Place Aux Dames: The Ideological Divide Between U.S. and European Gender Discrimination Laws

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Abstract

The United States and the European Union are both firmly committed to eliminating gender discrimination. However, as I show in this Article, they have adopted fundamentally different strategies in pursuing this objective: Whereas the United States offers plaintiffs much more generous procedural rules and far more powerful remedies, the European Union relies on more comprehensive substantive prohibitions against discrimination. What lies behind these different approaches?

Contrary to existing scholarship, which emphasizes path dependence arguments, I argue that differences between gender discrimination laws in the United States and Europe can best be understood as the result of a fundamental ideological divide. U.S. law is designed to grant protection against discrimination across social boundaries. By contrast, much of Europe espouses a "social-democratic" conception of gender discrimination law that views the protection of working-class employees as its primary concern.

Several European countries have recently adopted or are considering the adoption of mandatory gender quotas for corporate boards. However, as I demonstrate in this article, such quotas merely address the symptoms of a much more foundational issue. European gender discrimination law is designed to protect working-class women, not women with managerial aspirations. Quotas cannot redress this imbalance; they can merely hide its symptoms. Accordingly, European reformers who aspire to a more class-neutral gender discrimination law will have to consider much more profound structural changes.

Introduction

A female part-time employee finds out that her employer pays part-time employees substantially less than full-time employees for the same

work. She also learns that the part-time employees are mostly female, whereas the full-time employees are mostly male. Does she have a viable claim of gender discrimination against her employer? The answer is "yes" if she works in the European Union, but "no" if she works in the United States.[1]

A woman applies for a managerial position. Despite the fact that she is qualified for the position, the employer rejects her application and continues to solicit applicants. Several weeks later, the employer hires a man. Do these facts suffice to establish a prima facie case of gender discrimination? They do in the United States, but not in the European Union.[2]

These examples are pieces of a larger puzzle: Both the United States and Europe are deeply committed to the goal of eradicating gender discrimination in employment, yet, as this article reveals, they have adopted very different strategies to combat discrimination. The European Union boasts stricter substantive prohibitions against discrimination. The United States, by contrast, offers plaintiffs favorable procedural rules and more powerful remedies.[3] What accounts for these different approaches?

The existing literature, inasmuch as it seeks to explain differences between gender discrimination laws in the United States and Europe, focuses on path dependence.[4] According to this theory, present divergences are the result of each legal system's inherent tendency to develop along its initial path: minor choices by lawmakers and courts early on have led to considerable differences today.[5]

The path dependence argument is no doubt true to an extent. That legal regimes are generally path dependent is well established,[6] and there is no reason to believe that gender discrimination law is the exception to this phenomenon. Indeed, in common law countries like the United States, the principle of *stare decisis* virtually guarantees a certain amount of path dependence,[7] and even civil law courts, which do not recognize *stare deci-*

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1. *See infra* Part I.A.2.
2. *See infra* Part I.B.4.a.
3. *See generally infra* Part I.
4. *See, e.g.*, Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115, 115–69 (2010) (presenting a path dependence theory to explain various differences between EU and U.S. gender discrimination law); Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1315–71 (2008) (invoking path dependence to explain French procedural rules in antidiscrimination cases).
5. *See* Linos, *supra* note 4, at 117 (stressing that, because of path dependence, early choices by courts and lawmakers can have "momentous consequences much later in time").
6. *See, e.g.*, Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999) (describing path dependence in corporate law); Stephen J. Choi, *Law, Finance, and Path Dependence: Developing Strong Securities Markets*, 80 TEX. L. REV. 1657 (2002) (identifying path dependence in securities regulation); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001) (exploring path dependence in the law in general).
7. *See* Hathaway, *supra* note 6, at 606 ("The doctrine of stare decisis thus creates an explicitly path-dependent process.").

sis, attach considerable importance to existing case law.[8]

This does not mean, however, that path dependence is the primary cause, or even a central cause, of the differences in the gender discrimination laws of the United States and Europe. To the contrary, there are strong reasons to believe that gender discrimination law is less prone to path dependence than most other areas of the law. Within only a few decades, the United States and Europe went from having no federal gender discrimination legislation to full-fledged protections against gender discrimination in the workplace.[9] This kind of tectonic shift in the law is unlikely to occur without fundamental changes at the political and social level; and, indeed, it is difficult to think of a more powerful political and social dynamic in the second half of the twentieth century than the civil rights movement.[10] Where such mighty cultural forces are at play, the prior shape of the law can be but one of several factors determining the trajectory of the law's development.

In this Article, I argue that the disparities between U.S. and European rules on gender discrimination can best be understood as expressions of a fundamental ideological divide. In the United States, a broad political coalition that extended well beyond lawmakers closely allied with the labor movement or other working-class organizations drove the enactment of Title VII, the centerpiece of U.S. employment discrimination law.[11] It is not surprising, therefore, that the resulting protections against discrimination also cut across social boundaries.

By contrast, many continental European countries adhere to a "social-democratic" conception of gender discrimination law, which has the protection of working-class employees as its primary goal. "Working class" is used broadly here to encompass not only blue-collar workers, but also other rank-and-file employees without professional status or managerial prospects. The legal focus on these workers is manifested at both the EU (federal) and member-state levels, the latter of which is represented in this article by France and Germany.[12]

As I show in this Article, Europe offers stronger substantive provisions against discrimination than the United States, but combines them with weaker rules on remedies and procedure. I argue that the ideological divide

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8. *See* Christiane C. Wendehorst, *The State as a Foundation of Private Law Reasoning*, 56 AM. J. COMP. L. 567, 573 n.21 (2008) (noting that, under the prevailing view in civil law jurisdictions, "precedents give rise to a presumption of rightness" and shift the burden of persuasion).

9. *See generally infra* Part III.

10. Aldon Morris fittingly calls the civil rights movement "one of the pivotal developments of the twentieth century." Aldon Morris, *A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks*, 25 ANN. REV. SOC. 517, 517 (1999).

11. *See infra* Part III.A.

12. Relevant features of French and German laws tend to be widely shared by the rest of continental Western Europe, which makes my reasoning more broadly applicable. One caveat, however: the United Kingdom and Ireland, being common-law countries, have a somewhat different tradition in matters of gender discrimination law and shall remain exempt from my analysis.

between gender discrimination laws in the United States and Europe can explain this divergence.

To the extent that the *substantive* prohibitions against discrimination are stronger in Europe, these differences typically benefit those workers at the bottom of the corporate hierarchy. For example, EU law offers greater protection than U.S. law to employees of small firms and part-time employees.[13] This is consistent with the social-democratic ideals underlying European gender discrimination law since part-time employees and employees of small firms are also disproportionately likely to be low-wage workers.

Different ideologies can also account for the weakness of the European rules on remedies and procedure in gender discrimination cases. Gender discrimination litigation is not the only way to protect workers against discrimination. Rather, general rules and institutions of labor and employment law can serve the same function. Collective bargaining agreements, for example, help to enforce the prohibition against wage discrimination.[14] Crucially, though, the general rules of gender and employment law do not protect all employees alike. Instead, they are much more effective at protecting working-class employees than at protecting managerial employees. For example, the wages of managerial employees typically are not governed by collective bargaining agreements.[15] As a result, the European failure to offer strong rules on remedies and procedure in discrimination cases impacts managerial employees and working-class employees in very different ways. For managerial employees, the lack of strong procedural rules and remedies drastically limits the value of the substantive prohibitions against discrimination. For working-class employees, weak procedural rules and remedies are much less problematic, since such employees can rely on alternative enforcement mechanisms.

Will the ideological divide between gender discrimination laws in the United States and Europe persist in the future, or will Europe embrace a more class-neutral vision of gender discrimination law? On the surface, the latter scenario may seem evidenced by Europe's recent move toward mandatory gender quotas for corporate boards. The first such quota was introduced in 2003 by Norway.[16] France adopted its version in January 2011,[17] and Belgium followed in June 2011.[18] The German government has publicly threatened to introduce quotas unless firms diversify their

13. *See infra* Part I.A.1–2.

14. *See infra* Part IV.B.1.

15. *Id.*

16. *See* Lizette Alvarez, *Norway Is Set to Compel Boardrooms to Let More Women in*, N.Y. TIMES, July 14, 2003, at A3, *available at* http://www.nytimes.com/2003/07/14/?world/norway-is-set-to-compel-boardrooms-to-let-more-women-in.html.

17. *See* Emile Picey & Daniel Flynn, *France Sets Quota for Women on Big Companies' Boards*, REUTERS (Jan. 13, 2011), http://www.reuters.com/article/2011/01/?13/us-france-equality-idUSTRE70C5ZA20110113.

18. *See Frauenquote für börsennotierte Unternehmen* [*Women's Quota for Listed Companies*], HANDELSBLATT, June 30, 2011 (Ger.), *available at* http://www.handelsblatt.?com/politik/international/frauenquote-fuer-boersennotierte-unternehmen/4345192.html [hereinafter HANDELSBLATT article].

boards voluntarily within the next five years,[19] and the European Commission, for its part, is considering EU legislation to impose such quotas union-wide.[20] Europe on the whole appears determined to add gender diversity to European boardrooms, which trail far behind their American counterparts in this regard.[21]

As I will show in this Article, however, gender quotas address only one symptom of a much deeper structural problem. European gender discrimination law is primarily designed to protect working-class women, not women with managerial aspirations. Quotas for corporate boards—especially as they are currently designed in Europe—cannot remedy this imbalance, but can only hide its most visible symptom. Accordingly, those European countries interested in a more class-neutral approach to gender discrimination law will have to consider more profound changes to the structure of their laws.

The structure of this Article is as follows: Part I surveys major differences between gender discrimination laws in the United States and Europe. Part II discusses possible explanations for these differences. Part III examines the history of gender discrimination law in the United States and Europe and shows that European gender discrimination law has, from its very beginning, focused primarily on the protection of working-class women. Part IV argues that today's differences between gender discrimination laws in the United States and Europe are best explained by a continuing ideological divide. Part V discusses the European trend towards gender quotas for corporate boards.

I. U.S. v. European Gender Discrimination Law

In this part, I will analyze the most important differences between gender discrimination laws in the United States and Europe.

As a preliminary matter, it is worth noting that some common ground exists in the gender discrimination laws of the United States and Europe. Like the United States, the European Union prohibits not only wage discrimination,[22] but also discrimination in other aspects of employment, such as hiring,[23] promotion,[24] termination,[25] and working conditions.[26]

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19. *Von der Leyen Droht Konzernen mit der Frauenquote* [*Von der Leyen Threatens Corporations with Women's Quota*], FIN. TIMES DEUTSCHLAND, Jan.19, 2011, at 1 (Ger.) [hereinafter FIN. TIMES DEUTSCHLAND article].

20. *See* Nicola Clark, *Where Final Step is Hardest to Reach: Despite Advance, Women Find Wider Gender Gap at Top of Ladder in Europe*, INT'L HERALD TRIB., Jan. 27, 2011, at 204.

21. *See infra* Part V.A.

22. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 157, para. 1, May 9, 2008, 2008 O.J. (C 115) 47; Directive 2006/54/EC, Of the European Parliament and of the Council of July 5, 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation art. 4, 2006 O.J. (L 204) 23 [hereinafter Directive 2006/54/EC].

23. *See* Directive 2006/54/EC, *supra* note 22 art. 14(a).

24. *Id.*

25. *Id.* art. 14(c).

Furthermore, U.S. law's dual-pronged approach to discrimination—disparate treatment and disparate impact[27]—has an immediate analog in EU law, which proscribes both "direct discrimination" and "indirect discrimination" respectively.[28]

Substantial differences emerge, however, beyond these fundamentals. As this Part will show, substantive prohibitions against discrimination are more comprehensive in the European Union, but procedural rules and remedies are generally more plaintiff-friendly in the United States. Crucially, these differences are not merely of a doctrinal nature. Rather, they amount to real disparities in the level of protection against gender discrimination offered by each system.

A. The Substantive Prohibitions against Discrimination

In the context of substantive law, three differences stand out: EU law offers greater protection than U.S. law to employees of small firms, part-time employees, and employees subject to disparate impact discrimination.

1. Employees at Small Firms

Whereas the European Union applies all of its gender discrimination law to all employers,[29] U.S. law is, for lack of a better word, more discriminating. Although the Equal Pay Act prohibits wage discrimination by all employers regardless of size,[30] Title VII of the Civil Rights Act applies only to employers of "fifteen or more employees."[31] U.S. federal law, therefore, does not protect employees of small enterprises against gender discrimination except in the area of wages.[32]

To be sure, employees outside the scope of Title VII may still invoke *state* gender discrimination laws. However, many of the states that have

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26. *Id.*

27. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, ____, 129 S. Ct. 2658, 2672 (2009) ("Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact').").

28. Directive 2006/54/EC, *supra* note 22 arts. 4, 14.

29. *See, e.g.*, HANDELSBLATT article, *supra* note 18.

30. Interestingly, when the Act was adopted, a minimum threshold of 25 or more employees was suggested. *See* S. REP. NO. 88-176, at 2 (1963) ("Other legislation introduced in this Congress would have required any employer in commerce with 25 or more employees at a single place of employment to comply with proposed equal pay legislation . . . ."). However, because the Equal Pay Act was eventually adopted as an amendment to the Fair Labor Standards Act, Congress decided not to define the scope of application of the equal pay provision differently from those of the rest of the Act. *See* BUREAU OF NATIONAL AFFAIRS, EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, at 102 (1963) ("The committee believes that the uniformity of application offered by S. 1409 obviates the problems which would be created by any expansion or curtailment of labor standards coverage.").

31. Civil Rights Act tit. VII, 42 U.S.C. § 2000e(b) (2000).

32. *Cf.* Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1197 (2006) (noting that a firm with no more than fourteen employees can refuse to hire women without violating federal antidiscrimination law).

adopted prohibitions against gender discrimination in the workplace have followed the model of Title VII and excluded small firms.[33] The resulting gap is substantial, since small businesses account for a sizable portion of overall employment. The latest available Census data put the number between 11% and 18%.[34]

2. Part-time Workers

Gender discrimination laws in the United States and Europe also differ in their treatment of part-time employees. In practice, such employees are often female: Women make up 64% of part-time workers in the United States[35] and 76% in the European Union.[36] The obvious risk, therefore, is that employers discriminate against women by offering part-time employees less favorable terms than full-time employees.

This issue is of considerable practical importance since part-time employees constitute a substantial part of the workforce. They account for roughly 20% of all U.S. employment[37] and for about 18% of employment

33. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1461 (2011) (placing the threshold for an employer's size at fifteen or more employees); FLA. STAT. § 760.02 (2011) (defining an employer as a person employing fifteen or more employees); 775 ILL. COMP. STAT. 5/2-101B(1)(A) (2011) (defining an employer as a person employing fifteen or more employees); KY. REV. STAT. ANN. § 344.030 (2011) (defining an employer as a person employing eight or more employees); NEB. REV. STAT. § 48-1102 (2010) (defining an employer as a person employing fifteen or more employees); NEV. REV. STAT. ANN. § 613.310 (2010) (defining an employer as a person employing fifteen or more employees); OKLA. STAT. tit. 25, § 1301(1) (2011) (defining an employer as a person employing fifteen or more employees); MD. CODE ANN., STATE GOV'T § 20-601 (2011) (defining an employer as a person employing fifteen or more employees); S.C. CODE ANN. § 1-13-30 (2010) (defining an employer as a person employing fifteen or more employees); TEX. LAB. CODE ANN. § 21.002 (2011) (defining an employer as a person employing fifteen or more employees); UTAH CODE ANN. § 34A-5-102 (2011) (defining an employer as a person employing fifteen or more employees); CAL. GOV'T CODE § 12926 (2011) (defining an employer as a person employing five or more employees); DEL. CODE ANN. tit. 19, § 710 (2011) (defining an employer as a person employing four or more employees); KAN. STAT. ANN. § 44-1002 (2010) (defining an employer as a person employing four or more employees); N.Y. EXEC. § 292 (2010) (defining an employer as a person employing four or more employees).

34. The total number of paid employees in the United States in 2008 was 120,903,551. Of these employees, 6,086,291 worked for firms with less than five employees, 6,878,051 for firms with five to nine employees, and 8,497,391 for firms with 10 to 19 employees. *See Statistics About Business Size (Including Small Business) from the U.S. Census Bureau*, U.S. CENSUS BUREAU, tbl. 2a, http://www.census.gov/?epcd/www/smallbus.html (last visited Jan. 6, 2012).

35. *See* U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 69–70 (2010) (indicating that there were 27,244 part-time workers in the United States in 2009 of which 17,525 were women), *available at* http://www.bls.gov/?cps/wlf-table 20-2010.pdf [hereinafter WOMEN IN THE LABOR FORCE].

36. Out of 41,219 part-time workers in the European Union in 2009, 31,273 were women. *See Full-time and Part-time Employment by Sex and Economic Activity*, DATAMARKET, http://datamarket.com/data/set/19uv/full-time-and-part-time-employment?-by-sex-and-economic-activity-from-2008-nace-rev2-1000-3#!display=line (for number of part-time workers, select "Total" under SEX; "PT" under WORKTIME; then select "Visualize"; for number of female part-time workers, change the SEX value to "F" and keep all other values the same) (last visited Jan. 6, 2012).

