

The Principle of Equal Treatment in Triangular Relationships

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Table of Content

- I. *Introduction: Triangular Relationships in Non-Discrimination and Equal Protection Law*
 1. *Coleman v. Attridge Law - A new paradigm in non-discrimination law?*
 2. *Introducing a comparative point of view*
 3. *The peculiarities of triangular relationships examined*
- II. *What a Difference a Couple Makes*
 1. *Who is discriminated against on the grounds of sex in same-sex relationships?*
 2. *The origins and the failure of the sex discrimination argument in same-sex cases*
 3. *Consequences*
 - a) *New law makes better cases - the ECJ's decision in Maruko*
 - b) *Redefining the triangular relationship*
- III. *Discrimination or Retaliation - Two Different Categories of Triangular Relationships*
 1. *The principle of equal treatment in EC law*
 2. *The significance of Coleman*
 3. *Coleman, Sullivan, Jackson & CBOCS West, Inc. - A transatlantic reading experience*
 - a) *Sullivan and its progeny*
 - b) *The triangular dimension in retaliation cases*
- IV. *The Principle of Equal Treatment and its Governance of Conduct*
 1. *The Hohenzollern case*
 2. *The status-conduct dichotomy reexamined*
- V. *Conclusion: The Concept of Discrimination by Association in Triangular Relationships*

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Abstract

The European Court of Justice [ECJ] held in Coleman v. Attridge Law, Case C-303/06, E.C.R. I-5603 [2008], that the prohibition of direct discrimination laid down in Art. 1 and 2 Directive 2000/78/EC is not limited only to people who are themselves disabled, but includes a less favorable treatment of an employee which is based on the disability of her child, whose care is provided primarily by that employee. The Coleman case is the first noticeable case in European anti-discrimination law with facts involving a triangular relationship: the person who presumably discriminates, the injured party and the carrier of the characteristics the discrimination was based upon. However, the problem is not new at all, as will be demonstrated by a comparative analysis of retaliation cases under U.S. law [Sullivan v. Little Huntington Park, Inc., 396 U.S. 229 (1969), Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005), CBOCS West, Inc. v. Humphries, 128 S.Ct. 1951 (2008)]. ECJ jurisprudence provides other examples as well: Is it a discrimination on grounds of sex if an employer refuses to provide its employee's same-sex partner with travel concessions granted to married spouses and different-sex partners? [Grant v. South West Trains Ltd., Case C- 249/96, 1998 E.C.R. I-621]. That issue is closely related to an argument put forward in same-sex marriage cases: Does a law that restricts marriage to a union between a male and a female discriminate on the grounds of the sex of the partner of one of the applicants? [Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Baker v. Vermont, 744 A.2d 864, 897 (Vt. 1999)(Johnson, J., conc.)]. If so, was a Virginia anti-miscegenation statute unconstitutional because it discriminated against one spouse on the grounds of the race of the other spouse? [Loving v. Virginia, 388 U.S. 1 (1967)]. These cases cover a variety of subjects, from the classic realm of non-discrimination law or equal protection law to the more contested area of the influence of fundamental rights within private relationships to the hotly debated field of sexual orientation discrimination and same-sex marriage. The one feature these cases have in common is a triangular relationship, since there are three parties involved: the state or a party that allegedly discriminates, the injured party and a third party that carries the grounds upon which the discrimination was based. In this paper I will argue that cases like Grant; Loving and the same-sex marriage cases are better understood as cases dealing with disparate treatment of the couple as a unit rather than of the two persons forming that couple, and, that they do not fall within the category of triangular relationships discussed in this paper. I will then focus on the peculiarities of discrimination cases in triangular relationships and defend the proposed reading against the criticism that it violates or levels the "commonsense distinction" between anti-discrimination provisions seeking to prevent injury to individuals based on who they are, i.e. their status, and retaliation provisions seeking to prevent harm to individuals based on what they do, i.e. their conduct.

I. Introduction: Triangular Relationships in Non-Discrimination and Equal Protection Law

1. Coleman v. Attridge Law - A new paradigm in non-discrimination law?

If we were asked to construct a classical non-discrimination case, we would most likely frame the issue as a problem in a two-party relationship: the party that made a decision or committed an act presumably based on a “suspect classification” such as race or ethnic origin,² sex,³ religion or belief, disability, age or sexual orientation,⁴ and the party that has been discriminated against because she or he carries the personal characteristic in question. The U.K. Disability Discrimination Act 1995⁵ as amended by the Disability Discrimination Act 1995 (Amendment) Regulations 2003⁶ (henceforth: DDA) includes, *inter alia*, the following definition of direct discrimination: “A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, *he treats the disabled person less favourably* than he treats or would treat a person not having that particular disability”⁷. This language requires a direct link between the less favorable treatment and the complainant's

² Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180) 22.

³ Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, 2004 O.J. (L 373) 37; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 2002 O.J. (L 269) 15, repealed as of August 15th 2009 by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, 2006 O.J. (L 204) 23.

⁴ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, 2000 O.J. (L 303) 16.

⁵ 1995 c.50.

⁶ Statutory Instrument 2003 No. 1673.

⁷ Section 3A(5) Disability Discrimination Act 1995 (Amendment) Regulations 2003 (emphasis added).

own personal disability.⁸ It thus appears that a specific feature of non-discrimination law is that the discrimination took place because the person discriminated against carries the “forbidden grounds” upon which discrimination was based.

This conclusion, however, would be premature. The DDA implements Directive 2000/78/EC, and the wording of the definition of a direct discrimination in Article 2 par. 2(a) Directive 2000/78/EC⁹ leaves open the question if the Directive protects only those who are themselves disabled. That was the issue the European Court of Justice (ECJ) had to resolve in the recent case of *Coleman v. Attridge Law*¹⁰. Sharon Coleman was a legal secretary and is the mother of a disabled boy who is in need of specialised and particular care. A few years after giving birth to the child she accepted voluntary redundancy and, subsequently, lodged a claim with the Employment Tribunal alleging that her employer discriminated against her because she was the primary carer of a disabled child. Ms. Coleman alleged that this treatment caused her to end her employment with the defendants. This assertion was supported by a variety of allegations, including (1) that her former employer refused to allow her to return to her existing job, in circumstances where the parents of non-disabled children would have been allowed to retain their former posts; (2) that she was not given the same flexibility in regard to her working hours and the same working conditions as those who were parents of non-disabled children, (3) that she was told she was ‘lazy’ when she requested time off to care for her child, (4) that abusive and insulting comments were made about both her and her child, and, (5) having occasionally arrived late at the office because of

⁸ Marcus Pilgerstorfer & Simon Forshaw, *Transferred Discrimination in European Law*, 37 *Indus. L. J.* 384, 385 (2008)

⁹ Art. 2 reads insofar: “Concept of discrimination. 1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. 2. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.” Article 1 reads: “Purpose. The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”

¹⁰ *Coleman v. Attridge Law*, Case C-303/06, 2008 E.C.R. I-5603.

circumstances related to her son's condition, she was threatened with dismissal should she arrive to work late again. No such treatment was afforded similarly situated parents with non-disabled children.¹¹ The ECJ held that the Directive's prohibition against direct discrimination is not limited only to the disabled themselves but also prohibits less favorable treatment of an employee if that treatment results from the disability of that employee's child, whose primary care is provided by that employee.¹²

2. *Introducing a comparative point of view*

The ECJ decision stirred some controversy among legal commentators.¹³ It is remarkable, however, that the discussion was confined to European Community law. From a comparative point of view, the issue before the ECJ in *Coleman* is anything but novel. Courts in a variety of jurisdictions have repeatedly decided discrimination claims in which the plaintiff or claimant who is the subject of an allegedly discriminatory act was not identical to the person who actually carries the characteristic at issue.

The U.S. Supreme Court (Supreme Court) had before it the issue whether a white owner of shares in a community park may sue for monetary damages under 42 U.S.C. § 1982¹⁴ following his expulsion after assigning his membership share to a black lessee, and after protesting the board's refusal to approve the assignment due to the lessee's race.¹⁵ In

¹¹ See *Coleman*, 2008 E.C.R. I-5603, par. 19-26.

¹² *Coleman*; 2008 E.C.R. I-5603, par. 56.

¹³ See Lisa Waddington, Annotation, *Case C-303/06, S Coleman v Attridge Law and Steve Law, Judgement of the Grand Chamber of the Court of Justice of 17 July 2008*, 46 C.M.L.R. 665 (2009); Marcus Pilgerstorfer & Simon Forshaw, *supra*, note 8 at 384; Franz Josef Lindner, *Die Ausweitung des Diskriminierungsschutzes durch den EuGH*, *Neue Juristische Wochenschrift (NJW)* 61, (2008), 2750; Frank Bayreuther, *Drittbezogene und hypothetische Diskriminierungen*, *Neue Zeitschrift für Arbeitsrecht (NZA)* 24 (2008), 986; Paul Melot de Beauregard, *Diskriminierungsschutz ohne Ende?*, *Recht der Internationalen Wirtschaft (RIW)* 55 (2009), 18; Felix Welti, *Gleichbehandlung in Beschäftigung und Beruf - Unmittelbare Diskriminierung wegen einer Behinderung*, *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, 8 (2009), 148.

¹⁴ 42 U.S.C. § 1982 reads: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

¹⁵ *Sullivan v. Little Huntington Park, Inc.*, 396 U.S. 229 (1969).

another case it resolved the question whether 20 U.S.C. § 1681¹⁶ encompasses the claim of a public school teacher who was removed as the girls' basketball coach after complaining to his supervisors about the unequal treatment of the girls' team.¹⁷ The Supreme Court recently determined whether 42 U.S.C. § 1981¹⁸ supports a complaint of a former employee who alleged that he was dismissed after objecting to the dismissal of another employee who allegedly had been dismissed for race-based reasons.¹⁹ ECJ jurisprudence provides other examples as well: Is it a discrimination on grounds of sex if an employer refuses to provide its employee's same-sex partner with travel concessions granted to married spouses and different-sex partners?²⁰ That issue is closely related to an argument put forward in same-sex marriage cases: Does a law that restricts marriage to a union between a male and a female discriminate on the grounds of the sex of the partner of one of the applicants?²¹ If so, was a Virginia anti-miscegenation statute unconstitutional because it discriminated against one spouse on the grounds of the race of the other spouse?²² Turning our focus back over the Atlantic, the Bundesgerichtshof (German Federal Supreme Court) had to decide whether the will of Wilhelm of Prussia, the oldest son of the former German Emperor Wilhelm II, was void under Sec. 138 (1) of the Bürgerliches Gesetzbuch [German Civil Code]²³ because it

¹⁶ 20 U.S.C. § 1681(a) reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that [omitted]."

¹⁷ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

¹⁸ 42 U.S.C. § 1981 reads: "(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

¹⁹ *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008).

²⁰ See *Grant v. South West Trains Ltd.*, Case C- 249/96, 1998 E.C.R. I-621.

²¹ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baker v. Vermont*, 744 A.2d 864, 897 (Vt. 1999)(Johnson, J., conc.).

²² *Loving v. Virginia*, 388 U.S. 1 (1967); *Baehr*, 852 P.2d at 61-64; see also *Perez v. Sharp*, 198 P.2d 14 (Cal. 1948).

²³ Sec. 138 (1) reads as follows: A legal act which is contrary to public policy is void.

included a nobility requirement regarding the ancestry of the future heir's wife or mother, thus infringing on his sons' and their male progenies' constitutionally granted equal protection right not to be discriminated against on grounds of the parentage²⁴ of their wives.²⁵ Finally, the Bundesverfassungsgericht (German Federal Constitutional Court) decided whether a law violated the German constitution's non-discrimination clause²⁶ by easing the requirements for obtaining a residence permit for a child only if the mother was a legally resident alien, while the non-citizen-father's status was irrelevant.²⁷

3. *The peculiarities of triangular relationships examined*

These cases cover a variety of subjects, from the classic realm of non-discrimination law²⁸ or equal protection law²⁹ to the more contested area of the influence of fundamental rights within private relationships³⁰ to the hotly debated field of sexual orientation discrimination³¹ and same-sex marriage.³² The one feature these cases have in common is a triangular relationship, since there are three parties involved: the state or a party that allegedly discriminates, the injured party and a third party that carries the grounds upon which the discrimination was based.

In *Sullivan* the board expelled the white lessor - the injured party - from the community park, after he entered into a contractual relationship with the third party, a black lessee.³³

²⁴ Art. 3 (3) [1] German Basic Law reads: No one may be disadvantaged or favored because of his sex, parentage, race, language, homeland and origin, his faith, or his religious or political opinions. [Translated by Axel Tschentscher, The Basic Law (Grundgesetz), 19 [2008] available at http://www.servat.unibe.ch/jurisprudentialit/the_basic_law.pdf.]

²⁵ See BGHZ 140, 118, 131 *et seq* [henceforth: Hohenzollerncase].

²⁶ See *supra*, note 24.

²⁷ BVerfGE 114, 357 [henceforth: Residence Permit case].

²⁸ *Cf. Sullivan*, 396 US 229; *Jackson*, 544 U.S. 167; *Humphries*, 128 S. Ct. 1951; *Coleman*, 2008 E.C.R. I-5603.

²⁹ *Cf. BVerfGE* 114, 357.

³⁰ *Cf. BGHZ* 140, 118.

³¹ *Cf. Grant*, 1998 E.C.R. I-621.

³² *Cf. Baehr*, 852 P.2d 44; *Baker*, 744 A.2d, at 904-07 (Johnson, J., conc.).

³³ *Sullivan*, 396 U.S. at 234-35.

The Birmingham Board of Education allegedly removed Jackson - the injured party - from his position as the girls' basketball coach, because he had complained about sex discrimination against his team - the third party - in a public high school's athletic program.³⁴ Humphries - the injured party - claimed that he was dismissed by CBOSC West, Inc. because he had objected to the dismissal for race-based reasons of a third party, a black co-worker.³⁵ Sharon Coleman, the injured party, asserted that her employer, Attridge Law, discriminated against her because of a third party, her disabled child, for whose primary care she was responsible. The will of Wilhelm of Prussia in the *Hohenzollern* case discriminates against his male progeny, the injured party, because a third party's ancestry - that of the progeny's wife or mother - does not comply with certain nobility requirements. In the *Residence Permit* case the law at issue did not allow to grant the applicant - the injured party - a resident permit because it discriminated on the grounds of the sex of third parties: the child-applicant's parents.³⁶ Both her parents were Turkish citizens, but only the child's father was legally resident in Germany. After the parents' divorce the child lived with her father. Her application for a residence permit was denied because the statute required the child's mother to be a legally resident alien while the father's status was irrelevant.³⁷ Although the statute did not discriminate against the child based on her sex, the German Federal Constitutional Court held it unconstitutional under violation of the non-discrimination clause,³⁸ because it discriminated on grounds of her parent's sex.³⁹

The situation is slightly more complicated in the sexual orientation discrimination and the same sex marriage cases. South West Trains, Ltd., refused to grant travel concessions to the female partner of Lisa Grant, one of its employees, on the ground that such concession

³⁴ *Jackson*, 544 U.S. at 171.

³⁵ *Humphries*, 128 S. Ct. at 1954.

³⁶ BVerfGE 114, 357.

³⁷ BVerfGE 114, 357.

³⁸ See, *supra*, note 24.

³⁹ BVerfGE 114, 357.

would be granted only for an employee's partner of the opposite sex.⁴⁰ Ms. Grant sued and argued that her employer discriminated against her on grounds of sex. There are at least two alternative ways of framing this argument. First, Ms. Grant's application was denied because *she was a female* rather than a male employee living in a "meaningful relationship"⁴¹ *with a female partner*. Alternatively, the ground of the denial could be *that Ms. Grant's partner was female and not male*. The interchangeability of the roles becomes even more apparent when examining same-sex marriage cases. In those cases the state prohibits the two applicants from obtaining a marriage license because of the sex of the other applicant. Regarding the Hawai'i same-sex marriage case of 1993, one could argue that Ninia Baehr was the injured party because, due to Genora Dancel's sex, the state would not allow Ms. Baehr to marry Ms. Dancel.⁴² It would be equally compelling, however, to designate Genora Dancel as the injured party who was denied to marry another person, Ms. Baehr, because of that person's sex. The same is true in *Loving*.⁴³ Did the state of Virginia injure the equal protection rights of Mildred Jeter, a black woman, because of the race of her husband, Richard Loving, a white man? Or was Loving the injured party and his wife the third person whose race was the ground of the discrimination? In Part II of this paper I will argue that cases like *Grant*, *Loving* and the same-sex marriage cases are better understood as cases dealing with disparate treatment of the couple as a unit rather than of the two persons forming that couple, and, that they do not fall within the category of triangular relationships discussed in this paper.

