AALS Joint Newsletter
Section on Employment Discrimination Law
Section on Labor Relations & Employment Law
2016

Joseph Fishkin (Texas) & Joseph Mastrosimone (Washburn), Secretaries of the sections

We would like to thank Kasia Solon Cristobal, a librarian at the University of Texas School of Law, and Glen McBeth, a librarian at Washburn University School of Law, for invaluable assistance in compiling the information contained here.

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Faculty News

Brad Areheart received tenure at the University of Tennessee College of Law.

Rachel Arnow-Richman (University of Denver Sturm College of Law) served as a Visiting Professor during the Fall 2016 term at University of Colorado Law School.

Sahar Aziz was granted tenure and promoted from Associate Professor to Professor of Law in 2016 at Texas A & M University School of Law.

Jason Bent received tenure at Stetson University College of Law.

Susan Bisom-Rapp was appointed Associate Dean for Faculty Research and Scholarship effective August 1, 2016, at Thomas Jefferson School of Law.

Jessica Clarke received tenure from the University of Minnesota and visited this fall quarter at the University of Chicago.

Joseph Fishkin is the Irving S. Ribicoff Visiting Professor of Law at Yale Law School for the academic year 2016-17.

Wendy Greene (Samford-Cumberland) will serve as a visiting professor at the University of Kentucky College of Law during the spring of 2017. In September, the 11th Circuit Court of

Appeals quoted her article, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?* 79 U. COLO. L. REV. 1355 (2008) in *EEOC v. Catastrophe Management Solutions, Incorporated*. In November, Greene along with Professor Angela Onwuachi-Willig (Berkeley), the NAACP-Legal Defense Fund, and the Legal Aid Society – Employment Law Center filed an amicus brief with the 11th Circuit in support of the EEOC's petition for rehearing *en banc* in this case.

Tristin Green was appointed Associate Dean for Faculty Scholarship at University of San Francisco Law School Law this year.

Jeffery Hirsch was appointed Associate Dean for Strategy at the University of North Carolina School of Law.

Martin Malin was elected as Vice President of the National Academy of Arbitrators at its June 2016 annual meeting. He was also presented with the Arvid Anderson Award for lifetime contributions to public sector labor law at the ABA Section on Labor and Employment Law Annual meeting on November 11, 2016.

Joseph Mastrosimone was promoted to full professor and granted tenure at Washburn University School of Law. Both the promotion and tenure will be effective in 2017. In addition, he was appointed as Associate Dean for Academic Affairs beginning in July 2017.

Paul Secunda of Marquette University Law School received the Senior Fulbright Scholar Award to study comparative workplace retirement law at Melbourne Law School in Australia for six months in the second half of 2015 and taught two Master Law classes - Comparative Superannuation (Pension) Law and International Employment Law (with Sean Cooney) at Melbourne Law School. Based on that work, he then briefed the Assistant Secretary of Labor for the Employee Benefit Security Administration on insights from his Fulbright research. Finally, he co-filed with Charles Morris an interested persons rule-making petition with National Labor Relations Board (NLRB) on employer captive audience meetings on behalf of 106 labor and employment relations professors.

Carolyn Shapiro returned to Chicago-Kent full time after a two-and-a-half-year leave during which she served as Solicitor General of Illinois.

Sandra Sperino received the Harold C. Schott Award at the University of Cincinnati College of Law. The award recognizes outstanding research and scholarly achievements.

E. Gary Spitko received an appointment to an endowed chair. As of August 1, 2016, he became the Presidential Professor of Ethics and the Common Good and Professor of Law at Santa Clara University.

AALS Meeting Information

AALS SECTION PRESENTATIONS

New and Emerging Voices in Workplace Law
Wednesday January 4, 2017
3:30 pm – 4:45 pm

Moderators: Bradley A. Areheart, University of Tennessee College of Law; Michael Z. Green, Texas A&M University School of Law

Speakers: Deepa Acevedo, University of Pennsylvania Law School; Andrew Elmore, New York University School of Law; David Y. Kwok, University of Houston Law Center; and Courtlyn G. Roser-Jones, University of Wisconsin Law School

Section on Employment Discrimination Law and Labor Relations and Employment Law Joint Breakfast
Thursday January 5, 2017
7 am – 8:30 am

Business meeting of Section on Labor Relations and Employment
Law will be held during the breakfast

Classifying Workers in the "Sharing" and "Gig" Economy
Thursday January 5, 2017
8:30 am – 10:15 am

Moderator: Michael Z. Green, Texas A&M University School of Law

Speakers: Miriam Cherry, Saint Louis University School of Law; Charlotte Garden, Seattle University School of Law; Seth D. Harris, Former U.S. Labor Department Acting Secretary and Deputy Secretary, Counsel, Dentons; Leticia Saucedo, University of California, Davis, School of Law; Julia Tomassetti, Assistant Professor of Law, City University of Hong Kong School of Law, Hong Kong; Veena Dubal, University of California, Hastings College of the Law

This program will focus on the emerging trend of businesses using "on-demand" workers who share economic risks with those businesses as nominally independent contractors. These workers consider the job opportunity as an individual "gig," characterized by flexibility conveniently gained from technology. State, federal, and local legislatures and related labor and employment law enforcement agencies have started to add items to this analysis beyond the typical "1099/W-2" common law control nomenclature. As a result, the question of who is an employee in the gig and sharing economy has become an ever-increasing concern. During the program, a panel of leading labor and employment scholars will address this question from a multi-disciplinary approach including the examination of unique issues for business franchises and immigrant workers. Also, with the help of a hypothetical involving an internationally-franchised, pizza making company and its use of local "gig" delivery drivers obtained from an on-demand

matching service, the panelists will be asked to explore the scope of these worker classification problems for our economy. We will be seeking one additional speaker through a call for papers who will present on a related topic, and we particularly encourage new voices to submit a paper abstract.

***Responding to* Fisher v. Texas**
Thursday January 5, 2017
1:30 pm – 3:15 pm

Moderator: Bradley A. Areheart, University of Tennessee College of Law

Speakers: Richard T. Ford, Stanford Law School; Melissa Hart, University of Colorado Law School; Richard H. Sander, University of California, Los Angeles
School of Law; Ilya Somin, The Antonin Scalia Law School at George Mason; University Erika Wilson, University of North Carolina School of Law

This program will reassess, in the recent wake of *Fisher v. University of Texas*, whether and/or how employers can be attentive to race in hiring and promotion. The answers to these questions are important since very large numbers of employers engage in diversity programs that might or might not be characterized as affirmative action, but are certainly not blind to race. Moreover, Fisher may tell us something about the Court's view of the relationship, if any, between diversity and merit. This panel will react to *Fisher* and consider the potential implications of the Court's affirmative action jurisprudence for the world of employment.

Business meeting at program conclusion

Author Meets Reader: Celebrating Recent Books on Employment Discrimination
Thursday January 5, 2017
5:30 pm – 7 pm

Moderator: Naomi Schoenbaum, The George Washington University Law School

Speakers: Susan Bisom-Rapp, Thomas Jefferson School of Law; Tristin K. Green, University of San Francisco School of Law; Joanna L. Grossman, Southern Methodist University, Dedman School of Law; Ann C. McGinley, University of Nevada, Las Vegas, William S. Boyd School of Law; Sandra Sperino, University of Cincinnati College of Law; Suja A. Thomas, University of Illinois College of Law

Sponsored by University of Nevada, Las Vegas, William S. Boyd School of Law

This author meets reader session will recognize recent books in the employment discrimination field. Topics range from the intersection of work and family to workplace culture to masculinities theory to the role of courts in undermining discrimination law. The session will feature a panel with the authors, as well as time to mingle and celebrate.

OTHER AALS PROGRAMS OF INTEREST

Current Development in Rights Protections in the European Union: Anti-discrimination Measures, The Charter of Fundamental Rights, and the Refugee Crisis
Friday January 6, 2017
8:30 am – 10:15 am

Speakers: Frank Emmert, Indiana University Robert H. McKinney School of Law; Roger J. Goebel, Fordham University School of Law; Laurence Gormley, Professor of European Law & President of ELFA, University of Groningen Faculty of Law, Netherlands; Katerina Linos, University of California, Berkeley School of Law; Julie C. Suk, Benjamin N. Cardozo School of Law

Novel legislation adopted by the E.U. Council of Ministers in 2000 prohibits discrimination based on race or ethnic origin in all fields regulated by E.U. law, and prohibits discrimination in employment based on religion, age, disability, or sexual orientation. Panelists will discuss efforts to curb discrimination of the Roma people under E.U. rules and the European Convention on Human Rights, and Court judgments concerning compulsory retirement of university professors, judges, and prosecutors. Another panelist will discuss the efforts to maintain human rights protection while coping with the on-going refugee crisis. A guest European professor will discuss the impact of the U.K. referendum on withdrawal from the E.U. on the U.K. rules on residence of migrant nationals of other E.U. nations.

Papers from the program will be published in *Fordham International Law Journal*.

Animals as Living Accommodations
Friday January 6, 2017
10:30 am – 12:15 pm

Moderators: Francesca Ortiz, South Texas College of Law Houston and Ani B. Satz, Emory University School of Law

Speakers: Rebecca J. Huss, Valparaiso University School of Law; Michael Nunez, Associate, Rosen Bien Galvan & Grunfield LLP; Ellen O'Neill-Stephens, Founder, Courthouse Dogs Foundation; Paul Harpur, Senior Lecturer, The University of Queensland, Australia; Mackenzie Landa, Legal Fellow, PETA Foundation; Laura F. Rothstein, University of Louisville, Louis D. Brandeis School of Law

This panel will explore the use of animals as living accommodations for individuals with disabilities and other impairments. The panel will be interdisciplinary, likely spanning topics in animal, disability, health, business, criminal, and education law and policy. Possible topics include but are not limited to: business obligations to accommodate service and emotional support animals; species restrictions in service animals; animals as accommodations in schools; emotional support animals in civil and criminal proceedings, housing, and air travel; the use of animals to treat mental distress; and service animal training and placement. Mackenzie Landa

will discuss From War Dogs to Service Dogs; Michael Nunez will discuss Emerging Issues in Service Animal Litigation in the Sharing Economy; Ellen O'Neill-Stephen will discuss Courthouse Facility Dogs – Promoting Justice with Compassion.

