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Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights

Anita Silvers†

In many areas... we confront historical practices giving particular significance to traits of difference... The right to be treated as an individual ignores... group membership; the right to object to... group membership re-invokes the trait that carries the negative meanings... Why do we encounter this dilemma about how to redress the negative consequences of difference without reenacting it?

I. INTRODUCTION

"Because women’s situations are so various and the forms of oppression we suffer are usually multiple, most feminist issues are inextricably involved with questions of... justice and... bias," writes feminist philosopher Alison Jaggar in describing the impetus for feminist social ethics. Following Jaggar, the immediate purpose of this essay is to explore how certain questions of bias and justice play out when women are situated so as to be identified as disabled. But the essay reflects a larger ambition as well, namely, to see how feminist thinking can be empowered to expunge bias against, and promote justice for, women with disabilities.

To both the narrower and the larger end, I will consider how feminist identity strategy, which has been liberatory for the typical or "normal" woman, responds to the bias that the general culture visits on women with disabilities. And I will ask how feminist liberatory theory should address

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the unjust curtailment of opportunity which is a commonplace experience for those women with disabilities who strive for "normal" social participation. Juxtaposed, these two lines of inquiry will indicate how identity strategy restricts, but how a disability perspective can further, feminist liberatory theory.

Over the past quarter-century, a new perspective on disability has stimulated a striking alteration in how American law conceptualizes disability. From this perspective, the medicalization of disability is supplanted by a social constructionist account. Feminist legal scholar Susan M. Wolf tells us that "feminists turn to the supposed biological fact of disability skeptically," which is the first step in accepting a disability perspective. In the spirit of Wolf's remarks, we will see why considerations of inclusiveness, intersectionality, and the danger of iterating women's historical oppression all urge that feminism acquire a disability perspective. We will also see how feminism can incorporate the disability perspective that informs the Americans with Disabilities Act. Finally, we will see that, with a disability perspective, disability identity can be constructed without reiterating the oppressive aspects of feminist identity strategies.

What occasions my project is the growing insistence of women with physical, sensory, or cognitive impairments that they are marginalized within feminist theory to an extent little different from how patriarchal society devalues them. For instance, Virginia Kallianes and Phyllis Rubenfeld write: "Disabled women have begun to articulate their criticism of . . . the feminist movement's failure to integrate into its agenda the perspectives of disabled women." They then cite eleven other essays by women with disabilities who have made this point over the past fifteen years, and their list hardly overlaps with my list of writers who voice the same concern. Recent work in feminist ethics is beginning to address this omission. Influential feminist scholars like Martha Minow, Susan Sherwin, Rosemarie Tong, and Iris Marion Young have made important contributions by commenting on the confluence of disability discrimination with gender oppression. For instance, as feminist bioethicist Susan Sherwin remarks: "The contextual analysis sought by feminist ethics involves examination of the phenomenology and politics that arise from being assigned a posi-

7. See generally Minow, supra note 1; Susan Sherwin, No Longer Patient: Feminist Ethics and Health Care (1992); Rosemarie Tong, Feminist Approaches to Bioethics, in Feminism and Bioethics: Beyond Reproduction, supra note 3, at 67; Iris Marion Young, Throwing Like a Girl and Other Essays in Feminist Philosophy and Social Theory (1990).
tion among the disabled in a society that demands perfection of its members." And the cultural criticism of feminists Katherine Pyne Addelson, Susan Bordo, Elizabeth Grosz, and Elizabeth Spelman, among others, has helped as well by illuminating the situations of all women who suffer because their bodies or minds fall away from cultural standards of perfection. All these writers open feminism to a disability perspective, but none fully incorporates the new model of disability that recently has emerged to inform American law and public policy.

This new model suggests an approach to addressing oppression which differs from the one favored by feminists who embrace the "politics of [group identity] recognition." In the next part, I explore the impact of the politics of recognition on feminist approaches to disability. Then, in Part III, I turn to the alternative of constructing a disability culture as a means of achieving political recognition. Finally, Part IV explicates the disability perspective that is exemplified by U.S. law prohibiting disability discrimination, and examinnes its significance for the politics of recognition.

II. THE POLITICS OF RECOGNITION AND FEMINIST APPROACHES TO DISABILITY

A. Feminist Identity Strategy

The political philosopher Charles Taylor introduced the expression "the politics of recognition" in his 1992 essay *The Politics of Recognition*, a much quoted analysis of how identity politics operates as a liberatory strategy within the tradition of democratic morality. Although Taylor's main concern is with the French-speaking cultural minority in Canada, his account has been applied to the situations of women and of people of color by such influential theorists of contemporary democratic theory as Amy Gutmann, Susan Wolf, and Anthony Appiah.

The model emerging from one's reading of Taylor and these other theorists frames the politics of recognition as typically relying on an ar-

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8. SHERWIN, supra note 7, at 91.
11. See id.
gument that unfolds through two stages. For example, feminist identity strategies focus on both gender-specific disparities of treatment and gender-specific commonalities of worth to establish their cause. First, they define the class whose status is to be elevated, e.g., the class of women, in terms of those characteristics which have been referenced by the general culture to explain or justify disparate treatment. Second, this type of argument revalorizes the characteristics associated with disparate treatment, establishing them as positive rather than negative features.

Displaying the class’s distinctive worth exposes the arbitrariness of subordinating the class’s members. So, as I have shown elsewhere, some feminists portray women as being disposed to caring for others. They hold that the actions which flow from this propensity are at least as worthy as those inspired by males’ preference for autonomous individualism. Caring, thereby revalued, together with its characteristic expression in loving and nurturing roles, is established as a model quality of women. Women’s worth thus is identified with the strategic value of their caring and nurturing roles.

As a consequence of its argument structure, feminist identity strategy constructs a model woman, different from but no less to be respected than any man. Doing so, however, works against the interest of women who do not approximate the definitive paradigms of the role(s) identified with their gender. These are women who do not manifest the characteristics which have been designated as establishing the class’s special value. In analyzing the politics of group recognition, Taylor acknowledges this consequence: to better attain “what the members of distinct [groups] really aspire to, which is [group] survival,” it is important to weigh treating all members of the group as being of equal importance, despite their differences from one another, “against the importance of [group] survival, and opt sometimes in favor of the latter.”

For women who are situated so as to be exposed to multiple sources of oppression, the politics of group identity thus can be distressing. Whereas once these women were bonded to others of their sex at least in respect to their mutually suffered rejection by the male culture, the politics of group identity disrupts this solidarity by advancing some women but reprising the rejection of others. As a consequence, women with disabilities experience subordination by the dominant culture for being members of the class of women, and again by feminist identity theory when it fails to adopt a disability perspective in recognizing women.

13. Cf. generally Appiah & Gutmann, supra note 12; Taylor, supra note 10.
14. See generally Silvers, supra note 6; see also An Ethic of Care: Feminist and Interdisciplinary Perspectives (Mary Jeanne Larrabee ed., 1993); Carol Gilligan, In a Different Voice: Psychological Theory and Women’s Development (1992); Women and Moral Theory (Eva Feder Kittay & Diana T. Mergers eds., 1987).
15. Taylor, supra note 10, at 61.
B. The Disability Perspective

There are several reasons for maintaining that feminist theorizing should cultivate a disability perspective. First, as feminism is committed to embracing women who are especially disadvantaged, adopting a disability perspective would further the goals of feminism. Second, adopting a disability perspective would enable feminist theory to expand to include the viewpoints of women who experience multiple sources of oppression. Finally, a disability perspective would enable feminist legal theory to acknowledge the commonalities in the experiences of women in general and women with disabilities in particular.

1. Women with disabilities and feminism

A first and very substantial reason for adopting a disability perspective is that feminism is rightly admired for its commitment to embrace women who are especially disadvantaged. For example, this commitment can be seen in the works of two notable scholars, Alison Jaggar, who states “that in addressing moral and political problems, we must give the interests of more disadvantaged women special consideration,”16 and Susan M. Wolf, who urges:

A feminist bioethics will pay special attention to subjects that emerge from the experiences of women who bear added burdens in dealing with . . . health care . . . . Built into feminist method is the insistence that analysis start with attention to the individual, particularity, and context . . . . A feminist bioethics would not group all females under the rubric “woman” and proceed with a monolithic analysis, but would deliberately attend to differences.17

For Wolf, feminism can and should incorporate the standpoint of women with disabilities.

Of course, accommodating the experiences of women with disabilities may be an issue for the adherents of some versions of feminist theory, especially those who embrace cultural feminism. As a leading feminist ethicist, Rosemarie Tong, describes it, cultural feminism stresses “[v]alorizing the traits and behaviors traditionally associated with women . . . [and] viewing separation from others as the quintessential harm.”18 Thus, cultural feminism elevates what is typical of females in our culture into regulative ideals. This is, of course, the liberatory approach recommended by the politics of recognition.

