Transformation of Immigrant Integration in Western Europe: Civic Integration and Antidiscrimination Policies in the Netherlands, France, and Germany

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TRANSFORMATION OF IMMIGRANT INTEGRATION
Civic Integration and Antidiscrimination in the Netherlands, France, and Germany

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FUELED by the recent wave of Islamic terrorism, which in Europe has alarmingly domestic roots, there is an acute sense that European states and societies have failed to integrate their immigrant and ethnic minority populations. Not by accident, in the past few years governments across Western Europe have engaged in general stocktaking about their past immigration and integration policies, while trying to chart out new directions.[1] I argue in this article that in response to the integration crisis distinct national models of dealing with immigrants are giving way to convergent policies of civic integration and antidiscrimination.

In laying out the empirical evidence for this, I challenge a central claim in the wider literature on historical institutionalism and path dependence that national policy trajectories are locked in to inert patterns.[2] At least in the migration domain, there seems to be much less inertia than has previously been assumed.[3] Much of the migration literature nevertheless distinguishes, within a liberal-democratic spectrum, between the opposite poles of difference-friendly multiculturalism and universalistic assimilationism, and negatively demarcates both of them

* I acknowledge helpful suggestions from three anonymous reviewers for this journal.

[1] For Britain: Home Office, *Secure Borders, Safe Haven* (London: White Paper, 2002); for France: Cour des Comptes, *L'accueil des immigrants et l'intégration des populations issues de l'immigration* (Paris: Cour des Comptes, 2004) (hereafter cited as *L'accueil des immigrants*); for Germany: Süssmuth-Kommission, *Zuwanderung gestalten, Integration fördern* (Berlin: Federal Ministry of the Interior, 2001) (hereafter cited as *Zuwanderung gestalten*); and for the Netherlands: Tweede Kamer, *Bruggen bouwen, Eindrapport Onderzoek Integratiebeleid* (The Hague: Kamerstuk 28689, no. 9, 2003–4).

[2] See Sven Steinmo, Kathleen Thelen, and Frank Longstreth, eds., *Structuring Politics* (Cambridge: Cambridge University Press, 1992); Paul Pierson, "Increasing Returns, Path Dependence and the Study of Politics," *American Political Science Review* 94, no. 2 (2000).

[3] For a classic statement stressing cultural traditions, see Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge: Harvard University Press, 1992). For a combination of culturalist and path-dependency reasoning, see Adrian Favell, *Philosophies of Integration* (London:

from the illiberal and nondemocratic segregationism prevailing in some of the countries that once received guest workers.[4]

The following review of recent policy trends in three countries that are commonly taken as representatives of these divergent approaches—the "multicultural" Netherlands, "assimilationist" France, and "segregationist" Germany—will attest to the implausibility of such classification. In fact, with respect to the obsolescence of national models, it is apposite to speak of a "transformation" of immigrant integration in Western Europe.

Section I of this article identifies two background factors that have been conducive to policy transformation: a new elite consensus in favor of new immigration and Europeanization. The following two sections compare the Netherlands, France, and Germany and demonstrate that there is convergence of two new policies on immigrant integration. The first, civic integration for new immigrants, is discussed in Section II; and the second, antidiscrimination for settled immigrants and their descendants, is discussed in Section III. Section IV grounds antidiscrimination and civic integration in opposite variants of liberalism, an "old" liberalism of nondiscrimination and equal opportunities and a "new" liberalism of power and disciplining, respectively. Section V concludes.

Selecting the Netherlands, France, and Germany as cases for comparison follows the logic of a least-likely case comparison:[5] if the same, or similar, policies of civic integration and antidiscrimination have come to mark the state's approach to immigrant integration in these sharply distinguished exemplars of "national model" reasoning, a strong case in favor of policy convergence is established, making it the default claim that needs to be refuted.

I. Changing Parameters of Immigrant Integration: A Consensus for New Immigration and Europeanization

Two parameters—one in the realm of ideas, the other in the realm of institutions—that had shaped immigrant integration in the past changed since the mid-1990s. The realm of ideas has seen the rise of a new consensus in favor of new legal immigration, reversing three de-

Macmillan, 1998). And for a pure path-dependency argument, see Randall Hansen, "Globalisation, Embedded Realism, and Path Dependence," *Comparative Political Studies* 35, no. 4 (2002).

[4] Most recently, and with great sophistication, Ruud Koopmans, Paul Statham, Marco Giugni, and Florence Passy, *Contested Citizenship* (Minneapolis: University of Minnesota Press, 2005).

[5] Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry* (Princeton: Princeton University Press, 1994), 209–210.

cades in which immigration was mostly unwanted. This has elevated the problem of immigrant integration from a concern of low priority for policymakers to one of high priority. And in the realm of institutions, the process of Europeanization has seized the migration domain, weakening the powers of the nation-state that had shaped immigrant integration in the past. Let me briefly elaborate on both developments in turn.

In the realm of ideas, there is a growing awareness that immigration, far from being a finite historical episode, is a permanent, even desirable feature of European societies, above all for economic reasons but also—though in much more ambivalent and qualified ways than commonly thought—for demographic reasons. This constitutes a fundamental shift. Well into the early 1990s it had been the joint stance of European states to sternly reject new labor migration, the last and perhaps most drastic manifestation of the phenomenon being former French interior minister Charles Pasqua's martial quest for "zero immigration."[6] Such migration as still occurred, mostly family and refugee migration, was reluctantly accepted for constitutional reasons but it was certainly not wanted.[7] As in the "firm but fair" logo that has framed the British approach to immigration for many decades, closure to the outside was often taken as a precondition for being inclusive and accommodating to those migrants who had already been admitted. *This* condition for "fair" integration is no longer valid. Beginning in the late 1990s, all West European countries opened their doors to the economic elite of globalization. In its new Immigration Law of 2004, Germany, the proverbial "no immigration country" of the past, even broke with the incremental logic of European-style immigrant rights in offering permanent settlement visas from the start, but only for highly skilled immigrants. There is now, across Western states, a competitive "race for talent," in which these states are bending over backward to attract the "best and brightest" of the global migrant stream.[8]

However, in a Europe permeated by right-wing populism, the imperative to keep the numbers small is still strong, in contrast to the classic immigrant nations. Tellingly, the demographic case for new immigration is mostly made in that polity that is marked by the absence of

[6] For a sharp critique of this policy, see Patrick Weil, "Pour une nouvelle politique d'immigration," *Esprit* 20 (1996).

[7] See Christian Joppke, "Why Liberal States Accept Unwanted Immigration," *World Politics* 50 (January 1998).

[8] See Ayelet Shachar, "The Race for Talent," *New York University Law Review* 81 (2006).

direct democratic accountability: the European Union. By contrast, in the rougher "democratic" quarters of member states demographic rhetoric is heard much less. But demography is still destiny. As far back as the late nineteenth century, European demographic decline had been a worrisome trend for demographers and political elites.[9] The alarming novelty is that relative decline has since turned into absolute decline. If a century ago the countries that constitute today's European Union still accounted for 14 percent of the world's population, that figure is down to 6 percent today, and it is expected to drop to a mere 4 percent by 2050. "There has not been such a sustained reduction in the European population since the Black Death of the 14th century," writes a noted British historian.[10] Considering further that by 2050 the median age in Europe is expected to be a graying fifty-three, while that in the United States will be a relatively youthful thirty-six,[11] the European Union's (EU) ambitious claim to become "the most competitive and dynamic knowledge-based economy in the world" appears even more risible.[12] As the bleak implications of shrinking and aging populations for Europe's economies and welfare states are beginning to register, the demographic case for new migration cannot but gain in importance. Accordingly, the recently issued declaration of the European Council (intergovernmental steering body of the European Union) on "immigrant integration policy" opens with the statement, "Immigration is a permanent feature of European society. If the flow of immigrants . . . is orderly and well-managed, Member States reap many benefits."[13]

The new elite consensus in favor of new immigration has important ramifications for integration policy. Most important, immigrant integration is elevated from a fringe problem into one of the central challenges facing the entire society. For the first time, European states are beginning to see the need for a "global and coherent policy of immigrant integration," as the French Cour des Comptes put it in 2004.[14]

At the very moment that immigrant integration became a concern of high priority, the Europeanization of the immigrant function has

[9] See Geoffrey Barraclough, *An Introduction to Contemporary History* (Harmondsworth: Penguin, 1967), 80–82.

[10] Niall Ferguson, "Eurabia?" *New York Times Magazine*, April 4, 2004, 13.

[11] *The Economist,* August 24, 2002, 22.

[12] In EU jargon, this is the "Lisbon strategy" (as if any "strategy" could ever achieve that much), formulated at the EU summit in Lisbon in March 2000.