Part III of this paper will focus on the peculiarities of discrimination cases in triangular relationships. I will begin with the *Coleman* case and an analysis of the approach applied in *Sullivan*, *Jackson* and *Humphries*. I will read the ECJ opinion as a remarkable rejection of a

⁴⁰ *Grant*, 1998 E.C.R. I-621, par. 8.

⁴¹ *Grant*, 1998 E.C.R. I-621, par. 5.

⁴² *See Baehr*, 852 P.2d at 49.

⁴³ 388 U.S. at 1.

strict interpretation of the principle of equal treatment in community law, a view supported by some following the decisions in *Palacio*⁴⁴ and *Chacón Navas*⁴⁵. More importantly, however, the ECJ has now broadly construed discrimination to include acts that discriminate not against the party who carries the characteristics the directives prohibits discrimination against, but also acts in which the victim and the subject of the discriminatory act are not one and the same. The Supreme Court's interpretation of *Sullivan* in *Jackson*⁴⁶ is, in both in language and result⁴⁷ similar to *Coleman*.⁴⁸ The ECJ, however, does not frame the issue in *Coleman* as a question of retaliation. I contend that retaliation is but one notion related to a triangular relationship in non-discrimination law. It is characteristic of retaliation cases that another discrimination has allegedly⁴⁹ already occurred. Theoretically more interesting are cases such as *Coleman* in which the facts at issue account for the only possible discrimination based on prohibited grounds. The difference can be made clear by reframing *Sullivan* applying the approach used in *Coleman*: I will argue that the non-discrimination law would have supported petitioner Sullivan's "own private cause of action"⁵⁰ for the board's refusal to approve the assignment of the membership share to Freeman and not only due to his expulsion after objecting.

This interpretation of non-discrimination law in particular and equal protection law in general has met with strong criticism that I address in Part IV. Justice Thomas, the most prominent critic has repeatedly argued that this reading would violate or level the "commonsense distinction"⁵¹ between non-discrimination provisions seeking to prevent injury to individuals based on who they are, i.e. their status, and retaliation provisions seeking to

⁴⁴ *Palacios de la Villa v. Cortefiel Servicios SA*, Case C-411/05, 2007 E.C.R. I-8521.

⁴⁵ *Chacón Navas v. Eurest Colectividades SA*, Case C-13/05, E.C.R. I-6467 [2006].

⁴⁶ See *Jackson*, 544 U.S. at 176.

⁴⁷ See *Jackson*, 544 U.S. at 173-74.

⁴⁸ See *Coleman*, 2008 E.C.R. I-5603, par. 38.

⁴⁹ See *infra* note 291-93 and accompanying text.

⁵⁰ *Jackson*, 544 U.S. at 176 n. 1.

⁵¹ *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951, 1963 (2008) (Thomas, J., diss.).

prevent harm to individuals based on what they do, i.e. their conduct.⁵² According to that view, discrimination based on race, sex, or disability, for example, is always confined to the plaintiff's race, sex or disability, not someone else's.⁵³ In response I will demonstrate that the premise of Justice Thomas' argument, the status-conduct-dichotomy is not compelling at all. Despite the initial clear and straightforward appearance of that argument, it will not readily or satisfactorily resolve cases like *P. v. S. and Cornwall County Council*, in which the ECJ held that the principle of equal treatment for men and women applies to discrimination arising from the gender reassignment of the concerned person.⁵⁴ Did the employer base its discrimination on the status of the employee or his or her conduct? In Part V I will conclude by proposing the concept of "discrimination by association" to explain the application of non-discrimination law in triangular relationships. The person carrying the characteristic the statute prohibits discrimination against (the child in *Coleman*, the parent in the *Residence Permit* case and the (future) wife in the *Hohenzollern* case) is closely associated with the injured party by family status (being the mother or the child, or the spouse/fiancee). The status-based degree of association would not sufficiently explain the holdings in *Sullivan*, *Jackson* and *Humphries*. I will therefore put forward a different explanation that is not based on the degree of association between two involved parties, but focused on the detrimental effects of the injured party's freedom rights.

II. What a Difference a Couple Makes

The defining feature of non-discrimination and equal protection cases in triangular relationships is the involvement of three parties. A tentative definition of these triangular

⁵² *Burlington N. & S.F.R. v. White*, 548 U.S. 53, 63 (2006). *But see CBOCS West, Inc.* at 1960 (holding that Burlington did not suggest that Congress must separate discrimination and retaliation in all events).

⁵³ See *Jackson*, 544 U.S. at 185-88 (Thomas, J., diss.); *CBOCS West, Inc.*, 128 S.Ct. at 1963-65 (Thomas, J., diss.).

relationships includes (1) the state or a party that made a decision or committed a prohibited act allegedly based on one or more “suspect classifications”, (2) the injured party who was subject to a presumably discriminatory act and (3) a third party with whom the injured party is associated. The ECJ’s decision in *Grant v. South West Trains, Ltd.*, thus appears to be a seminal triangular relationship case. I will argue that it actually is not, and neither are the same-sex marriage cases.

1. Who is discriminated against on the grounds of sex in same-sex relationships?

Lisa Grant worked for South West Trains, Ltd. Her contract of employment stated, inter alia, that her “spouse” would be granted free travel concessions. South West adopted regulations for the application of this provision, providing that “[p]rivilege tickets are granted to a married member of staff ... for one legal spouse” or “for one common law opposite sex spouse of staff ... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more”.⁵⁵ On the basis of those provisions Ms. Grant applied for travel concessions for her female partner, with whom she declared she had had a ‘meaningful relationship’ for over two years.⁵⁶ SWT refused to allow the benefit sought, on the ground that travel concessions would be granted to unmarried persons if the partner was of the opposite sex.⁵⁷ So far, the case fits well with our preliminary definition: South West is the entity that allegedly discriminates on grounds of sex; Ms. Grant is the injured party and the discrimination is related to her relationship with her female partner. It is therefore not surprising that various commentators of the *Coleman* decision refer to *Grant* in discussing the scope of the principle laid down in *Coleman*.⁵⁸

⁵⁴ *P. v. S. and Cornwall County Council*, 1996 E.C.R. I-2143 par. 17-20.

⁵⁵ *Grant*, 1998 E.C.R. I-621 par. 3-5.

⁵⁶ *Grant*, 1998 E.C.R. I-621 par. 7.

⁵⁷ *Grant*, 1998 E.C.R. I-621 par. 8.

⁵⁸ Lisa Waddington, *supra*, note 13 at 673; Marcus Pilgerstrofer & Simon Forshaw, *supra*, note 8 at 390-91.

The difficulties become discernible if we take a look at the alleged ground of discrimination. Ms. Grant complained, arguing that her employer's refusal constituted discrimination based on sex contrary to of Article 119 EEC (now Article 141 EC)⁵⁹ and the Directive 76/207/EEC. She argued that her predecessor in the post, a man who had declared himself to have been in a meaningful relationship with a woman for over two years, had enjoyed the benefit which had been refused her. The refusal constituted sex discrimination, so the reasoning goes, because a male employee with a female partner would have been granted the concessions *ceteris paribus*, while Ms. Grant 's application was denied only because she was female.⁶⁰ The ECJ eventually rejected the argument. I will argue that the characteristic feature of these cases is is the fact, that two persons of the same sex form a couple, a same-sex couple. We should therefore focus on the different treatment of the same-sex unit rather than on the individuals that make up that unit. Consequently, these cases will no longer fit the definition of triangularity because, conceptually, they deal with two parties only: the alleged discriminating party and the "couple" or "unit" as the injured party.

2. The origins and the failure of the sex discrimination argument in the same-sex cases

⁵⁹ Art. 141 EC reads: "1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means:
(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
(b) that pay for work at time rates shall be the same for the same job.
3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.
4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."

The origin of the sex discrimination argument in *Grant* can be tracked back to the decision of the Supreme Court of Hawaii in *Baehr v. Lewin*⁶¹ decided a few years earlier. The Hawaii Supreme Court held that the statute regulating access to the marital status' on the basis of the applicants' sex⁶² constituted sex discrimination and is therefore subject to strict scrutiny under the equal protection clause of the Hawaii Constitution⁶³. The Hawaii Supreme Court remanded the case for determination whether the state has a compelling justification for the preclusion of the marriage of same-sex couples.⁶⁴ According to his view, discrimination on the basis of sex exists if the same conduct is prohibited or stigmatized when engaged in by a person of a particular sex, while it is tolerated when engaged in by a person of the other sex. "If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is being discriminated against because of his sex."⁶⁵ The argument appears "self-evident"⁶⁶. It was, however, neither successful in other American jurisdictions,⁶⁷ nor could it have been,⁶⁸ as we will see in a minute. The ECJ sided

⁶⁰ John McInnes, Annotation, *Case C-249/96, Lisa Jacqueline Grant v. South West Trains Ltd, Judgement of the Full Court of 17 February 1998, [1998] ECR I-636*, 36 C.M.L.R. 1043, 1050 (1999).

⁶¹ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

⁶² See HRS § 572-1 (3) ("The *man* does not at the time have any lawful *wife* living and that the *woman* does not at the time have any lawful husband living")(emphasis added).

⁶³ Art. I § 5 Haw. Const. ("No person shall [...] be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.")

⁶⁴ *Baehr*, 844 P.2d at 67. For a detailed analysis see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 NYU L. Rev. 197. 204-220 (1994). The trial court held the statute unconstitutional, *Baehr v. Miike*, No. Civ.91-1394, 1996 WL 694235 (Haw. Cir.Ct., Dec. 3, 1996). Eventually, the state constitution was amended allowing the legislature to reserve marriage to opposite-sex couples, Haw. Const. Art. I § 23. HRS § 572-1 was subsequently amended ("In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that [...]"). See David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. Haw. L. Rev. 19 (2000).

⁶⁵ Koppelman, *supra* note 64 at 208; see also *Baker v. Vermont*, 744 A.2d 864, 906 (Vt. 1999)(Johnson, J., conc.): "Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her differently from Dr. A, a man. This is sex discrimination."; *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971-72 (Mass. 2003)(Greany, J., conc.); *Hernandez v. Robles*, 855 N.E.2d 1, 29-30 (N.Y. 2006)(Kaye, C.J., diss.).

⁶⁶ *Goodridge*, 798 N.E.2d at 971-72 (Greany, J., conc.)

⁶⁷ See *Baker*, 744 A.2d at 880 n. 13 (Vt. 1999)(citing several cases where the argument has been dismissed); *In re Marriage Cases*, 183 P.3d 384, 426-440 (Cal. 2008)(citing precedent where the argument has been dismissed).

with the Hawaii Supreme Court's dissent. Judge Heen concluded from the fact that "[a] male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female"⁶⁹ that the statute does not discriminate on grounds of sex because all males and females are treated alike. The ECJ almost literally agrees with that position: "[T]he travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex. Since the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex."⁷⁰

This reasoning has been fiercely criticized, citing⁷¹ "the most aptly titled case in the entire history of American law"⁷², *Loving v. Virginia*⁷³. Richard Loving, a white man, and Mildred Jeter, a black woman, were married in 1958 in the District of Columbia.⁷⁴ Shortly thereafter they returned to Virginia where they were charged with violating the state's ban on interracial marriages.⁷⁵ The trial judge suspended the sentence on the condition that the Lovings leave Virginia and not return for twenty-five years.⁷⁶ His rationale is worth quoting at length: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."⁷⁷ The Lovings challenged the statute in question among, other reasons, on equal protection grounds. The state of Virginia argued that, because its miscegenation

⁶⁸ See Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L. J. 1, 19-20 (1994).

⁶⁹ *Baehr*, 852 P.2d at 71 (Heen, J., diss.).

⁷⁰ *Grant*, 1998 E.C.R. I-621 par. 27-28.

⁷¹ See *Baehr*, 852 P.2d at 67-68; *Baker*, 744 A.2d at 90 (Johnson, J., concurring & diss.); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d at 971-72 (Greany, J., conc.); *Hernandez v. Robles*, 855 N.E.2d at 29-30 (Kaye, C.J., diss.).

⁷² Sunstein, *supra*, note 68 at 17.

⁷³ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁷⁴ *Id.* at 2.

⁷⁵ *Id.* at 2-3.

⁷⁶ *Id.* at 3.

statutes punish equally both the white and the black participants to an interracial marriage, these statutes, despite their reliance on racial classifications do not discriminate based upon race.⁷⁸ The Supreme Court rejected “the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations”⁷⁹ and held the statutes unconstitutional because their only justification was “to maintain White Supremacy”.⁸⁰

It is thus easy to understand why *Loving* attracts those who seek support from the Constitution to counteract sex discrimination.⁸¹ To fully understand why *Loving* is so attractive to those who would like to build a “miscegenation analogy”⁸² just take the following quote from the decision and substitute “sex” for “race”.⁸³ “[The] statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.” Why then, after all, did the analogy not carry the day either in *Grant* nor in the same-sex marriage cases following *Baehr*?

The central feature of *Loving* is the involvement of two persons of different races who are closely associated with each other, forming a (married) couple. Virginia’s anti-miscegenation statutes did not target individuals *per se* but couples made up of a “white person”⁸⁴ and a

⁷⁷ See *Loving*, 388 U.S. at 3.

⁷⁸ *Id.* at 8.

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* at 11.

⁸¹ Cf. *Baehr*, 852 P.2d at 67-68; *Baker*, 744 A.2d at 90 (Johnson, J., conc. & diss.); *Goodrigde*, 798 N.E.2d at 971-72 (Greany, J., conc.); *Hernandez*, 855 N.E.2d at 29-30 (Kaye, C.J., diss.).

⁸² See Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 Yale L. J. 145 (1988)

⁸³ Cf. *Baehr*, 852 P.2d at 68.

⁸⁴ Sec. 20-54 of the Virginia Code provided: “It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term ‘white person’ shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.” See *Loving*, 388 U.S. at 5.

“colored person”⁸⁵. Their goal was to prohibit and punish *marriages* on the basis of racial classification.⁸⁶ The Supreme Court made this particular notion very clear a few years earlier in *McLaughlin v. Florida*.⁸⁷ At issue was a Florida statute that prohibited non-married interracial couples consisting of one white person to occupy the same room during nighttime.⁸⁸ According to the Court, “[i]t is readily apparent that [the statute] *treats the interracial couple* made up of a white person and a Negro *differently than it does any other couple*. No *couple* other than a Negro and a white person can be convicted under [the statute]”.⁸⁹ This language highlights the fact that the invidious discrimination is targeted at the “interracial couple”⁹⁰ itself. While it is obviously true that such a couple is defined by a classification based upon the race of its participants,⁹¹ one has to be very careful not to blur both levels, the discrimination of the couple as such and the discrimination of the individuals forming the couple. The confusion of these levels is the central flaw in the argument of both states, Florida in *McLaughlin* and Virginia in *Loving*. Relying on 19th century Supreme Court precedent,⁹² both the Florida and Virginia courts contended that the law treats all white and black persons who engage in forbidden conduct equally, so that prohibition of this conduct does not constitute invidious racial discrimination.⁹³ I will call this justification the “equal application” argument. It ignores the germane legal discrimination at issue. The target of the statutes is the interracial couple as a unit. The interracial couple is treated differently than a

⁸⁵ Sec. 1-14 of the Virginia Code provided: “Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.” See *Loving*, 388 U.S. at 5.

⁸⁶ *Loving*, 388 U.S. at 6 (emphasis added).

⁸⁷ *McLaughlin v. Florida*, 379 U.S. 184 (1964).

⁸⁸ *Id.* at 186.

⁸⁹ *Id.* at 188 (emphasis added).

⁹⁰ *Id.* at 188.

⁹¹ *Cf id.* at 191-92 (“But we deal here with a classification based upon the race of the participants”).

⁹² *Pace v. Alabama*, 106 U.S. 583 (1883).

