitutional equality jurisdiction, and to radically curtail it in statutory civil rights law. But the important matter is: the concept of indirect discrimination "amounts to erasing the analytical distinction between antidiscrimination policy and affirmative action."[26] It requires the construction of groups as a benchmark for underrepresentation, pushing antidiscrimination into a group-recognizing and thus multicultural direction.

This article traces overlaps and tensions between multiculturalism and antidiscrimination, comparing the United States and Europe, two liberal heartlands facing the same challenge of coping with racial and immigrant diversity. I argue that the multicultural variant of antidiscrimination was defeated in the United States, and that it never grew into a serious challenge to a formalistic understanding of antidiscrimination in Europe. This story is complexly, even paradoxically, involved with different paradigms underlying antidiscrimination on both sides of the Atlantic: "race" in the US and "sex" in Europe. Race, in terms of the legacy of slavery, has provided unique urgency to American antidiscrimination. But the latter at the same time lost stamina through the fact that racial difference has no positive cultural content and thus, as many claim, should not be acknowledged or furthered by the state in any way, even if the intention is positive and remedial. Conversely, the fact that sex discrimination has provided the model for antidiscrimination in Europe, at least within the ambit of European Union law, has allowed antidiscrimination to more easily

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23 Steven M. Teles, *Why is There No Affirmative Action in* Britain*?*, 41 AM. BEHAV. SCI. 1004, 1023 (1998).

24 Daniel Sabbagh, Judicial Uses of Subterfuge: Affirmative Action Reconsidered, 118 POLITICAL. SCI. Q. 411, 423 (2003).

25 Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

26 SABBAGH, *supra* note 24, at 424.

embrace a substantive, group-recognizing equality standard. This is because sexual difference can also be positively valued. No one is seriously advocating a unisex society, while advocating a society with separate bathrooms or locker rooms for different races would be rightly dismissed as racist. However, sexual difference tends to be a majority-norm confirming if not stereotyping difference, which is of little help to the cause of Europe`s racial and immigrant minorities.

A. ANTIDISCRIMINATION AND THE RACE CHALLENGE IN THE UNITED STATES

In January 1992, the City Council of Santa Cruz proposed an ordinance prohibiting discrimination on the basis of "personal appearance". What became known as the "purple hair" or "ugly" ordinance, stirring a heated debate over "anti-lookism", was in keeping with the counter-cultural and progressive image of this coastal college town 75 miles south of San Francisco. In a brilliant paper, Robert Post[27] has demonstrated that this prankish proposal faithfully mirrors the "logic of American antidiscrimination law", which is the utopian undertaking of rendering appearance invisible. The Santa Cruz proposal still resonated with liberal core values. "Equality" commanded that not the best looking but best-qualified person should get the job; and "personal autonomy" meant that people should have control over their looks. The latter, however, is what stirred debate: wouldn`t a free go with weird hair, tattoos, and piercings entail a right to communicate threat and simultaneously require others to ignore it? In response to this concern, the Santa Cruz ordinance became limited to "physical characteristics" that are "outside the control" of the person, thus aligning the planned restriction with the dominant "immutability" standard of American antidiscrimination law. However, this did not make the ordinance any less controversial. Wasn`t it the *reductio ad absurdum* of American antidiscrimination, which was "powerfully compelling" when applied to race or sex, but "seemed to lose its footing when applied to appearance"?[28]

Post defined as the impetus of American antidiscrimination law to "neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities."[29] "Blindness", since the

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27 Post, *supra* note 12.

28 *Id.*, at 8.

29 *Ibid.*

European Renaissance the symbol of justice, is central to it. In the context of Title VII, an employer is required to look at their employees as if they did not exhibit the forbidden characteristics, as if they had no race or sex. Considering that in progressive Santa Cruz not just the mentioned two, but also age, marital status, sexual orientation, height, and weight, among others, were added to the prohibited markers, this amounted to the absurd enterprise of completely de-personalizing the person: "In what sense does a person without an appearance remain a person?"[30] In fact, as employers have to make distinctions between employees, the only criterion left is "individual merit". But this pushes them toward a functional logic of "ability to perform the job" as decisive for employment decisions. "Functional rationality" à la Max Weber or, more darkly, "pure instrumental reason" from the pages of the Frankfurt School of Critical Theory is the truth of American antidiscrimination.

The logic of American antidiscrimination law is still deeply transformative, "fundamentally altering existing social arrangements."[31] However, the utopian thrust is in a radically individualistic direction, to consider people "on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."[32] One sees that in its instrumental individualism, which even effaces the individual, reducing her to a "presocial" thing with "`context-free` functional capacities"[33], American antidiscrimination is the exact opposite of multiculturalism and its "politics of recognition"[34], which requires the social embedding of the individual. Naturally, the "logic of willful blindness"[35] is merely the "dominant conception" of American antidiscrimination law, distorting its actual operation that is much less radical than it proclaims to be. For instance, the official mandate to eliminate all "generalizations" and "stereotypes" on the sex front, would do nothing less than "eliminate" the "social practice of gender."[36] It would force into existence a unisex world, which is not our world and unlikely to ever be.

In fact, in the context of Title VII cases, American courts have embraced different approaches on different discriminatory markers: "integrationist" on race and ethnicity and "separationist" on sex, on both fronts conformant with dominant social norms.

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30 *Id.*, at 12.

31 *Id.*, at 16.

32 Quoted from 29 C.F.R. § 1604.2 (guidelines of the Equal Employment Opportunity Commission, EEOC). EEOC watches over the implementation of Title VII. Post, *supra* note 12, at 19 *et seq*.

33 *Id.*, at 30.

34 Taylor, *supra* note 10.

35 Post, *supra* note 12, at 16.

36 *Id.*, at 18.

Closest to a multicultural logic is a third, "accommodationist" line that was tried for a while on religion, before it was folded back into the "integrationist" mode.[37] With the exception of religion, these different approaches are united by a broadly conservative and "assimilationist" logic that only an individual`s immutable "status" features, ordained by nature, but not her culturally variable "conduct", even if the latter is closely connected to or even constitutive of that status, are protected under antidiscrimination law.[38]

Despite its dominant individualism and penchant for symmetry, there are at least two ways in which a latent group reference in American antidiscrimination has moved to the fore. The first and best known is "affirmative action", which pushes antidiscrimination towards substantive equality, here understood as procuring equality of results.[39] A second, somewhat less known but more explicitly multicultural way of making antidiscrimination group-protective, is to load race with cultural significance. In this mode, race figures as identity, to challenge the predominant conception that only immutable physical markers are protected under antidiscrimination law.

As we shall see, the group challenge has been rebutted. But on both fronts, "race" has proved to be central to American antidiscrimination, pushing it into a group-recognizing, multicultural direction.

1. Affirmative Action

The most famous of all affirmative action cases, *Regents of the University of California v. Bakke*,[40] is a stern abdication of a race-conscious interpretation of the American Constitution`s Equal Protection Clause, and it reasserts the individualistic and symmetric logic of mainstream antidiscrimination. As Justice Powell argued for the court, "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[41] Conversely, he argued, "Racial and ethnic distinctions of any sort are inherently suspect."[42] Powell also put in question a cornerstone of multicultural reasoning, which is a view of society as

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37 *See* Engle, *supra* note 19.

38 *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L. J. 485 (1998).

