# Discrimination as Stigma

## A Theory of Anti-discrimination Law

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# Introduction

This book is about the use of anti-discrimination law to pursue equality. The focus is on discrimination because, as explained by Sayce, 'discrimination' highlights the 'producers of rejection and exclusion—those who do the discriminating'[1] rather than those who are the recipients of such rejection behaviours. In this book, I suggest that the producers of discrimination are not only individuals acting alone but also society as a whole. To speak of discrimination is therefore to focus on the individuals and society as collectively responsible for the problem and to identify specific prescriptions for action.

Anti-discrimination law has a dual mandate: it protects and prevents. However, what determines when individuals or groups with a particular trait, attribute or condition will be protected by anti-discrimination law, or when law will prevent persons without that trait, attribute or condition from discriminating against those possessing it? This is the question that is at the heart of this book. It focuses on the question of when law should be used to remedy discrimination: when should a distinction be unlawful discrimination? Not all distinctions are unlawful discrimination, so how should this be determined? What logic should guide legislators as they make anti-discrimination law?

In 1976—the year of the second Race Relations Act and the first Sex Discrimination Act in Britain—Brest described the anti-discrimination principle as 'the general principle disfavouring classifications and other decisions and practices that depend upon the race (or ethnic origin) of the parties affected'.[2] The anti-discrimination principle is not limited to race—it also applies to a range of other attributes which may or may not be biological. In most jurisdictions where it is recognised, it applies at a minimum to age, disability, political belief, religion, gender and sexual orientation but it can also encompass genetic make-up[3] and even publication of enforcement details regarding fines.[4]

Post describes this principle as the 'simple but powerful logic' that informs American anti-discrimination law and 'underwrites the important trope of "blindness" that dominates antidiscrimination law'. Blindness, he writes, 'renders

[1] L Sayce, 'Stigma, Discrimination and Social Exclusion: What's in a Word' (1998) 7 *Journal of Mental Health* 4, 331.

[2] P Brest, 'In Defense of the Anti-Discrimination Principle' (1976) 90 *Harvard Law Review* 1, 1.

[3] Title II of the Genetic Information Nondiscrimination Act (GINA) was introduced in the USA in 2008. It applies to the sphere of employment only.

[4] The Equal Opportunity Act 1984 (WA) Part IVC prohibits 'discrimination on ground of publication of relevant details of persons on Fines Enforcement Registrar's website'.

forbidden characteristics invisible; it requires employers to base their judgements instead upon the deeper and more fundamental ground of "individual merit" or "intrinsic worth"'. Thus the logic behind American anti-discrimination law 'requires employers to regard their employees as though they did not display socially powerful and salient attributes, because these attributes may induce irrational and prejudiced judgments. Each time the law adds another proscribed category of discrimination, it renders yet another attribute of employees invisible to their employers'.[5]

The anti-discrimination principle is traditionally activated via categories, which are used to mark the boundaries of who is guaranteed protection by law and in which circumstances. These categories have different names—they are called 'protected characteristics' in British anti-discrimination law,[6] 'grounds' in Canadian and Australian legislation and 'suspect classifications' in American equality jurisprudence. Once protected by law, a characteristic, ground or classification may not form the basis of any disadvantageous decision by a public or private decision-maker across a range of fields of activity. Where this is found, it constitutes direct discrimination, which in most jurisdictions can never be justified unless the distinction is protected because it is genuinely essential to the job or role[7] concerned or is related to age.[8] In most cases, only indirect discrimination may be justified by a non-discriminatory reason. Indirect discrimination, or 'disparate impact' arises where a 'general policy or measure that has a disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group'.[9]

Decision-makers can choose to include additional categories that are not set out in the legal instruments—for example, in the recent consultation on university-level teaching, the Secretary of State included 'lower income groups' in the scope of the impact assessment under the public sector equality duty.[10] In *EAD*, it was decided that anti-discrimination law protects legal as well as natural persons.[11] However in *Tirkey*[12] it was confirmed that although 'caste' is an autonomous concept, it is not a specific protected characteristic under the Equality Act 2010. This does not mean that the Equality Act provides no remedy for caste discrimination as some of the factors relevant to caste may fall within

[5] R Post, 'Brennan Center Symposium Lecture: Prejudicial Appearances: The Logic of American Antidiscrimination Law' (2000) 88 *Calif Law Rev* 1, 11.

[6] Section 4 of Equality Act 2010 lists nine protected characteristics—Race, Sex, Disability, Age, Sexual Orientation, Religion or Belief, Gender Reassignment, Marriage and Civil Partnership, Pregnancy and Maternity.

[7] The 'genuine' or 'bona fide' occupational requirement is a common feature in anti-discrimination law.

[8] See EU Equal Treatment (Employment) Directive 2000/78, Art 6.

[9] *DH v Czech Republic* (2008) 47 EHRR 3 [175].

[10] Section 159 of the Equality Act 2010 sets out the 'Public Sector Equality Duty' (PSED) which applies to all protected characteristics. See Secretary of State for Business, Communities and Skills, 'Fulfilling Our Potential: Teaching Excellence, Social Mobility and Student Choice', November 2015, para 39.

[11] *EAD Solicitors LLP & Ors v Abrams* [2015] UKEAT 0054_15_0506.

[12] *Chandok v Tirkey* [2014] UKEAT 1090_14_1912.

