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Aude Lejeune

PhD in Sociology and Political Science
Visiting Scholar, Massachusetts Institute
of Technology (USA)

Jean-François Orianne

PhD in Sociology and Political Science
Assistant Professor, University of Liège (Belgium)

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Introduction

Stephanie, 33, was working as an architect for a small municipality in South Belgium when she fell pregnant. Several days after she told her employer she was pregnant, Stephanie received a negative assessment and was subsequently dismissed. She did not want to fight her dismissal because she felt she was partly in the wrong for her handling of the situation. She relates: 'I announced my pregnancy when I was almost three months pregnant. Maybe I should have done that before. But you know... I did not want to attract ward off ill fortune by disclosing the news too early. Nevertheless, her father (a former union activist) contacted his union for advice. A union lawyer advised that Stephanie would benefit from the statutory protection afforded to pregnant women under the 1971 labor law.

After her father convinced her, Stephanie met a private labor lawyer who works in collaboration with her union. 'When I met the lawyer for the first time, I was not sure I wanted to fight my dismissal. I went there because my father wanted to. But the lawyer told me that what my employer did was not fair. He convinced me that I was not in the wrong for my action'. Through this litigation, Stephanie wanted her former employer to recognize that she did a good job in the company. She did not want her job back, but did want the negative assessment to be changed. A few weeks later, one of Stephanie's friends told her about the Belgian Institute for Equality of Women and Men, a government agency empowered to enforce newly enacted anti-discrimination legislation. She went there to meet with a lawyer specializing in anti-discrimination law, who offered support from the Institute to begin an additional action explicitly directed against the discrimination she experienced. The lawyer explained to Stephanie that a lot of women are fired – or not hired in the first place – when their parenting plans are clear. The Institute expressed interest in her case because they were trying to develop a strategy concerning pregnancy and the workplace. Stephanie agreed to proceed with the case, realizing that her personal story could result in a positive impact on other women's lives. Stephanie explains: 'The lawyer made me realize that my case could benefit other women. My misfortune can have positive consequences; the situation can change at a broader level.' In addition to Stephanie and her lawyer's vindication, the Institute hired another attorney to defend the cause of women at work on a wider scale. The Institute got in touch with national media, such as newspapers and TV, and brought the case to the attention of the public.

Through her different encounters with union, court, and government equality agency lawyers, Stephanie reported diverse understandings of her personal experience of injustice in the workplace. Mirroring Millie Simpson's story, as told by Patricia Ewick and Susan Silbey (1998), Stephanie's narrative illustrates that ordinary citizens' experience of the law is an evolving process. In this paper, we analyze how private, union, and government equality agency lawyers qualify

complaints as “employment discrimination” in Belgium. Tracking different stages in the construction of discrimination cases, we analyze how lawyers shape workers’ experiences and representations of injustice in the workplace and, more broadly, how lawyers shape workers’ legal and rights consciousness. Instead of focusing on ordinary citizens’ experience of the law in their everyday lives, we focus on moments when ordinary citizens interact with lawyers or other legal professionals. More precisely, we investigate how people experience the law as a process and what role “legal mediators” play in such a process.

We argue that private lawyers, union lawyers, and lawyers working for government equality agencies do not all refer to or invoke the same legislation when they face a discrimination case. Our field investigations and empirical data show two different ways of translating injustice at work. While some lawyers refer to labor legislation negotiated by unions and employers’ organizations, others refer to anti-discrimination legislation. While the former contributes to rolling out the enactment of labor legislation designed to protect vulnerable workers, the latter produces new frames for understanding injustices at work by referring to existing discrimination legislation.

By analyzing workers’ experiences of discrimination and the role lawyers play in litigating these issues, this study reveals broader changes that have occurred in Belgian courts within the last decades. While in the US and other common law countries, courts have traditionally been used to vindicate rights, this has not been the case in civil law countries. Under European pressure, discrimination policies and laws have brought with them new ways of using the Belgian courts. Through this paper, we also ask if these changes tend to broaden the framework Belgian citizens use to consider their rights.

Bringing together the legal and rights consciousness studies and the sociology of mediation (Section 1) in the case of employment discrimination in Belgium (Sections 2 and 3), we examine the processes of legal translation and qualification (Section 4), as well as the construction of workers’ rights consciousness (Section 5). Focusing on lawyers’ and plaintiffs’ interactions and tracking different stages in the construction of discrimination cases, from the moment when a future litigant describes an event as an injustice to the moment when the judge recognizes a discriminatory behavior (or conversely, dismisses a case), we are left with the following question: **does the way in which lawyers interpret and describe a case contribute to shaping workers’ experience of injustice and understanding of discrimination?** Through this paper, we suggest several possible empirical explanations of the way in which lawyers’ interpretation of a case directly affects workers’ rights consciousness.

1. The role of legal mediators in legal and rights consciousness studies

To analyze the way in which lawyers and legal mediators help to shape the rights and legal consciousness of workers, we have sought to bring together two theoretical frameworks: legal and rights consciousness studies and the sociology of mediation.

Legal consciousness studies have been carried out in the United States at a particular moment in the history of the Law and Society tradition. Research in this field shifted away from an instrumental conception of the law towards a constitutive perspective that views law as one of many competing forces that affect and shape social life. Over the last 20 years, Law and Society scholars have put more emphasis on cultural dimensions of the law. The concept of "legal consciousness" illustrates this shift in socio-legal research (Ewick and Silbey, 1998). Scholars have highlighted the conditions under which citizens are able to resist the law, at a cultural level (Sarat, 1990), community level (Greenhouse, 1988; Ygnvesson, 1989) or individual level (Ewick and Silbey, 2003) ⁽²⁾. One of their main concerns was to understand how legal consciousness is translated into actions and decisions, which is referred to by some scholars as "legal mobilizations" (McCann, 1994; Nielson, 2000; Stryker, 2007).

