

Is Disability Discrimination Different?

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Among the least controversial claims that can be made about disability is that it is a complex phenomenon. The physical and mental characteristics classified as impairments, abnormalities, or diseases are, on the one hand, makers for stereotyping, stigmatization, and exclusion; on the other, they are limitations of structure or function that arguably cause disadvantages independently of, or in interaction with, social attitudes or practices.¹ The question I will address is whether we can have a coherent disability discrimination law that takes account of only the first aspect of impairment, as a stigmatized characteristic and a target of exclusionary practices; the aspect in which an impairment is like dark skin, female sex, or homosexual orientation. I will not consider whether a comprehensive disability policy could limit itself to this aspect. Few would deny that a comprehensive policy which made no provision for medical, rehabilitative, and support services would be radically deficient. In disability-studies terms, my question is whether the U.K. Social Model of Disability, restricting “disability” to social exclusion on the basis of impairment² can provide an adequate foundation for disability discrimination law.

I will examine two issues that appear to suggest a negative answer. Both illustrate the interplay of the two aspects of impairment—as stigmata and as limitations—in disability law and policy. Both can be, and have been, adduced to argue that disability discrimination is different from other forms of discrimination.

The first issue is more familiar. It concerns the fit of “reasonable accommodation” with anti-discrimination law. Some scholars claim that reasonable accommodation is really a form of redistribution, introduced under an anti-discrimination rubric but designed to shift costs attributable to the functional deficits of people with disabilities.³ If that view is correct, then disability discrimination law cannot ignore the other aspect of impairment, as an independent source of disadvantage.

¹ David Wasserman, Adrienne Asch, Jeffrey Blustein, and Daniel Putnam, “Disability: Definitions, Models, Experience”, (2011) *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/disability/>>.

² Wasserman et al, “Disability: Definitions, Models, Experience” (n 1).

³ David Wasserman, “Distributive Justice”, in Anita Silvers, David Wasserman, and Mary B. Mahowald, eds., *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham, MD: Rowman & Littlefield, 1998) 189–207; Mark Kelman, “Defining the Antidiscrimination Norm to Defend It”, (2006) 43 *San Diego L. Rev.* 735.

The second issue may be less familiar. If one thinks of discrimination in broader terms, including not only the deliberate or negligent exclusion of people with a given characteristic, but also as including any state or state-sanctioned expression of the view that people with that characteristic are not full moral, social, or political equals, what are the implications for how one thinks of disability? On this broader view of discrimination, many familiar and uncontroversial disease- and accident-prevention policies may appear to discriminate against people with disabilities. If we wish to preserve those policies, even in modified form, we must take account of the functional aspect of impairment. We must acknowledge that it is sometimes appropriate to prevent functional limitations, and thereby reduce, often dramatically, the number of people with various disabilities. If so, we must distinguish disability discrimination from race and sex discrimination in one important respect.

I. Reasonable Accommodation and Discrimination

Under the Americans with Disabilities Act of 1990 (ADA), the failure to make “reasonable accommodations” for disabled employees or users of public facilities constitutes, with some notable exceptions, discrimination. Reasonable accommodations include ramps, elevators, Braille texts, sign-language interpreters, flexible work schedules, and job coaching. There is no reference to that concept in the legal definition of discrimination on the basis of race, sex, or age; the term was introduced in the 1964 Civil Rights Act to apply to discrimination on the basis of religion.⁴ Like the members of minority religious groups, but unlike women, people of color, or older people, people with disabilities are required by law to receive “reasonable accommodation” when it is appropriate.

For the social model of disability, which attributes all or most of the disadvantage in disability to exclusionary environments, reasonable accommodation requires the partial reconstruction of those environments. Such reconstruction can be costly. Unless people with disabilities are entitled to fully inclusive environment, a claim some scholars reject as incoherent,⁵ then at some point, the cost makes further reconstruction unreasonable. On this view, the legislative understanding of accommodation as a matter of distributive justice is reflected in the qualifying use of “reasonable” and the exemption of accommodations that pose an “undue” burden or hardship.⁶

But it is also possible to see reasonable accommodation as a requirement of equality for people with disabilities without recourse to a theory of distributive justice.⁷ Since the ADA’s passage, several legal scholars have challenged the “canonical distinction”

⁴ Alan Schuchman, “The Holy and the Handicapped: Different Applications of the Reasonable Accommodation Standard in Title VII and the ADA”, (1997) 73 *Indiana L. Rev.* 745.