According to Tong, cultural feminists argue that women have “a unique perspective on the meaning of human connection” because
"[t]hrough their bodies women link one generation to the other." In respect to medical concerns, this manifests itself in a "focus on issues of caring . . . [evidenced by] the kind of relationships established between [a male with quadriplegia] and the [female] health care professionals assigned to his case." The conviction that women are better served by revaluing, rather than by rejecting, their customary social roles magnifies the importance of their traditional functions of loving and nurturing.

But women with disabilities commonly find themselves precluded from performing the major life functions commonly assigned to women. In particular, being separated from others by social and physical barriers that threaten family and community connections pervades the lifestyle of many people with disabilities. So cultural feminism's valorizing of women's traditional roles offers women with disabilities few realistically positive images or other validation of their lives as women. Because women with disabilities have little access to the relationships and roles cultural feminism celebrates, they may be denied full womanly standing by feminist theories which do not appreciate a disability perspective. To the extent feminist ethics takes itself to be centered by the usual activities of women's lives, women with disabilities may find themselves expected to affirm standpoints that emerge out of experiences they themselves are denied.

Cultural feminism may be advantageous to women generally because it revalues them by celebrating distinctively womanly characteristics. To avoid magnifying the tyranny of the normal which marginalizes women with disabilities and reiterating the old patterns which exclude them, however, feminism should seek a disability perspective, even if, as Jaggar cautions us about such attempts, doing so is "highly charged emotionally as well as morally" because practices which affect different groups of women differently "may involve . . . incompatibilities among important feminist values or principles." Another significant objection to introducing a disability perspective into feminism comes from those who urge that feminism must focus on securing gender equity. In discussing the hazards of feminist explorations on the margins where categories of oppression intersect, this group of feminists questions whether feminists have either the expertise or the mandate to address dimensions of inequality that are not gender-specific. Jaggar warns against permitting the fear of being "unfeminist" to derail consideration of women who are affected differently than most by the institutionalized mechanisms of domination.
This position about which Jaggar is concerned is narrower than that earlier advocated by Wolf. This gender-specific focus of inequality in feminism has nothing much to say about disability except in respect to whether the mistaken acceptance of "the supposed biological fact of disability" promotes oppression that is disproportionately visited upon women. To hold that feminism should focus on gender-specific elements of oppression means that, for example, in considering the propriety of the practice of sterilizing people with disabilities, the proper concern of feminism is whether more women than men suffered from it. Such a narrow focus is, of course, the outcome of taking gender-specific oppression to be feminism's single target.

The understanding of feminism that informs this narrow focus dictates that feminism should not concern itself with such sterilization programs (or likewise with eugenics or other "cleansing" programs) per se, no matter how oppressive they may be, but only with whatever aspects of them that can be shown to be gender-specific. Feminism's contribution on this interpretation is mainly to insist that women should not be held primarily responsible for being the vectors of the intergenerational transmission of disability and to avert the consequences of programs meant to reduce the numbers of people with disabilities from being visited primarily upon women.

A logical application of this interpretation is that feminism's prerogative and obligation will be thought to lie in critiquing only the gender differentiated implementation of sterilization policy, not the gender neutral theory of disability which underwrote it. Of course, such deference to gender specificity leads to odd conclusions, such as that feminists can be content with policies preventing women with disabilities from being mothers as long as men with disabilities are equally prohibited from being fathers. Wrongs visited on women because they are regarded as disabled fall outside the province of feminism, on this narrow interpretation of feminism.

2. Intersectionality

The feminist framework outlined above assumes that we can dissect how women with disabilities experience oppression into gender-specific and disability-specific elements. Yet, suffering exacerbated by multiple sources of bias cannot be so readily compartmentalized. Thus, a second reason why feminism should cultivate a disability perspective is that doing so enables theory to expand so as to comprehend better the standpoints of the many women whose experience lies mainly where various categories of oppression intersect.

23. Wolf, supra note 3, at 23.
Wolf reminds us that being identified with any minority group influences women's situations:

Until recently, the key concerns in bioethics have been mainly dyadic . . . . This has obscured the importance of groups to which actors may belong . . . . Indeed, as data emerge showing correlations between health care and gender, as well as race and insurance status, it becomes all the more important to consider an individual's membership or perceived membership in a group. 24

A conceptual framework that acknowledges this intersection of identity is needed to reflect how individuals who identify with more than one oppressed group are situated.

Legal theorist Kimberlé Crenshaw maintains that an effective discourse of liberation must be both complex and compounded, capable of exposing and transfiguring several categories of oppression simultaneously. 25 In commenting on the marginalization of women of color, she observes:

In order to include Black women, [feminism] must distance [itself] from earlier approaches in which experiences are relevant only when they are related to certain clearly identifiable causes (for example, the oppression of . . . women when based on gender) . . . . [T]he failure to embrace the complexities of compoundedness is not simply a matter of political will, but is also due to the influence of a way of thinking about discrimination which structures politics so that struggles are categorized as singular issues. 26

The narrowness Crenshaw identifies also diminishes the ability of feminism to acknowledge women with disabilities.

Like disability, women's race has affected how they are permitted to participate in sexual, procreative, and nurturing activities. Women of color have been assigned a status inferior to that of white women. Crenshaw says: "Black women were not presumed to be chaste," 27 so while, for white women, rape prosecution turned on whether to restore a violated woman's chastity, "[n]o such restoration was available to Black women, 28 because they were systematically precluded from assuming such a character. She charges that feminism's "singular focus on rape as a manifestation of male power over female sexuality" 29 is "an oversimplified account and an ultimately inadequate account" 30 because it ignores the institution-

24. Wolf, supra note 3, at 17.
26. Id.
27. Id. at 157.
28. Id. at 158.
29. Id.
30. Id. at 157.
alized difference between white and black women. Thus, an analysis of patriarchy rooted in white experience cannot address those aspects of intersectionality which pertain to female roles in which black women traditionally have been devalued. It is not only whether, but also the way in which, sexuality, procreation, and nurturing are valued that affects the inclusiveness of feminist discourse for both black and non-black women. Black women typically have had access to sexual, procreative, and nurturing roles but the social construction of their race has devalued their participation in them.

Similarly, the way society constructs disability commonly makes it difficult for women with disabilities to become wives or mothers, or to assume other social or nurturing roles. Thus, there are important commonalities between what women with disabilities report regarding the pertinence of central notions of feminist theory to their experience, and the concerns women of color have raised about feminism. Both live in a general culture that has denied members of their groups roles sought by women and characteristics admired in women.

With respect to women with disabilities, this conclusion is supported by census data showing that they have a much lower socio-cultural participation rate than their non-disabled female and disabled male counterparts. For instance, while more than half of non-disabled men, non-disabled women, and disabled men are employed, less than half of women with disabilities have employment. They are the group most likely to remain unmarried. Among persons who have married and are not widowed, 25% of female disabled, while only 12% of male non-disabled, 15% of female non-disabled, and 11% of male disabled, are divorced or separated. These data show the socio-cultural participation rate of women with disabilities descending below the combined straight-line projections of the participation rates of non-disabled women and men with disabilities, thereby suggesting that, combined, the two stigmas have a more than additive negative effect.

31. Indeed, slave women’s parenting of their own children was under constant threat of disruption; black women raised white women’s children, putting their energy into nurturing other women’s children to earn basic subsistence for their own.
32. See Tom Shakespear et al., The Sexual Politics of Disability: Untold Desires 58–66 (1996). For extensive documentation of practices that have a disparate impact on the sexual lives of people with disabilities, see generally id.
33. The Census Bureau’s survey reveals that 40–49 year old women with disabilities have a less-than-expected rate of labor force participation. Among the non-disabled, 91% of males had a job compared with 65% of females; for those with disabilities, the figures are 73% and 43%. See William John Hanna & Betsy Rogovsky, Women with Disabilities: Two Handicaps Plus, 6 Disability, Handicap & Soc’y 49, 52–53 (1991) (analyzing the Census Bureau’s 1984 Survey of Income and Program Participation, SIPP84-R3, focusing on data of 40–49 year olds).
34. See id. at 53.
35. See id. at 52.
36. See id.
A study by Hanna and Rogovsky demonstrates that this low socio-cultural participation rate is magnified by relatives and friends of disabled women who could not envision these women as functional wives and mothers. Addressing the disparity between disabled men and women in respect to marital status, a respondent pointedly summarized: "A disabled husband needs a wife to nurture him, but a disabled wife is not seen by society as capable of nurturing a husband who is not disabled."

Hanna and Rogovsky conclude that women in general, in contrast with men, are typically seen as having nurturing roles in our society, while women with physical disabilities are viewed differently, as incapable of nurturing—indeed, as dependent people who must themselves be nurtured.