One of the main criticisms addressed to legal consciousness scholars was that they pay too much attention to ordinary citizens and neglect the role professionals can play in framing legal consciousness ⁽³⁾. Some researchers suggest that legal consciousness studies should integrate legal professionals as they mobilize the law and legal language in their routine commitments to citizens. According to Jerome Pelisse, lawyers' interactions with ordinary people contribute to shaping how citizens experience the law in their everyday life (2005: 125). Other scholars have already emphasized the influence lawyers wield in shaping ordinary citizens' perception of the law. In the 1960s, Jerome Carlin, Jan Howard, and Sheldon Messinger (1967) showed that people who have directly experienced standing trial have a markedly different perception of the law compared with those who have never experienced lawyers and courts (see also: Curran, 1977; Sarat and Felstiner, 1986; Conley and O'Barr, 1990). In *Rights at Work*, Michael McCann brings together legal mobilizations and rights consciousness. He demonstrates that legal mobilizations, even if they do not have a significant impact in changing social structures, have transformed the way women understand payment equity at work. "Perhaps the most important achievement of the movement has been the transformations in many working women's understandings, commitments, and

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2. Many scholars have mobilized the concept of legal consciousness and attributed it with diverse meanings. Susan Silbey suggests that the debate around this term should move on and that as such it is more useful to invoke other concepts to develop our understanding of how people experience law (2005).
 3. For further critical comments on legal consciousness studies, see García Villegas (2003).

affiliations.” (1994: 230) This paper explores, in one setting, the results of these changed conceptions and understandings.

This paper pays particular attention to the role played by legal mediators and lawyers in the construction of workers’ experience of the law. To this end, we utilize a second theoretical framework: the sociology of mediations and mediators. This framework has been developed in France over more than 20 years by two groups of scholars: the *Centre de Sociologie de l’Innovation*, producing studies in the sociology of sciences and techniques (Callon, 1986; Latour, 1987; Hennion, 1983; Vinck, 1999) and a second group exploring the “Economy of conventions” (Bessy and Eymard-Duvernay, 1998; Eymard-Duvernay and Marchal, 1997; Meyer, 1998; De Munck, 2006; Oriane and Maroy, 2008).

The sociology of mediations takes its roots in Harold Garfinkel’s epistemology (1967). Rather than focusing on factual occurrences, Garfinkel instead studied the processes through which those facts – or social events – are built. He showed that the meaningful, patterned and orderly character of everyday life is something that people must constantly work to achieve. In Garfinkel’s view, members of society must have some shared methods that they use to mutually construct the meaningful orderliness of social situations (1967: 5). “In line with this assumption, the goal of ethno-methodological investigations becomes the description of the methods and practices employed in the production of the orderly character of everyday life. These methods and practices are embedded in the work that people do, and realized in local settings by the people who are party to those settings” (Garfinkel, 1967: 6).

Legal mediators are legally trained people who take part in collectives involving objects and programs. They are go-betweens or coordinators who get people interested and negotiate the terms of their involvement (Callon, 1986). It is important to emphasize that we are not speaking specifically about those who play the role of the official third party in formal dispute resolution processes that go by the name mediation. In this context, mediators are legal professionals who are active in a range of transactions as intermediaries between citizens, government agents, organizational members including employers, and the law as a body of texts and set of processes and practices. According to Susan Sturm, they play a pivotal role in qualifying uncertain facts into legal language (2001: 522-524; 2005).

In short, by cross-referencing the sociology of mediators and legal consciousness studies, this paper examines the processes of legal translation and qualification, as well as the construction of rights consciousness.

2. Employment, discrimination, and courts in Belgium

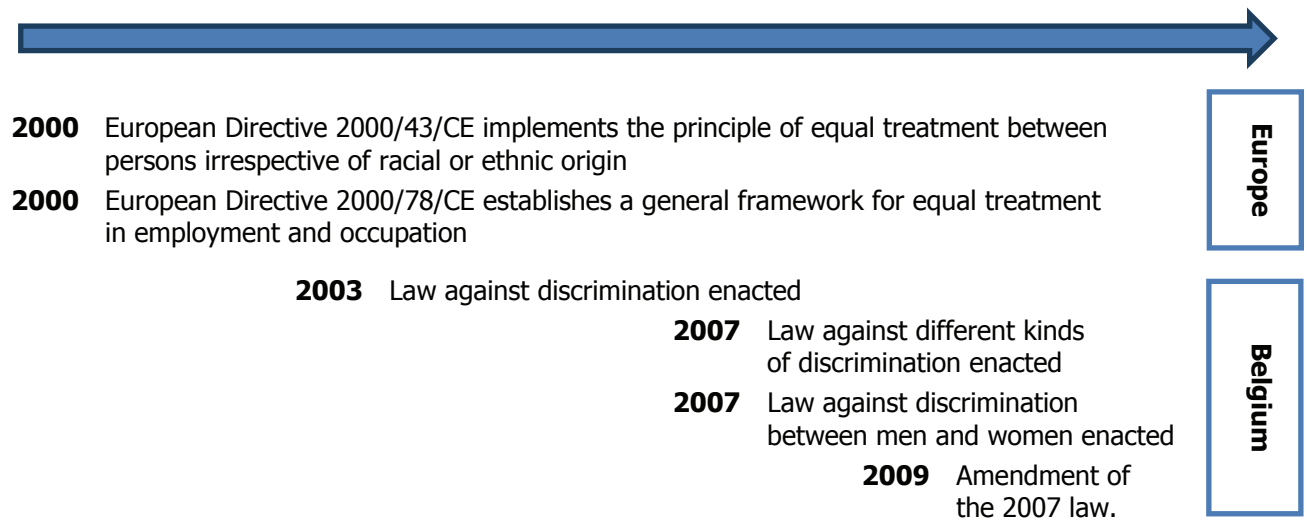
In Belgium, civil society is structured around a number of socio-political pillars (*piliers / verzuiling*), which played a significant role in the construction of the Belgian welfare state. These pillars are sub-systems that bring together political parties, labor unions, education networks, health insurance policy, leisure organizations etc. sharing a similar set of values: namely the Socialist, the Christian and the Liberal pillars (De Munck, 2002). While in the US and other common law countries, courts have traditionally been used to vindicate rights, this has not been the case in civil law countries. Since the constitution of the state in 1831, Belgium has evolved through a very complex system of labor negotiation and dialogue among the state, labor unions, and employers' federations as well as among those pillar organizations listed above. Courts were not a significant player in the process of vindicating workers' rights at a collective level. We argue here that discrimination policies and laws bring with them new ways of using Belgian courts, promoting strategic litigation to vindicate civil rights.

