SPECIAL ISSUE

Law and the Imagining of Difference

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SPECIAL ISSUE: LAW AND THE IMAGINING OF DIFFERENCE

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CHAPTER 1

DIFFERENTIATING ASSIMILATION

Douglas NeJaime

ABSTRACT

This chapter uncovers the destabilizing and transformative dimensions of a legal process commonly described as assimilation. Lawyers working on behalf of a marginalized group often argue that the group merits inclusion in dominant institutions, and they do so by casting the group as like the majority. Scholars have criticized claims of this kind for affirming the status quo and muting significant differences of the excluded group. Yet, this chapter shows how these claims may also disrupt the status quo, transform dominant institutions, and convert distinctive features of the excluded group into more widely shared legal norms. This dynamic is observed in the context of lesbian, gay, bisexual, and transgender (LGBT) rights, and specifically through attention to three phases of LGBT advocacy: (1) claims to parental recognition of unmarried same-sex parents, (2) claims to marriage, and (3) claims regarding the consequences of marriage for same-sex parents. The analysis shows how claims that appeared assimilationist – demanding inclusion in marriage and parenthood by arguing that same-sex couples are similarly situated to their different-sex counterparts – subtly challenged and reshaped

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legal norms governing parenthood, including marital parenthood. While this chapter focuses on LGBT claims, it uncovers a dynamic that may exist in other settings.

Keywords: assimilation; same-sex marriage; sexual orientation; parentage; parenthood; family law; LGBT rights; constitutional law; *Obergefell* v. *Hodges*; social movements; cause lawyering

1. INTRODUCTION

Assimilation entails incorporation into the mainstream. For a previously excluded or marginalized group, assimilation involves not merely integration but loss – loss of distinctive identity, loss of subculture, and loss of opposition to dominant practices and institutions. Examples of such loss abound in legal scholarship and cultural commentary; the costs of assimilation are borne by immigrants (Chamallas, 1994, pp. 2407–2408; Montoya, 1994, pp. 193–194; Perea, 1994, pp. 857–862), racial minorities (Carbado & Gulati, 2000, pp. 1279–1293; Peller, 1990, pp. 762–763), women (Finley, 1986, pp. 1142–1143; Littleton, 1981, pp. 487–488; Rhode, 1988, pp. 1202–1206), and people with disabilities (Maatman, 1996, pp. 331–337; McCluskey, 2010, pp. 148–150). Consider also lesbian, gay, bisexual, and transgender (LGBT) individuals (Yoshino, 2006). Through demands for inclusion in traditional institutions like marriage and parenthood, gays and lesbians assimilated to heterosexual norms and erased unique dimensions of queer life. Important forms of intimacy and family receded or disappeared.

Yet, as this chapter shows, assimilation entails more than loss; it entails the promise of new meanings and institutional norms. Assimilation can be a generative process in which not only is the assimilated group altered but mainstream practices are remade. This chapter focuses on the dynamics of assimilation specifically with respect to law, showing how legal claims that appear assimilationist may subtly challenge and reshape legal norms structuring dominant institutions.[1]

The transformative dimensions of assimilation are uncovered through a detailed study of LGBT claims to family recognition.[2] LGBT advocates demanded inclusion in mainstream institutions – marriage and parenthood – by arguing that same-sex couples are similarly situated to their different-sex counterparts. Yet advocates did not simply assert sameness on the terms that defined existing institutions. Rather, they marginalized key features – gender

differentiation, sexual procreation, and biological parenthood – that distinguished same-sex couples from their different-sex counterparts. Focusing elsewhere, advocates emphasized points of commonality between the families formed by same-sex and different-sex couples. They stressed adult romantic affiliation and emotional and economic interdependence as key elements of spousal relationships. Further, they drew on relatively unconventional practices of family formation – namely, the use of assisted reproductive technologies (ART) – that cut across same-sex and different-sex couples with children. In doing so, advocates articulated understandings of parenthood – specifically, intentional and functional parenthood – that could be located within emerging heterosexual practices but could also encompass practically all same-sex family formation. Through this process, advocates refashioned marriage and parenthood in ways that aligned with LGBT existence. Ultimately, assimilationist claims reconfigured the axes on which similarity was understood and transformed aspects of the very institutions in which LGBT individuals sought inclusion.[3]