37. *See* WOMEN IN THE LABOR FORCE, *supra* note 35, at 69–72.

in the European Union.[38] Even more importantly, part-time work accounts for 26.5% of female employment in the United States[39] and 31% in the European Union.[40]

Against this background, it is noteworthy that U.S. and EU gender discrimination laws diverge greatly in their treatment of part-time workers. To be sure, neither U.S. law nor EU law excludes part-time workers from its scope of application. However, part-time workers face an important obstacle in the United States that is absent in Europe: U.S. courts have been adamant that part-time employees are not comparable to full-time employees.[41] Accordingly, a female employee cannot establish discrimination by pointing out that she is treated worse than a male full-time employee whose situation is otherwise comparable.

By contrast, European law has proven substantially more protective of part-time workers. The Court of Justice was quick to acknowledge the possibility that discrimination against part-time workers had a disparate impact on women.[42] More recently, the European Union's statutory law has taken a step further to provide explicitly that any discrimination on the basis of an employee's part-time status constitutes gender discrimination.[43]

3. Disparate Impact and Wage Discrimination

The doctrine of "indirect discrimination" also has a broader scope of application in the European Union than the parallel "disparate impact" doctrine does in the United States. Both doctrines outlaw a practice that is neutral on its face but in fact burdens one group more heavily than another without justification.[44] However, some U.S. courts have resisted the use of the disparate impact doctrine in wage discrimination cases,[45] whereas EU

38. *See* EUROSTAT, EUROPE IN FIGURES: EUROSTAT YEARBOOK 2010, at 291 tbl.5.5 (2010), *available at* http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-CD-10-220/EN/KS-CD-10-220-EN.PDF (putting the percentage of part-time employees in 2008 at 18.2%) [hereinafter EUROSTAT YEARBOOK 2010].

39. *See* WOMEN IN THE LABOR FORCE, *supra* note 35, at 70.

40. EUROSTAT YEARBOOK 2010, *supra* note 38, at 283.

41. *See, e.g.*, Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1155 (7th Cir. 1997); Flebotte v. Dow Jones & Co., 2000 U.S. Dist. LEXIS 19875, at *13 (D. Mass. Dec. 6, 2000).

42. *See* Case 170/84, Bilka-Kaufhaus GmbH v. Karin Weber von Hartz, 1986 E.C.R. 1620, para. 31.

43. *See* Council Directive 97/81/EC of 15 Dec. 1997 Concerning the Framework Agreement on Part-time Work Concluded by UNICE, CEEP, and the ETUC, annex cl. 4(1), 1998 O.J. (L 14) 9 [hereinafter Directive 97/81/EC]; *see also Part-Time Work*, EUROFOUND (May 5, 2011), http://www.eurofound.europa.eu/areas/?industrialrelations/dictionary/definitions/PARTTIMEWORK.htm.

44. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (defining disparate impact discrimination under Title VII to include "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity").

45. *See, e.g.*, AFSCME v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985); *see also* Sacha E. de Lange, *Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women's Movement*, 31 N.Y.U. REV. L. & SOC. CHANGE 315, 349 n.285 (2007) ("The lower courts that have decided this issue have generally rejected the use of a disparate impact standard in sex-based wage discrimination cases."). *But see* Atonio v. Wards

law imposes no such restriction on the use of the indirect discrimination doctrine.[46] This difference is highly significant in practice since many of the cases where EU plaintiffs successfully raise claims of indirect discrimination involve wage discrimination.[47]

B. Procedural Rules, Remedies, and the Burden of Proof

As has become clear from the analysis above, substantive prohibitions against gender discrimination are substantially more comprehensive in the European Union than in the United States. However, when it comes to enforcement, the situation is reversed. U.S. law offers plaintiffs three crucial advantages that European plaintiffs must do without: pretrial discovery, U.S.-style punitive damages, and class action lawsuits. In addition, the rules governing the burden of proof are also much more plaintiff-friendly in the United States than in Europe.

1. The Ability to Gather Evidence

U.S.-style discovery is unavailable in Germany,[48] France,[49] and most other European countries.[50] To prevail, the plaintiff in Europe must meet her burden of proof even though she does not have access to evidence that is under her employer's control.[51]

2. Punitive Damages

Punitive damages represent another advantage that U.S. plaintiffs enjoy over their European counterparts. In the United States, Title VII allows courts to award punitive damages in cases involving intentional dis-

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Cove Packing Co., 810 F.2d 1477, 1486 (9th Cir. 1987) (holding that "disparate impact analysis can be applied to subjective employment practices," including wage discrimination, and expressly overruling any prior decisions that have held the contrary).

46. *See* Directive 2006/54/EC, *supra* note 22 art. 4 (prohibiting indirect discrimination with respect to remuneration explicitly).

47. *See, e.g.*, Case 170/84, Bilka-Kaufhaus GmbH v. Karin Weber von Hartz, 1986 E.C.R. 1620, para. 31; Case C-300/06, Ursula Voß v. Land Berlin, 2007 E.C.R. I-10573, para. 44; Case C-256/01, Debra Allonby v. Accrington & Rossendale College, 2004 E.C.R. I-873, para. 75; Case C-184/89, Helga Nimz v. Freie und Hansestadt Hamburg, 1991 E.C.R. I-297, para. 15.

48. Joachim Zekoll & Jan Bolt, *Die Pflicht zur Vorlage von Urkunden im Zivilprozess—Amerikanische Verhältnisse in Deutschland? [The Duty to Present Documents in Civil Proceedings—American Conditions in Germany?]*, 55 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3129, 3129 (2002).

49. *See* Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 248 (2002); Steven J. Stein & Daniel R. Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685, 1707 (1983).

50. *See* Cyrus Afshar & Paul Rose, *Capital Markets Competitiveness: A Survey of Recent Reports*, 2 ENTREPRENEURIAL BUS. L.J. 439, 468 (2007); Nathan D. O'Malley & Shawn C. Conway, *Document Discovery in International Arbitration—Getting the Documents You Need*, 18 TRANSNAT'L LAW. 371, 371 (2005).

51. *See* Suk, *supra* note 4, at 1335–37 (describing in detail the difficulties that French plaintiffs face in bringing a discrimination suit in the absence of any mechanism akin to pretrial discovery in the United States).

parate treatment discrimination.[52] By contrast, EU law does not specify sanctions against discrimination, but merely requires that the compensation for victims be "dissuasive and proportionate to the damage suffered."[53] Member states are free to fill in the details. This is bad for the plaintiff, because European countries, including the U.K.,[54] do not allow U.S.-style punitive damages in employment discrimination cases.[55]

The lack of U.S.-style punitive damages does not mean that damages in Europe are limited to economic loss suffered by the plaintiff. German law, for example, explicitly allows compensation for noneconomic losses in cases of gender discrimination.[56] However, the amounts awarded are typically much lower than in the United States. German law limits noneconomic compensation to three times the employee's monthly salary,[57] whereas Title VII caps punitive damages in discrimination cases at $300,000 for a large firm.[58] The employee's annual salary would therefore have to reach $1.2 million in order for Title VII to be as restrictive as German law. Even then, Title VII's caps do not prevent plaintiffs from seeking higher punitive damages based on state anti-discrimination statutes, which often impose no such limits.[59]

Less onerous civil damages in Europe are not counterbalanced by meaningful criminal sanctions. Under German law, gender discrimination in employment does not constitute a criminal offense.[60] French law allows for criminal sanctions,[61] but they can be imposed only when the discrimination is intentional[62] and only if the court is certain of the defendant's guilt.[63] Due to the high threshold for conviction, the sanction is essentially dead letter in France in the context of employment gender discrimination.

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52. 42 U.S.C. § 1981a(a)(1)(2000).

53. Directive 2006/54/EC, *supra* note 22 art. 18.

54. *See* Aaron Baker, *Access vs Process in Employment Discrimination: Why ADR Suits the US but not the UK*, 31 INDUS. L.J. 113, 115 (2002).

55. *See* MICHÀLLE E. MOR BARAK, MANAGING DIVERSITY: TOWARD A GLOBALLY INCLUSIVE WORKPLACE 51 n.11 (2005); Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 330 (2001); Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 KAN. L. REV. 9, 18 (1996).

56. *See* Allgemeines Gleichbehandlungsgesetz [AGG] [Equal Treatment Act], Aug. 14, 2006, BGBl I at 1897, § 15(2) (Ger.).

57. *Id.*

58. 42 U.S.C. § 1981a(b)(3) (2000) (imposing different caps for punitive damages depending on the number of employees that the firm has and setting the limit for firms with more than 500 employees at $300,000).

59. Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 517 n.271 (1993).

60. *Cf.* AGG § 15 (imposing civil liability, but no criminal sanctions, in cases of gender discrimination).

61. CODE PÉNAL [C. PÉN.] art. 225-2 (Fr.) (providing for a prison term of up to three years and a fine of up to 45,000 euros for discrimination).

62. *Id.* art. 121-3.

63. *See* William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 CORNELL INT'L L.J. 477, 485 n.37 (1999) (stating that French law requires "that the trier of fact have an inner certainty (intimate conviction) of the defendant's guilt.").

According to available data, the number of convictions nationwide between 1997 and 2003 is no higher than two, and possibly as low as zero.[64]

The lack of punitive damages and other meaningful sanctions compromises the effectiveness of European gender discrimination law. For the employer, the probability of being sued for discrimination is small to begin with.[65] When the employment relationship is likely to continue, the specter of the employer's retaliation often discourages lawsuits.[66] Even in the absence of an ongoing employment relationship, it is well documented that victims of discrimination are generally reluctant to enforce their rights.[67] Hence, without punitive damages or other meaningful sanctions, firms have only limited incentives to prevent gender discrimination.

3. Class Action

U.S.-style class action lawsuits can bypass problems caused by the victims' reluctance to sue. However, class action lawsuits are not allowed in discrimination cases in France,[68] Germany[69] or many countries in Europe.[70] Without class action, the worst-case scenario from the

64. Between 1997 and 2003, application of section 225-2 of the French Penal Code led to 137 convictions. Of these convictions, 132 were for discrimination based on criteria other than gender. Three convictions were for gender discrimination, but not in the employment context. *See* JEAN-RENÉ LECERF, SÉNAT RAPPORT NO. 65, at 18 (2004). It follows that the number of convictions for employment gender discrimination cannot have been greater than two.

65. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1031 (1991); *see also* COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON THE APPLICATION OF DIRECTIVE 2002/73/EC OF THE EUROPEAN PARLIAMENT AND THE COUNCIL OF 23 SEPTEMBER 2002 AMENDING COUNCIL DIRECTIVE 76/207/EEC ON THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN 7 (2009).

66. *See* Donohue & Siegelman, *supra* note 65, at 1031–32. *Cf.* Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERSP. & SOC. PSYCHOL. BULL. 254, 254–55 (2001) (surveying the literature on the reluctance of discrimination victims to complain about discrimination and suggesting that fear of retaliation may be one reason for this reluctance).

67. *See* KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY 26 (1992); Robert L. Nelson et. al., *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. L. SOC. SCI. 103, 109 (2008); *see also* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1166 (1991) ("There is already evidence that discrimination victims are less likely than other victims to bring their grievances to anyone's attention or to bring them to court."); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 87 (1983) (presenting data indicating that only a small percentage of discrimination victims sue).

68. *See, e.g.*, Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The* Lipietz *Case*, 56 AM. J. COMP. L. 363, 398 (2008).

69. *See, e.g.*, Susan-Jacqueline Butler, *Models of Modern Corporations: A Comparative Analysis of German and U.S. Corporate Structures*, 17 ARIZ. J. INT'L & COMP. L. 555, 598 (2000); Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT'L. L. 369, 372 (2001).

70. *See* Louis Degos & Geoffrey V. Morson, *Class Systems: The Reforms of Class Action Laws in Europe Are as Varied as the Nations Themselves*, 29 L.A. LAW. 32, 34–36 (2006) (providing an account of the various approaches taken by different European legal systems to deal with permissive joinder and create a quasi-class action).

employer's perspective is to be ordered to compensate all of the individual plaintiffs. And since victims of gender discrimination are generally reluctant to sue,[71] the resulting deterrent effect is necessarily limited.

Moreover, even if the victims *do* sue individually, separate lawsuits are unlikely to threaten the employer's reputation to the same extent as a class action would. Class action discrimination suits can wreak havoc on the employer's reputation, in part because they tend to uncover widespread patterns of discrimination, which individual discrimination suits with more limited findings of fact, do not.[72] Although it is difficult to measure the deterrence effect of class actions,[73] which comprise a relatively small percentage of employment discrimination suits in the United States,[74] even those scholars who warn against overestimating the effect concede that employers take the risk of such suits very seriously.[75]

Of course, a class action lawsuit can be brought only where the class is sufficiently large.[76] Consequently, the proceeding is much more relevant to rank-and-file employees than to top executives. However, managerial employees below the board level have made use of class action lawsuits,[77] and the more generously one defines the notion of managerial employees, the more prevalent such lawsuits become.[78]

4. The Burden of Proof in Disparate Treatment Cases

The rules governing the burden of proof are also much more favorable to plaintiffs in the United States than in Europe. In disparate impact cases, U.S. law and EU law allocate the burden of proof in a similar fashion.

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71. *See supra* notes 66–67.

72. *See* Winnie Chau, Note, *Something Old, Something New, Something Borrowed, Something Blue and a Silver Sixpence for Her Shoe:* Dukes v. Wal-Mart *& Sex Discrimination Class Actions*, 12 CARDOZO J.L. & GENDER 969, 993–96 (2006) (describing the risks to employer reputation from class actions in gender discrimination cases).

73. Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2550 (2008).

74. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1255 (2003).

75. *Id.* at 1250.

76. Fed. R. Civ. P. 23(a).

77. *See, e.g.*, Peter Lattman, *Three Women Claim Bias at Goldman*, N.Y. TIMES, Sept. 16, 2010, at B1 (describing the attempt to gain class action status in a suit alleging that there were too few women among Goldman Sachs' managers); Stephen Barr, *FBI Settles Sex-Bias Suit Involving Non-Agents and Management Posts*, WASH. POST, Aug. 16, 2006, at D04 (describing a class action settlement in a case on behalf of FBI employees, GS-12 and above, who had unsuccessfully sought GS-14 and GS-15 administrative and managerial positions); Patrick McGeehan, *Wall Street Highflier to Outcast: A Woman's Story*, N.Y. TIMES, Feb. 10, 2002, at 1 (reporting on plans by the Equal Employment Opportunity Commission to initiate a class action against Morgan Stanley on the grounds that very few women have advanced into the investment bank's senior management ranks).

78. *Cf.* Steven Greenhouse & Michael Barbaro, *Costco Bias Suit Is Given Class-Action Status*, N.Y. TIMES, Jan. 12, 2007, at C9 (reporting that a federal judge's decision to grant class action status to plaintiffs claiming that Costco Wholesale had systematically discriminated against women seeking jobs as managers); Marcia Heroux, *Ensuring Workplace Equity*, SUN SENTINEL, May 17, 2007, at D1 (describing a class action settlement as part of which the grocery chain Publix agreed to change promotion practices such as to ensure a fair representation of women in management ranks).

Under both legal systems, the plaintiff has to show the disparate impact of a measure, and if she succeeds in doing so, the burden shifts to the defendant to demonstrate that the measure is justified.[79]

But substantial differences arise in the context of disparate treatment discrimination. In both the United States[80] and Europe,[81] the discrimination victim's initial evidentiary burden in disparate treatment or direct discrimination cases is limited to a prima facie showing of gender discrimination. However, both the difficulty and the consequence of that prima facie showing differ substantially between the two jurisdictions.

a. Establishing a Prima Facie Case of Gender Discrimination

Establishing a prima facie case of disparate treatment is far more difficult in Europe than it is in the United States. The U.S. approach was set forth in the race discrimination case *McDonnell Douglas Corp. v. Green*.[82] There, the U.S. Supreme Court held that a plaintiff could establish a prima facie case of discrimination by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[83]

Over the years, these requirements, which also apply, *mutatis mutandis*, in gender discrimination cases,[84] have become more flexible as courts have adjusted them to fit different fact patterns.[85] For example, the *McDonnell Douglas* test also applies if, instead of leaving the position open, the employer hires a candidate employee outside the protected group.[86]

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79. Regarding U.S. law, see 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2011), which states that disparate impact discrimination is established if the plaintiff demonstrates "that a respondent uses a particular employment practice that causes a disparate impact on the basis of . . . sex" and if "the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Regarding EU law, see Directive 2006/54/EC, *supra* note 22 art. 19(1), providing that if the plaintiff establishes "facts from which it may be presumed that there has been . . . indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

80. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing a prima facie test with respect to Title VII).

81. *See* Directive 2006/54/EC, *supra* note 22 art. 19(1).

82. *McDonnell Douglas Corp.*, 411 U.S. at 802.

83. *Id.*

84. *E.g.*, Tex Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981); Louis v. E. Baton Rouge Parish Sch. Bd., 303 F. Supp. 2d 799, 801–02 (M.D. La. 2003).