Unions have always been a strategic player in these negotiations, and the 52% unionization rate is relatively high (union membership is around 12 percent in the United States and 8 percent in France) ⁽⁴⁾. Most of the labor legislation aims at protecting workers who are generally viewed as the weaker, more vulnerable party in relationships with employers. The 1971 labor law, the 1991 law on the protection of workers, and the 2002 law against harassment in the workplace are major parts of this workers' protection movement. In the 1970s, anti-discrimination rhetoric began to incorporate inequalities between men and women at work. Since then, this theme has been increasingly present in political and legal speeches. From the late 1980s, anti-discrimination rhetoric has been expanded to include racism and xenophobia at work. Even so, the anti-discrimination laws became truly significant only in the early 2000s, under European Union pressure. The first Belgian legislation against discrimination was enacted in 2003 and two additional statutes were enacted in 2007: the law against discrimination and the law against discrimination between men and women. While anti-discrimination has been an issue for a long time in the United States where the Title VII of the Civil Rights Act of 1964 already protected most American employees from employment discrimination based upon race, color, religion, sex, or national origin (Burstein, 1985; Donohue and Siegelman, 2005), anti-discrimination is a fairly new debate in Belgium.

4. Organization for Economic Cooperation and Development (OECD).

Anti-discrimination legislation in Belgium and Europe

2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011



Belgian legislation enacted in 2003, 2007, and 2009 has enlarged the list of categories for which discrimination is prohibited, extending the list of protected characteristics to include race, gender, union affiliation, political commitment and disabilities. Indeed, differential treatment or hostile attitude is not considered discrimination if it does not refer to one of these categories established and protected by law. The definition of discriminatory behavior was also broadened, including *indirect discrimination* (when the effect of certain requirements, conditions or practices imposed by an employer has an adverse and disproportional impact on one group or another) or *declaration of discriminatory intent in a public statement* (when, for example, an employer declares in the media that, under its recruitment policy, he will not recruit any employees from certain ethnic or racial groups) (Ringelheim, 2010; for the French case, see: Bereni and Chappe, 2011).

Through legislation, legal mobilizations or protective actions by victims of discrimination were also simplified. Crucially, the onus of proof was reversed: employers must now prove that they have not discriminated their employees. Additionally, two specific organizations were created to deal with anti-discrimination issues: the Center for Equal Opportunity and Opposition to Racism (*Centre pour l'égalité des chances et la lutte contre le racisme*, CECLR) in 1993 and the Institute for the Equality of Women and Men (*Institut pour l'égalité des femmes et des hommes*, IEFH) in 2002 ⁽⁵⁾.

Lawyers and social workers employed by these equality-promoting organizations, and therefore functioning as legal mediators, have two main tasks. Firstly, they support and assist plaintiffs who

5. European directive 2000/43/CE requires each state to create an independent organization dedicated to helping and supporting victims of discrimination.

claim to have experienced an injustice at work; and secondly, they promote the aspirations of anti-discrimination law among Belgian workers. They attempt to convey non-discriminatory norms and values and, in this way, to give rise to new demands. By encouraging legal mobilization and socialization of social groups, they legitimate their position and mission.

3. Data collection and analysis

Through investigation techniques consisting primarily of open-ended interviews, observations and supporting archival work in litigants' records, we examined how lawyers, legal mediators, and litigants themselves interpret and describe workers' experiences of injustice in the workplace.

We conducted twenty-five open-ended interviews with private lawyers, union lawyers, government equality agencies lawyers, and judges in several Belgian towns: Brussels, Liège, and Charleroi. Firstly, we asked lawyers to speak generally about their work and about their recent cases. We then asked them to speak about specific cases involving an injustice in the workplace, as well as to define what they consider to be an "injustice". Following this, we asked specific questions about their use of discrimination legislation. We also conducted interviews with litigants themselves, asking them to tell their own story and experience of what they thought was an injustice at the workplace. We then asked them to speak about their interactions with lawyers in private practice, in unions, or in government equal agencies, as well as with judges. Following this, we asked them to speak about their beliefs, hopes, and knowledge about the litigation that was underway. At the end of the interview, we asked both lawyers and litigants to speak about equality, fairness, and justice in the workplace. In order to analyze the construction of rights consciousness, we always met people who were involved in the same litigation process: the litigant, her/his private lawyer, the lawyer in charge of this case at the union, and so on.

In addition to interviews, we also observed lawyers and legal mediators at work, as well as interactions between legal professionals and their clients. According to Sarat and Felstiner, interaction between lawyers and ordinary citizens is "one important setting where law and society meet and where legal norms and folk norms come together to shape responses to grievances, injuries, and problems" (1988: 94). Observations have been conducted in courts, government equality agencies, private lawyers' chambers, and unions. We also completed analysis of forty case records. We tried to get simultaneous access to all records related to a particular claim of injustice: records from the private lawyer, from the union, from the equality agency, and the judicial record.

In order to focus our study, we inquired about a specific kind of problem, with a particular set of specified legal categories and limited the scope of our study to a particular location. For this reason, our study of legal and rights consciousness is doctrinal (anti-discrimination law), with

reference to a particular social phenomenon (employment discrimination), and within a particular location (the workplace). Through this analysis, we have studied legal consciousness in situations where workers meet and interact with legal professionals (Merry, 1990). Because each stage of the litigation process may influence development of the law, we chose to look at the entire process of constructing a complaint, rather than focusing on outcomes in the final judgment on the case (Albiston, 1999). However, while we examine interactions and exchanges between lawyers and their clients, we do not go back to the genesis, when one or more parties first named a situation as an injustice (Felstiner, Abel and Sarat, 1981). The collected data do not allow us to uncover how ordinary citizens do or do not refer to the law when they experience an injustice, prior to legal professionals' intervention (Marshall, 2003).

4. Translating workers' complaints into legal language

When employees experience an injustice at work and decide to seek advice from a lawyer, they are encouraged to tell their own story. A labor lawyer in private practice explains:

"Sometimes, our work is not easy... People come and expose all their problems and misfortune. Their stories are sometimes very hard and disturbing. We have to find out what is legally relevant and what is not, which staples can be useful for the case we are building."
(November 2010)

Through this process, lawyers translate workers' complaints into legal language. Listening to the plaintiff's narrative, composed of anecdotes, feelings, and impressions about their experience, lawyers select which aspects or pieces of the stories are relevant to build a legal case. In this way, lawyers help clients by redefining their situation and restructuring their perceptions to facilitate reconciliation between client objectives and the needs of legal institutions (Sarat and Felstiner, 1986).