Papers from the program will be published in *Animal Law Review*.

Other Announcements

The 2017 Twelfth Annual Colloquium on Scholarship in Employment and Labor Law (COSELL) will be hosted by Texas A&M University School of Law in Fort Worth, Texas. Sessions for scholarly works will be held on Friday, September 15, 2017, and Saturday, September 16, 2017. The Colloquium gives both emerging and established labor and employment scholars an opportunity to gather with colleagues to present their work to an expert audience. For further information and details, contact Professor Michael Z. Green at mzgreen@law.tamu.edu.

Thomas Jefferson School of Law's Seventeenth Annual Women and the Law Conference will focus on ***Diversity and the Workplace***. Co-organizers Susan Bisom-Rapp and Rebecca Lee aim for a conference that addresses challenges that include yet transcend gender. The conference will be held on Friday, February 3, 2017. The keynote speaker is UC Davis Professor Leticia Saucedo, who will deliver the 2017 Ruth Bader Ginsburg lecture at the conference.

Washburn University School of Law's annual symposium will focus on the tension between Congress and administrative agencies in labor and employment matters. ***Future of Labor and Employment Law: Power, Policies, and Politics*** will be held on Thursday, February 23, 2017. With Congress gridlocked, federal agencies are increasingly at the forefront of regulatory change in labor and employment law. Supporters of these administrative initiatives defend them as both necessary and commendable. Meanwhile, critics challenge the form, scope, and substance of these agency actions. This symposium bridges these competing viewpoints across a variety of cutting-edge labor and employment law issues: the EEOC's Expansion of Title VII to Include Sexual Orientation Discrimination, Religious Freedom and Accommodation Issues Arising from Regulatory Expansions, and the Stubborn Problem of Unpaid, Unregulated, and Illegal Labor. The symposium will feature a keynote address by National Labor Relations Board General Counsel Richard Griffin, Jr.

Some Developments in the Law

(Selected cases)

Fisher v. Texas (USSC 2016)
http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin-2/

Joseph Fishkin (Texas)

The protracted litigation over the University of Texas' affirmative action program reached its somewhat surprising conclusion in June 2016. In the Supreme Court's second bite at the case, Justice Kennedy, who despite his swing justice status has been consistently skeptical of affirmative action programs, wrote for the Court and concluded that UT's program indeed satisfies the strictures of strict scrutiny as the Court has developed and articulated them in higher-education affirmative action cases (including *Fisher* itself). The 4-3 holding was narrow, but it was widely viewed in the press and elsewhere as the end of the line for challenges to affirmative action in higher education. That view is almost certainly wrong. There are already a series of new challenges in the pipeline, including some more organized by Ed Blum, the constitutional impact litigation impresario who was behind *Fisher*; the new cases focus on Asian-Americans and we will hear more about them in coming years.

What, if anything, does *Fisher II* tell us about affirmative action in the employment sphere? That is less clear. Voluntary affirmative action in employment has always seemed to operate on a separate doctrinal track from affirmative action in higher education. The leading cases we all teach on this subject are now fairly old (*Steelworkers v. Weber*, *Johnson v. Santa Clara*). They do not sound the way they might sound if today's court confronted the same facts. It is difficult to know what the current or future court would have to say about voluntary efforts by employers to address manifest imbalances in traditionally segregated job categories. These imbalances remain extremely prevalent—and many employers do use various forms of affirmative action to try to address them. The Court's blessing of UT's rather different affirmative action plan in *Fisher*, on educational grounds that do not translate especially easily to the employment sphere, may provide a mild signal of a modest change in Justice Kennedy's general view of affirmative action. Or just a signal that he is in a different position now, as the Court's sole swing Justice, then he was during the last round of major affirmative action cases when Justice O'Connor was on the Court. At any rate, affirmative action in employment is exactly as secure as Justice Kennedy wants it to be – for now.

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Friedrichs v. California Teachers Association (USSC 2016)
http://www.scotusblog.com/case-files/cases/friedrichs-v-california-teachers-association/

Charlotte Garden (Seattle)

Friedrichs v. California Teachers Association was a potential blockbuster in a Term with many such cases. It involved two questions: first, whether union-represented public sector

employees have a First Amendment right to refrain from paying "agency fees," which cover their share of the costs of union representation; and second, whether it is sufficient for public unions to permit represented workers a chance to opt out of the non-mandatory portion of union dues, or whether they must instead obtain affirmative consent before charging them. *Friedrichs* would have built on two recent Supreme Court cases, each decided adversely to the state and union defendants in opinions authored by Justice Alito: *Knox v. SEIU Local 1000*; and *Harris v. Quinn*. But in a larger sense, *Friedrichs* would have built on decades of litigation and advocacy aimed at weakening unions by draining their coffers.

Friedrichs ended with a whimper, rather than the expected bang – after Justice Scalia's death, the court affirmed the Ninth Circuit in a 4-4 tie. But with the likelihood that President-Elect Trump will be able to nominate and have confirmed at least one Supreme Court justice, the issues presented in *Friedrichs* will soon return to the Court. When that happens, the Court will probably side with the challengers, and against unions and states that permit public sector bargaining supported by agency fees. The more difficult question is whether the Court will go even farther: cases now pending either in cert. petitions or in the courts of appeals involve arguments that private sector workers covered by the Railway Labor Act have a constitutional right not to pay agency fees; that exclusive representation is unconstitutional as to "partial" public employees; and that union membership incentives are unconstitutional in the public sector. Taken together, these cases could seriously weaken unions in the public and private sectors, and make it more difficult for unions to participate in electoral politics.

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Heffernan v. City of Paterson (USSC 2016)
http://www.scotusblog.com/case-files/cases/heffernan-v-paterson/

Paul M. Secunda (Marquette)

The Chief of Police of the City of Paterson, N.J., demoted Detective Jeffery Heffernan, believing that he had been caught supporting the Chief's political opponent in the mayoral campaign. If there were actually what Heffernan was doing, there would be some interesting legal questions surrounding the permissibility of a city employee engaging in political activity under New Jersey's baby Hatch Act or other local laws. However, the Chief and his allies were factually mistaken about Heffernan's actions: he was merely carrying a sign supporting the Chief's opponent to his mother, who was bedridden, after her sign had been stolen from her yard. Heffernan himself did not live in Paterson, was not a voter, and was not involved in the challenger's campaign.

The legal question: can a public employee be demoted for being involved in a political campaign consistent with the First Amendment' free speech clause, although his supervisors were mistaken about that involvement? Writing for the 6-2 majority, Justice Breyer found the city's action to violate the First Amendment. In such a case, the Court held the employer's reasons, mistaken or not, are what matter. Because those reasons interfered with, and were motivated by, the public employee's rights to engage in expression on a matter of public concern (not pursuant to his official job duties) and with no countervailing employer efficiency interests at stake, the

employee made out a successful First Amendment claim under the Pickering-Connick-Garcetti analysis.

Although the employee survived to litigate another day on his First Amendment claim, the case was remanded because there was some evidence that Heffernan may have been demoted because he violated a neutral city policy for police officers not to be involved in political campaigns. If the city demoted Heffernan specifically because they mistakenly believed he was speaking in support of the challenger in the mayoral election, he would prevail on his First Amendment claim. On the other hand, if he was demoted pursuant to a neutral official policy prohibiting all police officers from any overt involvement in any political campaign, then he might lose under the "same decision" test of Mt. Healthy, which allows the city to prove they would have disciplined the officer anyway under appropriate state or local law even though he engaged in First Amendment protective conduct.

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Tyson Foods v. Bouaphakeo
http://www.scotusblog.com/case-files/cases/tyson-foods-inc-v-bouaphakeo/

Sergio Campos (Miami)

A class of workers at an Iowa pork processing plant sued their employer, Tyson Foods, Inc., for failing to pay overtime in violation of the Fair Labor Standards Act (the "FLSA") and Iowa state law. The class alleged that Tyson failed to pay overtime for the time the workers spent "doffing and donning" their protective equipment. The district court certified the FLSA claims as a collective action and certified the state law claims under Rule 23(b)(3), and the action proceeded to trial. Because Tyson did not record the workers' donning and doffing times, the class relied upon *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which permits a plaintiff to use representative proof if an employer fails to keep time records. Although the class proposed bifurcating the proceedings, with a phase for common issues and a phase for determining the overtime owed to each employee, Tyson rejected the proposal and the court submitted both the issue of liability and damages to the jury. The jury returned a verdict for the class, and awarded a smaller amount than the one determined by expert reports submitted by the class. On appeal, the Eighth Circuit affirmed the judgment and award.

Before the Court, Tyson challenged the use of representative evidence to determine the amount of overtime each class member was due. Tyson argued that the representative evidence was not only inaccurate, but that it impermissibly assumes away the very differences among the class members that makes the use of the class action inappropriate. A majority of the Court rejected the argument by first noting that it did not want to make a categorical rule against the use of representative evidence in class actions, given that it is used regularly in class actions in other contexts. More importantly, the Court concluded that the use of representative evidence was appropriate because the FLSA, as interpreted by the Court in Mt. Clemens, permitted it, and that to exclude such evidence only for class actions would raise serious Rules Enabling Act concerns. In dissent, Justice Thomas, joined in part by Justice Alito, noted that the Court's decision was in tension with its decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), where the Court

strongly suggested that a class action cannot be certified when individual issues of damages are present.

