Equality and Inequality: Legal Aspects

Law’s role in the pursuit of equality remains a focal point of attention and controversy in both theory and practice. That inequality persists in many significant domains—employment, housing, education, wealth—is uncontroversial. However, the explanations and solutions for this continuing inequality have become more complex and elusive. Legal approaches developed to address first generation types of inequality—deliberate exclusionary treatment based on race, gender, or other identity classifications—are inadequate to address more complex, interactive, and structural forms of inequality. As the experiences and causes of inequality become more subtle and multifaceted, consensus over the role of law in addressing inequality has also fractured.

Many of the recurring disagreements in case law, commentary, and policy proceed from the clash between theories of equality. These theories in turn reflect differences in the assumptions about the causes of inequality, the appropriate balance between inequality and competing values, and the proper role of courts in addressing social problems. This essay lays out four conceptual and legal approaches to equality, focusing on the employment context as a case study. The employment context in the United States has become a proving ground for other areas of discrimination law and practice. It features a wide range of conceptual approaches to inequality. As such, it provides a useful vehicle for mapping the terrain of argumentation about legal approaches to inequality. (See Discrimination; Affirmative Action: Comparative Policies and Controversies; Affirmative Action: Empirical Work on Its Effectiveness; Injustice: Legal Aspects.)

1. Formal Equality of Treatment

The dominant conception of equality in American antidiscrimination law is embodied in the concept of ‘colorblindness.’ The law pursues equality by eliminating race, gender, or other suspect classifications as a legitimate basis of making decisions. It focuses on the state of mind of the decision maker, and targets intentional reliance on race or gender as the violation of the equality norm. It is also process oriented, in the sense that it is the taking account of race or gender in the treatment of employees that constitutes both the harm and the wrongful conduct.

This paradigm mirrors the social and political context that led to the adoption of civil rights legislation. In the period preceding the enactment of Title VII, deliberate exclusion of women and people of color from private employment was lawful and even, for some, morally acceptable. Many companies had employment policies that segregated or excluded workers based on race and gender (Abrams 1989, Fiss
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1976, Crenshaw 1988). Supervisors and co-workers displayed open hostility or bias to workers based on their sex or race, and fired, refused to hire, or segregated workers based on those attitudes.

The formal equality model, and its implementing principle of antidiscrimination, is closely linked to these factual and moral conditions. Within that paradigm, discrimination occurs when an actor with formal power over subordinates in the workplace hierarchy deliberately uses that power against a particular subordinate because of attitudes, motivations, or desires relating to sex or race.

This model defines the wrongful conduct as intentional, unequal treatment based on race, gender, or some other class-based characteristic that is viewed as arbitrary. For inequality to count as legally relevant under this theory, it must be demonstrably caused by this form of deliberate, class-based exclusion. The premise of this model is that these class characteristics are irrelevant to the underlying decision, and that taking class membership into account is thus arbitrary and unfair (Fiss 1971, Fallon 1984). This premise embraces the idea that employers may, and usually do, properly differentiate among employees based on qualifications relevant to effective job performance.

By taking race or gender into account, employers unjustifiably depart from merit-based decision making. This violates basic notions of fairness, because people deserve to be treated 'on the merits,' based on an individualized assessment of their capacities (Fallon 1984, Gutmann 1996). Exclusion based upon characteristics that are beyond the control of the affected individual are viewed as particularly morally problematic (Fiss, Brest 1976). Decisions based on class membership thus offend dignitary values, in addition to underlying instrumental values of efficiency.

The goal of the formal equality model is 'colorblindness': employment decisions should be made without regard to employees' race or gender. Race, gender, and other categories of status operate as fixed, universal, and static categories based on membership in a set, unchanging group identified by predetermined, and often physical, characteristics such as skin color. The assumption is that group status is, by definition, irrelevant to decisions about capacity to do the job, that considering class status is by nature arbitrary, designating, and unfair, that decision makers can make decisions without noticing or taking account of racial and gender characteristics, and that equality can be achieved by a rule that prohibits employers from considering race or gender in making employment decisions.

