

Spring 2024

Theoretical Issues in Anti-Discrimination Law

Benjamin Eidelson

CLASS MEETINGS

Mondays, 3:45–5:45pm ET
WCC 4059

CONTACT INFORMATION

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OVERVIEW

This seminar examines an urgent question that arises in the law and in ordinary life: When and why is it wrong to treat people differently because of particular attributes that they have? On the one hand, we all know that some forms of discrimination are wrong and unjust. On the other hand, we all engage in countless forms of differential treatment that we regard as completely unremarkable. Philosophers and legal theorists have advanced a number of competing ideas about what distinguishes wrongful discrimination from benign or even obligatory differences in treatment. We will explore and evaluate these theories and juxtapose them with some of the case-law that spells out the law's evolving answers to the same questions. The course should help students both to sharpen their own views about one important sphere of legal and moral concern and also, more broadly, to think critically about the interplay of philosophical and legal ideas.

COURSE REQUIREMENTS AND GRADING

There are three required components of this course: (a) weekly questions posted before class (weighted 10% in grading); (b) participation in class discussion (weighted 30%); and (c) three short papers (weighted 60%). Each is explained below.

A. Weekly Questions

You are responsible for posting one or two questions about the readings to Canvas by 9:00 AM on the morning of each class (including the first). You may skip up to two weeks without any explanation; beyond that, please get in touch with me.

Your questions might focus on aspects of the reading that you found particularly persuasive, unpersuasive, or confusing; or connections between a week's reading and prior readings or themes; or any other topic that you would like to flag for discussion. The questions should not be more than two or three sentences each; this is important to make sure that your classmates can read them quickly before class. The questions should reflect engagement with the materials, but their purpose is to frame discussion, not to mount a sustained argument about anything. Questions will strike you as you read, so this shouldn't take significant time on your part beyond the time spent doing the reading.

Please also make time to read your classmates' questions ahead of class. Because the questions will be short, this shouldn't take much time either.

B. Participation in Class Discussion

Given the seminar format, student participation is central to this course. Participation includes regular attendance and meaningful, constructive engagement in our effort to think through the issues posed. That kind of constructive participation can take many forms. One way to contribute is to stake out a position and articulate an argument for it. But there is also value in expressing confusion or uncertainty, engaging charitably and perceptively with others' ideas, or trying out inchoate lines of thought, among other things.

Although I expect that most participation will be student-initiated, I may call on students proactively from time to time. Please bear in mind that the point of that exercise is to ensure that we hear from a wide range of voices, not to give anyone a pop quiz. Still, if you don't want me to call on you on a given day, just e-mail me by 12:00 PM on the day of class and I won't.

In light of the subject matter of this course, it is particularly important both that our discussions be carried out on terms of mutual respect and, also, that a wide range of ideas, including uncomfortable ideas, be voiced and discussed. If you have concerns that we are falling short on either front, please let me know.

C. Short Papers

You are responsible for submitting short papers three times during the semester. The papers should be about five pages long (double-spaced). Each should focus on some issue posed or encompassed by the relevant third of the course materials. The papers should be analytical, not merely descriptive; they should propose, defend, or challenge some way of thinking about something. Although you are free to draw on ideas from beyond this course if you'd like, you are not expected to do any outside reading or research, and it is important that your papers reflect engagement with the course materials. There is no need for formal citations in your papers.

The papers are due by 5:00 PM on the following dates:

DUE DATE	MATERIALS COVERED
February 26	Classes 1 to 4 (January 22 to February 12)
March 25	Classes 5 to 7 (February 19 to March 1)
May 3	Classes 8 to 12 (March 18 to April 15)

Papers should be submitted via Canvas and formatted for anonymous review. More detailed instructions for submitting your papers will be posted on Canvas.

COURSE READINGS

The readings for this seminar average between 60 and 90 pages per week. It is important to your own learning and to the success of the class as a whole that you make time to do the reading. If you aren't sure of your commitment to doing the reading, please consider relinquishing your spot to someone on the waitlist.

A **tentative** schedule with the relevant readings is included at the end of this syllabus. Please look through it before the first class to get a sense of where we are going. But please also bear in mind that the details may shift over the coming weeks and months.