⁵ Linda Barclay, “Disability, Respect and Justice”, (2010) 27(2) *J. Applied Philosophy* 154–71.

⁶ Wasserman, “Distributive Justice” (n 3).

⁷ See e.g. Mary Crossley, “Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project”, (2004) 35 *Rutgers L. J.* 861; Pamela S. Karlan and George Rutherglen, “Disabilities,

between anti-discrimination and accommodation.⁸ They have argued that ending discrimination against any group always involves economic costs, including extensive changes in hiring and promotion practices, lost customers, and maternity and parenting leave. Such leave has long been recognized as an accommodation—one that is critical in eliminating the stereotype-driven view of younger women as temporary employees. More broadly, critics of the distinction argue that (1) many once-excluded groups have differences that require accommodation in some settings, for example, integrating of women into the workplace may require the purchase of smaller-sized furniture and the provision of separate restrooms. The accommodations required by people with disabilities may often be more extensive, but only as a matter of degree; (2) the exclusion of women and racial minorities has often been informed by false or exaggerated beliefs about their limited competence or capacity. Such false beliefs about people with disabilities are pervasive, and may be even harder to correct.

The analogy to religious accommodation is also instructive. Accommodating religious practices may be expensive in various ways, but no one regards doing so either as compensating religions for their deficits or as achieving a just distribution of resources among religions. Either rationale would violate the state's constitutionally mandated neutrality towards religion. Rather, treating religions impartially, like treating citizens as moral and social equals, will sometimes require unequal provision. For disabilities as for religions, the extent of unequal provision required is indeterminate. This is not because we lack a complete theory of justice to specify the amount or proportion, but because the demands of equal respect are indeterminate. That assessment depends on context, and requires judgment rather than calculation. In requiring redistribution as a matter of justice, the mandate for reasonable accommodation need not be seen, then, as a form of distributive justice; its goal is not to produce a particular pattern of outcomes but to display equal respect.

Consider, for example, the question of how much would be reasonable for a small business to spend on an elevator or ground-floor space to be able to employ a talented IT technician with emphysema. To answer that question, we might do better to decide what respect for that person demands, rather than to consult a theory of distributive justice. In any case, it may be unreasonable to expect a determinate answer. But at the same time, the utter lack of accommodation in many workplaces and public facilities is clearly unjust on any plausible theory of justice.

Thus, the fact that reasonable accommodation is an explicit feature of disability- but not race- or sex-discrimination law need not be seen as showing that the former has a more redistributive character. Moreover, the ADA has always covered individuals who are merely “regarded as having” a disability or impairment. Reasonable accommodation is not appropriate for such individuals, for the simple reason that they have no significant functional or structural differences requiring

Discrimination, and Reasonable Accommodation”, (1996) 46(1) *Duke L. J.* 1–42; contra Kelman, “Defining the Antidiscrimination Norm to Defend It” (n 3).

⁸ Christine Jolls, “Antidiscrimination and Accommodation”, (2001) 115 *Harv. L. Rev.* 640; and Michael A. Stein, (2004) “Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination”, (2004) 153 *U. Pa. L. Rev.* 579.

accommodation. The ADA amendments (ADA Amendments Act 2008) recognize this, in explicitly excluding those individuals from the reasonable accommodation requirement (section 6(a)(1)(h)). But the fact that reasonable accommodation is unnecessary for people merely regarded as having an impairment does not make the failure to provide it to people with impairments any less discriminatory.

It is certainly possible to imagine societies in which anti-discrimination would require extensive accommodations for non-disabled minorities. Consider an African country in which the colonial occupiers had pursued a divide-and-conquer strategy by setting up a tribal group of short average stature to rule over a more populous tribal group of much taller average stature. Public buildings and facilities would not have been built to accommodate members of the taller group, since they would not have been considered fit to participate in many aspects of social and political life. To end discrimination in the post-colonial society, it would be necessary to overhaul or reconstruct numerous features of the built environment. The extent and character of the reconstruction required might be a matter of disagreement and negotiation. But the effort at integration would not be *bona fide* if it did not involve significant modifications. Whatever the required modifications, they would clearly not be understood to compensate tall people for their “internal deficits”, on the assumption that they suffered from inherently disadvantageous stature.

