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FOREWORD INTRODUCTION TO SYMPOSIUM: ENHANCING ANTI-DISCRIMINATION LAWS IN EDUCATION AND EMPLOYMENT

DEAN SUSAN D. CARLE

When this Symposium was first conceived in the Summer of 2021, the nation was just emerging from the first phases of the COVID-19 pandemic. This was the beginning of trying to go back to life as normal. Given this reawakening, the Symposium’s planning committee felt the urgency of a need to regroup, rethink, and reassess the state of employment anti-discrimination law. We were not sure where others would be on this possible project, given the newness of the hopeful end to lockdowns and social isolation and return to “normal” concerns. But we quickly found that those who joined the Symposium planning group, and then those who responded to our calls to contribute to the Symposium, were more than ready to join in a reassessment and relinking of the many unresolved issues confronting employment anti-discrimination law. We saw such reassessment as all the more pressing in light of the multiple pressures of the COVID-19 pandemic, the #MeToo Movement, and the racial reckoning that followed the state-sponsored murders of George Floyd, Breonna Taylor, and 184 other persons of color in the spring of 2020,¹ on top of the countless state-sponsored murders of persons of color stretching far back into the past and the rise of Sinophobic violence.

With these goals in mind, a planning committee extraordinaire coalesced. Its members included, most importantly, the *Journal of Gender, Social Policy & Law* (“JGSPL”) leaders Adriana E. Morquecho, Editor-in-Chief, and Inka Sklodowska Boehm, Symposium Editor, without whose indefatigable work this project would never have been possible; National

1. See Li Cohen, *Police in the U.S. Killed 164 Black People in the First 8 Months of 2020. These Are Their Names.* (Part I: January-April), CBS NEWS, Sept. 10, 2020 (<https://www.cbsnews.com/pictures/black-people-killed-by-police-in-the-u-s-in-2020/>).

Employment Lawyers Association (“NELA”) President, Rebecca Salawdeh; the National Institute for Workers’ Rights (“Institute”) Executive Director, Jeffrey Mittman; NELA member, Bruce A. Frederickson; Washington College of Law Assistant Dean for Diversity, Inclusion and Affinity Relations Lisa Taylor; and me.

From the first, the idea was to span gaps—between race, sex, and disability discrimination; between employment and career, on the one side, and preparation for employment through education, on the other; between Title VII and Title IX; and, very importantly in our eyes, between academia and practitioners of law in the anti-discrimination arena. The planning committee was hugely excited to be carrying forward a collaboration between NELA, the Institute, and the American University Washington College of Law (“WCL”) and JGSPL. The Symposium idea came to me first from someone who exemplifies bridging academia and practice, Bruce Frederickson, a longtime adjunct professor at WCL and a leading employment anti-discrimination law practitioner in Washington, D.C. JGSPL quickly took up the idea and we took off into the planning stages. Our call for papers explained the Symposium’s theme of “Intersections” as follows:

- At the intersection of ending pandemic restrictions and launching in-person learning and academic engagement –
- At the intersection of judicial practice, legislative advocacy, jurisprudential analysis, and academic creativity –
- At the intersection of student life and career trajectories, and at the intersection of gender and race, immigration and socio-economic status, religion and sexual orientation –
- And at the intersection of law, policy, activism, organizing, culture, politics and story-telling

This Symposium [will] address a fundamental question plaguing anti-discrimination law, and particularly anti-discrimination law as applied to workplaces and higher educational institutions:

- How can we improve the law to advocate for members of protected classes as they make their way through life, higher education, and careers . . .
- What are the key changes leading thinkers would suggest making the law more responsive to what people need to flourish in the face of historical and structural subordination and current implicit biases and other forms of oppression—some blatant and some more nuanced but no less powerful? These various forces present obstacles to human flourishing. Still, despite many decades of development, anti-discrimination law as it currently works does not seem to have succeeded in stopping them from negatively affecting educational and work experiences. . . .

The transcripts of proceedings and articles growing out of the Symposium represent the culmination of this initiative to span divides and study the intersections among topics, methodologies, and practice and academic sectors while examining some of the most salient unresolved topics in employment anti-discrimination law today. Above all, we sought to address the most pressing and practical question: what at this moment are some of the key interventions that could make employment anti-discrimination law work better toward promoting the goals of human flourishing outlined above? We hope you will enjoy reading our participants' answers within this Volume and JGSPL's 30.3 Volume.