In identifying and unpacking the unappreciated potential of assimilation, this chapter contributes to three related bodies of scholarship that focus on the meaning and implications of a social movement's turn to law. First, sociolegal scholars have explored both the moderating *and* transformative effects of legal mobilization (Brown-Nagin, 2005, pp. 1440–1441, 1443, 1510; Cummings, 2009, pp. 65–74; Leachman, 2016, p. 655; McCann & Silverstein, 1998, p. 261; Sarat & Scheingold, 2006, p. 4, 12). Scholars have analyzed, in Michael McCann's description, "the constitutive role of legal rights both as a strategic resource *and* as a constraint, as a source of empowerment and disempowerment, for struggles to transform, or to reconstitute, the terms of social relations and power" (McCann, 2004, p. 578). This work on the double-edged nature of legal strategies tends to focus on the consequences of the turn to law and litigation generally (McCann, 2004, p. 514; McCann & Silverstein, 1998, pp. 266–267), rather than on the concrete and substantive consequences of legal claims themselves.[4] Instead of asking whether and how legal tactics hinder or advance progressive change, this chapter asks whether and how specific legal claims affirm or transform the norms and principles that structure central legal relationships.

Next, left-progressive scholars, working in law as well as in other disciplines, have devoted much attention to the conservative implications of a social movement's turn to law. When movements translate demands into viable legal claims, they frame grievances within the bounds of legal doctrine and appeal to the logics accepted by government actors (NeJaime, 2013b, p. 877). They ask that existing practices and arrangements be reformed in

ways that meet the requirements of established legal norms. They demand that law treat them like those already regarded as insiders, and they seek inclusion in institutions that law has long protected. In other words, they willingly assimilate. Scholars have faulted this mode of claims-making for prioritizing formal over substantive equality and institutional reform over societal transformation (Joshi, 2014, pp. 207–208; Robson, 2002, pp. 709, 719). On this view, claims premised on sameness and claims seeking inclusion portend moderation, rather than transformation.[5]

While crediting important insights from this literature, this chapter shows how the conservative and limiting consequences of assimilation can exist alongside more transformative dimensions. Through claims premised on sameness and inclusion, features that mark the excluded group as different can be subtly integrated into law. Moreover, institutions can be reconstituted in ways that reflect the distinctive practices of those long subject to exclusion. To see this dynamic, this chapter focuses on the subtle ways in which legal claims are developed and expressed. As Martha Minow has observed in one of the most important and insightful treatments of difference and the law, those who have been marginalized can push law to accommodate difference by "challenging and transforming the unstated norm used for comparisons … [and] disentangling equality from its attachment to a norm that has the effect of unthinking exclusion" (Minow, 1990, p. 16). Taking cues from Minow, this chapter closely examines how LGBT advocates articulated the grounds on which to compare same-sex to different-sex couples in ways that shifted the legal norms governing marital and parental relationships.

Finally, in attending to the generative dimensions of claims that appear assimilationist, this chapter contributes to a growing body of legal scholarship on law and social movements (Cummings, 2017). Through in-depth historical and doctrinal analysis, scholars have uncovered both the limits and opportunities created when particular movements, including those focused on questions of gender and sexuality, seek legal reform (Eskridge, 2001; Franklin, 2010; Mayeri, 2011; Siegel, 2006). William Eskridge has shown how a social movement's reliance on legal claims – and specifically, constitutional claims – may privilege moderate movement demands, such as integration and inclusion within existing institutions, over more radical appeals, such as separatism and the creation of new institutions (Eskridge, 2001, pp. 487–488). Reva Siegel has shown how legal claims themselves may, over time, shift in more moderate directions as a movement seeks to persuade state actors and responds to the arguments of countermovement activists (Siegel, 2006, p. 1364). Importantly, while both Eskridge and Siegel attend

to moderating aspects of a movement's turn to law, they view the process of legal claims-making as dynamic and contingent (Eskridge, 2001, p. 487 & n.236; Siegel, 2006, pp. 1330–1331, 1357). In fact, Eskridge explicitly resists the notion that equal protection arguments necessarily lead in assimilationist directions (Eskridge, 2001, p. 487 & n.236), and Siegel elaborates how "movements for constitutional change … make claims on the society's values … in ways that transform their meaning" (Siegel, 2006, p. 1361).