The analogy between tall stature and major impairments is limited, and its limits are debatable. But it does suggest that much of the accommodation now required for people with disabilities would not have been necessary if the built environment had been designed for people with significant physical and mental differences—whether or not they are classified as disabilities. The fact that the environment was not built to include a wider range of human variation may be due to oversight and stereotyping more than to hostility, but that does not deny that its reconstruction can be seen as an anti-discrimination measure.

In conclusion, the law can treat the failure to provide reasonable accommodation as discrimination when—and only when—it is appropriately regarded as an expression of stereotyping, devaluation, or contempt, rather than as unfair frugality in the distribution of resources.

II. Prevention, Correction, and Discrimination

The second issue I will explore is a gap between a commitment to the social equality of people with disabilities and accepted practices of disability prevention, from folic acid enrichment to seat-belt laws. This gap raises difficult issues about what it means to discriminate, or to discriminate wrongfully, against persons with disabilities.

I want to consider what is widely seen as an unproblematic form of prevention: taking folic acid during pregnancy to prevent neural tube defects.⁹ Most disability

⁹ I'll avoid the case of prenatal selection since I think the strongest objections to the practice are based on the morality of family creation—a subject that would take me far afield. Basically, I think that prospective parents should aspire to an ideal of unconditional welcome that would oppose

advocates do not object to this precautionary measure, and some governments mandate that certain food be enriched with folic acid. Such mandates are controversial, but the controversy concerns the issue of involuntary medication and possible side-effects rather than the intended preventative effect.

Imagine that a similarly safe and common drug could alter the sex of the fetus, or lighten its complexion. I suspect that most of us would find it troublesome for pregnant women to take that drug voluntarily, let alone for the government to put it in the food supply. Or imagine a Fluoride-like substance with similar effect, which could be safely added to the water supply. Fluoridation to “prevent” female sex or dark skin would strike most people as grossly discriminatory, even though it would not prevent the existence of anyone on the basis of a disfavored characteristic (unless we shared Anthony Appiah’s intuition that one’s sex is a necessary part of one’s numerical identity)¹⁰. I doubt that fluoridation to prevent disability would be seen as similarly objectionable. So what’s the difference?

The commonsense answer, I think, is something like this: It is not intrinsically worse to be black or female than white or male—any overall difference in well-being, however assessed, will result from discriminatory attitudes and practices. These attitudes and practices persist, which may make life more difficult for a black or female child. But just because of their persistence, we would display a form of complicity in modifying a black or female child to avoid or mitigate these adverse effects. If the disadvantages associated with disability were equally attributable to discriminatory attitudes and practices, it would be equally problematic to prevent or mitigate disability in our children. But even in the most inclusive society we can imagine, it would, in general or on average, be better to be non-disabled than disabled—at least for most disabilities. It might not be bad to be disabled, but it still would be disadvantageous in some ways, so we should prevent or correct disabilities prenatally, if we can do so without significant risk or burden to the future child or its parents.

I’m willing to concede that there is some truth to this commonsense view. But I think it needs to be significantly qualified. The most obvious point is that we may not be very good at imagining what an inclusive society would look like. Even allowing for this, however, it remains the case that many disabilities involve discomfort, disruption, pain, or shortened life expectancy, and to eliminate those features is to correct or modify rather than to accommodate disability. Adrienne Asch and I attempt to bracket this issue by focusing on what we call “static impairments”—the absence of a sensory, motor, or cognitive function without associated pain, discomfort, disruption, or shortened life expectancy.¹¹ This category may

selection against disabilities even if they were intrinsically harmful, or inimical to well-being (Adrienne Asch and David Wasserman, “Where is the Sin in Synecdoche: Prenatal Testing and the Parent-Child Relationship”, in David Wasserman, Rober Wachbroit, and Jerome Bickenbach, eds., *Quality of Life and Human Difference: Genetic Testing, Health Care, and Disability* (New York, NY: Cambridge University Press, 2005) 172–216.

¹⁰ Anthony Appiah, “‘But Would That Still Be Me?’ Notes on Gender, ‘Race’, Ethnicity, as Sources of ‘Identity’”, (1990) 87 *J. Philosophy* 493–99.

¹¹ Adrienne Asch and David Wasserman, “Making Embryos Healthy or Making Healthy Embryos: Differences Between Prenatal Treatment and Selection”, in *The Healthy Embryo* (Cambridge: Cambridge University Press, 2010).

be highly artificial, or unrepresentative of actual disabilities, but it permits us to isolate and address another claim: that because even in the most inclusive society, a blind person could not see, a quadriplegic could not walk, etc., (1) he would lack the inherent good of seeing or walking, even if he had completely adequate ways to get information about his physical and social environment and to move around in it; and (2) his life would, all else equal, be worse for lacking those goods.