[13] Council of the European Union, *Immigrant Integration Policy in the European Union* (Brussels: November 19, 2004), 14615/04 (Presse 321) (henceforth cited as *Immigrant Integration Policy in the European Union*).

[14] *L'accueil des immigrants* (fn. 1), 17.

shifted into high gear. "Europe" is burying the national models of old in two ways, through legal mandate and through cultural standardization. With respect to legal mandate, since the mid-1990s the entire migration function has slowly but steadily come under the purview of European Community (EC) law. The making of a joint EU immigration policy has been on the agenda since the 1997 Amsterdam Treaty, and with respect to family migration and asylum there are now EC directives that are legally binding on member states. Even immigrant integration is increasingly coming within the ambit of EC law, though it does not yet match in importance the level of concern accorded migration control. Milestones in this are the 2000 Race Directive (to be discussed further below), which obliges member states to develop and implement national antidiscrimination laws, and the 2003 Directive on third-state permanent legal residents, which in important respects realizes the long-standing quest for approximating the residence and free-movement rights of non-EU immigrants to those of EU citizens. Finally, in November 2004, the Council of the European Union agreed on "common basic principles" for "immigrant integration policy in the European Union";[15] though nonbinding, this agreement is likely to further the harmonization of integration policies across Europe.

However, Europeanization proceeds by means of cultural standardization no less than it does by legal mandate. There is now a dense network of academics, journalists, and policy experts that is monitoring best practices in other countries and feeding them back into the national debates. In terms of the "open method of coordination" the soft force of best-practice emulation has even been incorporated into the legal ambit of a less ambitious Euro-building project that has recently been undercut by resurgent nationalisms. A pertinent example of soft best-practice Europeanization is the civic integration policy, to which I now turn.

II. Civic Integration

The emergent gestalt of contemporary European immigrant integration is a peculiar coexistence of civic integration and antidiscrimination policies. They are complementary in that they address different phases of the migration process—its initial (civic integration) or late phases (antidiscrimination). However, both policies also exhibit countervailing, even contradictory dynamics. The logic of civic integration is to

[15] *Immigrant Integration Policy in the European Union* (fn. 13).

treat migrants as individuals who are depicted as responsible for their own integration; civic integration is an extension into the migration domain of the austere neoliberalism that frames economic globalization. The opposite logic of antidiscrimination is to depict migrants and their offspring as members of groups that are victimized by the majority society. There is thus reintroduced at the tail end of integration the ameliorative group logic that had been discarded at its beginning by the harsh individualism of civic integration.

The coexistence of civic integration and antidiscrimination reveals that the liberal mantra of two-way integration,[16] according to which not just the migrants but also the receiving societies must change in the process of immigration, consists in reality of two separate one-way processes. At first, the burden of change falls completely on the migrant; later, the burden of change falls on society. Since continental European courts had pioneered the constitutionalization of alien rights and thus helped turn European societies into immigrant societies, the idea was that such rights are incremental, increasing with the migrant's length of stay.[17] The dualism of civic integration and antidiscrimination subtly reinforces this idea, and in that the migrant's initial entry into the new society is precarious and in that she must gradually "earn" the rights of full (and this means, above all, permanent) membership. In this Europe remains lastingly different from the classic immigrant nations, in which from the very outset the legal immigrant is considered a fully functioning and rightful member of the new society.[18]

As will be further examined below, a key feature of civil integration is its obligatory character. In his seminal treatise on illiberal policy in liberal states, Desmond King had argued that a balance between rights and duties is inherent in "liberal contractualism" and that at times this balance shifts decidedly toward "duties."[19] Civic integration is an instance, next to eugenics in the past and workfare today, of "illiberal social policy" in a liberal state. King's important insight is that such

[16] Ibid.

[17] For the constitutionalization of alien rights, see Elia Marzal, "Constitutionalising Immigration Law: The Reformulation of the Rigths of Aliens by the Courts in Germany, France and Spain" (Ph.D. diss., Department of Law, European University Institute, 2004). The motif of incremental rights, for instance, is invoked in the European Commission "communication" to the Council of June 3, 2003, which prepared the ground for the November 2004 Council conclusions on "common principles" of European integration policy. See European Commission, *Communication on Immigration, Integration and Employment* (Brussels: June 3,2003), COM (2002) 336 final.

[18] In my view, the immediate availability of permanent settlement rights in the classic immigrant nations and the general absence of such rights in Europe overrides, for instance, the important internal distinctions between the "contract," "affiliation," and "transition" models in U.S. immigration law as unraveled by Hiroshi Motomura, *Americans in Waiting* (New York: Oxford University Press, 2006).

[19] Desmond King, *In the Name of Liberalism* (Oxford: Oxford University Press, 1999), 18.

policies are not born of sources extrinsic to liberalism, such as nationalism or racism, but are inherent in liberalism itself.[20] Thus, liberalism's core tenets of freedom and equality presuppose that "members of the polity possess the necessary reasoning powers or ability to . . . plan for their future."[21] This creates illiberal temptations with respect to those who do not meet these criteria.

The Netherlands

Civic integration originated in the Netherlands, and here alone the new policy has exclusively domestic sources. More precisely, civic integration is a response to the obvious failure of one of Europe's most pronounced policies of multiculturalism to further the socioeconomic integration of immigrants and their offspring.[22] In a counterpoint to multiculturalism's tendency to lock migrant ethnics into their separate worlds, the opposite goal of civic integration is migrants' participation in mainstream institutions (which came to be labeled "shared citizenship") and "autonomy," to be achieved through learning the Dutch language and integrating into the labor market. The new policy was first enunciated in the 1998 Newcomer Integration Law (*Wet Inburgering Nieuwkomers*, henceforth referred to as WIN), which obliges most non-EU newcomers to participate in a twelve-month integration course, consisting of six hundred hours of Dutch language instruction, civic education, and preparation for the labor market.

When WIN was introduced in 1998, the coercive side was still subordinate to the service aspect. Over time, however, the obligatory, coercive side of civic integration moved to the fore. This entailed a paradoxical double move on the part of the Dutch state: withdrawal and increased presence. On the side of state withdrawal, the philosophy of "autonomy" and "self-sufficiency" (*zelfredzaamheid*) underlying civic integration was quickly extended to its actual provision, requiring migrants to pay for the integration courses in full. In addition, the provision of integration courses was farmed out to private organizations, and state involvement in the whole affair was reduced to administering standardized tests at the very end. In effect, the state did not care whether the courses were

[20] In this King's approach differs from Rogers Smith's well-known "multiple traditions" approach, in which liberalism is tightly separated from nonliberal traditions (in America) such as "ascriptive Americanism." See Smith, "Beyond Tocqueville, Myrdal, and Hartz," *American Political Science Review* 87, no. 3 (1993).

[21] King (fn. 19), 8.

[22] See Ruud Koopmans, "The Failure of Dutch Multiculturalism in Cross-National Perspective" (Paper presented at the conference "Immigrant Political Incorporation," Radcliffe Institute for Advanced Study, Harvard University, April 22–23, 2005).

actually attended; only the result counted. It thus became quite literally true that "everyone is responsible for his own integration," as an official in the Justice Ministry put it.[23] In a counterpoint to this privatization of integration, coercive state involvement has massively increased. Eventually not only newcomers but also settled immigrants (so-called *oudkomers*), not a few of them Dutch citizens, were required to pass an integration test, which amounts to an enormous logistic operation on the part of the state—identifying, mobilizing, and policing no less than the entire migrant population of the country.

The crucial innovation on the coercive side was to tie the granting or renewal of residence permits to passing an integration test. This creates a linkage between the previously separate domains of migration control and immigrant integration. It also constitutes an entirely new vision of immigrant integration. So far the prevailing view across Europe was that a secure legal status enhances integration; now the lack of integration is taken as grounds for the refusal of admission and residence, and the entire integration domain is potentially subordinated to the exigencies of migration control. The most drastic expression of this is the Dutch innovation of "integration from abroad." Applicants for family reunification are now required to take an integration test at a Dutch embassy abroad in order to be granted a temporary residence permit. In the absence of Dutch education programs abroad, integration from abroad therefore equates with no integration whatsoever, making the integration test a perfect tool for preventing unwanted family immigration.

What began as a policy of immigrant integration has thus turned into its opposite, a no-immigration policy. What caused this evolution? If one considers that none of the civic integration policies in other European states has gone to such extremes, the explanation is obvious: the right-wing populist turn of Dutch politics after the assassination of iconic leader Pim Fortuyn in 2002. His followers, or anxious mainstream politicians close to the anti-immigrant pulse of the public, have since pushed for an increasingly restrictive and repressive Dutch immigration and integration policy.