39 For a sorting of alternative understandings of substantive equality, *see* Fredman, *supra* note 16.

40 Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

41 *Id*., at 298.

42 *Id.*, at 291.

composed of a privileged majority and disadvantaged minority groups. If anything, the United States was a "Nation of minorities."[43] Whoever might pass as majority or minority was historically variable, "necessarily reflect[ing] temporary arrangements and political judgments."[44] A court was ill-equipped to engage in the "variable sociological and political analysis necessary to produce... rankings" of victim groups.[45] This could only "exacerbate racial and ethnic antagonisms, rather than alleviate them."[46] Hence the virtue of an Equal Protection Clause that is "framed in universal terms"[47], whereby the "standard of justification will remain constant."[48]

The upshot of Powell`s reasoning is that *all* uses of race, even if the intention is benign, have to be subject to "strict scrutiny", requiring the court to determine whether the contested policy is "narrowly tailored" to serve "compelling" state interests—a test that almost always turns out fatal to the law or policy in question. This is where the true import of *Bakke* entered: to decouple a thinned version of affirmative action from a remedial justice rationale, and to tie it instead to the utility of "diversity". Note that the medical school of the University of California at Davis had justified its incriminated quota for designated "minority groups" in terms of countering "societal discrimination" and "historic deficit". For Justice Powell, this was "an amorphous concept of injury that may be ageless in its reach into the past."[49] Instead, there was a need to establish "that the classification is responsive to identified discrimination."[50] But this could not be obtained in this case. In addition, an unnecessary burden was imposed on innocent third parties (in the person of a white applicant who had lost out against a worse-qualified minority applicant). However, there still *was* a way to retain race in the admissions process, as a factor that helped in the "attainment of a diverse student body"[51] and that reinforced the university`s mission of a "robust exchange of ideas".[52]

Powell`s pulling of "diversity" out of the hat was an ingenious compromise between the "social necessity of affirmative action" and a "commitment to the values

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43 *Id.*, at 292.

44 *Id.*, at 295.

45 *Id.*, at 297.

46 *Id.*, at 298–299.

47 *Id.*, at 293.

48 *Id.*, at 299.

49 *Id.*, at 307.

50 *Id.*, at 309.

51 *Id.*, at 311.

52 *Id.*, at 312.

of individualism", as Robert Post succinctly commented.[53] It kept a place for affirmative action in American higher education, the site where it perhaps matters most. There was even an element of multiculturalism in Powell`s reasoning: the correlating of race with a viewpoint or culture, which might enrich the university`s educational mission. Powell`s elevating of race to the realm of "ideas" implied that "racial difference" paraded as "cultural difference."[54] Such multicultural reasoning was otherwise categorically rejected in American antidiscrimination law (see below).

Faced with a groundswell of state-level mobilization against affirmative action that followed upon *Bakke*, the Supreme Court held a middle line, not opposing state-level constitutional amendments that prohibited affirmative action, but also sticking to the *Bakke* compromise. In its seminal *Grutter v. Bollinger*[55] decision, the court upheld the University of Michigan`s law school admissions procedure, which used *Bakke*`s "diversity" rationale to achieve a "critical mass" of "groups which have been historically discriminated".[56] On grounds of this policy, 14.5 percent of the law school`s class of 2000 stemmed from minority groups—without it, the minority share would have been just 4 percent.[57]

The interesting part of *Grutter* is not on the doctrinal side, which exactly followed the reasoning of *Bakke*. Rather, its most astounding aspect is the amicus curiae briefs filed by 65 "Fortune 500" companies, including American Express, American Airlines, Coca-Cola, Chrysler, Dow Chemical, Kodak, General Electric, Hewlett Packard, Intel, Kellogg, Kraft, Lockheed Martin, Mitsubishi, Nike, and Reebok.[58] Corporate America came all out in defense of race-conscious policy! Indeed, 25 years after Justice Powell had invented "diversity" in *Bakke*, it now was corporate dogma. Obviously impressed by the corporate-studded amici briefs, the majority opinion by Justice O`Connor concluded that "the skills needed in today`s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[59] By way of diversity, a modicum of affirmative action, and thus of group-centeredness in American antidiscrimination, endures, at least in the jurisdiction of America`s highest court.

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53 Robert Post, *Introduction: After Bakke*, 55 REPRESENTATIONS (SPECIAL ISSUE) 1, 4 (1996).

54 RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 45 (2005).

55 Grutter v. Bollinger, 539 U.S. 306 (2003).

56 *Id*., at 316.

57 *Id.*, at 320.

58 DESMOND S. KING & ROGERS M. SMITH, STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA'S AMERICA 109 (2011).

59 Grutter, *supra* note 55, at 330.

This does not mean that even a thinned-down, diversity-couched version of affirmative action was immune to opposition in the political arena. In 2006, Michigan voters approved Proposal 2, which amended the state constitution to render illegal *all* forms of affirmative action, even (or rather: precisely) a minimal one as endorsed in *Grutter*. In *Schuette v. Coalition to Defend Affirmative Action*,[60] the Supreme Court endorsed this popular move, notably not in changing its mind with respect to the constitutionality of "race-conscious admissions policies in higher education",[61] but through the procedural lens that "courts may not disempower the voters from choosing which path to follow".[62] In his "plurality" opinion (that is not binding for future decisions of the court), Justice Kennedy also railed against the multicultural gospel that "all individuals of the same race think alike."[63] This motif had been mobilized by a federal court to argue that the Michigan vote`s "'clear purpose'" was to make it "'more difficult for certain racial and religious minorities to achieve legislation that is *in their interest*'" (emphasis supplied), and to outlaw it on this ground.[64] While *Grutter*`s endorsement of diversity-focused affirmative action remains the law of the land, *Schuette* underscores the individualistic and formal understanding of equality that is ultimately working against it.

2. Protecting Identity?

The most direct way in which multiculturalism has sought to impact on American antidiscrimination law is through attacking its dominant "immutability" standard, trying to bring behavior and identity also, and not only unchangeable (in essence, physical) status, under the umbrella of protection. How immutability became the dominant standard of American antidiscrimination is an interesting matter in itself. "[J]udges all write as if Congress had tied their hands", reports Karen Engle, but nowhere have legislators stated their original intent. Accordingly, the matter of what "discrimination" is was settled by judicial discretion, dictated by little more than "common understanding."[65] Peter Bayer hopefully argued that "Congress defined discrimination to have the broadest possible reach",[66] concluding that the mutable v.

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60 Schuette v. Coalition to Defend Affirmative Action 572 U.S. 291 (2014).

61 *Id.*, at 300.

62 *Id.*, at 310.

63 *Id*., at 308.

64 *Id*., at 304.

65 Engle, *supra* note 19, at 415.

66 Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U. C. DAVIS. L. REV. 769, 773 (1987).

immutable distinction was without a legal basis. Given the dystopian possibilities of "willfully blind" antidiscrimination,[67] this is a questionable assumption. But it cannot be denied that "individual dignity, personal freedom, and sense of self are often intimately tied to mutable characteristics",[68] and there has been chronic pressure to bring them under the umbrella of legal protection.

