

LAW 7779 : THEORETICAL ISSUES IN DISCRIMINATION LAW

Cornell Law School | Fall 2015

Instructor: John Gardner (john.gardner@cornell.edu)

Practicalities at a glance

- 2-credit seminar
- Wednesdays 6.05pm-7.45pm, beginning on Wednesday August 26th, 2015
- Meets for 7 weeks only; last class is on Wednesday October 7th 2015
- Room 387, Myron Taylor Hall
- S/U or Letter Grade
- Assessed by class presentation (50%) and essay based on that presentation (50%)
- May be used to meet the writing requirement

Course description

In this seminar we will study a range of theoretical puzzles about the law regulating discrimination in employment, service-provision, education, and other contexts. Our discussions will range across discrimination on grounds of sex, race, religion, age, sexuality, political viewpoint, and many other possible grounds. Examples will be taken from US constitutional law and from federal legislation, but also from the law of other jurisdictions, especially the UK, where antidiscrimination law has reached a relatively high level of doctrinal sophistication.

The seminar is **not** designed to equip you to be a discrimination law practitioner, or more generally to master the applicable black-letter law (which is vast and byzantine). Nor is it a seminar about policy design, implementation, or advocacy. Nor is it about the politics of discrimination. Nor is it an attempt to look at the problem of discrimination in a particular social context, or as part of a particular history. Nor is it about the special modes of reflection and critique (critical race theory, feminism, etc.) that such a history makes possible and desirable.

Rather, it is about abstract philosophical puzzles that lie in the background of the legal and policy debates, and that affect our conceptualization of the relevant social context and history. Our puzzles will include: What exactly is wrong with discrimination, when it is wrong? Does its wrongness depend on the consequences, and/or on historical contingencies? When discrimination is harmful, is the harm fundamentally a harm to opportunity or to identity or what? What makes a certain ground of discrimination an improper ground? Is it wrong to discriminate on such grounds in friendships, romantic relationships, etc. as well as in employment, schooling, etc.? Is indirect discrimination ('disparate impact') really a kind of discrimination? Is there any essential connection

between discrimination and equality? Why is discrimination a suitable matter for legal regulation, rather than something to be left to private ethics or the market?

As these sample questions suggest, we will not shy away from testing our most basic and cherished assumptions. Although there are no prerequisites, some knowledge of the Civil Rights Act 1964 (or similar legislation) would be an advantage. We will begin in the first seminar with an attempt at a broad overview of the relevant legal arrangements.

Approaching the seminar

There is probably too much reading listed below. For each class, it's better to read a couple of items carefully and critically than to try and be even-handed. You can have a quick skim of everything just to see where you would rather place your emphasis. Each week (after the first) two or three members of the class will present their own critical assessments of one item each. Those presenters will need to liaise to avoid choosing the same item. They will help to guide the shape of the class for the rest of us. However others in the class who have read different things will always be free to take the discussion off in different directions.

Each class member will submit an essay for grading, which is expected (but not required) to be a development of their class presentation. The length and the deadline are up for discussion, except that the former will be relatively short and the latter relatively generous.

Books/materials

The readings are listed over the following pages, with a separate page for each week's topic.

Most of what appears on the list is linked to an online version, which is occasionally a home-made scan on Blackboard. Where possible I have used DOI links that will resolve to locally available journal subscriptions, wherever you are. I tested these links from Oxford and I apologise if any fail. Let me know and I will try to correct them. There is no course book. However you will note below that two recent books are listed more than anything else. They are:

D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (2013)

K Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (2013)

Both are online at [Oxford Scholarship Online](#), but it is just possible that you might find it good to own a copy of one or both of them. It depends on how much you like books.

Schedule of classes

Meeting 1 (August 26th): Introducing anti-discrimination law

Meeting 2 (September 2nd): What is discrimination?

Meeting 3 (September 9th): What's wrong with discrimination (when it's wrong)?

Meeting 4 (September 16th): When is discrimination wrong?

Meeting 5 (September 23rd): Why regulate? How regulate?