'ethnic origins' in s 9(1)(c) of the Act. 'Ethnic origins' has a broad and flexible ambit, including characteristics determined by 'descent'.

Attention regularly focuses on the interpretation of these categories: who is included, who is excluded, and in relation to which activities and forms of behaviour? However, there is a more fundamental question to be answered: how do we decide which categories are to be regarded as—to use the American term—'suspect'? When should we worry about the use of personal attributes, characteristics or conditions as ratio? And more to the point for this book, when should legal protection be introduced to prevent and protect against this?

This is an increasingly important question because the categories that enjoy this legal protection have expanded over time, albeit at a different pace in different places. The selection of categories is usually a reflection of a context-specific collective recognition that individuals with the trait form a group that has a legitimate need for legal protection. This recognition is often preceded by various forms of social action such as lobbying.[13] What has become increasingly blurred is the explanation of why anti-discrimination law may provide that protection to individuals with trait A (for example, a religious belief) but not individuals with trait B (for example, obesity). Is it just a matter of the existence of a strong enough lobby with sufficient resources for campaigning? This is the question at the centre of this book. It asks 'When is discrimination wrong?'

This question is not posed in a moral[14] sense, in other words, it is not an enquiry into why some forms of discrimination are seen to be so bad that they require legal regulation. Hellman explains this moral question thus:

> A sign that says 'men only' looks very different on a courtroom door than on a bathroom door … 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.

It is the infringement of dignity that makes this form of discrimination wrong. In this book, the question takes on a more sociological hue so as to generate consideration of which targets of demeaning or disadvantageous treatment should be protected using anti-discrimination law in particular. Any person or group of people can suffer damage and distortion if the people or society around them show them a demeaning or contemptible picture of themselves.[15] Why then does anti-discrimination law only protect some groups of people and not others? This is not just a question of the content of our categories, but the logic that informs that content.

The question also suggests that there is a singular logic that can explain why discrimination is wrong. The feasibility of a unified theory of discrimination law

[13] I Solanke, *Making Anti-Racial Discrimination Law* (Abingdon, Routledge, 2009).

[14] D Hellman and A Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford, Oxford University Press, 2013).

[15] C Taylor, *Sources of the Self* (Cambridge, Massachusetts, Harvard University Press, 1989).

is keenly debated. Some authors, such as Shin[16] argue this is not possible. I agree with Khaitan[17] that it *is* possible, although our purposes differ. While he seeks to clarify the purpose of discrimination law, my goal is to clarify the mechanics of that law. Thus he argues that discrimination law is 'grounded not in the value of equality but autonomy—its purpose to provide people with a free choice between valuable options. It presents discrimination law as a distinctively liberal social programme.' I would argue that this brings us no closer to the practical question of whose free choice—the individual's or the group's—should benefit from legal protection offered by discrimination law.

This question also has relevance in the context of criminal law and hate crime. Hate crime laws provide additional protection for selected victim groups but how is it to be decided when this extra layer of protection will be available? Should it depend upon which group has the resources to campaign?[18] Should paedophiles benefit from it? Mason asks whether the 'targeted victimization of adults who sexually assault children should be recognized as a form of hate crime under the criminal law?'[19] Should therefore the murder of Bijan Ebrahimi[20]—killed because he was mistakenly identified as a paedophile by his neighbours—be treated as a hate crime as well as murder?

This book therefore seeks to offer a possible solution as to how we can identify those who should benefit by legal protection from discrimination. In so doing it challenges the rhetoric of 'blindness': is this really a 'timeless liberal virtue that inherently produces fairness and equality'?[21] Must society pretend that differences do not exist in order to prevent and protect its members from discrimination? Does blindness to difference ameliorate or perpetuate discrimination? To what extent does it help, for example, a disabled person if society is blind to the difficulties experienced as a result of that person's particular affliction or condition?

While blindness may have inspired the movements that campaigned for civil rights in the 1960s and 1970s, Harris and Lieberman observe that its 'meaning and valence have changed dramatically in recent decades, from liberal aspiration in the era of Jim Crow segregation to a conservative rhetorical device frequently mobilised to evade collective responsibility for the persistence of racial inequality and

[16] P Shin, 'Is There a Unitary Concept of Discrimination?' in Hellman and Moreau (eds), *Philosophical Foundations* (n 14).

[17] T Khaitan, *A Theory of Discrimination Law* (Oxford, Oxford University Press, 2015).

[18] For example, the fight for gay rights: see K Eleved, *Don't Tell Me to Wait: How the Fight for Gay Rights Changed America and Transformed Obama's Presidency* (Basic Books, 2015), which tells the story of the struggle for gay rights under Obama's presidency.

[19] G Mason, 'Victim Attributes In Hate Crime Law: Difference and the Politics of Justice' (2014) 54(2) *British Journal of Criminology* 161.

[20] S Morris, 'Police officers jailed over Bijan Ebrahimi murder case' (*The Guardian*, 9 February 2016).