As for Tyson's argument that the amount awarded cannot be accurately distributed to class members who were actually injured, the Court concluded that the district court was better positioned to determine the issue of distribution. In fact, the Court suggested that any distributional problem was one of Tyson's own making, as Tyson rejected the class's proposal to bifurcate the proceedings. Filing a concurrence, Justice Roberts, joined by Justice Alito in part, expressed skepticism that the district court could accurately distribute the award to those actually injured.

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EEOC v. Catastrophe Management Solutions (11th Cir 2016)
http://media.ca11.uscourts.gov/opinions/pub/files/201413482.pdf

D. Wendy Greene (Samford)

In 2010—like many if not most job seekers—Chasity Jones, an African American woman, searched online for employment. She submitted a job application with Catastrophe Management Solutions ("CMS"), a company based in Mobile, Alabama that provides customer service support to insurance companies' claims processing. Ms. Jones applied for a Customer Service Representative position, which required handling customer inquiries via telephone phone and basic computer knowledge. Along with 30 other applicants, CMS invited her to interview for the position. Jones wore a blue business suit, dark pumps, and her hair in locks to the interview. After an initial assessment of the required skills, CMS extended a job offer to Ms. Jones. Jones then met privately with CMS' HR manager, Jeannie Wilson, to reschedule required lab tests. As Ms. Jones departed the meeting, Ms. Wilson asked her if she was donning "dreadlocks," to which Jones replied in the affirmative. Wilson informed Jones that she could no longer hire her if she continued to wear locks, explaining "they tend to get messy, although I'm not saying yours are, but you know what I am talking about." Wilson added that previously an African American male applicant was asked to cut off his locks to secure a position with CMS. Ms. Jones refused this condition of employment, returned her initial paper work to Ms. Wilson, and left the building.

In 2013, the Equal Employment Opportunity Commission (EEOC) filed a Title VII intentional race discrimination case on Ms. Jones' behalf in the U.S. Southern District of Alabama, Selma Division. Pursuant to Federal Rule of Procedure 12(b)(6), CMS sought a dismissal of the EEOC's complaint contending that CMS applied its grooming policy in a racially discriminatory manner and intentionally deprived and adversely affected Ms. Jones' equal employment opportunities because of her race. CMS defended Ms. Jones' rescission of employment based upon its grooming policy, which advised that employees were expected to wear "professional and business-like" hairstyles that were not "unusual colors and excessive." In 2014, the federal district court dismissed the EEOC's original complaint and denied the EEOC's motion to amend, holding that the EEOC did not state a plausible claim of race discrimination and would be unable to do so even if it amended the complaint. The court suggested that the only way the EEOC could assert an

actionable race discrimination claim is if it proffered evidence that African descendants are the "*exclusive*" wearers of locks.

The EEOC appealed this decision to the 11th Circuit Court of Appeals. In 2015, a three-judge panel heard oral arguments on both procedural and substantive issues. On September 15, 2016, the 11th Circuit affirmed the district court's opinion, agreeing that any attempt on the EEOC's part to prove that CMS' "no locks" policy constituted intentional race discrimination would be "futile." In reaching this conclusion, the panel (like the federal district court) primarily relied upon two Fifth Circuit decisions, *Willingham v. Macon Telephone Publishing Company* and *Garcia v. Gloor*, and a federal district court decision in *Rogers v. American Airlines*. In *Willingham, Garcia,* and *Rogers*, the courts ruled that workplace regulations of mutable characteristics did not violate federal prohibitions against sex, national origin, and race discrimination respectively; for such laws like Title VII proscribes discrimination based upon *immutable characteristics*: characteristics one is born with or cannot change.

In October, the EEOC petitioned the 11th Circuit for a rehearing *en banc,* primarily arguing that CMS' ban against locks essentially imposes straightened hairstyles as a condition of employment (i.e., "a normative standard and preference for white or Caucasian hair and style standards") and engenders an undue burden on African descendant women to comply with this standard. The EEOC emphasized that countless Black women resort to wigs, weaves, and/or extreme chemical and heating agents to straighten their hair in order to secure employment; these alternatives are often times expensive and time-consuming to maintain and can also result in permanent hair damage and loss. The EEOC also challenged the panel's dismissal of the case as premature, contending that the agency was deprived the opportunity to engage in necessary discovery to uncover evidence of CMS' motivations for and application of its grooming policy. In lieu of granting the EEOC's petition, on December 13, 2016, the three judge panel issued a revised opinion that reaffirmed its dismissal of the EEOC's complaint on essentially identical grounds articulated in the panel's first opinion.

First, by describing the consequences of a "no locks" policy using terms like "impact," "disadvantage," and "adverse effects," the panel concluded that the EEOC conflated the disparate impact and disparate treatment theories of liability. Secondly, while acknowledging that race and law scholars and social scientists have effectively demonstrated that race is a social construction, the panel maintained that the current definition of race be guided by the prevailing (arguably biological) understanding of race in 1964 when Congress passed Title VII. Accordingly, after reviewing dictionary entries published during the 1960s, the panel surmised that race "referred to common physical characteristics shared by a group of people and transmitted by their ancestors over time." Noting that none of these sources used the term "immutable" in defining race, the panel declared, "it is not a linguistic stretch to think that [racial] characteristics are a matter of birth, and not culture." The panel adhered to the *Gloor* and *Willingham* courts' pronouncement that Title VII only protects against discrimination based upon immutable characteristics, suggesting that this judicial interpretation of Title VII's scope is consistent with the conceptualization of race and Congressional intent in 1964. The panel also noted that since no federal court has held that a workplace prohibition against locks or other natural hairstyles that African descendants adorn like braids and twists—except afros—constitutes unlawful race discrimination, it could not adopt a broader notion of race posited in EEOC regulations but rather was obligated to follow legal

precedent. As a result, the panel concluded that "discrimination on the basis of black hair *texture* (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hair*style* (a mutable choice) is not." Accepting the EEOC's argument "that dreadlocks are a 'natural outgrowth' of the texture of black hair"—a texture or style that would likely be considered an afro if cropped short and unstraightened—the panel nonetheless declared that this reality "does not make [locks] an immutable characteristic of race." The panel ultimately deemed Ms. Jones' locks a *cultural, mutable hairstyle of choice* seemingly because they are not an inheritable characteristic that African descendants exclusively possess beyond their control and/or at birth (presumably like an afro or a darker complexion). Thus, workplace discrimination against the former does not violate Title VII whereas workplace discrimination against the latter does.

The panel—literally and figuratively—issued a hair splitting legal distinction between afros and locks, race and culture, as well as lawful and unlawful grooming policies. In so doing, the 11th Circuit fortified nearly four decades of federal precedent permitting the lawful deprivation of employment opportunities for which African descendant women like Ms. Jones *are qualified* when they grow their unstraightened, naturally textured hair long or if it simply does not fit the mold of an afro. Alongside the legality of workplace grooming codes, this case presents a number of ripe procedural, substantive, and interpretive issues such as: 1) lower courts' application of the *Iqbal/Twombly* plausibility standard in employment discrimination cases; 2) the (dis)connectivity between theories of discrimination and the plain language of anti-discrimination statutes; 3) jurisprudential notions of race and culture; 4) the continued viability of the immutability doctrine in anti-discrimination jurisprudence; 5) the role of legislative intent in statutory interpretation; and 6) the scope of anti-discrimination protections in light of shifting notions of identity.

Scholarly Articles, Essays, and Book Chapters

Charlotte S. Alexander, *Workplace Information Forcing: Constitutionality and Effectiveness,* 53 Am. Bus. L.J. 487 (2016).

Charlotte S. Alexander, Zev J. Eigen & Camille Gear Rich, *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn,* 91 N.Y.U. L. Rev. 1 (2016).

Bradley A. Areheart, *Accommodating Pregnancy*, 67 Ala. L. Rev. 1125 (2016).

Rachel Arnow-Richman, *Modifying at-Will Employment Contracts*, 57 B.C. L. Rev. 427 (2016).

Elvia Rosales Arriola, *Queer, Undocumented, and Sitting in an Immigration Detention Center: A Post-Obergefell Reflection*, 84 UMKC L. Rev. 617 (2016).

Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights*?, 114 Mich. L. Rev. 893 (2016).

Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 Cornell L. Rev. 1115 (2016).

Eva Grosheide & Mark Barenberg, *Minimum Fees for the Self-Employed: A European Response to the "Uber-Ized" Economy*?, 22 Colum. J. Eur. L. 193 (2016).

Stephen F. Befort, *What's the Relationship Between Labor Arbitrators' Backgrounds and Outcomes of Discipline and Discharge Awards? An Empirical Analysis*, 31 ABA J. Lab. & Emp. L. 433 (2016).

Stephen F. Befort & Michael J. Vargas, *Same-Sex Marriage and Title VII*, 56 Santa Clara L. Rev. 207 (2016).

Jason R. Bent, *Health Theft*, 48 Conn. L. Rev. 637 (2016).

Mark T. Berger & Jersey M. Green, *Do the New Overtime Rules Affect You? A Review of the Fair Labor Standards Act*, Wyo. Law., August 2016, at 32.

Susan Bisom-Rapp, *Reading Mike: Assessing Work Law and Policy in an Age of Global Capital*, 47 Loy. U. Chi. L.J. 667 (2016)

Susan Bisom-Rapp, *Reading Mike: Assessing Work Law and Policy in an Age of Global Capital – What's Next? A Matrix for the Grey Zone,* 20 Emp. Rts. & Emp. Pol'y J. __ (forthcoming 2016)

Stephanie Bornstein, *Unifying Antidiscrimination Law through Stereotype Theory,* 20 Lewis & Clark L. Rev. 919 (2016).

Ronald C. Brown, Chapter 7 China-U.S. Implementation of Ilo Standards by Bits and Pieces (Ftas), 49 IUS Gentium 169 (2016).

Douglas E. Ray & Christopher David Ruiz Cameron, *Revisiting the Offensive Bargaining Lockout on the Fiftieth Anniversary of American Ship Building Company v. NLRB*, 31 ABA J. Lab. & Emp. L. 325 (2016).