For your convenience, I will post electronic coursepacks (in PDF format) with the readings for each week on Canvas. These coursepacks will be available at least a week before the relevant course meeting (and hopefully sooner than that in most cases). ***You may not redistribute the electronic coursepacks, in whole or in part, in any form or for any purpose.***

OFFICE HOURS

I will hold office hours on Thursday mornings from 9:00 to 10:45am, beginning on January 25 and continuing through April 18 (with the exception of March 14, which falls during spring break). You can sign up for an appointment slot at <https://calendly.com/ben-eidelson>. If you can't meet during office hours, please e-mail my assistant, Maureen Worth (mworth@law.harvard.edu), to arrange another time.

OTHER COURSE POLICIES

Class Recording. In keeping with HLS policy, you may not record audio or video of class sessions under any circumstances. If you would like to have class recorded because you will not be able to attend, please review and follow the HLS policy described at <https://tinyurl.com/recpolicy>.

Computer Use and Note-Taking. In order to foster a more engaged and less distracting classroom environment for everyone, I ask that you please not use a laptop or other keyboard-based device to take notes in class. (Using an electronic tablet

as a substitute for paper—either for writing or for accessing assigned readings—is fine, and using a laptop solely to access the readings is fine as well.) If you need an accommodation because of disability or another special circumstance, please reach out to Accessibility Services in the Dean of Students Office at accessibility@law.harvard.edu.

HLS Conflict of Interest Policy. My HLS Conflict of Interest Report is online at <https://helios.law.harvard.edu/Public/Faculty/ConflictOfInterestReport.aspx?id=11948>. The report describes cases in which I have participated as an attorney that relate to the topics covered in this course. (Because it was not covered by the last annual reporting cycle, I separately disclose here my participation as co-counsel for the petitioners in *Doe v. Kentucky ex rel. Cameron*, No. 23-492 (U.S., petition for cert. filed Nov. 3, 2023).)

Theoretical Issues in Anti-Discrimination Law

INTRODUCTION

1 Jan. 22: Framing the Inquiry

- 1.1 George A. Rutherglen and John J. Donohue III, *Employment Discrimination: Law and Theory* (4th ed. 2018), pp. 1-5
- 1.2 Deborah Hellman, *When Is Discrimination Wrong?* (2008), pp. 1-9, 114-32
- 1.3 Patrick Shin, “Is There a Unitary Concept of Discrimination?,” in *Philosophical Foundations of Discrimination Law* (Hellman & Moreau eds. 2013), pp. 163-181
- 1.4 Benjamin Eidelson, *Discrimination and Disrespect* (2015), pp. 1-26 (*optional*)

WHAT IS WRONGFUL DISCRIMINATION?

2 Jan. 29: Disrespect and Social Meaning

- 2.1 Deborah Hellman, *When Is Discrimination Wrong?* (2008), pp. 34-68
- 2.2 Benjamin Eidelson, *Discrimination and Disrespect* (2015), pp. 71-94
- 2.3 Tarunabh Khaitan, “Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea,” 32 Oxford J. L. Stud. 1 (2012), pp. 1-19
- 2.4 *United States v. Windsor*, 133 S. Ct. 2675 (2013) (excerpt)
- 2.5 *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019) (excerpt)

3 Feb. 5: Stereotyping and Treating People as Individuals

- 3.1 *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978) (excerpt)
- 3.2 Glenn C. Loury, *The Anatomy of Racial Inequality* (2002), pp. 17-54
- 3.3 Frederick Schauer, *Profiles, Probabilities, and Stereotypes* (2003), pp. 131-154

- 3.4 Benjamin Eidelson, "Treating People as Individuals," in *Philosophical Foundations of Discrimination Law* (Hellman & Moreau eds. 2013), pp. 203-227
- 3.5 Rima Basu, "What We Epistemically Owe To Each Other," 176 *Phil. Stud.* 915 (2019)

4 Feb. 12: Stigma and Group Subordination

- 4.1 Sophia Moreau, *Faces of Inequality* (2020), pp. 39-75
- 4.2 Glenn C. Loury, *The Anatomy of Racial Inequality* (2002), pp. 57-107
- 4.3 Samuel R. Bagenstos, "'Rational Discrimination,' Accommodation, and the Politics of (Disability) Civil Rights," 89 *Va. L. Rev.* 825, 839-59 (2003)
- 4.4 Benjamin Eidelson, "Patterned Inequality, Compounding Injustice, and Algorithmic Prediction," 1 *Am. J. L. & Equality* 252 (2021) (excerpts)