85. *See, e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 216 (2d Cir. 2005) ("Ordinarily, a plaintiff must first establish a prima facie case of discrimination by showing that (1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class.").

86. *Burdine*, 450 U.S. at 253 n.6.

Importantly, the *McDonnell Douglas* test is relatively generous to the plaintiff in that all the facts that she has to prove are typically within her reach. Obviously, the plaintiff can readily establish her own gender and qualifications, and she will frequently be able to show that the employer hired another applicant or continued to advertise the position after rejecting her. Accordingly, as one court aptly put it, "the initial elements of the prima facie case are relatively simple to prove."[87]

European law, by contrast, makes it much more difficult to establish a prima facie case of disparate treatment. Under EU law, the plaintiff has to "establish . . . facts from which it may be presumed that there has been direct or indirect discrimination."[88] In disparate treatment cases, this standard is generally understood to require the plaintiff to persuade the court that she has *more likely than not* suffered discrimination on the basis of her gender.[89] In other words, unlike U.S. law, EU law makes it incumbent upon the plaintiff to show that (a) she was subjected to disparate treatment and (b) her gender was, more likely than not, the reason for the disparate treatment.[90]

These requirements are very hard to meet without inside information. For example, consider the plight of a job applicant who suspects that she was not hired because she is a woman. That job applicant may know that she meets the qualifications for the job, and she may also know that she was rejected and that the employer continued interviewing other candidates. But EU law does not compel the courts to infer from these facts that discrimination occurred.[91] After all, there are many other possible explanations for the rejection,[92] such as a bad impression from the interview or

87. Randle v. LaSalle Telecomm. Inc., 876 F.2d 563, 568 (7th Cir. 1989) (citing Robert J. Smith, Note, *The Title VII Pretext Question: Resolved in Light of* St. Mary's Honor Center v. Hicks, 70 IND. L.J. 281, 283 (1994)).

88. Directive 2006/54/EC, *supra* note 22 art. 19(1). The Member States may—but are not required to—provide for rules that are more favorable to the plaintiff. *Id.* art. 19(2).

89. *See* Christoph Bergwitz, *Die Neuen EG-Richtlinien zur Beweislast bei Geschlechtsbedingter Diskriminierung [The New EC Directives on the Burden of Proof in Cases of Gender Discrimination]*, 52 DER BETRIEB 94, 97 (1999) (Ger.); Alexander Leuchten, *Der Einfluss der EG-Richtlinien zur Gleichbehandlung auf das deutsche Arbeitsrecht [The Influence of the EC Equal Treatment Directives on German Employment Law]*, 19 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 738, 740 (2002) (Ger.). The same interpretation has been adopted with respect to the German statute implementing the relevant European directives. *E.g.*, Bundesarbeitsgericht [BAG] [Federal Labor Court] Feb. 5, 2004, 8 AZR 112/03, NEUE JURISTISCHE WOCHENSCHRIFT [NJW], 2112 (2115), 2004 (Ger.); JOBST-HUBERTUS BAUER, BURKHARD GÖPFERT & STEFFEN KRIEGER, ALLGEMEINES GLEICHBEHANDLUNGSGESETZ [EQUAL TREATMENT ACT] 10 (2007) (Ger.).

90. *See* Bergwitz, *supra* note 89, at 97.

91. *See, e.g.*, Gregor Thüsing, *§ 22 AGG*, *in* 2 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 22 ¶ 12 (Kurt Rebmann et al. eds., 5th ed. 1997) (commenting on section 22 of the General Equal Treatment Act which implements EU law).

92. *Id. See* Peter Windel, *Der Beweis Diskriminierender Benachteiligungen* [*Proving Discriminatory Disparate Treatment*], 60 RECHT DER ARBEIT [RDA] 1, 6 (2007) (Ger.) (noting that there is "obviously" no assumption that disparate treatment suffered by the applicant was motivated by the applicant's gender and explaining that such disparate treatment is therefore not sufficient to establish a prima facie case of discrimination).

doubts about the applicant's qualifications. Thus, unless there are clearly observable indicia of discrimination, such as gender-specific language in the job posting[93] or discriminatory remarks during the interview,[94] the plaintiff will usually be unable to establish a prima facie case of disparate treatment discrimination.

In sum, the difference between U.S. law and EU law is substantial. While U.S. plaintiffs will find it relatively easy to establish a prima facie case of discrimination, EU plaintiffs will find it very difficult to do so unless they have access to inside information.

b. The Consequences of a Prima Facie Case

Once the plaintiff has succeeded in establishing a prima facie case of gender discrimination, European law turns out to be more favorable to the plaintiff than U.S. law. In the United States, after the plaintiff has established a prima facie case, the employer is simply required to articulate a nondiscriminatory reason for his action.[95] The burden of proof remains with the plaintiff to show that the employer's articulated reason is a mere pretext for discrimination.[96] In the European Union, by contrast, the consequences of a prima facie case of discrimination are much more far-reaching. Once the employee has established a prima facie case of discrimination, the *employer* has to prove that it did not discriminate against the employee.[97]

In short, for those plaintiffs who manage to establish a prima facie case, the situation is more advantageous in the European Union. However, in practice, this matters little. Because the threshold for establishing a prima facie case is so high and because European plaintiffs do not have the benefit of pretrial discovery, relatively few plaintiffs can ever hope to meet their initial burden of proof.[98]

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93. Bundesarbeitsgericht [BAG] [Federal Labor Court] Feb. 2, 2004, 8 AZR 112/03 (Ger.) (holding that a gender-specific job advertisement is sufficient to make a prima facie case that the job candidate was put at a disadvantage because of her gender).

94. *E.g.*, Thüsing, *supra* note 91, at § 22 ¶ 11 (noting that statements by the employer or his agents, to the extent that they act within the scope of their authority, can be sufficient to establish a prima facie case of discrimination); Windel, *supra* note 92, at 6 (arguing that discriminatory statements may establish a prima facie case of discrimination).

95. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973) (explaining that once the plaintiff has established a prima facie case of discrimination, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection").

96. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Moreover, for a mandatory ruling of discrimination, it is not enough to show that the employer lied when it articulated the pretext. Rather, the employee cannot show that the articulated reason is a pretext "unless it is shown both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993). If the employer has articulated a reason for his action and the plaintiff has offered no evidence beyond the bare minimum that is necessary to establish a prima facie case, even summary judgment against the plaintiff may be appropriate. Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994).

97. *See* Directive 2006/54/EC, *supra* note 22 art. 19(1).

98. *See* Suk, *supra* note 4, at 1335–37.

Thus, the rules governing the burden of proof neatly fit into the overall pattern that characterizes the differences between gender discrimination laws in the United States and Europe. The substantive provisions are more generous in the European Union, but when it comes to sanctioning and enforcing these provisions, U.S. law offers plaintiffs more powerful remedies, a more favorable allocation of the burden of proof, and more plaintiff-friendly procedural rules.

II. Non-Ideological Explanations

What accounts for the profound differences between gender discrimination laws in the United States and Europe? In law, nothing is ever monocausal, and so we should expect multiple factors to have a bearing on the matter. In the remainder of this Article, I will show that different ideologies are not only one of these factors, but in fact play a central role. Indeed, I will demonstrate that ideology can explain many of the above-described differences between U.S. law and European law.

Before making the affirmative case for the relevance of ideology in comparative gender discrimination law, however, it is helpful to consider potential competing explanations. Two types of arguments are of interest in this context. The first invokes the concept of path dependence, whereas the second stresses the role of coherence within a legal system.

The explanation favored by existing scholarship is path dependence.[99] Legal systems have an inherent tendency to follow their original path. Accordingly, the argument runs, seemingly minor doctrinal choices made in the early days of gender discrimination law explain why differences between gender discrimination laws in the United States and Europe persist and even deepen.[100] Today's differences in gender discrimination laws are therefore not motivated by ideological differences existing today, but are simply a result of past choices by courts and lawmakers. The past shape of the law dictates its present shape.

It is crucial to note at this point that this theory is much more far-reaching than it may appear at first glance. Obviously, all present facts—including today's differences in ideology—can somehow be traced back to past events, and so it would be trivial to argue that past events are important in understanding the present shape of gender discrimination laws in different countries. But the path dependence argument in comparative gender discrimination law is much more ambitious. It asserts that past *legal differences* explain today's divergences in gender discrimination laws.[101]

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99. *See, e.g.*, Linos, *supra* note 4, at 115–69 (presenting a path dependence theory to explain various differences between EU and U.S. gender discrimination law); Suk, *supra* note 4, at 1315–71 (2008) (invoking path dependence to explain French procedural rules in antidiscrimination cases).

100. *See* Linos, *supra* note 4, at 117 (stressing that, because of path dependence, early choices by courts and lawmakers can have "momentous consequences much later in time").

101. *See id.*

Apart from the path dependence theory, another possibility is that gender discrimination laws in the United States and Europe simply reflect the characteristics of the respective legal systems at large and, importantly, that these characteristics were chosen without regard to the question of how much protection to accord to working-class employees. For example, German law never allows for pretrial discovery,[102] and so it is hardly surprising that there is no pretrial discovery in gender discrimination cases. I refer to this type of argument as a coherence-based explanation, since it presupposes a legal system's inherent tendency to make coherent choices across different areas of the law.

Path-dependence and coherence-based arguments may both have a legitimate role in explaining differences between gender discrimination laws in Europe and in the United States. However, as I show in the following sections, there are strong reasons not to exaggerate their explanatory power.

A. Path Dependence Arguments

Path dependence arguments may seem inviting where the law exhibits a certain level of continuity. However, it is crucial to note that legal continuity does not imply path dependence. Path dependence arguments presume that the present shape of the law is a function of its past shape.[103] But if a legal system continues to adhere to certain norms, the reasons do not necessarily lie in the past. Instead, it may simply be the case that the preferences and policy consideration that guided the choice of a certain norm still persist. In that case, the law owes its present shape to present policy considerations, not to path dependence.

Accordingly, we should take care when invoking path dependence arguments. Even if a legal system shows a certain level of continuity, one must first determine what reasons prompted the choice of a given norm in the first place and whether these considerations still apply today. If the relevant motives can be ascertained and if they still persist today then there is no reason to suspect that path dependence completely accounts for the status quo.

In the area of gender discrimination, path dependence arguments face an additional challenge: More than many other areas of the law, antidiscrimination law—including gender discrimination law—reflects the values of a society.[104] The spectacular rise of gender discrimination law was the result of uniquely powerful socio-political dynamics in the form of the civil

102. Zekoll & Bolt, *supra* note 48, at 3129.

103. *See, e.g.*, Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643 (1996) ("Today's road depends on what path was taken before.").

104. For example, in the European Union, the principle of non-discrimination between women and men is deemed to be so important that it is mentioned among the fundamental aims of the European Union. Consolidated Version of the Treaty on European Union art. 3(3), Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU] ("[The Union] shall . . . promote social justice and protection, equality between women and men . . . .").

rights movement and, especially in the decades after the enactment of Title VII, the women's rights movement.[105] However, the greater the influence of cultural forces on a given area of the law, the more difficult it is to view present legal rules as determined by past legal rules.

At the EU level, there is an additional reason not to overemphasize the role of path dependence. Because the European Union is a work in progress,[106] European Union law is inherently more dynamic than most other legal systems. Since the establishment of the European Economic Community in 1957, its constitutional treaty has undergone at least five fundamental transformations.[107] The latest of these transformations occurred as a result of the Treaty of Lisbon,[108] which only came into force in December 2009.[109] Moreover, membership in the European Union is constantly expanding: from six member states in 1957 to twenty-seven now. Each new member state has its own legal and cultural traditions, which then feed into EU law. This feedback effect occurs not only in the legislative process, but also at the European Court of Justice. One judge from each member state sits on the Court.[110] As the composition of the European Union changes, so does the composition of the Court of Justice. It is therefore unsurprising that legal continuity is not as high on the Court's agenda as in other jurisdictions. Instead, the Court is expressly committed to a dynamic interpretation of EU law.[111]

Combined, these factors undercut path dependence arguments, even if they do not rule them out altogether.

B. Coherence-based Arguments

Coherence-based arguments may seem to offer a better non-ideological explanation for differences between discrimination laws in the United States and Europe. According to this line of thought, these differences are simply due to the fact that U.S. and European gender discrimination laws share commonly applicable features with the rest of their respective legal systems.[112] Indeed, several of the legal norms that are central to the suc-

105. It is often thought that the civil rights movement was a catalyst for other social movements including the women's right movement. *See* Morris, *supra* note 10, at 527.

106. The Preamble of the Treaty on European Union specifically invokes the dynamic nature of the European Union by stressing the member states' resolution "to continue the process of creating an ever closer union among the peoples of Europe." TEU pmbl.

107. These included the Single European Act, the Maastricht Treaty, the Treaty of Amsterdam, the Treaty of Nice, and the Lisbon Treaty. *See generally* PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 7–37 (4th ed. 2008) (discussing the five relevant treaties).

108. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

109. *See* Amnon Lehavi, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 441 (2010).

110. TEU art. 19(1).

111. Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 3415 para. 20 ("[E]very provision of Community law must be . . . interpreted in the light of the . . . state of evolution [of Community law] at the date on which the provision in question is to be applied.").

112. *See, e.g.*, Zekoll & Bolt, *supra* note 48, at 3129.

cess or failure of gender discrimination cases are by no means germane to gender discrimination law in particular: Pretrial discovery, class action lawsuits, and punitive damages are broadly available in the United States and broadly unavailable in Europe.[113] With respect to these features, therefore, the plaintiff in a gender discrimination case is treated like a plaintiff in any other area of the law. Thus, the observed differences may seem to be motivated more by coherence than by ideological differences related to the protection of working-class employees.

However, the importance of coherence-based arguments is much more limited than it may appear. To begin, legal systems are frequently less coherent than they seem. German law illustrates this point. Despite their rejection of U.S.-style punitive damages,[114] German courts have explicitly recognized that damage awards may primarily serve a deterrent rather than compensatory function in certain cases,[115] and that this deterrent function can be taken into account in determining the amount to be awarded.[116] Accordingly, the decision to cap damages for non-economic loss in gender discrimination cases can hardly be based on the overall structure of German law. Rather, it would have been entirely consistent with the principles developed by the German judiciary to take a more generous approach to such damage awards in the interest of guaranteeing effective deterrence.

Similarly, although U.S.-style class actions are unavailable in Germany,[117] German securities law allows so-called "model proceedings," which represent a compromise between individual suits and class actions.[118] A model proceeding does not spare the plaintiffs the trouble of bringing suits individually, but it does allow the court to concentrate on one of the suits (the "model"), the resolution of which will also be binding on the rest.[119] As a result, the plaintiffs avoid the costs in time and money normally associated with a multitude of individual lawsuits.[120] Once again, this raises an obvious question: If German law can make an exception for securities lawsuits, why not also for gender discrimination law?

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113. *See* Directive 2006/54/EC, *supra* note 22 art. 18; *see also* Degos & Morson, *supra* note 70, 34–36 (2006).

114. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 21, 1992, 45 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3096 (3102), 1992 (Ger.) (holding that punitive damage awards are incompatible with the German ordre public).

115. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 5, 1995, 48 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 984 (985), 1995 (Ger.).

116. *Id.*

117. MOR BARAK, *supra* note 55, at 51 n.11; Schlosser, *supra* note 55, at 18.

118. GESETZ ZUR EINFÜHRUNG VON KAPITALANLEGER-MUSTERVERFAHREN [KAPMUG] [CAPITAL MARKETS MODEL CASE ACT], Aug. 16, 2005, BGBL I, 2005, 2437 (Ger.).

119. *Id.* arts. 7, 16.

120. Christoph Keller & Annabella Kolling, *Das Gesetz zur Einführung von Kapitalanleger-Musterverfahren – Ein Überblick* [*The Act Introducing Model Proceedings for Securities Investors – A Survey*] 5 BKR [ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT] 399, 400 (2005) (Ger.) (noting that the act reduces the costs for plaintiffs since the costs of ascertaining the facts are only incurred once, namely in the model proceeding, and are then divided among all the plaintiffs).

Coherence-based arguments come with a second, even more fundamental limitation. Different legal systems can and often do achieve similar outcomes via different legal mechanisms.[121] Against that background, arguments based on doctrinal coherence as opposed to ideology can serve to explain the prevalence of different legal *rules*, but are much less suited to explaining different *outcomes*.

Pretrial discovery is a case in point. Germany and France's general rejection of pretrial discovery no doubt explains pretrial discovery's unavailability in discrimination cases. However, pretrial discovery is not the only way of helping plaintiffs to meet their burden of proof. The rules on prima facie evidential burden and burden of proof can themselves be modified to favor the plaintiff. Indeed, this latter approach plays a central role in the continental European tradition.[122] A coherence-based explanation cannot explain why Germany and France do make use of it in the context of gender discrimination law.[123]

In sum, coherence-based arguments surely have a legitimate role in explaining the differences between gender discrimination laws on both sides of the Atlantic. But it is difficult to see them as the driving force behind the gulf that has opened between European and U.S. gender discrimination law.