While it would be impossible to capture the full richness of the participants' contributions in a short summary, some of the overarching and interwoven themes of their contributions might be offered as follows:

In an opening panel, we heard from several panelists with deep experience in the enforcement of the nation's anti-discrimination laws, who noted that it is unlikely that Congress will act anytime soon to enact major fixes to the aspects of those laws that are not working. How, as former senior counsel to the chair of the Equal Opportunity Employment Commission ("EEOC") Patrick Patterson put it, can the EEOC implement change in the face of a judiciary that has been off course in interpreting Congress's major employment rights statutes This question becomes all the more important in the face of congressional disfunction, which makes it unlikely that Congress will step in to make the necessary corrections to judicial misinterpretations of anti-discrimination statutes in the way it has frequently in the past. Former Republican EEOC Chair and Assistant Secretary for Labor Victoria Lipnic echoed Patterson's concerns about the current malfunctioning of Congress as the appropriate body to set legal policy through the exercise of its legislative powers. Carol Miaskoff, a longtime leader in the EEOC's Office of Legal Counsel and now its head, offered her thoughts about how the EEOC might offer technical assistance to fill in the gaps where Congress has not legislated sufficiently. The importance of using state and local fair employment agencies to carry out some of the roles the EEOC cannot perform emerged from the comments of Interim Director of the D.C. Office of Human Rights, Hnin Khaing. As Khaing emphasized, much of the effectiveness of anti-discrimination laws depends on the effectiveness of their implementation, a process in which state and local agencies often play a major role.

Bridging the trajectory from higher education into professional employment and repeating the theme of implementation as a key focus in exploring paths to greater effectiveness in achieving anti-discrimination goals, the next Symposium panel moved to an examination of some of the

opportunities for improvement of higher education implementation of Title IX. Chaired by WCL's own Assistant Dean for Diversity and Inclusion, Lisa Taylor, this panel addressed the challenges to Title IX enforcement presented today. American University Assistant Vice President for Equity and Title IX Coordinator, Leslie Annexstein, led off with a discussion of the challenges of responding to changing national administrations' radical shifts in policy through their multiple Title IX guidances, as well as setting up processes that encompass the needs of students and employees alike. Annexstein further pointed to the difficulties of doing deeper analyses of the patterns of discrimination and institutional policies that might get in the way of achieving full equal opportunity in higher education given the demands of day-to-day complaint processing—important as responding to individual complaints must always be. Again, the theme that the “devil is often in the details” sounded clear: in both the workplace and higher education institutions, federal statutory policy is one thing, but implementation on the ground is yet another, and crucially important though too often overlooked. Elizabeth Kristen, an expert on Title IX implementation in athletics, followed with deep insights into the problems in implementing that statutory mandate. Kristen noted themes that would come up again in the afternoon's panels, including the problems of always expecting complainants—in this context, often young girls—to come forward with complaints against their schools for lack of equal athletic opportunities. In her remarks and also in her beautifully presented article included in this Symposium Volume, Kristen detailed nine expert suggestions for improving Title IX's effective enforcement. Sounding in themes that persisted throughout the day, Kristen pointed to the need for better training, education, funding, and gathering of and access to data and information. Rounding out the panel with her experiences on the other side of the nation as the Chief Equity Officer at Seattle University, Associate Vice President for Institutional Inclusion and Professor of Law Natasha Martin presented her thoughts on the intersections between sex and race equity work in higher education. She noted the importance of maintaining a lens focusing on intersectionality in seeking to broadly support the nurturing of a culture of inclusion and equity on university campuses.