If one considers that today nobody could sanely deny that "race" is primarily a social and not biological fact, the persistence of immutability as the standard of antidiscrimination in the US is anachronistic. Already Gunnar Myrdal had argued in his *American Dilemma* (1944) that "'the social definition and not the biological facts actually determines the status of an individual and his place in interracial relations.'"[69] Not even in the era of official racism had America`s highest court denied the social construction of race. The case in point is a set of famous citizenship cases in the early 1920s, in which the court had to decide whether physically "white" Japanese or "Aryan Hindu" applicants could naturalize under a law that stipulated that only "free white persons" could become Americans. For denying these requests, the court had to conceive of race as a "[product] of social and political institutions."[70] Accordingly, race and racism have *always* defied the phenotype v. culture distinction.

The persistence of immutability becomes extra-implausible to the degree that racism has evolved from overt to covert, sometimes called "aversive racism". The biological v. voluntarist distinction is "fundamentally unprincipled and illogical, as the discriminatory animus... operates identically", argues legal scholar Camille Gear Rich.[71] Moreover, the Foucault- and Bourdieu-trained eye easily sees that the conduct-based parts of identity are difficult to "unlearn" because they become inscribed in the person`s body. In the legal literature, it is above all Kenji Yoshino[72] who has brought to bear Judith Butler`s performative idea of identity, according to which "statuses can be partially constituted by acts". This removes the basis for the iron conduct v. status distinction in terms of which American antidiscrimination usually operates, protecting status only. Yoshino rightly criticizes the "strong assimilationist bias in equal protection."[73] Not only is this ill-suited to a world that

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67 As explored by Post, *supra* note 12.

68 Bayer, *supra* note 66, at 839.

69 Myrdal quoted by Donald Braman, *Of Race and Immutability*, 46 U.C.L.A. L. REV. 1375, 1417 (1999).

70 *Id.*, at 1462.

71 Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1141 (2004).

72 Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 779 (2002).

73 *Id.*, at 877.

celebrates diversity; it also obscures that the expectation to assimilate may be exactly the mode in which, in the post-civil rights era, discrimination operates. As another legal critic pointed out, to limit legal protection to immutable traits "in effect cedes to employers and courts the power to define many aspects of individual identity, such as personal appearance, language, and accent."[74] And "Employers use this power to enforce majoritarian norms".[75] More drastically, commenting on the seminal federal court cases of *Rogers v. American Airlines*[76] and *Garcia v. Gloor*[77] that denied black hairstyle and Hispanic-language use, respectively, to minority employees, one "critical race" jurist finds that "antidiscrimination law perpetuates the allocation to employers of a kind of property right in the persons of women and minority employees."[78] Accordingly, critics have demanded broadly defined "ethnic traits" to be protected under antidiscrimination law,[79] and for this law to "recognize correlations between behaviors and statuses."[80]

The legal challenges to the immutability doctrine have been unmistakably multicultural, claiming protection for the group identity of minority individuals. In the mentioned *Rogers v. American Airlines* case, an airline employee defended her cornrows as "'reflective of cultural, historical essence of the Black women in American society."[81] In *Garcia v. Gloor*, the prohibition of using Spanish in the workplace was taken by the (bilingual) Mexican-American plaintiff as robbing him of his "most important aspect of ethnic identification."[82]

When, more than a decade later, a federal court had to decide on a similar English-only case at the worksite, in *Garcia v. Spun Steak*,[83] the situation seemed more favorable to the plaintiffs. By then, the federal Equal Employment Opportunity Commission (EEOC) had passed guidelines that stipulated, against the restrictive diction of *Garcia v. Gloor*, that there was a close relationship between language and national origin, and discrimination based on "linguistic characteristics" was classified

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74 Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM.& MARY. L. REV. 805, 867 (1994).

75 *Ibid.*

76 Rogers v. American Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981).

77 Garcia v. Gloor, 618 F.2d 264 (5th cir. 1980).

78 Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, DUKE L. J. 365, 380 (1991).

79 Perea, *supra* note 74, at 869.

80 Yoshino, *supra* note 72, at 783.

81 Rogers v. American Airlines, Inc., 527 F, *supra* note 76, at 232.

82 Garcia v. Gloor, 618 F.2d 264, *supra* note 77, at 267.

83 Garcia v. Spun Steak Company, 998 F.2d 1480 (9th Cir. 1993).

as unlawful under Title VII. Accordingly, an English-only rule may "create an atmosphere of inferiority, isolation and intimidation".[84] The new EEOC guidelines obviously favored a multicultural outcome. Moreover, an English-only rule was hardly "neutral", as courts usually argued, because "No member of the majority class will ever be disqualified".[85] Accordingly, one dealt here not just with indirect discrimination, but with a more serious case of direct discrimination, for which a justification was much more difficult to find, if one could be found at all.

However, in *Garcia v. Spun Steak*, the federal court flatly rejected a multicultural accommodation, declaring that it was "not bound" by the EEOC guidelines, and that "there is nothing in Title VII which requires an employer to allow employees to express their cultural identity."[86] *Spun Steak* was, like the earlier *Garcia v. Gloor*, a case of Hispanic bilingualism, where the use of English was considered "a matter of choice."[87] But there was an additional twist to *Spun Steak*, as it concerned "derogatory, racist comments in Spanish" hurled at two black and Chinese-American coworkers.[88] In response, management had imposed the English-only rule to "promote racial harmony", in tandem with forbidding "offensive racial, sexual, or personal remarks of any kind".[89] This fact gives a hollow ring to a dissenting judge`s claim that "language is intimately tied to national origin and cultural identity", so that the decision would amount to a "denial of that side of an individual`s personality."[90] Instead, the demanded right to exchange insults in your preferred language gives a taste for the disruptive possibilities of a multilingual workplace.

The only softening of the iron immutability standard in American antidiscrimination has occurred in a number of lower court cases dealing with gay rights. Gays, as Kenji Yoshino[91] has pointed out, bear the brunt of an assimilationist American antidiscrimination law that expects them to "cover" their identity. He quotes the popular black General Colin Powell who bluntly rejected civil rights for gays: "[h]omosexuality is a decision[,]... not a race."[92] As of today, much in contrast to Europe, American antidiscrimination law does not include "sexual orientation" as

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84 Garcia v. Spun Steak Company, 13 F.3d 296 (9th Cir. 1993)., ¶ 7 (Reinhardt, J. dissenting).

85 Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265, 290 (1990).

86 Garcia v. Spun Steak Company, 998 F.2d 1480, *supra* note 83, ¶ 16.

87 *Id.*, ¶ 18.

88 *Id.*, ¶ 3.

89 *Ibid.*

90 Garcia v. Spun Steak Company, 13 F.3d 296, *supra* note 84, ¶ 8, (Reinhardt, J. dissenting).

91 Yoshino, *supra* note 72.

92 *Id.*, at 877.

prohibited marker. However, lower courts have argued that some aspects of identity, like sexual orientation, may be "effectively immutable", so that the mandate to repress them would constitute discrimination. This concerns those traits that "are so central to a person`s identity that it would be abhorrent for government to penalize a person for refusing to change them."[93] Jessica Clarke (2015) has dubbed this the "new immutability", which protects not only "chance" (as previously) but, to a degree, "choice" also. The new immutability covers "a core trait or condition that one cannot or should not be required to abandon."[94]

However, the relaxing of the immutability standard bears risks of its own, all of which have been rehearsed in the debates surrounding multiculturalism. Accepting a right to difference, warns Richard Ford, would be like "protective custody", which "confine[s] and restrict[s] behavior, expression and identity to precisely the degree to which it protects them".[95] Another critic similarly finds that "cultural rights are double-edged—they both protect and regulate their beneficiaries."[96] Gay and Lesbian rights veteran Janet Halley speaks of "'...a script that identity bearers must heed."'[97] Groups often disagree about what is their identity, so that legal fixation could be "favor[ing] tradition over emergent or rebellious cultural forms."[98] In this way antidiscrimination might become "a sort of endangered species act for social identities",[99] which echoes Jürgen Habermas` caustic objection to Charles Taylor`s "politics of recognition."[100]

Moreover, to protect identity "does not have any limiting principle",[101] and it may fuel group conflict. Jessica Clarke cites the recent clash between conservative religionists and gay rights activists over inserting "marriage conscience protection clauses" in state-level same-sex marriage and antidiscrimination laws, which would exempt religiously minded service providers from the antidiscrimination norm. After

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93 A lower court justice as quoted by Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 25 (2015).