Our empirical data highlight **two models of translating clients' complaints into legal discourses**, which we call the workers' protection model and the workers' non-discrimination model. Both legal mobilization models can be distinguished by three main characteristics: legal qualification; range and specificity of protection; and the role of jurisprudence and mobilization of courts. Before expanding on the two models and their characteristics, one point needs to be clarified: the professional or organizational context does not determinate lawyers' choice of one

model over the other. Rather, lawyers' identities, areas of specialization, and socialization play a significant role in shaping their choice (6).

	Workers' protection	Workers' non-discrimination
Legal qualification	Protection legislation Internal positive law Defined by collective bargaining between labor-related organizations and actors	Non-discrimination legislation European law and internal positive law Produced by international actors, outside the labor field
Range and specificity of protection	Single location: workplace Narrow range of people: workers Wide range of protection: discrimination, harassment, unfair dismissal, etc.	Wide range of locations: workplace, housing, health care, etc. Wide range of people: workers, citizens, customers, etc. Narrow range of protection: discrimination according to the criteria defined by the law
Strategic mobilization of courts	Application of the law One particular case Protection of individuals	Strategic mobilization of courts and production of jurisprudence One particular case which reveals collective implications Vindication of collective rights

4.1 Legal qualification

In most cases, union lawyers, private labor lawyers and labor judges refer to what we have termed the workers' protection model. When translating clients' requests into legal language, they give an individual response to an unfair experience at work by applying the terms of the relevant legislation. A private lawyer who works in close collaboration with the main socialist left-wing union and is in charge of union members' defense in court says:

"I have never used anti-discrimination legislation. When a woman is dismissed because she is pregnant, why should I use anti-discrimination legislation while we have a whole bunch of laws in Belgium to protect pregnant women against dismissal?" (November 2010)

Through legal qualification, this particular lawyer gives an individual answer to injustice at work, according to a principle of workers' protection guaranteed by the 1971 labor law or 1991 law on the protection of workers. Labor legislation protects different kinds of workers who are likely to be victims of unfair treatment in the workplace, including pregnant women or labor union

6. The impact of lawyers' socialization and identities in shaping their practice is outside the scope of this paper, although this is a highly relevant and significant topic of research (Boigeol, 1980; Cam, 1978; Roussel, 2002).

representatives. Most of the legislation protecting workers was enacted in the 1970s, 1980s, and 1990s as a result of collective bargaining and negotiation between labor unions and employers' organizations.

Supported by government equality agencies such as the Center for Equal Opportunity and Opposition to Racism or the Institute for Equality of Women and Men, but also by some private labor lawyers and labor judges, a new model of workers' non-discrimination has been challenging the workers' protection model since the early 2000s. A lawyer from the Institute for Equality of Women and Men explains:

"When a young woman who has just announced her pregnancy to her employer is fired, what can we do? We have two options. First option: we defend this woman according to the 1971 law on labor which protects pregnant women from dismissal. If we win, she receives compensation. This is what most lawyers do. Second option: we consider that, beyond that particular case and story, this case reveals an accurate and societal issue which is the inclusion of women between 25 and 40 years old in the labor market. Mobilizing anti-discrimination legislation adds appreciation to the litigation because we can publicly state: "Firing a woman because she is pregnant is unfair and discriminatory. Women are discriminated against in the labor market and we have to change this situation, based upon the idea of equality between men and women." (December 2010)

Interestingly, they do not refer to the same legislation. A lawyer who works in a government equality agency says:

"We had a case of discrimination, a woman who was wearing the veil [hijab] at work. Her employer informed her that she would get fired if she didn't remove her veil. She was member of a union so she had rights to be defended by her union lawyers. Her union decided they did not have to intervene in such a case because the labor regulations [negotiated between unions and employers' organizations in this particular company] say that the veil is not allowed at the workplace. We [Centre for Equal Opportunity and Opposition to Racism] consider that, in private sector, they don't have any reason to make neutrality in appearance a compulsory principle. According to us, banning of the veil is not justified." (November 2010)

This lawyer highlights the difference between their organization's action and the line pursued by unions. In this case, while the union refers to the labor agreement signed both by employees and employers' organizations, the government equality agency argues that the prohibition of the veil (hijab) at work is not justified and decided to take on the case on this basis. Thus, the agency lawyers ignored previous collective bargaining between workers and firms to mobilize the more general anti-discrimination principle.

This example shows that lawyers and legal mediators do not all refer to the same legislation in response to a client's problem. While some refer to protective legislation negotiated by unions and employers' organizations, others refer to the 2007 anti-discrimination legislation. The former approach uses labor legislation to protect vulnerable workers, while the latter, by referring to the discrimination legislation, produces a new conceptual framework to address injustices at work. In short, the same problem can be translated into legal language in different ways. As Mather writes, "Lawyers are not simple conduits for client interests, faithfully translating preconceived goals into legal language and shepherding client through the legal process. Rather, lawyers frequently add their own goals, ideas, and values to clients' problems and conflicts." (2009: 49)

Importantly, while the first approach focuses on the application of Belgian internal law, the second resorts to European legislation and encourages the translation of international directives into Belgian internal positive law. A private lawyer specializing in discrimination law explains:

"I am deeply convinced that we have to think about European legislation, not only about Belgian positive law. European law widens understandings and interpretations of discrimination. [...] We don't have so many cases but I am utterly convinced that we miss lots of them because internal Belgian law lacks appropriate qualifications for discrimination." (November 2010)

4.2 Range and specificity of protection

Lawyers who refer to the workers' protection model apply legislation that is specific to labor and employment relationships, although the range of protections may be very broad. Specializing in labor legislation, such lawyers only defend workers and employers. A labor lawyer in private practice explains:

"I am specialized in labor and employment law. I only plead on behalf of employers and workers in labor jurisdictions. Discrimination is only a very small part of my activity. Until now, I have had only a few cases, two or three. Most of the cases are related to workers' protection, unfair dismissal, moral and sexual harassment at work, and so on." (November 2010)

Conversely, agency lawyers tend to refer to legislation which is not limited to the employment field but instead exclusively restricts application to anti-discrimination for a restricted list of legal criteria: sex, race, disability. A lawyer from the Center for Equal Opportunity and Opposition to Racism explains:

"We can only go to courts when one of the criteria mentioned in the anti-discrimination legislation is not respected. And our action can only focus on anti-discrimination. Unions can go further; they can highlight non-respect of labor legislation. We cannot do that. Our action is confined to the anti-discrimination law." (November 2010)

Another difference between the two models relies on the specificity of the site of the targeted action and the breadth of the protections.