[21] FC Harris and RC Lieberman (eds), *Beyond Discrimination: Racist Equality in a Postracist Era* (Russell Sage Foundation, 2013) 13.

to oppose policies such as affirmative action, designed to tackle racial inequality head on'.[22] It is unclear that it continues to play a progressive role in the ongoing struggle for equality. Arguably, it has, on the contrary, been 'appropriated by an antigovernment, premarket conservative culture that is at best indifferent (and at worst hostile) to demands for racial equality'[23] and results in the paradoxical sociological phenomenon of 'racism without racists'.[24]

In fact, it is accepted that in order to effectively tackle disability discrimination, it is sometimes necessary to see the disability and make adjustments to help the individual manage the resulting difficulties. There are different ways of 'seeing' disability: according to the 'medical model' of disability, disability is a 'personal tragedy' intrinsic to the individual—it is part of their body. The focus is therefore on 'fixing' or 'curing' the broken body and, where this is impossible, hiding the individual away from society in hospitals and institutions. The medical model therefore underpins institutionalisation of the disabled and their segregation from mainstream society. By contrast, the 'social model' of disability—created by disabled persons themselves to characterise their experiences of disability—sees disabled persons as victims of an uncaring society.[25] It locates the key problem in *structure*—social and institutional organisation—that actively *disables* individuals, rather than individual impairment. This can include external obstacles within the environment, for example the provision of stairs rather than a ramp to access a building or the use of small type text instead of braille to present information. Ignorance, stereotype and prejudice are also problems under the social model—obstacles to equality frequently reside in prevailing ideologies. Under this model the focus thus falls upon changes required in society and institutions to remove barriers that disable the individual. The purpose of their removal is to enable disabled people to live equal, independent and autonomous lives.[26]

Discrimination law can be inspired by the way of seeing which is used in the social model of disability. This social approach can replace the notion of blindness with a social vision wherein the characteristic is seen in its context. My premise is that anti-discrimination law should not aim to be blind, for to take this stance is to make the same mistake as the medical model—to see the problem as inherent in the individual. Blindness is not the solution because the individual attribute *per se* is not the problem. It is the social meaning given to the attribute that is the problem, thus it is this social meaning that should be the focus of anti-discrimination law. In other words, anti-discrimination law needs to tackle social stigma not individual sight. This is the vision of anti-discrimination law under the anti-stigma

[22] Harris and Lieberman, *Beyond Discrimination* (n 21) 13.

[23] Harris and Lieberman, *Beyond Discrimination* (n 21), 13–14.

[24] E Bonilla-Silva, *Racism without Racists: Color-blind Racism and the Persistence of Racial Inequality in the United States* (Maryland, Rowman and Littlefield Publishers, 2006).

[25] M Oliver, *The Politics of Disablement* (Basingstoke, Macmillan, 1990); M Fine and A Asch, 'Disability Beyond Stigma: Social Interaction, Discrimination, and Activism' (1998) 44(3) *Journal of Social Issues* 22.

[26] S Carr, *Personalisation: A Rough Guide* (London, SCIE, 2009).

principle developed in this book. If to destigmatise is to change society rather than individuals,[27] then the goal of anti-discrimination law under the anti-stigma principle is not only to protect and prevent individuals, but also to change society. From the perspective of the anti-stigma principle, blindness contributes to the continuation of discrimination because it leaves intact the social stigma that is the source of discrimination.

The anti-stigma principle begins from a similar place as the social approach promoted by Post[28] but moves in a different direction. In particular, it does not encourage a retreat from legal intervention in discrimination cases. I do agree with Post that anti-discrimination law should have a socially educative role and that it should focus on 'transforming' social practices. Like him, I also think that social norms are a major problem that anti-discrimination law should tackle, but so are the actions of individual people—it is both the behaviour of people and the social norms from which their behaviour is drawn that should be the target of law. Thus, under the anti-stigma principle, individual employers would be punished for behaving in ways that conform to prevailing social norms. For example where, as in *Jespersen*[29] an employer fires a woman who refuses to wear make-up, the problem is both the employer's decision and the social norm according to which women are expected to wear make-up. Anti-discrimination law under the anti-stigma principle would seek to change the way society thinks and acts as well as the way employers behave.

The anti-stigma principle moves anti-discrimination law away from its socio-biological basis. Like the 'vulnerabilities'[30] approach, it recognises that there are an increasing number of groups who experience risk in everyday society, many of whom—for example, young people leaving care or the homeless—are not protected by the legal frameworks that emerged from the era of civil rights and social movements. Unlike the vulnerabilities approach, however, it does not argue for a framework based on capabilities[31] or functioning.[32] The groups may be created

[27] R Harre, *Social Being: A Theory for Social Psychology* (Oxford, Basil Blackwell, 1979) 315.

[28] RC Post, *Prejudicial Appearances—The Logic of American Antidiscrimination Law* (Durham, Duke University Press, 2001) 22.

[29] *Jespersen v Harrah's Operating Company* 444 F.3d 1104, No 03-15045 (9th Cir. 2006) (en banc). For comment on this case see D Carbado, M Gulati and G Ramachandran, 'The Jespersen Story: Makeup and Women at Work' in JW Friedman (ed), *Employment Discrimination Stories* (Foundation Press, 2006) and in general CL Fisk, 'Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy' (2006) 66 *Louisiana Law Review* 44.

[30] M Fineman and A Grear, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate Publishing, 2013).

[31] A Sen, 'Human Rights and Capabilities' (2005) 6(2) *Journal of Human Development* 151; M Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, Harvard University Press, 2011).

