RECENT PUBLICATIONS


In her 2008 book, When is Discrimination Wrong?, Professor Deborah Hellman reviews and analyzes the moral foundations of discrimination. Hellman aims to develop a general theory of “discrimination,” a term that has a negative connotation in our culture. In so doing, she breaks down many of our intuitions about when and why discrimination is wrong. As her book title suggests, Hellman reminds us that not all discrimination is wrongful—in fact, some discrimination, like between a sound and unsound purchase, is important and beneficial. Laws that govern driving motor vehicles state a permissible age to have a driver’s license and denote the requisite tests that must be passed, thereby discriminating based on age and driving ability, and yet are morally sound. If discrimination between people on the basis of traits is not inherently wrong, Hellman asks, when is discrimination wrong?

While the asserted core question is of central importance to legal scholarship, it has been widely neglected. Here Hellman’s background in philosophy is particularly useful as she uses her joint expertise in law and philosophy to thoroughly analyze the moral and legal aspects of discrimination. By starting with the foundational question of why some discrimination is wrong, Hellman’s book provides an analytically clear starting point for us to proceed with the legal analysis of wrongful discrimination. Thus Professor Hellman’s attempt to delineate a clear theory is an important step in establishing logical rules that can help legal scholars and citizens alike in distinguishing between legitimate and illegitimate discrimination.

Hellman’s theory is that discrimination is wrong when it demeans, regardless of the intent or motivation of the discriminator. She asserts that wrongful discrimination occurs when we differentiate among people and treat them differently as a result. Hellman addresses the inadequacies of alternate theories of when discrimination is wrong and juxtaposes each with her theory.

1 Deborah Hellman, When is Discrimination Wrong? 2 (2008).
Why is some discrimination morally wrong? Professor Hellman begins with the bedrock moral principle that all persons are of equal moral worth. Hellman argues that distinguishing among people on the basis of traits is wrong when it demeans any of the people affected by treating some people as of lesser moral worth. When we differentiate among people and treat them differently as a result, it is possible for this act to be (1) permissible, (2) impermissible for reasons unrelated to the moral concerns underlying our worries about classification, or (3) impermissible because it offends the principle of the equal moral worth of persons. Professor Hellman aims to lay the moral foundation on which an inquiry into when wrongful discrimination should be legally proscribed could proceed.

*When is Discrimination Wrong?* begins with a presentation of Hellman's theory of wrongful discrimination that discrimination is wrong when it is demeaning and that discrimination is not wrong when it is not demeaning. She defines “demeaning” as differentiation of people that fails to treat some of those people as of equal moral worth. To demean is to debase or degrade another. Hellman argues that there are two dimensions that make an action demeaning. The first dimension is expressive: expressing that the other is of less worth. The second dimension is power: that the speaker occupies a status such that they subordinate the other. Here Hellman draws on social justice theory: distinctions should not treat individuals unfairly.

Further, Hellman's account is grounded in the moral wrong of the act of demeaning itself, not in the result, meaning that the person need not feel demeaned or discriminated against. In this sense her thesis is not about the mental states of either the demeaner or the demeaned, but rather about the contextual consequences. The act is defined in and of itself, not by its effect or its intention.

Equality is the central underpinning of Hellman's theory. Equality on an individual level is defined by each individual's equivalent moral worth. This is a particularly gripping aspect of Hellman's book that helps get at the root of why we intuitively find discrimination to be wrong: it is one person/group/law stripping moral worth/respect from another person/group. Hellman makes an important distinction about equality. She disagrees with the oft-quoted “Separate is inherently unequal” line from *Brown v. Board.*

One of the best aspects of Hellman's book is her illustration of abstract concepts with concrete examples. She discusses the example of gender-separated bathrooms compared to bathrooms separated by race. Hellman asserts that society often and in many ways treats similarly situated people dissimilarly based on one trait or another. Returning to her core thesis, what she believes makes this wrong is when the trait being used as a

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distinguishing point has the social context to make differentiation on the basis of that trait demeaning. Here the example of gendered bathrooms is illustrative. While in our society women have been subjugated in many ways socio-historically, that is not the reason for or outcome of giving women separate bathrooms. Rather, these separate bathrooms exist for privacy and safety reasons that respect women's self-worth and do not demean them. Bathrooms separated by race do not have such a benign motive or outcome.