Meeting 6 (September 30th): Accommodating difference

Meeting 7 (October 7th): Discrimination rights in conflict with other rights

Meeting 1 (August 26th): *Introducing anti-discrimination law*

The tort model and its limits

D Reaume, '[Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination](#)' *Theoretical Inquiries in Law* 2 (2001), 349

Direct discrimination (disparate treatment discrimination)

P Brest, '[Foreward: In Defense of the Antidiscrimination Principle](#)' *Harvard Law Rev* 90 (1976), 1

Indirect discrimination (disparate impact discrimination)

[Griggs v Duke Power](#) 401 US 424 (1971)

Race Relations Act 1976 [s 1\(1\)\(b\)](#) [UK attempt to capture Griggs rule]

The symmetry question

R Dworkin, '[Why Bakke Has No Case](#)' *New York Review of Books*, November 10th 1977; also in Dworkin, *A Matter of Principle* (1985), ch 14

R Fallon & P Weiler, '[Firefighters v Stotts: Conflicting Models of Racial Justice](#)' *The Supreme Court Review* [1984], 1

Meeting 2 (September 2nd): *What is discrimination?*

Ground-rules for the inquiry

K Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (2013), [ch 1](#)

P Shin '[Is there a Unitary Concept of Discrimination?](#)' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (2013)

The intention question

[Gill and Coote v El Vino Company](#) [1983] IRLR 206.

[James v Eastleigh Borough Council](#) [1990] 2 AC 751

The comparison question

S Moreau, '[Equality Rights and the Relevance of Comparator Groups](#)' *Journal of Law & Equality* 5 (2006), 81

J Gardner, '[Review of Lippert-Rasmussen](#)', *Ethics* 125 (2015), 1204

The segregation question

[Brown v Board of Education](#) 347 U.S. 483 (1954)

European Network of Legal Experts, [Sex-Segregated Services](#) (2009), part I

Is indirect discrimination really discrimination?

J Waldron, '[Indirect Discrimination](#)' in S Guest and A Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice* (1985), 83

E Holmes, '[Anti-Discrimination Rights Without Equality](#)' *Modern L Rev* 68 (2005), 175 at 182-4

Meeting 3 (September 9th): What's wrong with discrimination (when it's wrong)?

Rationality

L Alexander, '[What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies](#)', *U Pa Law Rev* 141 (1992), 218

R Epstein, *Forbidden Grounds* (1992), [31-47](#) and chapter 3

Meritocracy

C McCrudden, '[Merit Principles](#)' *Ox J Leg Stud* 18 (1998), 543

M Cavanagh, *Against Equality of Opportunity* (2002), Part 3 (esp [3.1 and 3.2](#))

Equality

E Holmes, '[Anti-Discrimination Rights Without Equality](#)' *Modern L Rev* 68 (2005), 175

R Arneson, '[Discrimination, Disparate Impact, and Theories of Justice](#)' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (2013)

Counting the consequences

K Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (2013), [ch 6](#)

T Khaitan, *A Theory of Discrimination Law* (2015), [ch 5](#)

Insult and humiliation

T Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (2008), [69-74](#)

D Hellman, *When is Discrimination Wrong?* (2008), [ch 1](#)

The place of groups

O Fiss, '[Groups and the Equal Protection Clause](#)' *Phil & Pub Aff* 5 (1976), 107

Meeting 4 (September 16th): When is discrimination wrong?

On which grounds?

J Gardner, '[On the Ground of Her Sex\(uality\)](#)' *Ox J Leg Stud* 18 (1998), 167

R Arneson, '[What Is Wrongful Discrimination?](#)' *San Diego Law Rev* 43 (2006), 775 at 795-804

F Thomsen, '[Some Groups Are More Equal Than Others](#)' *Social Theory and Practice* 39 (2013), 120

P Singer, '[Speciesism and Moral Status](#)', *Metaphilosophy* 40 (2009), 567

Within which domains?