⁹³ *McLaughlin*, 379 U.S. 188-190; *Loving*, 388 U.S. at 7-8.

white or non-white intra-racial couple.⁹⁴ The differential treatment of this unit compared to other units is based exclusively on racial grounds and is therefore discrimination not legitimated by an overriding purpose independent of the invidious discrimination itself.⁹⁵ The fact that both participants, the white and the black, were punished regardless of their race is therefore irrelevant. The “equal application” argument in equal protection analysis was thus expressively rejected⁹⁶ because it was entirely beside the point.

In my opinion, the line between the differential treatment of a couple or unit and the persons forming that couple provides the best explanation why the miscegenation analogy does not work for the sex discrimination argument in the same-sex cases. The employer’s regulation in *Grant* and the marriage statutes in the same-sex marriage cases draw a distinction between opposite-sex couples and same-sex couples.⁹⁷ They treat a *couple* made up of two persons of the same sex differently than a *couple* made up of opposite sex partners. The sex discrimination argument fails for precisely the same reasons the “equal-application”-argument in *Loving* failed. It obfuscates the crucial distinction between the differential treatment of the couple and the discrimination of the persons building that couple. This mistake is quite ironic, because the rejection of the “equal application” argument in *Loving* is supposedly the best argument in favor of the sex discrimination claim.⁹⁸ Florida’s and Virginia’s argument, that they apply their anti-miscegenation laws equally because both participating individuals are prosecuted, was wrong because the interracial couple was the target of the statutes and that couple was treated differently than an intra-racial unit on grounds of race. Precisely the same flaw is characteristic for the sex discrimination argument

⁹⁴ Cf. *McLaughlin*, 379 U.S. at 189-190 (“Because each of the Alabama laws applied equally to those to whom it was applicable, *the different treatment accorded interracial and intraracial couples* was irrelevant.”)(emphasis added).

⁹⁵ *McLaughlin*, 379 U.S. at 188-195; *Loving*, 388 U.S. at 11-12.

⁹⁶ *Loving*, 388 U.S. at 8.

⁹⁷ See *In re Marriage cases*, 183 P.3d 384, 436, 440 (Cal. 2008).

⁹⁸ See *Baehr*, 852 P.2d at 67-68; *Baker*, 744 A.2d at 90 (Johnson, J., conc. & diss.); *Goodridge*, 798 N.E.2d at 971-72 (Greany, J., conc.); *Hernandez*, 855 N.E.2d at 29-30 (Kaye, C.J., diss.).

in the same-sex cases, too. To frame these cases as sex discrimination of the individuals does not address the decisive fact, namely that it is the same-sex couple which is treated differently than an opposite-sex couple. A statute or policy that treats same-sex couples differently from opposite-sex couples does not treat an individual man or an individual woman differently because of his or her sex.⁹⁹ The sex of each of the individuals is immaterial *per se* as was the race of each person in *Loving*. These factors are significant only insofar as the race of both persons was necessary to distinguish the interracial from the non-interracial couple or the the same-sex couple from the opposite-sex couple. The argument that Ninia Baehr was refused to marry Genora Dancel because of her sex or that “Gary Chalmers cannot marry Richard Linnell because he (Gary) is a man”¹⁰⁰ is therefore besides the point. Gary Chalmers was not allowed to marry Richard Linnell because *both* are men, thus forming a same-sex couple. Hillary Goodridge was not allowed to marry Julie Goodridge¹⁰¹ because both are women, thus forming a same-sex couple. It is not only their sex that prevents Hillary and Gary from marrying their chosen partners, but also the sex of the respective partner.¹⁰² In *Loving*, the “equal application” argument failed because the interracial couple was discriminated against on grounds of race. In the same-sex cases it holds, because the differential treatment of the same-sex couple is not based on sex.

A short analysis of the *Grant* case will further elucidate my point. John McInnes has argued that in the ECJ’s analysis of Lisa Grant’s sex discrimination claim the wrong comparator was chosen.¹⁰³ In his view, the Court erroneously compared Lisa Grant’s situation to that of a male employee with a male partner instead of comparing her situation to that of a male

⁹⁹ *In re Marriage Cases*, 193 P.3d at 437.

¹⁰⁰ *Goodridge*, 798 N.E.2d at 971 (Greaney, J., conc.).

¹⁰¹ *Goodridge*, 798 N.E.2d at 971 (Greaney, J., conc.).

¹⁰² *But see Goodridge*, 798 N.E.2d at 971 (Greaney, J., conc.) (“Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law.”).

¹⁰³ McInnes, *supra*, note 60 at 1050.

employee with a female partner.¹⁰⁴ He argues that the ECJ was wrong to incorporate not only the sex of the discriminated individual but her sexual orientation as well into the comparison with a similarly situated employee.¹⁰⁵ John McInnes's suggestion to compare Ms. Grant's situation with a *male* seeking travel benefits for his *female* partner is not - as he claims - a logic result, but a flawed strategic choice. It "makes the gay man or lesbian a relative creature, defined only by reference to his or her relationship."¹⁰⁶ There is an alternative to John McInnes' comparison. One could argue that the employer did not base its decision on Ms. Grant's sex but her partner's sex.¹⁰⁷ If Ms. Grant had been living in a "meaningful relationship"¹⁰⁸ with a male person the travel concessions surely would have been granted. The sex discrimination argument thus leads to a severe conceptual problem: Who's sex matters: Ms. Grant's or her partner's sex? One could argue Ms. Grant's sex is relevant, because she was the employee. However, the employment contract at issue clearly stipulated that the partner is entitled to the travel concessions.¹⁰⁹ This demonstrates how interchangeable the person whose sex is supposed to matter actually is if we try to formulate a sex discrimination argument in same sex cases. If we focus on the couple instead, we are able to grasp the real issue here. It is the fact that under her employer's policy only opposite-sex couples can constitute a "meaningful relationship". The employment regulation effectively precludes gay employees from receiving the benefits for their partner. In the same-sex marriage cases the statutes effectively preclude gay persons from marriage.¹¹⁰ Therefore these cases are "more accurately characterized as involving differential treatment on the basis of sexual orientation rather than an instance of sex discrimination, and properly

¹⁰⁴ McInnes, *supra*, note 60 at 1050.

¹⁰⁵ McInnes, *supra*, note 60 at 1050.

¹⁰⁶ Caroline Lindberg, *Lisa Grant v. South West Trains: The Limited Utility of Sex Discrimination Arguments in Securing Lesbian and Gay Rights*, 12 Temp. Int'l & Comp. L.J. 403, 421 (1998).

¹⁰⁷ See Waddington, *supra*, note 13 at 673.

¹⁰⁸ *Grant*, 1998 E.C.R. I-621, par. 5.

¹⁰⁹ *Grant*, 1998 E.C.R. I-621, par. 5 ("Your spouse and dependants will also be granted travel concessions.").

should be analyzed on the former ground".¹¹¹ In short: they are sexual orientation discrimination and not sex discrimination cases.¹¹²

3. Consequences

I began the analysis in this part of the paper with the assumption that *Grant* would be a seminal case for the triangular aspect of non-discrimination and equal protection law. As it turns out, this assumption could not withstand scrutiny. Ms. Grant was discriminated against on grounds of her sexual orientation. The involvement of her female partner in the case was only necessary to establish this sexual orientation discrimination claim. It failed in 1998. Today it would be successful as the recent decision of the ECJ in *Maruko*¹¹³ clearly demonstrates.

a) *New law makes better cases - the ECJ's decision in Maruko*

Maruko is the first case decided by the ECJ under Directive 2000/78/EC concerning discrimination on grounds of sexual orientation. In 2001, Germany enacted the Gesetz über die eingetragene Lebenspartnerschaft¹¹⁴ [Law on registered life partnerships, henceforth LPartG] allowing two persons of the same sex to enter into a legally protected "life partnership".¹¹⁵ Mr. Maruko entered into a life partnership with his male partner, a designer of theatrical costumes. As such, his partner had been a continuous member of the

¹¹⁰ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431 n. 24. (Conn. 2008); *In re Marriage Cases*, 193 P.3d 384, at 440-41.

¹¹¹ *In re Marriage cases*, 193 P.3d at 437.

¹¹² *Grant*, 1998 E.C.R. I-621 par. 29 *et seq.*; *Maruko v. Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, 2008 E.C.R. I-1757, par. 62-73; *Baker*, 744 A.2d at 880 n. 13; *Goodridge*, 798 N.E.2d at 958; *Lewis v. Harris*, 908 A.2d 196, 211 *et seq.* (N.J. 2006); *In re Marriage Cases*, 193 P.3d 384, at 436-40; *Kerrigan*, 957 A.2d at 431 *et seq.*; *Varnum v. Brien*, 2009 WL 874044 (Iowa, 2009); *see also* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA 471, 503-05 (2001); Lindberg, *supra*, note 106 at 421; Sunstein, *supra*, note 68 at 18-20.

¹¹³ *Maruko v. Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, 2008 E.C.R. I-1757.

¹¹⁴ BGBI 2001 I, p. 266.

¹¹⁵ *See* Stephen Ross Levitt, *New Legislation in Germany Concerning Same-Sex Unions*, 7 ILSA J. Int'l & Comp. L. 469 (2001)

Versorgungsanstalt der deutschen Bühnen [German Theatre Pension Fund, henceforth VddB] since 1959. After his death in 2005, Mr. Maruko applied to the VddB for a widower's pension. The VddB rejected his application on the ground that its regulations provided for such an entitlement for surviving spouses of a marriage but not for surviving life partners. Mr. Maruko filed a claim before the competent court, arguing, *inter alia*, that the VddB's refusal infringed upon the principle of equal treatment as enacted in Directive 2000/78/EC.¹¹⁶ He maintained that the refusal to grant the survivor's benefit to surviving life partners constituted indirect discrimination¹¹⁷ based on sexual orientation within the meaning of Directive 2000/78, since two persons of the same sex cannot marry in Germany and, consequently, cannot qualify for that benefit, entitlement to which is reserved to surviving spouses.¹¹⁸ The ECJ held that surviving life partners were treated less favourably than surviving spouses regarding entitlement to that survivor's benefit and that such provision constituted direct¹¹⁹ discrimination if the surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit.¹²⁰ *Maruko* implicitly rejects the reasoning in *Grant* and in *D. & Sweden v. Council*¹²¹ where the ECJ held that stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of the opposite sex¹²² and that the concept of registered partnership is generally distinct from marriage.¹²³

Prior to *Maruko*, German courts have generally denied that unequal treatment of marriages

¹¹⁶ *Maruko*, 2008 E.C.R. I-1757, par. 19-23.

¹¹⁷ Mr. Maruko and the Commission argued, as well as the Advocate General Ruiz-Jarabo Colomer, that the refusal constituted indirect discrimination. See *Maruko*, 2008 E.C.R. I-1757, par. 62; Opinion of AG Ruiz-Jarabo Colomer, *Maruko*, 2008 E.C.R. I-1757, par. 97.

¹¹⁸ *Maruko*, 2008 E.C.R. I-1757, par. 63.

¹¹⁹ *Maruko*, 2008 E.C.R. I-1757, par. 72. Thus, the ECJ concurs with the holdings in *In re Marriage Cases*, 193 P.3d 384, at 440-41; *Kerrigan*, 957 A.2d at 431 n. 24.; *Varnum*, 2009 WL 874044 at 13-14 (Iowa, 2009) where the courts found that the statutory provision restricting marriage to a man and a woman must be viewed as directly imposing a different treatment on basis of sexual orientation.

¹²⁰ *Maruko*, 2008 E.C.R. I-1757, par. 71-72.

¹²¹ *D. & Sweden v. Council*, Joint Cases C-122/99 P & C-125/99 P, 2001 E.C.R. I-4313, par. 29-40.

¹²² *Grant*, 1998 E.C.R. I-621 at par. 35.

and registered civil partnerships amounts to a sexual orientation discrimination under Directive 2000/78/EC.¹²⁴ In the aftermath of *Maruko* German Courts split on the issue. While the Bundesarbeitsgericht (Federal Supreme Labor Court) has recently changed its opinion and decided that surviving life partners are entitled to receive employment related survivor's benefits because they are comparably situated with surviving partners,¹²⁵ a chamber of the second senate of the Bundesverfassungsgericht (German Constitutional Court) held in 2008 that a specific payment discrimination for civil servants in life partnerships does not constitute direct discrimination based on sexual orientation because civil servants in a life partnership are not in a comparable situation as married civil servants.¹²⁶ This decision has recently been superseded. The first senate of the German Constitutional court held unanimously the unequal treatment of marriages and registered civil partnerships concerning survivor's pensions under an occupational pension scheme unconstitutional.¹²⁷ The German Constitutional Court agrees with the ECJ's and the German Federal Supreme Labour Court's analysis that the unequal treatment of the registered civil partnership is solely based on the sexual orientation of both partners.¹²⁸ The unequal treatment cannot be justified under the

¹²³ *D & Sweden*, 2001 E.C.R I-4313 at par. 31. For a critical analysis see R. Amy Elman, *Sexual Equality in an Integrated Europe*, 132-33, 142-46 (2007)

¹²⁴ See Bundesverfassungsgericht, *Neue Juristische Wochenschrift* (NJW) 61 (2008), 209; Bundesarbeitsgericht, *Neue Zeitschrift für Arbeitsrecht* (NZA) 24 (2007), 1179 (discussing the provisions in a collective agreement of the German protestant church); Bundesgerichtshof, *Neue Juristische Wochenschrift - Rechtsprechungs-Report* (NJW-RR) 22 (2007), 1441 (arguing that the entitlement provision in a collective agreement does not constitute discrimination based on sexual orientation but on grounds of the civil status, citing *D. & Sweden v. Council*, Joint Cases C-122/99 P & C-125/99 P, 2001 E.C.R. I-4313, par. 29-40); Bundesverwaltungsgericht, NJW 61 (2008), 246 (holding that the discrimination of life partners regarding the entitlement of widower's pension does not violate Article 3 Basic Law, the German Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, BGBl 2006 I, p. 1897) nor the Directive 2008/78/EC because it is not grounded on sexual orientation but on family status).

¹²⁵ Bundesarbeitsgericht NZA 26 (2009), 489.

¹²⁶ Bundesverfassungsgericht, NJW 61 (2008), 2325 (2326-27). For a critique see Ulrich Fastenrath, *BVerfG verweigert willkürlich die Kooperation mit dem EuGH*, NJW 62 (2009), 272; Claus Dieter Classen, *Annotation*, *Juristenzeitung* 63 (2008), 794.

¹²⁷ Bundesverfassungsgericht, Order of 07/07/2009, 1 BvR 1164/07, at http://www.bundesverfassungsgericht.de/entscheidungen/rs20090707_1bvr116407.html (last visited 10/30/2009).

¹²⁸ *Id.*, at para. 90-92.

equal protection clause in the German Basic Law.¹²⁹ In principle, the legislature is not barred from treating marriage more favorably than other ways of life.¹³⁰ Such provisions can find their justification in the spouses' jointly shaping their path through life and in the responsibility for the partner which they have assumed in a permanent and legally binding manner.¹³¹ However, the same applies to partners in a registered civil partnership.¹³² Where giving marriage favorable treatment goes along with disadvantaging other ways of life even though they are comparable to marriage as regards the life situation that is regulated and the objectives pursued by the regulation, the mere reference to the requirement of protecting marriage in Art. 6 para. 1 Basic law does not justify such a differentiation.¹³³ Thus, a sufficiently weighty factual reason is required which, measured against the respective object and objective of regulation, justifies the unfavorable treatment of other ways of life.¹³⁴ The Court was not able to find such reasons and it explicitly rejected the child-rearing-argument: There are not children in every marriage and not every marriage is oriented towards having children.¹³⁵ On the other hand, children live in a large number of registered civil partnerships.¹³⁶ *In sum*, the decision is quite revolutionary. It sets a very strict standard of review,¹³⁷ that will make it almost certainly impossible for the legislator and employers to differentiate between marriage and registered civil partnerships.

b) Redefining the triangular relationship

Grant and *Maruko* are seminal non-discrimination cases within the classical realm on non-discrimination law: the two party relationship. The alleged discriminating party is South West

¹²⁹ Art. 3 para 1 Basic Law reads: „All humans are equal before the law“.

¹³⁰ See Art. 6 para 1 Basic Law: „ Marriage and family are under the special protection of the state.“

¹³¹ Bundesverfassungsgericht, *supra* n. 127, para. 102.

¹³² *Id.*, at para. 102.

¹³³ *Id.*, at para. 105.

¹³⁴ *Id.*, at para. 105.