Susan D. Carle*, Angry Employees: Revisiting Insubordination in Title VII Cases*, 10 Harv. L. & Pol'y Rev. 185 (2016).

Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 Comp. Lab. L. & Pol'y J. 577 (2016).

Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. Rev. 1673 (2016).

Henry Drummonds, *Business Law Fall Forum Introduction: Workplace Secrets, Loyalty, and Theft*, 20 Lewis & Clark L. Rev. 399 (2016).

Michael C. Duff, *Are Workers' Compensation "Alternative Benefit Plans" Authorized by State Opt-Out Schemes Covered by ERISA*?, Brief, Spring 2016, at 22.

Deborah Thompson Eisenberg, *The Restorative Workplace: An Organizational Learning Approach to Discrimination*, 50 U. Rich. L. Rev. 487 (2016).

Cynthia Estlund, *The "Constitution of Opportunity" in Politics and in the Courts*, 94 Tex. L. Rev. 1447 (2016).

Jessica Fink, *Madonnas and Whores in the Workplace*, 22 Wm. & Mary J. Women & L. 255 (2016).

Matthew W. Finkin, *Beclouded Work, Beclouded Workers in Historical Perspective*, 37 Comp. Lab. L. & Pol'y J. 603 (2016).

Joseph Fishkin, Wealth, Commonwealth, & the Constitution of Opportunity (with Willy Forbath) (forthcoming, NOMOS).

Joseph Fishkin, *Bottlenecks and Flourishing: A Response* (forthcoming 2016, Review Journal of Political Philosophy) (part of a symposium about Bottlenecks: A New Theory of Equal Opportunity).

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Ruben J. Garcia, *Politics at Work After Citizens United*, 49 Loy. L.A. L. Rev. 1 (2016).

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Michael C. Harper, *Confusion on the Court: Distinguishing Disparate Treatment from Disparate Impact in Young v. Ups and EEOC v. Abercrombie & Fitch, Inc*., 96 B.U. L. Rev. 543, 543 (2016).

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Maria O'Brien Hylton, *After Tackett: Incomplete Contracts for Post-Employment Healthcare*, 36 Pace L. Rev. 317 (2016).

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Alex B. Long, *Employment Discrimination in the Legal Profession: A Question of Ethics*?, 2016 U. Ill. L. Rev. 445 (2016).

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Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment,* 101 Minn. L. Rev. ___ (forthcoming 2016).

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Stephen Plass, *Wage Compression As A Democratic Ideal*, 25 Cornell J.L. & Pub. Pol'y 601 (2016).

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Nicole B. Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 Pepp. L. Rev. 213 (2016).

Nicole B. Porter, *The Difficulty Accommodating Healthcare Workers*, 9 St. Louis U. J. Health L. & Pol'y 1 (2016) (symposium paper).

Jayesh M. Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 Seton Hall L. Rev. 813 (2016).

Jessica Roberts, *Rethinking Employment Discrimination Harms*, 91 Ind. L.J. 393 (2016).

Jessica Roberts, *An Alternate Theory of Hobby Lobby v. Burwell*, 22 Conn. Ins. L.J. --- (forthcoming 2016) (invited symposium contribution).

Jessica Roberts, *The Legality of Tracking Professional Athletes Through Biometric Screening, Amer. J. Bioethics* (forthcoming 2016) (with I. Glenn Cohen, Chris Deubert, & Holly Fernandez Lynch).

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Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 Harv. L. & Pol'y Rev. 479 (2016).

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Elizabeth A. Rowe, *Rats, Traps, and Trade Secrets*, 57 B.C. L. Rev. 381, 381 (2016).

George Rutherglen, *The Constitution and Slavery Overseas*, 39 Seattle U. L. Rev. 695 (2016).

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Paul M. Secunda, *The Teamster Law Professor: Michael J. Zimmer*, 47 Loy. U. Chi. L.J. 676 (2016).

Alexander Hertel-Fernandez & Paul Secunda, *Citizens Coerced: A Legislative Fix for Workplace Political Intimidation Post-Citizens United*, 64 UCLA L. Rev. Discourse 2 (2016).

Paul M. Secunda & Brendan S. Maher, *Pension De-Risking*, 93 Wash. U.L. Rev. 733 (2016).

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Craig Robert Senn, *Redefining Protected "Opposition" Activity in Employment Retaliation Cases*, 37 Cardozo L. Rev. 2035 (2016).

Peter Siegelman, *Protecting the Compromised Worker: A Challenge for Employment Discrimination Law*, 64 Buff. L. Rev. 565, 565 (2016).

Joseph Slater, *Jeffrey Kahana, the Unfolding of American Labor Law: Judges, Workers, and Public Policy Across Two Political Generations*, 1790-1850, 10 NYU J.L. & Liberty 404 (2016).

Sandra F. Sperino, *Discrimination Law: The New Franken-Tort*, 65 DePaul L. Rev. 721 (2016).

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Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 Seattle U. L. Rev. 927 (2016).

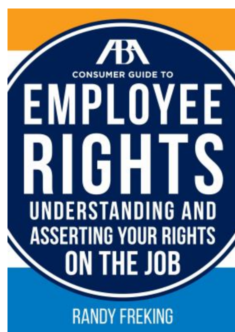
Noah D. Zatz, *Does Work Law Have A Future If the Labor Market Does Not*?, 91 Chi.-Kent L. Rev. 1081 (2016).

Noah D. Zatz, *Get to Work or Go To Jail: Workplace Rights Under Threat* (with Tia Koonse, Theresa Zhen, Lucero Herrera, Han Lu, Steven Shafer, and Blake Valenta). UCLA Institute for Research on Labor and Employment, UCLA Labor Center, A New Way of Life Reentry Project (March 2016).

Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 Seattle U. L. Rev. 859 (2016).

Books of Interest

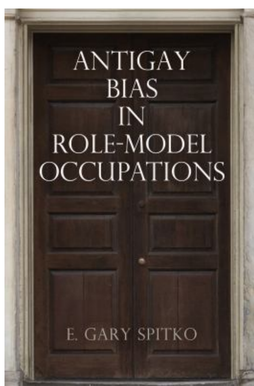
Note: The books in this section include, but are not limited to, books by section members, from 2015 and 2016. (If we have not mentioned your book, we apologize!)



The ABA Consumer Guide to Employee Rights by Randy Freking

ISBN: 9781634250214
Publication Date: 2015-09-07

Although a job is a huge part of most people's lives, few people fully understand the rules that define their employment or know their options when the relationship with their employer sours. This book covers issues such as job security and termination issues, discrimination, job applicant rights, harassment, privacy at work, whistleblower rights, and when to hire an attorney. It will answer questions such as: What rights do I have in the workplace? Can I be fired without warning? Am I entitled to overtime pay even if I am paid a salary? What are my rights if I think I am the victim of discrimination? Written by a top employment attorney, this book will help employees understand their rights and what to do if those rights are violated.



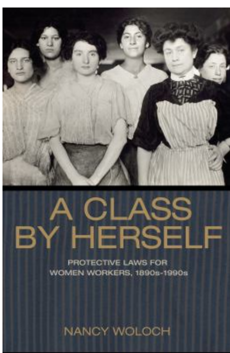
Antigay Bias in Role-Model Occupations by E. Gary Spitko

ISBN: 9780812248708
Publication Date: 2016-11-07

From the first game of the National League of Professional Baseball Clubs on April 22, 1876, tens of thousands of men have played professional sports in the Big Four--baseball, basketball, football, and hockey--major professional sports leagues in the United States. Until April 29, 2013, however, when National Basketball Association center Jason Collins came out publicly as gay, not one of those tens of thousands of men had ever come out to the public as gay while an active player on a major league roster. Is it because gay men can't jump (or throw, or catch, or skate)? Or is it more likely that the costs of coming out are too high? In Antigay Bias in Role-Model Occupations, E. Gary Spitko argues that in the case of athletes, and others in role-model occupations, a record of widespread and frequently systematic employment discrimination has been excluding gay people from the public social spaces that identify and teach whom society respects and whom members of society should seek to emulate. Creating a typology of role models--lawyers/judges, soldiers, teachers, politicians, athletes, and clergy--and the positive values and character traits associated with them, Spitko demonstrates how employment discrimination has been used for the purpose of perpetuating the generally accepted notion that gay people are inferior because they do not possess the requisite qualities--integrity, masculinity, morality, representativeness, all-American-ness, and blessedness--associated with employment in these occupations. Combining the inspirational stories of LGBT trailblazers with analysis of historical data, anecdotal evidence, research, and literature, Antigay Bias in Role-Model Occupations is the first book to explore in a comprehensive fashion the broad effects of sexual orientation discrimination in role-model occupations well beyond its individual victims.

Because of Sex by Gillian Thomas

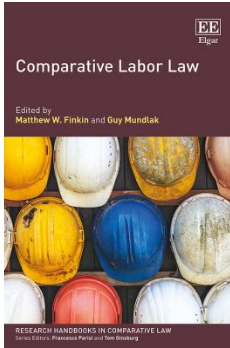
ISBN: 9781137280053
Publication Date: 2016-03-08
"Meticulously researched and rewarding to read...Thomas is a gifted storyteller." --The New York Times Book Review Best known as a monumental achievement of the civil rights movement, the 1964 Civil Rights Act also revolutionized the lives of America's working women. Title VII of the law made it illegal to discriminate "because of sex." But that simple phrase didn't mean much until ordinary women began using the law to get justice on the job--and some took their fights all the way to the Supreme Court. Among them were Ida Phillips, denied an assembly line job because she had a preschool-age child; Kim Rawlinson, who fought to become a prison guard--a "man's job"; Mechelle Vinson, who brought a lawsuit for sexual abuse before "sexual harassment" even had a name; Ann Hopkins, denied partnership at a Big Eight accounting firm because the men in charge thought she needed "a course at charm school"; and most recently, Peggy Young, UPS truck driver, forced to take an unpaid leave while pregnant because she asked for a temporary reprieve from heavy lifting. These unsung heroines' victories, and those of the other women profiled in Gillian Thomas' Because of Sex, dismantled a "Mad Men" world where women could only hope to play supporting roles; where sexual harassment was "just the way things are"; and where pregnancy meant getting a pink slip. Through first-person accounts and vivid narrative, Because of Sex tells the story of how one law, our highest court, and a few tenacious women changed the American workplace forever.