While some commentators take issue with Hellman's relational dimension of demeaning, I believe it is more intuitive and straightforward than alternate accounts. According to Hellman, not everyone has the power to demean. Instead, the person demeaning must have sufficient power status to put down the one being demeaned. Moral worth is defined and experienced comparatively.

Hellman asserts a third dimension to demeaning action: context. The act must discriminate by tapping into past and present socio-cultural sources of cruel and unfair treatment. Where a white couple and a black couple look at a house, and the homeowner accepts the white couple's bid for the house, the black couple does not lose part of their inherent worth because they did not get the house. However, if they did not get the house because of the selection criteria used, whites only, for example, then the denial of their bid becomes demeaning.

Here Hellman clarifies an aspect of what she means by demeaning. As demeaning means to put someone down, and Hellman believes equality is the foundational value, to demean is to disrespect someone. Disrespect is culturally relative. For example, it used to be a pervasive custom throughout the United States that a man would ask permission of the father of the bride before he proposed to her. Now, in some regions, religions, and families this practice is not expected, and a man would not be considered rude for failing to ask his girlfriend's father for permission to wed her. In fact, depending on the specific, contextually rich instance, to ask her father for permission could be either respectful, disrespectful, or neither.

In this sense, Hellman gives us a helpful metric for determining when morally reprehensible discrimination has occurred. We must look to the action itself: what occurred or was said. This action is analyzed by looking at the players involved and their relative power and status. Finally, the social meanings are clarified by the socio-historic and specific context of the interaction.

Hellman uses a fairly simple example through the book: differentiating between persons based on the first letter of their last name. This may not be fair—but justice is not her topic. Let us say that 100 people apply for a job. As part of the winnowing process, the hiring manager excludes all persons
whose last name starts with A. Under our metric, what occurred? All persons with A last names did not get this job. Is not getting a job inherently demeaning? Not in itself, no. The hiring manager has power over the potential employees: he has power where they do not. Finally, what is the context in which persons named A did not get this job? The manager was using random, arbitrary criteria to make his job easier. He was expressing no disrespect for persons with last names beginning with A, nor are there socio-cultural patterns of disenfranchisement of persons with the last name A. Therefore, as a group, they do not already have diminished status in a way that being rejected from this job demeans them.

Hellman does an extraordinarily job throughout her book of addressing counterarguments. Here, she anticipates the reader saying, "but wait, I think X is demeaning but my friend thinks Y is demeaning." Hellman readily acknowledged that people will, regardless of how accurate a theory is, disagree over whether a particular practice demeans. Rather than state that her thesis will solve all these disagreements, she believes that it will channel these disagreements to the right questions.

After thoroughly laying out her theory with a range of subtle examples, Hellman transitions to explaining why her theory is more accurate than the three most popular alternate theories: merit, accuracy and intention. Each of these options directly challenges the theory of discrimination as defined by demeaning. Her arguments are complex and meticulous.

This section of Hellman’s book has a strong academic function: to bolster her theory by presciently undercutting the most prominent alternatives. However, for the non-academic, or perhaps for someone who is looking for the practical uses of Hellman’s theory, this second half of the book is much less useful and makes for dense and heavy reading. The first alternative theory to Hellman’s proposal that discrimination is wrong when it demeans is that discrimination is wrong when it does not select the most deserving, entitled, or capable employee.

Hellman believes that merit is generally limited to traits and skills of social utility. The value of a certain talent (be it academic prowess, ability to throw a football, or speed of assembling parts in an automobile assembly line) is a function of that trait’s scarcity in much the same way that the value of oil is a function of its scarcity. In this way, Hellman argues that the talented person does not own the part of the value of her talent that can be attributed to its scarcity. As such, the person does not deserve the benefits that the scarcity-induced value of her talents makes possible.

Hellman next addresses the argument that since we must distinguish among people on the basis of attributes they have or lack, it is permissible to do so when the differentiation is rational or accurate. For example, while

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1 Hellman, supra note 2, at 61.
courts have acknowledged that race is rarely relevant to legitimate government objectives, race is often a helpful proxy for educational level achieved or incarceration. Should an employer use race as a proxy to guess an applicant’s educational attainment, we would find it morally repugnant if he excluded all black applicants. In sum, Hellman argues that accuracy is neither necessary nor sufficient to establish the permissibility of classifications. Just because some characteristic, like national origin, is rational and a useful proxy does not mean it is morally acceptable to use it as such.