The first claim seems obvious and incontrovertible. We argue, though, that it does not imply the second. Even on objective accounts of well-being, the lives of people with and without particular sensory or motor functions can go equally or incommensurably well. And even if there is a sense in which lives without those impairments can be said to go better, failing to prevent or correct static impairments is more appropriately seen as omitting to confer benefit rather than as causing harm.

Asch and I argue that in this respect, static impairments are akin to limited literacy. On a reasonably pluralistic view of well-being, one can live as good a life without as with education in many generally decent, hospitable environments. Yet we still see education as a good and strongly support literacy campaigns. But the good of literacy alone cannot explain why we require parents to educate their children. If we do, it is in part because the demands of specific environments make the failure to do so harmful, and not because a lack of education is inherently bad. The conclusion we draw in light of the education analogy is not that parents should hesitate to prevent disabilities in a fetus or child, but that prevention may have lower priority or urgency than commonly assumed.

Even if our analysis is plausible, however, it does not answer the question of why disability discrimination seems different from other forms of discrimination. If fluoridation to prevent disabilities were as safe as fluoridation to prevent tooth decay (and even cheaper than literacy campaigns), it would not need to be justified by the urgency of preventing major disabilities, or by the assumption that they were grave evils. Although seeing major disabilities as no worse than tooth decay would reflect a great leap forward in public attitudes, it would hardly be tantamount to seeing disabilities as akin, for public health purposes, to female sex or dark skin.

The difference remains even if we replace imposition with subsidy. Most of us would be highly skeptical of government funding for the development of a drug to alter sex or lighten skin perinatally. We would be less skeptical of government funding for a drug that would act perinatally to suppress the effects of an extra-chromosome 21, preventing not only the cardiac problems but also the intellectual limitations associated with Down syndrome. If such a drug had no adverse side-effects for mother or child, there would be few objections to its use by women who chose not to terminate. Indeed, many people would insist that those women had a duty to take the drug. Some disability advocates would lament the loss of diversity, and the virtual disappearance of people with the characteristic physical and psychological features of Down (although to talk about “characteristic features” is to engage in stereotyping—not all children with Down are effervescent and euphoric; some may even be dour). But few disability advocates, I think, would oppose funding for such a drug or criticize pregnant women for taking it.

In general, measures to prevent or reduce the incidence of other socially significant characteristics and conditions, from sex to rural living, would be considered objectionable or in need of special justification (such as population balance or economic development), whereas measures to prevent disabilities seem presumptively acceptable. The contrast is particularly stark in light of the fact that measures to alter stigmatized social identities are generally seen as more objectionable than measures to alter dominant social identities, e.g., skin lightening vs. skin darkening. It is just the reverse for disabilities. Giving deaf children cochlear implants is somewhat controversial; deafening hearing children would be considered child abuse. And this would be so even if the child were too young to have the self-conscious experience of hearing, had no other functional effects from being deafened, and faced no discrimination as a deaf child.

Moreover, the case for preventing disabilities seems even stronger for the state than for parents. Arguably, a parent has some latitude in the measures she is willing to take to prevent disabilities in her children, especially minor ones. There are a variety of reasons for this, ranging from the reluctance of the state to interfere with the parent-child relationship to the moral prerogative arguably enjoyed by parents to pursue non-standard conceptions of the good in raising children. But if the state has an even clearer duty to prevent disabilities than parents, its preventative measures raise far graver expressive concerns. The requirement that certain foods be enriched with folic acid to reduce the odds of neural tube defects expresses a negative view of those condition more loudly and clearly than the decision of an individual pregnant woman to take folic acid.

One response would be to deny that the message sent by the state was that it is bad or undesirable to have a disability. I agree that the state need not be expressing a view about the intrinsic disvalue of disability. Its message is more plausibly construed as a claim that it is bad or undesirable to have *too many* people with disabilities, because ensuring their health and welfare is very costly. This message hardly seems less insulting, even if current economic and technological circumstances give it some truth. And it is clearly a message of disability prevention programs. Thus, the Executive Summary of the (quasi-governmental) Institute of Medicine's report on *Disability in America: Toward a National Agenda for Prevention* states, as one of the six bulleted points on its first page, "Annual disability-related costs to the nation total more than \$170 billion". Some of this cost undoubtedly reflects an unjust and discriminatory lack of accommodation in the physical and social environment—a point the report's authors would likely endorse, since they go on to adopt a social model of disability. But the report is not about reconstructing the environment; it is about preventing disability. The prevention agenda does include improved health services for people with disabilities, but that is largely in the service of preventing further disability and disease.