III. An Ideology-Based Explanation: Historical Background

In this part, I present an alternative explanation for the differences between European and U.S. gender discrimination law. These differences can best be explained by differing ideologies: European law is modeled on a social-democratic vision of gender discrimination law whereas U.S. law reaches more uniformly across social boundaries.

This is not to say that Title VII has an absolutely uniform impact on employees at different levels of the corporate hierarchy.[124] Rather, my point is that one of the core purposes of Title VII was to allow women and

121. *E.g.*, Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 55 (1996).

122. *See, e.g.*, Reinhard Greger, *Vor § 284: Verfahren vor den Landgerichten* [*Proceedings Before the District Court*], in ZÖLLER ZIVILPROZESSORDNUNG 832–36 (Reinhold Geimer et al., eds., 25th ed. 2005) (Ger.) (discussing the general principles underlying the allocation of the burden of proof under German law).

123. EU law does not stand in their way, since the relevant directive explicitly allows the member states to adopt rules that are more generous to plaintiffs. *See* Directive 2006/54/EC, *supra* note 22 art. 19(2).

124. Indeed, various voices in the U.S. literature have claimed that even U.S. law is less effective at protecting women in upper-level jobs than at protecting ordinary workers. *See, e.g.*, Tracy Anbinder Baron, Comment, *Keeping Women out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 320 (1994) ("[T]raditional Title VII analyses are ill-suited to the small statistical samples and unconscious barriers that usually are associated with upper-level cases . . . ."); Ramona L. Paetzold & Rafael Gely, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1552–53 (1995) (stressing the difficulties that a small pool of job candidates creates for a statistical showing of discrimination "[a]t higher levels of the organization").

minorities to gain access to all levels of the corporate hierarchy, whereas European gender discrimination law is primarily designed to protect working-class employees.

This ideological divide did not always exist. Originally, U.S. and European gender discrimination laws shared a common focus on working-class employees. However, with the adoption of Title VII—the centerpiece of modern American antidiscrimination law—the United States made a clear break with tradition and adopted a class-neutral model of antidiscrimination law. By contrast, no comparable change has occurred in Europe.

In this Part, I will analyze the relevant developments in Europe and the United States. My purpose is not just to show how the different ideologies have emerged. Rather, my account also demonstrates how ideology has trumped path dependence: Europeans, who generally want the government to play a central role in promoting social equality,[125] have retained the social-democratic approach to gender discrimination law. Americans, by and large warier of social egalitarianism in government policies,[126] have not.

A. The United States

As early as 1918 in the United States, the War Labor Policies Board adopted and recommended the policy that "[w]omen doing the same work as men shall receive the same wages with such proportionate increases as the men are receiving in the same industry."[127] In 1919, Michigan and Montana first enacted equal pay laws, and twenty other states followed suit between 1944 and 1962.[128]

The first decisive step at the federal level, however, was the enactment of the Equal Pay Act of 1963.[129] In many ways, the Act encapsulates the very essence of what I call a social-democratic approach to gender discrimination legislation.

Among the political forces driving the legislation, labor unions played

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125. *Cf.* Alberto Alesina et al., *Inequality and Happiness: Are Europeans and Americans Different?*, 88 J. PUB. ECON. 2009, 2010 (2004) ("European governments are more heavily involved with redistribution than that of the United States. European fiscal systems are more progressive than in the United States and the welfare state is more generous in Europe, where the share of government in the economy is substantially larger than in the United States."). A different and more complex question is whether Europeans and Americans have different attitudes towards social equality or whether they simply differ in the role that they allow their governments to play in this context. Some studies find that attitudes towards equality differ in the United States and Europe. *See id.* at 2035–36 (finding no statistical differences regarding the effect of inequality on happiness levels for American and European societies as a whole, but noting that for specific income and ideological groups, there are significant differences in the attitudes towards inequality between Europe and the United States).

126. *See id.* at 2010 (noting that the U.S. government is much less involved in the redistribution of wealth than its European counterparts).

127. Bureau of Labor Statistics, U.S. Department of Labor, *Women in Industry*, 8 MONTHLY LAB. REV. 216, 217 (1919).

128. *See* BUREAU OF NATIONAL AFFAIRS, EQUAL PAY FOR EQUAL WORK, *supra* note 30, at 39–51 (1963) (providing an overview of the relevant statutes).

129. 29 U.S.C. § 206(d) (2000).

a key role.[130] Esther Peterson, the director of the Woman's Bureau and the key promoter of the Equal Pay Act,[131] was a former lobbyist for the AFL-CIO.[132]

The Act itself was also aimed at working-class employees. In part, this was due to the inherent limitations of equal pay legislation. Such legislation does not offer any protection against discrimination in hiring and promotions and therefore does not address the most central challenges for high-achieving women seeking to climb the corporate ladder.

Moreover, the Equal Pay Act, as adopted in 1963, was clearly designed with the intent to protect ordinary workers. Exempted from the equal pay provision was "any employee employed in a bona fide executive, administrative, or professional capacity."[133] In other words, women in white-collar positions were not protected by the Act at all. This would remain the case until 1972, when the exemption was removed.[134]

The lawmakers involved in the passage of the Act were well aware that the Act would primarily benefit low-level female employees rather than high-level ones. During the debate in the House of Representatives, an amendment was proposed to limit investigation of potential violations to the facts set forth in writing by the aggrieved employee.[135] However, opponents of the amendment—which was ultimately rejected—argued that such a rule would "make it incumbent on millions of rather poor and uneducated persons to embark on legal processes."[136] This line of reasoning would be hard to comprehend if the law had been targeted at upper-level employees, but it made perfect sense if it the Equal Pay Act was designed to protect members of the working class.

However, in the United States, the social-democratic approach to gender discrimination law was not destined to endure. The seminal change came with the enactment of Title VII in 1964, which was further strengthened by the Equal Employment Opportunity Act of 1972.[137]

Title VII of the Civil Rights Act of 1964 represented a clear break with the labor-oriented legislation typified by the Equal Pay Act. Pointedly, Title VII did not distinguish between different types of jobs, and instead applied to all positions high or low.[138] But the ideological shift ran much deeper than that. Rather than being solely the fruit of the labor movement, Title

130. *See generally* CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES 89–105 (1989) (describing the events that resulted in the enactment of the Equal Pay Act).

131. *See id.* (explaining the pivotal role played by Esther Peterson).

132. *Id.* at 89.

133. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 13(d), 75 Stat. 65, 71 (1961) (codified as amended at 29 U.S.C. § 213(a)(1) (2000)).

134. Education Amendments of 1972, Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 235, 375 (1972) (codified as amended at 29 U.S.C. § 213(a)(1) (2000)).

135. 109 CONG. REC. 9214 (1963) (statement of Rep. Ashbrook).

136. *Id.* at 9215 (statement of Rep. Thompson).

137. There is considerable discussion regarding the importance of the changes brought by the Equal Employment Opportunity Act.

138. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 980–83 (1982) (adducing various parts of the legislative history of the Equal

VII owed its birth to a broad bipartisan coalition[139] of moderate Republicans and northern Democrats.[140] Indeed, the role that the labor movement played in its enactment is slightly ambiguous.[141] Organized labor was initially wary of the fact that Title VII applied to unions as well as to employers.[142] Thus, while the AFL-CIO ended up as one of the staunchest and most crucial supporters of Title VII, this appears to have been partly the result of some nudging on the part of President Johnson.[143]

Furthermore, the legislative history of Title VII makes it plain that giving minority groups—for whom Title VII had primarily been designed[144]—and women equal access to upper-level jobs was among the chief goals of Title VII. For example, the House Judiciary Committee's report points out that "[t]wenty-two percent of white college men become proprietors, managers, or officials in business while only 5 percent of [black] college men achieve such positions."[145] Other statements made in the legislative his-

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Employment Opportunity Act in support of the claim that Title VII does not distinguish "based on level of employment").

139. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1501 (2004).

140. *See* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1452–98 (2003) (providing a comprehensive analysis of the coalition behind the 1964 Civil Rights Act).

141. *See* Herbert Hill, *Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and Litigation Record*, *in* RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 263, 263–41 (Herbert Hill & James E. Jones, Jr. eds., 1993) (providing a comprehensive analysis of the role of the labor movement in the enactment of Title VII).

142. *Id.* at 269–70.

143. *See id.* at 269 (detailing the efforts of President Johnson to gain the support of the AFL-CIO for H.R. 7152).

144. Title VII was initially designed to protect minorities, but ended up including women as well. This rather peculiar legislative history is described in detail in Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37, 37–56 (1983); and CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–17 (1985). Originally, Title VII was mainly designed to target race discrimination and did not cover gender discrimination. *See* H.R. 7152, 88th Cong., 1st Sess. §§ 704(a)–(b) (1963), *reprinted in* H.R. REP. NO. 88-914 (1963), *reprinted in* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2001, 2010 [hereinafter EEOC LEGISLATIVE HISTORY]. That Title VII ended up prohibiting gender discrimination as well was the result of a somewhat bizarre political twist. One of the avid opponents of Title VII, Representative Howard Smith (D) from Virginia, suggested an amendment that included gender discrimination. 110 CONG. REC. 2577 (1964). It is often suggested that at least part of Smith's intention was to derail the adoption of Title VII. *See, e.g.*, Brauer, *supra*, at 45 ("[Smith] saw an opportunity to take a swipe at the civil rights bill . . . ."). *But see* Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 765, 767 (2002) ("I do not think that Smith . . . introduced 'sex' into Title VII as a joke or simply as 'a southern attempt to incite a filibuster.'"). However, if this was Smith's agenda, his strategy backfired. Various female representatives from both parties declared their support. *See* 110 CONG. REC. 2578–84 (1964). The amendment was accepted and remained part of Title VII as it was later adopted. *See* 110 CONG. REC. 2584 (1964).

145. H.R. REP. NO. 88-914, *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 144, at 2001, 2157.

tory also emphasize the awareness that Title VII would open up the upper echelons of private enterprise.[146]

This function of Title VII became even clearer with the adoption of the Equal Employment Opportunity Act in 1972.[147] Indeed, the legislative history of the Equal Employment Opportunity Act is awash with statements that stress the need for ethnic minorities[148] and women[149] to have access

146. *See* 110 CONG. REC. 8452–53 (1964) (statement of Rep. Javits) (referring to reports indicating that "nonwhites . . . are frequently compelled to accept unskilled or semiskilled jobs"); 110 CONG. REC. 12619 (1964) (statement of Rep. Muskie) ("If we are to promote the general welfare, we must make it possible for all Americans to gain the education and training necessary for them to find and obtain jobs utilizing their full potential.").

147. Pub. L. No. 92-261, 86 Stat. 103 (1970 ed. Suppl. 5).

148. *See, e.g.*, S. COMM. ON EDUC. & LABOR, H.R. REP. NO. 92-238 (1971), *reprinted in* SUBCOMMITTEE ON LABOR OF THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT ACT OF 1972, 92d Cong., 2d Sess. 61, 77 [hereinafter EEOA 1972 LEGISLATIVE HISTORY] ("The report found that . . . most white-collar jobs were found to be largely inaccessible to minority persons. For example, in Atlanta and Baton Rouge, there were no blacks in city managerial positions."); 117 CONG. REC. 31967 (1971) (statement of Rep. Anderson) (noting that "although blacks constitute 10 percent of the American labor force, eight out of 10 male black workers are concentrated in occupations that are grouped along the three lowest rungs of the economic ladder in terms of income"); 117 CONG. REC. 31976 (1971) (statement of Rep. Drinan) ("As of May 30, 1970, minorities accounted for 19.4 percent of the total number of Federal employees. But minorities constitute only 2 percent of individuals in the GS-16 through GS-18 grades."); 117 CONG. REC. 32106 (1971) (statement of Rep. Leggett) (acknowledging "sincere efforts [on the part of corporations] to recruit black graduates for management positions," but noting that "we have a long way to go."); S. COMM. ON LABOR & PUB. WELFARE, H.R. REP. NO. 92-415 (1971), *reprinted in* EEOA 1972 LEGISLATIVE HISTORY, *supra*, at 410, 415–16 (noting that African Americans "hold only 1% of professional and managerial positions" and that they "are precluded from high-paying executive positions."); H.R. REP. NO. 92-415 (1971), *reprinted in* EEOA 1972 LEGISLATIVE HISTORY, *supra*, at 410, 422–23 (pointing out that in educational institutions, "minorities and women are precluded from the more prestigious and higher-paying positions . . . ." and that, with respect to the federal government, "[t]he inordinate concentration of women in the lower grade levels and their conspicuous absence from the higher grades is again evident"). *Cf.* 117 CONG. REC. 32101 (1971) (statement of Rep. Badillo) (stressing with respect to the federal civil service, that those "Spanish-speaking Americans . . . fortunate enough to be employed by Uncle Sam are heavily concentrated in the lower grade levels," while "only 17 Spanish-speaking persons . . . hold supergrade positions . . . in the entire Federal Establishment").

149. *See, e.g.*, H. COMM. ON EDUC. & LABOR, H.R. REP. NO. 92-238 (1971), *reprinted in* EEOA 1972 LEGISLATIVE HISTORY, *supra* note 148, at 61, 80 ("When they have been hired into educational institutions . . . women have been relegated to positions of lesser standing than their male counterparts."); H.R. REP. NO. 92-238, *reprinted in* EEOA 1972 LEGISLATIVE HISTORY, *supra* note 148, at 61, 83 (noting that "the majority of [minority and female] employees are at the lower levels of government employment"); SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR & PUB. WELFARE, H.R. 1746, 92nd Cong., 2d Sess., *reprinted in* EEOA 1972 LEGISLATIVE HISTORY, *supra* note 148, at 191, 195 (statement of Rep. Martin) ("In [1968], 60 percent of women, but only 20 percent of men earned less than $5,000 while, at the other end of the scale, only 3 percent of women, but 28 percent of men had earnings of $10,000 or more."); H.R. 1746, *reprinted in* EEOA 1972 LEGISLATIVE HISTORY, *supra* note 148, at 191, 239 (statement of Rep. Nix) ("The conclusion is that women and minority group workers . . . still are largely underrepresented in the more remunerative jobs of private industry."); H.R. 1746, *reprinted in* EEOA 1972 LEGISLATIVE HISTORY, *supra* note 148, at 191, 240 (statement of Rep. Nix) (citing a newspaper article from the Washington Star, Sept. 12, 1971, reporting that "[i]n 1970,

to upper-level jobs. In sum, when the U.S. Congress included gender discrimination in Title VII, it not only broadened gender discrimination law, but also put it on a different conceptual basis: Social-democratic ideology was replaced by a class-neutral vision of gender discrimination law.

B. Europe

European law has developed in a fundamentally different direction. Just like the United States, the European Union and member states such as Germany and France started out with a social-democratic approach to gender discrimination law. But unlike the United States, Europe never abandoned the social-democratic vision of gender discrimination law. Instead, its law is still geared towards the protection of working-class women.

1. Before the Founding of the European Economic Community

The birth of gender discrimination law in Europe predates the founding of the European Union—then known as the European Economic Community—in 1957. In the following sections, I will analyze the development of gender discrimination law in France and Germany, which, together with Italy, Belgium, the Netherlands, and Luxembourg, were among the European Economic Community's founding members.

a. France

French gender discrimination law has its origins in the first half of the twentieth century. In 1919, France enacted its first legislation on collective bargaining agreements.[150] In 1936, the French legislature amended the law to allow for the first time the extension of collective bargaining agreements to employees and employers who were not part of the unions and employer associations that had concluded the agreement.[151] Some of these collective agreements contained equal pay provisions, while many others did not.[152]

The rise of autonomously negotiated collective bargaining agreements

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women made up 34 percent of the total working force, but only 2.7 percent held managerial positions, as opposed to 12.4 percent of the men."); 117 CONG. REC. 32,095 (1971) (statement of Rep. Fountroy) ("The difficulties of minorities and women in securing Federal employment, their high concentration in low level jobs, their virtual absence from executive level positions, can only be attributed to systematic and institutional failures . . . ."); 117 CONG. REC. 32,103 (1971) (statement of Rep. Fraser) (noting that "minority groups and women hold the lowest paying jobs, are the first to be laid off during cutbacks, have few benefits and in many areas are systematically discriminated against moving into jobs involving greater skills and training"); 117 CONG. REC. 32,104 (1971) (statement of Rep. Fraser) ("The percentage of women in top Government jobs—1.5%—shows that the Federal Government itself contains systematic discrimination.").

150. GEORG STEINMANN & HEINZ GOLDSCHMIDT, GEWERKSCHAFTEN UND FRAGEN DES KOLLEKTIVEN ARBEITSRECHTS IN GROßBRITANNIEN, FRANKREICH, BELGIEN, DEN NIEDERLANDEN UND ITALIEN 65 (1957) (Ger.).