[32] Wolf and de Shalit define 'disadvantage' as a 'lack of genuine opportunities for secure functioning' (p 84) where there are six categories of functioning: life; bodily health; bodily integrity; affiliation (belonging); control over one's environment and sense; and imagination and thought (p 106). The least disadvantaged groups lack all or some of these. J Wolf and A de Shalit, *Disadvantage* (Oxford, Oxford University Press, 2007).

as a result of shared attributes, statuses or conditions. I propose the anti-stigma principle as a lens through which to determine in a systematic, robust and consistent manner where legal protection from discrimination is warranted and where it is not. As awareness of and respect for equality grows it becomes even more important to clarify to the general public why, for example, people with a religious belief are protected from discrimination but people with tattoos are not.

The anti-stigma principle is more than an anti-stereotyping approach as suggested by Morris and Timmer, although stereotypes are recognised as a mechanism of discrimination. Anti-stereotyping approaches can be seen in early cases of sex discrimination. Supreme Court Justice Ruth Bader Ginsburg used this route to challenge gender roles assigned to both men and women. Ginsburg argued that the 'state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles'.[33] Her approach was not to challenge stereotyping *per se* but to focus in particular on those practices and institutions that led to sex inequality. As Franklin notes, this limited application had little success. Morris proposed a broader role for the anti-stereotyping principle. She suggested it be used to deal with cases involving a mixture of protected and unprotected characteristics, such as gender and weight. She argued for a 'stereotypic transformation of a non-suspect'[34] characteristic when combined with a suspect characteristic so that it gains an 'honorary' protected status in anti-discrimination law. Timmer goes further still, suggesting that courts adopt an anti-stereotyping analysis that includes two phases: a 'naming' and 'contesting' of stereotypes.[35]

The anti-stigma principle proposed in this book goes beyond anti-stereotyping. It shares the targeted vision of Ruth Bader Ginsburg. It also incorporates both stereotypes and a procedural analysis, as suggested by Morris and Timmer. However unlike stereotyping, it explicitly identifies the role of power and its application involves more phases. The anti-stigma principle is also activated in the creation of categories of protection, not just the determination of discrimination. It proposes a process through which the state can recognise which stigmas should be within the scope of anti-discrimination law and which should not be. Finally, by drawing upon models of stigma it also offers a useful and novel connection between anti-discrimination law and public health: anti-discrimination law as public health offers a range of different actions to tackle discrimination including 'early intervention' as well as protection and prevention.

[33] See C Franklin, 'The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law' (2010) 20 *New York University Law Review* 101, 106.

[34] M Morris, 'Stereotypic Alchemy: Transformative Stereotypes and Anti-Discrimination Law' (1989) 7 *Yale Law & Policy Review* 251.

[35] A Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11(4) *Human Rights Law Review* 707.

# I. Construction of the Anti-stigma Principle

Chapter 1 establishes the conceptual origins of the anti-stigma principle. The intellectual heritage of the anti-stigma principle lies in the work of classical and critical scholars of stigma, as well as scholars in public health. The most famous work on stigma was written by Erving Goffman in 1963.[36] His studies, however, should now perhaps be seen as a starting point for an understanding of stigma. The concept has since been used and developed by social psychologists, sociologists, criminologists, psychiatrists, medical scholars, management specialists, urban planners, development scholars and public health experts who, as explained below, have conducted a more critical analysis of stigma, linking it to social power.

Goffman belongs to a tradition of social psychology that centres upon the individual and her behaviour. His work is an example of cognitive social psychology that may recognise but pays scant analytical attention to the social relationships surrounding individuals; it can be described as 'micro-sociological'[37] and apolitical. In his work, cognition and conation[38]—behavioural intentions or reactions to stigmatised persons—are strictly 'face-to-face' phenomena. The key task of critical social psychology has been to redress this narrow focus by explicitly directing 'attention to the social and cultural contexts within which individuals find themselves'.[39]

Critical social psychology replaces the isolated individual with an individual connected to a social world, where the social is comprised of two levels: an *interpersonal* level of interactions and individual relationships as well as a *societal* level of broader social norms and practices. Both levels 'surround and penetrate the individual, impacting on personal identity and public practices'.[40] The two levels interact: the language that is used to communicate at an interpersonal level draws upon assumptions and 'common sense' provided by the surrounding culture. Critical social psychology emphasises that there is no escape from this: 'no individual is separate from social relations and systems of difference which serve to position people in various, often inequitable ways'.[41] Thus as Harre states: 'all our actions are carried out against a structured background'[42] where individuals as actors contribute to the construction of that background through their actions. The key factor determining the level of influence on both the interaction and the construction of that background is power.

[36] *Notes on a Spoiled Identity* (London, Penguin 1990 [1963]).

[37] Harre describes Goffman's work as 'micro-sociology'. Harre, *Social Being* (n 27), 124.

[38] J Gottlieb and BW Gottlieb, 'Stereotypic Attitudes and Behavioural Intentions Towards Handicapped Children' (1977) 82(1) *American Journal of Mental Deficiency* 65.

[39] B Gough and M McFadden, *Critical Social Psychology—An Introduction* (Basingstoke, Palgrave, 2001).

[40] Gough and McFadden, *Critical Social Psychology* (n 39) 11.

[41] Gough and McFadden, *Critical Social Psychology* (n 39), 13.

[42] Harre, *Social Being* (n 27) 192.