I think we need to acknowledge both a significant difference between disability discrimination and discrimination on the basis of race or sex, and an abiding tension between the state's duty to show equal respect for its citizens and its duty to protect their welfare, in part by preventing disability. We can get a handle on this tension by again considering the state posture towards religion—traditionally

claimed to be one of strict neutrality. That ideal has long been assailed as impossible or incoherent, even when it is qualified as neutrality of aim or purposes rather than result. The state may, indeed, must, aim at certain goals, e.g., the political equality of its citizens, which are opposed by some religions. Although this pursuit may violate neutrality, it does not treat those religions with disrespect; it merely overrides their goals in pursuit of its own.

Nevertheless, adherents of religions whose tenets are challenged by the state may reasonably feel “discriminated against”. Imagine a religion committed to the view that women should play a strictly domestic role. Its beliefs and practices would be challenged in myriad ways by a state that aggressively pursued equal employment opportunities for women. Although the state would not force women of this religion to get jobs, it would not only increase the economic pressure on them to work (e.g., by denying families with one working spouse large tax breaks granted to families with two); it would forcefully express a view about the role of women that sharply contradicted the religious tenet that a woman’s place was in the home.

Some who find this conflict acceptable might claim that the discriminatory impact of disability prevention was more objectionable. Disability, unlike a belief in the religious tenet, is an immutable characteristic, which makes that impact harder to justify. Without entering the debate on the meaning or moral significance of immutability, it is clear that this objection exaggerates the difference between the two cases. Although an individual with the disability may not have chosen to be disabled, he did choose—at least to the same extent as the religious adherent—to make the challenged feature a central part of his social identity. Just as someone raised in the religion would be less offended by the state’s employment policies if he did not accept its tenets, someone born with the disability would be less offended by the state’s prevention policies if disability was not an important part of his identity.

In both cases, there is an undeniable tension between two political ideals—neutrality and equality in the case of religion; equality and health protection in the case of disability. And in both cases, that tension imposes constraints on state action. Because of the tension between its legitimate pursuit of its goal of equal employment opportunities and the ideal of neutrality, the state should pursue those goals in a way that is minimally offensive to religions with opposing views. Something similar holds for the state’s duty of equal respect for its citizens with disability. It is not enough to make the facile claim that we can separate the citizen from her disability; that claim would be rightly dismissed if we substituted race or sex. Rather, we must acknowledge the tension but insist that the state minimize its adverse impact on citizens with disabilities. It must endeavor to prevent disabilities in ways that do not exaggerate the difficulties of life with a disability, and which do not encourage pity for, or condescension toward, its disabled citizens. As in the case of religions whose goals are trumped by the pursuit of legitimate state goals, this mandate to minimize adverse impact is a matter of respect, not of political correctness.

Some concrete suggestions for reducing the tension in the case of disability are offered by Elizabeth Emens,¹² who focuses on several “framing contexts”—settings

¹² Elizabeth Emens, “Framing Disability”, (2012) *U. Ill. L. Rev.* 1383–441.

where non-disabled individuals are prompted to think about disability. Contexts such as accident-prevention education and product safety warnings offer “teachable moments”, with the opportunity to convey information to people at a time when they are unusually receptive. Emens proposes “framing rules” for these contexts, which require the presentation of more realistic, balanced information about disability. The purpose of these rules is not so much to modify behavior, but to change public attitudes toward disability. Emens argues that disability in these settings need not be presented as tragic or catastrophic for the cautionary message to be effective. Indeed, if disability is presented as unthinkable, it is less likely to be thought about at all, making the message less effective. A balanced message might, given the expectation of hysterical or melodramatic warnings, get more attention, and might actually increase deterrence by making it easier to contemplate what most non-disabled people would still regard as unpleasant possibilities.

Modified as Emens suggests, safety messages might prove far less offensive to disabled listeners. Even if realistic, balanced, and tactful messages would still cause some discomfort to disabled listeners, they would surely provoke far less embarrassment and hurt. But however we represent disabilities in prevention efforts, we are still seeking to prevent them. This stubborn fact will remain a source of tension and uncertainty in formulating or assessing a comprehensive anti-discrimination policy for disability.