

DRILLING DOWN ON DISCRIMINATION AND EQUALITY

DEBORAH HELLMAN is one of the nation's leading scholars on the philosophical foundations of discrimination law. Her work explores moral and philosophical questions that arise in law, especially constitutional law. So it is perhaps ironic that she launched her academic career by dropping out of graduate school in philosophy. While she enjoyed her graduate work, Hellman worried that some of the subjects were too far removed from real-world concerns. And the job market for professional philosophers was, as usual, dismal. (As her grandmother pointed out, "What are you going to do with a degree in philosophy, open a philosophy store?") Hellman decided to set aside her plans for a Ph.D. in order to attend law school.

As it turned out, she never left philosophy behind. Instead, Hellman began to explore the law's treatment of salient philosophical questions, typically in the realm of constitutional rights. During her nineteen years of teaching law—first at the University of Maryland and more recently at the University of Virginia—Hellman has sought to understand and evaluate the law's resolution of complex moral and philosophical issues. This led her to concentrate on three main questions: First, what is discrimination and what makes it wrong? Second, what is the relationship between money and rights, and when should we understand legally protected rights to include the right to spend money to effectuate them? Third, what does it mean to be a professional, and what obligations does the role of a professional impose?

The law provides its own "answer" to these questions, and Hellman approaches each of the topics by seeking to understand the theory that underlies the answer. In the process, she also begins to identify what she believes is correct or mistaken about how our law approaches each issue. Finally, she offers her own analysis of the issue, and uses that analysis to demonstrate where the law should be amended or changed.

For example, Hellman has concentrated on the law's conception and treatment of discrimination. This inquiry led her to the Supreme Court's Equal Protection Clause jurisprudence. In "Two Types of Discrimination: The Familiar and the Forgotten,"¹ she explores the idea that discrimination occurs in two distinct ways—whereas the Court's treatment is limited to one. Sometimes a trait like race or sex is used as a proxy for another trait—male for a higher probability of drinking and driving, to use an example drawn from one of the Court's early sex discrimination cases. At other times a trait is not used as a proxy. A single-sex school might admit only women, for example, not because it uses female sex as a proxy for other traits, but simply because it seeks a single-sex environment. The Court's equal protection doctrine is ill-equipped to handle these "non-proxy cases," as Hellman calls them, because the doctrine is built to address proxy cases. As a result, a court addressing a non-proxy case is likely to consider issues that aren't morally relevant and will fail to address those that are.

For example, if we see a military academy that admits only men as using the trait "male" not as a proxy for other traits (like having the capacity to succeed at the school or benefit from its training method), but instead as a way to produce a single-sex environment, we will ask different questions about this policy. Rather than ask is "male" a good proxy for "likely to succeed" at the Virginia Military Institute, for example, we ask instead, "Does state support of a unique and coveted educational opportunity for men, with nothing comparable for women, treat young men and women in Virginia as people who matter equally to their government?"

While "Two Types of Discrimination" took a critical approach to the existing constitutional treatment of discrimination, Hellman's next project developed her own alternative theory of when discrimination violates the Constitution. In "The Expressive Dimension of Equal Protection,"² she argued that we should not judge whether state action violates equal protection by either of the two dominant approaches: looking at the intent of those who enacted the law, or looking at the practical effect of the law. Rather, we ought to judge whether laws violate equal protection by looking at the meaning or expressive content of the law or policy at issue. According to Hellman, state action violates equal protection if its *meaning* conflicts with the government's obligation to treat each person with equal concern. In other words, she argues that the constitutional wrong inheres in what the law expresses.

1 86 Cal. L. Rev. 315 (1998).

2 85 Minn. L. Rev. 1 (2000).

This view developed from exploring the moral significance of appearances more generally, and from exploring discrimination in a context quite different from constitutional law and equal protection. She wrote two articles that in different ways explored the moral significance of appearance and expression (“The Importance of Appearing Principled”³ and “Judging by Appearances: Professional Ethics, Expressive Government and the Moral Significance of How Things Seem”⁴). Taken together, these articles led Hellman to the view that what actions express—how they appear and how they seem—all matter morally, and that this is especially true for state actors or professionals.

Hellman has also wrestled with the issue of discrimination, and what makes it wrong, in the context of insurance. She was attracted to examining the insurance industry because the law requires insurers to distinguish—discriminate, if you will—among insurance purchasers. State law insists upon actuarially accurate pricing, which means that insurance purchasers who are good risks should be charged less than purchasers who are bad risks. In other words, while discrimination is bad in some contexts (refusing to hire someone based on race or sex, for example), it is required in others (charging a person in poor health more for life insurance than someone in good health). What theory of discrimination could accommodate and explain these two results?