94 *Id.*, at 4.

95 FORD, *supra* note 54, at 90.

96 Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2198 (2009).

97 *Id.*, at 2208.

98 *Id.*, at 2211.

99 FORD, *supra* note 54, at 98.

100 Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 128–135 (Amy Gutmann ed., 1994).

101 Clarke, *supra* note 93, at 45.

the federal legalization of gay marriage in 2015, and after the corporate-minded expansion of religious liberty rights in the Supreme Court`s controversial *Burwell v. Hobby Lobby Stores*[102] decision of 2014, this makes for a new round in America`s ongoing culture wars.[103] In light of this, it does not appear unreasonable to put "social identities... on a diet", as Richard Ford[104] suggested for the purposes of antidiscrimination law.

B. ANTIDISCRIMINATION WITHOUT A VICTIM GROUP IN EUROPE

A recent comparison of American and European antidiscrimination laws found them "stalling in the United States while flourishing in Europe".[105] Gráinne De Búrca attributes the difference mainly to antidiscrimination`s more recent arrival in Europe, with no sufficient time yet for backlash to evolve. This diagnosis is correct with respect to a highly technical jurisprudence on disparate impact or indirect discrimination. This indeed has advanced in the European Union, particularly in the context of sex discrimination, while it ails in America, under the Supreme Court`s frantic rooting out of any element of color-consciousness in antidiscrimination. However, the expectation of a backlash is perhaps exaggerated. This is because, devoid of a domestic victim group, European antidiscrimination efforts toward their racial and immigrant minorities have remained timid and subdued. One should not expect a popular backlash against something that is little known outside the narrow province of courts and lawyers.

1. Absence of a Victim Group

There are three legal sources of antidiscrimination in Europe. The weakest and most oblique is regional human rights law. Article 14 of the European Convention of

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102 Burwell v. Hobby Lobby Stores, 573 U.S. (2014).

103 *See* Robin Fretwell Wilson, *Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights after Hobby Lobby*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 257 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

104 FORD, *supra* note 54, at 91.

105 Gráinne De Búrca, *The Trajectories of European and American Antidiscrimination Law*, 60 AM. J. COMP. L. 1, 5 (2012).

Human Rights (ECHR) prohibits discrimination on the basis of race, among other personal markers. But until an amendment in 2005, the ECHR`s antidiscrimination clause was merely "accessory", that is, it could be invoked only when another convention right was violated.[106] And a reluctant European Court of Human Rights (ECtHR) initially set the burden of proof exceedingly high, applying a prohibitive "beyond any reasonable doubt" standard and recognizing "indirect discrimination" not before 2006. The first racism indictment under the convention occurred in a case involving Roma people, who are the closest—if largely unacknowledged—European equivalent to a domestic victim group.[107] Despite its recent strengthening, the ECHR`s equality guarantee in Article 14 "has long remained a second-class guarantee".[108]

The second source of antidiscrimination is at nation-state level. This is either in the form of civil law measures against "access racism", which Britain instituted for its postcolonial immigrants already in the 1960s; or of hate speech provisions under penal law that target "symbolic racism", such as antisemitism, which predominated on the European Continent.[109] The British approach, which is modeled on US civil rights law, remained exceptional, because the typical view in Europe was that "racists are only a very few crazy individuals."[110]

This changed in the year 2000, when a third source of antidiscrimination arrived in the form of European Union law. It is modeled on the civil-law approach of fighting "access racism" (more on this below).

Before exploring the latter, it is important to point out the main difference of antidiscrimination in Europe, compared to the US: the lack of a race-like domestic victim group, which would exert pressure to move law and policy into a group- and

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106 Protocol 12, which turns ECHR Article 14 into a free-standing right, has so far been signed by only 18 convention states. Accordingly, two-thirds of Council of Europe states are not bound by it. *See* Samantha Besson, *Evolutions in Non-Discrimination Law Within the ECHR and the ESC Systems*: *It Takes Two to Tango in the Council of Europe*, 60 AM. J. COMP. L. 147, 155 (2012).

107 *See* Marie-Bénédicte Dembour, *Still Silencing the Racism Suffered by Migrants…The Limits of Current Developments under Article 14 ECHR*, 11 EUR J. MIGRATION & L. 221 (2009); Emanuela Ignătoiu-Sora, *The Discrimination Discourse in Relation to the Roma: Its Limits and Benefits*, 34(10) ETHN. RACIAL STUD. 1697 (2011).

108 Besson, *supra* note 106, at 159.

109 ERIK BLEICH, RACE POLITICS IN BRITAIN AND FRANCE: IDEAS AND POLICYMAKING SINCE THE 1960S (2003).

110 Mathias Möschel, *Race in Mainland European Legal Analysis: Towards a European Critical Race Theory*, 34 ETHN. RACIAL STUD. 1648, 1661 (2011).

result-oriented direction. The Roma, the proverbial "travelling people" who through the centuries have been the ire of Europe`s sedentary populations, are too scattered and leaderless to make a difference, and they appeared on the European radar only through their bad treatment in the new Eastern member states, notably Bulgaria post-2004. Meanwhile, Muslims, who entered Western Europe through immigration from the 1960s on, became embroiled in a separate debate over the vicissitudes of multiculturalism, whose liberal underpinnings came to be questioned over some of these Muslims` putatively "illiberal" claims, like veiling or free-speech restrictions—claims that have been persistently rejected by the European Court of Human Rights.

Particularly in continental Europe, a peculiar "race blindness" took hold, not unlike in the US.[111] The one difference is that the European variant was seemingly supported by the voluntariness of its immigration (even if it was colored, as in a postcolonial context), whereas the fact of slavery had made race blindness a much less plausible and more embattled stance in the US. When France, the European country most resistant to classifying people by ethnicity or race, pondered on changing its constitution to allow "positive action" on these grounds, for the sake of a "more effective" integration policy, a Presidential Commission resolutely rejected this.[112] France, unlike the US, South Africa or India, argued the commission chaired by *femme d`état*, Simone Veil, had never known "legal segregation" that would now call for stronger, "remedial action."[113] Moreover, wouldn`t it be anachronistic to embark on something akin to affirmative action just when it was on the way out in the US? Finally, among the expected "perverse effects" of positive action was the "weakening of the sense of living together" (*affaiblissement du `vivre ensemble`*) and growing "tensions and resentments between groups."[114] This has been the standard riposte against multiculturalism.[115] Here it was brought to bear against an antidiscrimination policy that, in Nicolas Sarkozy`s progressive first moment of his presidency, might well have moved toward positive action.