Hellman’s argument that accuracy is irrelevant cuts against current legal doctrine that requires courts to look into how well classifications achieve their goals: “narrowly tailored,” “substantially related,” or “rationally related.” Hellman believes that the fit between the end to be achieved and the means employed does not matter morally.

In Professor Hellman’s perhaps most controversial chapter, she asks in the context of discrimination, is it the thought that counts? Hellman argues that an actor’s intention is not determinative of whether he has differentiated on the basis of a particular trait. As she puts it, the actor’s intention is what he is aiming at: not necessarily what occurs. The intent to distinguish on the basis of a trait, such as gender, is neither necessary nor sufficient to determine if an actor does distinguish on the basis of this trait.

She sums up the two predominant ways in which intentions could be relevant. First, the intention of the person distinguishing people could determine whether or not she is distinguishing between people on the basis of a particular trait. Second, intentions could be relevant to determining whether distinguishing among people on a particular basis is wrong. Hellman asserts that neither motive nor purpose should be morally relevant to the question of whether certain laws or policies discriminate. In arguing this, Hellman counters long-established Supreme Court doctrine that there is a crucial difference between discriminatory intent and disparate impact:

Continuing in her socio-historic perspective, a strong aspect of Hellman’s undercutting of the importance of intention is the concept of unconscious bias. She argues that relevance is in what occurs, not what is intended, as intention does not translate to the concurrent reality. As such, even the best-intentioned persons can unconsciously use impermissible factors to make daily distinctions. Subconscious cognitive biases can affect an individual’s judgment and their perception.

While this counters much precedent, one strong benefit to removing the intentionality analysis is the fact that intentions are nonpublic. Legally, it has historically been very difficult to prove an actor’s bare animus, and the courts have held disparate impact to be a very high standard. Further, it is incredibly difficult for plaintiffs to prove that discrimination has occurred in employment contexts, where there is no one “right” hiring choice.
In one sense, Hellman’s theory takes away from our sense of moral righteousness in that we are not condemning an actor for making immoral judgments nor laying the blame solely on him. We are rather doing a much greater social good in addressing the result. As our criminal justice system punishes the criminal but does not restore the victim, so does our constitutional and civil law system punish the bad actor without remedying the underlying societal inequality.

If attorneys and the courts were to integrate some of Hellman’s analyses, it would be the consequences of the action (that is, how people are actually treated) that shape whether or not discrimination has occurred and hence whether or not it is remedied. This is a much more viable solution which makes her theory highly attractive. Rather than sitting back and accepting unconscious biases while society hopefully slowly transitions to a more just version of itself, Hellman’s theory, if actualized in legal practice, is a very practicable way to more quickly ameliorate historically perpetuated inequalities in our society.

*When is Discrimination Wrong?* is highly recommended for its thorough analysis of the moral underpinnings of discrimination. Professor Hellman meticulously lays out a philosophical theory that integrates socio-historic perspective to increase its efficacy. Further, Hellman provides a strong and radically different concept of how discrimination law and policy should be thought about and practiced in our country. Yet this powerful message can at times be hidden within a dense, philosophical, and highly academic piece. Professor Hellman has a powerful statement to make about how jurisprudence could much more effectively serve the principles of equality that our country was founded upon.

*Alana Edelstein-Kopke, J.D. 2013 (U.C. Berkeley)*
In the wake of the 1994-95 Major League Baseball (MLB) strike that saw the cancellation of hundreds of games, including the 1994 World Series, few could have imagined that the following decades would see such little open discord between the Major League Baseball Players Association (MLBPA) and Major League owners. Indeed, as the lockouts of the National Football League (NFL) and National Basketball League (NBA) dominated the sports and business headlines in 2011,1 MLBPA and ownership quietly reached an agreement on a five-year Collective Bargaining Agreement (CBA) in November, less than a month after the 2011 World Series concluded and four full months before the start of the 2012 season.2 Over the past two decades, MLB labor relations have gone from being the cautionary tale of high stakes salary negotiations to its exemplar.