However, not to be forgotten in this restrictive turn is the demographic profile of the migrant categories targeted by civic integration. As elsewhere in Europe, in the absence of numerically significant labor migration, the large majority of newcomers are still asylum and family

[23] Sandrine Musso-van der Velde, "Immigrant Integration Policy: The Case of the Netherlands" (Manuscript, Dutch Justice Ministry, The Hague, 2005).

migrants, many of whom are low skilled or unskilled, with very little if any schooling and certainly with no Dutch language competence. The harshest measure, integration from abroad, applies only to family migrants, who are mostly from Turkey and Morocco. Turkish and Moroccan ethnics in the Netherlands (and elsewhere in Europe) have a high propensity for in-group marriage. Not just that, most second- and third-generation Turks and Moroccans look for a marriage partner in their parents' country of origin. A recent Dutch report on "imported marriages" claims that 70 percent of Turkish youth marry a partner from their parents' home country, while in the case of Moroccan youth 60 percent of females and 50 percent of males do so.[24] The offspring of such unions grow up in ethnically closed families, thus reinforcing and perpetuating the ethnic segregation that characterizes the Turkish and Moroccan communities in the Netherlands at large. That is the precise problem that put "civic integration" on the map and from which even its latest, heavily restriction-minded incarnation has evidently not deviated.

France

The Dutch civic integration policy has quickly become a "model for Europe."[25] Not unlike the Dutch, the French version quickly moved from initial voluntarism toward coercion, though it stopped well short of the Dutch extreme. While the influence of the "Dutch example" is obvious,[26] the French policy also has domestic precursors, in terms of the *plates-formes d'accueil* (introduction platforms), voluntary half-day instruction for certain categories of newcomers (originally only family migrants) that was introduced by the socialist Jospin government in 1998. In July 2003 the Gaullist Raffarin government launched the more ambitious program of *Contrats d'accueil et d'intégration* (CAI), which took its cues from the Dutch example.[27] It consists of one day of civics instruction, followed (when deemed necessary) by five hundred hours of French language instruction. Interestingly, only about one-third of the 150,000 newcomers in 2006 (the first year of full operation of the new policy) were slotted for enrollment in a French language course.[28] The francophone background of the majority of newcomers to France

[24] *Migration News Sheet,* July 2005, 26.

[25] Ines Michalowski, "Integration Programmes for Newcomers: A Dutch Model for Europe?" IMIS-*Beiträge* no. 24 (2004).

[26] See the brief discussion of the "Dutch example" in Haut Conseil à l'intégration, *Les parcours d'intégration* (Paris: La documentation française, 2001), 47–48.

[27] Ibid.

[28] *Le Figaro*, May 19, 2004.

evidently is an asset that positively distinguishes the French from the more severe Dutch or German civic integration challenges, where generally no host-society language competence can be presupposed.

While this demographic fact might have led the French state to a lesser emphasis on the earliest phase of immigrant integration, there was also a more principled consideration that moved in the exact opposite direction. As the Cour des Comptes outlined, with an eye on the long-standing French distaste for classification by ethnic origin, *accueil* (reception) constitutes the only moment in the entire integration process "where the targeted groups can be easily designated without creating a legitimacy problem for public action."[29] In this interestingly subterranean way, the French "national model" of immigrant integration, which discounts ethnicity, was propelling (rather than obstructing) the French immersion into the European "civic integration" mainstream.

Moreover, in an interesting counterpoint to the Dutch case, the obligatory aspect of the French integration contract was much slower in moving to the fore and remained much more contested than in the Netherlands. In this case also, the "national model" forces of old were at play: in "Republican" France, the *contrat d'accueil* was immediately associated with the *contrat social*, and from this angle a "forced contract" appeared to be even more of a contradiction in terms.[30] However, spotty participation by newcomers provided the impetus for making CAI obligatory: in its first year of operation, 90 percent of applicable newcomers signed an integration contract but only 65 percent of those who were told to take a French language course followed up.[31] A first step in the obligatory direction was the Loi Sarkozy of November 2003, which drastically restricted the access to legal permanent residence and which made the receipt of a ten-year residence card dependent on "Republican integration," defined in the law as "knowledge of the French language and of the principles that constitute the French Republic." Most important, family migrants who previously had had direct access to a ten-year residence card (or at least the same residence status as their sponsor) now received only a temporary one-year card. And only after two years would they be eligible to apply for the all-important ten-year card, subject to the "Republican integration" proviso.

The justification for this restriction is strikingly similar to the Dutch case: the fight against ethnic endogamy, denounced by Sarkozy as "to-

[29] *L'accueil des immigrants* (fn. 1), 125.

[30] For more detail, see Christian Joppke, "Beyond National Models: Civic Integration Policies for Immigrants in Western Europe," *West European Politics* 30, no. 1 (2007), 12.

[31] *Le Figaro*, September 27, 2004.

tally clannish communalism (*communautarisme*)."[32] Moreover, as is typical for civic integration, repression is mobilized for liberal purposes. As Sarkozy outlined the rationale of subjecting family migrants to a "Republican integration" requirement: "What we want is to oblige someone who wants to be joined by a close family member (from abroad), which is generally his wife, to permit her to learn French and to insert herself in our society."[33] What Danièle Lochak denounced as "perversion of logic and of equity"[34] amounts to a double illiberalism in pursuit of a liberal goal: not only obliging a person to become "autonomous," which is the usual rationale of civic integration, but mobilizing patriarchy to achieve this goal.

While the 2003 Loi Sarkozy did not specify how "Republican integration" was to be formally determined, the next logical step was to determine such integration explicitly in terms of the integration contract (CAI) and to make the latter obligatory for a ten-year residence card. This promptly happened in the second Loi Sarkozy, which was passed in spring 2006 under Sarkozy's second term as interior minister.

Germany

While reference to the "Dutch model" figured much more prominently in the German incarnation of civic integration than in the French version, there was also, as there was in France, a domestic precursor to civic integration, in terms of long-standing service programs for ethnic German immigrants (so-called *Spätaussiedler*). The service-oriented *Aussiedler* paradigm contributed to a certain reluctance to follow the obligatory and coercive tilt of the Dutch model. Since the idea of *Integrationskurse* (which consists of six hundred hours of German language instruction and thirty hours of civic instruction) was first picked up from the Dutch neighbor in the Süssmuth Commission on Immigration Reform of 2001, the "right" to participate was stressed, though it was never in doubt that attendance was also to be obligatory. The Süssmuth Commission wanted to have its cake and eat it too: "The courses should be obligatory; however, penalties in the case of non-attendance . . . cannot be implemented and are not practicable."[35] How can there be an obligation without a penalty for noncompliance?

The same twisted logic is visible in the few clauses of the 2004 Immigration Law (Zuwanderungsgesetz) that deal with the "promotion

[32] Danièle Lochak, "L'intégration, alibi de la précarisation," *Plein Droit*, no. 59–60 (2004), 4.
[33] Ibid.
[34] Ibid.
[35] *Zuwanderung gestalten* (fn. 1), 260.

of integration" and lay out the design of the integration courses. Article 43 creates an "entitlement" to participate for non-EU newcomers. Article 43a, in turn, creates an "obligation" to participate for those who are "entitled" according to Article 43 but who "cannot lead a simple oral conversation in German language" (this obligation applies as well to settled migrants who are dependent on welfare). According to this bizarre construct, newcomers are "entitled" and "obliged" at the same time to enroll in an integration course.

Such debate as there was surrounding the new policy focused on the question of sanctions (positive or negative) and who is to pay (the migrant or the state, and if the latter, the federal state, the Land, or the municipality). The dividing line on both questions was the obvious one, with the right pushing for Dutch-style negative sanctions and having the "user pay" and the left following the Süssmuth Commission in stressing positive incentives and having the state pay. In the end, a compromise was reached on both questions. With respect to the all-important tying of residence permits to civic integration, an elastic formula was inserted in the 2004 Immigration Law (Article 8.3) that noncompliance "can" lead to the nonrenewal of a temporary permit or the denial of a permanent residence permit, provided that these permits are discretionary. However, this comes with strings attached (existing family and other social ties in the Federal Republic have to be taken into consideration), so that it is not likely to cut much ice. Most important, family migrants are not affected by this clause, because their entitlement to a residence permit is not discretionary but rather is grounded in constitutional law. Considering that the majority of newcomers to Germany arrive as family migrants, the rough edges of the civic integration policy do not apply to them at all.