But in refusing to do so France is no outlier. When Britain devised its "race relations" framework in the mid-1960s, E.J.B. Rose`s *Colour and Citizenship*, the self-styled "British Myrdal", denied that there was a British "race dilemma" equivalent to the American dilemma. Britain`s blacks had come as immigrants, not

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111 *Ibid.*

112 Simone Veil, Redécouvrir le Préambule de la Constitution (2008).

113 *Id.*, at 54.

114 *Id.*, at 56.

115 Most sophisticated, Claus Offe, *"Homogeneity" and Constitutional Democracy: Coping with Identity Conflicts through Group Rights*, 6 J. POLITICAL PHILOS. 113 (1998).

slaves; so they could not "be on the conscience of the country in the way that the Negro had for generations been on the conscience of Americans."[116] Accordingly, there would never be American-style affirmative action even in the one country that was more closely influenced by American developments than any other in Europe. "Positive discrimination" was explicitly prohibited in an expanded British Race Relations Act in 1976, to counteract any group-tilt after the introduction of the concept of "indirect discrimination" in the same act (that, naturally, was a direct American import). The only thing allowed was "positive action", such as minority-targeting job advertisements or training, which never involves a breach of meritocracy.[117] This changed only marginally, after the discovery of "institutional racism" in the police force in the late 1990s, in the course of the famous inquiry into the racially motivated murder of black teenager Stephen Lawrence. As a result, the 2000 Race Relations Act imposes a "positive duty" on public authorities to promote racial equality. However, no such duty was ever extended to the private sector, in which a "light-touch" voluntarist approach prevails.[118] And in the public sector the "positive duty" never advanced beyond a procedural "due regard" obligation, which does not require concrete courses of action or outcomes.[119]

As British antidiscrimination, qua "race relations", carries the word "race" in its name, it is not quite correct to say that race does not figure prominently in Europe. But the British experience is much in contrast to continental Europe, including Germany and France, where the concept of race has been smeared by the Nazi and Vichy legacies, respectively.[120] Moreover, the important matter for Britain is that race is disconnected from a domestic legacy of slavery. Legally, race became indistinguishable from other collective origin terms like ethnic or national. Colloquially, "black" became another word for postcolonial immigrants—note that until the late 1980s not only Caribbean immigrants, who are black-skinned, but also South Asians, who are brown-skinned, were referred to as "Blacks".

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116 E.J.B. ROSE, COLOUR AND CITIZENSHIP: A REPORT ON BRITISH RACE RELATIONS 4 (1969).

117 Teles, *supra* note 23, at 1007.

118 Bob Hepple, *The Aims of Equality Law*, 61 CURRENT LEGAL PROBS. 1, 18 (2008).

119 Sandra Fredman, *Breaking the Mold: Equality as a Proactive Duty*, 60 AM. J. COMP. L. 265 (2012).

120 In Germany, where the Black Lives Matter movement arrived after the brutal killing, in late May 2020, of George Floyd by an American police officer, the Green Party is currently campaigning for erasing the word "race" from the equality clause of the Basic Law, arguing that there "are no races, only human beings" (www.gruene.de/aktionen/den-begriff-rasse-aus-dem-grundgesetz-streichen).

Interestingly, through subsequent court interpretation, the term "racial group" under the British Race Relations Act came to be defined in exceedingly cultural terms, as marked by a "long shared history" and a "cultural tradition of its own."[121] This cultural definition is in marked contrast to the narrowly biological understanding of race in American civil rights law, which centered on physical immutability and—as we saw—resisted to be extended to a person`s identity.

However, a more capacious, identity-linked understanding of race did not make British antidiscrimination law any more group-protective or multicultural than its American counterpart. On the contrary, British antidiscrimination law stands out in its iron insistence on formal symmetry, strictly ruling out negative *and* positive discrimination. This had bizarre, even perverse consequences. In its treatment of direct discrimination, British case law makes an arcane distinction between the "motive" (intention) and "ground" (cause) of discrimination; and, crucially, motives never count in determining the fact of discrimination.[122] To rule out motive or intention is for the sake of keeping antidiscrimination perfectly symmetric, that is, to fend off positive discrimination (but also covertly negative discrimination under the cloak of "customer preferences", "costs", and kindred pretexts). As a prominent justice explicated, "race discrimination legislation intended, through the mechanism of direct discrimination, to achieve symmetrical formal equality between men and women, black and white, rather than to redress any historic disadvantage of one against the other."[123] But the motive v. ground distinction, by means of which this goal is achieved, has a perverse consequence: it decouples the fact of direct discrimination from any subjective rationale on part of the perpetrator. Yet, intention is exactly what distinguishes direct discrimination from indirect discrimination, the latter being defined not by the subjective intention but by the objective effect of discriminatory action. In short, the motive v. ground distinction undermines the distinction between direct and indirect discrimination. This problem came to the fore in the hugely controversial *Jewish Free School* (JFS) decision of the House of Lords in 2009: it indicted a highly competitive Jewish school's religiously motivated preference for orthodox Jewish applicants as discrimination on grounds of race. One justice conceded that, naturally, to denounce Jews as racist had not been the intention,

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121 *See* the famous Mandla v. Dowell-Lee [1983] 2 AC 548 [HL]. It defined Sikhs as a "racial group" in these terms.

122 *See* SANDRA FREDMAN, DISCRIMINATION LAW, at 203–214 (2011).

123 Lady Hale, in R v. Governing Body of JFS [2009] UKSC 15, ¶ 60 (2009).

but this was the price to pay for "rigid adherence to formal symmetry" in British antidiscrimination law.[124]

When De Búrca called antidiscrimination "flourishing in Europe"[125], she did not refer to national laws, and least of all to these British idiosyncrasies. Neither did she refer to regional human rights law, which lately may have become more protective of the Roma but continues to be unforthcoming to Muslims. Instead, her reference was to EU law.

2. Enter European Union Law

Indeed, antidiscrimination went Pan-European with two EU Directives passed in 2000, the Race Equality Directive and the Employment Equality Directive. This was a "genuinely new development"[126] that entailed a transition from a "common principle of equality", which can be found in all West European state constitutions, to an explicit statutory antidiscrimination law with a higher degree of specification and a horizontal extension of the equal treatment norm— from the state to private actors. Concretely, the EU Directives outlaw direct and indirect discrimination in a broad swath of societal sectors, while allowing member states to move further toward "positive action" and mandating the establishment of special public bodies controlling the process.

Despite this bold move forward, not all is well with European antidiscrimination. To begin with, there are severe deficits in implementing the new EU Directives. The whole process is top-down, while the "civil society" watching and controlling the process is largely "funded and organized by the European Union itself."[127] A study of Europe`s big three: the UK, France, and Germany, found "uneven implementation on the ground", being "pro forma" and suffering from a "lack of political will and public support."[128] Moreover, the activists of the Anglo-Dutch Starting Line Group, who had in large part written the Race Equality Directive, with British race relations law as the model, were never quite happy with this directive because it failed to include

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124 *Id.*, ¶ 69.

125 De Búrca, *supra* note 105, at 5.

126 Bruno De Witte, *From a "Common Principle of Equality" to "European Antidiscrimination Law"*, 53 AM. BEHAV. SCI.1715, 1718 (2010).