Hellman chose to look at two contexts that seemed to depart from the norm that actuarially accurate pricing is fair, and see if these outlier cases would help her better understand what makes wrongful discrimination wrong. In the first, “Is Actuarially Fair Insurance Pricing Actually Fair: A Case Study in Insuring Battered Women,”⁵ she looked at state laws that prohibited charging battered women more for health and life insurance than women who are not battered. In the second, “What Makes Genetic Discrimination Exceptional?”⁶ she examined laws forbidding insurers from charging higher rates or denying coverage on the basis of genetic factors. In both contexts, she found that widely shared intuitions that these practices were wrong were correct and that the reason they were correct related to the history of unfair treatment of women and people with genetic diseases. Charging these groups more for insurance, even if actuarially supported, demeaned battered women and people with genetic abnormalities because the history of mistreatment was in part the reason they needed more health care or the reason that their need was stigmatizing.

3 37 *Ariz. L. Rev.* 1107 (1995).

4 60 *Md. L. Rev.* 653 (2001).

5 32 *Harv. C.R.-C.L. L. Rev.* (1997).

6 29 *Am. Journal of Law & Med.* 77 (2003).

Together, these inquiries into discrimination, in the context of insurance and in the context of constitutional equal protection doctrine, led Hellman to conclude that she wanted to think more deeply about discrimination and about what makes discrimination wrong. Despite the many fascinating questions to explore, until recently there has been surprisingly little in-depth philosophical work on the general nature of discrimination. While there is a plethora of philosophical work on equality and distributive justice—and also a similarly extensive amount of legal scholarship on particular forms of discrimination like race discrimination, sex discrimination, and disability discrimination—scholars rarely explore the foundational question, What is discrimination and what makes it wrong?

The result of Hellman's effort was her book, *When Is Discrimination Wrong?*⁷ In addition to the preliminary work that generated the articles described above, Hellman devoted two years to the research and writing of the book, time that was generously supported by the Edmond J. Safra Foundation Center for Ethics at Harvard University, where she was the Eugene P. Beard Faculty Fellow in Ethics, and by the Woodrow Wilson International Center for Scholars at the Smithsonian Institution, where she was a fellow. The book, which has been read widely both inside and outside the United States, has been translated into Korean as well.

In her book, Hellman observes that we routinely draw distinctions among people on the basis of characteristics that they possess or lack. While some distinctions are benign, many are morally troubling. How do we determine which are which? Hellman answers this by developing a much-needed general theory of discrimination. She demonstrates that many familiar ideas about when discrimination is wrong—when it is motivated by prejudice, grounded in stereotypes, or simply departs from merit-based decision-making—don't adequately explain our widely shared intuitions. In the end, Hellman argues, distinguishing among people on the basis of traits is wrong when it demeans any of the people affected and is not wrong when it does not. *When Is Discrimination Wrong?* explores what it means to treat people as equals, and thus takes up a central problem of democracy.

The philosophical study of discrimination and discrimination law is still a fairly young field. While a few countries, such as the U.S., have had longstanding constitutionalized equality rights, it is arguably only since after World War II that these constitutional rights have been interpreted

⁷ (Harvard University Press, 2008).

in a broad way to recognize that all citizens have certain rights to non-discrimination. Likewise, most countries have only enacted domestic civil rights codes protecting individuals from private-sector discrimination in the relatively recent past. It is not surprising, then, that work theorizing about discrimination law is also at an early stage.

In order to take a more comprehensive look at these problems, Hellman's recent efforts have been spent organizing and editing (with her colleague Sophia Moreau of the University of Toronto) *The Philosophical Foundations of Discrimination Law*, to be published by Oxford University Press in the fall of 2013. This volume brings together a series of essays addressing how we are to understand and justify laws prohibiting discrimination. Such laws raise daunting philosophical questions. Indeed, Hellman says, part of what makes this area of law such a difficult one is that there is no initial consensus among scholars as to what the important questions are.

Hellman's interest in moral and philosophical questions that are addressed by law does not stop at the problem of discrimination. She has also written about the relationship between money and rights, particularly in the Supreme Court's jurisprudence on campaign finance laws. Since 1976, when the Court decided *Buckley v. Valeo*, the law has treated the giving and spending of money in connection with election campaigns as "speech" that is governed by the First Amendment. Hellman's first article in this area, "Money Talks but It Isn't Speech,"⁸ challenges this central premise of our campaign finance laws, namely that restrictions on giving and spending money constitute restrictions on speech, and so can only be justified by compelling governmental interests. The claim is often defended on the grounds that money is important or necessary for speech. Without money, how could one publish flyers or buy advertising time? While it is surely true that money facilitates speech, money also facilitates the exercise of other constitutionally protected rights. For some of these rights, such as abortion, spending money is protected as part of the right. The right to abort a fetus includes the right to pay a doctor for this service. But for other rights, spending money is not protected. The right of sexual intimacy does not include the right to pay for sex. The right to procreative liberty does not include the right to simply buy a baby.