III. Antidiscrimination

The parallel European trend toward antidiscrimination is a concession that civic integration has failed, and not because of a lack of effort or aptitude on the part of the migrant but because of prejudice or inertia on the part of the receiving society. In shifting the burden of adjustment from the migrant to the receiving society, antidiscrimination is society's distinct share in the two-way process of immigrant integration.

However, in targeting the end of the integration process, or rather deficiencies of an integration that should already have occurred, the very notion that "immigrants" are involved in this becomes questionable, both legally and sociologically.

Legally, "discrimination" is a distinction between people that ought not to be made because people are entitled to equal treatment.[36] Immigrants, however, are not formally equal until they have acquired the citizenship of the receiving society. Note that nationality-based distinctions have in principle remained legitimate under international and domestic law—otherwise states could not have an immigration policy. To be sure, the scope of immigration policy or, more generally, of nationality-based distinctions that may be drawn by the state has dramatically shrunk in recent years, ironically due to the growing strength of international and domestic antidiscrimination norms. For instance, while it was once common practice to prohibit foreigners from owning land or to tax them more heavily, this is no longer possible. To the degree that trade is replacing warfare as the dominant relationship in international society and that the state is retreating behind the market in the regulation of society, the clear trend is toward the reduction of nationality-based distinctions.[37]

Sociologically, despite the trend to include nationality-based distinctions within the ambit of discrimination, the impetus behind antidiscrimination is ethnic or racial discrimination directed against fellow nationals. A prominent example is U.S. civil rights law, which initially targeted black Americans for protection and only indirectly was extended to non-European immigrants.[38] Britain, the European state with the earliest, and still today most extended, antidiscrimination policy, originally established the policy with respect to immigrants who had arrived as fellow citizens. Conversely, Germany, the European state that had resisted granting citizenship to its immigrants longer than most, did not have an antidiscrimination law before August 2006 and was whipped into it only by EU dictate. At its sociological heart, the right of equal treatment, which underlies antidiscrimination policy, is a

[36] D. Malamud, "Discrimination," *International Encyclopedia of the Social and Behavioral Sciences* (Amsterdam: Elsevier, 2001).

[37] Nationality-based distinctions that are not within the ambit of immigration policy are differently developed across states and sometimes even across sectors within the same state. In cross-national perspective, for example, in the Netherlands public sector employment is widely accessible to non-Dutch citizens, while in France and Germany this is reserved for citizens, even in areas that are not at all related to sovereignty functions (exempt from this, of course, are European Union citizens, according to Article 12 of the EC Treaty). In France, one-fourth of professional jobs are foreclosed to foreigners, including employment in public sector companies like Air France, EDF, or SNCF. Such exclusion is increasingly branded as "discriminatory"; Haut Conseil à l'intégration, *Lutte contre les discriminations* (Paris: La documentation française, 1998), 94–96. In cross-sectional perspective, France, while a laggard with respect to public sector employment, has removed all nationality-based distinctions in social protection, as commanded by Convention No. 118 of the International Labor Organisation (Haut Conseil, 15–23).

[38] See the masterful study by John Skrentny, *The Minority Rights Revolution* (Cambridge: Harvard University Press, 2002).

citizen right, even though the universalism of the equality norm works against and eventually transcends the nationality limitation.

Accordingly, the recent push for a more vigorous antidiscrimination policy in France is also a move beyond the very notion of "integration," which is now seen as stigmatizing and exclusionist.[39] As a young *beur* rejects the notion of "integration" if applied to the offspring of immigrants, "We never immigrated, and still we are being told that we have to integrate. But we already *are* a part of this society."[40] Antidiscrimination sets in when people who are no longer "immigrants" nonetheless are still disadvantaged because of their ethnicity or race. Ironically, it is the fact of cultural assimilation, particularly among second-generation "immigrants," that militates against the framework of "immigrant integration." The noted survey by Michèle Tribalat found that, particularly with respect to language acquisition, marriage patterns, and religious practice among ethnics of North African origin, "assimilation is at work" in France,[41] although these youngsters still experienced disproportionately high rates of unemployment.[42] The discrepancy between being "of" society, that is, having graduated "from immigration to assimilation,"[43] and still being excluded "by" society is the precise target and moment of antidiscrimination policy.

The EU Race Directive

A milestone in the European trend toward antidiscrimination was the Race Directive of the European Union, issued in June 2000. Implementing Article 13 of the Amsterdam Treaty, which had conferred powers on the European Community to legislate in this domain, the Race Directive requires that by July 2003 member states pass laws against "direct" and "indirect" discrimination on the grounds of "racial or ethnic origin." Its scope is broad, including employment, education, social protection and health care, and access to vital goods and services, such as housing and private insurance. It places the burden of proof on the accused party, which has to rebut a "presumption" of discrimination brought forward by the plaintiff. Finally, member states are called upon to create special agencies with observatory, investigative, and consultative functions.

[39] Michel Wieviorka, "Faut-il en finir avec la notion d'intégration?" *Les cahiers de la sécurité intérieure* no. 45, third trimester (2001).

[40] Quoted in Gwénaële Calvés, *Renouvellement démographique de la function publique de l'Etat* (Paris: La documentation française, 2005), 281.

[41] Michèle Tribalat, *Faire France* (Paris: La Decouverte, 1995), 216.

[42] Ibid., 172–82.

[43] Michèle Tribalat, *De l'immigration à l'assimilation* (Paris: La Decouverte, 1996).

How such a far-reaching measure, which extends EU competence into new areas (such as housing), could be passed with the consent of all member states (as required by Article 13 of the Amsterdam Treaty) and with such record speed has immediately drawn scholarly attention.[44] One important factor is the framing of ethnic and racial discrimination in economic rather than human rights terms. This allowed presenting the Race Directive as serving the interests of common-market integration. From the market-building angle, prohibiting ethnic and racial discrimination was but an extension of prohibitions on nationality and sex discrimination that were already well established in European Community law. A novelty, however, is that "all persons" (Article 3.1), and not just citizens of member states, are entitled to the "principle of equal treatment," signifying that the main addressees of this measure are the non-European-origin ("Third-State," in EU jargon) populations of Europe, that is, its "immigrants" proper.[45]

However, a second factor that helped usher the Race Directive into being was directly political—"le facteur Haïder."[46] The all-European ostracizing of a conservative Austrian government that had dared include as coalition partner the notoriously xenophobic Freedom Party of Jörg Haider showed, at least in the view of its ardent protagonists, that Europe was not just an economic union but was also a political union. Most importantly, the Haider episode muted all possible opposition to the Race Directive. Especially France, which spearheaded the anti-Austrian coalition but which also had most to fear from an Anglo-American-style, latently group-recognizing antidiscrimination policy, now became one of this policy's strongest supporters. In fact, the anti-Semitic and xenophobic profile of Haider and his party corresponded directly to the French concept of "ideological" racism, providing a direct link between the anti-Haider campaign and France's support for the Race Directive.[47]

Before the arrival of the EU Race Directive, one could find two different types of antidiscrimination law in Europe. One targeted "expressive racism"[48] and conceived of discrimination as intentional, ideology-

[44] See the highly informative study by Virginie Guiraudon, "Construire une politique européenne de lutte contre les discriminations," *Sociétés contemporaines* 53 (January 2004).

[45] However, further attempts by promigrant activists to include "nationality" as proscribed discrimination within the Race Directive were rebutted, and in two places the nonapplicability of "equal treatment" to the domain of immigration policy is affirmed (Paragraph 13 of the preamble, and Article 3.2). See Adam Tyson, "The Negotiation of the European Community Directive on Racial Discrimination," *European Journal of Migration and Law* 3, no. 2 (2001), 209–10.

[46] Guiraudon (fn. 44), 24.

[47] Nicely observed by Guiraudon (fn. 44), 25.

[48] Erik Bleich, *Race Politics in Britain and France* (New York: Cambridge University Press, 2003), 9–13.

driven acts of slander and denigration by concrete individuals against other individuals. Epitomized by the 1972 French Law against Racism, this type of antidiscrimination law is a branch of criminal law, the burden of proof is set high on the plaintiff's side, and the entire approach is individual-centered and exceptionalist, yielding only few convictions.[49] A second, very different type of antidiscrimination law is the British race relations law, which itself is modeled on American civil rights law. It targets "access racism"[50] in vitally important spheres of society, such as employment, education, or housing, and proceeds in terms of civil law. If the crucial affront targeted by the French-type law is a violation of individual human dignity, the key target in the Anglo-type law is group-tinged inequality. In this respect, an important development in Anglo-American antidiscrimination law was also to tackle indirect discrimination, which has pushed an initially individual-centered and color-blind law into a group-recognizing and color-conscious direction. In the United States the result has been "affirmative action," and in Britain (and a few other European countries, such as the Netherlands) it has been "positive action."