This exclusion of women with disabilities from nurturing roles is both historical and deeply rooted. Several examples will illustrate this point. For instance, in the latter part of the nineteenth century, the model for teaching deaf children to communicate centered around the "normal" mother; deaf mothers were never mentioned. When college students were asked to free associate with the terms "woman" and "disabled woman," they connected sexuality, sexual relations, and mothering with the former, but loneliness and lifelessness with the latter. Susan Wendell reports being deeply impacted by how women disabled as adults "struggle with shame and loss of self-esteem at being transformed from people who took physical care of others (husbands and children) to people who [are] physically dependent.

Jaggar notes that "the Western tradition has consistently regarded women primarily as mothers and as sexual objects." Because women with disabilities commonly have not been regarded as such, their experience is not addressed whenever analyses of women’s oppression foreground these roles. For instance, a fact sheet prepared for the United Nations Fourth World Conference on Women states:

Women gave testimony as to how their disabilities had ended their marriages, isolated them from their families and communities, and destroyed their futures. Girls recounted how they were no longer regarded as future wives or mothers, but were instead hidden away from society. Unlike other women, they have little chance to enter a marriage which can offer a form of economic security. Around the world, disabled women are subjected to involuntary sterilization [and] pressured to or required to seek abortions.

37. Id. at 55.
38. See id. at 55–56.
42. Jaggar, supra note 2, at 7.
Because they are not permitted to execute maternal and sexual roles, the oppression of women with disabilities cannot be characterized in terms of how those assigned to these roles are subordinated.

That the general culture rejects life as a person with a disability is evidenced by the extent to which women with disabilities are discouraged from bearing and rearing children. Thus, the general culture limits disabled women's maternal occupation and leaves them "roleless." As disability attorney Deborah Kaplan argues, most contemporary thinking about prenatal screening manifests a cultural aversion to disability. In this environment of exclusion, the differences of women with disabilities dominate how they are perceived and what experiences are permitted to them.

A study of physically disabled young women in Sweden who have been the lifelong recipients of personal, parental, and medical care revealed that the women nevertheless seek their identity in traditional female caregiving roles. One of the study's authors, Karin Barron, comments on the women's rejection of the dependent role forced upon people with disabilities in favor of the traditional female caretaking role:

Instead of abandoning the mothering role, which has been described as a means of becoming 'equal' for women, disabled women may thus strive for this role ... [but] this is not the traditional role of disabled women [who] have traditionally been denied the role of homemakers and mothers.

Disability studies scholar Tom Shakespeare also describes the perceived incompatibility of disability with a sexual identity: "[D]isability is a very powerful identity, and one that has the power to transcend other identities .... For example, it has the power to de-sex people, so that people are viewed as disabled, not as men or women, straight or gay." Many women with disabilities feel this de-sexing from other women. "When I come into a room full of feminists, all they see is a wheelchair," reports disability activist and Assistant Secretary for the Office of Special Education and Rehabilitative Services Judy Heumann.

When I joined a women's consciousness-raising group a few years ago ... I listened in amazement and awe as the others delivered outraged accounts of their exploitation at the hands of bosses, boyfriends, and passersby ... [I]t

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47. ROSEMARIE GARLAND THOMSON, EXTRAORDINARY BODIES: FIGURING PHYSICAL DISABILITY IN AMERICAN CULTURE AND LITERATURE 26 (1997).
was impossible for me to confess my own reaction to their tales of horror, which was a very real sense of envy. Society had provided a place for them as women, however restricting that place might be . . . For myself and for other disabled women, sex discrimination is a secondary issue.\(^{48}\)

We now need to understand better how individuals can be banished to the margins of social participation and denied the roles customary for their gender by being identified as disabled.

3. **Reprising women's historical oppression**

Another reason for urging a disability perspective on feminism is that it highlights the similarities in the oppression experienced by women in general and women with disabilities. Today, disability is virtually identified with being physically, sensorily, or cognitively impaired, so much so that persons in these very different conditions and with very different degrees of impairment are referred to, collectively, as "the disabled." But originally, to have a disability meant having fewer, more limited, or more truncated rights than other classes of people. This usage persists in legal discourse today.

Thus, designating the class of individuals with physical, sensory, or cognitive impairments as "the disabled" introduces the thought that they are ineligible to be equally protected by the law. It is because law or tradition deems them incompetent, or else their impairments bar them from meaningful exercise of the usual rights, that they are deprived of a citizen's ordinary protections. For instance, women with disabilities have been frequent sufferers of surgical sterilization.\(^{49}\) While other women are expected to become mothers and may even be called upon to defend their choice to remain childless, women with disabilities are criticized for becoming pregnant.\(^{50}\) Those who have children are expected to prove that retaining their maternal roles is compatible with their children's welfare.\(^{51}\)

All women were once similarly marginalized by a group identity that placed them on the defensive because it marked group members as weak and incompetent. In fact, among the earliest targets of organized women's protests during the nineteenth century were laws specifying that to be a woman was to have disabilities. For example, a series of legal cases brought in the English courts in the latter half of the nineteenth century and the beginning of the twentieth century challenged women's legal

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\(^{48}\) Deborah Kent, *In Search of Liberation*, DISABLED USA, ISSUE 3, 1977, at 18.


\(^{50}\) See, e.g., Susan Shaul et al., *Like Other Women: Perspectives of Mothers with Physical Disabilities*, in *Women and Disability: The Double Handicap* 133, 133–34 (Nancy Brooks & Mary Jo Deegan, eds., 1985). See also Hanna & Rogovski, supra note 33, at 55–56.

status rather than their physical or cognitive condition, but their being characterized as a "weak" and thereby an inferior class arguably figured in rationalizing their unfavorable legal treatment.

Before being liberated by the early struggles of the women's movement, women, regardless of their personal competence, were disabled from voting, owning property, and obtaining custody of their children. Such limitations were justified by characterizing women as belonging to a group of persons whom nature made too weak and stupid, too physically and morally frail, to execute business and head households successfully. Susan Sherwin describes how medicalizing women's physical differences from men contributed to women being perceived as disabled:

The mid nineteenth century brought... a new medical interest... to establish menstruation as disability that demands rest and withdrawal from ordinary activities.... By the end of the century physicians were in the forefront of the campaign to... restrict [women's] participation in the suffrage campaigns that increasingly brought women into the political sphere.... [T]he prevailing medical attitude was that menstruation created invalids out of women and made them particularly unfit for activities demanding significant mental effort.... [N]o thought was given... to adapting the demands of the universities or the workplace to these supposed special needs of women.

We need not document at length how medicalizing elements of women's ordinary experiences as illnesses became a rationale for disempowering women by barring them from important social roles. It suffices to note that a correspondingly oppressive social or cultural history connects women's identification as a marginalized social group with disabled people's collective identity. Furthermore, despite having progressively liberated themselves from their former legal subordination, women still are disadvantaged by physical and social environments arranged to favor the physical and social preferences of men. So are people with disabilities. The influential political philosopher Iris Young cites this source of oppression when she attributes limitations in women's physical activity to the coercion of a patriarchal social structure that cannot abide having women manifest full proficiency: "Women in sexist society are physically handicapped. Insofar as we learn to live out our existence in accordance with the definition that patriarchal culture assigns to us, we are physically inhibited, confined, positioned and objectified."

52. See ALBIE SACHS & JOAN HOFF WILSON, SEXISM AND THE LAW: A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATES 22-34 (1978) (discussing the "persons" cases, in which, over a period of 60 years, British women continued to be denied legal status as "persons").

53. See id. at 53 ("One judge said he shared the widely held view that women were intellectually inferior to men, and in particular were incapable of severe and incessant work.").

54. SHERWIN, supra note 7, at 182.

55. For an excellent summary, see id.

56. YOUNG, supra note 7, at 153.
Even given that some women were demonstrably stronger and more competent than some men, women’s disabilities were defended as being in the state’s overriding interest. Society had to be protected from the typical woman’s supposedly hapless attempts at independence and, concomitantly, had to protect the typically helpless woman from demands that supposedly would overwhelm her. While its expressions are greatly reduced today, this oppressive assessment of women’s collective physical and emotional character has not been eliminated nor its deleterious influence fully erased.

Women as a group, no less than people with disabilities, diverge from able-bodied males—our entrenched dominant class—in how they conduct themselves both physically and cognitively. For instance, our workplace practice has not fully advanced beyond thinking of pregnancy, an element of the life plans of many women but of no men, as a disability. For some employers, the prospect of a pregnant worker still induces the fears more familiarly evoked if ill or impaired employees are in question. Such a pretext for exclusion—namely, that an individual’s fleshly functioning is disruptive because divergent from what is typical in the workplace—also is routinely invoked against people with physical or cognitive impairments, whose personal, civic, and commercial flourishing is chronically compromised by others regarding their presence as unsuitable, inconvenient, and awkward.