4.3 Strategic mobilization of courts

The protection model is based upon the defense of workers' individual rights, as members of a category of people considered relatively weak in their relationship with their employer. A labor lawyer in private practice says:

"My professional task is... advising my clients, defending their rights, pleading on behalf of them in courts. Each client has a particular story, and a particular problem. I listen to them, try to understand what they want, explain what I can do and what I can't do, and try to do my best to defend their rights." (October 2010)

Through legal qualification, this lawyer gives an individual answer to an injustice at work. He adds:

"I have an example in mind. My client was a labor union representative. He had got fired and had received compensation for his dismissal. But he demanded compensation for unfair dismissal because he believed that he got fired because he is a labor union representative. We could have mentioned antidiscrimination legislation but we did not. We focused our action on the law on protected workers which allowed us, in that particular case, getting compensation for unfair dismissal." (October 2010)

According to a principle of workers' protection guaranteed by the 1991 law on the protection of workers, this lawyer seeks to protect his clients from unfair dismissal.

On the other hand, when lawyers and legal mediators who refer to the non-discrimination model translate clients' requests into legal language, they also give an individual response to an experience of injustice at work. But unlike those using the workers' protection model, they pursue a goal of *strategic litigation, leading to social and market change*. A strategic litigation is a case undertaken as part of a strategy which identifies criteria for involvement in litigation. Such cases are often linked to other organizational projects including, for example, inquiries, policy proposals, research, and public communication. This strategic litigation seeks to achieve broad social change in key areas of human rights rather than merely individual justice. A lawyer explains:

"When we met her last time [a woman who was fired after her pregnancy], we were very clear. Her case is very important for us because it enables us to modify legislation. Thus, even if her former employer suggests giving her compensation, we cannot give up. We need litigation, not transaction... because litigation creates case law and jurisprudence. We were clear and I think she understood our concern. We have a strategic interest to carry on with this case!" (December 2010)

Therefore the goal is not only to apply the law, but also to create case law in order to transform the law. A lawyer from the Center for Equal Opportunity and Opposition to Racism explains:

"In the field of employment and labor, jurisprudence about discrimination is very weak, even if employment is numerically the most important field. Sometimes, the Center for equality decides to go to court, when we think that we can create positive jurisprudence and we can clarify some aspects of the legislation which were left unresolved. Defending an individual case if there is no goal of strategic litigation behind it... well... we will do that but it is not our main objective." (November 2010)

If lawyers referring to the protection model mobilize legislation that has been used for several decades, those who refer to the non-discrimination model strive to create jurisprudence which clarifies or modifies a new legislative corpus.

With this goal, lawyers and legal mediators who refer to the non-discrimination model *choose from among workers' stories ones which are relevant for collective action legislation and case law*. The selection does not imply to ignore stories that do not lead in these jurisprudential directions. In most cases, victims do not seek to go to court and then, lawyers and legal mediators try to find alternative ways of resolving dispute outside the courts. Only a particular type of social incident can be translated into a legal claim for discrimination inside the courts. As "repeat players", equality organizations and lawyers tend to strategically choose cases deemed likely to produce precedent rules to promote their own interests (Galanter, 1974). In this way, they "secure legal interpretations that favor their interests" (Albiston, 1999: 870). This selection allows equality bodies to reinforce their legitimacy, and underline their usefulness.

From a union perspective, mobilization of courts may undermine their own action, as unions have historically negotiated compromises with employers' organizations without resorting to litigation. The regulation of the relationship between employers and employees has traditionally resulted from collective bargaining between labor-related organizations and players. The increasingly pivotal role of courts and equality agencies, as well as the constraint of generalization implied by such a judicial process may weaken unions' power.

The difference between union and agency lawyers highlights a trade-off between individual rights and collective power. Nevertheless, this distinction is not absolute. For some lawyers and legal mediators, mobilizing discrimination legislation is a second option, when labor legislation is not directly applicable to the particular situation their client experienced. A labor lawyer in private practice relates the case of a woman who was pregnant but was not protected by the 1971 labor law because she was on a training session:

"I have had a case, a woman who was on a pre-employment training session, prior to starting work with a company. Actually, training sessions are for people who are unemployed. They are trained in a particular company while they are paid by the state. They are trained to a particular task, and then they are supposed to sign a labor contract with the company. This woman was trained in a small grocery where she had to supply different counters with vegetables and fruits. So she had to carry heavy crates. She got pregnant and her pregnancy turned out badly so she could not carry crates anymore. The employer said: 'Well, she is trained for one particular task. If she cannot do that anymore, she has to leave, we cannot hire her'. She got in touch with me. We asked for compensation according to the 1971 labor law that protects pregnant woman. But it was unsuccessful because the law protects women with labor contracts and my client was unemployed, on a training program. On appeal, we are going to invoke discrimination based upon gender. We refer to European legislation. Again, discrimination was not the first argument, but came later." (October 2010)

From this perspective, mobilizing anti-discrimination legislation does not require lawyers to campaign for collective rights (7).

While Belgium traditionally rejected the principle of access to courts to vindicate rights (8), this second model shows that anti-discrimination issues bring with them new ways of using the courts. This model relies on strategic litigation and the mobilization of courts to achieve broader social change through jurisprudence (Lejeune, 2011). It is clearly a model imported from the common law countries, where courts and litigation play a significant role in shaping discrimination issues. This second model therefore raises questions around the globalization of law and litigation

7. Vindication for rights through the courts demonstrates how the symbolic power of the law can contribute to promote change, although the symbolic dimension of law is outside the scope of this paper (see: García Villegas, 1995).

8. Dorice Marie Provine, who compares French and American courts mobilizations (French models being very similar to Belgian ones), says: "American rights consciousness and litigiousness are, of course, controversial in United States, as well, and many believe the United States has gone too far in permitting courts to shape public policy. France provides anyone concerned about these issues a fascinating alternative vision of the role of courts in society." (1996:247-248).

processes. Membership of the European Union tends to broaden the framework Belgian citizens use to consider rights issues.