151. *Id.*

152. International Labor Office, *Employment of Women in France*, 55 INT'L LAB. REV. 549, 552 (1947).

came to an abrupt end, however, with the arrival of World War II.[153] An act passed on July 11, 1938, concerning the general organization of the nation in time of war[154] gave the Minister of Labor the power to regulate the conditions of employment.[155] On the basis of that legislation, the Ministry of Labor soon started intervening forcefully in the setting of wages, culminating in a freeze in 1939.[156] This meant that the prevailing practice of paying women less than men was now legally sanctioned. In the ensuing years, with much of France occupied by Nazi Germany, the law would become even less favorable for women. Regulations adopted in 1943 and 1944 mandated that women be paid 20–30% less than men for the same work.[157] In other words, wage discrimination against female workers was not only allowed, but positively *required* by law. Thus, when World War II and the German occupation of France ended, the new French government inherited an economy in which wages were tightly controlled by the government and women *had* to be paid less than men.

In the immediate aftermath of the war, the new French government revoked these regulations.[158] Crucially, though, the relevant decree—which consisted of a single sentence—did not prohibit discrimination against female workers. It simply abolished the earlier decrees that had *required* unequal salaries.[159]

Nor did the French law guarantee gender equality in employment by other means. The preamble to the French Constitution of 1946—the constitution of the Fourth Republic that lasted until 1958—addressed the situation of women. It specifically provided that "[t]he law guarantees women equal rights to those of men in all spheres."[160] However, at the time, that preamble was not thought to be legally binding,[161] and no statutory law implemented the principle of gender equality in the area of employ-

153. *See generally* International Labor Office, *Social Legislation in Wartime*, 40 INT'L LAB. REV. 641, 641–50 (1939) (summarizing legislation on the regulation of employment in wartime that was adopted between 1938 and 1939).

154. Loi du 11 juillet 1938 [Law of July 11, 1938], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 13, 1938, p. 8330.

155. International Labor Office, *Social Legislation in Wartime*, 40 INT'L LAB. REV. 641, 646–47 (1939).

156. *See Les salaires féminins*, 10 DROIT SOCIAL 26, 27 (1947) (Fr.); B. Piguet, *L'Égalité des Salaires Masculins et Féminins*, 2 REVUE FRANÇAISE DU TRAVAIL 419, 425 (1947) (Fr.).

157. *See Les salaires féminins*, *supra* note 156, at 27; Piguet, *supra* note 156, at 425–26.

158. *See Les salaires féminins*, *supra* note 156, at 27.

159. Décret du 30 juillet 1946 [Decree of July 30, 1946] art. I, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 3, 1946, at 6897–98 (Fr.).

160. 1946 CONST. pmbl., *reprinted in* GENEVIÈVE KOUBI ET AL., LE PRÉAMBULE DE LA CONSTITUTION DE 1946—ANTINOMIES JURIDIQUES ET CONTRADICTIONS POLITIQUES 291–92 (1996) (translation by author).

161. GEORGE RIPERT, LE DÉCLIN DU DROIT 17 (1949) (Fr.). Indeed, scholars at the time could not even agree as to whether the Preamble could have any legal relevance at all. *See* Yves Poirmeur, *La réception du Préambule de la Constitution de 1946 par la doctrine juridique*, *in* KOUBI ET AL., *supra* note 160, at 120–23 (1996) (Fr.) (providing an overview of the discussion).

ment.[162] Real steps toward imposing a principle of equal treatment came some time later and were distinctly labor-oriented in nature.

In 1950, France enacted a new statute on collective bargaining.[163] That statute explicitly required collective bargaining agreements to contain provisions on the principle of equal pay for equal work.[164] In effect, the statute entrusted the implementation of equal pay to organized labor. More importantly, equal pay was guaranteed only in the presence of collective bargaining agreements. Due to the weakness of the labor unions in the post-war era, however, collective bargaining agreements failed to become widely accepted until later years.[165]

For that reason, the second feature of the 1950 statute acquired central importance.[166] The 1950 statute called on the French government to prescribe, via governmental decree, a minimum wage for all French workers.[167] This minimum wage, the *salaire minimum interprofessionnel garanti* [SMIG], later renamed *salaire minimum interprofessionnel de croissance* [SMIC], did not distinguish between male and female workers.[168] Thus, it guaranteed equal wages to men and women at the bottom of the pay scale. But of course, this legislation on minimum wages did nothing to help upper-level employees.

b. Germany

In Germany, the marriage between the labor movement and the development of employment discrimination law was similarly close. To properly understand the relevant developments, one has to go back to the drafting of the German Constitution. That task was entrusted to the so-

162. *See generally* Danièle Alexandre, *The Status of Women in France*, 20 AM. J. COMP. L. 647, 655 (1972) ("[As of 1972,] neither with respect to access to certain professions nor remuneration has the principle of equality been fully implemented.").

163. Loi 50-205 du 11 février 1950 [Law No. 50-205 of Feb. 11, 1950], JOURNAL OFFICIEL DE LA RÉPUBLIQUE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 12, 1950, at 1688 (Fr.).

164. *Id.* at 1689.

165. *Cf.* Arthur M. Ross, *Western Europe: Italy and France*, 16 INDUS. & LAB. REL. REV. 63, 82 (1962) ("[U]ntil recently, France was not successful in re-establishing collective bargaining of any kind on a widespread basis."). On the relative weakness of the French labor unions, see also Arnold R. Weber, *The Structure of Collective Bargaining and Bargaining Power: Foreign Experiences*, 6 J.L. & ECON. 79, 80 (1963), for a comparison of ten countries, noting that "[o]nly in France and Japan are unions relatively less prominent than in the United States."

166. *See, e.g.*, STEINMANN & GOLDSCHMIDT, *supra* note 150, at 67 (explaining that in light of the weakness of the labor unions and employer associations in 1957, it was not surprising that the governmentally-fixed minimum wage played the central role).

167. Loi 50-205 11 février 1950 [Law No. 50-205 of Feb. 11, 1950], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 12, 1950, art. 31x, at 1690 (Fr.).

168. Décret du 8 Sept. 1951 portant fixation du salaire national minimum interprofessionnel garanti [Decree of Sept. 8, 1951 on the Setting of the National Universal Minimum Wage], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 20, 1951, at 9476 (Fr.) (setting the minimum hourly wage for both men and women at 86.5 Francs and—for those working in the region of Paris—at 100 Francs).

called Parliamentarian Council (*Parlamentarischer Rat*), whose work lasted from 1948 to 1949.[169]

Gender equality in employment proved to be a contentious issue from the start. When it was first discussed in the Committee for Fundamental Questions (*Ausschuss für Grundsatzfragen*), the social-democratic members of the committee and the sole communist representative wanted the Constitution to explicitly enshrine the principle of equal pay for equal work.[170] By contrast, the committee chair from the conservative Christian Democratic Union, Hermann von Mangoldt, argued that the question of equal employment opportunities ought to be governed by statutory law, not the Constitution.[171]

The question was deferred after the committee failed to a reach a consensus.[172] Later, the committee agreed on a draft of the bill of rights. In its article on equal treatment, the draft bill of rights included gender as a criterion upon which discrimination was not allowed.[173] The committee then discussed whether the provision should be further amended to include an explicit right to equal pay. This provision was supported not only by the representatives of the social-democratic party and the communist party,[174] but also by the sole female representative of the Christian Democratic Union, Helene Weber, who expressed her interest in seeing a right to equal pay anchored in the Constitution.[175]

In light of opposition from within his own party, von Mangoldt modified his earlier view on equal pay. He now argued that an explicit equal pay provision was unnecessary because such a guarantee was already implicit in the prohibition of discrimination on the basis of gender.[176] The problem with von Mangoldt's argument was that a separate provision of the draft explicitly provided that the "basic rights"—which included the prohibition against discrimination on the basis of gender—were binding on the legislature, the administration, and the courts.[177] Private parties such as employers were not mentioned among those bound by the basic rights.[178]

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169. *See, e.g.*, Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341, 1387 (2004) (noting that the Parliamentarian Council was entrusted with drafting the German Constitution).

170. EBERHART PIKART & WOLFRAM WERNER, DER PARLAMENTARISCHE RAT 1948-1949: AKTEN UND PROTOKOLLE [FILES AND PROTOCOLS], VOLUME 5/1: AUSSCHUSS FÜR GRUNDSATZFRAGEN [COMMITTEE FOR POLICY ISSUES], X–XXI, at 142 (1993) (Ger.).

171. *Id.*

172. *Id.*

173. Art. 1-21 in der vom Grundsatzausschuß in zweiter Lesung angenommenen Fassung, at 784-88, art. 4(3), *reprinted in* PIKART & WERNER, *supra* note 170, at 142 ("Niemand darf seines Geschlechts . . . wegen benachteiligt oder bevorzugt werden [No one shall be disfavored or favored because of his gender.]").

174. Sechsundzwanzigste Sitzung des Ausschusses für Grundsatzfragen Nov. 30, 1948, *reprinted in* PIKART & WERNER, *supra* note 170, at 712, 752.

175. PIKART & WERNER, *supra* note 170, at 712, 752.

176. *Id.*

177. *Id.* at 784.

178. *Id.* at 752.

One of the other committee members promptly pointed out this limitation of the basic rights.[179]

However, von Mangoldt was not about to give in so easily. He simply refined his reasoning by stating that while individual employment contracts were not covered by the existing provision on equal treatment, collective bargaining agreements that were extended by the administration to non-unionized employees could no longer provide for unequal wages because the extension was necessarily governmental in nature.[180]

Von Mangoldt's argument carried the day. Once satisfied that administratively-sanctioned collective bargaining agreements were covered by the prohibition against discrimination on the basis of gender, the other committee members no longer called for an explicit equal pay provision.[181] The German Constitution thus did not, and still does not, contain any explicit guarantee of equal pay.[182]

Moreover, the German judiciary would later adopt an approach that more or less corresponded to the compromise made by the Committee for Fundamental Questions. In the leading 1955 case, the federal labor court (*Bundesarbeitsgericht*)—the highest court for labor and employment matters—held that collective bargaining agreements were bound to respect the principle of equal pay for equal work.[183] At the same time, it explicitly exempted individual employment contracts from its holding.[184]

The fact that the German federal labor court limited the scope of the equal pay guarantee to collective bargaining agreements meant that the equal-pay principle protected working-class women much more effectively than women aspiring to upper-level jobs. Working-class employees in Germany are typically paid the wages specified in collective bargaining agreements.[185] By contrast, the salaries of upper-level employees are typically negotiated individually, and accordingly, the rule that collective bargaining agreements cannot discriminate based on gender does not protect upper-level employees.[186]

Thus, the original German approach to gender equality in employment very much fit the social-democratic pattern of antidiscrimination legislation. Not only was the political left the staunchest advocate for the equal-pay principle, but the equal pay principle's limited application to collective bargaining agreements meant that, in practice, it only protected working-class employees.

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179. *Id.*

180. *Id.* at 753.

181. *Id.* at 752–53.

182. *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDEGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl I, art. 3 (Ger.) (containing various prohibitions against discrimination but no explicit guarantee of equal wages for men and women).

183. Bundesarbeitsgericht [BAG] [Federal Labor Court] Jan. 15, 1955, 8 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 685 (686) (Ger.).

184. *Id.*

185. *See supra* Part III.B.A.

186. *Id.*

2. *The Founding of the European Economic Community*

1957 saw the creation of the European Economic Community, which would later become the European Union. Among the provisions of the founding treaty, the so-called Treaty of Rome, was Article 119, which guaranteed equal pay for men and women.[187]

Article 119 went on to become the heart of European gender discrimination law. But unlike Title VII, it did not break with the social-democratic ideology underlying previous gender discrimination law. To the contrary, Article 119 represented an attempt to preserve the status quo, not to change it. Its inclusion into the Treaty of Rome was due to the pressure of the French government, whereas the other parties to the treaty were either opposed or without strong preferences.[188] French employers, concerned about suffering a competitive disadvantage, had pushed for a community-wide equal-wage guarantee.[189]

The design of Article 119 reflected its historical purpose: Article 119 was embedded in the Treaty's chapter on "social provisions," introduced with the statement in the preamble that the member states "agree upon the need to promote improved working conditions and an improved standard of living for workers."[190] The immediately preceding article called on the European Commission to try to "develop the dialogue between management and labor."[191] In sum, Article 119 was the very paradigm of a social-democratic approach to gender discrimination law.

IV. The Lasting Allure of the Social-Democratic Model

Of course, Article 119 of the Treaty of Rome was not the end of European gender discrimination law. Based on the provision, the Court of Justice developed a comprehensive case law on discrimination, and various directives and regulations were adopted to implement the principle of gender equality.[192] However, the legal system that emerged remains beholden to the social-democratic model, as I will demonstrate below.

A. Substantive Law

As explained in Part I, the substantive prohibitions against gender discrimination are much more comprehensive in the United States than in Europe.

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187. Treaty Establishing the European Economic Community art. 119, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome] ("Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.").

188. CATHERINE HOSKYNS, INTEGRATING GENDER: WOMEN, LAW, AND POLITICS IN THE EUROPEAN UNION 55 (1996) (explaining the French demand for equal pay and noting that "Dutch officials tried hard to narrow the scope of what was agreed" while "[o]ther delegations appeared at different times confused, complaisant or indifferent . . . .").

189. *Id.*

190. Treaty of Rome, *supra* note 187, art. 117(1).

191. *Id.* art. 118b.

192. *See* HOSKYNS, *supra* note 188, at 78–93.

1. Part-time Workers and Employees at Small Firms

Two of the most striking differences between the gender discrimination laws in the United States and Europe concern part-time workers and employees of small enterprises. In the United States, Title VII does not apply to employers with less than 15 employees, whereas the EU prohibitions against discrimination contain no such exemption.[193] And whereas U.S. courts have held that part-time workers are not comparable to full-time employees, European law now explicitly prohibits discrimination based on an employee's part-time status.[194]

The differences in the treatment of part-time workers and small-firm employees make sense, however, in light of the ideological divide. Given the relatively class-neutral approach that Title VII takes to gender discrimination, there is no reason for U.S. lawmakers and courts to go out of their way to protect part-time and small-firm employees. At most, one might question why U.S. law treats small-firm employees worse than other employees by exempting them from the protection of Title VII. But even this distinction is completely in line with a general tendency in U.S. law to exempt small firms from regulation.[195]

For the European Union, by contrast, the situation presents itself in an altogether different light. Given the social-democratic ideals of European gender discrimination law, it is expected that EU law is particularly concerned about workers who find themselves at the bottom of the corporate hierarchy. And both part-time workers and small-time employees are more likely than other employees to fit that description.

Consider, first, the situation of part-time employees. Such employees are disproportionately likely to be low-wage workers. For example, in France in 2011, 25.2% of part-time workers were paid the legal minimum wage (SMIC),[196] more than twice the overall percentage (full-time and part-time).[197] In Germany, which has no general minimum wage, 61% of part-time workers engage in low-wage work versus only 14% of full-time workers.[198]

The same pattern obtains in the United States, where in 2009, 11% of part-time workers were paid at or below the minimum wage, compared

193. Civil Rights Act tit. VII, 42 U.S.C. § 2000e (b) (2000).

194. *See* Directive 97/81/EC, *supra* note 43, annex cl. 4(1).

195. *Cf.* Ronald F. Wilson, *Federal Tax Policy: The Political Influence of American Small Business*, 37 S. TEX. L. REV. 15, 17 (1996) (stressing that the Internal Revenue Code is replete with exemptions in favor of small businesses).

196. *Proportion de salariés rémunérés sur la base du SMIC en 2011* [*Proportion of Employees Paid on the Basis of Minimum Wage in 2011*], INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES, http://www.insee.fr/fr/themes/?tableau.asp?ref_id=NATTEF04112&reg_id=0.

197. *Id.* (indicating that 10.6% of all employees were paid the minimum wage in 2011).

198. These percentages are derived from data presented by Thorsten Kalina & Claudia Weinkopf, *Weitere Zunahme der Niedriglohnbeschäftigung: 2006 bereits rund 6,5 Millionen Beschäftigte betroffen*, 2 IAQ-REPORT 6 (2008). Low-wage work is defined as work that pays two thirds of the median wage or less. *Id.* at 2.

with only 2.2% of full-time workers.[199]

In other words, part-time workers in the United States and Europe are similarly situated inasmuch as they are disproportionately likely to do low-wage work. What differs is the legal treatment of part-time workers. They simply receive better protection against discrimination in Europe than in the United States. Differing ideologies provide a plausible explanation for this divide: A class-neutral system of gender discrimination law may be willing to ignore the plight of part-time workers, but a social-democratic system cannot.

A similar picture emerges with respect to small-firm employees. There can be no doubt that a Title VII-style exemption for small firms has a disproportionate impact on low-income workers. The reason is simple: Small firms are much more likely to employ low-wage workers.[200] Of course, this is a generalization, as many small-firm employees are extremely well paid. Associate lawyers at boutique law firms or doctors come to mind. But overall, employees at small firms are much more likely to be low-wage workers than their counterparts at larger firms.[201] In light of the different ideologies of European and American gender discrimination laws, this has obvious consequences. Given its social-democratic orientation, European law can hardly be expected to grant small-firm employees less protection than employees at larger firms.