So whoever finds herself—through illness or accident, through inheritance or acquisition—in the intersect of these overlapping categories of oppression reasonably might presume to find understanding and support in the women’s movement. Women who live with physical, sensory, or cognitive impairments understandably might hope that, despite their difference from other women, feminist theory would illuminate their struggles rather than divide them from other women. Given the striking resemblances in how the general culture has operated to bar both women and people with disabilities from flourishing, those for whom both ways of identifying themselves are salient might plausibly expect feminist theory to illuminate how they can shape their lives in coherent response to the multiple forces that limit their options. Moreover, given their commonalities, the benefits of doubly centering disabled women’s self-reflection is a third reason for urging a disability perspective on feminism.

C. Feminism’s Failure to Include a Disability Perspective

Yet the center encompassing both feminism and disability theory does not appear to hold. With increasing insistence in recent years, women with disabilities have declared themselves to be marginalized within the women’s movement to an extent little different from their devaluation by patriarchal society. “Of great frustration to women with disabilities has been the reluctance of many women’s rights groups to include them and recognize their issues as women’s issues,”58 write Carol Gill, Kristi Kirschner, and Judith Panko Reis, arguing that “women with disabilities are one of the most isolated and invisible minority groups in this country.”59

There is, however, little clarity about why this is so. Most complaints about the disregard accorded women with disabilities within the women’s movement focus on contingencies or exigencies; namely, on how, in this matter, feminism itself is under the sway of and helpless against the corruption of the general culture. Because feminists are women who live in the general culture, it is thought they must carry within themselves the unfortunate psychosocial baggage that the general culture attaches to disability.

One version of this explanation found in the disability literature is that non-disabled women simply haven’t had the chance to get to know women with disabilities because the latter are made invisible in the general culture.60 Hence feminists cannot be expected to ascend beyond the general culture’s chronic disregard of persons who are physically, cognitively, or emotionally impaired.

Moreover, women without disabilities are supposed to fear women who are impaired, possibly because of their fear of becoming disabled themselves. Iris Marion Young remarks: “The only difference between myself and the wheelchair-bound person is my good luck. Encounter with the disabled person again produces the ambiguity of recognizing that the person whom I project as so different, so other, is nevertheless like me.”61 As G. Thomas Couser observes: “Part of what makes disability so threatening to the nondisabled, then, may be precisely the indistinctness and permeability of its boundaries; the border is patrolled vigilantly by

59. Id. at 357. See also B.S. Klein, We Are Who You Are: Feminism and Disability, Ms., Nov.–Dec. 1992, at 70–74.
60. Cf. Morris, supra note 40, at 85, 117–18 (discussing how women with disabilities are ignored and subordinated by society); Adrienne Asch & Michelle Fine, Introduction to WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS 1, 1 (Michelle Fine & Adriene Asch eds., 1988) (“Despite the prevalence of disability in this society, disabled persons tend to be invisible.”).
'normals' more out of fear that they may stray over it than out of fear of transgression by those on the other side.\textsuperscript{62}

Another reason cited for non-disabled women's disregard of women with disabilities is their fear of having to care for the disabled. According to Asch and Fine, non-disabled feminists are reluctant to engage with disabled women because they perceive them not as powerful, competent, and appealing females but instead as dependent, passive, and needy. Under this description, they constitute a threat to able-bodied women who are liable to be recruited to care for them because the culture assigns this burden to women rather than to men. "Non-disabled academics and activists who have fought hard for women's right to autonomy may fear disability . . . . Accepting the widespread, if inaccurate, belief that disability inevitably threatens independence, women know that it is they, as women, who will be called upon to care for the disabled individual."\textsuperscript{63} Feminism's marginalization of women with disabilities thus is traced to a merely peripheral aspect of it, namely, that it is situated within and so subjected to the failings of the general culture.

Yet this kind of defense of feminism is precarious. One reason women want to be feminists is their faith that feminist theory is powerful enough to liberate us from the negative effects induced by the general culture's gender tyranny. Thus our credence should be strained if, without further explanation, feminism is portrayed as forceful enough to liberate its adherents from cultural oppression based on gender, but simultaneously helpless in the face of general cultural repression directed at disability. This representation is as unfair to feminism as it is unfortunate for women with disabilities.

Few critics trace the problem to a more profoundly troubling source, that is, to structural aspects of feminist thought itself. One of the few authors who does so, British politician and disability studies scholar Jenny Morris, addresses the feminist fundamentals that marginalize women with disabilities. Morris—a mother, a winning politician, an activist buoyed on the rising tide of a flourishing feminist movement—injured her lower spine so that she lost the ability to walk, but retained all her political knowledge and skills, her relationship with her child, and her disposition to fight for social justice. Very little about her that had been of social value changed after the fall—certainly not the skills and knowledge she had demonstrated.\textsuperscript{64}

Yet, hers was a social as well as a physical fall, for in the eyes of others, she found, her life no longer seemed worth living. Morris writes:

\textsuperscript{62} G. THOMAS COUSER, RECOVERING BODIES: ILLNESS, DISABILITY, AND LIFE WRITING 178 (1997).
\textsuperscript{63} Asch & Fine, supra note 60, at 4.
\textsuperscript{64} See MORRIS, supra note 40, at 3–4.
Disabled people—men and women—have little opportunity to portray our own experiences within the general culture, or within . . . political movements. Our experience is isolated. . . . This lack of a voice, of the representation of our subjective reality, means that it is difficult for non-disabled (people) to incorporate our reality into their research and their theories, unless it is in terms of the way the non-disabled world sees us.65

Transitioning from the class of able-bodied people to the class of the disabled, Morris was shaken to find people without disabilities shunning her new standpoint. She discovered that her peers—the Marxist and feminist reformers with whom she previously ardently identified—had no interest in extending their theories to reflect the life of the kind of person she had become—that is, a nonwalking person.

To be isolated and ignored in theory as well as practice just because she could no longer walk, a capacity with little direct connection to her previous achievements, shocked and distressed Morris, as it has so many other newly disabled people. On the basis of her experience, she argues that feminism’s adoption of stand-point epistemology disadvantages women with disabilities because their voices are so rarely heard.66 Morris claims that to have a disability positions one differently from other women,67 but she leaves the coordinates of this disability perspective largely unspecified.

III. CONSTRUCTING A DISABILITY PERSPECTIVE FOR POLITICAL RECOGNITION

A. Defining Disability Identity: Embodiment

Very few philosophers, feminist or otherwise, have tried to delineate a disability perspective. Feminist philosopher Susan Wendell attempts to specify the coordinates of disability culture at which Jenny Morris hints. In The Rejected Body: Feminist Philosophical Reflections on Disability,68 Wendell suggests that a disability perspective characterizes experience from the position of an impaired body. Like Morris, Wendell was an adult when she experienced disablement.69 Wendell proposes that women with disabilities characteristically stand in a different relation to their bodies than other women do.70 Their troubled transactions in regard to their own bodies forestall their embracing a theory that glorifies the body. Wendell argues that feminism has centered on embodiment—rooting women’s

65. Id. at 8.
66. See id. at 7–9, 146.
67. See id. at 7–9.
69. See id. at 2.
70. See id. at 165–79.
identity in the reality of female bodies—without taking in disabled women’s experience of the negative body which stems from their experience of the body as a source of suffering. This reading of embodiment departs from those of feminists like Donna Haraway who take dissatisfaction with our bodies to be a socially curable phenomenon.

Wendell draws upon her own experience of disablement to inform her account, but her conceptualization also is influenced by the autoethnographic writing of Robert Murphy, an anthropologist whose 1987 book The Body Silent records his increasing paralysis from a spinal tumor. Murphy writes:

I have . . . become rather emotionally detached from my body, often referring to one of my limbs as the leg or the arm . . . . The paralytic becomes accustomed to being lifted, rolled, pushed, pulled, and twisted, and he survives this treatment by putting emotional distance between himself and his body.

One feature of the positionality characteristic of people with disabilities, Wendell suggests, is this unusual way of relating to their own bodies, a mode she claims is not acknowledged by feminism’s familiar analyses of embodiment. But just how feminism should respond is unclear. In formulating her account of how people with disabilities relate to their bodies, Wendell recognizes and relies on the contributions that disability writing has to make to studies of the politics of the body. She takes this writing to suggest that feminist theory must acknowledge the reality of suffering as well as of pleasurable bodies.