Power is a key theme in critical social psychology. There are different ways to depict power. Foucault depicts power as being manifested at numerous points and through a web-like matrix, with individuals at different points in a spectrum of exercising and undergoing power. In this formulation of power it is imaginable that some will be more regularly at the former and others most frequently at the latter end of the spectrum. Bachrach and Baratz identify two faces of power in relation to the exercise of power—the power to take action as well as the power to prevent something from happening.[43] Other scholars such as Gaventa have posited power as a three-dimensional cube with one dimension focusing on levels (global, national, local) a second on spaces (closed, invited, claimed) and the third on forms (visible, invisible, hidden).[44]

According to critical social psychology, power influences cognition. Loury uses the idea of 'social bias cognition' to highlight the interaction between social power, cognition and stigma. Under the theory of 'social bias cognition', cognition is an individual action but is not an independent process. Loury argues that cognition is set within a cultural and historical context where individuals undergo the process of learning the meanings of things in their context, just as in Nina Simone's song 'Turning Point' which is discussed in Chapter 1, a little girl learns the meaning of brown skin in her world from her mother. Cognition, according to his theory, is therefore informed by a subtle performance of social practices. He attributes the perpetuation of racial stigma and enduring racial inequality in the USA to socially biased cognition. He argues that in relation to racial stigma, cognition is automatically negatively biased. This negative cognitive response informs the conative response, or how we choose to behave with the stigmatised person: will we punish them by withholding access to resources? Will we associate with them, befriend them or avoid association with them?[45] More significantly, this negative cognitive response determines our willingness to use public resources to address racism and racial disparities.

Consideration of power is important to understand the role it plays in stigma. It is the social power behind stigma that differentiates it from stereotype and prejudice. A stereotype is a categorisation that can be either negative or positive; a prejudice is an endorsement of these categorical stereotypes. Thus although any individual can encounter stereotypes and prejudice—even, as has been reported, young, white British men[46]—this does not always result in the social opprobrium that is stigmatisation. They may suffer negative stereotypes but are neither tainted

[43] P Bachrach and MS Baratz 'Two Faces of Power' (1962) 56 *The American Political Science Review* 4, 947.

[44] J Gaventa, 'Finding the Spaces for Change: A Power Analysis' (2006) 37(6) *Institute of Development Studies Bulletin* 23.

[45] Gottlieb and Gotttlieb, 'Stereotypic Attitudes' (n 38).

[46] 'Young, white British men are the least popular group in the country, according to a poll that shows the public think that they drink too much, are lazy, promiscuous and rude.' R Bennett, 'Young, white British males really do have a bad name' *The Times* (17 December 2015), available at http://www.thetimes.co.uk/tto/news/uk/article4643023.ece.

for life nor subjected as a result to discrimination, that is, a 'behavioral response based on prejudice' that is likely to harm the members of that group.[47] Despite the data on educational attainment, young, white British men remain the most likely to go to university and to obtain the most important senior leadership positions in every branch of politics and sector of industry in this country. By contrast, young black British men remain over-represented in the criminal justice[48] and prison system, and the least likely of all demographic groups to go to university. This suggests that skin colour is inescapable unlike being Irish.[49]

Critical social psychology therefore embeds stigma in social relations and social context. From this perspective stigmatisation is characterised as a process that is contingent on access to social, economic and political power.[50] Stigma is the consequence of a continuum of disempowerment, that results in the experience of discrimination. It is this critical psychological understanding of stigma that underpins the anti-stigma principle.

The purpose of Chapter 2 is to provide an overview of current approaches in law to protection from discrimination. The chapter sketches a historical review of the development of the anti-discrimination principle in international law, beginning with the use of Aristotelian ideas in Ancient Greece. Aristotle's ideas on equality are frequently used as a starting point for understanding what this idea means. However, his morality has been described as 'a morality of the privileged, a morality … that requires the services of women and other Others to maintain its integrity'.[51] Indeed, his vision of equality was not at all inclusive: it was limited only to those who were equal as a functional necessity to secure political stability and the status quo. During the later period of the Enlightenment inequality took on two forms: natural and political. Only the latter was seen as the avoidable consequence of human behaviour to reserve power and privilege for the few at the expense of the many. Yet Enlightenment philosophers such as Rousseau offered few suggestions to address this. Later Romantics such as Herder and Hegel saw no need to address this—the natural distribution of talents was the source of uniqueness and individuality. Toleration of inequality was the price to be paid for individual brilliance.

Tolerance and celebration of 'natural' difference was arguably the basis for the pseudo-science of eugenics which imparted intellectual credence to racist systems such as slavery, colonialism, apartheid and national socialism. It was this thinking that had to be overcome using international norms. Chapter 2 discusses

[47] P Corrigan, FE Markowitz, A Watson, D Rowan and MA Kubiak, 'An Attribution Model of Public Discrimination towards Persons with Mental Illness' (2003) 44 *Journal of Health and Social Behavior* 162, 163.

[48] Home office figures for 2010 to 2015 show that black men were three times more likely to be tasered than white men. See 'Black people "three times more likely" to be Tasered', BBC News, 13 October 2015, available at http://www.bbc.co.uk/news/uk-34511532.

[49] N Ignatiev, *How the Irish Became White* (New York, Routledge, 1995).

[50] BG Link and JC Phelan, 'Conceptualizing Stigma' (2001) 27 *Annual Review of Sociology* 363.