Hellman thus observes that the fact that money facilitates the exercise of a constitutional right (speech or any other right) is *insufficient* to establish that one has a right to spend money to effectuate that right. Some

8 95 *Minn. L. Rev.* 953 (2011).

rights generate a right to spend money and some do not. What explains this? Hellman contends that a right that depends on a market good or service for its exercise generates a related right to give or spend money. Conversely, when a right does not depend on a market good or service for its exercise, the right does not include a right to spend money. So, for example, because abortion services are traded in the market, one must have the right to pay an abortion provider if the right to choose an abortion is to be meaningful. On the other hand, sex and babies are (for the most part) not distributed using the market. As a result, the rights to sexual intimacy and to procreative liberty need not include the rights to pay for sex or to buy babies. Using this rationale, Hellman argues that the right to give and spend money in connection with elections need not be protected as speech under the First Amendment.

A second article, “Money and Rights,”⁹ continues the project of exploring the connection between money and rights. The overarching question is the same: When do constitutionally protected rights include an accompanying right to spend or give money to effectuate them? In “Money Talks,” Hellman drew on shared intuitions about how hypothetical cases might be resolved by courts. In “Money and Rights,” she turned from the normative to the descriptive, looking at how the Supreme Court and some lower courts have begun to answer the question. The goal of this project was to deepen what she sees as an overly narrow approach to campaign finance issues by embedding questions concerning the constitutionality of campaign finance regulations within the broader discussion of the relationship between money and rights.

Most recently, Hellman wrote a third article relating to campaign finance. In this piece, she accepts, for the sake of argument, that restrictions on giving and spending money on campaigns are restrictions on speech and examines when and why such restrictions are nonetheless constitutionally permissible. To date, the only interest that the Court has found compelling enough to justify restrictions on campaign giving or spending is the need to avoid corruption (or its appearance). Thus, the heart of the issue, from a constitutional perspective, has been and will continue to be the definition of “corruption.” Over the years, campaign finance cases have defined corruption in different ways, sometimes broadly and other times narrowly, with the most recent cases defining it especially narrowly. While supporters and critics of campaign finance laws have argued for and against each of these views, both sides have missed

9 35 *N.Y.U. Rev. of Law & Soc. Change* 527 (2011).

the more foundational issue: Is this a question the Court should answer at all?

In “Defining Corruption and Constitutionalizing Democracy,”¹⁰ Hellman argues that there are important reasons to think not. Corruption is a derivative concept, which means that it depends on a theory of the institution involved. As a result, defining legislative corruption implicates the Court in defining the proper role of a legislator in a well-functioning democracy. In other areas of constitutional law—apportionment and gerrymandering, for example—the Court is cautious about constitutionalizing a particular contested conception of democracy. But if the Court necessarily defines good government when it defines corruption of that ideal, there is an important and overlooked tension between the Court’s campaign finance cases—which are eager to define corruption—and other areas of constitutional law, where the Court is reluctant to define the proper role of a legislator in a well-functioning democracy. Hellman’s latest article develops the implications of this insight and argues that there are important reasons for judicial deference to a legislature’s own conception of corruption of its members. Ultimately, “Defining Corruption” asks who gets to decide what role money should play in politics—legislatures or courts.

Hellman continues to think, write and teach about discrimination and campaign finance law. She is currently working on an article demonstrating that equal protection doctrine is animated by two quite different accounts of what makes discrimination wrong. In one view, a law or policy wrongfully discriminates when it fails to treat people as moral equals. This understanding sees discrimination as inherently a comparative wrong. In the competing view, a law wrongfully discriminates not because person X is treated worse than person Y, but instead because X is denied something she is entitled to have. We may notice that X is denied something she is entitled to have because Y has it, but it isn’t the comparison between how the law treats X and how it treats Y that makes the law problematic. By sorting equal protection cases into those that ground what is wrong in comparative terms and those that do not, Hellman hopes to show that an important conceptual disagreement animates the doctrine.

Taken together, Hellman’s work is marked by a combination of creativity, clarity, and analytical rigor that allows her to reframe familiar issues in new ways. Her work eschews hot new topics. Rather, it revisits important and enduring ones—discrimination, equal protection, and campaign

¹⁰ 111 *Mich. L. Rev.* 1385 (2013).

finance—and manages to uncover overlooked assumptions or missed questions that are embedded in the way that our laws address these foundational matters. In doing so, Hellman offers fresh, insightful, and provocative answers to central questions facing our society.