Yet even disability writing may not be sufficiently representative to be generally informative about disability, particularly among women. As G. Thomas Couser observes: “Given that disabled women outnumber disabled men, the prominence of published narratives of male paralysis says much about the gendering of disability.” Couser notes that these typically follow our cultural scripts of bodily dysfunction:

One significant pattern in their accounts is the redemptive shifting of emphasis from the body to the mind. Self-rehabilitation involves in large part redefining the self as more a function of mind and spirit than of the flesh. (Which is to say that it reinforces the cultural identification of men with the mind, women with the body, and the privileging of mind over body.)

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71. See id. at 166–69.
74. See WENDELL, supra note 68, at 177–79.
75. See id. at 178–79.
76. COUSER, supra note 62, at 184.
77. Id. at 185.
Although detaching from awareness of one’s dysfunctioning body is a technique adopted by people with certain disabilities, there is no reason to suppose that such experience is definitive of disability. In extensive reading of the writings by people with disabilities, I have observed that the language of detachment is not usually found in disability writing about blindness or deafness, nor does it seem to me to be applicable to cognitive disability. Some women with disabilities do detach in the way Wendell describes herself as doing, yet they too are excluded by feminist theory that elaborates on the cultural identification of women with the body.

As Stanley Fish, Professor of Law and English at Duke University, remarks: “Right now the body, in all its forms and functions, is big and serious business in the academy, and anyone who wants to participate in high-level discussions of literary, historical and cultural issues had better be thoroughly conversant with these new discourses.” Yet to be inclusive of women with disabilities, feminism should be wary of magnifying the general culture’s association of women with the body, however attractive a defense, against masculinist abstraction this may be.

Our culture is fixated on unusual bodies. Abnormal ones both attract and repel us, as evidenced by the horrified fascination engendered by nineteenth century freak shows and twentieth century telethons. Consequently, disability has moved to the forefront of cultural studies of embodiment. However, in this intellectual context, disability attracts interest precisely because it signifies alienation, of which the rolelessness of women with disabilities is an instance. Trading on the squalid exhilaration occasioned by our cultural infatuation with aberrancy does not seem a propitious approach to enhancing the opportunities for social participation of women with disabilities.

Moreover, regardless of whether the relevant condition of their bodies is interpreted as a cultural rather than a biological fact, the differences among the physical consequences of various disabilities and the permutations in how individuals experience the same impairment preclude plausibly positing that disablement is a specifiably distinctive kind of embodiment. As we have seen, what shapes the life plans of, and thereby identifies, people who have disabilities is not any single and thereby characteristic relation to their bodies. The cautions against formulating dis-

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79. See WENDELL, supra note 68, at 173-75.
80. Stanley Fish, School for the Scandalous, N.Y. TIMES, Nov. 21, 1997, at A27.
81. Think of such films as EDWARD SCISSORHANDS and the Disney version of THE HUNCHBACK OF NOTRE DAME. There is also a genre, exemplified by MY LEFT FOOT, that depicts the struggles of those with inoperative bodies. See also Fish, supra note 80 (reporting on a recent book that is "a volume in which an all-star roster, including the newly appointed president of Bryn Mawr College, contribute essays on the tongue, the anus, the breast, the belly, the entrails and so on" and that documents the increasing cultural fascination with sequestered body parts).
ability identity in such terms apply to all purportedly definitive accounts of disabled women’s embodiment.

How, then, should women with disabilities define themselves for the purposes of feminist identity strategy? To do so successfully and authentically, they cannot be expected to think of themselves as women who merely happen to be disabled. Such a construction of identity would be as self-alienating as considering themselves to be persons with disabilities who merely happen to be women. Are there other factors in the disability experience that contribute to a common identity? What is meant by “a disability perspective,” and how can a disability perspective figure in the recognition of women?

B. Defining Disability Identity: Culture

The kind of rupturing event that Jenny Morris experienced—the remaking of one’s self as a cripple—occurs in the history of some but by no means all people with disabilities. Some slide progressively rather than fall precipitously into disability, while others have lived no other kind of life. Identities are built transactionally. One school of thought describes gendered identity as forming from the earliest stages of a child’s development out of interactions with, and consequent modeling on, adult behavior. According to this theory, racial and cultural identities also emerge from the child’s interactions both with members of her own and of other groups. Parents typically educate their children in the practices of their group; judgments about the group by those outside it also influence how a child identifies herself.

But there is no definitive life stage during which disability identity emerges. Most people with disabilities neither consider nor seek to acquire disability as their primary identity. Thus no master plot other than a narrative of limit or loss distinguishes the lives of people with disabilities. Nevertheless, it is increasingly claimed that people with disabilities are united through their identification with a disability culture.

Proponents of the disability culture urge the disability community to move beyond being concerned with civil rights. Because society views

83. See generally Appiah & Gutmann, supra note 12, at 89-95 (describing racial and cultural identity as transactionally-based).
84. People who seek benefits to which being identified as disabled would entitle them may be an exception. Almost no comparative research exists to elucidate how public benefits systems affect people’s identifying themselves as disabled or eschewing being identified as disabled.
85. “Disability culture” is not the same as “deaf culture.” The latter concept designates the cultural and social practices of persons whose primary language is Sign.
86. See Douglas Martin, Disability Culture: Eager to Bite the Hands That Would Feed Them, N.Y. Times, June 1, 1997, § 4 at 1, 6. See also Sharon Barnartt, Disability Culture or Disability Consciousness?, 7 J. Disability Pol’y Stud. 2, 8 (1996) (stating that the disability movement has two
people with disabilities as deficient, they say, a disability lifestyle is better for people with disabilities than trying futilely to integrate into the general culture. For instance, a recent New York Times article, Disability Culture: Eager to Bite the Hands That Would Feed Them, states that promoters of the disability culture "castigate Christopher Reeve for his campaign for a cure for spinal injury, saying it is unrealistic and offensive to people who have learned to live with their disabilities and indeed thrive on them." 87

Disability studies scholar Sharon Barnartt argues that the beliefs, attitudes, and values that are attributed to persons with disabilities do not constitute a separate cultural identity because they do not establish, attach to, or drive a distinct social structure.88 However, she proposes that we may wish to speak of a collective disability political consciousness, one which deplores court-assisted suicide, supported employment, work disincentives, telethons, lack of support for independent living and personal attendant services, and the neglect of disability rights guaranteeing inclusion, self-determination, public accommodations, and ADA enforcement.89

What we should notice here is that the first part of this list is an enumeration of collective evils which, in fact, people with disabilities are far from uniform in fearing. For example, although some disability groups may characterize physician-assisted suicide as murder, Americans with disabilities are much more divided about whether permitting the prescription of lethal medication to terminally ill patients, as seen in Oregon's Measure 16,90 is dangerous to them than, for example, African Americans are about the dangers of lynching.

Nor, beyond provisional agreement on the desirability of enforcing their civil rights and enhancing their social participation, do shared practices, goals, or views about what is good shape the lifestyles of people with disabilities. For instance, only 3.1% of individuals with disabilities aged forty-five to fifty-four, 6.1% of those aged fifty-five to sixty-four, and 11.5% of those aged sixty-five to seventy-nine use a personal attendant (either a paid individual or a family member) for help in executing daily living activities.91 According to the census data, only half of the severely disabled over age eighty, whom we usually think of as most fragile and dependent, use a personal attendant.92 Furthermore, work disincen-

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87. Martin, supra note 86, at 1.
88. See Sharon Barnartt, supra note 86, at 2, 3.
89. See id. at 6–7.
90. See PHYSICIAN ASSISTED SUICIDE: EXPANDING THE DEBATE (Margaret Battin et al. eds., forthcoming 1998).
92. See id.
tives are elements of many government benefits programs. However, the majority of working age Americans with severe disabilities do not receive government benefits. Consequently, it is unlikely that a disability culture occupied with increasing government benefits and attendant services will be broadly inclusive.

In promoting a disability culture, advocates explicitly pursue an identity strategy to appeal to a politics of recognition. Their doing so creates additional issues of intersectionality. For instance, collectivizing people with disabilities into a disability culture threatens to estrange them from other groups with which they identify.

To illustrate, British disability researcher Mark Priestly discusses the common exclusion in the United Kingdom invited by both Asian identity and disability identity strategies, but notes that these two strategies, as commonly pursued, are not compatible. The Asian practice of providing family support for relatives with disabilities, for instance, is in conflict with the British disability culture's expectation that public assistance should provide for such individuals. Priestly is concerned that people with disabilities who identify equally or even primarily with ethnic minority groups will jeopardize the political solidarity of the disability movement:

The necessary emphasis on disablement as a common oppressive experience may in itself be seen as oppressive. Yet, to emphasize difference at the expense of commonality would be to undermine the precious legitimacy and cohesion which makes the movement a potential agent for social change on behalf of all disabled people.