127 De Búrca, *supra* note 105, at 21.

128 TERRI E. GIVENS & RHONDA EVANS CASE, LEGISLATING EQUALITY: THE POLITICS OF ANTIDISCRIMINATION POLICY IN EUROPE 129 (2014).

nationality (understood as third-state nationality)[129] as a protected marker. Of course, it was obvious and agreed by all that the measure was aimed at protecting immigrants. But including formal nationality status as a ground of protection would have compromised member states` immigration policies. Immigrants were covered, but only indirectly, through their "racial or ethnic origin". Finally, "positive action" was not prescribed but also not prohibited at member state level. This has the "comforting flavor of subsidiarity", observed a legal scholar.[130] The European Union fashioned itself as a space of formal equality, while states could aim at higher levels of substantive equality, but only if they wanted it.

A critic found the European Union`s antidiscrimination law "concomitant to neoliberalism",[131] because of its post-welfare state logic of moving from the *correction* of market dependence toward making it "more *sustainable* through enhancing the inclusive fitness of individuals."[132] This strikingly resembles the "functional rationality" identified by Robert Post[133] as at the heart of American antidiscrimination law. In the European variant also, "the market" was affirmed "not merely as one sphere among others but rather as the fundamental law governing our social existence."[134] Indeed, the astonishing establishment of antidiscrimination law at European level, and its imposition on the states of Europe, often at great adjustment cost and met by fierce opposition, was only possible by presenting it as completing the internal market. This is not to deny that additional impetus was provided by the fight against xenophobia and right-wing populism that peaked exactly at that time.[135] But the activist Starting Line Group shrewdly "drew from EC legal resources surrounding market integration".[136] Most importantly, a precedent existed in terms of a well-developed antidiscrimination frame for nationality and sex in European

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129 Nationals of other member states are protected by the nationality clause (now Article 18) of the Treaty on European Union (TEU).

130 Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT'L L.J. 331, 350 (2003).

131 ALEXANDER SOMEK, ENGINEERING EQUALITY: AN ESSAY ON EUROPEAN ANTIDISCRIMINATION LAW 13 (2011).

132 *Id.*, at 14. emphasis supplied.

133 Post, *supra* note 12.

134 SOMEK, *supra* note 131, at 14.

135 GIVENS & EVANS CASE, *supra* note 128, ch. 5.

136 Andrew Geddes & Virginie Guiraudon, *Britain, France, and EU Anti-Discrimination Policy: The Emergence of an EU Policy Paradigm*, 27 WEST EUR. POLITICS 334, 342 (2004).

Community law. Accordingly, it was merely a matter of "logical extension" to cover other markers also, such as race, religion, or sexual orientation.[137]

3. The Importance of the Sex Paradigm

The tradition of combating sex discrimination turned out to be of great importance for giving shape and direction to EU antidiscrimination law. In particular, it explains this law`s greater propensity to tackle indirect discrimination and to bring behavior and "socially relevant attributes" under the umbrella of protection,[138] much in contrast to a race-centered US antidiscrimination law. Back in 1957, at the behest of France, which had feared competitive disadvantage because of a domestic equality law, an equal pay for equal work clause had been inserted in the first European Community Treaty. The rationale was that "[d]iscrimination is harmful because it means that human resources are not used to their full capacity".[139] However, over time, mostly through the case law of the European Court of Justice (ECJ/CJEU), the initially smallish equal pay clause grew into a comprehensive "equality of opportunity" frame for sex, which even touched the frontier of positive discrimination. In the *Kalanke* case,[140] the ECJ still struck down a measure of a public employer who, in hiring decisions, had given automatic priority to equally qualified women in underrepresented sectors. But in the *Marshall* case decided two years later,[141] the ECJ affirmed preferential hiring of equally qualified women, as long there was no automatism but a "saving clause" that might tip the balance in favor of the male candidate. Overall, on the sex front, there has been a move "towards a greater embrace of substantive equality".[142] This has been topped by the introduction of quotas to ensure women`s access to political office and seats on company boards, which now exist in a number of European countries.[143]

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137 Virginie Guiraudon, *Equality in the Making: Implementing European Non-Discrimination Law*, 13 CITIZENSH. STUD. 527, 531 (2009).

138 Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115, 117 (2010).

139 DAMIAN CHALMERS, GARETH DAVIS & GIORGIO MONTI, EUROPEAN UNION LAW 572 (3rd ed. 2014).

140 Case C-450/93, Kalanke v. Hansestadt Bremen, 1995 E.C.R. I-03051.

141 Case C-409/95, Marschall v. Land Nordrhein-Westfalen 1997 E.C.R. I-06363.

142 Colm O'Cinneide, *Positive Action and the Limits of Existing Law*, 13 MAASTRICHT J. EUR. & COMP. L. 351, 356 (2006).

143 *See* Ruth Rubio-Marin, *A New European Parity-Democracy Sex Equality Model and why It Won't Fly in the United States*, 60 AM. J. COMP. L. 99 (2012).

The sex paradigm explains the greater propensity of EU antidiscrimination law to embrace indirect discrimination, and its readiness to protect cultural traits or conduct beyond merely physical status. To understand this, it is important to register, with Richard Epstein,[144] a fundamental asymmetry between sex and race as concerns of law and public policy: "In both the public and the private sphere there is a sense that systematic differences between the sexes matter in a way that differences among races do not." Considering the "pervasive importance of sex roles" in society, the goal of public policy could not be "unisex bathrooms in airports or single-sex locker rooms."[145] In short, the crucial difference is that racial difference must not exist while sexual difference is inevitable, if not desirable.[146] Accordingly, an antidiscrimination law modeled on race, like the American, tends to be narrow in scope, as is demonstrated by its stubbornly maintained immutability doctrine and propensity for color-blindness. But an antidiscrimination law modeled on sex, like the European one, is more expansive and at ease with acknowledging cultural traits.

To understand the different workings of the race and sex paradigms requires some attention to legal detail. For the evidence required by plaintiffs to bring an indirect discrimination claim, the US development has been to require a proof of causality in terms of a "specific practice" by an employer that is discriminatory in effect. This was a U-turn from the Supreme Court`s seminal *Griggs v. Duke Power* decision of 1971,[147] which had invented the concept of indirect discrimination, and according to which the showing of statistical evidence about a minority`s underrepresentation in a specific sector or function was sufficient. The Supreme Court argued in *Wards Cove* (1989) that to let statistics suffice "would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the

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144 RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS, 269 (1992).

145 *Id.*, at 274.

146 For an alternative comparison of race and sex as identity-markers, see ROGERS BRUBAKER, TRANS: GENDER AND RACE IN AN AGE OF UNSETTLED IDENTITIES (2016). Starting with the contrary assumption of a basic symmetry between both, Brubaker still arrives at some sharply observed differences, most importantly that the "authority of ancestry" starkly limits the range of identity options (and changes) in the case of race, but not of sex. Accordingly, the dominant understanding (at least within the "cultural left") is "voluntarism" on sex and "essentialism" on race. Brubaker does not draw the implications for antidiscrimination law and policy. But one would expect a greater emphasis on immutability in the case of race-focused than of sex-focused antidiscrimination. This is exactly borne out by the US-EU comparison made in this paper.