The effect of the European Race Directive is to spread the Anglo-American model of latently group-recognizing antidiscrimination throughout Europe, with obvious adjustment costs for countries that had so far proceeded differently on this matter, if at all. Key in this respect is the recognition of "indirect discrimination," which half of EU states (including France and Germany) did not know before the arrival of the Race Directive.[51] It is defined as an "apparently neutral provision, criterion or practice (which) would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[52] As in the famous *Griggs v. Duke Power Co.* decision of the U.S. Supreme Court (1971),[53] which had pioneered the notion of indirect discrimination, an example is making the access to employment dependent on formal qualifications that are less likely held by certain ethnic or racial groups and that are not necessary for the task at

[49] In France, the annual number of proven cases of discrimination in employment was just 74 in 1995 and 81 in 1996, while in Britain the respective figure was about 2000 per year. See Haut Conseil à l'intégration (fn. 37), 96.

[50] Bleich (fn. 48).

[51] Isabelle Chopin, "Possible Harmonisation of Anti-Discrimination Legislation in the European Union," *European Journal of Migration and Law* 2, no. 3–4 (2001), 419.

[52] Council Directive 2000/43/EC of June 29, 2000, implementing the principle of equal treatment of persons irrespective of racial or ethnic origin (Article 2.2.a quoted).

[53] 401 U.S. 424 (1971)

hand. Such nonintentional, indirect discrimination became known in the U.S. as "institutional racism" (a term invented by black nationalist leader Stokely Carmichael in the late 1960s but that went mainstream). Measuring it requires statistical knowledge about the distribution of the discriminated group and of comparison groups in the workforce and in other targeted key sectors; doing so naturally presupposes the official construction of "groups."

The EU Race Directive is permissive with respect to the next logical step, "positive action," that is, remedial measures to achieve statistical parity between a designated group's demographic availability and its actual representation in the employed workforce or in other key sectors. Article 5 permits but neither mandates nor prevents such preferential measures, which are controversial because they violate the principle of equal treatment and provoke the corresponding charge of reverse discrimination.

While stopping short of positive action, the group-recognizing thrust of the larger EU antidiscrimination campaign is also visible in the fact that it is framed as one that "promotes diversity." If "combating discrimination" is ipso facto "promoting diversity,"[54] the implication is that individuals are considered first and foremost as members of groups—otherwise the notion of "diversity" is meaningless. Witness that since the 1978 U.S. Supreme Court's *Bakke* decision, "diversity" has figured as the main justification of affirmative action in the United States, which is one of the most explicitly group-recognizing policies ever seen in a liberal state. However, in the light of *Bakke*, the EU's pairing of diversity and antidiscrimination is also paradoxical. This is because *Bakke* had decoupled affirmative action from its original antidiscrimination rationale by making "diversity" a goal in its own right, in this case helping the university to further its mission of a "robust exchange of ideas."[55] But, perhaps, this is the whole point, if one considers the non-rights-oriented, common-market-building justification of the EU's antidiscrimination policy.

How have European states, particularly those traditionally hostile to the idea of group recognition, responded to this?

The Netherlands

Of our three cases, the Netherlands had the least problem in adjusting to the European mandate. This is because the Netherlands, to-

[54] See, for instance, European Commission, *Promoting Diversity* (Brussels: DG4 Employment and Social Affairs, 2002).

[55] 438 U.S. 265 (1978), at 786. The 2003 decision of the U.S. Supreme Court in *Grutter v. Bollinger* [539 U.S. 306 (2003)] has given even more prominence to diversity as a legitimate goal.

gether with Britain, had been Europe's champion of antidiscrimination policy long before the EU Race Directive was on the map. The 1994 Equal Treatment Act outlaws direct and indirect discrimination in a wide range of social spheres, including employment, the distribution of goods or services, and education, and it goes beyond race and nationality to include as well religion, belief, political opinion, sex, sexual orientation, and civil status. The act also established a Commission of Equal Treatment, which is empowered to investigate and issue "opinions" on individual cases that are legally nonbinding but "usually accepted and carried out."[56] Reputed as Europe's "most accessible system of legal remedies for discrimination,"[57] the 1994 Equal Treatment Act was, without much noise or friction, amended in 2004 to meet the requirements of the EU Race Directive.

Controversial, however, was a more wide ranging, proactive policy for ethnic minorities (*allochtonen*),[58] the 1994 Law to Promote Proportional Employment for Minorities. It required all private and public sector firms with more than thirty-five employees to register the ethnic origins of their staff and to develop (and release annually) action plans and targets to achieve a greater representation of designated ethnic minority groups (Surinamese, Antilleans and Arubans, Turks, Moroccans, ex-Yugoslavs, and, somewhat oddly, "refugees"). This law, which grew out of a failure to combat high minority unemployment through voluntary agreement by the "social partners" (employers and unions), was unpopular and fiercely rejected by employers from the start.[59]

Particularly controversial was the issue of ethnic identification and registration, which proceeded not (as is common practice today) by self-identification but on the basis of objective data about the native country of the employee or her parents as supplied by the employer. This was polemically likened by an influential employer representative to the forced ethnic registration under the Nazi occupation during World War II. However, even some representatives of ethnic minority groups objected to ethnic registration, pointing to its stigmatizing effects. Due to intense employer opposition, the law thus remained a dead letter from the start. At the end of 1996 only about half of employers had complied with the required ethnic registration of their workforce,

[56] Mark Bell, "EU Anti-Discrimination Law" (Ph.D. diss., Department of Law, European University Institute, 2002), 200.

[57] Ibid., 201.

[58] The Dutch notion of *allochtonen* includes foreign (non-EU) migrants, as well as Dutch citizens with at least one foreign-born (non-EU) parent.

[59] See Folke Glastra, Petra Schedler, and Erik Kats, "Employment Equity Policies in Canada and the Netherlands," *Policy and Politics* 26, no. 2 (1998), 168–71.

only 12 percent had produced action plans—and nobody was sued for noncompliance.[60] A softened version of the 1994 law, which was issued in 1998, was simply allowed to expire in 2004. The doomed history of this positive action scheme for ethnic minorities, whose crux was to be not merely latently but instead explicitly and preferentially group recognizing, must be seen in the context of the Dutch move away from its "ethnic minorities' policy" and toward "civic integration" that focuses on the individual in abstraction from her group affiliation.

France

A much more interesting case is France, whose opposition to ethnic and racial classification is part and parcel of the French national model of immigrant integration. Article 1 of the 1958 Constitution assures "equality before the law for all citizens without distinction of origin, race, or religion," which has usually been taken to imply that the state is absolutely prohibited from drawing distinctions on the basis of ethnic, racial, and religious group identity. Accordingly, France has not ratified, and at best has only conditionally accepted, the various international minority charters, and as late as 1991 the Conseil Constitutionnel has struck down as unconstitutional a law that had conceded the existence of a "Corsican people": "The Constitution recognizes only the French people, constituted of all French citizens, without any distinction of origin, race, or religion."[61]

Considering this stern rejection of ethnic and racial-origin distinctions in French constitutional law and public discourse, one is struck by the astonishing self-confidence displayed by the French government toward the Race Directive. The Law of 16 November 2001, which implements the Race Directive, goes beyond even the directive's prescribed minimum, in covering a larger range of employment discriminations (beyond hiring and firing, to include salaries and promotions as well), allowing unions to bring forward an action without individual mandate and shifting the burden of proof further toward the accused party. Key to the French self-confidence is that the riskier parts of the Race Directive have been formulated flexibly enough, also at the behest of France, to allow a perfectly color-blind implementation. France was free to reject articles 4 and 5, which permit (but do not mandate) both ethnic distinctions in certain professions and positive action, respectively; "racial" was rephrased in terms of "moral harassment" when Ar-

[60] Ibid., 170.

[61] Quoted in Gwénaële Calvés, "Il n'y a pas de race ici," *Critique internationale*, no. 17 (2002), 174.

ticle 2.3 of the Race Directive was implemented in the French Code du travail; and a sixth "whereas" was inserted that "(t)he European Union rejects theories which attempt to determine the existence of separate races." As if to emphasize that "race" is only in the eyes of the beholder, "physical appearance" and "name" (*patronyme*) were added to an already extensive list of illicit discriminatory markers in the Code du travail.