EXCERPTS

MONEY TALKS BUT IT ISN'T SPEECH95 *Minn. L. Rev.* 953 (2011)**INTRODUCTION**

Buckley v. Valeo rests on the claim that restrictions on both giving and spending money are tantamount to restrictions on speech, and thus can only be sustained in the service of important or compelling governmental interests. The justification for this claim offered by the Supreme Court in *Buckley* and in related cases that came after it is this: money facilitates speech; money incentivizes speech; and giving and spending money are themselves expressive activities. Therefore, restrictions on giving and spending constitute restrictions on speech. Missing from this analysis is the recognition that money facilitates and incentivizes the exercise of many other constitutionally protected rights. It does so because money is useful. Moreover, it is not at all obvious that restrictions on the ability to give or spend money to exercise these other rights are constitutionally impermissible. One has the right to vote, but not to buy or sell votes. One has the right to private sexual intimacy, but not to spend money to facilitate the exercise of that right—outlawing prostitution is constitutionally permissible. In order to determine if giving or spending money in connection with a right ought to be protected as a part of that right (within its penumbra, if you will), one needs a *theory*. *Buckley* provided only an inadequate one, resting its account on the claim that money facilitates speech. This Article urges the Court to broaden the lens through which it approaches this issue. Rather than focus on the connection between money and speech, we ought instead to focus on the connection between money and rights more generally. The question we should ask is this: When do constitutionally protected rights include a right to give or spend money to effectuate them? The answer we give to this question will have implications for campaign finance law but will be grounded in a deeper understanding of the connection between money and rights.

A reexamination of *Buckley*'s central premise is important in light of the Supreme Court's recent holding in *Citizens United V. FEC*. In that case, the Court invalidated a federal law that prohibited corporations and unions from "using their general treasury funds to make independent

expenditures” for speech in connection with elections. There is much in this opinion to lament. Some critics will focus on the likely effects on the political process. Others will address the Court’s rejection of the view that the reasons to respect the freedom of speech of real persons are not consonant with the reasons to protect the speech of corporations and unions. Also disturbing, however, is the way the Court handles the central *Buckley* claim—the Court considered it so obvious that restrictions on spending money amount to restrictions on speech that it needed no discussion at all, not even a citation to *Buckley*.

Money is clearly important to speaking. Without money, how would one publish a newspaper, buy a television advertisement, or pay campaign workers? Sometimes giving money is also itself expressive of one’s support for a political candidate. Indeed, giving a lot of money may be a way of expressing very strong support for a candidate or a position. So, spending money facilitates speaking and giving money can be expressive itself. This Article explores whether either of these ways that money is connected to speaking support the claim that limitations on the giving and spending of money ought to be treated as restrictions on speech under the First Amendment.

In order to develop an account of when spending money to speak ought to be protected as a part of the right to free speech, it is helpful to look at when and why other constitutionally protected rights include the right to spend money to effectuate them. In so doing, this Article develops an account of when spending money in connection with rights should be conceived as within the penumbra of the right and when it should not. Using this account, I conclude that spending money in connection with elections need not always be considered a part of the freedom of speech protected by the First Amendment.

B. MONEY AS FACILITATOR OF SPEECH

Meyer addresses how restrictions on money can affect speech because spending money facilitates speaking. In this case, the Supreme Court struck down a Colorado statute that criminalized paying money to people to circulate petitions in the context of ballot initiatives. Although the law forbade paying money to petition circulators and not the circulating of petitions itself, Justice Stevens, writing for the Court, concluded that “this case involves a limitation on political expression subject to exacting scrutiny.” He offered two reasons for this conclusion: “[f]irst, it limits

the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach"; and "[s]econd, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." What do these arguments prove?

If one is not able to pay petition circulators, one will be left only with volunteers. As the Court notes, this law will thus likely "limit the number of voices who will convey appellees' message." While the Court is surely correct that fewer people will do this work for free than would do so if paid, this fact does not show that the right of free speech is itself implicated.

Laws that set minimum wages or forbid child labor are also likely to affect the ability of the *Meyer* appellee to get his message out. If he could pay less than the minimum wage or employ child labor, his money would go farther, thereby allowing him to have more people to circulate the petitions. Yet, we are unlikely to conclude, based on this fact alone, that these laws raise First Amendment issues. While there might be important or even compelling governmental interests at stake in the case of minimum wage or child labor laws, demonstration of such is not necessary. It seems almost crazy to suggest that such laws limit speech and thus must pass exacting judicial review. Rather, these laws simply do not limit speech at all, despite the fact that they are likely to have a predictable effect on the number of people willing to convey a person's message. These are only representative examples. It is incredibly easy to come up with examples of laws which would have negative consequences for expression. The fact that a law makes it more difficult to exercise First Amendment rights does not *on its own* demonstrate that the law restricts speech.