This theory of equality provides remedies to individuals who have been subjected to a process tainted by racial or gender considerations. It is decidedly ahistorical and individualistic in its focus, and compensatory in its explicit remedial approach. Many who embrace a formal equality approach believe current racial inequality results from factors unrelated to racial discrimination. They question the legitimacy and efficacy of legal norms to address this form of inequality. (Browne 1993, Rabkin 1998, Sowell 1984).

Perhaps the most vehement expression of this view in the US can be found in Justice Scalia's concurring opinion invalidating voluntary affirmative action in government contracting based upon its inconsistency with the principle of color blindness: "To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred. In the eyes of government, we are just one race here. It is American!" (Adarand Constructors v. Peña 115 S. Ct. 2097 [1995]). (See Affirmative Action: Comparative Policies and Controversies; Affirmative Action: Empirical Work on its Effectiveness)

1.1 Critiques of Formal Equality

The dominance of formal equality in American antidiscrimination law has produced a wide array of criticism. One set of critiques questions the colorblindness prohibition on grounds of autonomy and freedom of association, a view expressed by Richard Epstein (1992). Other criticism proceeds from the view that colorblindness is an inadequate response to continuing inequality. Most fundamentally, critics point out that a formal equality theory leaves in tact a legacy of state-produced inequality and subordination. It ignores the role that group status continues to play in shaping the life expectancies, opportunities, and experiences of group members. It locks in the continued effects of past formal exclusion, imposing the consequences of that continued exclusion on the excluded groups themselves. By defining equality solely in terms of the conduct of the perpetrator, a formal equality approach normalizes conditions of marginalization and exclusion, and the group dimensions of those material conditions. It does not begin to address the perspective of those who experience exclusion, marginalization, and unequal enjoyment of resources and status (Freeman 1990, Crenshaw 1988, Gotanda 1991). At the same time, 'It conceals the distributive consequences of group-salient practices in a semantic code that defines instrumental rationality as race-neutral' (Siegel 2000). A moral theory that might be suitable for a just society, i.e., one that does not systematically disadvantage people based on their race, loses its moral premise for a society that is unjust in those ways (Gutmann, 1996, Sunstein 1994).

On a conceptual level, David Strauss has pointed out the logical inconsistencies of colorblindness as an antidiscrimination principle. To protect a designated group against treatment targeting that group, the state must pay attention to and indeed specially protect the interest of that group. Thus, colorblindness is contra-
dictory. Strauss also points out that the metaphor of colorblindness really doesn't fit its use in the non-discrimination context. Colorblindness in the literal sense prevents an individual from seeing color; colorblindness as a social model prevents an individual from acting on what he or she sees. This approach presumes that individuals can see race but keep it from influencing their perceptions, conduct, and decisions (Strauss, 1986).

Recent work in the social sciences challenges the assumption (which underlies the formal equality model) that conscious decision making adequately describes the current dynamics of exclusion and unequal treatment. Bias is produced not only as a result of motivation but also as a product of racial or gender schemas, multisexual group interactions, and patterns of conflict resolution or avoidance (Krieger 1995, Lawrence 1987, Sturm 1998). Bias or exclusion often results from interactive patterns of non-induction, as much as from exclusion motivated by bias (Donohoo and Kolb 1994, Wilkins and Gutai 1996). Members of nondominant groups may well be treated differently based on their race, notwithstanding the decision maker's lack of intention to do so.

Historians have also challenged the theory of formal equality for its ahistoricism. Colorblindness ignores historically constituted patterns of group inequalities that are 'socially pervasive (articulated across social domains) and equality consistent (articulated over time)' (Siegel 2000). Examining race and gender inequality from a historical standpoint reveals relations of group inequality embedded in the social order of slavery, privilege, and sexuality. 'In short, when considered from a historical standpoint, discrimination has no contextual or fixed form' (Siegel 2000).