But individuals with disabilities can bond in their common effort to eliminate physical and attitudinal barriers to their equitable exercise of talent and access to opportunity without abandoning the lifestyles with which they first identified in order to adopt that promoted by the disability culture. Whoever insists on the political necessity of promoting a disability culture mistakes identity, which is directive of lifestyles, for the solidarity that is a desirable attribute for political action. Solidarity can be strong even among individuals with divergent identities, especially when

93. See id. at 4 (discussing means-testing for cash, food, medical coverage, and rent assistance).
94. See id.
95. As I have argued at the beginning of this section, for many people, disability is not their primary identification because their disabilities occur after they have developed their gendered, ethnic, and/or racial identities. It is also true that not all social interactions experienced by people with disabilities are conducted in terms of their disabilities. To the extent their transactions are conducted in other terms, such individuals are likely to identify themselves by reference to these other terms rather than to their disabilities.
97. See id. at 162.
98. Id. at 165.
there is a common oppressor to defeat. Nor should the irony of insisting on disability identity as a liberatory strategy escape us here. For to sequester individuals with disabilities from a culture of family support by imposing reliance on public services distances them from their kin and can intensify their isolation.

C. Disability Identity: Discrimination

Many people with disabilities fiercely guard their individual approaches to life. While to be so limited as to be disabled may preclude one from achieving certain outcomes, it may instead simply necessitate that one pursue those outcomes in a different way. So, for instance, impairment may dictate that reading is executed through touch, talking through gesture, mobilizing by wheeling rather than walking. On the other hand, impairment may prevent the function’s being executed at all. Moreover, an exceptionally limited repertoire of abilities so nuances how one relates to one’s environment that even individuals similarly impaired diverge from each other in how they perform, especially if neither their talents nor their environments are identical.

The relevant kind of performance here is so immediately and nonreflectively visceral that its mode of execution often cannot be described, let alone generalized. This is why it is ineffective to expect people who fall into the same category of impairment to perform identically, and why it is not merely hard but inappropriate to teach someone else how to be disabled (although suggesting adaptive strategies may be very helpful). For example, I can no more convey the experience of calculating every breath (as I must do) to you than you can make me know what it is like to go about one’s daily activities oblivious to the pressing and persistent need to breathe.

For these reasons, as well, it is misleading to take one person with a disability as speaking for others, or to presume that to adjust an environment for one will facilitate most others. Disability thus introduces difference of a different order. To be disabled is, fundamentally, to be unique in one’s mode(s) of performance. To be so makes one exceptionally vulnerable to, and unduly limited by, policies, practices, and environments designed to be applied uniformly on the basis of what is common to a class.

A proposed airline policy will help to probe this proposition. In the late 1970s, some disability activists urged U.S. airlines to issue free tickets to personal attendants traveling with mobility impaired individuals. For a chronicling of these events, see JAN LITTLE, IF IT WEREN’T FOR THE HONOR—I’D RATHER HAVE WALKED: PREVIOUSLY UNTOLD TALES OF THE JOURNEY TO THE A.D.A. 161–66 (1996).
proposed to prohibit all individuals with disabilities from traveling without attendants. Yet this proposed policy jeopardized the employment of thousands of people with disabilities for whom airline travel was a job requirement and who had neither access to nor need of personal attendants. This and similar threats to curtail disabled people’s access to air travel led to the Air Carrier Access Act of 1986.100

This case illustrates why collectivizing people with disabilities does not advance them either individually or as a group. Homogenizing people who function differently from one another injures some, even if advancing others. Collectivizing disability perspectives thus competes with acknowledging the singular ways in which people with disabilities succeed. Consequently, being identified with a disability group norm appears to be no more advantageous to the equal recognition of all women with disabilities than is their being held to a gendered norm.

D. An Alternative Approach: the Social Model of Disability

Disability culture advocate Carol Gill explains that social rejection is the impetus for embracing the disability culture: “Even if we have a minor disability, we’re still different—because society won’t let us forget that we’re different.”101 But from a disability perspective, such rejection is not a given to be accepted and adapted to but is, instead, an arbitrary social fabrication that cries out for reform. The conviction that disability is a social construction rather than a biological fact emerged in the 1970s from how disability advocates saw their own situations and where they perceived the conditions that limited them to lie. British disability studies scholar Mike Oliver writes:

[T]he social model of disability has been the foundation upon which disabled people have chosen to organize themselves collectively. This has resulted in unparalled success in changing the discourses around disability, in promoting disability as a civil rights issue and in developing schemes to give disabled people autonomy and control over their own lives.102

Analyzing disability this way occurred as a result of crossovers from radical philosophy to the disability movement in Britain. American disability activists adopted the social model of disability because it both illuminated how they experienced their restrictions and gave a direction to social reform.103 The 1990 Americans with Disabilities Act (“ADA”)104 is thor-

103. For one of the original articulations of the social model of disability, see VICTOR FINKELSTEIN, ATTITUDES AND DISABLED PEOPLE (1980). See also Robert Funk, Disability Rights: From Caste to
REPRISING WOMEN'S DISABILITY

oughly grounded in the belief that disability is socially constructed. As we shall see, the conceptualization that blossoms in the ADA was cultivated in earlier case law. My reading posits the ADA's model of disability as applying both the social constructivism of Hegel, Marx, and Foucault and the classical liberalism of the American civil rights movement.

Recognizing how hostile environments, not personal deficits, disable people whose physical, sensory, or cognitive states are different from those of the dominant class is central to having a disability perspective, as scholar Liz Crow tells us:

[The] social model of disability... gave me an understanding of my life... what I had always known, deep down, was confirmed... It wasn't my body that was responsible for all my difficulties, it was external factors, the barriers constructed by the society in which I live.

The social model of disability was further refined during the 1980s in the new field of disability studies. Because it attributes the dysfunctions of people with physical, sensory, and cognitive impairments to their being situated in hostilely built and organized environments, the model construes the isolation of people with disabilities as the correctable product of how such individuals interact with stigmatizing social values and debilitating social arrangements rather than as the unavoidable outcome of their impairments.

This reconceptualization of what it means to be disabled has become a tenet of U.S. public policy in that it frames the ADA. The thrust of this view is that disability is not a "natural kind," nor is the attendant disadvantage an immutable fact of nature. Once it is recognized that no biological mandate nor evolutionary endorsement underwrites the optimal efficiency of the dominant group's fashions of functioning, we find that the main ingredient of being (perceived as) normal lies in being in an environment arranged to suit one's self.


105. See 42 U.S.C. § 12101(a)(7) (finding that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations... based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society").


E. Defining Disability: The Americans With Disabilities Act

The ADA, and its forebear, the amended Rehabilitation Act of 1973 encodes an important advance that contrasts with the way the class of the disabled is conceived in earlier disability policy and law. Who is designated as disabled has commonly been determined by the eligibility criteria for programs which offer charitable treatment, special public benefits, or exemptions from obligations to members of specific groups that the different charitable policies are designed to serve. As I have explained elsewhere, unlike the protection from disability discrimination afforded by the ADA, group-differentiated disability rights derived from entitlements are not corollaries of the principles or values of democratic political morality. Disability entitlements, benefits, insurance, and compensation are instances of special treatment, not equal treatment, and are the products of programs created for the purpose of sustaining and managing groups of people considered too weak, vulnerable, incompetent, or damaged to fend for or support themselves.

The approach that typifies such entitlement programs is narrower than the one designed to delineate disability discrimination for purposes of the ADA. Each entitlement program defines for itself what makes individuals eligible for benefits, so that, for instance, workers’ compensation programs define disability as dysfunction related to the performance of employer-assigned tasks, whereas disability is given a notably different meaning for the purposes of various publicly financed social welfare programs.

Disability in the context of the ADA means (a) the substantial limitation of one or more major life activities due to a physical or mental impairment; (b) having a history of such impairment; or (c) being regarded as so limited, even if one is not actually impaired. This three-prong definition is unlike the definitions of disability created for entitlement programs, all of which reflect prior agreements regarding the ultimate scope of the class of clients to be served.

111. See Silvers, Disability Rights, supra note 107; see also Anita Silvers, Reconciling Equality To Difference: Caring (F)or Justice for People with Disabilities, Hypatia, Winter 1995, at 30, 44–52.
115. See Berkowitz & Burkhauser, supra note 113, at 86 (discussing difference between disability insurance programs which use set of medical criteria to determine whether individual is “unable to engage in substantial gainful activity” and ADA scheme which uses reasonable accommodation requirement).
While entitlement programs define disability by focusing on what impaired individuals cannot do, the ADA addresses how they are competent. This is because the ADA’s broad approach views disability discrimination as the _misperception_ that being limited in performing major activities also limits competence. The ADA contains no notion of eligibility other than the demonstration that a competent individual has been discriminated against on the basis of an actual or imagined impairment rather than disadvantaged for some other reason.\(^{16}\)

The ADA thus establishes a generally applicable civil right rather than a group differentiated benefits right. Only some individuals can claim group differentiated disability rights to benefits, entitlements, insurance, and compensation. But the ADA assigns all individuals equally the right to be protected against disability discrimination, just as all are protected equally against race and sex discrimination. Expressing a disability perspective, it construes disability as an undeserved limitation created by unfair and unfavorable social treatment rather than as a limitation that is the outcome of an unfortunate personal state.