William B. Gould IV is uniquely positioned to give insight into the developments that have brought about this change, not only as a distinguished scholar in the areas of sports and labor law but also having served as chairman of the NLRB that voted to petition then-district court Judge Sonia Sotomayor for an injunction against the owners for engaging in unfair labor practice conduct that effectively ended the lockout. Gould’s *Bargaining with Baseball: Labor Relations in an Age of Prosperous Turmoil* thoroughly narrates the on-the-field and off-the-field issues that led to that lockout, the legal process that ultimately restored baseball in 1995, and the long term impact the lockout and the eventual CBA had on the game. But *Bargaining with Baseball* is not a dry recitation of a decades-old legal battle; rather, Gould infuses the book with personal anecdotes, opinions, and reflections on the game of baseball. He tells the reader upfront, “Make no mistake about it: it is a love of the game, as well as for

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labor law and my abiding interest in the business of the game itself, which has prompted me to write this book.\textsuperscript{3}

Gould's love of the game is especially apparent in the book's early chapters, where he recounts growing up a Red Sox fan in New Jersey, attending his first MLB game with his father, and his memories of some of the baseball players and plays that have captivated him and kept him interested in the game over the years. Following a long tradition of baseball writing, Gould plays up the nostalgia as he reminisces about how he listened to games on the radio in 1946 with something approaching religious fervor and as he bemoans the loss of certain features of the game he grew up with, such as doubleheaders. The personal touch is a welcome addition to a book about a legal issue, although Gould's asides occasionally distract from, rather than add to, his analysis. For example, in Gould's comment that Red Sox center fielder Coco Crisp was the only black American player on the 2007 World Championship team, Gould clogs his sentence with the additional comment that Crisp, "made a spectacular over-the-head back-to-the-plate Willie Mays-type basket catch one day in June '07 in the Oakland Coliseum when Curt Schilling had a no-hitter until the last batter (he had made two grabs like it earlier in that 4-game series)."\textsuperscript{4}

And while baseball enthusiasts will probably find themselves sharing the author's nostalgia to a certain extent, particularly if they are fellow Red Sox fans, readers with less familiarity of baseball's history will likely find the first two chapters somewhat tedious.

Still, Bargaining with Baseball's romanticizing helps set the stage for why major league baseball has held the attention of so many people for so long and, consequently, the reasons for, and significance of, the labor disputes that culminated in the 1994-95 strike. Gould recounts how he found himself in the position of NLRB chairman during the dispute, narrowly avoiding a Republican filibuster in 1994 against his nomination, and how the board considered the issues before them. Gould's firsthand knowledge of that dispute and his love for the game make this section of the book the most engaging and insightful. In detailing the issue of free agency, for example, Gould deftly moves between the relevant arbitrations and cases that shaped the legal landscape of baseball in the 1990s and the various players and owners whose talents and personalities made free agency a point of contention. The author similarly sheds light on salary cap and revenue-sharing proposals, and why they were opposed by one or both sides. He notes that he was once told that a player had him to thank for his high salary following the strike, but explains that the board's role in the matter was to evaluate the procedures of the parties, not the validity of their

\textsuperscript{3} WILLIAM B. GOULD IV, BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL 3 (McFarland 2011).

\textsuperscript{4} Id. at 11.
sides in the argument. He then details why the NLRB voted to recommend Judge Sotomayor issue an injunction against the owners.

Given their impact on both subsequent sports negotiations and the game of baseball itself, the changes the strike brought about in baseball are an important part of the story. For example, through the use of charts and firsthand accounts, he describes in detail the financial impact the strike and the CBA had on high and low revenue teams. Especially useful is Chapter 6, titled “On-the-Field Changes: The Players Speak,” where the author’s relationships with a wide variety of former and current players, managers, owners, commentators, and fellow enthusiasts allow him to bring a wider, firsthand analysis of some of the changes of the game in recent years. The focus here moves away from legal/labor issues and into such topics as the speed of the game and the importance of the pinch hitter. Unlike other parts of Bargaining with Baseball, which primarily rely on Gould’s own opinions of the game, here the players and other participants in the game speak for themselves, which adds weight to Gould’s argument about the inherent value of preserving the nature of the game.

Gould’s analysis of the ongoing labor challenges for the game is also helpful, although his discussion is less grounded in experience or expertise when discussing the issues of cheating, performance enhancing drugs (PEDs), race, and globalization. For instance, in discussing race, Gould points to the noticeable scarcity of black American players in the league, foreshadowed by many MLB teams’ reluctance to sign black players in the decades following Jackie Robinson’s breaking of the league’s color barrier. The way to address this problem, as he admits, is less clear. He proposes a number of solutions, many of which MLB and other organizations are already attempting, which could bring about more balance, although it is not clear to what extent most of these solutions relate to labor negotiations.