This dynamic and contingent view informs the treatment of specific social movements. For example, legal historians have challenged the progressive critique of the women's movement as serving an agenda centered on "formal equality" and "assimilation to a male norm" (Mayeri, 2011, p. 6) and instead have recovered "a richer set of claims regarding the constitutional limits on the state's power to enforce sex-role stereotypes" (Franklin, 2010, p. 86). Serena Mayeri has shown how in the early 1970s feminist lawyers successfully argued that equal treatment between women and men included rights against pregnancy discrimination; in other words, before the U.S. Supreme Court rejected the argument that pregnancy discrimination necessarily constituted sex discrimination (*Geduldig* v. *Aiello*, 1974), lower courts understood sex equality guarantees to reach legal distinctions rooted in women's distinctive reproductive capacity. (Mayeri, 2011, pp. 63–68, 119).[6] In examining more recent jurisprudence, Cary Franklin has shown how eventually the Court came to protect women against sex stereotyping even when – and perhaps especially when – "real" differences between women and men were implicated by the law in question (Franklin, 2010, pp. 145–146). By revealing how claims seemingly premised on sameness and inclusion may force law to recognize and accommodate difference, this work finds common ground with the dynamic identified in this chapter.

In focusing on claims to LGBT equality specifically, this chapter intervenes in longstanding debates over the meaning and implications of the LGBT turn to law. These debates cut across each of the bodies of scholarship identified above. The analysis that follows draws on earlier work in which I provided detailed and extensive case studies of LGBT advocacy on behalf of same-sex couples' romantic and parental relationships (NeJaime, 2016, p. 1185). This chapter isolates and elaborates an important dynamic that emerged from those case studies.

Beginning in the late twentieth century, LGBT advocates made claims to family recognition. They demanded adult relationship recognition, first in the form of nonmarital statuses (e.g., domestic partnership, civil union), and then in the form of marriage. They also demanded parental recognition, first for same-sex parents excluded from marriage, then as an argument for inclusion

in marriage, and finally as a consequence of marriage. Throughout this work, advocates argued that gays and lesbians merited recognition in part because they mirrored relevant aspects of the romantic and parental relationships of married different-sex couples – that is, that they were like different-sex couples in ways that should be deemed salient. If same-sex couples inhabited family relationships that appeared like those of married different-sex couples, they deserved recognition on the same terms – that is, they deserved access to marriage and parenthood. In the discussion that follows, I focus on three phases of LGBT advocacy: (1) claims to parental recognition of unmarried same-sex parents, (2) claims to marriage, and (3) claims regarding the consequences of marriage for same-sex parents. My argument about the transformative dimensions of assimilation hinges on shifts specifically in the law of parental recognition, which includes but also extends beyond marriage.

In the first phase, LGBT advocates asserted claims to parental recognition on behalf of *unmarried* gays and lesbians. Even as they sought rights outside marriage, as opposed to inclusion in marriage, their arguments relied on comparisons to *married* different-sex couples. By constructing unmarried same-sex couples as sufficiently like married different-sex couples, LGBT advocates did not simply constitute gay and lesbian identity in assimilative ways. They also contributed to emergent understandings of heterosexual family life and the institution of marriage. Constitutive aspects of same-sex family formation furnished the lens through which to understand family life more generally. Advocates stressed aspects of the adult relationship, focusing on emotional and economic interdependence, as well as the parent–child relationship, focusing on intentional and functional bonds. (Parental recognition based on intent tracks the decision to have a child, often through ART, and parental recognition based on function tracks the act of raising the child.) Advocates' efforts reduced the legal importance of attributes that had long defined dominant family structures and had justified gay and lesbian exclusion from marriage and parenthood – namely, gender differentiation, sexual procreation, and biological parenthood.