¹³⁵ *Id.*, at para. 112.

¹³⁶ *Id.*, at para 113.

¹³⁷ *Id.*, at para 85 *et seq.*

Trains, Ltd. and VddB, respectively. Lisa Grant and Tadeo Maruko, were the injured parties in each case and they were both discriminated against because of their common personal characteristic, their sexual orientation. That aspect distinguishes *Grant* and *Maruko* from *Coleman*. Sharon Coleman did not claim that she was discriminated against on grounds of her disability but of her sons'. At issue was the question whether the Directive protects non-disabled people who, in the context of their employment, suffer direct discrimination and/or harassment because they are associated with a disabled person.¹³⁸ Thus, I will reformulate the proposed¹³⁹ tentative definition of triangular relationships in non-discrimination and equal protection law. In the final version a triangular relationships exists if six criteria are met: (1) the state or a party made a discriminatory act allegedly based on one or more "suspect classifications"; (2) the injured party was subject to an alleged discriminatory act; but (3) does not carry the characteristic that may not be discriminated against upon which the act was based; and (4) a third person; (5) actually holding the characteristic at issue; and (6) with whom the injured party is associated.

III. Discrimination or Retaliation -

Two Different Categories of Triangular Relationships

1. The principle of equal treatment in EC law

The general principle of equal treatment is deeply embedded in European Community law. The principle requires that comparable situations be treated similarly and that different situations must be treated on their independent merits unless other treatment is objectively

¹³⁸ Opinion of AG Poiares Maduro, *Coleman*, 2008 E.C.R. I-5603, par. 6.

¹³⁹ See, *supra*, p. 10-11.

justified.¹⁴⁰ The various prohibitions of discriminations explicitly enumerated in the EC are “merely a specific enunciation of the general principle of equality which is one of the fundamental principles of community law”.¹⁴¹ It is thus important to note that case law does not distinguish between the “principle of equality” and the “principle of non-discrimination”, and uses both expressions synonymously.¹⁴² Historically, there have been two major strands in European non-discrimination law: (1) the law on nationality discrimination¹⁴³ and (2) the law on sex discrimination at the workplace.¹⁴⁴ Since 2000 the European Community has expanded the scope of its non-discrimination law with several directives based both on Article 13 EC¹⁴⁵ and Article 141 EC, thus framing a specific European non-discrimination law concerning labor relations and also general civil matters.¹⁴⁶ Most recently, the Parliament amended and approved¹⁴⁷ a directive proposed by the Commission in 2008 that provides for protection from discrimination on grounds of age, disability, sexual orientation and religion or

¹⁴⁰ *Lindorfer v. Council*, Case 227/04 P, 2007 E.C.R. I-6767, par. 63.

¹⁴¹ *Ruckdeschel & Co v. Hauptzollamt Hamburg-St. Annen*, Joint Cases 117/64, 16/77, 1977 E.C.R. 1753, par. 7.

¹⁴² See *Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa)*, Case C-442/00, 2002 E.C.R. I-11915, par. 32 (“Fundamental rights include the general principle of equality and non-discrimination. That principle precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified.”); Opinion of AG Mazak, *Palacios de la Villa v. Cortefiel Servicios SA*, Case 411/05, 2007 E.C.R. I-8531, par. 90 (“According to the commonly accepted definition, as well as established case-law, the general principle of equal treatment, or of non-discrimination, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way.”)

¹⁴³ See art. 12 EC (“1. Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. 2. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.”); and various specific emanations of that principle, see, e.g., art 34 par. 2 EC, art. 39 par. 2 EC, art. 43 EC, art. 49 EC.

¹⁴⁴ See Mark Bell, *Anti-Discrimination Law and the European Union* (2002), 32-51.

¹⁴⁵ Art. 13 EC reads: “1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.”

¹⁴⁶ See, *supra*, note 3.

¹⁴⁷ European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation; Eur. Parl. Doc. P6 TA(2009)211.

belief beyond the workplace.¹⁴⁸ At the core of these instruments lies the “principle of equal treatment”, which means that there shall be no direct or indirect discrimination whatsoever on any of the grounds covered by each Directive.¹⁴⁹ The relationship between the general principle of equal treatment and the “principle of equal treatment” as defined in the various directives was at issue in *Mangold v. Helm*¹⁵⁰. In that case the ECJ held that Directive 2000/78 does not establish the principle of equal treatment in the field of employment and occupation.¹⁵¹ “[T]he sole purpose of the directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation, the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States. The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law.”¹⁵² This passage has attracted a storm of academic criticism.¹⁵³ In my opinion, the best interpretation of *Mangold* was proposed by AG Sharpston.¹⁵⁴ AG Sharpston suggested that the prohibition of age discrimination identified by the ECJ was a particular expression of the general principle of equality before the law.¹⁵⁵ Accordingly, the better reading of *Mangold* is that (1) age discrimination has always been precluded by the general principle of equality; that (2) Directive 2000/78 has introduced a

¹⁴⁸ COM(2008) 426 final.

¹⁴⁹ See Art. 1 Directive 2000/43/EC, art. 1 Directive 2000/78/EC, art. 1 Directive 2006/54/EC.

¹⁵⁰ *Mangold v. Helm*, Case 144/04, 2005 E.C.R. I-9981.

¹⁵¹ *Mangold*, 2005 E.C.R. I-9981, par. 74.

¹⁵² *Id.* at par. 74-75.

¹⁵³ See Opinion of AG Mazák, *Palacios de la Villa v. Cortefiel Servicios*, Case C-411/05, 2007 E.C.R. I-8531, par. 79-100; Opinion of GA Geelhoed, *Chacón Navas v. Eurest Colectividades SA*, Case C-13/05, 2006 E.C.R. I-6467, par. 46-56; Opinion of AG Sharpston, *Bartsch v. Bosch und Siemens Altersfürsorge GmbH*, Case 427/06, 2008 E.C.R. I-7245, par. 31 n. 14-17, see also Antoine Masson & Claire Michau, *The Werner Mangold Case: An Example of Legal Militancy*, 13 Eur. Pub. L. 587 (2007); for a positive review see Marlene Schmidt, *The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment*, 7 German L.J. 504 (2006).

¹⁵⁴ Opinion of AG Sharpston, *Bartsch*, 2008 E.C.R. I-7245, paras. 28-77; Opinion of AG Sharpston, *Lindorfer v. Council*, Case 227/04 P, 2007 E.C.R. I-6767, par. 53-67.

¹⁵⁵ Opinion of AG Sharpston, *Bartsch*, 2008 E.C.R. I-7245 at par. 59.

specific, detailed framework for dealing with, *inter alia*, that discrimination; by (3) laying down a series of specific rules that establish the parameters of what differential treatment on grounds of (inter alia) age is acceptable or not (and why).¹⁵⁶ For the inquiry of this paper we do not have to go further. It will do to point out that this conception is basically grounded in settled case law.¹⁵⁷ The ECJ, for example, held that the “principle of equal treatment of men and women” in the Directive 76/207/EC is “simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law.”¹⁵⁸

2. The significance of *Coleman*

I will now address *Coleman* in some greater detail. The ECJ’s analysis in *Coleman* proceeds in four steps: (1) The ECJ framed the question whether Ms. Coleman’s was discriminated against on grounds of her son’s disability as an issue of direct discrimination.¹⁵⁹ (2) Unlike the U.K. law that specifically required the discrimination of a disabled person,¹⁶⁰ the wording of the relevant provisions in the Directive requires only a less favorable treatment “on the grounds of” disability, thus leaving open the question if the person has to be treated less favorable due to her disability or whether it is sufficient to have suffered disparate treatment on the basis of a third party’s disability.¹⁶¹ According to the ECJ, the Directive can be read broadly to interpret the principle of equal treatment so as not to apply merely to a particular category of persons (narrow reading) but by reference to the proscribed suspect

¹⁵⁶ *Id.* at par. 63.

¹⁵⁷ Jan H. Jans, *The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law*, 34 Leg. Issues Econ. Integr. 53, 62-65 (2007)

¹⁵⁸ *P. v. S. and Cornwall County Council*, Case C-13/94, 1996 E.C.R. I-2143, par. 18.

¹⁵⁹ *Coleman*, 2008 E.C.R. I-5603, par. 33; see Opinion of AG Poiares Maduro, *id.* at par. 19-20. For a discussion of an indirect discrimination claim see Waddington, *supra*, note 13, at 675-76.

¹⁶⁰ See, *supra*, note 7.

¹⁶¹ *Id.* at par. 38 (“Consequently, it does not follow from those provisions of Directive 2000/78 that the principle of equal treatment which it is designed to safeguard is limited to people who themselves have a disability within the meaning of the directive.”), see also Opinion of AG Poiares Maduro, *id.* at par. 16 (“The important words here are ‘on the grounds of’.”)

classifications (broad construction).¹⁶² This argument was developed in greater detail by AG Poirares Maduro.¹⁶³ AG Poirares Maduro argues that “[t]he Directive operates at the level of grounds of discrimination.”¹⁶⁴ It is thus well within a simple reading of the Directive’s language to argue that it “is not necessary for someone who is the object of discrimination to have been mistreated on account of ‘her disability’. It is enough if she was mistreated on account of ‘disability’.”¹⁶⁵ If Sharon Coleman had been treated less favorably because of a disability that she suffered from, the Directive would have applied.¹⁶⁶ Clearly, the discrimination would be “based on grounds of” disability. Yet, that is also true if the discrimination she suffered is “based on grounds” of her son’s disability. On a side note, the ECJ in *Feryn*, decided very shortly before *Coleman*, went even further and held that it constitutes discrimination on grounds of race even if there is no identifiable complainant contending that he or she has been treated less favorable than another person.¹⁶⁷ (3) It cannot be inferred from other provisions in the Directive that evidently apply only to disabled people¹⁶⁸ that the prohibition of discrimination “on grounds of disability” is also limited to persons who are themselves disabled.¹⁶⁹ (4) The Directive’s effectiveness and the protection

¹⁶² *Id.* at par. 38.

¹⁶³ Opinion of AG Poirares Maduro, *Coleman*, 2008 E.C.R. I-(nyr), at par. 16-17, 22-23.

¹⁶⁴ *Id.* at par. 22.

¹⁶⁵ *Id.* at par. 23.

¹⁶⁶ Opinion of AG Poirares Maduro, *Coleman*, 2008 E.C.R. I-5603, par. 21.

¹⁶⁷ *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Case C-54/07, 2008 E.C.R. I-5187, par. 28 (holding that the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market).

¹⁶⁸ Article 5 reads: Reasonable accommodation for disabled persons. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned. (emphasis added). Article 7 par. 2 reads: “With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.” (emphasis added).

¹⁶⁹ *Coleman*, 2008 E.C.R. I-5603, par. 39-43.

which it is intended to provide support a broad construction.¹⁷⁰ First, as mentioned in recital 11, it is the goal of the Directive to ensure that discrimination based on, *inter alia*, disability, does not undermine the Treaty's objectives.¹⁷¹ Second, the holding in *Chacón Navas*¹⁷², does not demand a strict interpretation of the principle of equal treatment regarding the scope of the grounds expressly mentioned in the Directive.¹⁷³ In *Chacón Navas* the ECJ held that a person who has been dismissed by her employer solely on account of sickness is not discriminated against on grounds of disability by Directive 2000/78/EC.¹⁷⁴ The ECJ dismissed the attempt to extend the scope of Directive 2000/78 by analogy beyond the grounds listed in Article 1 to include discrimination on grounds of sickness as well.¹⁷⁵ The Court thus followed AG Geelhoed who had advocated against an overly broad interpretation of the principle of equal treatment.¹⁷⁶ Although AG Geelhoed seems to assume throughout his opinion that the Directive applies only to the disabled,¹⁷⁷ he did not specifically address the issue of triangular relationships. Neither did the Court in *Chacón Navas*, because it was not an issue. The holdings in *Chacón Navas* and in *Coleman* are thus consistent.

Under the most narrow reading, *Coleman* stands for the proposition, that it constitutes direct discrimination¹⁷⁸ and harassment¹⁷⁹ on grounds of disability under Directive 2000/78/EC if the employee is not herself disabled but the less favorable treatment or harassment occurred based on the disability of the employee's child, whose primary

¹⁷⁰ *Id.* at par. 48, 51.

¹⁷¹ *Id.* at par. 49-50.

¹⁷² *Chacón Navas v. Eurest Colectividades SA*, Case 13/05, 2006 E.C.R. I-6467

¹⁷³ *Coleman*, 2008 E.C.R. I-5603, par. 46.

¹⁷⁴ *Chacón Navas*, 2006 E.C.R. I-6467, par. 47.

¹⁷⁵ *Chacón Navas*, 2006 E.C.R. I-6467, par. 56.

¹⁷⁶ Opinion of AG Geelhoed in *Chacón Navas*, 2006 E.C.R. I-6467 par. 57-83.

¹⁷⁷ *Id.* par. 50 ("compensate for or alleviate the limitations due to age or disability"); par. 55 ("such as the rights of disabled or older workers").

¹⁷⁸ Article 2 par. 2 (a) Directive 2000/78/EC.

¹⁷⁹ Article 2 par. 3 Directive 2000/78/EC reads: "Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States."

caretaker that employee is.¹⁸⁰ A broader reading would interpret the holding in *Coleman* as the emanation of a general principle applicable to all EC equality directives that direct discrimination and harassment by association are prohibited.¹⁸¹ That still leaves open the prerequisites regarding the degree of association. I will discuss that point in Part V.¹⁸²

Two brief observations why, in my opinion, a broad reading of *Coleman* is preferable. First, several commentators have mentioned *Grant* as a precedent that could have the potential to limit the principle's application towards sex discrimination cases.¹⁸³ As discussed above, *Grant* is not a triangular relationship case.¹⁸⁴ The disparate treatment was not based on Lisa Grant's partner's sex¹⁸⁵ but on her own sexual orientation.¹⁸⁶ The holding in *Grant*, that sexual orientation discrimination is not prohibited under EC law is no longer valid. The Directive 2000/78/EC and the holding in *Maruko* provide exactly the opposite. Second, the most compelling arguments for a broad reading of the *Coleman* Court's holding are the almost identical wordings of direct discrimination as defined in the several directives¹⁸⁷ and the opinion of AG Poiares Maduro, in which the analysis does not distinguish among the different suspect classifications mentioned in Article 1 Directive 2000/78/EC.¹⁸⁸ Finally,

¹⁸⁰ *Coleman*, 2008 E.C.R. I-5603, par. 56, 63.

¹⁸¹ Waddington, *supra*, note 13 at 673-74.

¹⁸² For a further explanation of the concept of discrimination by association see , *infra*, Part V.

¹⁸³ Waddington, *supra*, note 13 at 673; Pilgerstorfer & Forshaw, *supra*, note 8 at 390-91.

¹⁸⁴ See, *supra*, p. 19-21.

¹⁸⁵ *But* see Waddington, *supra*, note 13 at 673 ("The difference in treatment was therefore based on the sex of partner who the claimant "associated" with").

¹⁸⁶ See, *supra*, Part II.

¹⁸⁷ Article 2 par. 2 (a) 2000/78/EC reads: "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, *on any of the grounds referred to in Article 1*"; Article 2 par. 2 (a) Directive 2000/43/EC reads "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation *on grounds of racial or ethnic origin*"; Article 2 par. 1 Directive 76/207/EC as amended by Directive 2002/73/EC reads: "For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever *on grounds of sex* either directly or indirectly by reference in particular to marital or family status."; Article 2 (a) Directive 2004/113/EC reads: "direct discrimination: where one person is treated less favourably, *on grounds of sex*, than another is, has been or would be treated in a comparable situation" and Article 2 par. 1 (a) Directive 2006/54/EC reads: "direct discrimination": where one person is treated less favourably *on grounds of sex* than another is, has been or would be treated in a comparable situation".

¹⁸⁸ Opinion of AG Poiares Maduro, *Coleman* 2008 E.C.R. I-5603, par. 6-24.

proposed legislation supports this reading. The European Parliament recently approved the Commission's proposal¹⁸⁹ for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation amending several provisions.¹⁹⁰ Among the changes proposed by Parliament is an amendment into Article 2 par. 2 of the Commission's proposal defining the concept of discrimination. The proposed article currently provides that "direct discrimination shall be taken to occur where one person, *or persons who are or who are assumed to be associated with such a person*, is treated less favourably than another is, has been or would be treated in a comparable situation, on one or more of the grounds referred to in Article 1".¹⁹¹ I have no doubt that this amendment will become law, thus adding another strong reason to argue that the concept of "discrimination by association" is - or at least will become - a cornerstone of European non-discrimination law.