WHEN IS DISCRIMINATION WRONG? (Harvard University Press, 2008)

INTRODUCTION: THE DISCRIMINATION PUZZLE

- A law requires black bus passengers to sit in the back of the bus and white passengers to sit in the front.*
- A school principal asks the students with last names beginning with A-M to sit on the left side of the auditorium and those with last names beginning with N-Z to sit on the right side.*
- An employer at a casino requires female employees to wear makeup and prohibits male employees from wearing makeup.*
- A nursing home with a predominantly female clientele refuses to hire a male nurse's aide for a job requiring assisting residents with bathing and toilet needs.*
- A personal advertisement under "Men Seeking Women" in a local paper reads: "Looking for a single woman, age 30-40, for a long-term relationship or marriage. Seeking a woman who is not afraid to be feminine. Prefer someone slim, who wears makeup and likes to dress fashionably."*
- A worker who is biologically male but dresses and lives as a female requests that her employer designate some bathrooms as unisex or alternatively allow her to use the women's bathroom. The employer refuses and instructs the employee to use the men's bathroom. The employee refuses and is fired as a result.*
- The U.S. Food and Drug Administration approves a drug specifically for use by African American heart failure patients.*
- A public school's "gifted and talented program" and a selective private school screen kindergarten admissions according to children's IQ test scores.*
- A university in Iran uses political affiliation as a criterion for selecting students and faculty.*
- A business prefers to hire job applicants from the local community.*
- An airline refuses to continue to employ pilots older than 62.*
- A state refuses to license drivers under age 16.*
- A company prefers not to hire women between the ages of 20 and 40.*

EACH EXAMPLE ABOVE draws a distinction between people on the basis of a certain trait: race, the first letter of the person's last name, sex, appearance, ability, age, or another attribute. Our intuition suggests that while some of these laws, policies, or practices are morally wrong, some are benign, and the nature of still others is unclear. The aim of this book is to examine why it is sometimes permissible and sometimes impermissible to draw such distinctions among people. In other words, the aim here is to present a general theory of discrimination.

The term *discrimination* has come to have a negative connotation. To call something “discrimination” is to criticize it, to assert that it is wrong. But of course the term has positive associations as well. One can be complimented for discriminating taste (in art, wine, literature, etc.). Someone who is astute and has a subtle mastery of his subject is often described as “discriminating,” as in “the manager of the mutual fund is very discriminating in his investments.” This positive use of the term is more marginal, however, overwhelmed by its negative associations with wrongful discrimination. By resurrecting it here, I do not mean to downplay the harms of wrongful discrimination. Rather, I want to emphasize the positive as well as the negative aspects of discrimination in order to unsettle our certainty about which instances of discrimination are wrong and especially about whether we know why they are wrong.

Discrimination—used in this way that captures both its negative and its positive connotations—is both ubiquitous and necessary. We routinely draw distinctions among people in public policy and law as well as in business, school settings, and private life. Laws require that drivers must be a certain age (16 is common) and must pass a test to be licensed to drive in all states. These laws distinguish (i.e., discriminate) between people on the basis of age and their ability to pass a test; they treat those 16 and over who have passed the driving test more favorably (they are allowed to drive) than the group of people who are either under 16 or have failed the driving test. Employers and school admissions officials draw distinctions among applicants on the basis of grades, test scores, and myriad other, sometimes quite controversial, traits. Some firms are in the very business of discrimination: Insurers draw distinctions among people on the basis of traits that reflect the likelihood that the insured will file a claim during the policy period. For example, health and life insurers distinguish among people on the basis of health status—people with high blood pressure, who are overweight, and who smoke will pay more for health and life insurance (if they can get insurance at all) than

non-smokers with low blood pressure and average weight. Private and family life calls for discrimination as well. A mother who puts her 2-year-old daughter in her crib for an afternoon nap but allows her 4-year-old to continue playing is drawing a distinction between her children on the basis of age—and is limiting the freedom of the 2-year-old in a way that she is not limiting that of the 4-year-old.

Much of this distinction drawing is important or even unavoidable. While we could treat everyone the same in some of the instances described above, there would be a significant cost in doing so.

[...]

In the case of laws and public policies that distinguish among people, the stakes are much higher. I doubt that we would be willing to either license all drivers regardless of age or to bar everyone from driving—the two options that would treat everyone the same. Nor would we be willing, I imagine, to license anyone who wanted to practice law or medicine regardless of whether the person had passed the tests demonstrating the requisite knowledge and skill.