[51] SL Hoagland, 'Engaged Moral Agency' (1999) 4 *Ethics and the Environment* 91, 93.

the development of the UN Declaration of Human Rights (UNDHR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Drawing upon material from the diaries of John Humphries,[52] the chapter identifies some of the religious and political tensions underlying the UNDHR in its ambitious goal of creating a 'new universal society'. The diaries also show the difficulties at the time in understanding the relationship between prejudice and discrimination.

Humphries, a professor of law at McGill University in Canada, became the Director of the Human Rights Division in the UN Commission of Human Rights tasked with preparation of the International Bill of Rights that would provide a new baseline for international morality. He negotiated every provision. History has proved him correct in his assessment of the importance of the UNDHR but wrong in relation to the ICERD: he foresaw that the political and moral function of the Declaration would be its most important function, but underestimated the value of the work of the Sub-Commission on Discrimination, which prepared the groundwork for the ICERD. As this chapter shows, the ICERD has also exerted significant moral and political authority in the legal entrenchment of the anti-discrimination principle. I provide examples of the different ways in which this has been done. Some countries, for example Britain, the USA and Australia, carefully iterate in closed lists every group that will enjoy legal protection, while others, including Canada and South Africa, provide examples and leave scope for other grounds to be included (open lists). The chapter ends with discussion of the concepts of dignity and immutability, and their use in international and national anti-discrimination law by way of preparation for consideration of stigma in Chapter 3.

Chapter 3 opens the exploration of the role of stigma in law. It has a very simple objective—to provide an overview of where this idea appears in litigation. It will be seen that stigma is used by judges, albeit in an ad hoc and general way, across a range of cases from criminal to family law. The idea has also appeared in discussion on cases concerning discrimination, for example, *Hoffman* in South Africa, *Law* in Canada and *CHEZ* in the European Union. This leads into the introduction in Chapter 4 of the anti-stigma principle, drawing upon the concept as developed by critical stigma scholars discussed in Chapter 1. Chapter 4 also presents different models of stigma created by psychologists and public health researchers. Elements are adopted from these models to create a multi-level dynanic anti-stigma principle that will guide the creation of categories and action in anti-discrimination law. In this chapter I also explain the scope and priorities of an anti-discrimination law informed by the anti-stigma principle. It will be seen that the anti-stigma principle can change the priorities in anti-discrimination law. First, it makes social action to tackle discrimination the norm rather than the exception; second, it embraces complexity rather than shunning it; and, finally, it opens discrimination law to additional protected characteristics that are not immutable.

[52] AJ Hobbins, *On the Edge of Greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights* (Montreal, McGill University Libraries, 1996).

The key contribution of the anti-stigma principle is that it creates a new lens through which to view the current tools of anti-discrimination law. Highlighting social responsibility in anti-discrimination law throws up a different question. In relation to individual responsibility, the question asked is one of explanation ('Why did A do X?'); in relation to social responsibility, the relevant question is one of enablement ('Why could A do X?'). Attention does not therefore fall on the individual perpetrator alone but also on the context within which their action is set: Why could young girls in Rochdale be groomed by adult men? Why could 200 schoolgirls in Nigeria be kidnapped by Boko Haram? How were these young women ejected from the realm of the right to regard in the minds of their abusers and captors? Why could a disabled man be killed by his neighbours? Why can young black men be shot dead with impunity? What feeds such contempt in individual minds? Arguably, public stigma made these things possible thus there is social as well as individual responsibility.

Recognition of the social role in discrimination creates the potential for more socially focused remedies in anti-discrimination law, strengthening and even going beyond positive action and public sector equality duties. Thus stigma can modernise the vision of anti-discrimination law: it can improve what, how and who anti-discrimination law 'sees'. In terms of 'what', it includes the social as well as the individual level; in relation to 'how' it accomodates intersectional and single dimension discrimination and in respect of 'who' it broadens the personal scope to groups defined by, for example, weight. A model of 'ecological anti-discrimination law' can replace the prevailing single-dimension version. In the ecological version, the priority moves from individual attributes and behavioural deficits to social meanings and discourses, such as the stigma of obesity and the representation of fat in the media.[53] These specific contributions of the anti-stigma principle will be discussed in the final chapters of the book, which focus on the application of the anti-stigma principle.

## II. Application of the Anti-stigma Principle

Chapter 5 takes up the first of these contributions. Pursuing the link with public health, it posits discrimination as a virus that can be tackled using public health tools. It is interesting to consider what becomes possible when discrimination is re-imagined as a public virus. I suggest that depicting discrimination as a virus, or non-communicable disease (NCD) has analytical and practical advantages. First, this requires consideration of how the discrimination virus is transmitted as well as how it looks, sounds and feels. Second, this creates an opportunity to apply methods used in the field of public health to tackle discrimination: if it is

[53] K Holland, RW Blood, SL Thomas and S Lewis 'Challenging Stereotypes and Legitimating Fat: An Analysis of Obese People's Views on News Media Reporting Guidelines and Promoting Body Diversity', 51 *Journal of Sociology* 431-45.

regarded as a virus, discrimination has to be addressed not only at the interpersonal and structural levels, but also at the public and individual level. Public action to combat discrimination is therefore as important as individual remedies.