A Class by Herself by Nancy Woloch

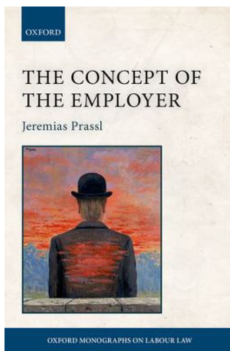
ISBN: 9780691002590
Publication Date: 2015-04-20
A Class by Herself explores the historical role and influence of protective legislation for American women workers, both as a step toward modern labor standards and as a barrier to equal rights. Spanning the twentieth century, the book tracks the rise and fall of women-only state protective laws--such as maximum hour laws, minimum wage laws, and night work laws--from their roots in progressive reform through the passage of New Deal labor law to the feminist attack on single-sex protective laws in the 1960s and 1970s. Nancy Woloch considers the network of institutions that promoted women-only protective laws, such as the National Consumers' League and the federal Women's Bureau; the global context in which the laws arose; the challenges that proponents faced; the rationales they espoused; the opposition that evolved; the impact of protective laws in ever-changing circumstances; and their dismantling in the wake of Title VII of the Civil Rights Act of 1964. Above all, Woloch examines the constitutional conversation that the laws provoked--the debates that arose in the courts and in the women's movement. Protective laws set precedents that led to the Fair Labor Standards Act of 1938 and to current labor law; they also sustained a tradition of gendered law that abridged citizenship and impeded equality for much of the century. Drawing on decades of scholarship, institutional and legal records, and personal accounts, A Class by Herself sets forth a new

narrative about the tensions inherent in women-only protective labor laws and their consequences.



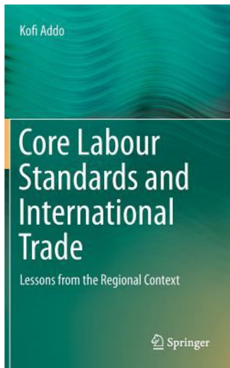
Comparative Labor Law by Matthew Finkin (Editor); Guy Mundlak (Editor)

ISBN: 9781781000120
Publication Date: 2015-09-30
Economic pressure and corporate policies, both transnational and domestic, have placed labor law under severe stress. National responses are so deeply embedded in institutions reflecting local traditions that meaningful comparison is daunting. This book assembles a team of experts from many countries, drawing on a rich variety of comparative methods to capture changes in different countries and regions, emerging trends and national divergences.



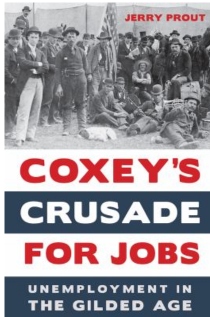
The Concept of the Employer by Jeremias Prassl

ISBN: 9780198735533
Publication Date: 2015-05-26
Employment law has increasingly struggled to adapt to complex modern work arrangements, from agency work to corporate groups. This book suggests that the reason for this failure can be found in our concept of the employer, which has become riddled with internal contradictions in its search for a unitary employer, the counterparty to a bilateral contract, through a series of multi-functional tests focused on the exercise of a range of employer functions. As a result of this tension, full employment law coverage is restricted to a narrow scenario where a single legal entity exercises all employer functions - a paradigm far from the reality of modern labor markets characterized by a fragmentation of work, from the rise of employment agencies and service companies to corporate groups and Private Equity investors. These problems can only be addressed by a careful reconceptualization and the development of a functional concept of the employer. The book draws on existing models in English, German, and European law to develop a definition of the employer as the entity, or combination of entities, exercising functions regulated in a particular domain of employment law. Each of the two strands of the current concept is addressed in turn to demonstrate how a more openly multi-functional approach can successfully overcome the rigidities of the current notion without abandoning a coherent underlying framework. It fills a crucial gap in employment law and corporate law with its analysis of the defects in our current understanding of the employer, and in developing a new functional concept designed to overcome the problems identified.

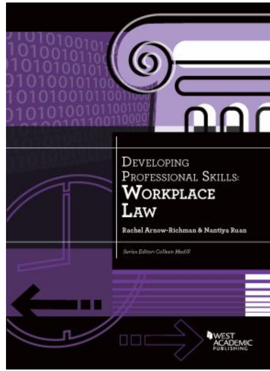


Core Labour Standards and International Trade by Kofi Addo

ISBN: 9783662446188
Publication Date: 2014-12-04
This book examines the labour standards provisions in a number of Regional and Bilateral Trade Agreements, and assesses the potential of using the relevant clauses in these trade agreements as a benchmark for a multilateral approach. Based on the lessons learned from the Regional model, the book proposes a Global Labour and Trade Framework Agreement (GLTFA) combined with a joint ILO/WTO enforcement mechanism to resolve the contentious issue of the link between the CLS and international trade. The history of the linkage between the Core Labour Standards (CLS) and international trade dates back roughly 150 years, and has recently become one of the most vexing issues facing policy-makers. At the heart of the debate is the question whether or not trade sanctions should be imposed on countries that do not respect the CLS as embodied in multilateral conventions administered by the International Labour Organization (ILO). Concretely, this would entail inserting a social clause in the World Trade Organization (WTO) rules, and would trigger the imposition of sanctions on those countries that do not adhere to the CLS.

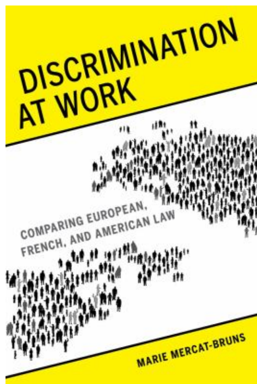


Coxey's Crusade for Jobs by Jerry Prout
ISBN: 9780875804989
Publication Date: 2016-05-15
In the depths of a depression in 1894, a highly successful Gilded Age businessman named Jacob Coxey led a group of jobless men on a march from his hometown of Massillon, Ohio, to the steps of the nation's Capitol. Though a financial panic and the resulting widespread business failures caused millions of Americans to be without work at the time, the word unemployment was rarely used and generally misunderstood. In an era that worshipped the self-reliant individual who triumphed in a laissez-faire market, the out-of-work "tramp" was disparaged as weak or flawed, and undeserving of assistance. Private charities were unable to meet the needs of the jobless, and only a few communities experimented with public works programs. Despite these limitations, Coxey conceived a plan to put millions back to work building a nationwide system of roads and drew attention to his idea with the march to Washington. In Coxey's Crusade for Jobs, Jerry Prout recounts Coxey's story and adds depth and context by focusing on the reporters who were embedded in the march. Their fascinating depictions of life on the road occupied the headlines and front pages of America's newspapers for more than a month, turning the spectacle into a serialized drama. These accounts humanized the idea of unemployment and helped Americans realize that in a new industrial economy, unemployment was not going away and the unemployed deserved attention. This unique study will appeal to scholars and students interested in the Gilded Age and US and labor history.



Developing Professional Skills: Workplace Law by Rachel Arnow-Richman; Nantiya Ruan

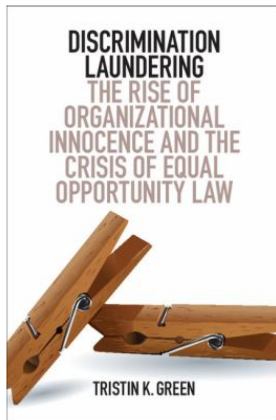
ISBN: 9781634596053
Publication Date: 2016-10-24
Incorporating professional skills and ethics into the traditional workplace law course is a critical but challenging undertaking. This easy-to-use book simplifies the effort, offering eleven discrete exercises designed to help students develop skills in the key areas of drafting, counseling, negotiation and advocacy. Each exercise involves a different substantive area of workplace law, including covenants-not-to compete, wage and hour law, employment discrimination, whistleblower protection and general common law and tort principles. The book is flexible enough to supplement any doctrinal casebook, or can be used to teach a stand-alone skills course. Students learn tasks such as: Conducting an intake interview with a terminated employee Drafting a discrimination complaint Negotiating the terms of a non-compete agreement Conducting a workplace investigation Revising an employee handbook Advising an employer on a legal compliance issue Writing a demand letter in a collective wage and hour action. For more information visit the companion site.



Discrimination at Work by Marie Mercat-Bruns; Christopher Kutz (Foreword by); Elaine Holt (Translator)

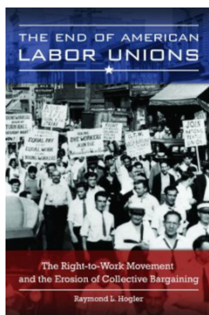
ISBN: 9780520283800
Publication Date: 2016-02-22
A free ebook version of this title is available through Luminos, University of California Press's new open access publishing program for monographs. Visit www.luminosoa.org to learn more. Do the United States and France, both post-industrial democracies, differ in their views and laws concerning discrimination? Marie Mercat-Bruns, a Franco-American scholar, examines the differences in how the two countries approach discrimination. Bringing together prominent legal scholars--including Robert Post, Linda Krieger, Martha Minow, Reva Siegel, Susan Sturm, Richard Ford, and others--Mercat-Bruns demonstrates how the two nations have adopted divergent strategies. The United States continues, with mixed success at "colorblind" policies, to deal with issues of diversity in university enrollment, class action sex-discrimination lawsuits, and rampant police violence against African American men and women. In France, the country has banned the full-face veil while making efforts to present itself as a secular republic. Young men and women whose parents and grandparents came from sub-Sahara and North Africa are stuck coping with a society that fails to take into account the barriers to employment and education they face. Discrimination at Work provides an incisive comparative analysis of how the nature of discrimination in both countries has changed, now often hidden, or steeped in deep unconscious bias. While it is rare for employers in both countries to openly discriminate, deep systemic discrimination exists, rooted in structural and environmental causes and the ways each state has dealt with difference in general. Invigorating and incisive, the book examines hot-button issues such as sexual harassment; race, religious and gender discrimination; and equality for LGBT individuals,

thereby delivering comparisons meant to further social equality and fundamental human rights across borders.