Finally, where there are limited openings, for jobs or places at school, for example, it is simply not possible to treat one and all the same. Not everyone can be hired or admitted. Thus, we must draw distinctions among the applicants on some basis. The question then becomes, when is such distinction-drawing morally problematic and when is it not?

This book will address the moral question posed by the fact that it is often desirable and sometimes necessary to treat people differently. Laws govern when it is legally permissible to do so, either in the form of local, state-wide, or national statutory prohibitions on discrimination of various types or, in the United States, in the form of judicial interpretation of the constitutional guarantee of Equal Protection. While in some ways one could view this statutory and constitutional law as itself providing an answer to the question of when it is morally permissible to draw distinctions among people, there are other important issues that play a role in determining when something ought to be legally prohibited. Some things that are morally wrong are not legally prohibited, and for good reason (being mean to others, for example). And some things are legally prohibited that are not morally wrong, except to the extent that it is wrong to break the law (driving without a license, for example). And yet, perhaps because the U.S. constitutional guarantee of equal protection is itself vague and open to interpretation, much of the legal debate—in this country and elsewhere—has a moral cast. For that reason, the legal liter-

ature provides an important starting point for wrestling with what I call the discrimination puzzle.

The fact that we often need to distinguish among people forces us to ask when discrimination is morally permissible and when it is not. This puzzle has no easy answer. While people may have a fairly settled sense that certain instances of drawing distinctions among people on the basis of particular traits in particular contexts are wrong, it is harder than one might expect to explain what makes these cases wrong in a way that also works to explain other cases of wrongful and permissible discrimination.

One might think that drawing distinctions on the basis of certain traits is always forbidden—race and sex, in particular. But if so, does that mean that the U.S. Food and Drug Administration (FDA) necessarily acts wrongly in approving a particular drug for use by African American patients? And does it mean that single-sex bathrooms are clearly impermissible? While there may be problems with each of these practices, which we will discuss in later chapters, I don't think either one could be easily written off as impermissible based solely on the fact that it discriminates on the basis of race or sex respectively.

Another facet of the discrimination puzzle that makes it difficult to untangle is that wrongful discrimination sometimes occurs in contexts where the difference in treatment seems unimportant. Nelson Mandela reports in his autobiography that the apartheid regime in South Africa required black prisoners to wear shorts while white and colored prisoners were required to wear pants. In the heat of southern Africa, shorts might be the more comfortable option. Nonetheless, the symbolism of being required to wear shorts, which were commonly seen as infantilizing in this postcolonial regime, was a means of demeaning black prisoners. On the other hand, distinguishing among and treating people differently may deny some an important benefit or opportunity, and yet seem perfectly permissible. An employer might choose the person who types the fastest with the fewest errors for a word-processing job, for example. This policy distinguishes among job applicants on the basis of typing speed and skill and as a result treats one group (the slower typists) far less favorably (they lose out on a well-paid job) than the other (faster typists). So the fact that someone or some group is denied something important, like a good job, doesn't provide a clue as to whether the discrimination is wrongful or permissible.

One might think that one could easily explain why the first of these two cases is impermissible and the second permissible (conclusions I

share) by looking at some obvious differences between them. First, in the case of the South African prison garb, the policy was likely imposed to stigmatize black prisoners, while the typing requirements were set for the benign purpose of increasing the productivity of the employer's business. Second, skin color is irrelevant to what uniform prisoners ought to wear, while typing speed and accuracy are relevant to the job of a typist.

Do these differences matter morally? Sometimes morally troubling policies are enacted with the same intention as that of the employer who selects the best typist—that is, to enhance business productivity. Suppose an employer refuses to hire women between the ages of 20 and 40 on the grounds that they are likely to take time off to have children, which would disrupt work schedules and raise the business's medical costs. The employer might adopt this policy merely to enhance business productivity, but does this benign intention insulate the policy from moral criticism?

The fact that a trait is "relevant" or "irrelevant" also fails to distinguish permissible from impermissible discrimination. In the previous example, sex is a relevant job qualification if by "relevant" we simply mean that it is positively correlated with something important. Here sex is likely correlated with work schedules and the costs of childbearing, as the employer supposes. If relevance is merely a matter of the fit between a distinguishing trait and a target, like efficiency, and such relevance is what matters morally, then many practices that our intuitions suggest are morally problematic would be deemed legitimate—like employers refusing to hire women of child-bearing age.

Perhaps the concept of relevance can be refined. The prison-garb case and the typist case differ in that the typist merits the job whereas the white prisoners do not merit long pants. Doesn't the idea of merit then provide an answer to at least some discrimination puzzles? I think not. Consider the employer who gives a preference to local job candidates in order to support the local community in which she is based. Do the locals thereby merit the jobs? The concept of merit is itself contested such that it will be unlikely to resolve questions regarding what is wrongful discrimination.