3. Coleman, Sullivan, Jackson & CBOCS West, Inc. -

A transatlantic reading experience

Coleman is the seminal case in EC law concerning triangular relationships in non-discrimination law. Due to the strong influence of American non-discrimination law on European legislation and European courts, it is appealing to compare the European holding with the U.S. approach to triangular relationship cases. In my opinion, three cases are of particular interest: *Sullivan v. Little Huntington Park, Inc.*¹⁹²; *Jackson v. Birmingham Board of Education*¹⁹³ and *CBOCS West, Inc. v. Humphries*¹⁹⁴.

¹⁸⁹ COM(2008), 426 final.

¹⁹⁰ Legislative Resolution, P6 TA(2009), 211.

¹⁹¹ *Id.*, amend. 38.

¹⁹² 396 U.S. 229 (1969).

¹⁹³ 544 U.S. 167 (2005).

¹⁹⁴ 128 S. Ct. 1951 (2008).

a) *Sullivan and its progeny*

Sullivan has enjoyed a remarkable recent renaissance. Little Huntington Park, Inc., was a corporation organized to operate a community park for the benefit of residents in Virginia. A membership share entitled all persons in the immediate family of the shareholder to use the corporation's recreational facilities. The bylaws provided that a person owning a membership share was entitled to assign her share to her tenant, subject to approval of the board of directors. Paul Sullivan leased the house he owned to T. R. Freeman and assigned his membership share to Freeman. The board refused to approve the assignment because Freeman was black. Sullivan was expelled from the corporation following his protestation¹⁹⁵ of the board's refusal to allow him to assign his shares to Freeman.¹⁹⁶ Sullivan asserted claims for monetary damages pursuant to 42 U.S.C. § 1982. The Court held "that Sullivan has standing to maintain [the] action."¹⁹⁷ If the white owner could not effectively vindicate the rights of minorities protected by the statute, racial restrictions on real property would perpetuate.¹⁹⁸ The effectiveness of the prohibition of racial discrimination was basically the Court's only argument. Some find Justice Douglas's decision, however, to be "not a model of clarity"¹⁹⁹. It does not, for example, elucidate whether Sullivan had "his own private cause of action"²⁰⁰ as Justice O'Connor argues or if, as Justice Thomas maintains, Sullivan in fact filed a third party claim on behalf of Freeman's statutorily protected rights.²⁰¹ Justice O'Connor's approach not only "won the day in *Jackson*"²⁰², but also prevailed in *CBOCS West, Inc.*²⁰³ and in *Gómez-Peréz v. Potter*²⁰⁴. There are more ambiguities in Justice

¹⁹⁵ For a more detailed description of his protest see *Sullivan*, 396 U.S. at 252-52 (Harlan, J., diss.).

¹⁹⁶ See *Sullivan*, 396 U.S. at 234-35.

¹⁹⁷ *Sullivan*, 396 U.S. at 404.

¹⁹⁸ *Id.* at 404.

¹⁹⁹ *CBOCS West, Inc.*, 128 S. Ct. at 1966 (Thomas, J., diss.)

²⁰⁰ See *Jackson*, 544 U.S. at 177 n. 1 (emphasis in original).

²⁰¹ See *Jackson*, 544 U.S. at 194-94 (Thomas, J., diss.); *CBOCS West, Inc.*, 128 S. Ct. at 1965-69 (Thomas, J., diss.)

²⁰² *Gómez-Peréz v. Potter*, 128 S. Ct. 1931, 1944 n 1 (2008)(Roberts, C.J., diss.)

²⁰³ *CBOCS West, Inc.*, 128 S. Ct. at 1959.

Douglas's opinion for the Court. Besides his claim for monetary damages, Sullivan had also sought an injunction requiring the board to approve the assignment to Freeman and not to use race as a factor in considering membership.²⁰⁵ The Court's holding that Sullivan has "to maintain *this* action"²⁰⁶ standing does not decide on the reliefs he sought.²⁰⁷ As Justice Harlan pointed out in his dissenting opinion, one can read § 1982 to encompass relief for injuries resulting from Little Huntington Park's interference with Sullivan's statutory duty to Freeman under § 1982.²⁰⁸ The Court focused instead on "Sullivan's expulsion [from the corporation] for the advocacy of Freeman's cause"²⁰⁹. That is the primary reason that *Sullivan* has been interpreted as a retaliation case in the other decisions I discuss herein, although "[t]he word retaliation does not appear in the Court's opinion."²¹⁰ Applying the standards of the *Coleman* decision, it would also be plausible to read *Sullivan* rather differently. Clearly, the board refused to approve the assignment of the shares on the grounds of race. Yet, it was not Sullivan's race driving the board's decision, but Freeman's. If Sullivan had leased his house to a white person, or *associated* with a person of the same race, the assignment would, in all likelihood, have been approved. The board thus treated Sullivan less favorably than another (white) person on the basis of Freeman's race, a person of a certain race with whom Sullivan chose to associate. Transferring the analysis of *Coleman*, it would be possible to construct § 1982 "to operate on the level of grounds of discrimination"²¹¹. The language of § 1982 does not tie the protection to the discriminated person's race, but to race as a ground for differential treatment. As a consequence, Sullivan

²⁰⁴ *Gómez-Peréz v. Potter*, 128 S. Ct. 1931, 1937 (2008).

²⁰⁵ *Sullivan*, 396 U.S. at 253 (Harlan, J., diss.).

²⁰⁶ *Id.* at 237 (emphasis added).

²⁰⁷ *Id.* at 251 (Harlan, J., diss.); *CBOCS West, Inc.*, 128 S. Ct., at 1966-67 (Thomas, J., diss.).

²⁰⁸ *Sullivan*, at 254 (Harlan, J., diss.).

²⁰⁹ *Id.* at 404.

²¹⁰ *CBOCS West, Inc.*, 128 S.Ct., at 1966 (Thomas, J., diss.).

²¹¹ Opinion of AG Poiares Maduro, *Coleman*, 2008 E.C.R. I-5603, par. 22.

would have had “his own private action”²¹² for the board’s refusal to approve the assignment already and would not have been limited to seeking remedy for his expulsion after advocating Freeman’s case.

Irrespective thereof, *Sullivan* was decisively interpreted in connection with a retaliation claim in *Jackson*, where the Court relied heavily on *Sullivan*.²¹³ Roderick Jackson was a teacher and coach of the girls’ basketball team in Birmingham, Alabama, public schools. After he had been transferred to a new high school within the school district, he discovered that the girls’ team there was not receiving equal funding and equal access to athletic equipment and facilities. He protested the disparate treatment to his supervisors, concerning, in particular, the girls’ basketball team, but to no avail.²¹⁴ Ultimately Jackson was removed as coach of the girls’ team. He sued the Birmingham Board of Education (board) alleging that it had retaliated against him because of his protestation of sex discrimination in the high school’s athletic program in violation of 20 U.S.C. § 1681 et seq.²¹⁵ The issue in *Jackson* was whether § 1681 encompasses claims of retaliation against a party affected by sex discrimination aimed at a third party. The Court of Appeals held that § 1681 could not be so interpreted, holding that Title IX does not explicitly encompass retaliation claims.²¹⁶ The Supreme Court reversed, holding that the alleged retaliation is discrimination on the basis of sex.²¹⁷

The Supreme Court argued that (1) retaliation against a party because he or she has complained against sex discrimination is a form of intentional sex discrimination,²¹⁸ since the

²¹² *Jackson*, 544 U.S. at 176 n. 1

²¹³ *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 399 (7th Cir. 2007), *aff’d sub nom. CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008).

²¹⁴ *Jackson*, 544 U.S. at 171.

²¹⁵ *Id.* at 172.

²¹⁶ *Jackson v. Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002), *rev’d* 544 U.S. 167 (2007)

²¹⁷ *Jackson* at 173-74.

²¹⁸ *Id.* at 173-74.

complainant is being subjected to differential, less favorable treatment.²¹⁹ (2) This holding is based in a textual analysis of the statute.²²⁰ First, the Court explains that retaliation is covered by the statute despite there being no explicit mention of “retaliation” therein. The term “discrimination”, argues the Court, covers a wide range of intentionally effected less favorable treatment,²²¹ and is thus open for a broad construction.²²² Second, the Court addressed the respondent’s argument that Jackson was not subject of the original protestation against sex discrimination.²²³ The dissent further pointed out that the retaliation was not based on Jackson’s sex.²²⁴ The implicit starting point for the Court’s analysis was the wording in the statute that “[n]o person [...] shall, on the basis of sex, [...] be subjected to discrimination”.²²⁵ That point of departure for analysis allows both interpretations discussed above in my analysis of *Coleman* - the narrow and broad constructions.²²⁶ The statute can thus be interpreted as understood by Justice Thomas, who argued that “the natural meaning of the phrase ‘on the basis of sex’ is on the basis of plaintiff’s sex, not the sex of some other person.”²²⁷ Justice Thomas’s assertion that his interpretation is the only “natural meaning” is, however, in my opinion, misplaced. The opposite interpretation is equally plausible. Justice Thomas’s reliance on earlier precedent is equally not compelling. Three of the cases Justice Thomas cites in support of his interpretation of the statute²²⁸ are not on point because they concern intentional discrimination cases in two party relationships. *Jackson*, on the other hand, concerns a triangular relationship.²²⁹ The fourth example is a disparate impact case²³⁰

²¹⁹ *Id.* at 174.

²²⁰ *Id.* at 173-75, 178-80.

²²¹ *Id.* at 175.

²²² *Id.* at 174.

²²³ *Id.* at 179.

²²⁴ *Id.* at 188 (Thomas, J., diss.).

²²⁵ 42 U.S.C. § 1681(1)

²²⁶ See, *supra*, p. 25-26.

²²⁷ *Jackson*, 544 U.S. at 185 (Thomas, J. diss.).

²²⁸ *Id.* at 186 (Thomas, J., diss.).

²²⁹ See *United States v. Burke*, 504 U.S. 229, 239 (1992); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

²³⁰ See *Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977).

and therefore distinguishable from a intentional discrimination claim.²³¹ Justice Thomas’s interpretation of the statute would apply only if the statute explicitly provided that “no person shall be subjected to discrimination on the basis of *such individual’s sex*.”²³² The statute, however, does not so provide. Like the Directive at issue in *Coleman* and the statute considered in *Sullivan*, 20 U.S.C. § 1681 operates also at the level of grounds of discrimination. “Where the retaliation occurs because the complainant speaks out about sex discrimination, the “on the basis of sex” requirement is satisfied.”²³³ (3) The Court next argues that the statute’s effectiveness required the broader reading. A broad construction, argues the Court, must be preferred, because it fosters an effective protection against discrimination on the basis of sex.²³⁴ Without protection from retaliation, the underlying discrimination would too often remain unremedied.²³⁵ (4) The Court then holds that neither the fact that Congress mentioned retaliation in other Titles of the Civil Rights Act expressly²³⁶ nor its limitation of discrimination on grounds of sex to the individual’s sex in other provisions²³⁷ is decisive. (5) The Court arrived at this conclusion by presuming that Congress is aware of judicial precedents; a presumption that some prefer to call a fiction.²³⁸ *Jackson* framed *Sullivan* solely as a retaliation case.²³⁹ The *Jackson* Court understood *Sullivan* to interpret “a general prohibition on racial discrimination to cover retaliation against those who

²³¹ See, *supra*, note 159.

²³² See *Jackson*, at 179 (emphasis in original).

²³³ *Jackson*, 544 U.S. at 179.

²³⁴ *Id.* 180-81.

²³⁵ See *id.* at 180-81.

²³⁶ See, *e.g.*, National Labor Relations Act, 29 U.S.C. § 158(a)(4); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d); Americans with Disabilities Act of 1990, 42 U.S.C. §§12203(a)-(b); Family and Medical Leave Act of 1993, 29 U.S.C. § 2615.

²³⁷ *Cf.* 42 U.S.C. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer [...] otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

²³⁸ See Nancy Eisenhower, Comment, Implied Causes of Action Under Federal Statutes: The Air Carriers Act of 1986, 59 U. Chi. L. Rev. 1183, 1193 (1992); William B. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. Pa. L. Rev. 171 (2000).

²³⁹ See *id.* at 176 (“protected a white man who spoke out against discrimination toward one of his tenants and who suffered retaliation as a result”).

advocate the rights of the groups protected by that prohibition.”²⁴⁰ Because the relevant provision was enacted shortly after *Sullivan*, Congress is deemed to have accepted its holding by framing a broad non-discrimination principle.²⁴¹ *In sum*, the result “flowed naturally from *Sullivan*”²⁴²: “Retaliation for Jackson’s advocacy of the rights of the girls’ basketball team in this case is “discrimination” “on the basis of sex,” just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race.”²⁴³

The last case I would like to discuss is *CBOCS West, Inc. v. Humphries*.²⁴⁴ Hedrick G. Humphries, a former assistant manager of a Cracker Barrel restaurant, claimed that CBOCS West, Inc. (Cracker Barrel’s owner) dismissed him, *inter alia*, because he had complained to managers that a fellow assistant manager had dismissed another black employee for race-based reasons.²⁴⁵ Since only 42 U.S.C. § 1981 could support Humphries’ claim,²⁴⁶ the issue was whether § 1981 encompasses retaliation claims.²⁴⁷ The Court of Appeals for the 7th Circuit answered in the affirmative²⁴⁸ and the Court affirmed.²⁴⁹ The Court emphasized that its conclusion rested in significant parts upon principles of *stare decisis*.²⁵⁰ Its analysis relied heavily on *Sullivan* and *Jackson*.²⁵¹ (1) As in *Jackson*, the issue was framed as retaliation.²⁵² Differing from *Jackson*, the Court fails to explicitly interpret retaliation as a form of “discrimination”. I believe that this can be attributed to the text of § 1981 which provides that “[a]ll persons shall have the same right [...] to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the

²⁴⁰ *Id.* at 176.

²⁴¹ Cf. *Jackson*, 544 U.S. at 176.

²⁴² *Gómez-Peréz v. Potter*, 128 S. Ct. at 1937.

²⁴³ *Id.* at 176-77.

²⁴⁴ 128 S. Ct. at 1951.

²⁴⁵ *CBOCS West, Inc.*, 128 S. Ct. at 1954.

²⁴⁶ His Title VII claim, 42 U.S.C. § 2000 *et seq.* was dismissed for failure to pay necessary filing fees on a timely bases, see *CBOCS West, Inc.*, at 1954.

²⁴⁷ *CBOCS West, Inc.*, 128 S. Ct. at 1954.

²⁴⁸ *Humphries v. CBOCS West, Inc.*, 474 F.3d at 397-402.

²⁴⁹ *CBOCS West, Inc.*, 128 S. Ct. at 1961.

²⁵⁰ *Id.*, at 1955.

²⁵¹ *CBOCS West, Inc.*, 128 S. Ct. at 1958.

security of persons and property as is enjoyed by white citizens” rather than the words “discrimination on grounds of race”, although that is commonly interpreted to be its plain meaning.²⁵³ Whenever the text of a statute mentions “discrimination” the Court should include an act of retaliation as an act of discrimination, as the Court clearly held in both *Jackson*²⁵⁴ and *Gómez Pérez*.²⁵⁵ (2) Although the plain text of § 1981 does not expressly refer to a retaliation claim, neither does § 1982. The Court has nonetheless read both statutes to include claims based on retaliation in both *Sullivan* as interpreted by *Jackson*,²⁵⁶ and, relying on other broadly worded civil rights statutes in *Jackson*²⁵⁷ and in *Gómez Pérez*.²⁵⁸ (3) In light of *Sullivan*, Congress’ failure to include an explicit anti-retaliation provision in its latest amendment of the statute²⁵⁹ does not demonstrate its intent *not* to cover retaliation claims.²⁶⁰ The argument was first propounded in *Jackson*,²⁶¹ and repeated in *Gómez Pérez*.²⁶² (4) The argument that § 1981, if applied to employment-related retaliation actions, overlaps with Title VII is not compelling. If that were true, it would also be true for employment-related direct discrimination where the overlap was explicitly created by Congress.²⁶³ (5) Justice Thomas in his dissenting opinion pointed to²⁶⁴ *Burlington Northern & Sante Fe Railway Co. v. White*²⁶⁵ where the Court distinguished between two types of discrimination: substantive provisions “which seek to prevent injury to individuals based on

²⁵² *Id.* at 1954-55.