Both the protection and non-discrimination models are based upon an ideal of “legal protection” which believes, according to Bumiller, “the law to be a powerful and effective instrument because it provides victims with a tool by which they can force perpetrators of unlawful conduct to comply with socially established norms.” (1988: 2) This approach, based upon legal protection, does not take into account potential victims’ ability to label their experience as discrimination or injustice. Workers’ experiences of law include the interpretation and comprehension of the role of the law in promoting social change, as well as the barriers and constraints workers individually face.

5. Workers’ experience of law as process

Do different lawyers various interpretations of workers’ complaints play a role in the way workers themselves experience their injustice at work? How do lawyers shape workers’ rights consciousness? In this section, we put forward the idea that lawyers and legal mediators influence the way workers experience, qualify, and comprehend their own stories of injustice. Instead of showing how the former influences the latter, we examine how workers think about law generally, and about specific discursive terms associated with anti-discrimination law. We also investigate whether workers’ representations do or do not fit with their lawyers’ interpretation and qualification.

Plaintiffs’ interpretations of the law are not consistent over time. Their rights consciousness changes and becomes more complex during the course of their litigation. Characterizing a problem into legal terms transforms the personal stories of victims into legal cases. Several tensions and contradictions in workers’ rights consciousness can be highlighted.

Socio-legal scholars shed light on three constraints and barriers that impede workers’ mobilization of law ⁽⁹⁾. First, litigants have to be able to name the situation or their experience as injurious (Felstiner, Abel, and Sarat, 1981; Bumiller, 1987; Bumiller, 1988; Marshall, 2003). Our empirical data demonstrate that workers’ consciousness of an injustice is ambiguous. Most of the time, victims’ narratives refer to three elements: an offence against his or her fundamental rights (unfairness), an unequal behavior or treatment in comparison with standards (inequality), or an attitude resulting from complex societal processes (fatalism).

9. Other scholars have highlighted a complex social process in action, revealing several factors preventing people from lower social-economic groups from mobilizing the courts: because they do not recognize something as a legal problem with legal solutions, because legal fees are too high, or because they are suspicious of lawyers for cultural reasons (Ladinsky, 1963, Carlin, Howard and Messinger, 1967; Galanter 1974; Abel, 1985).

Second, workers have to view themselves as victims and assume this role (Bumiller, 1988). Most litigants express two different and contradictory definitions of their own responsibility. If they consider themselves to be a victim of an injustice, they also view themselves as partly responsible for the situation. A female worker explains:

"Litigation is important because I want to make it clear that I did not do anything wrong. I did a good job in the company; I had good assessments from my clients. I have gone through depression and I had no self-esteem anymore. I felt guilty to be pregnant, you know... I felt guilty and I even thought: "You should not have been pregnant; you have been away for three months. Your employer's reaction is understandable". Now I want my former employer to recognize that what he did to me was unfair." (November 2010)

Third, workers have to view their employer's behavior as inappropriate and perceive their experience as the result of an intentional behavior from their employer. Litigants express different points of view about their employer. Some workers view their employer as "tyrannical" or "crazy". Attributing the inappropriate behavior to the anger of one particular person contributes to "strengthen the illusion that institutions are fair and that discrimination is not prevalent as long as the victims of discrimination believe that their individual misfortune stem from the acts of aberrant individuals and from business practices" (Bumiller, 1988: 93). Other workers consider that their employer's behavior is understandable. A black female worker explains:

"I will not assume that discriminating black people is normal. But I think I can understand employers, they are afraid of the difference." (November 2010)

If these three conditions come together (naming a situation, viewing themselves as victims, and considering the injustice to be the result of an intentional behavior), workers are likely to mobilize law and legal professionals to solve their employment problem.

At this stage, when initially meeting a lawyer, workers' rights consciousness is based upon the idea that law protects workers because they are the more vulnerable participants in the employment relationship. They conceive of the law as a coherent body of norms and values that regulates their employment relationships while protecting workers individually. Quoting Ewick and Silbey, they consider legality "as a distinctive, coherent, and autonomous entity enframing daily life" (1998: 83); here the legality was shaped by the history of negotiated labor rights. Their individual access to court and litigation does not lead to any kind of apprehension or vindication of new rights beyond their own situation.

Therefore, mobilization of the law and legal professionals does not systematically incite workers to view their own litigation as a particular means to fight general inequalities among workers on the basis of race, origin, disability or gender. Under what conditions do workers interpret their own

stories in the light of anti-discrimination legislation? How do they view the law as a resource to fight discrimination generally? Generalization process and anti-discrimination rights consciousness requires workers to go through additional barriers. Several tensions and contradictions in workers' rights consciousness can be highlighted.

Workers often view the law as a resource to fight discrimination generally. They view their own litigation as a particular means to fight general inequalities among workers on the basis of race, origin, disability or gender. A young woman who was wearing the veil (hijab) was not hired in a bank after a job interview. She took a recording of the interview, in which the employer told her why she could not be hired; firmly convinced that the employer refused to hire her because of her veil, she got in touch with her union and the Center for Equal Opportunity and Opposition of Racism and showed them the recorded interview. She was determined to sue the bank, but if her union and the Center did not refer to anti-discrimination legislation, she did not want to follow up the procedure. She explains:

"If litigation merely means asking for compensation because my employer unilaterally breached my contract, I am not interested at all! But if litigation also means bringing up the discrimination as an aggravating circumstance, I am in! The discrimination against veil is what matters!" (December 2010)

Thus, workers tend to see their individual case as relevant to understanding how other workers experience the same unfair treatment at work and see their own case as part of larger strategy through which they recognize themselves as part of a larger group. Lawyers and legal mediators promote the idea that a worker's personal story is relevant in creating new jurisprudence which will in turn affect many other people. In this way, litigants do not consider their own case for itself alone, but also conceptualize it as a part of broader challenges, generalizing their story and speaking on behalf of a group (Boltanski, 1994; 2009). A transgender woman who worked as a furniture-mover was fired when she began the medical process of gender transition. She explains:

"Courts and litigation are the only option to make him [her former employer] understand that he was wrong. Even through litigation, I am not sure he is going to understand. He was totally blind and impervious to my situation. So litigation is essential, especially for all the others like me, all the women and men who are afraid to show who they really are, all those who live a hidden life. [...] Nowadays, the law does not say anything particular about transgender people's rights. My case is one of the first cases litigated in Belgium. It is crucial to clearly say: 'The law exists, people must respect it'. If it is not the case, if the law has no power, it is laughable." (December 2010)

Litigation also brings the cause to the attention of the public. Through this process, a singular misfortune becomes a part of broader injustice patterns.