All of the aforementioned themes and more came up in the keynote address presented by Ford Foundation Professor of Law and the Social Sciences at Yale Law School, Vicki Schultz. Professor Schultz started by frankly acknowledging the failure of civil rights law over the past several decades and highlighted several manifestations of this failure, including the U.S. Supreme Court's almost continual narrowing of enforcement of civil rights statutes through its many procedural rulings diminishing the chances of success for civil rights plaintiffs, the delay of judicial recognition of rights

that law should have delivered years before, and the excessive abstraction and formalism in the law relating to civil rights goals. Then, Schultz proposed using her analysis as a kind of inspiration going forward, and outlined seven main points for future reform, including shifting law to respond to people's needs and the facts on the ground, redressing longtime historical inequality, returning to multipronged approaches, and coordinated strategies across various federal agencies, creating stronger substantive employment rights beyond protection against discrimination only, redistributing power and increasing democratization to counter current trends toward consolidation and control in the hands of a small sector of private wealth, and fostering the concept of shared fates across lines of race, class, gender, age, and ability. Professor Schultz's call to action added up to a tall order indeed, but one that inspired the afternoon's further look into what can be done to improve employment anti-discrimination law and policy now.

The afternoon's first panel turned to the topic of harassment law. A panel of leading employment anti-discrimination practitioners, along with distinguished professor Ann McGinley, author of path-breaking work on sexual harassment law, and Bernice Yeung, a Pro Publica reporter who documented the prevalence of extreme sexual harassment among farmworkers and nightshift janitors, led off by discussing both the facts and the jurisprudence surrounding the contemporary recognition of harassment as an anti-discrimination issue. This panel again modeled a key theme of the Symposium in challenging the contradiction between lived reality or facts and overly detached and formalist law. Professor McGinley also injected the gendered nature of how the law views harassment (such as dismissing harassment of men as horseplay) and the need for intersectional analysis across a variety of axes, including race and class. Professor McGinley reiterated the repeating theme of the Symposium, addressing proceduralism's hurdles to substantive enforcement of anti-discrimination law's purported protections. In her comprehensive article appearing in this Volume, McGinley further developed one of the Symposium's key morning themes regarding finding paths forward in light of Congress' malfunction and the frustrations of policy development while being stymied at the federal level. That article starts by summarizing the many studies that show a shocking lack of success by plaintiffs in employment discrimination cases and then fills out, with extensive documentation. These many unfair procedural hurdles have led to this lack of success. These phenomena, McGinley explains, add up to what she terms a "lethal mix of substance and procedure," a proposition she details with many examples. McGinley points to opportunities for progress at the state level when turning to state law opportunities. McGinley concludes by calling on researchers and state-level

activists, and policymakers to capture the results of state experimentation so that when conditions again exist for progress on a national level, lessons from the states can inform how best to bring the protections workers in some states now enjoy to workers in all parts of the country. Indeed, McGinley's call mirrors a historical phenomenon in the development of civil rights law over the past 100+ years, in which activists, stymied by hostile or indifferent policymakers at the national level, moved to the states for experimentation during a period of stasis, and then brought those lessons to the development of national policy when conditions became ripe for doing so.²

Next came leading practitioners Joseph M. Sellers and Aniko R. Schwarcz's discussion of their important work, again accompanied by an article published in this Volume, concerning the mismatch between the law's formalism—in this instance, its insistence that plaintiffs complain about harassment using employers' internal complaint procedures—before filing a lawsuit seeking law's protection—and the actual lived experience in which complaining internally about sexual harassment is infeasible, career-destroying, and/or otherwise highly improbable in a host of particular situations. Highlighting a theme I have also been concerned about,³ Sellers and Schwarcz argue for doing away with the internal complaint requirement, otherwise known as the *Faragher-Ellerth* defense, as a matter of equitable tolling when a particular situation warrants this. Instead, the authors urge practitioners handling harassment cases to make these arguments where appropriate, thus reinforcing one of the Symposium's key themes of making progress on the law even where broad policy changes appear unlikely.

The final panel entitled "The Future of Employment Law" adjusted the lens of focus to a wider angle to explore the bigger picture for moving employment anti-discrimination law forward. Here, we heard some of the boldest and ambitious proposals for federal legislative action when conditions become ripe. Geraldine Sumter called for new federal laws protecting employees from the abusive scheduling practices of employers that make work so difficult for regular line workers today. Such new laws surely must be at the vtop of any list of necessary statutory reforms if this nation is not to descend into a 21st Century version of the exploitative labor

2. For examples of civil rights activists' turn to state level campaigns during the so-called nadir period in the nation's civil rights history between 1880 and 1930, see Susan Carle, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880-1915*, at 58-60 (2013).