Discrimination Laundering by Tristin K. Green
ISBN: 9781316506998
Publication Date: 2016-11-14
While discrimination in the workplace is often perceived to be undertaken at the hands of individual or 'rogue' employees acting against the better interest of their employers, the truth is often the opposite: organizations are inciting discrimination through the work environments that they create. Worse, the law increasingly ignores this reality and exacerbates the problem. In this groundbreaking book, Tristin K. Green describes the process of discrimination laundering, showing how judges are changing the law to protect employers, and why. By bringing organizations back into the discussion of discrimination, with real-world stories and extensive social-science research, Green shows how organizational and legal efforts to minimize discrimination - usually by policing individuals over broader organizational change - are taking us in the wrong direction, and how the law could do better, by creating incentives for organizational efforts that are likely to minimize discrimination, instead of inciting it.

Note: This book is part of the AALS Employment Discrimination Section Author Meets Reader event on January 5, 2017.

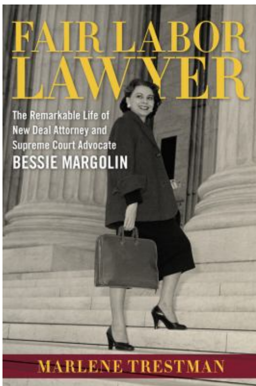


The End of American Labor Unions by Raymond L. Hogler

ISBN: 9781440832390
Publication Date: 2015-02-01
By examining the history of the legal regulation of union actions, this fascinating book offers a new interpretation of American labor-law policy—and its harmful impact on workers today. * Provides a unique interpretation of labor law from a multidisciplinary perspective that encompasses history, politics, economics, culture, and psychology * Considers the role organized labor played in creating the American middle class and what role it might play in the future * Shows the adverse consequences of the contemporary right-to-work movement * Examines the politicized nature of law in America * Offers recommendations for political action to restore union vitality.

The Eternal Criminal Record by James B. Jacobs

ISBN: 9780674368262
Publication Date: 2015-02-09
For over sixty million Americans, possessing a criminal record overshadows everything else about their public identity. A rap sheet, or even a court appearance or background report that reveals a run-in with the law, can have fateful consequences for a personâe(tm)s interactions with just about everyone else. The Eternal Criminal Record makes transparent a pervasive system of police databases and identity screening that has become a routine feature of American life. The United States is unique in making criminal information easy to obtain by employers, landlords, neighbors, even cyberstalkers. Its nationally integrated rap-sheet system is second to none as an effective law enforcement tool, but it has also facilitated the transfer of ever more sensitive information into the public domain. While there are good reasons for a personâe(tm)s criminal past to be public knowledge, records of arrests that fail to result in convictions are of questionable benefit. Simply by placing someone under arrest, a police officer has the power to tag a person with a legal history that effectively incriminates him or her for life. In James Jacobsâe(tm)s view, law-abiding citizens have a right to know when individuals in their community or workplace represent a potential threat. But convicted persons have rights, too. Jacobs closely examines the problems created by erroneous record keeping, critiques the way the records of individuals who go years without a new conviction are expunged, and proposes strategies for eliminating discrimination based on criminal history, such as certifying the records of those who have demonstrated their rehabilitation.

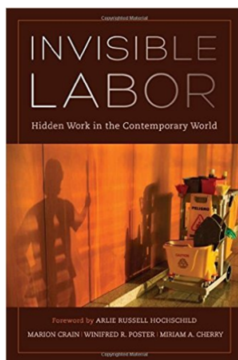


Fair Labor Lawyer by Marlene Trestman

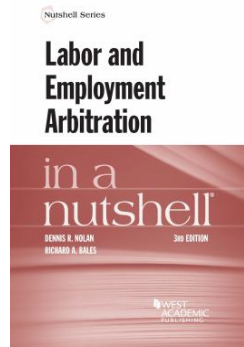
ISBN: 9780807162088
Publication Date: 2016-03-01
Through a life that spanned every decade of the twentieth century, Supreme Court advocate Bessie Margolin shaped modern American labor policy while creating a place for female lawyers in the nation's highest courts. Despite her beginnings in an orphanage and her rare position as a southern, Jewish woman pursuing a legal profession, Margolin became an important and influential Supreme Court advocate. In this comprehensive biography, Marlene Trestman reveals the forces that propelled and the obstacles that impeded Margolin's remarkable journey, illuminating the life of this trailblazing woman. Raised in the Jewish Orphans' Home in New Orleans, Margolin received an extraordinary education at the Isidore Newman Manual Training School. Both institutions stressed that good citizenship, hard work, and respect for authority could help people achieve economic security and improve their social status. Adopting these values, Margolin used her intellect and ambition, along with her femininity and considerable southern charm, to win the respect of her classmates, colleagues, bosses, and judges -- almost all of whom were men. In her career she worked with some of the most brilliant legal professionals in America. A graduate of Tulane and Yale Law Schools, Margolin launched her career in the early 1930s, when only 2 percent of America's attorneys

were female, and far fewer were Jewish and from the South. According to Trestman, Margolin worked hard to be treated as "one of the boys." For the sake of her career, she eschewed marriage -- but not romance -- and valued collegial relationships, never shying from a late-night brief-writing session or a poker game. But her personal relationships never eclipsed her numerous professional accomplishments, among them defending the constitutionality of the New Deal's Tennessee Valley Authority, drafting rules establishing the American military tribunals for Nazi war crimes in Nuremberg, and, on behalf of the Labor Department, shepherding through the courts the child labor, minimum wage, and overtime protections of the Fair Labor Standards Act of 1938. A founding member of that National Organization for Women, Margolin culminated her government service as a champion of the Equal Pay Act, arguing and winning the first appeals. Margolin's passion for her work and focus on meticulous preparation resulted in an outstanding record in appellate advocacy, both in number of cases and rate of success. By prevailing in 21 of her 24 Supreme Court arguments Margolin shares the elite company of only a few dozen women and men who attained such high standing as Supreme Court advocates.

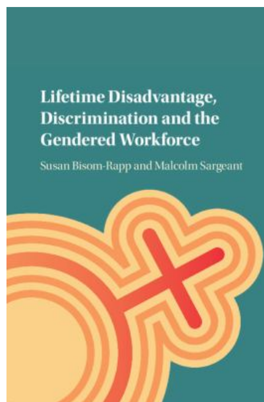
Gender Nonconformity and the Law by Kimberly A. Yuracko
ISBN: 9780300125856
Publication Date: 2016-01-26
When the Civil Rights Act of 1964 was passed, its primary target was the outright exclusion of women from particular jobs. Over time, the Act's scope of protection has expanded to prevent not only discrimination based on sex but also discrimination based on expression of gender identity. Kimberly Yuracko uses specific court decisions to identify the varied principles that underlie this expansion. Filling a significant gap in law literature, this timely book clarifies an issue of increasing concern to scholars interested in gender issues and the law.



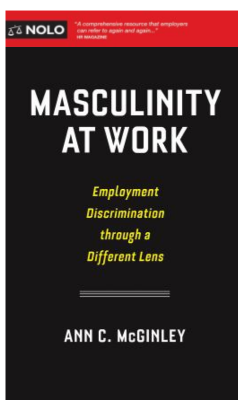
Invisible Labor: Hidden Work in the Contemporary World
Marion Crain (Editor), Winifred Poster (Editor), Miriam Cherry (Editor)
ISBN: 978-0520287174
Publication Date: 2016-06-28
Across the world, workers labor without pay for the benefit of profitable businesses—and it's legal. Labor trends like outsourcing and technology hide some workers, and branding and employer mandates erase others. Invisible workers who remain under-protected by wage laws include retail workers who function as walking billboards and take payment in clothing discounts or prestige; waitstaff at “breastaurants” who conform their bodies to a business model; and inventory stockers at grocery stores who go hungry to complete their shifts. Invisible Labor gathers essays by prominent sociologists and legal scholars to illuminate how and why such labor has been hidden from view.



Labor and Employment Arbitration in a Nutshell by Dennis Nolan; Richard Bales
ISBN: 9781634602860
Publication Date: 2016-11-15
Labor and employment arbitration law simplified. Authoritative coverage provides a description of the origin, development, and practice of labor and employment arbitration. Text focuses on the fundamentals of the labor and employment arbitration process and explores the major arbitration law issues, their importance, and the conflicting opinions on them.



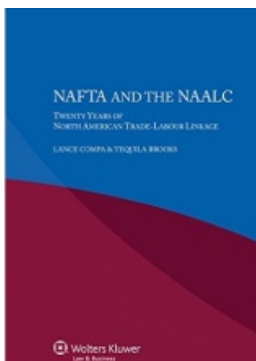
Lifetime Disadvantage, Discrimination and the Gendered Workforce by Susan Bisom-Rapp; Malcolm Sargeant
ISBN: 9781107123533
Publication Date: 2016-10-20
Lifetime Disadvantage, Discrimination and the Gendered Workforce fills a gap in the literature on discrimination and disadvantage suffered by women at work by focusing on the inadequacies of the current law and the need for a new holistic approach. Each stage of the working life cycle for women is examined with a critical consideration of how the law attempts to address the problems that inhibit women's labour force participation. By using their model of lifetime disadvantage, the authors show how the law adopts an incremental and disjointed approach to resolving the challenges, and argue that a more holistic orientation towards eliminating women's discrimination and disadvantage is required before true gender equality can be achieved. Using the concept of resilience from vulnerability theory, the authors advocate a reconfigured workplace that acknowledges yet transcends gender.
Note: This book is part of the AALS Employment Discrimination Section Author Meets Reader event on January 5, 2017.