Tackling discrimination as a virus also makes its eradication everybody's business. As with other NCD's, public action becomes a norm. Thinking of discrimination as an NCD draws attention to the role of the public in addressing this risk: public action, including but not limited to education, is required to stem its progress. Thus to think of discrimination as a virus highlights its effect on the environment, not only the impact of discrimination on the public but also the role of public action in containing its spread—public action can be both cause and cure. The discussion moves away from solely focusing on individual or institutional behavioural change and emphasises the role of social action in both perpetuation and resolution of discrimination.

As mentioned above, this approach is similar to the social model of disability which focuses on the characteristics of the environment that make everyday activities and interactions difficult for persons with physical or sensory limitations. The anti-stigma principle makes this social approach the norm for anti-discrimination law in general rather than disability discrimination alone. However, the anti-stigma principle adds the idea of power to the social model and identifies multiple levels for intervention.

Chapter 5 presents the argument that if the public level is the source of stigma then anti-discrimination law must acknowledge and address the role of the environment or context within which discriminatory behaviour occurs. With this acknowledgement comes acceptance that individual perpetrators take the cue for their behaviour from public norms and narratives—these act as a resource for discriminatory ideas and create a backdrop for face-to-face discriminatory behaviour. Arguably, persons who discriminate do so with some consciousness of a public norm that will sanction their behaviour unless—and sometimes even if—they are caught. Nadeem Saddique, a firearms officer who once guarded Tony Blair, wrote in his complaint about an inspector who had described him as a 'black c***' and 'just a P***', it is the environment that supports or excludes discriminatory behaviour. His words below make the point with poignant simplicity:

> I wonder why they feel so confident in the work environment to make such comments and display robust racism? One has to come to the conclusion that this is an environment where they feel so comfortable as no one challenges it and in most cases it is positively encouraged.[54]

[54] 'Firearms officer wins case against Cleveland police over racism' *The Guardian* (25 November 2015) available at https://www.theguardian.com/uk-news/2015/nov/25/nadeem-saddique-firearms-officer-cleveland-police-racism. Nadeem Saddique had joined the police force in 1991, just before the murder of Stephen Lawrence, and so should have been the beneficiary of the new spirit with the police under the Race Equality Duty. This was not so, and Cleveland Police continued to allow the type of sentiment and culture to flourish that contributed to the death of Lawrence. For example, Saddique told the tribunal that a firearms colleague displayed an English Defence League sticker on the holster of his weapon. The badge made reference to Muslims and a crusade, the tribunal found.

Silencing the social aspect of discrimination leads to responses that in effect tackle symptoms but overlook the key source of discrimination. The anti-stigma principle therefore does not ignore the social: it highlights social power and enables analysis of discrimination in the environment. In order to illustrate how discrimination can be tackled as an NCD, this chapter draws upon the experience of tackling a major medical epidemic such as ebola. For example, one of the key tasks in tackling a public health virus is identification of modes of transmission. I therefore consider the media as one of the key mechanisms for transmission of stigma at the social level.

Chapter 5 also considers the practical tools in the Equality Act 2010 that could be of use, such as the provisions for positive action and the public sector equality duty. I suggest that neither tool is rigorous enough: positive action is confusing and voluntary, while the public sector equality duty although obligatory imposes only a superficial duty. What is required is a tool that directly addresses 'common sense' and actively challenges individuals in particular and society as a whole on a regular basis to confront stigmas and take responsibility for them. I therefore suggest an alternative in the form of education and training at the workplace. This tool would be presented and promoted as integral to workplace health and well-being agendas, which would help it to avoid the controversy that sometimes arises in relation to positive action and the public sector equality duty.

From 'what' in Chapter 5, Chapter 6 discusses *how* anti-discrimination law 'sees'. Traditionally, this field of law has used a single dimension vision, seeing each attribute separately and forcing complainants to choose just one ground under which to bring their claim, for example either gender, race or religion.[55] The theory of intersectional discrimination, however, argues that there are times when such a choice is impossible due to the interaction of the attributes. As put by Scales-Trent, employers, landlords and institutions do not discriminate in neat categories.[56] If perpetrators do not pick grounds, why must victims? Intersectionality theory therefore promotes a disruption of the categories of anti-discrimination law to address its structural blindness. The aim thereby is to enable anti-discrimination law to more effectively tackle structural discrimination.

It is important to clarify what is meant by 'social structure'.[57] The social structure can be thought of as two-dimensional: the first dimension is the *relational*:– 'systemic relationships between individuals in their social roles', for example at work. The second dimension is the *institutional*: the formal and informal institutions and networks mediating those relationships.[58] From a structural perspective, discrimination is not the consequence of actions by any 'perceiver' but the result

[55] PK Chew, 'Freeing Racial Harassment from the Sexual Harassment Model' (2007) *University of Pittsburgh School of Law Working Paper Series*, No 54.

[56] J Scales-Trent, 'Black Women in the Constitution: Finding Our Place and Asserting Our Rights' (1989) 24 *Harvard Civil Rights-Civil Liberties Law Review* 16.

[57] J Lopez and J Scott, *Social Structure* (Buckingham, Open University Press, 2000).

[58] J Turner, 'American Individualism and Structural Injustice: Tocqueville, Gender, and Race' (2008) 40 *Polity* 197.

of accepted habits, rules, practices and procedures, such as the seniority system at General Motors within the context of 'Jim Crow'[59] that caused black women workers to be the 'last in and first out'.