3. See Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 *DUKE JOURNAL OF GENDER LAW & POLICY* 85 (2006).

conditions notorious in the late 19th and early 20th centuries, Those historical conditions eventually led to the passage of the Fair Labor Standards Act of 1938, and today’s new forms of labor exploitation likewise require new legislative responses.

In her remarks, as well as her important article in JGSPL’s upcoming 30.3 Volume, nonprofit advocacy organization Access to Justice Project Director, Karla Gilbride, presented her visionary proposal for reform of the Americans with Disability Act (“ADA”) to embrace principles of universal design in American workplaces. Gilbride points out how the ADA, as currently written, calls for accommodations in the workplace only for those with qualifying disabilities who request and negotiate for the. In contrast, real access to justice would call for restructuring American workplaces, so they are as accessible to all as possible at the outset, without special request. This article will surely be cited frequently in years to come as disability rights activists push forward on their path-breaking insights into how the default rules in the construction of the physical (and social, I will add) world construct difference or “disability. Disability, in other words, does not precede encounters with the humanly built world. Instead, it is a product of how the privileged have constructed that world.⁴

Playing with the concepts of temporality and longitudinal analysis of workers’ careers, University of San Diego Professor of Law Stephen Rich, presented work from his longstanding project of theorizing discrimination as a process in which employers’ practices shape the distribution of capabilities and opportunities to develop skills and achieve excellence in workplace environments. Like Gilbride’s insights, Rich offered a perspective that dug beneath the existing structures of work to question the socially constructed underpinnings of those structures. Rich called for considering how the law might facilitate the reconstruction of those underpinnings to enhance prospects for greater equity. As Rich points out, a socially constructed order, having been built from historical layers of human effort, might just as well be reconstructed through more intentional and reflective efforts toward reform.

As still another contribution built on taking a deep, critical dive into employment anti-discrimination law’s conceptual underpinnings, St. Louis University Professor of Law, Marcia McCormick, called for reconceiving of the analytic boxes which the Court has required the law pace plaintiffs in

4. See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE (1991) (discussing the social construction of disability); cf. Susan Carle, *Analyzing Social Impairments under Title I of the Americans with Disabilities Act*, 50 UC DAVIS LAW REVIEW 1109 (2017) (discussing social construction of interpersonal norms that can pose obstacles to neurodiverse persons).

order for employment anti-discrimination cases to proceed. Under this approach, proof of discrimination involves isolating a particular axis of identity as “the reason” for an employment action. Repeating one of the key themes from the prior panels, McCormick noted the overwhelming consensus that the Court has so distorted the purposes of employment anti-discrimination statutes, in this way as well as others, as to make their operation almost unintelligible to the ordinary people subject to them. At the same time, the Court’s formalism has made law highly ineffectual in preventing and remedying discrimination. McCormick thus calls for stripping away the layers of limiting doctrine that ossify factfinders’ search for the truth of whether discrimination occurred in particular circumstances, thus combining a bold proposal for change with a realistic assessment of the state of the law today.

Continuing with proposals for bold and essential reform, Michael Selmi calls for an adjustment in the caps for Title VII awards of compensatory and punitive damages. Selmi points out that these caps were enacted more than twenty years ago in the 1991 amendments to Title VII and are so outdated today as to make unlawful discrimination inexpensive to the extent of virtually incentivizing it. Again, Selmi’s grounded and ambitious proposal looks to a future time in which analysis and planning today can lead to important statutory reform at a future time to better achieve the nation’s employment anti-discrimination goals.

In sum, the Symposium and the wonderful articles it engendered, as published over two Volumes of JGSPL, turned out to be everything the planners hoped for and then some. Throughout its development, a number of interwoven themes emerged, much like the melodies of a fugue. Among those sometimes polyphonic and sometimes contrapuntal themes the reader will encounter and benefit from in proceeding forward are the following: find ways to make progress despite Congress’ malfunction; look to agency technical assistance and state and local law as possible avenues for progress and experimentation under these conditions; focus on procedural law as equally important to substantive law in either advancing or thwarting anti-discrimination goals; demand data, information, and analytics to analyze current conditions and needs; coordinate across campaigns and strategies and interrelated issues of employment and economic justice; emphasize shared fates among identity categories and work for greater democracy to build movements for change; and finally but no less importantly, think big, creatively, and ambitiously about what the employment law of the future can look like on a mid-length horizon.