Masculinity at Work by Ann C. McGinley

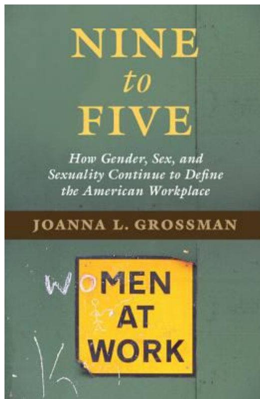
ISBN: 9780814796139
Publication Date: 2016-05-31
In late October 2013, the Miami Dolphins' player Jonathan Martin walked out on his team and checked into a mental health institution. The original story implied that Martin could not take the professional pressure. Within days, the story changed. News sources reported that Martin's teammates had repeatedly bullied him and as a result, the twenty-four year-old African American player suffered serious depression. The response was skeptical, and many opined the harassment involved was simply locker room banter that all players endure; essentially, that boys will be boys. Masculinity at Work uses the Jonathan Martin case and

others to analyze Title VII of the Civil Rights Act of 1964 through the lens of masculinities theory. Illustrating how harassment and discrimination can occur because of sex even if the gendered nature of the behavior remains unseen to onlookers, this book educates readers about the invisibility of masculine structures and practices, how society constructs concepts of masculinity, and how men (and sometimes women) perform masculinity in different ways depending on their identities and situational contexts. Using a sophisticated mix of legal, gender, and social science analysis, the author demonstrates how masculinities theory can also offer significant insights into the behaviors and motivations of employers, as well as workplace structures that disadvantage both men and women who do not conform to gender stereotypes. Both a theoretical disposition and a practical guide for legal counsel and judges on the interpretation of sex and race discrimination cases, Masculinity at Work explains how this theory can be used to interpret Title VII in new, liberating ways.
Note: This book is part of the AALS Employment Discrimination Section Author Meets Reader event on January 5, 2017.



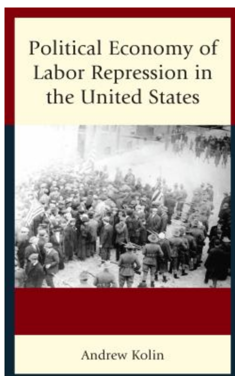
NAFTA and the NAALC by Lance A. Compa; Tequila Brooks

ISBN: 9789041160102
Publication Date: 2015-02-17
The 20th anniversary edition of the NAFTA and NAALC monograph in the International Encyclopaedia of Laws, Labour Law and Industrial Relations provides an up-to-date retrospective on all of the citizen petitions filed under the NAFTA labour side agreement since 1994. The monograph includes early petitions filed about trade union rights at the Honeywell and Echlin plants in Mexico, the McDonald's case in Canada and the Washington Apple and DeCoster Egg cases in the United States as well as more recent petitions filed about migrant worker rights under the H-2A and H-2B visa programs in the US. In addition to being the most complete compilation of NAALC cases in existence today, NAFTA and the NAALC Twenty Years of North American Trade-Labour Linkage outlines the internal mechanics leading to the filing of a 2000 NAALC petition with the Government of Mexico about unequal treatment of migrant workers in the US, and describes changes in the treatment of petitions by US, Mexican and Canadian authorities over the last 20 years. It also contains a chapter that compares the NAALC to the OECD Guidelines for Multi-National Enterprises and highlights recent North American cases filed under the OECD Guidelines including the relatively lesser known 2004 Yucatan Markey Tex-Coco Tex petition which was dual filed under both mechanisms. Finally, the 20th edition introduces a new chapter that compares labour provisions in US and Canadian free trade agreements negotiated since 2000 and discusses recent labour petitions filed under the US-Central America- Dominican Republic Free Trade Agreement (CAFTA-DR) and US free trade agreements with Bahrain and Peru.

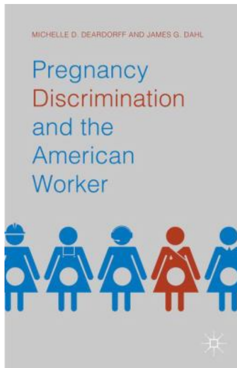


Nine to Five by Joanna L. Grossman

ISBN: 9781107133365
Publication Date: 2016-05-03
Nine to Five provides a lively and accessible introduction to the laws and policies regulating sex, sexuality, and gender identity in the American workplace. Contemporary cases and events reveal the breadth and persistence of sexism and gender stereotyping. Through a series of essays organized around sex discrimination, sexual harassment, pregnancy discrimination, and pay equity, the book highlights legal rules and doctrines that privilege men over women and masculinity over femininity. In understanding the law - what it forbids, what it allows, and to what it turns a blind eye - we see why it is far too soon to declare the triumph of working women's equality. Despite significant gains for women, gender continues to define the work experience in both predictable and surprising ways. A witty and engaging guide to the legal terrain, Nine to Five also proposes solutions to the many obstacles that remain on the path to equality.
Note: This book is part of the AALS Employment Discrimination Section Author Meets Reader event on January 5, 2017.

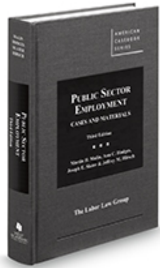


Political Economy of Labor Repression in the United States by Andrew Kolin
ISBN: 9781498524025
Publication Date: 2016-11-16
This book presents a detailed explanation of the essential elements that characterize capital labor relations and the resulting social conflict that leads to repression of labor. It links repression to the class struggle between capital and labor. The starting point involves an historical approach used to explore labor repression after the American Revolution. What follows is an examination of the role of government along with the growth of American capitalism to analyze capital-labor conflict. Subsequent chapters trace US history during the 19th century to discuss the question of the role assumed by the inclusion/exclusion of capital and labor in political-economic structures, which in turn lead to repression. Wholesale exclusion of labor from a fundamental role in framing policy in these institutions was crucial in understanding the unfolding of labor repression. Repression emerges amid a social struggle to acquire and maintain control over policy-making bodies, which pits the few against the many. In response, labor attempts to push back against institutional exclusion in part by the formation of labor unions. Capital reacts to such actions using repression to prevent labor from having a greater role in social institutions. For instance, this is played out inside the workplace as capital and labor engage in a political struggle over the function of the workplace. Given capital s monopoly of ownership, capital employs various means to repress labor at work, including the introduction of technology, mass firings, crushing strikes, and the use of force to break up unions. The role of the state is not to be overlooked in its support of elite control over production, as well as aiding through legal means the growth of a capitalist economy in opposition to labor s conception of greater economic democracy. This book explains how and why labor continues to confront repression in the 20th and 21st centuries."



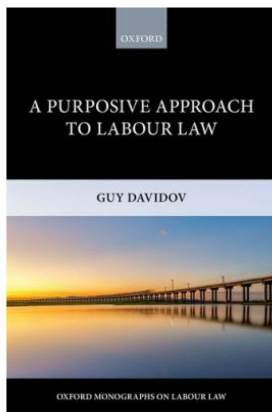
Pregnancy Discrimination and the American Worker by Michelle D. Deardorff; James G. Dahl

ISBN: 9781137343048
Publication Date: 2015-11-30
Deardorff and Dahl examine how the US courts have addressed pregnancy discrimination under federal statutory law. The historical, comparative, and federal and state legal contexts are analyzed in the competing conceptions of pregnancy and employment, exploring implications for gender equality and the treatment of pregnancy in employment.



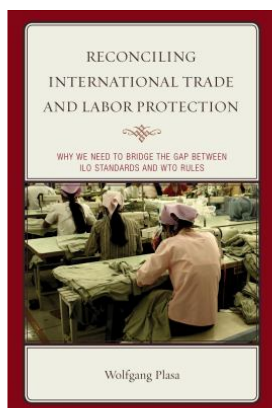
Public Sector Employment: Cases and Materials (3d ed. 2016), by Jeffrey M. Hirsch, Martin H. Malin, Ann C. Hodges, & Joseph E. Slater.

ISBN: 9781634602655
Publication Date: 2016-07-19
This law school casebook includes materials dealing with the labor and employment law rights of public employees. It covers constitutional rights, civil service, tenure, overtime, pension, and bankruptcy laws specific to public employees, and also public employee collective bargaining statutes and activities of public-sector unions and employers. It emphasizes how the law governing the public sector workplace differs from the private sector. It also focuses on how public-sector labor rules vary significantly among states (and the federal sector) in important areas including employee coverage, union organizing, the duty to bargain, scope of bargaining, impasse resolution (strikes and alternatives to strikes), bargaining units, and grievance arbitration. The book facilitates classroom examination of different policies, issues, and concerns that arise when the employer is a government entity.



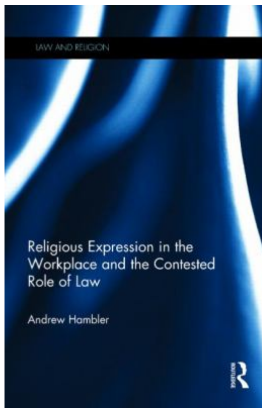
A Purposive Approach to Labour Law by Guy Davidov
ISBN: 9780198759034
Publication Date: 2016-07-05
The mismatch between goals and means is a major cause of crisis in labour law. The regulations that we use - the legal instruments and techniques - are no longer in sync with the goals they are supposed to advance. This mismatch leads to a problem of coverage, where many workers who need theprotection of labour law are not covered by it, as well as a problem of obsoleteness, as labour laws are not sufficiently updated in light of dramatic changes in the labour market. Adopting a purposive approach to interpretation and legislative reform, this volume addresses this crisis of mismatch. It first articulates the goals of labour law, both general and specific, through an in-depth normative discussion and a consideration of critiques. The book then proceeds toreconsider our means, asking what we need to change or improve in the laws

themselves in order to better advance the goals. Some of the proposed solutions are at the level of judicial interpretation, others at the legislative level. The book offers several examples for the way a purposive analysisshould be performed in concrete cases. It also recommends institutional structures that are suited to ongoing adaptation of the law to ensure that our goals are advanced even when circumstances frequently change. Finally, in response to the crisis of enforcement in this field, which frustrates theachievement of labour law's goals, several proposals to improve compliance and enforcement are considered.