Bargaining with Baseball will resonate most with fellow baseball enthusiasts, in particular, Red Sox fans who have some interest in the 1994-95 strike and its impact on the game. Those who would hope for a straightforward analysis of the strike and the labor negotiations behind it will perhaps find themselves frustrated by Gould’s frequent asides and sometimes brash opinions (“...[Red Sox player David Ortiz] is far more loveable than any of the other strange and sullen characters involved in [the performance-enhancing drug] controversy, most of them constituting the baseball mirror image of the bratty ex-Los Angeles Laker Sasha Vujacic.”). But perhaps the biggest criticism of Bargaining with Baseball is that, only a few months old, it is already in need of an update. As mentioned, MLBPA and ownership recently reached an agreement on a new CBA: one that includes testing for PEDs, among other changes.

5. Id. at 23.
Gould’s criticisms, then, about the legacy of PEDs and ownership’s complicity in their use, among other topics, need some revision.

I am sure it is no coincidence Gould gave the book nine chapters to model the nine innings of a baseball game. So, too, does his nostalgic approach accurately capture this nation’s shared romanticism for the American pastime. Indeed, a book about two of America’s most prized institutions, baseball and the law, ought to convey the joy and the beauty of the game, as well as the struggles and injustices inherent in it as a business, and *Bargaining with Baseball* does just that. It is a sprawling book, filled with memories of sandlot games and the importance of people like Ted Williams and Jackie Robinson in shaping our cultural identity, as well as reflections on the legal process behind one of the most prominent labor disputes of the last twenty years. In this way, Gould not only captures the magical feeling baseball produces for so many people, but adds to the ongoing legacy of the game.

*Caleb Webster, J.D. 2012 (U.C. Berkeley)*
Raymond F. Gregory focuses his most recent book on the limitations of a worker’s right to lawful religious expression in the workplace. In doing so, Gregory successfully explains the genuine tensions between employers and employees and between employees and their co-workers when religion enters the workplace. The result is that, like much of employment law, there are no bright-line rules, but rather adopted analytic frameworks that require a fact-specific inquiry. Accordingly, predicting the legal limitations of religious expression in any particular instance is a challenging task. Since both sides are disadvantaged by this lack of clarity, many cases in this area of law, including those discussed in this book, resolve well before trial.

Gregory’s intended audience is “laypersons and those lawyers who do not specialize in employment law.” However, laypersons might have trouble following the analytic train of Gregory’s thought as he writes in what he terms a modified form of the casebook method. For this same reason, lawyers and law students alike should find Gregory’s analytic style and use of analogies comfortingly familiar. Gregory has correctly identified his audience as lawyers who do not specialize in employment law, given that he has eliminated the technicalities of the law and focuses instead on providing a more sweeping view of the landscape of religious workplace discrimination through a discussion of the facts and implications of a number of illustrative cases.

For example, Gregory dissects a case involving Cloutier, a worker at Costco in Massachusetts. After Cloutier had worked at Costco for a few years, the dress code was revised to prohibit all employees from wearing any form of facial jewelry other than earrings. Cloutier, who had multiple facial piercings, told her supervisor that she refused to remove her eyebrow piercings because she was a member of the Church of Body Mortification and that her piercings were based on the church’s teachings. Ultimately, the court held in favor of Costco on the grounds that allowing Cloutier an

2. Id. at 4.
3. Id. at 205-06.
exemption from the dress code constituted an undue hardship because it undermined Costco's legitimate business interest in cultivating a professional image at the store.

Beyond being an interesting case study, Cloutier's case illustrates two predominant themes in Gregory's book. The first is that the courts are extremely reluctant to answer the question of which types of organizations or which types of beliefs should be classified as religious. Moreover, courts are reluctant to cast doubt on whether an individual sincerely holds the beliefs in question unless faced with directly inconsistent behavior. Thus, in the aforementioned case, as there was no evidence to show inconsistent behavior, the court assumed the sincerity and the religious nature of Cloutier's beliefs. This case might have turned out differently had Cloutier been more amenable to Costco's proposed accommodations. Cloutier originally proposed that she would cover the piercing with Band-Aids and Costco rejected this proposal. Yet, when another reasonable accommodation could not be agreed on by both parties, Costco proposed the same Band-Aid solution, but Cloutier stated that she would only agree to an exemption from the dress code that allowed her to leave the piercings in during work. This leads to a second predominant theme in Gregory's book, which is that both employees and employers must be reasonable and act with a good faith effort throughout the process. Courts have not been sympathetic to employees who refuse to compromise, and are explicit that a reasonable accommodation does not mean that employers must provide the accommodation preferred by the employee. Employers are, however, responsible for initiating the accommodation discussion and must offer the means of accommodation with the fewest disadvantages. Yet, employers are exempt in a number of situations from providing a reasonable accommodation such as when the accommodation would require the employer to violate the terms of a collective bargaining agreement, impose more than a de minimis cost on the employer, or adversely affect other employees.