However, generalization requires that workers understand their own experience as the result of their belonging to one particular group who share a legally protected characteristic. They have to consider that the inappropriate behavior of their employer or colleague is linked to the fact that they are a member of a structurally oppressed group, for instance women, ethnic minority groups, or disabled workers.

Also, through this process of generalization, litigants sometimes feel deprived of their own story because they think that the collective status of the issue overrides their own story and injustice. While equality agencies use individual cases to fight for general goals, some litigants think the organization is exploiting their individual story for its own ends. A woman working as assistant manager in a private company, who discovered that a male employee with the same title and less experience was making higher income than she was, says:

"Since the beginning, the Institute [for Equality of Women and Men] has been very clear. If they support my case, if they help me, if they pay for my litigation, it is because they do believe they can create innovative jurisprudence. But sometimes, I think that everything is going too far... and it takes so many months and years. I would sometimes prefer running a transaction with my employer. It would be faster than the litigation, courts and so on. But they need my case, because my record is what they call "an excellent record with all the proofs needed"." (December 2010)

Furthermore, although some litigants celebrate the general purpose that strategic litigation can serve, they also adopt a very pessimistic point of view about the power of law to change the society. They express a "double consciousness" (Matsuda, 1987). The transgender woman expresses the idea that law is powerful but ineffective:

"I do believe that litigation is important. It is the only way to create a law to protect transgender people like me... We have to change the law in order to change the society. But I am also convinced that I will not enjoy those changes. I will be dead before that. Even if the law changes, I am not sure the society is going to change." (December 2010)

In short, if legal mediators and lawyers generate new commitments, attachments, and capacities of enduring political significance among workers, generalization also has pernicious effects.

Conclusion

Legal mediators play a significant role in promoting alternative mobilization of law to deal with employment discrimination issues. While lawyers used to interpret individual cases in the light of legislation that protects workers in their employment relationship with employers, alternative legislation enacted in the last ten years has provided additional resources. Government equality agencies were created to deal with such issues. Legal mediators who work in these organizations mobilize legislation specifically outlawing discrimination not only at work but also in a broader social context.

In this article, we have brought together legal consciousness studies and the sociology of mediations to argue that lawyers and legal mediators influence the way workers experience, qualify, and comprehend their own stories of injustice. We examined the way in which workers think about law generally and about specific discursive terms associated with anti-discrimination law. As Ewick and Silbey demonstrated, “the same person may express vastly different understandings of the law.” (1998: 228). Legal mediators and lawyers generate new commitments, attachments, and capacities of enduring political significance among workers. Workers’ rights consciousness changes and becomes more complex throughout the course of their litigation.

We highlighted tensions and contradictions in workers’ rights consciousness. If workers view the law as a resource to fight discrimination, they also adopt a very pessimistic point of view about the power of the law to change society. In addition, workers tend to conceive of their individual case as relevant in understanding how other individual workers experience the same unfair treatment at work. Nevertheless, they sometimes feel simultaneously deprived of their own story through this generalization process.

Most importantly, our empirical investigation demonstrated that North-American scholars’ observations about mobilizations of law and legal consciousness among workers in common law countries can be extended to civil law countries. In the particular field of employment discrimination, international regulations have penetrated and shaped local social arenas (Merry, 1992). This finding reveals changes to the way in which lawyers and legal mediators conceptualize the goal and meanings of courts and litigation in Belgian society. Workers are also likely to experience and understand the law differently, as they are encouraged by legal mediators to view their personal story as relevant to lead broader action for social justice and to consider that litigation promotes social change.

This exploratory paper suggests several lines of research for further investigations, which remain under-examined, specifically regarding the way in which lawyers can use courts to vindicate rights in civil law countries (Commaille, Dumoulin, 2009). If recent works show new strategic and political mobilizations of courts in Europe, a deep empirical analysis must be built in order to highlight the stakes and consequences on civil rights' vindication and ordinary citizens' rights consciousness.

References

- Abel Richard (1985), "Law without Politics: Legal Aid under Advanced Capitalism", *UCLA Law Review*, 32, 474-642.
- Albiston Catherine (1999), "The Rule of Law and the Litigation Process: The Paradox of Losing by Winning", *Law & Society Review*, 33(4), 869-910.
- Bereni Laure, Chappe Vincent-Arnaud (2011), "La discrimination, de la qualification juridique à l'outil sociologique", *Politix*, 24(94), 9-34.
- Bessy Christian, Eymard-Duvernay François (eds.), (1998), *Les intermédiaires du marché du travail*, Paris : PUF.
- Boigeol Anne (1980), *Les avocats et les justiciables démunis : de la déontologie au marché professionnel*, PhD dissertation, Paris.
- Boltanski Luc (1994), "La dénonciation", *Actes de la recherche en sciences sociales*, 51, 3-40.
- Boltanski Luc (2009), *De la critique. Précis de sociologie de l'émancipation*, NRF Essais, Paris : Gallimard.
- Bumiller Kristin (1987), "Victims in the Shadow of the Law: a Critic of the Model of Legal Protection", *Signs*, 12(3), 421-439.
- Bumiller Kristin (1988), *The Civil Rights Society: The Social Construction of Victims*, Baltimore/London: The Johns Hopkins University Press.
- Burstein Paul (1985), *Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States since the New Deal*, Chicago/London: University of Chicago Press.
- Callon Michel (1986), "Éléments pour une sociologie de la traduction", *L'Année sociologique*, 36, 169-208.
- Cam Pierre (1978), "Juges rouges et droit du travail", *Actes de la Recherche en Science Sociale*, 1, 2-27.
- Carlin Jerome, Howard Jan, Messenger Sheldon (eds.) (1967), *Civil Justice and the Poor: Issues for Sociological Research*, New York: Russell Sage Foundation.
- Commaille Jacques, Dumoulin Laurence (2009), "Heurs et malheurs de la légalité dans les sociétés contemporaines. La sociologie politique de la 'judiciarisation'", *L'Année Sociologique*, 59(1), 63-107.
- Conley John, O'Barr William (1990), *Rules versus Relationships. The Ethnography of Legal Discourses*, University of Chicago Press.
- Curran Barbara (1977), *The Legal Need of the Public: The Final Report of a National Survey*, Chicago: American Bar Foundation.
- De Munck Jean (2006), "Vers un nouveau paradigme du droit", in Eymard-Duvernay François (dir.), *L'économie des conventions. Méthodes et résultats*, Paris : La Découverte, 249-264.
- De Munck Jean (2002), "La Belgique sans piliers ? Du conflit des modèles au choix d'une politique", in Daems Jean, *Piliers, réseaux et démocratie*, Bruxelles : Vie Ouvrière.
- Donohue John, Siegelman Peter (2005), "The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Investigation", in Nielsen Laura Beth, Nelson Robert L. (eds.), *Handbook of Employment Discrimination Research: Rights and Realities*, Springer, 261-284.