In attempting to answer the question posed by the discrimination puzzle, I begin with what I consider a bedrock moral principle—the equal moral worth of all persons. I take it that this bedrock principle is comprised of two sub-principles: First, there is a worth or inherent dignity of persons that requires that we treat each other with respect. What

violates this principle may be contested (and is something that the argument of this book will address), but I will assume that the inherent worth of a person sets moral limits on how others may treat her. Second, this inherent dignity and worth of all persons does not vary according to their other traits. While some people are smarter, faster, and more talented at tasks that benefit others, or even kinder and more gentle, these and other differences do not affect how important each of us is from a moral perspective. The inherent worth of persons is not something that comes in degrees. Rather, all people are equally important from the moral point of view and so are equally worthy of concern and respect.

I begin with this bedrock principle because I suspect the moral concern that fuels our worries about drawing distinctions among people is that in doing so we may act in ways that fail to treat others as equally worthy. The discrimination puzzle asks when it is morally permissible to draw distinctions among people on the basis of some trait that they have or lack. We can further refine that question, in recognition of the fact that our concern springs from our commitment to the principle of equal moral worth, and ask, when does drawing distinctions among people fail to treat those affected as persons of equal moral worth? It is this question that this book will address.

It is important to emphasize here the conventional and social nature of wrongful discrimination. We all have many traits: race, age, sex, appearance, abilities, height, weight, voice tone, our names, religion, and so on. As simply traits, they are inert. What matters about them is their social significance in particular contexts. Drawing distinctions on the basis of certain traits in certain contexts has meaning that distinguishing on the basis of other traits would not. Separating students by last name feels quite different than separating students by race, for example—though each can be done for good or bad reasons and each may be related or unrelated to some legitimate purpose. In addition, drawing distinctions among people on the basis of the same trait in different contexts feels different as well. As Justice Marshall once observed: “A sign that says “men only” looks very different on a bathroom door than on a courthouse door.” It “looks very different” not because women can practice law as well as men. After all, women can also use men’s bathrooms as well as men, too. Nor does the fault lie in the fact that the law prohibiting women from practicing law was enacted in order to keep women out or was grounded in stereotypes about men and women. The prohibition of women from the men’s bathroom was also enacted to keep women out

and is based on stereotypes about men and women (and privacy norms concerning certain bodily functions). Rather, the problem with the courthouse prohibition is that it distinguishes between men and women in a way that demeans women whereas the bathroom prohibition does not.

Part I builds the argument that it is morally wrong to distinguish among people on the basis of a given attribute when doing so demeans any of the people affected. Chapter 1 lays out the argument for this account of wrongful discrimination. Whether a particular distinction does demean is determined by the meaning of drawing such a distinction in that context, in our culture, at this time. In focusing on whether a distinction demeans, this account does not rest on the consequences or the effects of a classification. Rather, some classifications demean—whether or not the person affected feels demeaned, stigmatized, or harmed. As such, this account of wrongful discrimination grounds moral impermissibility in the wrong rather than the harm of discrimination.

Chapter 2 develops the argument by exploring in more detail what “demeaning” is and why it is important. It begins by explaining why actions that distinguish among people in a way that demeans are thereby wrongful. The chapter argues that because to demean is to treat another in a way that denies her equal moral worth, it picks out a wrong that is intimately tied to the value that underlies our moral concern with differentiation in the first place. The chapter then provides a more detailed account of “demeaning”: to demean is both to express denigration and to do so in a way that has the power or capacity to put the other down.

Chapter 3 explores the important questions of how we determine whether drawing a particular distinction in a particular context does demean and whether the fact that people will likely disagree about whether particular distinctions demean is problematic for the theory I advance.

Part II explores some common answers to the discrimination puzzle and argues that each is ultimately unsatisfactory. Chapter 4 considers the concept of merit and argues that it cannot separate permissible from impermissible discrimination. The concept of merit is unable to help because any discussion about whether drawing a particular distinction in a particular context is permissible can simply be recast as a debate about what constitutes merit in that context. For example, universities in Iran use political affiliation as a criterion in selecting students and professors. One might think that this practice constitutes wrongful discrimination because these students and professors don’t merit their positions. But

why not? The university administrators surely believe that the best students and teachers are those with the best moral values—as they define them. In other words, critics and supporters of this policy can best be understood as arguing about what constitutes merit in a university context. If so, the concept of merit itself will not be useful in sorting out permissible from impermissible discrimination.