²⁵³ *Gómez-Peréz v. Potter*, 128 S. Ct. 1931, 1936 (2008); *CBOCS West, Inc.*, 128 S. Ct. at 1962 (Thomas, J. diss.)

²⁵⁴ *Jackson*, 544 U.S. at 167.

²⁵⁵ *Gómez-Peréz*, 128 S. Ct. at 1931.

²⁵⁶ *Id.* at 1955.

²⁵⁷ *Id.* at 1958-59.

²⁵⁸ *Gómez-Peréz*, 128 S. Ct. at 1936-37.

²⁵⁹ Civil Rights Act of 1991, § 101, 105 Stat. 1071.

²⁶⁰ *CBOCS West, Inc.*, 128 S. Ct. at 1959.

²⁶¹ *Jackson*, 544 U.S. at 176.

²⁶² *Gómez-Peréz*, 128 S. Ct. at 1939.

²⁶³ *CBOCS West, Inc.*, 128 S. Ct. at 1959-60.

²⁶⁴ *Id.* at 1960 and *id.* at 1963 (Thomas, J., diss.)

²⁶⁵ *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53 (2006).

who they are, i.e., their status”²⁶⁶ and anti-retaliation provisions “which seek to prevent harm to individuals based on what they do, i.e., their conduct”.²⁶⁷ In *Burlington*, however, the Court used the status/conduct distinction to explain why the explicit anti-retaliation provision in Title VII of the Civil Rights Act of 1964²⁶⁸ sweeps more broadly than the narrower drafted (status-based) anti-discrimination²⁶⁹ provision.²⁷⁰ The Court argues that although Congress can separate anti-discrimination and non-retaliation within a statute, in absence of clear Congressional intent and regarding broadly worded statutes the Court will assume it has not done so.²⁷¹ *Burlington* can be distinguished on another basis. The anti-discrimination provision at issue in *Burlington* limited the protection to discriminations “because of such individual's race, color, religion, sex, or national origin”²⁷² while the text of the statute at issue in *CBOCS West, Inc.* contains no such limitation.²⁷³

In summary: *Sullivan, Jackson and CBOCS West, Inc.*, and *Gómez-Peréz* established that U.S. federal non-discrimination laws prohibiting “discrimination” based on a suspect classification encompass retaliation, unless the statutory text clearly indicates the contrary.²⁷⁴ *Sullivan, Jackson and CBOCS West, Inc.* also held that retaliation is discrimination based on race or sex, respectively, even if the complainant is not a member of the protected group that was allegedly initially discriminated against, so long as the text of the statute does not limit the protection to the individual’s respective race or sex.

b) *The triangular dimension in retaliation cases*

²⁶⁶ *Id.* at 63.

²⁶⁷ *Id.* at 63.

²⁶⁸ 42 U.S.C. 2000e-(3)(a).

²⁶⁹ 42 U.S.C. 2000e-(2)(a).

²⁷⁰ *White*, 548 U.S. at 61-64.

²⁷¹ *Cf. Gómez-Peréz*, 128 S. Ct. at 1945 (Roberts, C.J., diss.)(critizing the majority’s view that any time Congress proscribes “discrimination bases on x” it means retaliation as well even if the provision at issue does not stand alone and the context within an statutory scheme calls for a different interpretation).

²⁷² 42 U.S.C. 2000e-(2)(a)

²⁷³ *Cf. Jackson*, 544 U.S. at 179

Jackson and *CBOCS West, Inc.*, are framed as retaliation cases, and despite the fact that *Sullivan* was not discussed as a retaliation action by the Court in 1969²⁷⁵ it has been interpreted as such since *Jackson*.²⁷⁶ As these cases demonstrate, the elements of a retaliation claim are (1) statutorily protected participation of a person or a group of persons, not necessarily the plaintiff of the retaliation claim; (2) adverse action against the complainant; and (3) a causal relationship between the two.²⁷⁷ A feature of a retaliation claim is that the plaintiff opposed an alleged discriminatory practice²⁷⁸ and was then subjected to a materially adverse action compared to a similarly situated person that did not protest.²⁷⁹ *Coleman*, on the other hand, is a direct discrimination case. At issue was not if Attridge Law retaliated against Sharon Coleman because she had protested a discriminatory practice in the first place. At issue was whether her less favorable treatment on grounds of her son's disability constituted direct discrimination. In theory, direct discrimination and retaliation claims can easily be distinguished. Even so, *Sullivan* shows that this is not always that easy. As demonstrated above, it would be possible to frame *Sullivan* as a direct discrimination claim. According to this view, Sullivan was discriminated against because the board refused to approve Sullivan's assignment of his shares to Freeman because of Freeman's race.²⁸⁰ Having said that, the differences between direct discrimination and retaliation claims should not impede on our seeing the common denominator of the cases discussed herein: All these

²⁷⁴ Cf. *Gómez-Peréz v. Potter*, 128 S. Ct. at 1944 (Roberts, C.J., diss.)("But it cannot be - contrary to the majority's apparent view - that any time Congress proscribes "discrimination based on X," it means to proscribe retaliation as well.")

²⁷⁵ Cf. *CBOCS West Inc.*, 128 S. Ct. 1951 at 1968 n. 4 (Thomas, J., diss.)("[Little Huntington Park, Inc., did not argue that § 1982's text could not reasonably be construed to create a cause of action for retaliation; nor did Justice Harlan in dissent. No one made this argument because that was not how the issue was framed, either by Sullivan or by the Court.")

²⁷⁶ See *Jackson*, 544 U.S. at 176.

²⁷⁷ See, e. g., *Humphries v. CBOCS West, Inc.*, 474 F.3d 397, 404 (7th Circ. 2007), *aff'd sub nom. CBOCS West, Inc.* 128 S. Ct. at 1951.

²⁷⁸ It is not necessary that a discrimination actually occurred in the first place, a reasonable, good faith belief that such discrimination took place will do, see *Jackson*, 544 U.S. 187 n. 1 (Thomas, J., diss)(citing various court of appeals opinions).

²⁷⁹ See, *id.* at 404; *White*, 548 U.S. at 67-68.

²⁸⁰ See, *supra*, p. 30 *et seq.*

cases concern triangular relationships, and the victim of the discrimination or retaliation, respectively, has not been discriminated against or retaliated against because of his or her own characteristics, but because of the characteristics of a third person he or she associated with.

In my opinion, *Sullivan, Jackson and CBOCS West, Inc.* are all non-discrimination cases in triangular relationships. Each of these meet all of the six criteria I have listed above:²⁸¹ (1) Little Huntington Park, Inc., the Birmingham Board of Education and CBOCS West, Inc., respectively, each made a decision or committed an act presumably based on race (*Sullivan* and *CBOCS West, Inc.*) or sex (*Jackson*); (2) *Sullivan, Jackson and Humphries*, respectively, were subject to a presumably discriminatory act; but (3) they did not possess the trait that the discrimination was based upon because *Sullivan* was a white person, *Jackson* was male and *Humphries*, although he was black, did not allege in his § 1981 claim that he was fired because of *his* race; (4) these traits were carried by (5) a third person: *Freeman*, the girls in the basketball team and *Humphries*' black co-worker, and (6) *Sullivan, Jackson and Humphries* were associated with them.

By framing these cases through the triangular relationship lens it will become clear that from an analytical point of view two kinds of retaliation claims must be distinguished: (1) retaliation claims in which the victim of the retaliation is also the victim of the alleged initial discrimination; and, (2) retaliation claims where the victim of the retaliation is not identical with the subject of the alleged discrimination and is thus not a member of the protected group.

*Gómez-Peréz*²⁸² is an excellent example of the first category. Myrna Gómez-Pérez worked for the U.S. Postal Service at the Post Office in Dorado, Puerto Rico. A request to be transferred to another Post Office was approved, the later request to be transferred back was

²⁸¹ See, *supra*, p. 22.

²⁸² *Gómez-Peréz*, 128 S. Ct. at 1931.

denied. Ms. Gómez-Pérez claimed that, after she had filed a Postal Service equal employment opportunity age discrimination complaint, she was subjected to various forms of retaliation.²⁸³ *Jackson* and *CBOCS West, Inc.*, are examples for the second category. The *Jackson* Court was aware of the distinction I propose herein. It rebuffed the respondent's argument that Jackson was not entitled to relief because he was an "indirect victim".²⁸⁴ Relying on *Sullivan*, the Court held that "[t]he complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint."²⁸⁵ Because the discrimination Jackson complained about, allegedly happened on grounds of sex, it was irrelevant that it had not occurred on his sex.²⁸⁶ The Court did not feel compelled to address this distinction in *CBOCS West, Inc.* That is somewhat surprising because it was addressed in the oral argument before the Court,²⁸⁷ and because the oral argument in *CBOCS West, Inc.* was held only one day after²⁸⁸ the oral argument in *Gómez-Peréz*²⁸⁹ and both decisions were published on the very same day. *Gómez-Peréz* falls squarely in the first category of retaliation cases, while *CBOCS West, Inc.* plainly does not. Justice Thomas pointed to this fact in his dissent.²⁹⁰ He refused to frame the issue in *CBOCS West, Inc.*, as discrimination based on race, because "the employer treats all employees - black and white - the same".²⁹¹ Justice Thomas's dissent stated that there was no evidence to support Humphries's assertion, that he had been treated differently than a similarly situated white complainant would have been.²⁹² This kind of argument is precisely the reason why it is important to distinguish between the two categories of retaliation claims.

²⁸³ *Id.* at 1935.

²⁸⁴ *Jackson*, 544 U.S. at 179.

²⁸⁵ *Id.* at 179.

²⁸⁶ *Id.* at 179.

²⁸⁷ *CBOCS West, Inc. v. Humphries*, Oral Argument, WL 446726 at 28-30

²⁸⁸ Oral argument for *CBOCS West, Inc.* was held on February 20th, 2008; for *Gómez-Peréz* on February 19th, 2008, see *CBOCS West, Inc.*, 128 S. Ct. at 1951; *Gómez-Peréz*, 128 S. Ct. at 1931.

²⁸⁹ *Gómez-Peréz*, 128 S. Ct. at 1931.

²⁹⁰ *CBOCS West, Inc.*, 128 S. Ct. at 1963 (Thomas, J., diss.).

²⁹¹ *Id.* at 1963 (Thomas, J., diss.)

²⁹² *Id.*

As long as not stated otherwise in the text of the relevant non-discrimination provision, successful retaliation claims in triangular relationships are not linked to the complainants personal characteristics, but require only that the alleged discrimination in the first place was based on a suspect classification ground. That assertion flows from *Sullivan*²⁹³ and *Jackson*.²⁹⁴ Because Sullivan's advocacy on behalf of Freeman in *Sullivan* is discrimination based on (Freeman's) race and retaliation for Jackson's advocacy of the rights of the girl's basketball team in *Jackson* is discrimination based on (the girl's) sex,²⁹⁵ Humphries advocacy on behalf of his black co-worker is discrimination based on (his co-worker's) race.

IV. The Principle of Equal Treatment and its Governance of Conduct

In Part III of this paper I argued that less favorable treatment and retaliation of a person not possessing a suspect classification is generally encompassed within European and American non-discrimination law in triangular relationships if this person is associated with the third party who belongs to the protected group and thus suffers injury. The core of the "discrimination by association" concept is the proposition, that treating a person differently because this person associates with somebody who is part of a group protected against invidious discrimination, violates the principle of equal treatment or non-discrimination. That concept thus broadens the scope of non-discrimination law. Not only does it protect the person who possesses the suspect classification (*e.g.*, race, sex, disability), it also shields somebody who does not but is affiliated with that person and as a result, has suffered an injury. "Discrimination by association" therefore conflicts with what is referred to as a "commonsense distinction"²⁹⁶ between provisions seeking to prevent harm to individuals

²⁹³ *Sullivan*, 396 U.S. at 229.

²⁹⁴ *Jackson*, 544 U.S. at 167.

²⁹⁵ See *Jackson*, 544 U.S. at 176-77; *Gómez-Peréz*, 128 S. Ct. at 1937.

²⁹⁶ *CBOCS West, Inc.*, 128 S. Ct. at 1963 (Thomas, J., dissenting)

based on who they are, i.e. their *status*, and provisions seeking to prevent harm to individuals based on what they do, i.e. their *conduct*.²⁹⁷

In his dissenting opinion in *CBOCS West, Inc.*, Justice Thomas argued that retaliation is not discrimination based on race. “When an individual is subjected to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his *race*; rather, it is the result of his *conduct*.”²⁹⁸ Although Justice Thomas confined his argument to retaliation, it applies equally to all discrimination cases involving triangular relationships. Once again, *Sullivan* supports that proposition. Justice Thomas’s argument applies straightforwardly if we follow *Jackson* and frame *Sullivan* as a retaliation case.²⁹⁹ The same is true if we were to frame *Sullivan* as a direct discrimination case.³⁰⁰ The board’s refusal to approve the assignment to Freeman was not based on Sullivan’s race, *i.e.* his status, but on Freeman’s race, the person that he chose to lease his house to and to assign his membership share to.³⁰¹ The German *Hohenzollern* case provides another example that demonstrates that the argument based on the status-conduct dichotomy is not confined to retaliation cases but provides a general feature of non-discrimination law concerned with triangular relationships.

1. *The Hohenzollern case*

The 1938 will of Crown Prince Wilhelm of Prussia, the eldest son of the former German Emperor Wilhelm II, provides that only the eldest male offspring may become heir, therefore discriminating discriminated against the younger male and all female progenies.³⁰² It also

²⁹⁷ *Id.* at 1963 (Thomas, J., dissenting)(quoting *Burlington N. & S.F.R., Co. v. White*, 548 U.S. 53, 63 (2006).

²⁹⁸ *Id.* at 1963.

²⁹⁹ See, *supra*, p. 31.

³⁰⁰ See, *supra*, p. 31.

³⁰¹ *Sullivan v. Little Huntington Park, Inc.*, 396 U.S. 229, 234-35 (1969).

³⁰² BGHZ 140, 118 (119)(1998). Note, that German law allows the testator to disinherit his or her children but provides the disinherited progeny with a legal portion worth half of the progeny’s legal distributive share, § 2303 (1) BGB.

included a particular nobility requirement set forth in the *Hausverfassung* of the House Brandenburg-Prussia regarding the ancestry of the potential heir's wife or mother.³⁰³ Prince Louis Ferdinand, the Crown Prince's second oldest son and heir,³⁰⁴ executed his will in 1981 and decided that his grandson, the offspring of his eldest son, who had died in 1977, should become heir of the family fortune, because he fulfilled the requirements set forth in the 1938 will of Prince Louis Ferdinand's father.³⁰⁵ After Prince Louis Ferdinand's death in 1994, the selected grandson applied for a certificate of inheritance stating that he was the sole heir of the family fortune.³⁰⁶ His uncles and other family members challenged the will in court, arguing, *inter alia*, that the will was void under Sec. 138 (1) of the Bürgerliches Gesetzbuch [German Civil Code, henceforth: BGB],³⁰⁷ because it discriminated on grounds of sex and ancestry of the progeny, and infringed on the progeny's constitutionally protected right to marry a person of his choice, regardless of her ancestry.³⁰⁸

The Bundesgerichtshof [Federal Supreme Court, henceforth: BGH] held that Louis Ferdinand's choice was not contrary to public policy and thus not void under § 138 BGB. According to settled constitutional principles, the courts have to consider the impact of fundamental rights as enshrined in the German Basic Law when they construct broadly worded statutes that make reference to "public policy".³⁰⁹ The Court began its analysis in the *Hohenzollern* case with a reference to Article 14 Basic Law that guarantees the "right of

³⁰³ BGHZ 140, 118 (119-20)(1998).

³⁰⁴ The Crown Prince's oldest son, Wilhelm of Prussia, waived his inheritance right because his marriage did not comply with the nobility requirement set forth the *Hausverfassung*, see BGHZ 140, 118 (120)(1998).

³⁰⁵ BGHZ 140, 118 (120)(1998).

³⁰⁶ BGHZ 140, 118 (120-21)(1998).