Gregory discusses more prevalent examples of cases involving religious accommodation as well. A much more common situation, as Gregory explains, is when an employee requests a schedule that accommodates his/her religious belief which forbids working on the Sabbath. Yet, the courts have not settled on a straightforward answer even in this more common situation. Gregory presents the courts' agreement that under Title VII employers are required to provide a reasonable accommodation except where this would present an undue hardship on the employer's business that would require more than de minimis cost. But he also explains that courts disagree about what qualifies as a reasonable accommodation or a de minimis cost.
Surprisingly, in a post 9/11 world, what the discussion of religious accommodation lacks and what this book lacks in general are examples of cases involving employees who identify as Muslim. In fact, two of the cases discussed in the book involving Muslims are actually situations wherein a worker was discriminated against for not being Muslim. This oversight is not due to a lack of potential cases, because Gregory reports that the EEOC experienced a 300 percent increase in complaints filed by Muslims in the seven months immediately following the 9/11 attacks.

Gregory does draw extensive attention to the cases related to a recent surge in disagreements about what it means for there to be a separation of church and state in practice. In the previous decade and a half there has been a general increase in religious discrimination charges filed with the EEOC by employees practicing majority religions in America. One of the issues contributing to this increase involves the “ministerial exception.” This exception exempts churches from the scrutiny of the courts for their decisions regarding the employment of clergy members and others whose duties are functionally equivalent to those of the clergy or are central to the spiritual mission of the organization. After the publishing of Encountering Religion in the Workplace, the Supreme Court on January 11, 2012, handed down its decision in Hosanna-Tabor Church v. EEOC which appears to further broaden the scope of the ministerial exception to include teachers at religious schools whose teaching at least partially encompasses religious matters. The teacher in this particular case only spent approximately 45 minutes a day on religious duties and taught secular subjects the rest of the day. This decision further strengthens the wall between church and state, and will be celebrated as a positive enforcement of First Amendment rights, but it does so at the potential cost of allowing discrimination and harassment against employees at religious institutions to go unchecked. Gregory would likely question whether the Court correctly applied the ministerial exception in this case and would be deeply skeptical that the decision best served the interests of justice.

Gregory discusses this tension between church and state in chapters specifically devoted to the ministerial exception. He also devotes multiple chapters to another issue related to the separation of church and state—proselytization in the workplace. Commonly, these situations involve evangelical Christians who believe it is an integral part of their faith to

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4. However, there is a subsection in the book on Muslims. Id. at 106-11.
7. Id. at 708.
spread the word to others and that the government cannot prohibit what they believe to be lawful religious expression. Gregory discusses a range of cases including employees who so aggressively attempt to convert their co-workers that it verges on harassment, employees who include religious language in emails to customers against their employer’s wishes, and employers who attempt to use their position of authority to encourage the practice of their faith in their employees. Utilizing these cases, Gregory discusses the delicate balancing act that must occur between squashing an employee’s right to lawful religious practice or an employer’s right to run their private business in accordance with their personal religious beliefs and failing to respect the rights of employees to work in an environment free from religious harassment, persuasion, or forced practice.

Aside from illuminating the limitations and inherent tensions of encountering religion in the workplace, Gregory’s book is notable for its interspersed explanations of how the law grounding these cases has developed over time. Primarily, the law has simply co-opted analytical frameworks from other areas of law and applied them in the context of religion by analogy. For example, Gregory explains that the EEOC has neglected to adopt a set of regulations in religious discrimination cases specifically defining “harassment” or “hostile work environment.” In the absence of guidance from the EEOC, courts have held that the standards for sexual harassment should be applied in religious harassment cases. So while the law on religious discrimination is clearly grounded in Title VII and the First Amendment, the case law surrounding interpreting the broad language of these statutes appears underdeveloped as presented by Gregory. Thus it is ripe with opportunities for lawyers to make novel arguments in the courtroom and as well as to influence decisions at the policy level as the EEOC is likely to continue to update their guidelines and recommendations in this growing area of law.