COMPLEXITIES OF DIRECT DISCRIMINATION

5 Feb. 19: "Because of" a Protected Ground

- 5.1 Patrick S. Shin, "Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law," 62 *Hastings L.J.* 67 (2010)
- 5.2 *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) (excerpts)
- 5.3 Benjamin Eidelson, "Dimensional Disparate Treatment," 95 *S. Cal. L. Rev.* 785 (2022)
- 5.4 Mitchell N. Berman & Guha Krishnamurthi, "*Bostock* Was Bogus: Textualism, Pluralism, and Title VII," 97 *Notre Dame L. Rev.* 67 (2021) (*optional*)

6 Feb. 26: Which Grounds?

- 6.1 Tarunabh Khaitan, *A Theory of Discrimination Law* (2015), pp. 49-62
- 6.2 Jessica A. Clarke, "Against Immutability," 125 *Yale L.J.* 2 (2015) (excerpts)

- 6.3 Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” 1989 U. Chi. Legal F. 139, 139-152
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- 7 **Mar. 1*: Affirmative Action**
 - 7.1 Elizabeth Anderson, *The Imperative of Integration*, pp. 135-179 (2010)
 - 7.2 *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023)
 - 7.3 Angela Onwuachi-Willig, “Roberts’s Revisions: A Narratological Reading of the Affirmative Action Cases”
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- 8 **Mar. 18: Indirect Discrimination**
 - 8.1 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (excerpt with notes)
 - 8.2 *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (excerpt)
 - 8.3 Hugh Collins and Tarunabh Khaitan, “Indirect Discrimination Law: Controversies and Critical Questions,” in *Foundations of Indirect Discrimination Law* (Collins & Khaitan eds., 2018), pp. 1-30
 - 8.4 Deborah Hellman, “Indirect Discrimination and the Duty to Avoid Compounding Injustice,” in *Foundations of Indirect Discrimination Law* (Collins & Khaitan eds., 2018), pp. 105-121
 - 8.5 Benjamin Eidelson, “Patterned Inequality, Compounding Injustice, and Algorithmic Prediction,” 1 Am. J. L. & Equality 252 (2021) (excerpts)
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- 9 **Mar. 25: Disability and Accommodation**
 - 9.1 Samuel R. Bagenstos, *Disability Rights Law: Cases and Materials* (2d ed. 2014), pp. 3-7, 65-102 (including *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), and notes)
 - 9.2 Jasmine E. Harris & Karen M. Tani, “The Disability Frame,” 170 U. Pa. L. Rev. 1663 (2022)

* This class is rescheduled from Monday, March 4, to Friday, March 1, at the normal time (the school-wide make-up block).

CURRENT CONTROVERSIES

10 Apr. 1: Discrimination and Conscientious Objection

- 10.1 Douglas NeJaime and Reva B. Siegel, “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics,” 124 Yale L.J. 2516 (2015) (excerpts)
- 10.2 Sherif Girgis, “Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel,” Yale L.J. F. (2016)
- 10.3 *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (opinions of Kagan and Gorsuch, JJ.)

11 Apr. 8: Inclusion, Hate Speech, and Symbolic Communication

- 11.1 Jeremy Waldron, *The Harm in Hate Speech* (2012) (excerpts)
- 11.2 Randall Kennedy, *Say It Loud! On Race, Law, History, and Culture*, ch. 7 (2023)
- 11.3 Benjamin Eidelson, “The Etiquette of Equality,” 51 Phil. & Pub. Affairs 97 (2023)

12 Apr. 15: Algorithmic Discrimination

- 12.1 Sandra G. Mayson, “Bias In, Bias Out,” 128 Yale L.J. 2218 (2019) (excerpts)
- 12.2 CWA et al. Charge of Discrimination against Facebook (EEOC, Sept. 2018)
- 12.3 Facebook Settlement Agreement (Mar. 2019)
- 12.4 ACLU Statement on Facebook Settlement (Mar. 2019)
- 12.5 Facebook Statement on Facebook Settlement (Mar. 2019)
- 12.6 Lily Hu, *Disparate Causes, Part II*, Phenomenal World (Oct. 17, 2019)