2. *Wage Discrimination and Disparate Impact*

Another conspicuous difference between EU law and U.S. law concerns the role of disparate impact analysis in wage discrimination. U.S. courts have declined to apply disparate impact analysis in the context of the Equal Pay Act.[202] By contrast, in EU law, it is well-established that employers may not engage in indirect discrimination with respect to wages.[203]

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199. Characteristics of Minimum Wage Workers: 2009, BUREAU OF LABOR STATISTICS, tabl.9 (Mar. 1, 2010), http://www.bls.gov/cps/minwage2009tbls.htm.

200. *See, e.g.*, FREDRIK ANDERSSON, HARRY HOLZER, & JULIA LANE, THE INTERACTIONS OF WORKERS AND FIRMS IN THE LOW-WAGE LABOR MARKET 18 (2002), *available at* http://www.urban.org/UploadedPDF/410608_lowwage.pdf (noting that "low earners are more heavily concentrated in small establishments than in larger ones"); Lisa M. Lynch, *Development Intermediaries and the Training of Low-Wage Workers*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 293, 295 (Richard B. Freeman et al. eds., 2005) (noting that "low earners are more heavily concentrated in small establishments than in larger ones").

201. MARK BERGER ET AL., DISTRIBUTION OF LOW-WAGE WORKERS BY FIRM SIZE IN THE UNITED STATES 8 (1999), *available at* http://www.sba.gov/advo/research/?rs196tot.pdf; *see also* KIRSTA GLENN, MINIMUM WAGE WORKERS IN WASHINGTON STATE 12 (2003), *available at* http://www.workforceexplorer.com/admin/uploadedPublications/?988_MinimumWageArticle.pdf ("[O]nly 2.3 percent of workers in large firms earn minimum wage. This compares to six percent for small firms . . . .").

202. *See, e.g.*, AFSCME v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985); de Lange, *supra* note 45, at 349 n.285.

203. *See* Directive 2006/54/EC, *supra* note 22 art. 4 (explicitly prohibiting indirect discrimination with respect to remuneration).

Once again, the stricter European position is fully consistent with the social-democratic vision of gender discrimination law. The Court of Justice first adopted the concept of disparate impact discrimination—or "indirect discrimination"—in its famous *Bilka* decision.[204] The facts of that case are illuminating: Bilka was a German limited liability company that was part of a group of companies running department stores.[205] As part of its employment contracts, Bilka offered its employees a pension scheme. However, part-time employees were excluded from that scheme unless they had also worked full-time for at least 15 years.[206] The case eventually reached the *Bundesarbeitsgericht*, the highest German court in matters of labor and employment law. Under the so-called preliminary rulings procedure, the Bundesarbeitsgericht referred various questions to the European Court of Justice.[207] In particular, the Bundesarbeitsgericht wanted to know whether a policy "excluding part-time employees from an occupational pension scheme constitutes discrimination . . . where that exclusion affects a far greater number of women than men."[208] In other words, the question of indirect discrimination did not arise in a vacuum. It was closely tied to another question—namely that of how to protect part-time workers most of whom were female. And as explained in the previous section, the protection of part-time workers is a primary concern for the social-democratic model of gender discrimination law.

To be sure, it is not difficult to also come up with other reasons why disparate impact analysis should apply to wage discrimination. In particular, one could argue that it is somewhat contradictory for a legal system to apply disparate impact analysis to the hiring, promotion, and termination context but not to wages. Nonetheless, it is noteworthy that the way in which EU law diverges from U.S. law on this issue once again corresponds quite neatly to the peculiar ideological underpinning of EU gender discrimination law.

B. Remedies, Procedure, and Rules Governing the Burden of Proof

Perhaps the most important difference between gender discrimination laws in the United States and Europe concerns remedies, procedural rules, and the burden of proof. As explained in Part Two, the European law on remedies and procedures threatens to undermine the effectiveness of the substantive prohibitions against discrimination. It is very difficult for European plaintiffs to prove gender discrimination because the threshold for establishing a prima facie case of discrimination is high,[209] and plaintiffs cannot even avail themselves of pretrial discovery to obtain the necessary information.[210] Moreover, the deterrence value of gender discrimination

204. Case 170/84, Bilka-Kaufhaus GmbH v. Weber von Hartz, 1986 E.C.R. 1620.
205. *See id.* para. 3.
206. *Id.* para. 4.
207. *Id.* para. 8.
208. *Id.* para. 24.
209. *See supra* Part I.B.4.
210. *See supra* Part I.B.1.

suits is limited since employers do not have to fear class action lawsuits or punitive damages.[211]

However, the social-democratic model of gender discrimination law can plausibly explain these apparent weaknesses. The key is to realize that gender discrimination litigation is not the only way to protect workers against discrimination. To some extent, general rules of labor and employment law can serve the same function. Rules requiring that employees can only be dismissed for cause illustrate this point. Inter alia, such rules require employers to articulate a reason for any dismissal and thereby offer some protection against discriminatory dismissals.[212]

In line with their more social-democratic ideals, many continental European countries boast labor and employment laws that are far more generous to workers than the corresponding laws in the United States.[213] As I will explain below, some of these rules effectively compensate for the lack of meaningful enforcement mechanisms in gender discrimination law.[214]

Crucially, though, the European reliance on the general rules of labor and employment law as a bulwark against gender discrimination has a serious drawback: The relevant rules in labor and employment law are geared towards the needs of ordinary workers and are much less effective at protecting employees with managerial aspirations.

Therefore, any legal system seeking to grant effective protection against discrimination across legal boundaries would strive to complement the general rules of labor and employment law with additional protections for upper-level workers. The easiest way to do that would be to create strong remedies and powerful procedural rules to enforce the general prohibitions against discrimination.

However, countries adhering to a social-democratic model of gender discrimination law will be less inclined to take such steps. After all, if the main purpose of the rules against gender discrimination is to protect working-class employees against such discrimination, and, if the general rules of labor and employment law already provide effective protection for working-class employees, why engage in additional political battles—and increase the regulatory burden on employers—to create additional protections?

In sum, social-democratic ideals matter on two levels. First, continental European countries are more likely to boast rules in labor and employ-

211. *See supra* Part I.B.2–3.

212. *See infra* Part IV.B.2.b.

213. *See infra* Part IV.B.1–3.

214. Ironically, the reverse is also true. Accordingly, antidiscrimination laws in the United States may be particularly strong in part because they had to substitute for the lack of more general social legislation. As Theda Skopcol has persuasively shown, early gender-specific legislation protecting women at the workplace enjoyed the support not only of women's groups, but also of male-dominated unions in part because it was seen as a step towards achieving protections for workers more generally. *See, e.g.*, THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 379 (1995) (arguing that "[h]ours limits for women are better understood as part of a broader aspiration by, and for, virtually all American workers").

ment law that are highly favorable to workers. Some of these rules—like the rule that workers can only be dismissed for cause—are difficult to imagine in a country like the United States that is less open to a social-democratic vision of society.

Second, and just as importantly, social-democratic countries are less likely to be concerned with the fact that the general rules of gender discrimination law are ineffective at protecting upper-level workers against discrimination. Accordingly, such countries cannot necessarily be expected to complement the general rules of labor and employment law with more specialized protections.

Among the general rules and institutions of labor and employment law, three are particularly important to the battle against discrimination: collective bargaining agreements, for-cause-termination rules, and so-called works councils. In the following section, I will explain why these institutions offer protection against discrimination and why they are better at protecting working-class employees than employees in upper-level jobs.

1. Collective Bargaining Agreements

Collective bargaining agreements play a crucial role in protecting French and German employees against their employers. Cross-country data proves illuminating. A 1997 study by the OECD reports the percentage of employees covered by collective bargaining agreements to be only 18% in the United States, but 92% in Germany and 95% in France.[215] A more recent study by the European Commission arrives at somewhat lower figures for Germany, but nonetheless confirms the overriding importance that collective bargaining agreements have for European workers. The percentage of employees covered in 2001 was found to be around 95% in France and between 60% and 65% in Germany.[216] Data from a variety of other sources paints a similar picture.[217] Moreover, the numbers for France and Germany are representative of the situation in many other European countries.[218]

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215. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, EMPLOYMENT OUTLOOK 71, tbl.3.3 (1997) [hereinafter OECD STUDY].

216. DIRECTORATE GENERAL FOR EMPLOYMENT AND SOCIAL AFFAIRS, INDUSTRIAL RELATIONS IN EUROPE 30, chart 1.5 (2004).

217. The percentage of workers covered by collective bargaining agreements has been estimated at 13.8% in the United States in 2004, 95% in France in 2003, and 63% in Germany in 1997. Jelle Visser, *Union Membership Statistics in 24 Countries*, 129 MONTHLY LABOR REV. 38, 46 tbl.4 (2006). Another study reported survey data demonstrating that the percentage of workers covered by collective bargaining agreements differed widely across portions of Germany. Collective bargaining agreements covered 62.1% of workers in West Germany, but only 42.6% of East German workers were similarly covered. Claus Schabel, *Gewerkschaften und Arbeitgeberverbände: Organisationsgrade, Tarifbindung und Einflüsse auf Löhne und Beschäftigung* [*Unions and Employer Associations: Membership Density, Bargaining Coverage, and Impact on Wages and Employment*], 38 ZEITSCHRIFT FÜR ARBEITSMARKFORSCHUNG [ZAF] 181, 189 (2005) (Ger.).

218. Visser, *supra* note 217, at 46, tbl.4 (reporting coverage rates for the United Kingdom (35%), the Netherlands (82%), Sweden (92%), Norway (77%), Finland (95%), Spain (81%), and Austria (99%)).

Why are so many more workers covered by collective bargaining agreements in Europe than in the United States? In part, the higher coverage rates reflect the fact that European employees are much more likely than U.S. workers to be union members.[219] However, just as importantly, European legal systems often allow wider impact for collective bargaining agreements even for those employers and employees who are not members of the relevant employer associations or trade unions. For example, in France[220] and Germany[221], the law explicitly authorizes the administration to extend the scope of collective bargaining agreements beyond those individuals belonging to unions and employer associations. The importance of this feature can be most clearly observed in France, where, according to the OECD study, only 9% of workers are unionized, but 95% are covered by collective bargaining agreements.[222]

When coupled with statutory prohibitions against gender discrimination, collective bargaining agreements offer considerable protection against wage discrimination. To the extent that the wage paid for a certain type of work is fixed in a collective bargaining agreement irrespective of gender, female workers paid according to that agreement are guaranteed the same pay as male workers for the same work.[223]

However, collective bargaining agreements only specify the minimum

219. The 1997 OECD study indicates that while 16% of U.S. workers are reported to be union members, the relevant figures for France, Germany, and Italy are 9%, 29%, and 39%, respectively. OECD STUDY, *supra* note 215, at 71, tbl.3.3. More recent data indicates that union membership has decreased in all countries. For 2003, union membership was estimated to be 12.4% in the United States, 22.6% in Germany, 8.3% in France, and 33.7% in Italy. Visser, *supra* note 217, at 45, tbl. 3. At least in the United States, this downward trend appears to be continuing. Thus, in the year 2007, only 12.1% of U.S. workers were union members. James A. Walker, *Union Members in 2007: A Visual Essay*, 131 MONTHLY LABOR REV. 28, 29 (2008).

220. French law provides for two mechanisms by which the minister in charge of labor (*ministre chargé du travail*) can extend the coverage of collective bargaining agreements. The less far-reaching step, the so-called *extension*, declares collective bargaining agreements binding on all employers and employees falling within their general scope of application, even though they may not be members of the relevant unions or employer associations. *See* CODE DU TRAVAIL [C. TRAV.] art. L 2261-15 (Fr.) (describing preconditions for extension of collective bargaining agreements). The more far-reaching measure is the so-called *élargissement*, by which a collective bargaining agreement can be declared binding for employers in geographical areas or industries that the collective bargaining agreement does not purport to cover. *Id.* art. L 2261-17.

221. Tarifvertragsgesetz [TVG] [Collective Bargaining Agreement Act], Aug. 25, 1969, BGBl I at 1223, last amended by Gesetz [G], Oct. 31, 2006, BGBl I at 2407, § 5(1) (Ger.). This provision authorizes the Federal Department for Labor and Social Affairs, if certain conditions are met, to declare collective bargaining agreements universally binding. Once the collective bargaining agreement has been declared universally binding, it covers, within its scope of application, even those employers and employees who would not otherwise be bound. *Id.* § 5(3).

222. OECD STUDY, *supra* note 215, at 71, tbl.3.3.

223. The economic literature tends to confirm that collective bargaining agreements tend to protect women against discrimination. *See* Francine D. Blau & Lawrence M. Kahn, *Understanding International Differences in the Gender Pay Gap*, 21 J. LAB. ECON. 106, 139 (2003) (analyzing cross-country data and finding that "the extent of collective-bargaining coverage in each country is significantly negatively related to the gender gap" meaning that the gap between female workers' salaries and male workers' salaries tends

that the employer has to pay employees for certain types of work.[224] By contrast, they do not prevent the employer from paying wages that exceed those specified in the collective bargaining agreement.[225] Accordingly, the existence of a collective bargaining agreement does not prevent discrimination where female employees are paid the wages specified in the collective bargaining agreement while male workers receive even higher wages. Regarding working-class employees, this is not a problem, since, in practice, most working-class employees are only paid the wages specified in collective bargaining agreements.[226] But upper-level employees are a different matter. Unlike working-class employees, upper-level employees are often paid individually-negotiated salaries that exceed the lower bounds set by collective bargaining agreements.[227] And, as pointed out above, the wages specified in collective bargaining agreements cannot protect against discrimination where an employer discriminates by paying at least one party wages that exceed those specified in the bargaining agreement.

In addition, there is another reason why collective bargaining agreements are ineffective at protecting upper-level employees against discrimination: Such agreements may simply fail to set wages for the work done by managerial employees. Indeed, such is the rule in France[228] and Germany,[229] where jobs held by managerial employees typically do not fall within the scope of collective bargaining agreements.

Why do collective bargaining agreements often neglect to govern the wages of managerial employees? Complexity is one factor. The fact that managerial positions tend to be less standardized than rank-and-file jobs makes it difficult for collective bargaining agreements to specify attractive wage levels for managerial employees. But the structure of labor unions also presents a challenge for managerial employees. Given that unions tend to be dominated by rank-and-file employees whose numbers vastly exceed those of managerial employees, labor unions can hardly be

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to be smaller in countries where more employment relationships are governed by collective bargaining agreements).

224. *See, e.g.*, TVG, § 4(3); C. TRAV., art. L 135-2; Codice civile [C.C.] art. 2077 (It.).

225. *See* TVG, § 4(3); C. TRAV., art. L 135-2; C.C. art. 2077.

226. Julia Löhr & Henrike Roßbach, *Vorzeitige Tariferhöhungen. Bescherung am Jahresanfang*, FRANKFURTER ALLGEMEINE ZEITUNG (Feb. 11, 2011), http://fazjob.net/?ratgeber_und_service/beruf_und_chance/beruf_und_chance/?em_cnt=118710 (Ger.) (citing estimates according to which only five to twenty percent of employees are paid in excess of the wages specified in collective bargaining agreements).

227. *See id.* (noting that it is standard practice for managerial employees to be paid wages in excess of those specified in collective bargaining agreements).

228. *See* Herbert H. Joka, FÜHRUNGSKRÄFTE-HANDBUCH: PERSÖNLICHKEIT, KARRIERE, MANAGEMENT, RECHT 540 (2002) (Ger.) (noting that collective bargaining agreements often exclude managerial employees or at least subject them to different rules).

229. *See* Michael Eckert, *Eingruppierung sog. AT-Angestellter* [*Categorization of So-called Employees Outside Collective Bargaining Agreements*], 34 DEUTSCHES STEUERRECHT [DStR] 1215, 1215 (1996) (Ger.) (noting that managerial employees are practically always outside the scope of collective bargaining agreements since their responsibilities far exceed those defined for the most senior wage level specified in the collective bargaining agreement).

expected to make a particular effort to bargain to improve the wages of managerial employees.[230]

In sum, collective bargaining agreements are very good at protecting working-class employees against wage discrimination, but are much less suited to protecting upper-level workers.

2. *Cause Requirements*

Another important mechanism that protects European employees against discrimination lies in the rules governing the termination of employment relationships. In France[231] and Germany,[232] as in most other European countries,[233] the general rule is that employees cannot be dismissed without cause. In the following section, I will first explain why the cause requirement has the potential to offer protection against gender discrimination in the hiring and in the termination context. In a second step, I will demonstrate that this protection—in keeping with the social-democratic structure of the European fight against gender discrimination—is much more likely to protect average employees than upper-level employees.

a. Hiring

How does the cause requirement help to reduce discrimination against women? The classical argument by Cynthia Estlund is that such a requirement reduces discrimination in hiring by reducing the relative costs of hir-

230. *See* TIZIANO TREU, LABOUR LAW AND INDUSTRIAL RELATIONS IN ITALY 38 (2d. ed. 2007) ("In recent years dissatisfaction among cadres has been growing with respect to bargaining and wage policies adopted by major confederations, where they are underrepresented.").