*Encountering Religion in the Workplace* is logically divided into five parts and readers with a specific interest in this area of law should be able to use the table of contents to quickly zoom in on the chapters of most interest to them and read them in a self-contained manner. But readers will both benefit and enjoy reading this thought-provoking book cover-to-cover. Those who do will walk away with a solid understanding of the tensions inherent in divining the limitations upon bringing religion into the workplace and in analyzing future scenarios will be able to draw upon the panoply of case-based examples brought to life by Gregory.

*Lisa Damm, J.D. 2013 (U.C. Berkeley)*
As the nation debates solutions to the illegal immigration "problem," with both parties at times proposing guestworker programs as a means of managing immigration, Professor Cindy Hahamovitch offers a cautionary history of these labor recruitment schemes in her book, *No Man's Land: Jamaican Guestworkers in America and the Global History of Deportable Labor*. Even in its current forms, Prof. Hahamovitch sees marked similarities between guestworker conditions in America today and South African apartheid, the Jim Crow south, and the controversial Bracero program. Indeed, in some ways this form of migration has become even more dangerous in recent years, with numerous recent abuses by for-profit recruitment agencies that amount to human trafficking.

The H2 Program, named after the sub-section of immigration law authorizing the scheme, is the country's longest-running guestworker program, and for over 40 years was dominated by Jamaican laborers. While the book focuses on Jamaican laborers in Florida's sugar industry, which was the largest employer of H2 workers from 1943 to the 1990s, Prof. Hahamovitch also explores the Bracero program and other guestworker programs in America, as well as the earliest schemes in South Africa, Prussia and Australia. She contends that guestworkers exist in a "no man's land" between countries, and between slavery and freedom. Allowed to work in their host countries, they cannot bring their families, vote, or take advantage of social services. Though guestworkers join the programs voluntarily and can leave at will, they face deportation if they protest their (often squalid) working conditions, and assume an illegal immigrant status if they walk off the job. Yet desperate poverty in places like Jamaica and Mexico keeps a steady stream of these workers clamoring to replace those who leave, and powerful agricultural lobbies keep the doors open to them and make sure that the power to deport remains in employers' hands.

Created in response to employers' demands for cheap, deportable labor, Prof. Hahamovitch notes that guestworker programs also serve to placate anti-immigrationists' fears of the influx of "illegal aliens" by managing migration and segregating the newcomers from the rest of

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society. She argues convincingly that both the perceived labor shortage that initiated America's guestworker programs, and the supposed solution to undocumented immigration these programs purported to be, were illusions. During World War II, when the country's first formal guestworker programs were born, there was less a shortage of labor than a shift in the balance of power between growers and laborers, with African American farmworkers now able to make demands for improved working conditions. Rather than having to bargain with black workers, growers organized and demanded foreign laborers, not to replace domestic farmworkers but to compete with them, to break up strikes, and to force domestic laborers to work. At the war's end, as guestworkers in other industries were repatriated, agricultural guestworkers remained, "not because there was a labor crisis in agriculture, but because farm employers had come to appreciate the certainty, flexibility, and authority that deportable workers afforded them." 2

According to Prof. Hahamovitch, at the same time that employers clamored for access to foreign labor, the public sought to exclude those same people from the country. While guestworker programs have been touted as a compromise, an incentive to keep employers from hiring undocumented workers, and a means of decreasing illegal immigration, she argues that these results have never materialized. Rather, the number of undocumented immigrants has increased due to workers walking away from their jobs in protest, increased border crossings, and overstays on visas. In reality, Prof. Hahamovitch contends, these programs have been popular "because they created the illusion of state control while giving growers precisely what they wanted." 3

To be fair, Prof. Hahamovitch notes that proponents of guestworker programs have also hoped they would improve the working conditions of farmworkers, both domestic and international. The initial Jamaican program was overseen by the labor-friendly Farm Security Administration, which required employers to pay guestworkers a minimum wage, guarantee work for three-quarters of their contracts (or pay $3 per day), and provide free housing and transportation. Sending countries provided liaisons to advocate on guestworkers' behalves. Even after the administration of the program shifted to the grower-friendly War Food Administration, and employers rather than the government made decisions on hiring and deportation, the conditions in guestworker contracts were improvements over the treatment of domestic laborers.