As will be seen, the theory of intersectional discrimination has ambitious substantive goals that require more than can be achieved using current provisions for indirect and institutional discrimination. Although provisions on 'indirect' discrimination can be used to address structural discrimination, they are limited as, ultimately, indirect discrimination can be justified if the discrimination arises in pursuit of a legitimate aim and the means are seen to be proportionate. The chapter considers the challenges arising from the attempt to provide a legal remedy for direct intersectional discrimination. It discusses the various responses to intersectionality, for example the concern that the 'sex-plus' approach treated black women as a departure from a white norm, as if 'being a woman or being black were like icing on a cake' rather than an 'integrated, undifferentiated, complete whole' consciousness.[60] I suggest the anti-stigma principle avoids these problems by enabling anti-discrimination law to see differently.

Chapters 7 and 8 then consider who anti-discrimination law 'sees'. Chapter 7 discusses how the anti-stigma principle can enable anti-discrimination law to extend its scope of protection, without losing its sense of boundaries. Chapter 8 does the opposite, showing how the anti-stigma principle helps anti-discrimination law retain its boundaries. Chapter 7 focuses on 'fattism'. Discrimination against the overweight or obese is a growing problem. According to Roehling, 'weight discrimination in the American workplace is a widespread phenomenon that has a significant negative impact on the lives of untold individuals',[61] and being 'slightly overweight, extremely overweight, or obese are all generally viewed in various employment contexts as less desirable than being average or thin'.[62] Weight discrimination is evident at every phase of the employment cycle including career counselling, selection, placement, compensation, promotion, discipline and dismissal.[63] Researchers have also found that 'if hired, persons who are obese are often assigned to non-visible jobs, receive more disciplinary actions, have their performance evaluated more negatively and earn less when compared to non-obese employees'.[64]

There is some evidence that the social approach intrinsic in the anti-stigma principle is being recognised in strategies to tackle obesity. In recognition of the

[59] M Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, The New Press, 2010).

[60] R Austin, 'Sapphire Bound!' (1989) 3 *Wisconsin Law Review* 539.

[61] MV Roehling, 'Weight Discrimination in the Workplace: Ethical Issues and Analysis' (2002) 40 *Journal of Business Ethics* 177, 187.

[62] MP Bell, ME McLaughlin and JM Sequeira, 'Age, Disability and Obesity: Similarities, Differences and Common Threads' in MS Stockdale and FJ Crosby (eds), '*The Psychology and Management of Workplace Diversity* (Malden: Blackwell Publishing, 2003) 210.

[63] MV Roehling, 'Weight Discrimination in the Workplace' (n 61).

[64] Bell et al, 'Age, Disability and Obesity' (n 62).

obesogenic environment in which we live, the All Party Parliamentary Group on Obesity calls for an ecological approach to obesity to be taken. As suggested in Chapter 4, they recommend an approach applied at a population level, rather than at the individual level, to shift the emphasis away from current unsuccessful strategies that view obesity as a personal disorder requiring treatment. Their approach 'regards obesity as a normal response to an abnormal environment, rather than vice versa'.[65]

The anti-stigma principle would not be useful if it did not also provide a systematic method to determine what should not be brought within the scope of anti-discrimination law. Its effectiveness in this task is shown in Chapter 8, in the context of tattoos. A tattoo is a modern day form of voluntary branding, now linked with 'coming of age' and freedom of expression rather than deviant behaviour, such as criminal activities or violence. However, persons with tattoos are not protected from discrimination—discrimination in employment may help to explain why tattoo removal has increased 440% in the last 10 years.[66] Should such individuals be protected? If yes, why, and if not, why not? Tattooing has a lengthy and interesting cultural history and there are a wide variety of tattooing practices with different origins and objectives across cultures. There is also a diversity of opinion among people of all ages as to whether tattoos are a 'positive, negative or neutral' presence in the workplace. Opinion is often informed by the type and location of the workplace, its mode of business and clientele, and the individuals who work there. There is no single approach taken by an employer—some are tattoo friendly, others are 'tattoo phobic'—and in the absence of a clear policy it can depend upon the individual manager. The more traditional or conservative the workspace, the more negative the attitude to tattoos is likely to be. Should the state take a position on this, forcing all employers to be tattoo friendly? Chapter 8 illustrates how legislators would apply the anti-stigma principle to decide this.

The book concludes with some thoughts on how regulation of discrimination can be holistic even if legal protection from discrimination is not universal. The 'anti-stigma principle' is a way to create an equality law that is neither *per se* inclusive nor exclusive. The anti-stigma principle allows anti-discrimination law to adopt a more flexible approach, which would allow this law to protect more groups that currently stand outside the law. This is important because as Theran points out, it enables 'a much closer relationship between the law (especially legislators) and the social sciences, since, in many cases, what the law considers a "new" or as yet untouched problem has actually been the subject of research for many years'.[67]

[65] All-Party Parliamentary Group on Obesity, 'Carrot and Stick: The Behavioural and Psychological Aspects of Obesity Management' (Meeting 5 Report, 9 July 2003).

[66] 'Ink blots', The Economist (2 August 20140, available at http://www.economist.com/news/united-states/21610334-body-art-growing-more-popular-though-few-employers-are-keen-ink-blots.

[67] EE Theran, 'Free to Be Arbitrary and … Capricious: Weight-Based Discrimination and the Logic of American Antidiscrimination Law' (2001) 11 *Cornell Journal of Law and Public Policy* 113.