Crucially, the virus of group recognition, which is inherent in "indirect discrimination," has been neutralized by the proviso that the "appreciation of the facts" from which discrimination may be inferred is "a matter for national judicial or other competent bodies, in accordance with rules of national law or practice."[62] This means that the French state acknowledges the existence of "indirect discrimination" without being forced to collect the requisite statistical evidence for such discrimination. As a result, this group-recognizing part of the Race Directive is bound to remain ineffective. Overall, concludes Gwénaële Calvés, more than from "hard" EU law, a turn to color consciousness may occur through the "soft" constraint of the Community action program to combat discrimination, which calls for standardized "monitoring" of the facts of discrimination and which mandates that receipt of EU funds is dependent on the "mainstreaming" of antidiscrimination in other policy sectors.[63]

It is important to see that, already preceding the EU Race Directive, there was a domestic "French invention of discrimination" in the late 1990s.[64] One of its key documents, the report *Lutte contre les discriminations* by the Haut Conseil à l'intégration,[65] included propositions that came to be realized almost point for point in the Race Directive: creation of a British-style "independent administrative authority," civil (rather than penal) law procedures, recognition of indirect discrimination, and a shift of the burden of proof toward the accused party, while the setting of "quotas" was rejected.[66] In fact, the U.K., which had once been demonized, together with the U.S., as a communitarian, ghetto-producing countermodel to French-style Republican integration, was

[62] Quoted from the fifteenth "whereas" of the Race Directive (see fn. 52). A previous attempt to neutralize the group-building effect of "indirect discrimination" had been to define the latter as one that "by nature" (*par sa nature*) discriminates, which would remove attention from "effects" to be measured. See Marie-Thérèse Lanquetin, "Le principe de non-discrimination," *Droit Ouvrier* (May 2001), 192.

[63] Calvés (fn. 61), 182.

[64] Didier Fassin, "L'invention française de la discrimination," *Revue française de science politique* 52, no. 4 (2002).

[65] Haut Conseil à l'intégration (fn. 37).

[66] Ibid., 111–14.

"now increasingly cited as an exemplar of good practice."[67] This new appreciation was even shared by Gaullists on the right who overall supported and later continued the antidiscrimination campaign that had been initiated by a socialist government.

In the course of this, there took hold the Anglo-Saxon notion that society's rewarded statuses and functions should mirror the sociological profile of the population. Once accepted, this notion, which is commonly referred to as "diversity," inevitably pushes public policy toward "positive action." France made a foray into this with its Parity Law of March 2001, which dictates that political parties nominate for public office in municipal, regional, and national elections equal numbers of male and female candidates. In fact, the existence of discrimination is especially galling in the public sector, because of its impersonal character and aura of neutrality and equality. All countries that practice positive action (which in France is referred to as *discrimination positive*) have therefore targeted access to public sector employment. France is no exception; the underrepresentation of immigrant ethnics in public functions was first discussed there in the context of the military and the police in the early and mid-1990s, respectively. As Calvés notes,[68] the idea that public service should be "in the image of the population" corresponds to the American idea of "representative bureaucracy" and conversely signifies a retreat of the classic French understanding of administration as "in the general interest," with no pretense at trying to resemble the administered society. In Rousseauian terms, the import of "diversity" is that the *volonté général* is replaced by the *volonté de tous* as the benchmark of public policy.

However, the French *lutte contre les discriminations*, in the public sector and elsewhere, is impaired by the traditional taboo on ethnic and racial categorizing. Paradoxically, while the existence of ethnic and racial discrimination is now officially acknowledged, the individuals and groups against whom it is directed cannot be directly named. Because of the 1978 Law on "Data Processing and Liberties," which largely prohibits collecting data on ethnic or racial origin, the main targets of antidiscrimination policy, naturalized and second-generation "immigrants" (not to mention national or ethnic subdivisions within them, like the particularly deprived North Africans), are statistically invisible.

Accordingly, remedial measures have to operate by proxy, most notably place of residence, socioeconomic status, and age. In substance,

[67] Alec Hargreaves, "Half-Measures: Antidiscrimination Policy in France," *French Politics, Culture and Society* 18, no. 3 (2000), 83.

[68] Calvés (fn. 40), chap. 3.

though not in name, some of these measures, which have notably increased in recent years, are strikingly similar to affirmative or positive action.[69] Since the early 1980s, for instance, there have been *zones d'éducation prioritaires* (ZEP), which are spatially and socioeconomically defined but factually marked by a high immigrant density. Such ZEPs receive additional educational resources to redress inequalities. Since the early 1990s, in the context of *la politique de la ville*, firms settling in designated enterprise zones (like the *zones franches*), which again overlap with areas of high immigrant density, receive tax reductions or exemptions; since 1995 they receive the breaks on condition that they engage in preferential hiring of youngsters from these areas. Since 2001 the elite Institut d'Etudes Politiques (IEP, or Sciences po) has had a quota for students from ZEPs. With respect to access to public sector employment, since 2000 there have been special preparatory courses for the required *concours* in distressed *quartiers prioritaires.*

Considering the circumscribed language necessary for respecting the ethnic-origin taboo (*jeunes issus de l'immigration, jeunesse des quartiers*, *concitoyens de ces quartiers*, and so on), there had to be someone to break the taboo and to call by name the groups that are obviously intended by these policies. This person was, unsurprisingly, France's maverick Gaullist, Nicolas Sarkozy. In his first round as interior minister, Sarkozy led a successful campaign to appoint the first *préfet musulman*, and he called for a policy of "positive discrimination" that would no longer hide behind territorial and socioeconomic proxies. According to Sarkozy, "It is imperative that our elites become more diverse, that they resemble more closely the multitude of France."[70] While his call for "positive discrimination" was predictably rebutted as "technically, legally, and politically inconceivable,"[71] everyone nevertheless agrees on the substance of his proposal. Note that there is now a whole arsenal of euphemisms for the reviled "positive discrimination": *mobilisation positive*, *politique positive*, *politique de diversité*, *mesures correctives*, or—my personal favorite—*volontarisme republicain*.[72] Reflecting on the fact that even the prime minister, Jean-Pierre Raffarin, called in 2005 for compiling "ethnic statistics" in private enterprises in order to "evaluate the policy of combating racial discriminations," a commentator

[69] See Patrick Simon, "Les jeunes issus de l'immigration se cachent pour vieillir," *VEI enjeux*, no. 121 (2000).

[70] *L'Express*, January 19, 2004.

[71] Minister for Social Affairs, Work, and Solidarity François Fillon, quoted in *Les Echos*, December 9, 2003.

[72] *Libération,* October 5, 2004.

noted, one year after Sarkozy's taboo-breaking stunt, that "the debate has changed": "The question is no longer whether to soften the edges of the Republican model, but how to allow the children of immigration to enter the worlds of business and public administration."[73]

Germany

The German case differs from the Dutch and French cases in the near complete absence of domestic pressure toward antidiscrimination. As the SPD-Green government correctly pointed out in its 2004 law proposal to implement the EU Race Directive, "In Germany there is as yet no culture of antidiscrimination."[74] There is no perceived need whatever to ensure that the composition of elites and of societal key sectors, such as employment and education, "mirror" the demographic reality of a multiethnic society. In the January 2004 parliamentary debate surrounding the antidiscrimination bill, there has been only *one* reference to "diversity," by a Green Party deputy, appositely in English. However, he conceived of the latter not as a matter of principle but only as "an important element for economic success in the age of globalization."[75] The absence of a culture of antidiscrimination surely reflects the absence of a postcolonial legacy that in countries as "philosophically" diverse as Britain and France had generated a generally recognized claim for migrants' legitimate membership in society.[76] By contrast, Germany's postwar migrants were received as mere guest workers who had no claim to legitimate membership in society.

Antidiscrimination first became a federal government project in 1998, when the coalition agreement between the Greens and the Social Democratic Party included the promise to "put on track a law prohibiting discrimination" that would complement the envisaged (and quickly realized) reform of the citizenship law. The pairing of antidiscrimination law and citizenship reform is revealing, because with that migrants were no longer considered as mere foreigners but as prospective citizens. However, as even the urgently needed citizenship reform proved more difficult to realize than expected, the loftier project of an antidiscrimination law was quickly shelved, and only the EU Race Directive brought it out of the drawer again. But that does not mean that now

[73] Célia Gabizon, "Le gouvernement mobilise contre les discriminations," *Le Figaro*, February 4, 2005.

[74] *Entwurf eines Gesetzes zur Umsetzung europäischer Antidiskriminierungsrichtlinien*, http://www.spdfraktion.de/cnt/rs/rs_datei/O,,4395,00.pdf., 48 (last accessed April 6, 2007).

[75] Volker Beck (The Greens), *Deutscher Bundestag*, Plenarprotokoll 15152, 152. Sitzung, Berlin, January 21, 2005.