Reconciling International Trade and Labor Protection by Carl Plasa; Mogens Peter Carl (Preface by); Wolfgang Plasa

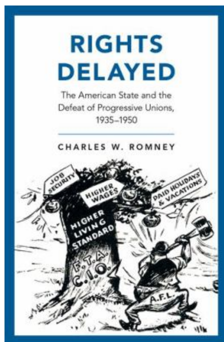
ISBN: 9781498521383
Publication Date: 2015-08-20
Over the last two decades or so, a number of developing countries have become important suppliers of manufactured goods. A good deal of these goods are produced under extremely poor working conditions, incompatible with the fundamental rights and freedoms. However, WTO rules do not allow restrictions on imports of such goods, and the ILO hardly ever sanctions violations of international labor standards. On the one hand, this leaves exporting countries free to compromise on labor protection in order to enhance their competitiveness on foreign markets. On the other hand, importing countries are obliged to keep their markets open for goods produced under substandard labor conditions. This gives rise to the question of whether the rules of the multilateral trading system should be linked to international labor standards. This study argues that there are two trade-related reasons for establishing such a link. The first one is commonly referred to as social dumping. GATT rules enshrine the principles that should govern international trade: fairness and responsibility. These principles should also apply where trade meets labor protection. Exporting goods made under substandard labor conditions is unfair and distorts trade. It would therefore be consistent to make social dumping actionable. The other reason concerns the responsibility of importing countries. Increased imports of goods produced under substandard labor conditions are an incentive for the exporting country to produce more goods under the same labor conditions, and ship them to the same importing country. This results in a proliferation of violations of labor standards, for which the importing country shares the responsibility. There is a need to adopt a link between trade and labor standards enabling the importing country to cap imports in order to escape the blame.



Religious Expression in the Workplace and the Contested Role of Law by Andrew Hambler

ISBN: 9780415746625
Publication Date: 2014-11-10

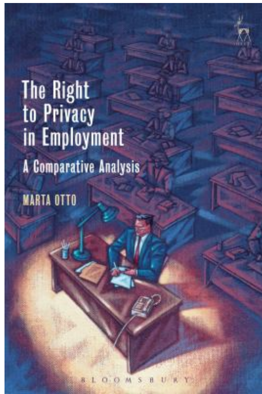
The workplace is a key forum in which the issue of religion and its position in the public sphere is under debate. Desires to observe and express religious beliefs in the workplace can introduce conflict between employees and employers. This book addresses the role the law plays in the resolution of these potential conflicts. The book considers the definition and underlying motives of religious expression, and explores the different ways it may impact the workplace. Andrew Hambler identifies principled responses to workplace religious expression within a liberal state and compares this to the law applying in England and Wales and its interpretation by courts and tribunals. The book determines the extent to which freedom of religious expression for the individual enjoys legal protection in the workplace in England and Wales, and asks whether there is a case for changing the law to strengthen that protection. The book will be of great use and interest to scholars and students of religion and the law, employment law, and religion and human rights.



Rights Delayed by Charles W. Romney

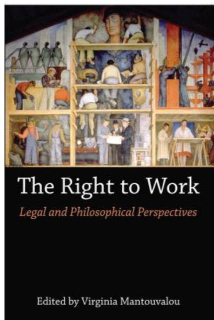
ISBN: 9780190250294
Publication Date: 2016-05-04

Progressive unions flourished in the 1930s by working alongside federal agencies created during the New Deal. Yet in 1950, few progressive unions remained. Why? Most scholars point to domestic anti-communism and southern conservatives in Congress as the forces that diminished the New Deal state, eliminated progressive unions, and destroyed the radical potential of American liberalism. Rights Delayed: The American State and the Defeat of Progressive Unions argues that anti-communism and Congressional conservatism merely intensified the main reason for the decline of progressive unions: the New Deal state's focus on legal procedure. Initially, progressive unions thrived by embracing the procedural culture of New Deal agencies and the wartime American state. Between 1935 and 1945, unions mastered the complex rules of the NLRB and other federal entities by working with government officials. In 1946 and 1947, however, the emphasis on legal procedure made the federal state too slow to combat potentially illegal cooperation between employers and the Teamsters. Workers who supported progressive unions rallied around procedural language to stop what they considered Teamster collusion, but found themselves dependent on an ineffective federal state. The state became even less able to protect employees belonging to left-led unions after the Taft-Hartley Act's anti-communist provisions-and decisions by union leaders-limited access to the NLRB's procedures. From 1946 until 1950, progressive unions withered and eventually disappeared from the Pacific canneries as the unions failed to pay the cost of legal representation before the NLRB. Workers supporting progressive unions had embraced procedural language to claim their rights, but by 1950, those workers discovered that their rights had vanished in an endless legal discourse.



The Right to Privacy in Employment: A Comparative Analysis by Marta Otto
ISBN: 9781509906130
Publication Date: 03-11-2016
At the beginning of the twenty-first century the term 'privacy' gained new prominence around the world, but in the legal arena it is still a concept in 'disarray'. Enclosing it within legal frameworks seems to be a particularly difficult task in the employment context, where encroachments upon privacy are not only potentially more frequent, but also, and most importantly, qualitatively different from those taking place in other areas of modern society. This book suggests that these problems can only be addressed by the development of a holistic approach to its protection, an approach that addresses the issue of not only contemporary regulation but also the conceptualization, adjudication, and common (public) perception of employees' privacy.

The book draws on a comprehensive analysis of the conceptual as well as regulatory convergences and divergences between European, American and Canadian models of privacy protection, to reconsider the conceptual and normative foundations of the contemporary paradigm of employees' privacy and to elucidate the pillars of a holistic approach to the protection of right to privacy in employment.



The Right to Work: Legal and Philosophical Perspectives by Virginia Mantouvalou (Editor)

ISBN: 9781849465106
Publication Date: 2015-01-29
The value of work cannot be underestimated in today's world. Work is valuable because productive labour generates goods needed for survival, such as food and housing; goods needed for self-development, such as education and culture; and other material goods that people wish to have in order to live a fulfilling life. A job also generally inspires a sense of achievement, self-esteem and the esteem of others. People develop social relations at work, which can be very important for them. Work brings both material and non-material benefits. There is no doubt that work is a crucial good. Do we have a human right to this good? What is the content of the right? Does it impose a duty on governments to promote full employment? Does it entail an obligation to protect decent work? There is also a question about the right-holders. Do migrants have a right to work, for example? At the same time many people would rather not work. What kind of right is this, if many people do not want to have it? The chapters of this book address the uncertainty and controversy that surround the right to work both in theoretical scholarship and in policymaking. They discuss the philosophical underpinnings of the right to work, and its development in human rights law at national level (in jurisdictions such as the United Kingdom, Australia, Japan, France and the United States) and international level (in the context of the United Nations, the European Social Charter, the International Labour Organization, the European Convention on Human Rights and other legal orders).

The Supreme Court on Unions by Julius G. Getman

ISBN: 9781501702730
Publication Date: 2016-06-14
Labor unions and courts have rarely been allies. From their earliest efforts to organize, unions have been confronted with hostile judges and antiunion doctrines. In this book, Julius G. Getman argues that while the role of the Supreme Court has become more central in shaping labor law, its opinions betray a profound ignorance of labor relations along with a persisting bias against unions. In The Supreme Court on Unions, Getman critically examines the decisions of the nation's highest court in those areas that are crucial to unions and the workers they represent: organizing, bargaining, strikes, and dispute resolution. As he discusses Supreme Court decisions dealing with unions and labor in a variety of different areas, Getman offers an interesting historical perspective to illuminate the ways in which the Court has been an influence in the failures of the labor movement. During more than sixty years that have seen the Supreme Court take a dominant role, both unions and the institution of collective bargaining have been substantially weakened. While it is difficult to measure the extent of the Court s responsibility for the current weak state of organized labor and many other factors have, of course, contributed, it seems clear to Getman that the Supreme Court has played an important role in transforming the law and defeating policies that support the labor movement."

Unequal Justice: Why Employment Discrimination Plaintiffs Lose by Sandra Sperino and Suja Thomas
Note: This book's publication date is in 2017. We are listing it here because authors will be part of the AALS Employment Discrimination Section Author Meets Reader event on January 5, 2017.

Writing for Hire by Catherine L. Fisk

ISBN: 9780674971400
Publication Date: 2016-10-17
Required to sign away their legal rights as authors as a condition of employment, professional writers may earn a tidy living for their work, but they seldom own their writing. Writing for Hire traces the history of labor relations that defined authorship in film, TV, and advertising in the mid-twentieth century. Catherine L. Fisk examines why strikingly different norms of attribution emerged in these overlapping industries, and she shows how unionizing enabled Hollywood writers to win many authorial rights, while Madison Avenue writers achieved no equivalent recognition. In the 1930s, the practice of employing teams of writers to create copyrighted works became widespread in film studios, radio networks, and ad agencies. Sometimes Hollywood and Madison Avenue employed the same people. Yet the two industries diverged in a crucial way in the 1930s, when screenwriters formed the Writers Guild to represent them in collective negotiations with media companies. Writers Guild members believed they shared the same status as literary authors and

fought to have their names attached to their work. They gained binding legal norms relating to ownership and public recognition - norms that eventually carried over into the professional culture of TV production. In advertising, by contrast, no formal norms of public attribution developed. Although some ad writers chafed at their anonymity, their nonunion workplace provided no institutional framework to channel their demands for change. Instead, many rationalized their invisibility as creative workers by embracing a self-conception as well-compensated professionals devoted to the interests of clients.