Chapter 5 argues against the moral relevance of the accuracy of classification. One might think that if one distinguishes among people on the basis of, say, age, in determining who is able to apply for a driving license, that it should matter morally whether age is indeed a good predictor of driving ability. If it is not, then perhaps there is something problematic about using it. There is surely something problematic about using age if it is unrelated to driving ability, but the relevant question is whether that something is a moral concern or merely a pragmatic one. Chapter 5 contends that the use of inaccurate classification is inefficient and stupid but not a moral wrong.

Finally, Chapter 6 argues against the view that it is the intention of the person who draws a distinction that is important. This chapter considers two arguments for the relevance of intentions: First, one might think that the actor's intention determines whether an actor in fact distinguishes on the basis of a particular trait or not. Second, one might think that distinguishing among people for a bad purpose renders the action morally suspect. In this chapter I argue against each of these claims, concluding that as far as discrimination goes, it's not the thought that counts.

The book concludes by exploring the ways in which the conception of wrongful discrimination I advance has affinities with the recent emphasis of moral philosophers on the importance of equality of respect when considering what the equal moral worth of persons requires.

BIBLIOGRAPHY

BOOKS

- Philosophical Foundations of Discrimination Law* (editor with Sophia Moreau) (Oxford University Press, forthcoming 2013).
When Is Discrimination Wrong? (Harvard University Press, 2008).

ARTICLES AND BOOK CHAPTERS

- "Defining Corruption and Constitutionalizing Democracy," 111 *Mich. L. Rev.* 1385 (2013).

- "Equality and Unconstitutional Discrimination," in Deborah Hellman & Sophia Moreau, eds., *Philosophical Foundations of Discrimination Law* (Oxford University Press, forthcoming 2013).
- "Racial Profiling and the Meaning of Racial Categories," in Andrew I. Cohen & Christopher Heath Wellman, eds., *Contemporary Debates in Applied Ethics* 232 (Wiley 2d ed., forthcoming 2013).
- "Comments on Michel Rosenfeld's *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*," 33 *Cardozo L. Rev.* 1839 (2012).
- "Discrimination, Concept of" in Ruth Chadwick, ed., *Encyclopedia of Applied Ethics* 833 (Elsevier, 2d ed. 2012).
- "Politics and Terrorism: What Happens When Money Is Speech?," 98 *Va. L. Rev. In Brief* 71 (2012).
- "Money and Rights," 35 *N.Y.U. Rev. L. & Soc. Change* 527 (2011).
- "Money Talks but It Isn't Speech," 95 *Minn. L. Rev.* 953 (2011).
- "Willfully Blind for Good Reason," 3 *Crim. L. & Phil.* 301 (2009).
- "Prosecuting Doctors for Trusting Patients," 16 *Geo. Mason L. Rev.* 701 (2009).
- "Pushing Drugs or Pushing the Envelope: The Prosecution of Doctors in Connection with Over-Prescribing of Opium-Based Drugs," *Phil. & Pub. Pol'y Q.*, Winter/Spring 2008, at 7.
- "Discrimination: When Is It Morally Wrong and Why?," *Dartmouth L.J.*, Fall 2006, at 3.
- "Physicians as Researchers: Difficulties with the 'Similarity Position,'" (with David Wasserman and Robert Wachbroit), *Am. J. Bioethics*, July/Aug. 2006, at 57.
- "What Money Can and Cannot Buy," 14 nos. 1-2 *Good Soc'y* 26 (2005).
- "What Makes Genetic Discrimination Exceptional?," 29 *Am. J.L. & Med.* 77 (2003).
- "Evidence, Belief, and Action: The Failure of Equipose to Resolve the Ethical Tension in the Randomized Clinical Trial," 30 *J.L. Med. & Ethics* 375 (2002).
- "Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem," 60 *Md. L. Rev.* 653 (2001).
- "The Expressive Dimension of Equal Protection," 85 *Minn. L. Rev.* 1 (2000).
- "Two Types of Discrimination: The Familiar and the Forgotten," 86 *Cal. L. Rev.* 315 (1998).
- "Trials on Trial," *Rep. Inst. Phil. & Pub. Pol'y*, Winter-Spring 1998, at 13; reprinted in Verna A. Gehring & William A. Galston, eds., *Philosophical Dimensions of Public Policy* 265 (Transaction Publishers, 2002).
- "Is Actuarially Fair Insurance Pricing Actually Fair?: A Case Study in Insuring Battered Women," 32 *Harv. C.R.-C.L. L. Rev.* 355 (1997).
- "The Importance of Appearing Principled," 37 *Ariz. L. Rev.* 1107 (1995).
- "Of Mice But Not Men — Problems of the Randomized Clinical Trial" (with Samuel Hellman), 324 *New Eng. J. Med.* 1585 (1991).