Robert Port applies this structural account of the dynamics of bias to the law itself. Using what he calls a sociological account of the field, he contends that law does not and cannot cause employers to make judgments about qualifications in a way that is totally race and sex blind. Legal actors are themselves engaged in a social practice of shaping the norms and conventions by which sex and race are given social meaning. 'Antidiscrimination laws always begin and end in history, which means that it must participate in the very practices that its seeks to aker and regulate' (Port 2000). To pretend otherwise is to allow courts to rely on unarticulated assumptions and premises that legitimate some racial or gender meanings and challenge others.

2. Functional Equality of Treatment

A modified approach to equal treatment attempts to take account of the more structural, interactive, cognitive, and unconscious character of bias in the second generation of discrimination. This theory provides a framework that continues to account for inequality as a result of unintentional as well as intentional biased treatment. "Functional equality focuses on whether differences in treatment based on group membership produce unequal outcomes, regardless of whether a policy or specific intent explains that unequal treatment. It broadens the focus of analysis from formal and deliberate decisions to the social context and practices that produce decisions. Differences in treatment between majority and minority group members that are arbitrary, in the sense that they are not justified by criteria of economic rationality, violate this principle of equality. These differences in treatment are morally problematic because they are unfair. Fair opportunity requires that 'equal consideration should be given to all qualified candidates so that candidates are chosen on the basis of their qualifications, where qualifications are set that are relevant to the legitimate social purposes of the position in question' (Gutmann 1996). If differences in treatment are attributed to stereotyping, cognitive bias, or differential access to the networks that structure advancement, they violate this fairness principle, even if the decision maker did not consciously intend that result. The harm is not only the stigma or loss of dignity that results from substituting group characteristics for individual assessment. It is the difference in access that results from patterns of exclusion that emerge from social interaction or cognitive bias (Krieger 1995, Sturm 1998).

This form of inequality is often difficult to identify at the level of individual decisions. For this reason, functional equality of treatment approaches often focus on patterns of unequal treatment affecting groups of similarly situated individuals. Unexplained disparities in treatment of similarly situated members of majority and minority groups are problematic under this approach (Tennessee v. United States, 431 US 324 [1977]). Fault, in the sense of conscious intent to exclude based on irrelevant and suspect classifications, is not necessarily a criterion for discrimination. Thus, functional equality theories depart from morality-based conceptions of discrimination and move to a focus on remediation.

2.1 Critiques of Functional Equality

The move away from fault-based notions of discrimination and formal notions of equality involves the courts in more subtle, complex, and interactive forms of bias. Critics of this move have questioned whether this is an appropriate role for the law in general and for courts in particular. If cognitive bias is widespread, indeed, ubiquitous, is it appropriate to rely on the law to change embedded patterns of interaction (Krieger 1995)? Others have questioned
the viability of a model of discrimination that, by its nature, can only be detected by looking at patterns involving groups over time (Browne 1993, Rabkin 1998). Do courts, and employers for that matter, have the capacity to prevent and redress bias at the level of cognition and group interaction? However, theories of proof and remediation have developed that operate effectively at the group and structural level. These theories shade into a third conceptual approach to inequality: equal achievement.

3. Equal Achievement or Equal Outcome

This concept of equality focuses on differences in the material conditions of members of particular groups. It is rooted in social reality, and looks at the distribution of jobs, income, and status of members of groups that have previously been subjected to systematic exclusion and subordination (Fiss 1975, Fallon 1984, Freeman 1990). The focus of this theory is the group, rather than the individual who has been excluded as a result of group status. Groups continue to matter because they define the opportunity structures affecting their members. For these theorists, group status must be directly addressed because it is the level at which inequality operates. For some, groups also have independent normative value, reflected in the patterns of cultural and political meaning that emerge among individuals who identify as a group (Gotanda 1991). These theorists justify the focus on groups not only in instrumental terms, but also as an independent value. The empirical premise of equal outcome or equal achievement is that current inequality continues to be the result of systematic and legally sanctioned subordination. Legal intervention is justified to remedy persistent and arbitrary differences in resources, social status, and opportunity based on group membership. The current system for allocating opportunities continues to reflect biased criteria that systematically disadvantage non-dominant groups. Thus, group-based remediation compensates for departures from merit-based decision making (Fiss 1971, Harris and Narayan 1994). The goal of this approach to equality is outcome oriented: disparities in group status should be reduced or eliminated.

