# IS 'DISCRIMINATION LAW' DOING THE JOB IT IS SUPPOSED TO DO?

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"Discrimination Law" has many different jobs to do, so the question posed for this discussion needs to be expanded. I would propose to ask what *jobs* "discrimination law" is supposed to do, and how well it accomplishes them. While I will discuss these questions from the perspective of the United States, I believe that much of the discussion is more broadly applicable. I am assuming, in light of the subject matter of this conference, that the reference is to "Employment Discrimination Law" rather than to the broader category of law concerning discrimination in public services, housing, education, commercial activities, governmental benefits and protections, and so forth.

I propose that "Discrimination Law" in the employment context has at least the following jobs to do:

1. Identify and articulate public policy against unjustified discrimination, by specifying forbidden grounds of discrimination in constitutional provisions, statutes or regulations.
2. Require public and private entities (government agencies, businesses, non-profit organizations) to adopt anti-discriminatory employment policies and to publicize them to their staffs.
3. Stimulate conversation and awareness to effect change in public attitudes towards groups who have historically been the victims of employment discrimination, thus making overt employment discrimination become socially unacceptable
4. Prevent the commission of discriminatory acts through the deterrence posed by potential enforcement and the imposition of remedies, and through the adoption of non-discrimination policies by entities subject to the legal non-discrimination requirements
5. Provide a mechanism for redress of actual discriminatory practices and actions in a way that would provide effective relief in meritorious cases without imposing unreasonable barriers on those who have suffered discrimination, or imposing an unreasonable burden on employers through having to deal with lengthy proceedings in non-meritorious cases

Notably absent from my list is the idea that Discrimination Law has the job of completely eliminating all unjustified employment discrimination. While one might plausibly list that as the first and overriding job of Discrimination Law, I would argue that it is entirely unrealistic to entertain the expectation that this would be possible, and that it would be much more effective as we evaluate the efficacy of Discrimination Law to set realistic goals.

1. Identify and Articulate Policy. Discrimination law in the United States has a mixed record on this job. Our Constitution addresses discrimination through a broadly phrased obligation of "equal protection of the laws" that is binding only on the government, and the courts have construed this obligation in such a way as to allow much leeway for discrimination by adopting a doctrine that affords substantial protection only to those who suffer discrimination by virtue of some "suspect" or "quasi-suspect" classification, while tolerating discrimination on other grounds unless an aggrieved party can prove that there is

no rational non-discriminatory justification for the unequal treatment they are challenging. Consequently, the Constitution, at least as it has been interpreted, does not do a good job of identifying and articulating public policy against unjustified discrimination because it is too general and vague. By contrast, the federal government, state governments and many local governments have done a better job of identifying and articulating public policy against unjustified discrimination by adopting statutes that specify forbidden grounds of discrimination and that provide enforcement mechanisms and remedial schemes. While these may fall short of the ideal in many ways, they do serve the function of signaling to the public that various specified forms of employment discrimination violate the public policy of the jurisdiction.

2. Requiring public and private entities to adopt policies against discrimination. Discrimination Law in the United States has done this rather well, with the result that surveys of employers generally show that most have adopted formal non-discrimination policies in compliance with legal requirements. The federal discrimination statutes and many state and local enactments specifically require that employers post prescribed notices in places where they customarily communicate company policy to employees, to make sure that employees are informed of their rights under discrimination laws. Adoption of an express policy against discrimination by an employer communicates to management and supervisory staff that discriminatory conduct on their part violates company policy. Whether this is effective in actually reducing (or eliminating) discrimination will depend on the seriousness with which the company approaches the issue, and whether the employer establishes effective ways to monitor compliance and deal with complaints. Failure to include such requirements in discrimination laws would seriously undermine the goal of reducing discrimination.

3. Stimulating public consideration of the issue towards making discrimination socially unacceptable. Public awareness is probably greatest when proposed laws about discrimination are being debated in the legislature, or when significant controversies about discrimination erupt in the media, frequently in response to developments in the courts. In the United States, public awareness of the problem of discrimination was stimulated by Supreme Court decisions at mid-20th century, by legislative struggles to enact discrimination laws, by controversies about the enforcement of the laws, and by reactions to major Supreme Court decisions. While the level of public dialogue has waxed and waned, public opinion polling suggests that Discrimination Law in the United States has served an important function in making overt discrimination socially unacceptable to a significant degree, which is an important prerequisite to preventing discrimination from occurring. However, there is substantial evidence that more covert discrimination remains a problem, and that progress has been uneven in terms of the grounds of discrimination. Race discrimination is now widely viewed as socially unacceptable, despite some pockets of resistance, but there is less of a consensus about sex discrimination, age discrimination remains rampant, and there is little evidence that laws against disability discrimination have yet had a major impact in making discriminatory treatment of persons with disabilities widely unacceptable. Public debate about proposed laws on sexual orientation and gender identity discrimination is still at an earlier point, so it would be premature to evaluate their social impact, although public opinion polls suggest that the battles over such laws over the past several decades have moved a majority of the public to disapprove of discrimination on these grounds.

4. Prevent discrimination. Has discrimination law in the United States done the job of preventing discrimination from taking place? Although the very existence of the laws has probably contributed to a decrease in the amount of discrimination based on the prohibited grounds spelled out in statues and regulations, generally the cumbersome enforcement mechanisms and remedial rather than punitive approach to dealing with proven cases of discrimination have kept Discrimination Law from exerting a heavy deterrent effect. Changing social attitudes, stimulated in part by the enactment of the laws, probably has more to do with declining discrimination than does the direct application of the laws. While it is likely that some employers refrain from discriminating because of a desire to comply with the law, or due to a conviction that employment discrimination is morally wrong, and so a fair amount of potential discrimination may be deterred by the existence of Discrimination Law, the polity is not ready to fund the level of enforcement activity or to countenance the kinds of strong remedies that would be needed to prevent all discrimination.

5. Providing a means of redress for victims of discrimination. If one focuses solely on published court decisions, it would appear that Discrimination Law in the United States fails utterly at the job of remedying discrimination, because plaintiffs rarely win in published court decisions. However, such a conclusion would be much too pessimistic, because the nature of the enforcement system is such that the cases that are litigated to a final published decision are most likely to be the least meritorious cases. At the federal level, and in most of the states and localities as well, Discrimination Law erects an administrative mechanism designed to encourage settlement of claims and avoidance of litigation over non-meritorious claims, and the deferral of as many unsettled discrimination claims as possible into "alternative dispute resolution" forums that frequently lead to private resolution without involving the courts. The overwhelming majority of discrimination claims brought to these systems are either found to be non-meritorious or are settled by agreement of the parties with the assistance of administrative agency staff, and the costs of defensive litigation likely result in some non-meritorious claims being settled as well. It is likely that cases that actually get into the courts and are litigated to an appellate level are a tiny fraction of all discrimination complaints, and the least likely to appear meritorious upon careful investigation, so it is likely that the system works relatively well at providing remedies for meritorious claims.