In this respect, the ADA differs from the United Kingdom’s 1995 Disability Discrimination Act ("DDA").\(^{17}\) The DDA protects only those with substantial physical or mental functional limitation, a narrow approach that diverges from the uniform protection British race and sex discrimination law affords to all alike as a right of citizenship.\(^{18}\) Regarded as deeply flawed by many British disability activists, the DDA is seen as continuing a paternalistic charity approach, entitling those deemed sufficiently unfortunate to special consideration.\(^{19}\)

\(^{16}\)_See 29 C.F.R. pt. 1630 app. (1997) (stating, in the interpretive guidance to 29 C.F.R. § 1630.2(l), that “[a]n individual rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities would be covered . . . whether or not the employer’s or other covered entity’s perception were shared by others in the field and whether or not the individual’s actual . . . condition would be considered a disability under the first or second point of this definition . . . . If an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on ‘myth, fear or stereotype,’ the individual will satisfy the ‘regarded as’ part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of ‘myth, fear and stereotype’ can be drawn”)

\(^{17}\)_Disability Discrimination Act, 1995, ch. 50 (Eng.).

\(^{18}\)_See id. § 1.

\(^{19}\)_For a summary, analysis, and comparison with the ADA, see Jenny Jacklin, Disability Discrimination: A Civil Rights Issue? in Disability Discrimination Act: An Enabling Act or a Discriminating Law? (visited February 8, 1998) <http://freespace.virgin.net/steven.jacklin/ddacivr.html>; see also Ken Davis, Disability and Legislation: Rights and Equality, in Beyond Disability: Toward an Enabling Society, supra note 78, at 124, 124–33 (discussing the U.K. welfarist approach, and contrasting it with the approach taken by several other countries, including the United States).
IV. The Disability Perspective that Informs U.S. Disability Discrimination Law

A. Evidence of a Disability Consciousness

Three years before Congress enacted the ADA, Robert Funk, at the time director of the Disability Rights Education and Defense Fund and later the Chief of Staff of the U.S. Equal Employment Opportunities Commission, effectively described the group assignment that burdens people with disabilities:

People who are disabled have historically been treated as objects of pity and fear—individuals who are incapable and neither expected nor willing to participate in or contribute to organized society. . . . This social construct has been supported by national welfare policies . . ., charitable programs, . . . and rehabilitation services . . . This has resulted in discriminatory programs, policies, and laws designed to deny disabled people's participation in organized society. These discriminatory policies and practices affect all classes of disabled people in virtually every aspect of their lives.120

Several years later, much of Funk's analysis quoted above was incorporated in the congressional findings that precede the definitions guiding the 1990 ADA:

[H]istorically, society has tended to isolate and segregate individuals with disabilities . . .; individuals with disabilities are a discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . . resulting from . . . assumptions not truly indicative of the . . . ability of such individuals to participate in, and contribute to, society.121

Political scientist and disability studies scholar Harlan Hahn testifies about how the disability discrimination described in the section of the ADA just quoted affects those people identified as disabled:

[O]ne of the most unpleasant features of the lifestyles of . . . disabled individuals . . . is the pervasive sense of physical and social isolation produced not only by the restrictions of the built environment but also by the aversive reactions of the nondisabled that often consign them to the role of distant friends or even mascots rather than to a more intimate status as peers, competitors, or mates . . . few nondisabled individuals would tolerate the curtailments of individual options that become part of the daily experience of people with disabilities.122

120. Funk, supra note 103, at 9.
Yet can being pitied, demeaned, and isolated because one is limited by the physical and social environment be the central elements of a life script that is definitive of disability? Writing about racism, the great African-American sociologist W.E.B. DuBois described this experience, calling it the "double consciousness". According to DuBois, a "double consciousness" is the debilitating awareness of stifled ambitions which result from "measuring one's soul by the tape of a world that looks on in amused contempt and pity."123 African-American legal theorist David Wilkins describes how this awareness contributes to an experienced collectivity and a shared identity:

[B]lacks cannot forget for one minute that they have a race; a race that links each individual black to the fate of every other black. Whether one takes the casual racism of the cab driver who refuses to pick up a black man on the assumption that he is a criminal, or the sophisticated 'statistical discrimination' of employers who judge individual blacks by the mean achievement levels of all blacks, black Americans know that their individual chances for achieving success in America are linked to the advancement of the race as a whole.124

People whose bodies or minds are classified as abnormal encounter similar systematic disregard of their actual capabilities. In The Politics of Disability, Joseph Stubbins writes: "The essence of disability is the social and economic consequences of being different from the majority."125

B. Case Law: Constructing the Protected Class

Case law has developed to illuminate how individuals with bodies or minds that are different from the majority's are subject to, and can be protected against, the social and economic consequences of their difference. Cook v. Rhode Island126 is a case that illustrates how disability discrimination law protects individuals who are judged with reference to their stereotypical body type rather than to their individual abilities. In 1988 Cook applied to fill a vacant state position as an institutional attendant, a job in which she had eight years of previous experience with a spotless work record. Both parties agreed that she had passed the routine pre-employment physical but she was denied the job because she was morbidly obese. Cook sued under section 504 of the Rehabilitation Act, with which

126. 10 F.3d 17 (1st Cir. 1993).
the employer Rhode Island's Department of Mental Health, Retardation, and Hospitals ("MHRH") was required to comply.\textsuperscript{127}

Cook claimed, and a jury agreed, that she had been subjected to disability discrimination. The employer appealed, claiming that morbid obesity is not a disability and that Cook thus could not seek redress under the Rehabilitation Act. The court of appeals agreed with the lower court, and in affirming its decision summarized: "[I]n a society that all too often confuses 'slim' with 'beautiful' or 'good,' morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences."\textsuperscript{128} We should not overlook the court's deeper message, namely, that disablement is not produced by the plaintiff's condition but rather by the character of the conduct to which the plaintiff was subjected. MHRH's repudiation of Cook constituted disability discrimination because of the character of its rejection of Cook.

In order to understand how MHRH's conduct against Cook transgressed federal law, it is useful to review how "disability" or "handicap" has been understood in anti-discrimination law since the early 1970s. Originally, the Rehabilitation Act defined a "handicapped" person as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services."\textsuperscript{129} In 1974 the Act was amended to define a person with a disability as someone who: (a) has a physical or mental impairment, (b) has a record of such, a physical or mental impairment, or (c) is regarded as having such a physical or mental impairment.\textsuperscript{130} Notice that the earlier definition is conjunctive, meaning that both conditions must be satisfied, while the later definition is disjunctive, meaning that only one of the three conditions needs to be satisfied.

In \textit{School Board of Nassau County v. Arline},\textsuperscript{131} the Supreme Court addressed the definition of a handicapped individual under the Rehabilitation Act, assessing the scope intended by Congress. Justice Brennan, writing for the majority, noted:

Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual . . . . The Senate Report provides as an example of a person who would be covered . . . . 'a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning.' Such an impairment might not diminish a person's physi-

\begin{itemize}
\item \textsuperscript{127} See id. at 20–21.
\item \textsuperscript{128} Id. at 28.
\item \textsuperscript{129} Pub. L. No. 93-112, 7(6), 87 Stat. 355, 362 (1973).
\item \textsuperscript{131} 480 U.S. 273 (1987).
\end{itemize}
cal or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment. 132

In 1990, the ADA reiterated the amended Rehabilitation Act's test (substituting "disability" for "handicap") for identifying persons protected against the hostility of built or arranged environments that exclude them from opportunities they are otherwise competent to pursue. 133 However, Cook could not originally sue under the ADA which became law two years after she was refused employment. The Court of Appeals applied interpretive guidance from the regulations implementing the ADA because it reasoned that "[t]he Rehabilitation Act seeks not only to aid the disabled, but also to 'eliminate discrimination on the basis of handicap.'" 134 The appellate court found that because the employer, MHRH, argued that Cook's physical state "foreclosed a broad range of employment options in the health care industry...[d]etached jurors reasonably could have found that this pessimistic assessment of plaintiff's capabilities demonstrated that appellant regarded" Cook as satisfying the "regarded as" prong of the disjunctive definition of disability. 135 As the jury also reasonably found that Cook was able to execute the essential tasks of the job, 136 the appellate court affirmed the judgment. 137 In other words, Cook deserved protection against disability discrimination simply because MHRH rejected her on the basis of a theory that falsely equated her physical condition with incompetence.