The normative justifications for the equal achievement theory are largely compensatory and remedial. Past group-based subordination justifies current group-based remediation. This theory rests on the premise that the group continues to have social meaning. The group continues to experience harm that is a consequence of the history of group-based exclusion, and members of the group experience the current manifestations of that harm. For this reason, matching harm to individual injury is thus both unnecessary and counterproductive (Crenshaw 1988). Moreover, group-based remediation is necessary to overcome barriers to participation that are perpetuated through individual, neutral processes that do not compensate for the effects of past discrimination (Sieg 2000, Abrams 1989).

Other justifications for the achievement theory of discrimination are more pragmatic: bias is difficult to prove and process rules are easy to evade. Outcome measures serve as an adequate proxy for bias that continues to affect access to fair process and opportunity. If a process is fair and race or gender neutral, it will produce a result that more or less mirrors the composition of the pool. Outcome measures that strive for a workforce that mirrors the racial or gender composition of the pool simply accomplish directly what may be more difficult to achieve through reforming the decision-making process. These measures also provide an easy-to-implement remedy that responds to concerns about judicial capacity to detect and correct patterns of bias (Fiss 1971, Gutmann 1996).

3.1 Critiques of Outcome Theories of Equality

Adherents of formal equality criticize outcome-based theories as inconsistent with the principle of race neutrality. Some critics take the view that any approach that treats race or gender as a salient category, even for remediation, reinforces the continued significance of those categories and is thus discriminatory. They also question the appropriateness of remedial strategies that focus on groups. This skepticism proceeds in part from an increasing willingness to question the empirical assumption that current inequality is the result of past legal subordination. Since the 1970s, some scholars have developed alternative explanations for persistent inequality that emphasize characteristics of the racial or gender group, rather than patterns of exclusion or marginalization (Glazer and Moynihan 1973, Sowell 1984). Once the causal link between current economic or social inequality and legal exclusion or subordination is questioned, that skepticism undermines the perceived legitimacy of group-based remedies. Indeed, some critics of outcome theories of equality question whether racial or gender status continues to have any meaning at the level of the group. Some conservative critics thus suggest that group-based remediation is just another form of racial or gender-based decision-making, and is thus illegitimate (Belz 1991, Abrams 1986). Finally, they treat outcome-based equality theories as inconsistent with principles of merit-based decision-making and thus contrary to both efficiency and dignitary values (Browne 1993).

Outcome theories have also been criticized by progressives as an inadequate framework to define equality policy because they rest too heavily on pragmatic considerations and lack an adequate normative foundation. Outcome theorists typically view their strategies as contingent and temporary. They do not generally defend group-based redistribution as an end
in and of itself, but rather as a means to an end. Nor do they reveal what it was about current practice that is objectionable, other than the result. The absence of a clearly articulated normative justification invites challenges to the legitimacy of any efforts to address racial or gender bias. Outcome approaches, if used as the exclusive theory justifying equality initiatives, may thus stultify the refinement, rearticulation, and reformulation of the normative meaning of racial and gender participation and exclusion. They may also reinforce the perception that equality and efficiency are competing goals (Sturm 2001, Sturm and Guinier 1996).

4. Equal Access

Equal access theories focus on inequalities that result from unfair criteria and structures of interaction. They target decision-making that is formally fair but functionally biased in favor of members of a particular group. The central question is whether the structure, process, or criteria of decision-making arbitrarily favors members of one group over another for reasons unrelated to the articulated goals underlying the decision (Sturm 2001).

The most widely articulated conception of equal access theory accepts the moral legitimacy of differentiating among applicants based on meaningful differences in their qualifications to carry out the functions of a position. Reasonable disagreements exist, however, concerning the social purposes relevant to a particular job, the relative importance of multiple purposes, and the best way to assess which applicants meet those qualifications. Those members of society who currently have the power to set qualifications may tend to value those qualifications that favor people similar to themselves (Ottman 2000). Moreover, these power differentials shape the structures for assessing individuals’ qualifications and opportunities for advancement. These standards and structures are no more likely to produce valued social outcomes than others that do not exclude members of non-dominant groups. As such, these exclusionary standards and practices are unfair, and thus discriminatory (Strauss 1998).