- Ewick Patricia, Silbey Susan (1998), *The Common Place of Law: Stories from Everyday Life*, Chicago: University of Chicago Press.
- Ewick Patricia, Silbey Susan (2003), "Narrating Social Structure: Stories of Resistance to Legal Authority", *American Journal of Sociology*, 108(6), 1328-1372.
- Eymard-Duvernay François, Marchal Emmanuelle (1997), *Façons de recruter. Le jugement des compétences sur le marché du travail*, Paris : Métailié.
- Felstiner William, Abel Richard, Sarat, Austin (1981), "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...", *Law & Society Review*, 15 (3/4), 631-654.
- Galanter Marc (1974), "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change", *Law & Society Review*, 9, 95-160.
- García Villegas Mauricio (1995), "L'efficacité symbolique et pouvoir social du droit", *Revue interdisciplinaire d'études juridiques*, 34, 155-179.
- García Villegas Mauricio (2003), "Symbolic Power without Symbolic Violence? Critical Comments on Legal Consciousness Studies in USA", *Droit et Société*, 53, 137-161.
- Garfinkel Harold (1967), *Studies in Ethnomethodology*, Englewood Cliffs (N.J.), Prentice Hall.
- Greenhouse Carol (1988), "Courting Difference: Issues of Interpretation and Comparison in the Study of Legal Ideologies", *Law & Society Review*, 22, 687-708.
- Hennion Antoine (1997), *La passion musicale. Une sociologie de la médiation*, Métailié, Paris.
- Ladinsky Jack (1963), "Careers of Lawyers, Law Practice, and Legal Institutions", *American Sociological Review*, 28(1), 47-54.
- Latour Bruno (1987), *Science in Action: How to Follow Scientists and Engineers through Society*, Cambridge: Harvard University Press.
- Lejeune Aude (2011), "Les professionnels du droit comme acteurs du politique: bilan critique de la littérature nord-américaine et enjeux de l'importation de ces travaux en Europe continentale", *Sociologie du Travail*, 53(2), 216-233.
- Marshall Anna-Maria (2003), "Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment", *Law & Social Inquiry*, 28(3), 659-689.
- Matsuda Mari (1987), "Looking to the Bottom: Critical Legal Studies and Reparations", *Harvard Civil Rights-Civil Liberties Law Review*, 22, 323-399.
- McCann Michael (1994), *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilizations*, Chicago/London: University of Chicago Press.
- Merry Sally Engle (1990), *Getting Justice, Getting Even: Legal Consciousness among Working-Class Americans*, Series in Law & Society, University of Chicago Press.
- Merry Sally Engle (1992), "Anthropology, Law, and Transnational Processes", *Annual Review of Anthropology*, 21, 357-379.
- Meyer Jean-Louis (1998), "Intermédiaires de l'emploi et marché du travail", *Sociologie du travail*, 98(3), 345-364.
- Nielson Laura Beth (2000), "Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment", *Law & Society Review*, 34(4), 1055-1090.

Nielson Laura Beth, Nelson Robert (2005) (eds.), *Handbook of Employment Discrimination Research: Rights and Realities*, Springer.

Orianne Jean-François, Maroy Christian (2008), "Esquisse d'une profession consultante: les intermédiaires du marché du travail en Wallonie", *Formation Emploi*, 102, 21-40.

Pelisse Jérôme (2005), "A-t-on conscience du droit? Autour des Legal Consciousness Studies", *Genèses*, 59, 114-130.

Provine Dorice Marie (1996), "France", in Jacob Herbert & al., *Courts, Law and Politics in Comparative Perspective*, New Haven: Yale University Press, 177-248.

Ringelheim Julie (2010), "Les transformations du droit de la non-discrimination", in Herman Ginette, Léonart Evelyne, Reman Pierre (eds.), *Travail, inégalités et responsabilité*, Louvain-la-Neuve : Presses universitaires de Louvain, p. 163-170.

Roussel Violaine (2002), *Affaires de juges. Les magistrats dans les scandales politiques en France*, Paris : La Découverte.

Sarat Austin (1990), "...The Law is All Over: Power, Resistance, and the Legal Consciousness of the Welfare Poor", *Yale Journal of Law and the Humanities*, 2, 343-357.

Sarat Austin, Felstiner William (1988), "Law and Strategy in the Divorce Lawyer's Office", *Law & Society Review*, 20(1), 93-134.

Silbey Susan (2005), "After Legal Consciousness Studies", *Annual Review of Law and Social Science*, 1, 323-368.

Stryker Robin (2007), "Half Empty, Half Full, or Neither: Law, Inequality, and Social Change in Capitalist Democracies", *Annual Review on Law and Social Sciences*, 3, 69-97.

Sturm Susan (2001), "Second Generation of Employment Discrimination: a Structural Approach", *Columbia Law Review [online]*, 101(1), <http://ssrn.com/abstract=244407>

Sturm Susan (2005), "Law's Role in Addressing Complex Discrimination", in Nielsen Laura Beth, Nelson Robert L. (eds.), *Handbook of Employment Discrimination Research: Rights and Realities*, Springer, 35-58.

Vinck Dominique (1999), "Les objets intermédiaires dans les réseaux de coopération scientifique: Contribution à la prise en compte des objets dans les dynamiques sociales", *Revue Française de Sociologie*, 40(2), 385-414.

Ygnvesson Barbara (1989), "Inventing Law in Local Settings: Rethinking Popular Legal Culture", *Yale Law Journal*, 98, 1689-1709.