147 Griggs v. Duke Power Co., 401 U.S. 424 (1971).

composition of their workforces.'"[148] As Katerina Linos persuasively argued, the insistence on proving causality was conditioned by race blindness, understood as the "belief that race should not be connected to any socially relevant characteristics."[149] She explains: "Because the Court refused to give any content to race, it required the plaintiff to supply the causal connection between the observed statistical disparity and race."[150]

By contrast, the ECJ, in its sex discrimination decisions, retained the weaker, more employee-friendly statistics requirement for the proof of indirect discrimination. The relevant case is *Enderby v. Frenchay Health Authority* (1993), which was about (mostly female) speech therapists in the British National Health Service earning less than (mostly male) pharmacists despite their work being of "equal value".[151] To its defense, the British government had argued, *Wards Cove* style, that a "specific practice" on its part had to be proved by the plaintiff to consolidate her claim that the wage disparity constituted indirect discrimination. But the ECJ did not agree. If the lower paid group of speech therapists was almost exclusively female, this was not a "statistical freak" but because this kind of work, which allows part-time employment, was naturally more attractive for (childbearing and -raising) women than for men. Common sense-based sex consciousness obliterated the need for an additional "specific practice" requirement for proving indirect discrimination. The court disposed of "an implicit theory about women`s social roles", which made it appear "'in the nature of things'" that women would end up as part-timers.[152] But then statistics sufficed as proof of indirect discrimination. There was no need for establishing causality, which in the US has greatly impaired the likelihood of indirect discrimination claims to succeed.

The European paradigm of sex consciousness is apparently at ease in connecting social traits with protected status, while the US paradigm of race blindness is extremely reluctant in this respect. The harshness of race blindness is particularly visible when extended from race to other markers, most notably sex. Accordingly, the US Supreme Court has refused to bring pregnancy-based discrimination under the umbrella of direct sex discrimination, on the simple assumption that "many women are not pregnant."[153] By contrast, the ECJ would argue that only women could get

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148 Wards Cove Packing Co. v. Antonio, 409 U.S. 642, 659 (1989).

149 Linos, *supra* note 138, at 140.

150 *Id.*

151 Case C-127/92, Enderby v. Frenchay Health Authority, 1993 E.C.R I-05535.

152 Linos, *supra* note 138, at 141.

153 *Id.*, at 118.

pregnant, so that pregnancy classifications (such as the refusal to hire on these grounds) were not facially neutral but amounted to direct discrimination. The readiness to bring variable, conduct-based traits (such as pregnancy) under the umbrella of status protection evidently implied a blurring of the line between direct and indirect discrimination, with the effect of further lowering the hurdle for bringing successful discrimination claims.

To a degree, other groups profited from an extension of sex consciousness. Accordingly, a German pension scheme`s limitation of survivors` benefits to married spouses, and denial thereof to formally unmarried domestic partners, has been considered direct discrimination on the ground of sexual orientation. In analogy to the logic that only women can be refused employment on grounds of pregnancy, the ECJ, in its first-ever decision on sexual orientation, held that only same-sex partners, unable to get married, could be lastingly excluded from the respective pension scheme, which constituted direct discrimination.[154] On the same logic, also in 2008, the ECJ, in the first-ever—and still rare—case on race discrimination under the 2000 Race Equality Directive, took an employer's statement not to recruit "immigrants" as direct discrimination on grounds of "racial or ethnic origin", even though this should "normally" be merely a case of indirect discrimination.[155]

However, a social trait-friendly European antidiscrimination law has not been readier to recognize multicultural identity claims than the American. True, under the sex-consciousness paradigm claims that are considered "typical" for the plaintiff group have gained greater protection in European than in American courts. But the effect is to perpetuate stereotypes about what is "typical". One is reminded of the charge, raised in the American context, that an identity-protective antidiscrimination law would impose rigid identities or "scripts" on people instead of liberating them.[156] Only that in the European case the streamlining is in the image of the societal majority and its norms. For instance, in Europe women in "typical" women`s jobs are better protected than in the US, but not women with atypical claims, say, women who want to work in a male profession. Claimants with atypical claims, in fact, are better protected under American antidiscrimination law, which follows a radical "anti-

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154 Case C-267/06, Maruko v. Versorgungsanstalt der deutschen Bühnen, 2008 E.C.R I-01757.

155 Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, 2008 E.C.R I-05187. Remember that direct discrimination on the basis of non-EU nationality status is *not* outlawed under the Race Equality Directive.

156 FORD, *supra* note 54.

stereotyping norm"[157] and which "reject[s] the legitimacy of the state`s promotion of a vision of the good life".[158] If European antidiscrimination law subsumes individuals under the majority group, in America the opposite thrust is to liberate individuals from "group-based stereotypes."[159] For instance, European law requires or endorses mandatory maternity leaves and mandatory retirement, which in the US would be considered discriminatory on the basis of sex and age, respectively. This is because European states and public institutions, including courts, arrogate to themselves a "normative vision of the ideal life cycle",[160] which is anathema in the US.

Multiculturalism loses out in both settings, to majority group favoritism in Europe, and to radical individualism in the United States.

CONCLUSION

One way of mapping the relationship between multiculturalism and antidiscrimination is to point to their opposite logics.[161] Multiculturalism, be it communitarian[162], liberal[163], or radical,[164] is particularistic and group-recognizing, it seeks to perpetuate (positively valued) difference. By contrast, antidiscrimination is universalistic and group-undoing, it seeks to destroy (negatively valued) difference. However, with the recognition of indirect discrimination, among other factors, a group-recognizing element is planted into the heart of antidiscrimination, which is pushing it into a multicultural direction. This view still strikes me as plausible, yet this paper suggests at least three modifications to it.

First, one must concede to the proponents of multiculturalism, from liberal to radical, that multiculturalism is not thinkable but as a response to discrimination and that, historically, the rise of antidiscrimination cannot be decoupled from an asymmetric, substantive justice concern for particular groups, most notably blacks in

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157 Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75, 96 (2012).

158 *Id.*, at 76.

159 *Id.*

160 *Id.*, at 97.

161 *See*, Christian Joppke, *Minority Rights for Immigrants? Multiculturalism Versus Antidiscrimination*, 43 ISR. L. REV. 49 (2010).

162 Taylor, *supra* note 10.

163 WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1995).

164 MODOOD, *supra* note 5.

the United States. In this respect, multiculturalism as group-privileging enterprise is indeed a kind of second-generation antidiscrimination, after the end of formal, legally prescribed discrimination.

Secondly, we saw that in the United States the group-enforcing aspect of antidiscrimination has been thoroughly suppressed under a symmetric and individualistic understanding of antidiscrimination. Racial identities have never been protected, affirmative action has been reduced to the thinnest of margins, and obstacles have been built even to the redressing of indirect discrimination. While the problem of race has pushed the American state to do more (for blacks), there is also a built-in limitation to the race paradigm that structures the American variant of antidiscrimination. It is difficult, even paradoxical, to lend cultural content to race, considering that the perniciousness of slavery is precisely the wiping out of indigenous culture. Race is crude "status hierarchy",[165] perhaps best captured by the rawness of physical "immutability", as in the identity-resistant minimalism of American antidiscrimination law. While few would want a world without sex differences, it is difficult to associate anything positive with a world in which race matters. Of course, the rebuttal of groupness in American antidiscrimination is not only due to the peculiarity of "race". It is above all the result of politics, in particular, of a Supreme Court that turned increasingly conservative under successive Republican presidencies from the early 1980s on, and which has dismantled affirmative action. American antidiscrimination discourse has always been marked by a struggle between "anticlassification" and "antisubordination" values.[166] These are just other words for a formalistic v. substantive understanding of equality and judicial reflection of a broader clash between "color-blind" and "race-conscious" alliances in American race politics since the 1960s.[167] It would be absurd to claim that the outcome of this struggle was conditioned by some inherent "logic" of the race paradigm. Instead, this outcome is politically contingent, and under a happier constellation, "antisubordination" and "race consciousness" might well have succeeded.