More than a decade earlier, another appellate ruling similarly demonstrated that falsely theorizing incompetence on the basis of an individual's physical or mental condition is the core of disability discrimination. In Pushkin v. Regents of the University of Colorado, 138 the Court of Appeals for the Tenth Circuit affirmed the judgment of the district court, holding that Dr. Pushkin had been denied admission to a psychiatric residency because he suffered from multiple sclerosis. The psychiatrists who testified in the case intimated that Dr. Pushkin's disability was causing him to be excessively angry, and that in their view, his "pushing away" of this anger would render him incapable of being a psychiatrist. 139 While denying, for obvious legal reasons, that Dr. Pushkin had been rejected due to his disability per se, 140 a reasonable gloss on their testimony is that they considered mental disorders to be the result of displaced emotions. From  

132. Id. at 282–83 (citing S. Rep. No. 93-1297, at 64 (1974)).
133. See supra text accompanying note 114.
134. Cook v. Rhode Island, 10 F.3d 17, 26 (1st Cir. 1993) (citing 45 C.F.R. § 84.1).
135. See id. at 25.
136. See id. at 26–28.
137. See id. at 28.
138. 658 F.2d 1372 (10th Cir. 1981).
139. Cf. id. at 1387–88.
140. See id. at 1388.
this point of view, severe disability caused anger, often suppressed and thereby displaced, from which it followed that anyone who used a wheelchair must be unable to relate well to patients. Guided by their mistaken beliefs about Pushkin’s disability, the senior psychiatrists who interviewed Pushkin all found him unqualified.\footnote{141}

As quoted in the appellate decision, the opinions of the senior psychiatrists have so little to do with documentable objective fact as to be laughable. One claimed that Pushkin was unqualified to be admitted to the residency in part because the work would make him unhappy.\footnote{142} Another gave primacy to his own subjectivity, feeling that he himself could “never meet Dr. Pushkin head on” and that “there was some organicity here that impaired Dr. Pushkin being able to engage with him.”\footnote{143} The same physician insisted that “[t]here is some delirium” when a person has MS,\footnote{144} a patent mistake about medical fact. A third also privileged subjectivity, rejecting Pushkin because he “elicits strong feelings in people” and because “I had a sense that he is very angry underneath.”\footnote{145} The senior psychiatrists displaced their own discomfort about disability onto Pushkin. They then justified their subjectivity in terms of a theory which assimilated physical to emotional ill health.

The appellate record documents that Pushkin’s two former supervisors, one a psychiatrist at the Menninger Foundation and the other a senior psychiatrist at the University of Colorado, found him to have normal emotional responses and good relationships with patients.\footnote{146} The appellate court concluded that the interviewers’ rejection of Pushkin rested on “psychologic theory” that was “weak and inadequate.”\footnote{147} The record demonstrated that the reasons the interviewers found Pushkin to be unqualified because of his handicap were based on “incorrect assumptions” or “inadequate factual grounds” regarding his physical condition.\footnote{148}

C. A Summary of the Perspective that Informs U.S. Disability Discrimination Law: Fair Individualized Opportunity

The physical capabilities of Pushkin and Cook were different; Pushkin was physically limited and Cook was not. Pushkin and Cook share neither physical nor cultural identity. Their commonality lies rather in their
being subjected to false and biased theories that precluded their proving their talent.

Traditional democratic political morality accepts natural inequalities stemming from differences in talent but condemns artificial inequalities stemming from unfair social arrangements. Especially detestable is the arbitrary use of power to deny demonstration of talent. Having fair opportunity to exhibit one’s talents is an important theme in disability discrimination law. Consequently, there is a burden on plaintiffs to demonstrate that they are qualified and could perform but for the conditions imposed by the defendant that have an unfavorable impact because of the plaintiff’s physical or mental state. But the burden shifts to defendants to show why conditions that, in view of the plaintiff’s physical or mental state, suppress the individual’s talents are not arbitrary and why it would be an undue burden to ameliorate such disparately unfavorable conditions.

The requirement to reasonably accommodate a disability is a central feature of current U.S. disability discrimination law. Reasonable accommodation is sometimes conceived of as a protective or privileging benefit, but this is a mistake which confuses disability discrimination law with disability benefits programs. Reasonable accommodation is not intended to make it easier for persons to meet performance standards because they have disabilities, for to do so would be to create a special entitlement to have standards relaxed. Instead, reasonable accommodation corrects the unfavorably disparate impact that an arbitrary or alterable feature of the environment, or of a practice or policy, has on an individual by reason of her disability.

For example, printed text has a disparate impact on the opportunity of people who are visually impaired to execute performances
that rely on the text’s information; a reasonable accommodation provides the information in an accessible format (Braille, or audio tape, or computer text file) so as to equalize the conditions under which visually impaired people perform.

Talent is an individual, not a group, characteristic. Whether one is permitted to exercise one's idiosyncratic configuration of talents undoubtedly is influenced by one's group identification. But which talents one enjoys and what modes one finds most functional for expressing them is persistently individualized. Reasonable accommodation ensures that an individual’s talent is not sacrificed just because the person’s modes of performance are considered impaired or abnormal or odd. Because physical or mental impairment can bar an individual from selecting the most common or popular mode for demonstrating her talents, ensuring that people with disabilities have fair opportunity to display their talents compels disability discrimination law to be inherently individualistic. It is this individualized dimension of the ADA that is described in the Equal Employment Opportunity Commission’s Interpretive Guidance on the ADA as a “different approach” from the Civil Rights Act of 1964.  

V. CONCLUSION

In Making All The Difference: Inclusion, Exclusion, and American Law, feminist legal scholar Martha Minow notes that “the idea of the abstract individual” undergirds the prevalent social contract legal theory. She admits that “[a]n admirable commitment to... inclusion accompanies this idea... that all individuals, if removed from context, would share a fundamental humanity.” However, she argues, abstracting from context creates artificial, far from inclusive norms “in the public sphere (but) obscures the power of assigned differences in the private sphere. On the basis of those differences, women, children, and disabled people have historically been denied participation... in the... public sphere.”

As we have seen, however, accentuating group differences is no way to accommodate, let alone embrace, individual differences. Group identity strategy is a political method that merely reprises the exclusion of minorities from collective interactions. That is because no component of group identity strategy precludes or protects against such interactions being shaped by false and biased theories about the competency of minority members of the group, as is illustrated by the false theorizing that impelled the discriminatory rejection of Dr. Pushkin and Ms. Cook. Group identity strategy relies on theorizing to establish the positive worth of

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154. See Minow, supra note 1, at 151.
155. Id. at 152.
156. Id.
typical members of the group. In doing so, group identity strategy invites theorizing that devalues atypical members of the group.

In answer to Minow's worry about abstraction, the reconceptualization of disability that influences the amended Rehabilitation Act and inspires the ADA does not sacrifice difference to idealized individualism. Rather, it admits even the most seemingly deviant kinds of difference by rendering individualism concrete. Hence the insistent theme in ADA implementation regulations that judgment is to be on a case-by-case basis. 157 It is the concrete detail of the contextualized case—the plaintiff's abilities, the defendant's motivation, and the alternatives available to each—that determines whether the plaintiff's opportunities to demonstrate her talents and enjoy their fruits have been arbitrarily or unfairly curtailed by the defendant's policies or practices.

Minow correctly disputes whether the idea of the person can be abstracted from context. In formulating her challenge, she cites feminist scholars Alison Jaggar, Susan Muller Okin, Genevieve Lloyd, Carol Gilligan, and Audre Lorde as questioning "whether the idea of the abstract individual ever did or could apply to women" and asserting that "[t]he presentation of a type of human being as though it described all human beings risks excluding any who do not fit or treating such misfits as deviant." 158 How can feminist theory implement this undoubtedly feminist insight into its own development?

It can do so by adopting a disability perspective. The logic of group identity strategy requires abstracting from the individualized talents of group members to talents that typify the group. But by its very nature, a disability perspective must eschew talent obscuring homogenization in favor of a policy that encourages individualized difference.

As reconceptualized by the provisions of the ADA, civil rights protection derives from neither abstracted generalities about universal human norms nor from equally abstracted celebrations of group specific norms. Civil rights protection safeguards against the foreclosure of opportunity due to false or inappropriate generalizing about what being a member of a marginalized group means. To incorporate this safeguard, feminism should abandon group identity strategy for the strategy of concrete individualization and its corollary, the celebration of singular rather than collective avenues of execution for exercising one's talents. In doing so, feminism

157. See, e.g., 29 C.F.R. pt. 1630 app. (stating, in the interpretive guidance to 29 C.F.R. § 1630.9, that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that includes both the employer and the qualified individual with a disability").

158. Id. at 153.
will regard women in virtue of themselves rather than regarding women only if they are the same.