³⁰⁷ Sec. 138 (1) reads as follows: "A legal act which is contrary to public policy is void."

³⁰⁸ See BGHZ 140, 118 (129-30)(1998).

³⁰⁹ BVerfGE 7, 198 (Lüth)(holding that (1) fundamental rights do not only entitle individuals to be free from governmental interference but contain elements of objective order, (2) they bind the legislator in enacting private law, (3) fundamental rights do not apply directly in the horizontal relationship, but (4) whenever possible the courts have to interpret private law statutes in order to accommodate the involved fundamental rights of the parties); for a detailed analysis of the constitutional foundations of German private law, see Matthias Kumm, *Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 German L.J. 341 (2006); for a specific application of these principles

inheritance”.³¹⁰ In principle, the testator is free to choose the devisee. His decision, however, is limited by countervailing principles of fundamental rights. The following three principles are expressly discussed in the Court’s opinion, a fourth was neither put forward by the parties nor considered by the Court.

The first is the principle of non-discrimination based on the sex of the progeny as protected by Article 3 par. 3 Basic Law.³¹¹ Following settled case law,³¹² which in Germany is not binding, the BGH quickly discarded this argument, because the preference for the firstborn male progeny in a will is protected by the principle of private autonomy.³¹³ The testator’s private autonomy interests secured by Article 14 Basic Law trump the non-discrimination interest protected by Article 3 par. 3 Basic Law.

The BGH was more concerned with the second charge that the nobility requirement discriminates against the testator’s progenies based on their ancestry, thus conflicting with the non-discrimination principle in Article 3 par. 3 Basic Law.³¹⁴ If the ancestry of the potential heir’s mother did not satisfy the requirements in the *Hausverfassung*, her son would be barred from inheriting even though he had satisfied the other criteria of the will. The BGH held that the will discriminated on grounds of parentage, thus requiring heightened scrutiny.³¹⁵ Under that standard the discrimination is justified and permissible, if it is a means to achieve a legitimate goal that itself is protected by Article 14 Basic Law.³¹⁶ The BGH found that that standard had been met because the testator’s motivation was not humiliation but to

in private law see Michael Gruenberger, *A Duty to Protect the Rights of Performers? Constitutional Foundations of an Intellectual Property Right*, 24 Card. Arts & Entert. L. J. 617, 662-684 (2006).

³¹⁰ Article 14 par. 1 reads: “Property and the right of inheritance are guaranteed. Their content and limits are determined by statute.” [Translated by Axel Tschentscher, *supra*, note 24 at 24]

³¹¹ Article 3 par. 3 German Basic Law reads insofar: “No one may be disadvantaged or favored because of his sex, parentage, race, language, homeland and origin, his faith, or his religious or political opinions.” [Translated by Axel Tschentscher, *supra*, note 24 at 18]

³¹² BGHZ 70, 313 (324)(1978).

³¹³ BGHZ 140, 118 (129-30).

³¹⁴ BGHZ 140, 118 (131-32).

³¹⁵ BGHZ 140, 118 (132).

³¹⁶ BGHZ 140, 118 (132-33).

select a devisee that could secure long-held family tradition.³¹⁷ The discrimination on grounds of parentage was therefore justified.

The third argument apparently raised some head shaking with the judges of the BGH.³¹⁸ The family members and the lower courts reasoned that the nobility requirement severely limited a potential heir's right to choose a spouse because, plainly, there were not that many female descendants of high noble families available who satisfied the will's nobility requirement. The right to marry a person of one's choice is guaranteed in Article 6 par. 1 Basic Law.³¹⁹ The BGH, in a thinly reasoned argument, did not agree.³²⁰ The Bundesverfassungsgericht [Federal Constitutional Court, henceforth: BVerfG] disagreed.³²¹ In the BVerfG's opinion, the BGH did not adequately consider whether the testator unduly influenced his sons' marital selections based on the potential bride's noble status.³²² Nor, held the BVerfG, did the BGH adequately analyze the actual nobility requirement at issue and whether it could deter male progeny from entering into a marriage with a person of their choice.³²³ The requirement can withstand constitutionally required scrutiny, held the BVerfG, only if it provides the presumptive heir a realistic opportunity to enter into a marriage that complies with the *Hausverfassung*.³²⁴ Finally, the BGH was admonished for not inquiring whether the nobility requirement could withstand scrutiny at all after the monarchy and the

³¹⁷ BGHZ 140, 118 (133).

³¹⁸ Cf. BGHZ 140, 118 (132) ("schwer greifbare Beeinträchtigung")

³¹⁹ See BVerfGE 31, 58 (67); BVerfGE 76, 1 (42); BVerfGE 105, 313 (342). Article 6 par. 1 reads: "Marriage and family are under the special protection of the state." [Translated by Axel Tschentscher, *supra*, note 24 at 19]. The freedom to marry is also a fundamental right under U.S. const. amend. XIV § 1, see *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

³²⁰ BGHZ 140, 118 (130-31).

³²¹ Bundesverfassungsgericht, *Neue Juristische Wochenschrift* 57 (2004), 2008.

³²² Bundesverfassungsgericht, *NJW* 57 (2004), 2008, (2010).

³²³ *Id.* at 2010. In a prior decision the Federal Constitutional Court agreed with the lower courts that a will requiring the consent of the respective head of the house to the marriage of the progeny did not infringe the progeny's freedom to marry. See Bundesverfassungsgericht, *NJW* 2000 (54), 2495 (*Leiningen*). The Court distinguishes the *Hohenzollern* case because the nobility requirement is set forth in the will itself while in *Leiningen* the will pointed to the decision of an individual, thus allowing for more flexibility. Bundesverfassungsgericht, *NJW* 57 (2004), 2008, 2010.

³²⁴ *Id.* at 2010.

social status of nobility were abolished in Germany in 1919.³²⁵

Finally, there is a fourth principle that could have been, but was not invoked, in this case. *Hohenzollern* could be framed as a triangular relationship case: The testator discriminates against his (male) offspring on grounds of (the offspring's prospective bride's) parentage. The firstborn son is thus not discriminated against because of his own personal characteristic, but on the grounds of a characteristic of a person he chose to associate with. The fact that this argument was not put forward by the parties and was not entertained by the courts demonstrates a clear lack of focus on the peculiarities of discrimination in triangular relationships.

If *Hohenzollern* is formulated as a triangular relationship case, the argument from the status-conduct dichotomy applies. The eldest potential heir was not discriminated against because of his own status, but because of his conduct - his association with another person. Moreover, *Hohenzollern* could also be invoked as evidence for the dispensability of applying the principle of non-discrimination in triangular relationships. Based on the status-conduct dichotomy, the following argument could be made: *Hohenzollern* stands for the notion that the protection of a person's status must be reviewed under equal protection law, while protection of a person's conduct must be reviewed applying specifically designed rights to protect a person's freedom. The attempt to frame the testator's decision as discrimination against the male offspring due to his association with a female whose parentage does not comply with the nobility requirement blurs the line between these two distinct categories. Furthermore, it is not even necessary to structure the case in that manner since the law already protects the association between a discriminated person and a third person, without reference to discrimination. The BVerfG apparently agrees. That Court relied on Article 6 Basic Law - a guarantee of freedom - to protect the association of the firstborn son with his chosen spouse. If the law values less the relationship between the discriminated person and

³²⁵ *Id.* at 2010-11.

the third party, and, consequently, does not award the discriminated-third party unit special protection, any recourse to non-discrimination law would undermine the legislative judgement to not protect the “unit” as such. Therefore, non-discrimination doctrine should not be applied in triangular relationships. I find that argument non-compelling.

2. The status-conduct dichotomy reexamined

The argument just sketched is based on the assumption that the distinction between the status-conduct dichotomy is sound.³²⁶ I think it is not, for two reasons: First, the status category is all but clear, and, second, the distinction between conduct and status is anything but plain.

On first view, the status category appears to be straightforward. If a person is discriminated against because of his or her race, sex, disability, etc., he or she is treated less favorably because of his or her personal status.³²⁷ Status is understood as a feature of individuals and their relationships to the law, including their legal relationships to other individuals.³²⁸ Non-discrimination law proscribes precisely some discriminations based on such features. If one interprets non-discrimination law to prohibit actions based on status only, one presumes that the status of a person remains static and is always clearly distinguishable from conduct. Both are problematic assumptions. The first one is well known in United States constitutional law, where there has been a lively discussion about whether the immutability of a personal feature is a necessary requirement or only a factor to establish strict scrutiny under the XIVth amendment of the United States constitution.³²⁹

³²⁶ See *CBOCS West, Inc.*, 128 S. Ct. at 1963 (Thomas, J., diss.)

³²⁷ Cf. *White*, 548 U.S. at 63 (“The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. [...] The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status.”)

³²⁸ See J. M. Balkin, *The Constitution of Status*, 106 Yale L. J. 2313, 2324 (1997).

³²⁹ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 442-43 n. 10 (1985); *In re Marriage Cases*, 183 P.3d 384, 442-43 (Cal. 2008); *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 422 n. 20 (Conn. 2008) ; *Varnum v. Brien*,

The second assumption, that the status, *i.e.* the feature due to which the person was discriminated against, is always clear, cannot be reconciled with the case law. In *P. v. S. & Cornwall County Council*³³⁰ the ECJ held that the principle of equal treatment for men and women encompasses discrimination arising from gender reassignment. P. worked as a manager in an educational establishment, operated by the Cornwall County Council. A year after P. started work there, she informed S., her supervisor, of her intention to undergo gender reassignment. This began with a "life test", a period during which P. dressed and behaved as a woman, followed by surgery to give P. the physical attributes of a woman.³³¹ Several months later, after undergoing the first surgical operations, P. was given notice of her dismissal, which took effect after the final surgical operation was performed.³³² P. filed suit asserting discrimination on grounds of sex. Her employer, the U.K. Government and the Commission however, argued that "equal application" applied, maintaining that P.'s sex had not influenced the decision, because a comparable person of the other sex would also have been dismissed.³³³ Because the gender reassignment procedure did not change P's legal status, P could not argue that she was treated less favorably once she became a woman. Under U.K. law in force through 2004³³⁴ P was still deemed to be male person.³³⁵ The ECJ rejected the "equal application" rationalization and held that the scope of the directive cannot be confined simply "to discrimination based on the fact that a person is of one or other

2009 WL 874044 1, 16-17 (Iowa, 2009); John Hart Ely, *Democracy and Distrust*, 150 (1980); Sunstein, *supra*, note 68, at 9; Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *Stan. L. Rev.* 503, (1994); Balkin, *supra*, note 328 at 2358-67; Kenji Yoshino, *Assimilation Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, *Yale L. J.* 485, 509-519 (1998); Marc R. Shapiro, *Treading the Supreme Court's Murky Immutability Waters*, 38 *Gonz. L. Rev.* 409, 443-44 (2003); Edward Stein, *Born That Way? Not a Choice?: Problems with Biological and Psychological Arguments for Gay Rights* (Cardozo Legal Studies Research Paper No. 223, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104538).

³³⁰ 1996 E.C.R. I-2143.

³³¹ *Id.* at par. 3.

³³² *Id.* at par. 4.

³³³ *P. v. S & Cornwall County Council*, 1996 E.C.R. I-2143, par. 7, 14.

³³⁴ See Gender Recognition Act 2004 (c.7). For a critical assessment see Andrew N. Shape, *Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category*, 15 *Feminist L. Stud.* 57 (2007).

sex”.³³⁶ “Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.”³³⁷ The decision is not very clear as to whom the transgender party is being compared. The treatment afforded to the transgender party might be compared to that afforded a male employee who had not undergone gender reassignment or it could be compared to the transgender party herself before she decided to undergo gender reassignment.³³⁸ Both alternatives are possible only because the protection against discrimination based on sex in the Directive is not based on legal status. Because P.’s legal status (male) had not formally changed, either comparator would exclude the conclusion that she was treated less favorably than another male employee. The best reading of *P. v. S. & Cornwall County Council* is that the ECJ implicitly acknowledged the relevance of sociological rather than legal status. Before undergoing gender reassignment, P.’s status was defined, both legally and sociologically, as male. With P.’s decision to start the gender reassignment procedure, her sociological status began to change, since her social environment no longer viewed her as male. Sociological status, however, differs greatly from legal status.³³⁹ Most importantly, sociological status cannot logically be distinguished from conduct: “Status-based discrimination in the sociological sense is discrimination with respect to all of the cultural markers - including "conduct" - that or are otherwise associated with them.”³⁴⁰ P. was dismissed because she decided to undergo gender reassignment. Her dismissal was based first and foremost on what she did, that is, her conduct. Yet, it is

³³⁵ *Id.* at par. 7. See also *Goodwin v. U.K.* [GC] no. 28957/95, ECHR 2002-II, par. 20-54 and *Bellinger v. Bellinger* [2003] 2 A.C. 467, 2 All E.R. 593, par. 11-16.

³³⁶ *P. v. S & Cornwall County Council*, 1996 E.C.R. I-2143, par. 20.

³³⁷ *Id.* at par. 21.

³³⁸ Mark Bell, *Direct Discrimination*, in *Non-Discrimination Law*, 208 (Dagmar Schiek et al. eds., 2007)

³³⁹ See Balkin, *supra*, note 328 at 2324-26 (comparing legal and sociological status).

precisely that conduct that also defines P.'s sociological status as a transexual woman. Thus, the status pillar of the status-conduct dichotomy crumbles.

The conduct pillar does not perform better. First, *P. v. S. & Cornwall County Council* also stands for the proposition that a person's conduct defines his or her sociological status. Also, it would be difficult to assert that it was Sharon Coleman's conduct that caused her to be treated less favorably. The only possible conduct at issue in *Coleman* is Sharon Coleman's care of her disabled son.³⁴¹ That conduct, however, is closely related to her legal and sociological status as primary caretaker and legally responsible parent. Even the *Hohenzollern* case does not easily allow for the recognition of the status-conduct dichotomy. At issue was, *inter alia*, whether the will's nobility requirement infringes the firstborn son's right to marry the spouse of his choice. Marrying a person of one's choice is conduct, a fundamentally protected right.³⁴² Marriage, however, also defines a person's status, both legally and sociologically. Courts in the United States have thus continuously framed obstacles to the right to marry a person of one's choice as an equal protection issue.³⁴³ *In sum*, *Coleman* and the *Hohenzollern* case cannot be understood as recognitions of a status-conduct dichotomy at work in non-discrimination law.

Initially, the status-conduct divide in non-discrimination law could fare better in *Sullivan*.³⁴⁴ Following its interpretation since *Jackson*³⁴⁵ the issue was whether Sullivan was expelled from the corporation for advocating Freeman's tenancy. According to the alternative reading proposed above,³⁴⁶ Sullivan's decision to assign his membership shares to Freeman would

³⁴⁰ Balkin, *supra* note 328 at 2325.

³⁴¹ *Coleman*, 2008 E.C.R. I-5603.

³⁴² See, *supra*, note 319.

³⁴³ See, e.g., *Loving*, 388 U.S. at 1; *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baker v. Vt.*, 744 A.2d 864 (Vt. 1999); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *In re Marriage Cases*, 193 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 2009 WL 874044 (Iowa, 2009).

³⁴⁴ 396 U.S. 229 (1969).

³⁴⁵ 544 U.S. 167 (2005).

³⁴⁶ See, *supra*, page 30 et seq.

have been an issue as well. Applying either reading, it was only Sullivan's conduct that was at issue, not his status. Yet, the board's actions were grounded on a person's status: Had Freeman not been black, the board would in all likelihood have approved the assignment. An analysis focusing solely on Sullivan's conduct that does not consider Freeman's race as the crucial factor would miss the point. It would deny the pivotal fact that Sullivan's action - to associate with Freeman - threatened the entire social arrangement of Little Huntington Park. The approval requirement in *Sullivan* can be construed as a means to enforce the exclusionary nature of the park. Another instrument popular in those times were restrictive covenants, which had as their purpose the exclusion of non-white minority groups from the ownership or occupancy of real property in the restricted area.³⁴⁷ If the seller or lessor failed to incorporate the covenant when conveying the property he or she risked being held liable for damages. That was the situation in *Barrows v. Jackson*³⁴⁸ - the "standing case"³⁴⁹ cited in *Sullivan*.³⁵⁰ Distinct from *Shelley v. Kramer*,³⁵¹ "no non-Caucasian [was] before the Court claiming to have been denied his constitutional rights."³⁵² *Barrows* is a typical case of discrimination in a triangular relationship. The co-signers of the covenant or their successor in interest sued Ms. Jackson for damages, thus treating her less favorably than any other person who had sold her property, on the ground that she chose to sell her property to a black buyer. That fact that Ms. Jackson's equal protection rights were not denied because she was not discriminated against on grounds of her race was decisive for the dissent.³⁵³ It should not have been and it was not crucial for the Court. It framed the issue as a question of standing and held that "the reasons which underlie our rule denying standing to raise

³⁴⁷ See *Shelley v. Kramer*, 334 U.S. 1 (1948).