Thirdly, for Europe, it seems far-fetched to expect a multicultural turn of antidiscrimination because of a readier and more unambiguous acceptance of fighting indirect discrimination. True, a group-recognizing tendency is facilitated by the sex paradigm that undergirds the antidiscrimination that has gone Europe-wide under EU

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165 FORD, *supra* note 54, at 123.

166 Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

167 KING & SMITH, *supra* note 5.

law. However, its import for racial and immigrant minorities has yet to materialize. An obstacle is that the element of group recognition inherent in the sex paradigm is stereotyping and majority-norm affirming, and thus at odds with the minority focus of multiculturalism. Most importantly, there is nothing akin to a domestic race problem that might push European states to do more for a particular victim group. Europe`s most problematic minorities are the semi-indigenous Roma and the much more numerous Muslim immigrants. While the Roma are increasingly receiving attention under European human rights law, the Muslim cause is greatly hampered by the fact that undeniably widespread discrimination against them is tied up with partially self-inflicted assimilation deficits, which have been shown to be aggravated by group-recognizing multiculturalism policies.[168]

On both sides of the Atlantic, multiculturalism and antidiscrimination go largely separate ways, with a bang in the United States, and with not much of a whimper in Europe. This is our finding for two liberal heartlands grappling with the problem to manage ever more diverse immigrant societies.

However, there is nothing necessary about the disjunction between multiculturalism and antidiscrimination that was demonstrated here for the United States and Europe. Canada, for instance, has followed a consistently multicultural, identity-protective and group-recognizing approach to antidiscrimination for over three decades. Section 15 of the 1982 Canadian Charter for Human Rights and Freedoms, which provides the "right to the equal protection and equal benefit of the Law" (15.1), *also* allows affirmative action, understood as "the amelioration of conditions of disadvantaged individuals or groups" (15.2). Importantly, in contrast to the US and Europe, affirmative action is not considered in Canada as a breach of the equal treatment principle but as its completion. The Supreme Court of Canada has thus taken both parts of the constitutional equality clause as "work[ing] together to confirm s.15`s purpose of furthering substantive equality."[169] The same court defined substantive equality as "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[170] This definition of substantive equality squarely corresponds to

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168 CLAIRE L. ADIDA, DAVID D. LAITIN & MARIE-ANNE VALFORT, WHY MUSLIM INTEGRATION FAILS IN CHRISTIAN – HERITAGE SOCIETIES (2016).

169 R v Kapp [2008] S.C.C. 41 (Can.). As quoted by SANDRA FREDMAN, COMPARATIVE STUDY OF ANTI-DISCRIMINATION AND EQUALITY LAWS OF THE US, CANADA, SOUTH AFRICA AND INDIA 68 (2012).

170 Supreme Court of Canada, Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143, as quoted by Luc B. Tremblay, *Promoting Equality and Combating Discrimination through Affirmative Action*, 60 AM. J. COMP. L. 181, 183–184 (2012).

Charles Taylor`s multicultural "politics of recognition", as Luc Tremblay[171] observed. Furthermore, at first in cases dealing with religious discrimination, but later also in cases dealing with other grounds of discrimination, Canadian courts have established the doctrine of "reasonable accommodation". It requires local norms, institutions, or practices, especially at the workplace, to be changed and adjusted to meet the liberty and equality interests of disadvantaged minority people.[172] In its transformative, dominant norm- and institution-changing thrust, "reasonable accommodation" is multiculturalism`s strongest imprint on antidiscrimination, and nowhere has it been more thoroughly developed than in Canada.

If Canada went this way, in marked contrast to both the US and Europe, this is surely connected to the unique strength of multiculturalism in Canada, which is not just official policy but enshrined in the constitution and cornerstone of Canada`s national identity.[173] Evidence for this can be found in the Canadian Supreme Court`s astounding *Multani* decision of 2006, perhaps the most famous of all "reasonable accommodation" cases, which deals with the claim of a Sikh boy to wear a religious knife (*kirpan*) in school. In requiring the school to accommodate what others might consider a dangerous weapon in the hands of a child, the court declared that *not* doing this would be "disrespectful to believers in the Sikh religion and...not take into account Canadian values based on multiculturalism."[174] As in other religious "reasonable accommodation" cases, *Multani* relied on the Canadian Charter`s freedom clause, not its equality clause, the recourse to which was deemed "unnecessary" in this particular case.[175] Accordingly, *Multani* is not, strictly speaking, an "antidiscrimination" case. The Canadian message is still that, under a happier star, a multicultural approach to antidiscrimination is well possible.

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171 *Id.*, at 183.

172 *See* Emmanuelle Bribosia, Julie Ringelheim & Isabelle Rorive, *Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?*, 17 MAASTRICHT J. EUR. & COMP. L. 137, 144–150 (2010); Avigail Eisenberg, *Rights in the Age of Identity Politics*, 50 OSGOODE HALL L. J. 609, 621–629 (2013).

173 Will Kymlicka, *Being Canadian*, 38 GOV. OPPOS. 357 (2003).

174 Multani v. Marguerite-Bourgeoys, [2006] 6 S.C.R. 1, ¶ 71 (Can.).

175 *Id.*, at 298.

רב־תרבותיות ואנטי־הפליה: השוואה בין ארצות הברית למערב אירופה

כריסטיאן יופקה

הקשר בין רב־תרבותיות לבין אנטי־הפליה אינו מובן דיו. יש הרואים בהן סתירה מוחלטת, ואילו אחרים סבורים כי הן נובעות מרעיונות דומים וקשורות זו לזו בקשר ישיר. מאמר זה מתחקה אחר הדומה והשונה בין השתיים באמצעות השוואה בין ארצות הברית למערב אירופה. במסגרת המאבק בהפליה קיים מתח מובנה בין שוויון פורמלי לשוויון מהותי. האחרון הוא שפותח פתח לסדר יום רב־תרבותי, המאתר קבוצות מיעוט ספציפיות שראויות להגנה. בעיית הגזע בארצות הברית קידמה מתחילת הדרך הבנה מהותית – ולכן רב־תרבותית – של אנטי־הפליה. באירופה, לעומת זאת, העדרה של קבוצת מיעוט מופלית מובהקת שמר במידה רבה את האנטי־הפליה במישור הרשמי בלבד, למעט החריג החשוב של היחס לנשים. בשני עברי האוקיינוס האטלנטי התגבשה עם הזמן האנטי־הפליה – הן בהקשר הגזעי והן בהקשר של מהגרים – כפרקטיקה פרטנית וסימטרית, ולכן נוגדת רב־תרבותיות. עם זאת, בארצות הברית התרחש התהליך רק לאחר מאבק, ואילו באירופה הדבר קרה כמעט ללא כל מאבק.

רב-תרבותיות ואנטי-הפליה: השוואה בין ארצות הברית למערב אירופה

כריסטיאן יופקה

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