[76] See Favell (fn. 3).

there was smooth sailing. In April 2005 a European Court of Justice indictment of Germany's failure to implement the Race Directive on time did not carry enough weight to overcome strong conservative opposition to the law, and thus the law was shelved again in July 2005.[77]

Conservative opposition to the Red-Green 2004–5 antidiscrimination bill focused on its "overfulfillment" of the EU Race Directive, because in (non-employment-related) civil law it had enlarged the circle of protected categories from race and ethnicity to age, sexual orientation, and disability, among others, categories that were not required by the EU directive.[78] However, this expansion may well reflect the subordinate status of racial and ethnic discrimination in Germany. Tellingly, the SPD rapporteur of the bill defended the proposed law as one that would protect "citizens" (*Bürgerinnen und Bürger*), thus dodging the fact that noncitizens were protected, too (even primarily if one follows the genealogy of the EU Race Directive). And his illustration of the necessity of a law did not refer to immigrant ethnics at all but only to handicapped people: "What is the purpose of this law? We as decent (*anständige*) citizens cannot accept the following: a group of handicapped people has booked rooms in a hotel, and when arriving in wheel-chairs, are told, 'you cannot enter here, you are disturbing the other guests.' That is the situation that we find insupportable, and we want to change it."[79] The emphasis on protecting handicapped people also allowed turning the tables on the conservative opposition claim of "overfulfillment": "I ask you: do you really want a handicapped person who happens to be white to be less protected than a handicapped person who happens to be black? That would be the consequence of your proposal (of limiting non-employment-related, civil law protection to race and ethnicity)."[80] While the focus on handicapped people was obviously a tactical move, the suggestion that an antidiscrimination law should not apply only to "black" people goes beyond simply demonstrating the subordinate status of ethnicity and race in this legislation; some might also take it as latently racist imagery.

[77] The implementation that was finally passed in June 2006 by the current CDU-SPD government under the euphemism of "Equal Treatment Law" (Gleichbehandlungsgesetz) has been widely criticized for not fulfilling the EU directive in important respects; *Süddeutsche Zeitung*, June 30, 2006, 18.

[78] EC law requires comprehensive protection (including not just race and ethnicity but also religion, ideology, handicap, age, sexual orientation, and sex) only in labor law; in civil law, protection is limited to race and ethnicity. The German "horizontal solution" to discrimination goes beyond EC law in offering comprehensive protection in civil law, too. See Matthias Mahlmann, "Stellungnahme," *Deutscher Bundestag: Ausschuss für Familie, Senioren, Frauen und Jugend*, A.-Drs. 15(12)440-F, 2005, 3f.

[79] Olaf Scholz (SPD), *Deutscher Bundestag* (fn. 75).

[80] Christel Humme (SPD), *Deutscher Bundestag* (fn. 75).

Next to objecting to the expected costs for employers, the main opposition charge against the proposed antidiscrimination law was that it violated the principle of contractual freedom in civil law. According to one leading opponent in the CDU, this was a "Law for Fighting Contractual Freedom," under which "landlords in Germany could no longer choose their tenants."[81] A conservative law professor even saw the Kantian distinction between "legality" (*Recht*) and "morality" (*Moral*) undermined, and he conjured up "surveillance and inquisition committees of truly Robespierrian dimensions to ascertain the new morality in civil law." In this vision, civil law had always been "the space in which free individuals act freely, and that means *willkürlich* (as they see fit)."[82] In this fundamentalist broadside, the very principle of a law that put "nondiscriminatory" constraints on civil transactions was objectionable. Such opposition, which was widespread in the conservative mainstream and among business circles in Germany and shared even by the Social Democratic chancellor at the time,[83] was exceptional in Western Europe.

As exceptional as it was, this opposition clearly articulated the different philosophical positions that were at stake in the broader debate over immigrant integration in Europe. As one prominent CDU politician explicated his objection to the antidiscrimination law, "(w)e want (a) society that is derived from the individual, that sets on the autonomy, freedom and responsibilities of the individual."[84] Such individualism was precisely the rationale behind the civic integration policy at the beginning of the immigrant integration cycle, thus pointing to the inherent tension between the two pillars in contemporary European states' immigrant integration policies.

IV. Liberalism and Immigrant Integration

The coupling of civic integration and antidiscrimination in immigrant integration policy reflects a confluence of two opposite variants of liberalism. On the one side, there is the liberalism of equal rights and opportunities, which has moved states from "assimilation" to "integration" and which energizes antidiscrimination. On the other side, recent policies of civic integration revealed the parallel existence of a liberalism of power and disciplining, which has received much attention

[81] Norbert Röttgen (CDU/CSU), *Deutscher Bundestag* (fn. 75).
[82] Eduard Picker, "Die neue Moral im Zivilrecht," *Frankfurter Allgemeine Zeitung*, July 7, 2003.
[83] *Süddeutsche Zeitung*, April 9, 2002.
[84] Norbert Röttgen (CDU/CSU), *Deutscher Bundestag* (fn. 75).

in a Foucault-inspired literature on "governmentality" and "neoliberalism."[85] In the optic of the latter, the contemporary state, hollowed out by economic globalization, is coercing individuals, as well as the "communities" that they constitute, to release their self-producing and self-regulating capacities as an alternative to the redistribution and public welfare that fiscally diminished states can no longer deliver. Civic integration is the equivalent on the part of immigrants to the workfare policies that the general population is subjected to in the context of shrinking welfare states:[86] both use illiberal means to make people self-sufficient and autonomous.

Because immigrants are at the intersection of different nation-state societies, one is inclined to interpret repressive policies against them in "nationalist" or "racist" terms. However, this notion is anachronistic: it is ruled out by liberal constitutionalism. Instead, we now see that the repressive impulse, at least at the level of state policy, stems from liberalism itself—this is the distinct contribution of the Foucault-inspired reading of liberalism. While capturing this repressive impulse today goes under the label of "neoliberalism," it has deep roots in the liberal tradition itself. Already John Stuart Mill had limited liberalism to "human beings in the maturity of their faculties," thus excluding all those who did not meet these requirements; and those not meeting these requirements could be induced to acquire them through—by definition—illiberal means. Accordingly, "Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement and the means justified by actually effecting that end."[87] Contemporary civic integration and workfare policies are of the same *kind*, because illiberal means are put to the service of liberal goals.

Consider in this context the strong focus on employment, which is the one commonality in the otherwise opposite civic integration and antidiscrimination policies. On the one hand, this is simply due to the fact that, unlike the classic immigration nations, where immigrants are generally working, immigrants to Europe, the majority of whom are still "unwanted" family and asylum migrants, often walk directly into welfare dependency.[88] On the other hand, at a deeper level, it reveals

[85] For a representative statement, see Nicolas Rose, *Powers of Freedom* (Cambridge: Cambridge University Press, 1999). Equally relevant in this context, though entirely unimpressed by Foucault, is King (fn. 19).

[86] For workfare policies, see Joel Handler, *Social Citizenship and Workfare in the United States and Western Europe* (New York: Cambridge University Press, 2004).

[87] Mill, *On Liberty* (1859; London: Penguin, 1974), 69.

[88] For the particularly drastic case of the Netherlands, and for reference to comparative European rates of unemployment and labor-market participation, see Koopmans (fn. 22).

that immigrants are no longer to be integrated into a self-contained nation-state but are to be placed into a state engaged in global competition. Integration into the latter is neither a story of cultural assimilation nor one of multicultural recognition, both of which are premised on the classic nation-state. Rather, integration now takes on a new meaning of "social inclusion," which is economically instrumentalist and subordinate to the exigencies of globalization.

"Social inclusion," which is the dominant integration rhetoric of the European Union,[89] also reveals that the two liberalisms underlying civic integration and antidiscrimination are not simply freestanding but are mutually implicated, with a tendency of disciplinary liberalism to corrode equal-opportunity liberalism. In the European Union the "combat" against "social exclusion" is not conducted as a matter of moral principle but, rather, is tied to the global competition goal, formulated within the so-called Lisbon strategy of making the Union "the most competitive and dynamic knowledge-based economy in the world" by 2010. Viewed from this perspective, antidiscrimination does not aim at equality but at the full utilization of society's resources in the global competition. A German legal scholar unwittingly expressed the underlying corrosion of equal-opportunity liberalism, at an expert hearing in the German Bundestag on implementing the EU Race Directive: "Ethnic minorities are to be fully included in society and labor market of the member states, *not least in order to reduce the costs for social protection or welfare.*"[90]

Whereas the point of equal opportunity is to *enable* people to become included in the economy and other vital aspects of social life, the point of social inclusion is to *require* people to become included. As a British legal scholar summed up the thrust of social inclusion, "There are no rights without responsibilities."[91] And, again, social inclusion is *not* about equality: "Social inclusion does not seek the same . . . outcomes for citizens. It concentrates its attention . . . on the absolute disadvantage of particular groups in society."[92] Social inclusion rhetoric thus obscures and helps legitimize persistent class inequalities among those who already *are* included, which has drawn the ire of the

[89] For its roots in the "third way" ideology of reconstructed socialist parties, most notably Britain's "New Labour," see Ruth Levitas, *The Inclusive Society? Social Exclusion and New Labour*, 2nd ed. (Basingstoke: Palgrave-Macmillan, 2005).