³⁴⁸ 346 U.S. 249 (1953).

³⁴⁹ *Jackson*, 544 U.S. at 194 (Thomas, J., diss.).

³⁵⁰ *Sullivan*, 396 U.S. at 237.

³⁵¹ *Shelley*, 334 U.S. at 1

³⁵² *Barrows*, 346 U.S. at 254.

another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.”³⁵⁴ The Court pointed to the fact that awarding the damages would punish Ms. Jackson for not continuing to discriminate against non-Caucasians in the use of her property.³⁵⁵ Persons like Ms. Jackson are “[t]he only effective adversary of the unworthy covenant”³⁵⁶ because it was precisely the conduct of white persons that reenforced or challenged the established exclusionary social order based on racial discrimination. White people as members of the privileged class had the power to continue to use their property to discriminate against blacks or to stop discriminating.³⁵⁷ If they chose to associate with members of the discriminated group and, consequently, were targeted by the discriminating party it was not their conduct as such, but their conduct paired with the status of the third party, that triggered the discriminator’s action. Although this action appears to address only conduct, it perpetuates the underlying discrimination and is therefore within the scope of the non-discrimination principle.³⁵⁸

V. Conclusion: The Concept of Discrimination by Association in Triangular Relationships

Discrimination in a triangular relationships is a distinct concept in non-discrimination law. A triangular relationship is involved if six criteria are met.³⁵⁹ (1) a party allegedly discriminates

³⁵³ *Id.*, at 262 (Vince, C.J., diss.) (“The plain, admitted fact that there is no identifiable non-Caucasian before this Court who will be denied any right to buy, occupy or otherwise enjoy the properties involved in this lawsuit, or any other particular properties, is decisive to me.”)

³⁵⁴ *Id.* at 257.

³⁵⁵ *Id.* at 258.

³⁵⁶ *Id.* at 259.

³⁵⁷ *Id.* at 259.

³⁵⁸ *Cf. Jackson*, 544 U.S. at 180-31 (arguing that without protection against retaliation the underlying discrimination is perpetuated and would go unremedied).

³⁵⁹ See, *supra*, p. 22.

based on one or more “suspect classifications”; (2) the injured party is subject to that discrimination; but (3) does not carry the characteristic that may not be discriminated against upon which the act was based; and (4) a third person; (5) actually holding the characteristic at issue; and (6) with whom the injured party is associated.

As I have demonstrated in Part II, the alleged sex-discrimination in *Grant v. South-West Trains, Ltd.*³⁶⁰ and in the same-sex marriage cases does not constitute discrimination in a triangular relationship. The injured parties were discriminated against on grounds of their own characteristic, that is sexual orientation, and not on the grounds of their respective partner’s sex.³⁶¹

In Part III, I introduced two different categories of discrimination in triangular relationships: direct discrimination and retaliation. I compared the ECJ’s approach in *Coleman*³⁶² (a direct discrimination case) with the United States Supreme Court’s analysis of *Sullivan*,³⁶³ *Jackson*³⁶⁴ and *CBOCS West, Inc.*³⁶⁵ *Coleman* stands for the proposition that the principle of equal treatment in EC non-discrimination law does not merely apply to a particular category of persons but by reference to the proscribed suspect classifications. Protection is not limited to parties which are members of the protected group, but also encompasses claims of parties who are solely associated with such a person. Although the American cases discussed in Part II were framed as retaliation cases, interpreting them through the triangular relationships lens provides for a better understanding. It will become clear that from an analytical point of view two kinds of retaliation claims must be distinguished: (1) retaliation claims in which the injured party is also the injured party of the alleged initial discrimination, thus being a member of the protected group; and, (2) retaliation claims where the victim of

³⁶⁰ Case 249/96, 1998 E.C.R. I-636.

³⁶¹ See, *supra*, Part II.

³⁶² *Coleman v. Attridge Law*, Case C-303/06, 2008 E.C.R. I-{nyr}.

³⁶³ *Sullivan v. Little Huntington Park, Inc.*, 396 U.S. 229 (1969).

³⁶⁴ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

³⁶⁵ *CBOCS West, Inc. v. Humphries*, 128 S. Ct 1951 (2008).

the retaliation is not identical with the subject of the alleged discrimination and thus not a member of the protected group but associated with a person pertaining to the protected group. As *Peréz-Goméz*³⁶⁶ makes clear for the first and *Sullivan, Jackson and CBOCS West, Inc.*, for the second category, both constitute discrimination based on a suspect classification.

In Part IV, I rejected the argument, that there is a status-conduct dichotomy embedded in non-discrimination and equal protection law, requiring a different treatment of the second category of retaliation and direct discrimination cases. I will now advance an alternative reading of the cases mentioned herein. I argue, that the associative element in these cases seems promising to resolve the peculiarities of non-discrimination issues in triangular relationships.

As provided in the above-proposed definition of triangular non-discrimination, the injured party must be associated with the party possessing the trait upon which the discrimination was based. That is why European legal literature refers to the central issue of these cases as “discrimination by association”.³⁶⁷ The cases discussed herein share that element, yet they differ substantially in regard to the degree of association between the plaintiff and the protected party. The subject association is strongest in *Coleman*, the *Hohenzollern* and the *Resident Permit* case. In *Coleman*, the employee asserted that she was discriminated against as the primary caretaker of her disabled child.³⁶⁸ In *Hohenzollern*, the subject will was alleged to have interfered with the firstborn son’s marital association.³⁶⁹ In the *Resident Permit* case, the statute discriminated against a child’s father on grounds of sex because it linked the child’s right to apply for a residence permit only to his or her mother’s status while

³⁶⁶ *Goméz-Peréz v. Potter*, 128 S. Ct. 1931 (2008).

³⁶⁷ Lisa Waddington, *Protection for Family and Friends: Addressing Discrimination by Association*, 5 *European Anti-Discrimination L. Rev.* 13 (2007); Pilgerstorfer & Forshaw, *supra*, note 8 at 390-91; Janeke Gerards, *Discrimination Grounds in Non-Discrimination Law*, 169 (Dagmar Schiek et al. eds, 2007).

³⁶⁸ *Coleman v. Attridge Law*, 2008 E.C.R. I-5603.

³⁶⁹ BGHZ 140, 118 (1998).

the child's father's status as legally resident alien was irrelevant. From there, the intensity of association continuously weakens: The association in *Sullivan* is the voluntarily entered lease agreement,³⁷⁰ in *Jackson* the plaintiff was the the girls basketball team's coach,³⁷¹ in *CBOCS West, Inc.*, it was the plaintiff Humphries's co-worker that was allegedly discriminated against because of her race³⁷² and, finally, in *Barrows* Ms. Jackson's association with the other party was limited to her real estate to the protected party.³⁷³ One might argue, in light of *Coleman*, *Hohenzollern* and the *Resident Permit* case, that a strong case of "discrimination by association" requires a substantial bond between the injured party and the person possessing the protected trait at issue. Requiring a substantial bond to exist between these parties would, however, demand a backdoor reintroduction of the status-category rejected earlier.³⁷⁴ A careful reading of *Coleman* reveals that the ECJ did not hold that the closeness of the relationship was decisive.³⁷⁵ Although the ECJ emphasized the fact that Ms. Coleman was the disabled child's mother and primary caretaker;³⁷⁶ that factor was not dispositive in the end. When discussing the governing burden of proof, the Court explicitly refers to "any discrimination on grounds of disability and to *any association* which that employee has with a disabled person."³⁷⁷ Also, AG Piores Maduro's opinion expressly endorsed the concept of discrimination by association.³⁷⁸ Finally, despite differences in degree of association, the courts in all these cases³⁷⁹ found discrimination against the

³⁷⁰ *Sullivan*, 396 U.S. at 229.

³⁷¹ *Jackson*, 544 U.S. at 167.

³⁷² *CBOCS West, Inc.* 128 S. Ct. at 1951.

³⁷³ *Barrows*, 346 U.S. 249.

³⁷⁴ See, *supra*, p. #-#

³⁷⁵ Waddington, *supra*, note 13 at 672.

³⁷⁶ *Coleman*, 2008 E.C.R. I-5603, par. 56.

³⁷⁷ *Id.* at par. 55 (emphasis added).

³⁷⁸ Opinion of AG Piores Maduro, *Coleman*, 2008 E.C.R. I-5603, par. 6 ("[D]oes the Directive protect non-disabled people who, in the context of their employment, suffer direct discrimination and/or harassment because they are associated with a disabled person?")

³⁷⁹ The exception is *Barrows*, because it was clearly framed as a standing case by the Court, see *Barrows*, 346 U.S. 249.

plaintiffs. The analysis of the cases discussed herein, in particular of *Coleman*,³⁸⁰ *Sullivan*³⁸¹ and *Jackson*,³⁸² suggests a conclusion that the protection of any association between the actual victim of the discriminatory act and the person who possesses the protected trait at issue enhances the effectiveness of the non-discrimination principle. It does so by protecting the choice of a person to associate with a member of the protected group. To sanction the exercise of a person's freedom to associate with persons possessing a suspect characteristic is discrimination based on that characteristic. It attempts to determine behaviour regarded as adaptive. I am drawing on the three types of discrimination distinguished by Alexander Somek: (1) humiliation, (2) stereotypisation and (3) overdetermination.³⁸³ The standard case of humiliation is discrimination on the ground of ascriptive traits, such as race. Such characteristics are the social tokens for the fact that in the discriminator's view a person possessing this trait may be treated as non-person.³⁸⁴ Stereotypisation happens if a person is treated as if she were an exemplification of a certain stereotype.³⁸⁵ Overdetermination occurs if a person is the addressee of a rule that presumes the person's capacity to adapt his or her behaviour in order to "fit in".³⁸⁶ Consider, for example, characteristics like religion or sexual orientation that are sometimes perceived to be mutable.³⁸⁷ According to that view, legislation concerning sexual orientation does not

³⁸⁰ *Coleman*, 2008 E.C.R. I-5603, par. 51 (arguing that the limitation of the Directive's application only to people who are themselves disabled deprives that directive of its effectiveness)-

³⁸¹ *Sullivan*, 396 U.S. at 6 (holding that the "white owner" is at times the only effective adversary of the discrimination)(internal citations omitted).

³⁸² *Jackson*, 544 U.S. at 180-81 (arguing that without protection against retaliation the underlying discrimination is perpetuated and would go unremedied).

³⁸³ Alexander Somek, *A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Constitutional Law*, 5 Eur. L. J. 1999, 243, 20-51 (1999); see also Alexander Somek, *Rationalität und Diskriminierung*, 379-384 (2001).

³⁸⁴ *Id.* at 251.

³⁸⁵ *Id.* at 251.

³⁸⁶ *Id.* at 251. For a further explication see Yoshino, *supra*, note 45 at 500 *et seq.*.

³⁸⁷ See, e.g. *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008)(arguing that one's religion is not immutable but is a matter over which an individual has control); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 673 (9th Cir. 1990)(holding that homosexuality is not an immutable characteristic but behavioral), *but see Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir.

discriminate against homosexuals “because of their orientation but rather by their conduct which identifies them as homosexual”.³⁸⁸ Because “[m]any homosexuals successfully conceal their orientation”,³⁸⁹ the argument continues, it is possible for homosexual persons to adapt their behaviour in order to avoid discrimination. The concept of overdetermination in non-discrimination law protects individuals precisely against this kind of demands. From a moral point of view, the adaptive behaviour demanded from that person cannot reasonably be expected because the characteristics are so fundamental to one's identity that a person should not be required to abandon them.³⁹⁰ “Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”³⁹¹ This understanding of overdetermination is essential to interpret equality as a second order freedom right.³⁹² The conception of overdetermination is particularly helpful to understand the doctrine in triangular relationship cases. Protection from overdetermination is understood as protecting a person’s freedom. It limits the pressure to adapt one’s behaviour to comply with expectations of the discriminator. This was precisely the issue in both *Barrows*³⁹³ and *Sullivan*.³⁹⁴ Ms. Jackson and Mr. Sullivan could choose whether to sell or lease to a black person. The other parties of the racial covenant or their respective successor in interest in *Barrows* and the other members of Little Huntington Park, Inc., in *Sullivan* expected them to

2000)(holding that sexual orientation and sexual identity are immutable); *Woodward v. U.S.*, 871 F.2d 1068, 1071 (Fed. Cir. 1989)(arguing that homosexuality is primary behavioral in nature).

³⁸⁸ *Equal. Found. of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3rd 261, 267 (6th Cir. 1995).

³⁸⁹ *Id.* at 267.

³⁹⁰ See Yoshino, *supra*, note 329 at 509 *et seq.* (arguing against the immutability and visibility presumption in equal protection law).

³⁹¹ *In re Marriage Cases*, 183 P.3rd at 442. See also *Hernandez-Montiel v. I.N.S.*, 225 F.3rd 1084, 1093 (9th Cir. 2000) (“Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them.”); *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 437-38 (Ct. 2008) (holding that sexual orientation forms an integral part of a person’s identity); *Varnum v. Brien*, 2009 WL 874044 (Iowa, 2009) (holding that sexual orientation may be altered if at all only at the expense of significant damage to the individual's sense of self).

³⁹² Alexander Somek, *Rationalität und Diskriminierung*, 385 (2001)

³⁹³ 346 U.S. at 249.

³⁹⁴ 396 U.S. at 227.

adhere to the established convention and not to associate with blacks. Because they did not act accordingly, they were respectively sued and expelled. The application of the non-discrimination principle protects the acting persons from the consequences of not complying with the discriminating party's moral values. For a legal system with a strong principle on non-discrimination to be effective, requires allowing a party who is not a member of the targeted group to act as a moral agent to stand up against discrimination based on invidious grounds. That person, who is, socially speaking, an insider, is sometimes "the only effective adversary"³⁹⁵ of such discrimination. It is no coincidence that precisely that holding from *Barrows* was cited in all the major Supreme Court decisions I discussed herein: *Sullivan*³⁹⁶, *Jackson*³⁹⁷ and *CBOCS West, Inc*³⁹⁸. Such reasoning also played an important role in *Coleman*. In his opinion, AG Poiares Maduro asserts that discrimination of those associated with persons belonging to a certain group excludes "the person who belongs to the suspect classification [...] from a range of possibilities that would otherwise have been open to him."³⁹⁹ My argument is not yet complete, because so far it considers only the protected party's interests and uses the injured party's protection as an instrument of protecting the former. The injured party of discriminations in triangular relationships "suffers a wrong himself".⁴⁰⁰ Treating a person differently because he or she chooses to associate with a member of a targeted group is an example of overdetermination because the discriminator deprives that person his or her permissible choice of options. The decision to interfere with that person's freedom is based on grounds that are generally not acceptable in a certain legal regime and therefore cannot stand. The prohibition against discrimination on certain grounds "applies not to a particular category of persons but by reference to the [prohibited]

³⁹⁵ 346 U.S. at 259.

³⁹⁶ 396 U.S. at 237.

³⁹⁷ 544 U.S. at 181.

³⁹⁸ 128 S. Ct. at 1955.

³⁹⁹ Opinion of AG Poiares Maduro, *Coleman*, 2008 E.C.R. I-5603 par. 12.

⁴⁰⁰ *See, id.* at par. 13.

grounds".⁴⁰¹ May the victim of a discriminatory act be the person who has the particular characteristic, may she be a third person, not belonging to that group but associating with one of its members, as long as the act is justified by reference to a suspect classification, the right not to be discriminated against on such grounds is infringed. The right not to suffer discrimination should not be infringed upon by the injured party's personal absence of the protected trait. That is, in my opinion, the most important consequence of the transatlantic reading of *Coleman, Sullivan, Jackson and CBOCS West, Inc.* proposed in this paper.

⁴⁰¹ *Coleman*, 2008 E.C.R. I-5603, par. 38, 50.