231. C. TRAV., art. L 1231-1 (Fr.). Under French law, once the trial period (*période d'essai*) expires, an employment contract without fixed duration can be terminated only for listed permissible reasons. *Id.* art. L 1231-1. These reasons can be of a personal or economic nature, but in either case, just cause (*cause réelle et sérieuse*) is required. *Id.* arts. L 1232-1, L 1233-2.

232. *See* Kündigungsschutzgesetz [KSchG] [Protection Against Termination Act], Aug. 25, 1969, BGBL I at 1317, last amended by Gesetz [G], March 26, 2008, BGBL I at 444, § 1 (Ger.) (declaring invalid a termination that is socially unjustified and defining as socially unjustified any termination that is not warranted by the employee's behavior or person or compelling business reasons).

233. *See* Carol D. Rasnic, *Balancing Respective Rights in the Employment Contract: Contrasting the U.S. "Employment-at-Will" Rule with the Worker Statutory Protections Against Dismissal in European Community Countries*, 4 J. INT'L L. & PRAC. 441, 478-93 (1995) [hereinafter Rasnic, *Balancing Respective Rights*] (describing cause requirements in Austria, Denmark, Finland, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom). Italy, too, generally requires a justification for the termination of employees. *See* Legge 15 luglio 1966, n. 604 (It.); Gazzetta Ufficiale della Repubblica Italiana 6 Aug. 1966, n. 195, art. 1 (It.). One country that does not appear to require cause for the termination of employment contracts is Greece. Rasnic, *Balancing Respective Rights*, *supra*, at 483. For a comparative analysis of various European regimes on dismissal of employees, see Carol Daugherty Rasnic, *Die Kündigung, Licenciement, Recesso dal Contrato, Firing, or Sacking: Comparing European and American Laws on Management Prerogatives and Discretion in Termination Decisions*, 18 IND. INT'L & COMP. L. REV. 19 (2008).

ing women or minority employees:[234] Under a regime of at-will employment, employees can generally be fired at any time. However, to the extent that an at-will regime is combined with antidiscrimination legislation, some employees may become harder to fire than others. More specifically, employers may fear that minority employees and women will be harder to dismiss than white males.[235] That, in turn, may make employers reluctant to hire minority and female employees in the first place.[236] The for-cause rule promises to mitigate this problem: By providing that employees can only be fired for cause, the law ensures that men and non-minority candidates are also hard to fire, thereby establishing that it is no longer advantageous for the employer to discriminate in favor of white males.[237]

Admittedly, this traditional line of reasoning has met resistance. In a recent article on race discrimination in France, Julie Suk argues that the French tradition of for-cause employment may actually have increased—rather than decreased—the problem of race discrimination.[238] Part of her reasoning is germane to race discrimination and can therefore be disregarded here.[239] However, she also offers one argument that seems broadly applicable to different types of discrimination. Specifically, she argues that the cause-requirement makes employers more anxious to avoid bad hiring choices and therefore makes them more likely to rely (consciously or subconsciously) on race as a proxy for qualification.[240] In essence, the argument is that employers will be less willing to "experiment" by hiring applicants of the disfavored ethnicity if it then becomes harder to get rid of them.

Should Professor Suk's reasoning lead us to question the value of the cause requirement in combating gender discrimination? It should not. This is because even in Europe, the for-cause rules typically do not apply immediately. For example, under German law, the legal default provides for a trial period of six months in which the employee can be fired without cause.[241] In France, the legal default does not provide for a trial period, but employers are at liberty to write a trial period into the employment contract which, depending on the type of employee, can be between two

234. CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 156 (2003).

235. *Id.*

236. *Id.*

237. *Id.*

238. Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 75 (2007).

239. Specifically, Professor Suk argues that the cause requirement makes French employers less likely to create jobs, and that this reluctance comes at the expense of young people of North African descent, who, in her words, are "less qualified for employment than others." *Id.* at 97. Even assuming, for the sake of the argument, that certain minorities in France, are less well educated than the work force at large, this argument has no bearing in the context of gender discrimination since European women do not lag behind men in terms of education. For example, in Germany, women constitute roughly half of all first year college students at 47.9%. STATISTISCHES BUNDESAMT, BILDUNG UND KULTUR: WINTERSEMESTER 2008/2009, at 11 (2009) (Ger.).

240. Suk, *supra* note 238, at 99.

241. KSchG § 1(1) (Ger.).

and four months long.[242] As a result, employers have ample time to correct any actual or perceived "hiring mistakes" that they may have made. Of course, employers may be reluctant to fire new employees—and thereby correct their "hiring mistakes"—for other reasons—because they will have to incur the costs of finding a new employee or because terminations are bad for morale—but these reasons apply just as strongly in an employment-at-will regime.

In sum, it seems difficult to argue, even on a merely theoretical level, that the cause requirement makes employers more reluctant to hire women. Quite on the contrary, the more persuasive argument is the traditional one, namely that cause requirements reduce the likelihood of discrimination in hiring.

b. Dismissals

While the existing literature on discrimination focuses solely on the role of cause requirements in hiring, these requirements play, in fact, an even more important role in preventing discrimination in the context of dismissals. Indeed, as a practical matter, the for-cause rule helps to reduce the risk of discriminatory dismissals in two ways.

The first is quite trivial. As one would expect, the cause requirement makes it harder to terminate employees.[243] And if it becomes harder to terminate employees in general, then it also becomes harder to terminate an employee for discriminatory reasons. At first glance, this solution to the problem of discriminatory terminations may seem highly unsatisfactory. After all, reducing the frequency of terminations does not, per se, reduce the likelihood that the terminations that *do* occur discriminate on the basis of gender. Yet such a line of reasoning misses the point. The traditional—and understandable—concern of women's rights activists has been that women are always first in line for termination.[244] If, however, the employer's right to dismiss employees without cause tends to be exercised more frequently at the expense of women, then the elimination of that right is a logical step towards more gender equality.

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242. C. TRAV. art. L 1221-19 (Fr.) (specifying the upper limits for the probationary period, which are four months long for upper-level employees, three months long for midlevel employees, and two months long for lower-level employees).

243. *See, e.g.*, MICHAEL BLATZ ET AL., CORPORATE RESTRUCTURING: FINANCE IN TIMES OF CRISIS 98 (2006) (noting that the German rules against dismissal make it difficult to terminate staff).

244. When the German Constitution was drafted, for example, one of the social-democratic representatives justified his insistence on provisions securing equal rights for women in employment as follows: "I am insisting with respect to [rights for] women because the administration, whenever it finds itself in a so-called economic crisis, always puts women second. When layoffs occur, it is the women who are laid off." PIKART & WERNER, *supra* note 170 (translation by author). *Cf.* CLAIRE DUCHEN, WOMEN'S RIGHTS AND WOMEN'S LIVES IN FRANCE: 1944-1968, at 141 (1994) (noting, with respect to France in the early sixties, that "women were . . . first to be fired"); Nancy Gabin, "*They Have Placed a Penalty on Womanhood": The Protest Actions of Women Auto Workers in Detroit-Area UAW Locals, 1945-1947*, 8 FEMINIST STUD. 373, 375-98 (1982) (detailing discriminatory termination practices in the American auto industry during the post-war era and the struggle to put an end to this discrimination).

There is, moreover, a second way in which a for-cause rule protects women against discriminatory termination. As explained above, one of the central challenges in European antidiscrimination law stems from the fact that the high threshold for establishing a prima facie case makes discrimination exceedingly hard to prove.[245] In this context, too, the for-cause rule proves helpful because it substantially alleviates the information problem faced by the employee. She no longer has to prove that the employer discriminated against her. Rather, the employer has to prove that he had a legitimate reason to terminate the employee.[246] Thus, the for-cause rule under French and German law fulfills a function which, under U.S. law, is incumbent on the rules pertaining to the burden of proof: It forces the employer to articulate a reason for the termination—a reason which can then be subjected to judicial scrutiny.

c. Employees with Managerial Careers

The cause requirement is thus a crucial element of Europe's fight against gender discrimination in the workplace. But do cause requirements protect all employees alike, or do they favor working-class employees over upper-level employees? Unsurprisingly, the latter turns out to be the case.

When an employee actually reaches the top of the corporate hierarchy and becomes a board member, the law's preference for working-class employees over upper-level employees becomes most obvious. In this case, the cause requirements may not apply at all. Thus, the German rule against dismissal without cause explicitly exempts board members.[247] The same result is reached by French law, since, under French law, board members are not considered employees.[248]

Moreover, even to the extent that managerial employees are not board members, the protection afforded by the for-cause rule often proves quite limited. German law is a case in point. German courts are more likely to find cause for termination where employees in managerial positions are concerned.[249] Additionally, the employer can terminate managerial employees without cause as long as he makes a severance payment.[250]

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245. *See supra* Part I.B.3–4.

246. Michael Kittner & Thomas C. Kohler, *Conditioning Expectations: The Protection of the Employment Bond in German and American Law*, 21 COMP. LAB. L. & POL'Y J. 263, 314 (2000) (discussing German law).

247. KSchG § 14(1) (Ger.).

248. *E.g.*, JEAN BAETEN & CLAUDE DEVOET, LA NOUVELLE LOI SUR LES PENSIONS COMPLÉMENTAIRES 126 (2003).

249. *See* Bundesarbeitsgericht [BAG] [Federal Labor Court] Nov. 11, 1962, DER BETRIEB [DB] 1055, 1055 (Ger.) (stressing that a breach of duty that might not otherwise be sufficient to justify the immediate termination of the employee may constitute sufficient cause for dismissal if the employee occupies a position of particular trust and importance).

250. KSchG § 14(2) (Ger.). While the employer may also petition the labor court to dissolve an employment contract with a regular employee in the absence of cause, the labor court will only grant that request if the employer can demonstrate that he cannot reasonably be expected to let the employment continue. *Id.* § 9.

Similar rules can be found in other EU member states.[251]

3. The Works Council

In the case of Germany, there is yet another mechanism that helps to prevent wage discrimination with respect to the ordinary worker—the so-called works council. Under German law, every firm with at least five regular employees has to allow its workers to elect, from their midst, a number of special representatives who form the works council.[252]

The works council enjoys manifold rights in employment matters vis-à-vis the employer.[253] For example, the employer generally needs the consent of the works council to determine when shifts begin and end and to change the methods of calculating wages.[254]

Crucially, one of the responsibilities of the works council is to protect employees against gender discrimination.[255] As a general matter, the works council is quite well-positioned to perform that task. To begin, the council is likely to be somewhat responsive to the concerns of female employees.[256] This is because the law takes special care to ensure that the composition of the works council is well-balanced in terms of gender: in those firms where female employees constitute a minority, their representation on the works council has to be at least proportional to the percentage of women among the firm's employees.[257] For example, if twenty percent of the firm's employees are women, then at least twenty percent of the seats on the works council must also be held by women. The same rule protects male employees in firms where men constitute a minority of the work force.[258]

Moreover, if the works council can demonstrate that the employer discriminates on the basis of gender, it has the ability to force the employer to change his ways. Apart from its general clout, the works council also has

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251. For example, the Italian rules protecting employees against dismissals are not fully applicable to managerial employees. Unlike regular employees, managerial employees "are never entitled to reinstatement, unless they are dismissed for discriminatory reasons." ABA, 1 LABOR AND EMPLOYMENT LAWS § 5.22 (William L. Keller & Timothy J. Darby eds., 2d ed. 2003). Moreover, "when assessing the ground on which a *dirigente's* dismissal is based, Italian labor courts apply criteria which are more flexible than the strict statutory principles used in connection with the dismissal of lower employees . . . ." *Id.*

252. Betriebsverfassungsgesetz [BetrVG] [Works Council Act], Sept. 25, 2001, BGBl I at 2518, last amended by Gesetz [G], Dec. 8, 2008, BGBl I at 1666, § 1(1) (Ger.).

253. *Id.* § 87 (listing the various matters in which the employer needs the consent of the works council to make a decision).

254. *Id.* § 87(1).

255. *Id.* § 75(1).

256. This has not always been the case. Before the law ensured proportionate representation, works councils were often criticized as being uninterested in promoting the interests of female workers. *See, e.g.*, MICHAELA KUHNHENNE, FRAUENLEITBILDER UND BILDUNG IN DER WESTDEUTSCHEN NACHKRIEGSZEIT: ANALYSE AM BEISPIEL DER REGION BREMEN 253 (2005) (Ger.) (discussing the unresponsiveness of works councils to the concerns of women in the postwar era).

257. BetrVG § 15(2) (Ger.).

258. *Id.*

standing to request the labor court to enjoin the employer from a discriminatory practice.[259]

Enforcement through the works council circumvents the major obstacles to individual enforcement of European gender discrimination law. As noted above, the problem with the general prohibitions on gender discrimination is essentially two-fold: First, the employer has little incentive to abstain from discrimination because few employees are willing to sue and there is no threat of punitive damages or class actions.[260] Second, the relatively high threshold for establishing a prima facie case of discrimination, coupled with the unavailability of pretrial discovery, makes it hard for the employee to prove her case.[261] However, the existence of the works council mitigates both of these problems.

The concerns that deter a worker from antagonizing the employer do not normally apply to the works council. Works council members enjoy various legal protections above and beyond those afforded to regular employees.[262] In particular, a member of the works council cannot be fired even with cause unless the cause amounts to an "important reason."[263] Accordingly, the members of the works council have less to lose from confronting the employer. Moreover, it must be kept in mind that because of their numerous participation rights,[264] the works council members can hardly avoid confrontations with the employer in any case. This, too, means that the members of the works council have less to lose than ordinary employees from standing up to the employer on the issue of women's rights. Finally, and perhaps most importantly, membership in the works council involves a measure of self-selection: Employees who are concerned about antagonizing their employer are unlikely to run for works council membership in the first place. In sum, then, the general concern that discrimination victims are unlikely to enforce their rights for fear of retaliation is far less pronounced with respect to the works council.

The other crucial weakness of European antidiscrimination law—the difficulty of establishing a prima facie case of discrimination without discovery—is also alleviated by the works council approach. The works council enjoys extensive access to the company's proprietary information, including payrolls.[265] This is particularly helpful in a wage discrimination

259. *See id.* § 23(3) (authorizing the works council to ask the labor court for an injunction when the employer commits material violations of duties under the Works Council Act).

260. *See supra* Part I.B.1–2.

261. *See supra* Part I.B.3–4.

262. German law makes it a criminal offense for the employer to retaliate against members of the works council. BetrVG § 119(1) (Ger.). Moreover, if a member of the works council is a trainee rather than a regular employee and, therefore, is not protected by the general prohibition against terminations without cause, the trainee—as a result of membership in the works council—has the right to be hired as a regular employee at the end of her training period. BetrVG § 78(a) (Ger.).

263. KSchG § 15(1) (Ger.).

264. *See* BetrVG § 87 (Ger.) (listing various matters in which the employer needs the works council's consent to make a decision).

265. *Id.* § 80(1).

case, where the disparate impact doctrine applies in the European Union.[266] Given that the works council does have access to the relevant information, it is extremely well-positioned to raise disparate impact claims.

To be sure, the German works council system described above is not entirely representative of European labor law on a more general level. To the extent that works councils exist in other European countries, they are often less powerful than in Germany.[267] In France, for example, the works council is largely limited to an advisory function.[268] However, this does not mean that the works council system plays no role in other parts of Europe. Quite on the contrary, most other European countries have adopted works councils in *some* form.[269] Indeed, for large firms with a substantial presence in at least two member states, EU law mandates the creation of a works council or equivalent institution.[270]

The protection afforded by the German works council fits seamlessly into the social-democratic approach to gender discrimination: It offers much more protection to working-class women than to women with managerial aspirations. The reason is quite simple. The German Works Council Act explicitly provides that managerial employees are not considered employees within the meaning of the Act.[271] Accordingly, managerial employees cannot participate in the election of the members of the works council, nor can they be elected to the positions themselves.[272] The works

266. *See, e.g.*, AFSCME v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985); de Lange, *supra* note 45, at 349 n.285.

267. For example, "in Britain works councils are usually regarded as instruments of 'joint consultation' . . . in sharp contrast to the German view of councils as organs of codetermination." Wolfgang Streeck & Sigurt Vitols, *The European Community: Between Mandatory Consultation and Voluntary Information*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 243, 276 (Joel Rogers & Wolfgang Streeck eds., 1995) [hereinafter WORKS COUNCILS]. In Sweden, the "absence . . . of sanctions in the event of conflict limits the significance of codetermination procedures." Göran Brulin, *Sweden: Joint Councils Under Strong Unionism*, *in* WORKS COUNCILS, *supra*, at 189. Other Member States are more similar to Germany in that they have relatively powerful works councils. This is true, for example, of Spain. *See, e.g.*, Modesto Escobar, *Spain: Works Councils or Unions*, *in* WORKS COUNCILS, *supra*, at 153, 164–65 (listing the various rights and powers enjoyed by works councils under Spanish law). The Netherlands also fall into this category. *See, e.g.*, Jelle Visser, *The Netherlands: From Paternalism to Representation*, *in* WORKS COUNCILS, *supra*, at 80, 80–81 (describing the rights and powers of works councils under Dutch law).