Prof. Hahamovitch explains that proponents of the programs expected these safeguards to both protect foreign workers and also improve

2. Id. at 88.
3. Id. at 134.
conditions for domestic workers, but the opposite came about. Growers used guestworkers as strikebreakers, undermining union attempts to organize domestic farmworkers to demand improved conditions. Rather than work toward improved treatment for foreign laborers as well, these unions usually focused instead on expelling them. Guestworkers could not successfully organize themselves, as they were under “no-strike” contracts and could be repatriated due to “indiscipline,” a term employers used broadly.\footnote{Id. at 71, 89.} As the program grew to include more countries, guestworkers from various countries competed with each other for coveted, though exploitative, American farmworker jobs, resulting in a “race to the bottom” which depressed working conditions and frequently forced workers to toil at a grueling pace. Liaisons became as much concerned about sustaining the program and the remittances it provided as they were about the treatment of their country’s workers. Intended to advocate on guestworkers’ behalves, they instead frequently helped to enforce the employers’ discipline.

Prof. Hahamovitch’s thoroughly-researched history and vivid depictions of the lives of Jamaican guestworkers provide a compelling indictment of a labor system that incentivizes exploitative working conditions and keeps immigrant workers “a caste apart.”\footnote{Id. at 235.} As she traces the shifts in the political landscape, oversight of guestworker programs, public sentiment toward immigrants, and attempts to improve conditions for farmworkers, she highlights just how little has changed for guestworkers. The few victories that have been won, such as a landmark back-wages suit for cane-cutters in 1992, and a collective bargaining agreement with the North Carolina Growers Association, have been few and far between. The most common pattern Prof. Hahamovitch sees is activism left impotent by deportation, and lawsuits failing when, at the threat of deportation, workers refuse to testify against their employers. Attempts at greater government oversight have usually been overwhelmed by corporate influence, such as when a sugar insider drafted the 1986 Immigration Reform and Control Act to exclude cane-cutters from obtaining the legal immigration status afforded other “alien farmworkers,” by defining sugarcane as neither a fruit nor vegetable.\footnote{Id. at 206, 213-14} Though the H2 program in sugar ended in the late ‘90s, due to a number of blows such as a General Accounting Office report of the Department of Labor’s failure to enforce regulations and after mechanization of harvest operations, the program expanded to numerous other industries in which the same abuses still exist. Employers still ignore regulations seemingly without consequence, and the proliferation of for-
profit recruitment agencies has led to new forms of exploitation of temporary workers.

After examining the perspectives of actors as varied as growers and their lobbies, Jamaican guestworkers sending remittances home, Braceros from Mexico, domestic migrant laborers, union organizers, undocumented immigrants, and politicians from both sides of the spectrum, Prof. Hahamovitch's conclusion is simple: "[F]reedom from fear of deportation is a basic prerequisite for justice." Short of a vast overhaul of the guestworker system, which Prof. Hahamovitch considers unlikely given the struggles unions have faced to secure even modest rights for domestic farmworkers, the only way to protect the rights of guestworkers is to provide them with citizenship. This, however, eliminates the power that employers have to deport these workers, which is the entire appeal of the program. Temporary visas which do not bind workers to one employer may improve their leverage, but Prof. Hahamovitch contends that:

the United States would still be creating a giant class of second-class citizens—really non-citizens—who would be denied the political power necessary to enforce their basic rights. We've been there before. It was called Jim Crow and it kept millions of African Americans outside the bounds of civil society for a century.8

Recognizing the country's dependence on immigrant workers, particularly in agriculture, Prof. Hahamovitch advocates for open borders and generous provision of citizenship rights.

Prof. Hahamovitch expertly analyzes the motivations and forces at work behind the rise and fall of American and global guestworker programs, and movingly depicts the experience of Jamaican laborers within this context. Shining a light not only on a little-known population of laborers, the book also exposes the patterns of corruption and exploitative profit-seeking that have rationalized and maintained guestworker programs over several decades. The depth of Prof. Hahamovitch's research and clarity of her writing give compelling force to her call for the end of deportable labor schemes as they now exist in America.

Sara Stephens, J.D. 2014 (U.C. Berkeley)

7. Id. at 240.
8. Id. at 242.