The classic case of Griggs v. Duke Power Co. (401 US 424 [1971]) lays out this theory through a fable: “Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of the milk to the stork and the fox.” If the goal of the employer is to find out who can drink milk, it is arbitrary and unfair to make that determination by evaluating all animals’ capacity to drink milk from a sourer. Discrimination thus occurs when an employer relies upon conditions, criteria, or practices that favor members of a particular group, if that advantage is arbitrary in the sense that it does not advance the articulated goals of the employer. This theory defines discrimination as conduct that deprives individuals or groups of meaningful access to employment opportunities through the use of standards, criteria, or structures that fail to minimize the expression of bias, or that arbitrarily advantage one group over the other (Friedman 1986). It builds on the practical insight that discrimination and inequality often result from arbitrary, unstructured, and unaccountable decision-making. It uses outcome measures not to define the harm, but to signal the likelihood that an employment process is biased, and thus to trigger scrutiny of the adequacy and fairness of the criteria and their application. The beneficiaries of this theory are both individuals, who are denied the opportunity to compete based on unbiased selection processes, and groups, which are systematically disadvantaged in their access to jobs.

Equal access theory has thus emerged as an integrative approach to discrimination that accepts the inevitability, if not the legitimacy, of merit-based distinctions but introduces structural and group notions of fairness to the question of how to define and implement merit-based decision making.

4.1 Critiques of Equal Access Theory

Equal access theory has been called both over- and under-inclusive. Its potential for radically restructuring employment decision-making prompts challenges based on the intrusiveness of such a theory into the autonomy of employers. This criticism often proceeds from the view that courts should not engage in the process of institutional restructuring and act illegitimately if they move beyond the role of dispute resolution and compensation for discrete individual harms. The under-inclusiveness critique challenges the acceptance of merit or market criteria as a morally defensible basis for distinguishing between the opportunities of potential employees. The weaker version of this critique, preferred by outcome theorists, argues that the continued pervasiveness of a caste system so infects the distribution of opportunities as to delegitimize a system of merit that produces racially identifiable results (Freeman 1990, Strauss 1998). The stronger version of this critique challenges the moral legitimacy of differentiating access to social goods based on any arbitrarily distributed characteristics, including talents and motivation. There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune . . . From a moral standpoint the two seem equally arbitrary” (Rawls 1974).

The differences in approach to equality summarized in this essay recur in and help to explain deep fractures in employment discrimination doctrine, legislative policy making, and public discourse about equality. Current debates often pose formal equality of treat-
ment and equal outcome as the only two available conceptions of equality, and force a choice between them. The increasing complexity of the dynamics of bias, along with the decreasing political and judicial viability of outcome theories of equality, have increased the attention to and importance of access theories of equality. These theories are, however, the least normatively and empirically developed. Emerging scholarship in the areas of employment discrimination has begun to fill this crucial gap. It remains to be seen whether the law will respond dynamically to these new understandings of the dynamics and meaning of workplace inequality.

See also: Affirmative Action Programs (India); Cultural Concerns; Affirmative Action Programs (United States); Cultural Concerns; Affirmative Action, Sociology of; Civil Liberties and Human Rights; Discrimination; Discrimination, Economics of; Discrimination: Racial; Equality of Opportunity; Equality: Philosophical Aspects; Gender, Class, Race, and Ethnicity, Social Construction of; Human Rights in Intercultural Discourse: Cultural Concerns; Injustice: Legal Aspects; Justice and its Many Faces: Cultural Concerns; Justice, Access to: Legal Representation of the Poor; Prejudice in Society; Race and the Law; Racism, History of

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Equality of Opportunity

Equality of opportunity is a concept that has been used frequently in the sociology of education, and in particular in discussions of social class differences in education, although the key ideas are applicable in many other fields. In the sociology of education the focus has been on whether there are equal opportunity-