M Cavanagh, *Against Equality of Opportunity* (2002), [163-4](#)

K Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (2013), [ch 10](#)

That symmetry question again

L Blum, '[Racial and Other Asymmetries](#)' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (2013)

Statistical generalization

K A Appiah, '[Stereotypes and the Shaping of Identity](#)' *Calif Law Rev* 88 (2000), 41

B Eidelson, '[Treating People as Individuals](#)' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (2013)

K Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (2013), [ch11](#)

Meeting 5 (September 23rd): *Why regulate? How regulate?*

Anti-discrimination law as a policy option

J Raz, '[Multiculturalism: A Liberal Perspective](#)' in Raz, *Ethics in the Public Domain* (1995), esp section 1

R Arneson, '[What Is Wrongful Discrimination?](#)' *San Diego Law Rev* 43 (2006), 775 at 775-777

R Posner, '[An Economic Analysis of Sex Discrimination Laws](#)' *University of Chicago Law Rev* 56 (1989), 1311

The problem of legal moralism

J Gardner, '[Liberals and Unlawful Discrimination](#)' *Ox J Leg Stud* 9 (1989), 1

L Green, '[Should Law Improve Morality](#)' *Crim Law and Phil* 7 (2013), 473

A. Hosein, '[Freedom, Sex Roles, and Anti-Discrimination Law](#)' *Law and Philosophy* 34 (2015), 485

The tort model again

C McCrudden, '[Institutional Discrimination](#)' *Ox J Leg Stud* 2 (1982), 303

J Suk, '[Antidiscrimination Law in the Administrative State](#)' *U Illinois Law Rev* [2006], 405

S Moreau, '[What is Discrimination?](#)' *Phil & Pub Aff* 38 (2010), 143

'Everything is discrimination now'

C Sleeter, '[Why Is There Learning Disabilities? A Critical Analysis of the Birth of the Field in Its Social Context](#)' *Disability Studies Quarterly* 30 (2010), 210

S Easton, '[Punishing Sex Offenders: Discrimination or Justifiable Treatment?](#)' *International Journal of Discrimination and the Law* 5 (2001) 71

Meeting 6 (September 30th): *Accommodating difference*

The tyranny of sameness

C MacKinnon '[Difference and Dominance: On Sex Discrimination](#)' in MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987)

T Macklem, *Beyond Comparison* (2003), [ch 4](#)

D Wasserman, '[Is Disability Discrimination Different?](#)' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (2013)

Some test cases

[Wisconsin v Yoder](#) 406 US 205 (1972)

T Gray, '[The Myths of Mabo](#)', *AMPLA Bulletin* 12 (1993), 62

[General Electric v Gilbert](#) 429 US 125 (1976)

A Koppelman, '[Why Discrimination against Lesbians and Gay Men Is Sex Discrimination](#)' *NYU Law Rev* 69 (1994), 197

A Kirkland, '[Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory](#)', *Law & Social Inquiry* 28 (2003), 1

Special exceptions -why so special?

[Page v Freight Hire](#) [1981] ICR 299

A Kapczynski, '[Same-Sex Privacy and the Limits of Antidiscrimination Law](#)', *Yale Law Journal* 112 (2003), 1257

Meeting 7 (October 7th): *Discrimination rights in conflict with other rights*

Freedom of contract

S Besson, [‘Discrimination and Freedom of Contract’](#), *Int Jnl of Discrimination & the Law* 3 (1999), 269

H Collins, [‘The Vanishing Freedom to Choose a Contractual Partner’](#), *Law and Contemporary Problems* 76 (2013), 71

Sexual freedom

S. Colb, [‘Is There a Moral Duty to Disclose That You’re Transgender to a Potential Partner?’](#) on *Justia.com*, June 18, 2015 (also read the comments)

Freedom of conscience and religion

M Minow, [‘Should Religious Groups be Exempt from Civil Rights Laws?’](#) *Boston College Law Rev* 48 (2007), 781

P Horwitz, [‘The Hobby Lobby Moment’](#) *Harvard Law Rev* 128 (2014), 154

Freedom of Association

George Kateb, [‘The Value of Association’](#) in A Gutmann (ed), *Freedom of Association* (1998)

Freedom of speech

J. Gardner, [Note on Hurley v Irish-American Gay, Lesbian and Bi-Sexual Group of Boston](#), *International Journal of Discrimination and the Law* 1 (1996), 283

Privacy

M Case, [‘Why Not Abolish the Laws of Urinary Segregation?’](#), in H Molotch and L Norén (eds), *Toilet: Public Restrooms and the Politics of Sharing* (2010)