[90] Eberhard Eichenhofer, *Deutscher Bundestag: Ausschuss für Familie, Senioren, Frauen und Jugend*, A.-Drs. 15(12)440-I, 2005, 2, emphasis added.

[91] Hugh Collins, "Discrimination, Equality and Social Inclusion," *Modern Law Review* 66, no. 1 (2003), 25.

[92] Ibid., 22.

unreconstructed left.[93] More relevant for us, social inclusion justifies group-specific policies of the state; it is indeed the prime justification of antidiscrimination policies that violate the equal treatment principle, such as positive action.[94] Accordingly, if France is pushed today toward color-conscious antidiscrimination policies and thus toward mellowing its traditional rejection of *communautarisme*, the reason is that it, like all states in the European Union today, is under the sway of the social inclusion and cohesion objectives.

But how, one must ask, can liberalism be such opposite things? Is there no unity to it? One of the twentieth-century's greatest liberals, Isaiah Berlin, identified the core of liberalism as a preference for "pluralism" over "monism."[95] Applied to society, liberalism is accordingly different things in different spheres; perhaps it is *the* political theory of functionally differentiated societies. For instance, as a market creed, liberalism is the unfettered pursuit of profit, or what the French—the Gaullist right no less than the leftist pens of *Le Monde Diplomatique*—denounce as the "neoliberalism" that undergirds *mondialisation*. By contrast, at the level of the state, liberalism connotes equality and citizenship—this is the liberalism of the "liberals" as demonized by American neoconservatives.

This, of course, is yet another version of the famous tale of the two liberties, the modern "liberty of particular men" and the ancient "liberty of the Commonwealth," first told by Thomas Hobbes[96] and later, with unsurpassed lucidity, by Isaiah Berlin.[97] If our distinction between disciplinary and equal-opportunity liberalism echoes this tale, however remotely, one also notices a reversal of their normative connotations. Whereas Berlin, writing at the height of the cold war, had celebrated "negative" over "positive" liberties, connoting only the former with freedom and the latter with potential repression, the message of our story is the reverse: it is now the "negative" liberty of civic integration that is implicated with repression, as immigrants are *forced* to become autonomous; and it is the "positive" liberty of antidiscrimination that has taken on the air of enhancing freedom and fighting oppression. I leave the paradox for what it is. Perhaps it reflects that a globalizing world is a market world, in which the positive liberties of state and community

[93] An example is Levitas (fn. 89).
[94] This is the interesting argument by Collins (fn. 91).
[95] Isaiah Berlin, "Two Concepts of Liberty," in I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 170–71.
[96] Thomas Hobbes, *The Leviathan* (1660; Oxford: Blackwell, 1946), chap. 21.
[97] Berlin (fn. 95).

are in short supply and thus unambiguously experienced as freedom enhancing.

Our analysis also reveals that the two liberalisms that undergird civic integration and antidiscrimination are implicitly reinforcing, even producing their ideological opposite: ascriptive group boundaries, or "race." The liberalism of civic integration, one could argue, is negatively group *targeting*; the liberalism of antidiscrimination is positively group *producing*. In its negative focus on fighting ethnic separatism, which in Europe is predominantly a Muslim problem, civic integration entails an obvious potential for discrimination: it furthers the normatively questionable vision of the liberal state as one for liberal people only. During the 2007 French presidential election campaign, Gaullist front-runner Nicolas Sarkozy offered a prime example of negative group targeting in the guise of liberalism (though characteristically indistinguishable from its French national version):

> Who does not want to respect our conception of the human being, who rejects humanism, . . . who wants to abolish the heritage of Enlightenment and Revolution, who does not want to recognize that women are equal to men, who wants to imprison his wife at home and force her to carry a veil, who wants to circumcise her or subject her to forced marriage, should stay away from France.[98]

Moreover, to the degree that a policy of civic integration in this spirit functions as a tool of immigration control, as it does with particular venom in the Netherlands, it, however indirectly, brings back a mode of immigrant selection that in principle has been discarded in the liberal state: that of "selecting by origin."[99]

While inclusive rather than exclusive, the liberalism of antidiscrimination goes even further than this, not just reinforcing but producing group boundaries. This is because the fight against indirect discrimination requires the construction of statistical "groups"—otherwise such discrimination literally cannot be seen. As the American experience shows, such statistical groups can quickly spring to life. In a way, this is what American "multiculturalism" is all about.[100] As France grapples with the introduction of color-conscious statistics and *discrimination positive*, the question is whether the American experience stands to be repeated. One French sociologist, who recently did much to insert the

[98] *Le Monde*, March, 11–12, 2007, 9.

[99] See Christian Joppke, *Selecting by Origin: Ethnic Migration in the Liberal State* (Cambridge: Harvard University Press, 2005).

[100] See Skrentny (fn. 38).

"racial question" into French academic discourse, thinks that the race-based *politique minoritaire* of antidiscrimination, because of its universalistic equality thrust, has little to do with a multicultural *politique communautaire*, the old nemesis of French Republicanism.[101] If one considers Nathan Glazer's observation that the root cause of American multiculturalism is "the great racial divide that has fissured American life since its origins,"[102] one cannot share the optimism. It is one of the ironies of contemporary European immigrant integration that, at the very moment that multiculturalism has been eclipsed, for instance, by the civic integration policy described here, the antidiscrimination prong of integration policy is subtly injecting new life into it.

V. Conclusion

Let me conclude by stating what has *not* been argued here: that national difference in dealing with immigrants and ethnic minorities has disappeared or that it will disappear in Western Europe. Rather, the claim advanced is that such difference is less likely to be couched in grand "national models" or "philosophies of integration," to invoke Adrian Favell's felicitous notion.[103] Such distinct visions are giving way to the convergent civic integration/antidiscrimination duplet discussed here. However, national difference will persist in at least two ways: trivially, as sheer contingency and history, which will never be the same in any two places; and more interestingly, as the attempts of the forces allied with the national models of old, sometimes to obstruct, but more often to accommodate and mold the new in the image of the past. The preceding discussion included many examples of the second, for instance, the attempted (yet unsuccessful) obstruction of antidiscrimination law in a Germany that remains deeply uncomfortable about its immigrant reality, or the folding back of "civic integration" into the Republican *contrat social* in France. Overall, the withering of national models of immigrant integration in Western Europe is unsurprising, because, if anywhere, it is here that the world of tightly bounded nation-states is no longer.

The purpose of this article was modest: to chart a new reality that diverges from the conventional notions of national models or inert path dependence that continue to dominate the immigration literature. A

[101] See the interview with Eric Fassin in *Le Monde*, March 4–5, 2007, 15.

[102] Nathan Glazer, "Multiculturalism and American Exceptionalism," in Christian Joppke and Steven Lukes, eds., *Multicultural Questions* (Oxford: Oxford University Press, 1999), 190.

[103] Favell (fn. 3).

next step would be to pursue a more rigorous analysis of the causes of policy convergence. In particular, more needs to be done to disentangle the role of domestic and external factors in the making of the new immigrant integration policies. While the role of the "Dutch model" in the introduction of civic integration programs across Europe is incontrovertible, we also saw that in each case there were domestic precursors. Is "Europeanization" really the gist of policy convergence, as suggested here? With respect to antidiscrimination, the answer should be yes, because European Community law is now indisputably driving it. But some countries, such as Britain and the Netherlands, had such laws long before the EU was on the map. In fact, antidiscrimination is standard practice in Western immigrant-receiving societies, and EC law is only the trick to give to the laggards what the others already had. With respect to civic integration, the impact of Europeanization is even muddier. The spreading of such schemes is more a best-practice diffusion within the ambit of *all* Western states, not limited to Europe. Consider that Australia has recently been debating the introduction of a formal "Australian citizenship test" that is obviously inspired by some of the European civic integration policies, especially the British and Dutch.[104] Rather than being limited to Europe, the civic integration/antidiscrimination model could well become the standard approach of Western states for dealing with immigrant diversity. But local explanation is still required as to why and how it is put in place.

[104] "Australian Citizenship: Much More than a Ceremony" (Discussion paper, Canberra, Australian Government, September 2006).