268. Jacques Rojot, *France*, *in* WORKPLACE JUSTICE: EMPLOYMENT OBLIGATIONS IN INTERNATIONAL PERSPECTIVE 136, 139 (Hoyt N. Wheeler & Jacques Rojot eds., 1992).

269. *E.g.*, Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV 351, 447 (2002); Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607, 636 (2004).

270. Council Directive 94/45 On the Establishment of a European Works Council, art. 4(1), 1994 O.J. (L 254) 64.

271. BetrVG § 5(1) (Ger.).

272. This follows from a combination of various provisions of the Works Council Act. The Act provides that managerial employees are not employees within the meaning of the statute. *Id.* Only employees can vote in the elections of works council members. *Id.* § 7. Moreover, only those who can vote can be elected to the works council. *Id.* § 8(1).

council therefore has little reason to be responsive to the concerns of managerial employees.[273]

In sum, the social-democratic model of gender discrimination law can explain with relative ease why neither the European Union nor member states such as France and Germany have imposed remedies and procedural rules akin to those that protect discrimination victims in the United States: Member states such as France and Germany can always rely on the general rules and institutions of labor and employment law to protect working-class employees. And while these rules and institutions fail to adequately protect upper-level employees, the latter are not the primary target of European gender discrimination law in the first place.

V. The Trend Towards Quotas

One of the most significant new developments in European gender discrimination law is the trend to diversify corporate boards though quotas.[274] Does this development signal that Europe may be willing to embrace a more class-neutral, less working-class-oriented vision of gender discrimination law? In other words, are we witnessing an ideological shift in European gender discrimination law?

The answer is no. The legislation at issue is symbolic in nature and unlikely to produce more gender diversity in management. European gender discrimination law is tailored to the needs of working-class women and is not fashioned to protect women with managerial aspirations. Gender quotas for corporate boards do not change this fact. Rather, they simply make the symptoms less apparent.

The real choice that Europe is facing is much more profound. Europe can retain its social-democratic structure of gender discrimination law, or it can move towards a more class-neutral approach. And unless the regulatory burden imposed on European employers is substantially increased by enacting stricter laws on gender discrimination, either choice will leave some victims of discrimination less well protected. Quotas do not resolve this choice, they only obscure it.

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273. However, managerial employees are not left entirely without representation. Instead of being represented by the Works Council, they are represented by the so-called Speaker Committee (Sprecherauschuss). Sprecherausschußgesetz [SprAuG] [Speaker Comittee Act], Dec. 20, 1988, BGBL I, at S. 2312, amended by Gesetz [G], Oct. 31, 2006, BGBL I, at S. 2407, § 1(1) (Ger.) (providing that managerial employees in firms with at least ten employees can elect speaker committees). However, unlike the Works Council, the Speaker Committee has very little influence: Essentially, the Speaker Committee has the right to be informed ahead of time of certain decisions such as the dismissal of managerial employees. *See id.* §§ 30–32 (listing the rights of the speaker committee).

274. *E.g.*, Norwegian Public Limited Liabilities Companies Act, June 13, 1997, § 6-11a (Schjødt trans.) *available at* http://www.oslobors.no/ob_eng/Oslo-Boers/?Regulations/Acts [hereinafter PLCA]; Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKLEY BUS. L.J. 55, 57 (2009).

A. Women on Corporate Boards

Obviously, many factors influence how strongly women are represented on corporate boards. Legal protections against discrimination are a likely issue, but so are many other dynamics—including a society's attitudes towards women in leadership positions and biases against working women more generally.

Nonetheless, it is striking that the large countries of Western Europe all trail the United States when it comes to gender diversity in management. To be sure, even U.S. boards are far removed from gender parity. Among Fortune 500 companies, women account for only about 16% of directors[275] and for only 14% of corporate officers.[276] Against this background, it may seem hard to believe that the United States is doing significantly better than most of Western Europe. Yet, this is exactly what the data on women directors in Western European countries suggests.[277] One recent study focusing on the 300 largest European companies[278] finds that only 7.8% of the directors on the boards of German corporations are women.[279] For the other large countries of continental Europe, the numbers are even lower, with France reaching an average of 7.6%, Spain an average of 4.1%, and Italy a dismal 2.1%.[280] Indeed, of the largest Western European countries, only the United Kingdom reached double digits, with a still modest 11.5%.[281] Another recent study focusing on women directors in the Global Fortune 200 paints a similar picture.[282]

B. The Trend towards Quotas

In response to these numbers, Europe has recently moved towards legally mandated gender quotas for corporate boards. The first European

275. RACHEL SOARES ET AL., 2010 CATALYST CENSUS: FORTUNE 500 WOMEN BOARD DIRECTORS 1 (2010), *available at* http://www.catalyst.org/file/413/2010_us_census_?women_board_directors_final.pdf.

276. RACHEL SOARES ET AL., 2010 CENSUS: WOMEN EXECUTIVE OFFICERS AND TOP EARNERS (2010), *available at* http://www.catalyst.org/file/412/2010_us_census_women_?executive_officers_and_top_earners_final.pdf.

277. *See* CORPORATE WOMEN DIRECTORS INTERNATIONAL, CWDI 2010 REPORT: WOMEN BOARD DIRECTORS OF *Fortune* Global 200 Companies (2010) [hereinafter CWDI REPORT], *available at* http://www.usjapancouncil.org/images/uploads/Women_?in_the_Workplace_and_Leadership_IRENE_NATIVIDAD.pdf. According to this report, only 12.2% of all directorships in Fortune Global 200 firms in 2009 are held by women. However, the percentages of female corporate directors differ substantially across countries, to wit 19.5% in the United States, 10.6% in the United Kingdom, 11.9% in Germany, 11.2% in France, and 3.6% in Italy. *Id.* at 8. *See also* EUROPEAN PROFESSIONAL WOMEN'S NETWORK, THIRD BI-ANNUAL EUROPEAN PWN BOARD WOMEN MONITOR 2008, at 1, 7 (2008). This study focuses on the 300 largest European firms. It finds that the percentage of female board members is 11.5% for U.K. firms, but only 7.8% for German firms, 7.6% for French firms, 4.1% for Spanish firms, and 2.1% for Italian firms.

278. CWDI REPORT, *supra* note 277, at 7.

279. *Id.* at 4.

280. *Id.*

281. *Id.*

282. *Id.*

country to adopt such a quota was Norway in 2003.[283] The relevant Norwegian law applies to publicly traded corporations and certain state-owned companies. Newly formed companies have had to comply with the law since 2006; existing companies were given until 2008 to comply.[284] The exact requirements depend on the size of a corporation's board. For example, if the board only has three members, then it is sufficient that at least one board member is female and at least one is male.[285] The quota rises, however, as boards get larger. On a board with ten or more directors, each gender has to be represented by at least 40% of the board members.[286]

Originally, the Norwegian experiment did not appear to be an obvious role model for the rest of Europe. Norway is not part of the European Union, and, with a population of less than five million, it is among the smaller countries of Western Europe. In addition, the Scandinavian countries, particularly Norway and Sweden, have long been viewed as much more progressive in gender matters than the rest of Europe.[287]

Nonetheless, Norway's quota law proved to be a trendsetter. In 2007, Spain became the first EU member state to adopt a gender quota for boards of companies that were not owned by the government.[288] It should be noted, though, that the relevant Spanish law is much weaker than the Norwegian model—the Spanish version merely "recommends" that by 2015, 40% of all directors in large publicly traded corporations should be female.[289]

In January 2011, the French parliament also adopted legislation imposing gender quotas for corporate boards. Following the Norwegian approach, this legislation requires that by 2017, 40% of all board members in large publicly traded French corporations have to be female.[290]

In June 2011, Belgium became the latest EU member state to adopt quota legislation for corporate boards.[291] The relevant Belgian law requires that 30 percent of board members be women, although, depending on the size of the firm, firms have several years to reach that target.[292]

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283. PLCA, *supra* note 274 § 6-11a.

284. Rosenblum, *supra* note 274, at 57.

285. PLCA, *supra* note 274 § 6-11a.

286. *Id.*

287. *E.g.*, Jamie Alan Aycock, *Contracting Out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 HARV. J.L. & PUB. POL'Y 231, 235 (2006) (noting that the countries of Scandinavia are frequently "held up as a model for actively seeking to end all forms of gender discrimination").

288. Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres, (B.O.E. 2007, 71) (Spain) [hereinafter: Ley Orgánica 3/2007].

289. *Id.* art. 75.

290. *La loi pour féminiser la direction des grandes entreprises adoptée*, LE MONDE.FR (Jan. 14, 2011), http://www.lemonde.fr/economie/article/2011/01/13/la-loi-pour-feminiser-la-direction-des-grandes-entreprises-adoptee_1465337_3234.html [hereinafter LE MONDE.FR article].

291. *See* HANDELSBLATT article, *supra* note 18.

292. *See id.* (noting that large firms have to reach the target within five years, whereas smaller firms have eight years).

In Germany, the secretary of Labor recently announced that if German corporations failed to ensure that at least one fourth of directors were female by 2016, a legally mandated gender quota would follow.[293]

Even the European Union appears to be warming up to quotas. In an interview in September 2010, the EU Commissioner for Fundamental Rights, Viviane Reding, suggested that the EU might resort to quotas to redress the gender imbalance on corporate boards.[294]

C. Its Relevance

Will gender quotas for corporate boards make a difference? Based on how the relevant quotas are designed, this seems highly unlikely. Two limitations of the relevant laws stand out. First, giving women access to corporate boards is not tantamount to putting women in charge of managing those companies; and second, quota laws are unlikely to benefit female employees below the board level.

1. Executive Directors and Independent Directors

Giving women access to corporate boards is not the same as giving women access to management. Corporation laws typically provide for two types of board members: executive directors, who are part of the company's management; and non-executive directors, who are not.

In many European countries, including the United Kingdom, Ireland, Spain and Portugal, corporations have only one board, and accordingly, both types of directors can be found on the same board.[295] In other European countries such as Germany, Switzerland, Austria, the Netherlands, and the Scandinavian countries, corporations have both a managing board—which consists of the executive directors—and a supervisory board that contains the non-executive directors entrusted with monitoring the managing board.[296] In France and Belgium, the law allows corporations to choose between the one-tier and the two-tier structures.[297] All of these systems have one feature in common, however: There are some directors who manage the corporation and others who do not.

Crucially, the gender quotas that have been enacted so far do not force corporations to raise the percentage of women among managing directors. The relevant provision in Norway only targets the supervisory board whose members, by definition, are not entrusted with managing the corporation.[298] Spanish law does not make quotas mandatory in the first place,

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293. *See* FIN. TIMES DEUTSCHLAND article, *supra* note 19.

294. Matej Hruska, *EU to Consider Corporate Gender Quotas in 2011*, EUOBSERVER.COM (Sep. 22, 2010), http://euobserver.com/9/30857.

295. Dieter Sadowski et al., *The German Model of Corporate and Labor Governance*, 22 COMP. LAB. L. & POL'Y J. 33, 36 n.11 (2000).

296. *Id.*

297. Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT'L L. 477, 522 n.231 (2004); Klaus H. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 23 (2011).

298. PLCA, *supra* note 274 § 6-11a.

but only recommends that 40 percent of directors be women.[299] In addition, Spanish law, which provides for a one-tier boards structure, does not require that the female directors have to be executive directors as opposed to independent directors.[300]

The quota rules adopted by the lower house of the French parliament follow a similar pattern. France, as explained above, lets corporations choose between the one-tier structure and the two-tier structure.[301] But to the extent that corporations follow the two-tier model, the French quota law only focuses on the supervisory boards, the so-called *conseil de surveillance*.[302] And to the extent that French corporations have adopted a one-tier board structure, the relevant legislation does not mandate that any of the female directors have to be part of the corporation's management.[303]

The most recent quota law—the one adopted by Belgium in June 2011—also follows this general pattern. Corporations in Belgium usually have a one-tier structure.[304] In that case, the corporation is headed by the *conseil d'administration*.[305] The new Belgian law provides that 30 percent of the members of the *conseil d'administration* have to be women, but does not require that any of them be managing as opposed to non-managing directors.[306] As previously mentioned, Belgian corporations can also opt for a two-tier structure. In this case, the management of the corporation is entrusted to the *comité de direction*,[307] in which case the *conseil d'administration* is entrusted with supervising the *comité de direction*.[308] However, nothing in the new Belgian quota law prescribes that the members of the *comité de direction* have to be women.[309]

2. *The Tip of the Iceberg*

Quota laws also have a second, even more important limitation. They merely address the tip of the iceberg. Only a small handful of employees can ever expect to reach the corporate board. Accordingly, increasing board diversity may benefit those select few individuals who are lucky

299. Ley Orgánica 3/2007, *supra* note 288 art. 76.
300. *Id.*
301. Sadowski et al., *supra* note 295, at 36 n.11.
302. *See* Proposition de Loi Adoptée par l'Assemblée Nationale relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle [Proposition of Law Adopted by the National Assembly Relating to the Equal Representation of Men and Women on the Boards of Trustees and Professional Responsiblity], art. 2 bis., Sénat Session Ordinaire de 2009–2010, *available at* http://www.senat.fr/leg/ppl09-223.pdf (Fr.).
303. *Id.* art 1 (providing only that neither men nor women may account for less than forty percent of all directors (*administrateurs*)).
304. Hopt, *supra* note 297, at 22 n.107.
305. CODE DES SOCIETÉS [C.SOC.] arts. 517–523 (Belg.), *available at* http://www.droitbelge.be/codes.asp#soc (describing the role of the conseil d'administration).
306. C.SOC. art. 518 (Belg.). At the moment this article was completed, the new Belgian law had not been published in the official journal. However, the text of the law is available online at http://www.lachambre.be/FLWB/pdf/53/0211/53K0211012.pdf.
307. C.SOC. art. 524 (Belg.).
308. *Id.*
309. C.SOC. art. 4 (Belg.).

enough to become a board member, but it does not help the remaining employees. One might theorize a trickle-down effect as a corporation's management becomes more diverse. After all, a diverse management might be more inclined to appoint women to lower level management positions, and this effect might slowly ripple through the company. There is some, albeit very limited, empirical evidence tending to show that such trickle-down effects may occur. One recent study has found that publicly traded firms with female CEOs tend to have a smaller wage gap between men and women in top executive jobs: Women managers in firms led by women earned 10-20% more than women managers in comparable firms led by male CEOs.[310] However, as pointed out above, the European quotas do not even target executive directors, let alone female CEOs. Accordingly, there is no reason to believe that the new quotas will benefit female employees below the board level.

D. Consequences

In sum, the new trend towards quotas is unlikely to bring meaningful changes. The implications, then, are obvious. For gender discrimination theory, it is crucial that quotas do not change the fact that European gender discrimination law tends to be geared towards working-class women rather than women with managerial aspirations. Instead, they only make the lack of diversity in management less visible. In other words, the new quotas do not present a departure from the social-democratic model of gender discrimination law; they merely cover up its shortcomings. Thus, they allow European countries to pay lip service to the idea of protecting women in managerial positions while in fact retaining the focus on non-managerial employees.

The policy implications are equally plain. Those European countries that want a more class-neutral gender discrimination law cannot rely on board quotas to do the job. Instead, they will have to think about much deeper structural reforms. The obvious possibilities include stronger remedies as well as rules that make it easier for plaintiffs to prove discrimination.

Summary and Conclusion

The United States and the European Union are both firmly committed to eradicating gender discrimination in employment, but their strategies differ widely. The European Union offers plaintiffs much more comprehensive prohibitions against discrimination. The United States, on the other hand, boasts more powerful remedies and procedural tools.

Contrary to the existing literature, I have argued that these differences can best be understood as expressions of a fundamental ideological divide. Much of Europe subscribes to what I have called a social-democratic vision

310. Linda A. Bell, *Women-Led Firms and the Gender Gap in Executive Compensation* 1 (Haverford Coll. Dep't Econ. Inst. Study Labor, Discussion Paper No. 16892005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=773964.

of gender discrimination law. Rather than seeking to protect all employees alike, the law is tailored to the needs of working-class employees and places little emphasis on the protection of upper-level employees. By contrast, Title VII, the heart of gender discrimination law in the United States, was explicitly designed to protect employees across the corporate hierarchy.

Recently, Europe has been moving toward a mandatory gender quota system for corporate boards. Following an example set by Norway, the French Parliament has adopted legislation requiring that by 2015, at least 40% of the directors of large publicly-traded firms must be women.[311] A similar law has been enacted in Belgium.[312] Other member states are expected to follow, and the European Commission is even considering legislation that would introduce EU-wide gender quotas for corporate boards.[313]

However, the relevant laws are mostly symbolic. In particular, companies can comply with the newly imposed quotas by choosing women as non-managing directors, thereby creating the impression of diversity without actually giving women access to corporate management. Thus, gender quotas for corporate boards do not change the fact that European gender discrimination law is geared toward working-class women rather than women with managerial aspirations. Accordingly, those in Europe who want upper-level employees to enjoy a level of protection against gender discrimination akin to that accorded to working class employees will have to seek much more profound structural changes.

311. LE MONDE.FR article, *supra* note 290.
312. *See* HANDELSBLATT article, *supra* note 18.
313. Hruska, *supra* note 294.