In the second phase, LGBT advocates leveraged earlier claims to *nonmarital* parental recognition as they sought inclusion in *marriage*. They asserted that unmarried same-sex couples are similarly situated to married different-sex couples for purposes of a model of marriage that sees parenting as an important function. Yet, in crafting this argument, advocates emphasized some understandings of marriage and parenthood while repudiating others. They stressed same-sex parents' adherence to marital norms of adult commitment and interdependence, deliberate family formation, and parent–child bonding, in order to marginalize norms rooted in sexual procreation and

biological, dual-gender parenting. Through this work, advocates contributed to new and more inclusive views of marriage and parenthood.[7] Marriage, through this lens, serves as a domain for intentional and functional, rather than biological and gender-differentiated, parenting.

In the third (and ongoing) phase, in which same-sex couples enjoy access to marriage, LGBT advocates assert claims to parental recognition in virtue of marriage – that is, parentage that derives from the marital relationship. These claims seize on understandings of marriage and parenthood advocates had pressed for many years in seeking both nonmarital recognition and marriage equality. Critically, the principles on which same-sex couples' marital parentage claims rest have begun to reach not only married but also unmarried parents, and not only same-sex but also different-sex couples.

Ultimately, comparisons to different-sex couples, for the purpose of gaining inclusion in dominant institutions, helped refashion marriage and parenthood in ways that accommodated – and, indeed, mainstreamed – some of the distinctive features of LGBT family life. More specifically, principles of parental recognition that were necessary to accommodate same-sex family formation slowly became more generally applicable standards governing all families – same-sex and different-sex couples, married and unmarried couples. Different-sex couples that defied traditional assumptions of biological parenthood – especially those using ART to have children – had pressed courts and legislatures to recognize their parental bonds based on intent and function. But such forms of recognition represented exceptions – special cases to be masked or cabined rather than allowed to reshape general principles. Same-sex couples leveraged these exceptional cases in ways that dramatically broadened their reach – transforming exceptions into rules. As same-sex couples were recognized – first, as unmarried parents and, then, as married parents – principles of intent and function began to supply the general logic of the law of parental recognition.

While this chapter focuses on LGBT claims, it uncovers a dynamic that appears to exist in other social movement contexts and in different substantive domains. Those seeking legal change engage in norm contestation as they compare themselves to those already treated as insiders and claim inclusion in society's central institutions. The very ideas of sameness and inclusion may be premised on new understandings that emphasize the claimants' distinctive practices and that destabilize traditional norms that had long justified the claimants' exclusion. Ultimately, the norms governing dominant institutions may be reshaped through ongoing conflict.

To be clear, my argument is not that claims to inclusion and claims based on sameness do not in important ways affirm the status quo, shore up the

importance of dominant institutions, and mute significant differences of the excluded group.[8] Rather, my argument is that these effects can occur *at the same time* that the status quo is disrupted, dominant institutions are transformed, and differences that mark the excluded group become more widely understood norms. The question is not *whether* claims of this kind yield assimilation or transformation, but *when* and *how* they serve assimilative and transformative functions.

Two additional points of clarification are helpful at the outset. First, the claims addressed here may arise in various doctrinal forms, but the analysis that follows focuses on their manifestation in family law and constitutional law. In seeking recognition of family relationships, gay and lesbian claimants ask that family-law statuses that have been available in the context of heterosexual family formation be extended to same-sex family formation. As a constitutional matter, the argument that same-sex couples are similarly situated to those already granted marital and parental recognition maps onto equality doctrine. Specifically, this argument tracks the threshold requirement for an equal protection violation, and it also shapes consideration of the government's asserted interests in excluding same-sex couples. Same-sex couples' claims to inclusion also map doctrinally onto liberty and privacy, as gays and lesbians contest their exclusion from institutions – marriage and parenthood – protected as a matter of due process.

Second, it is important to distinguish between the sameness arguments to which I am referring and other sameness arguments that are part of analogical reasoning. I am not focused on arguments that gays and lesbians are like other minority groups that have been protected as a matter of equal protection or antidiscrimination law. Scholars have argued that those analogical arguments have an assimilative power (Yoshino, 1998, p. 485; *but see* Mayeri, 2011, p. 229). Rather, here I focus on arguments that same-sex couples are like the majority – different-sex couples – already included in dominant institutions governing the family.

The remainder of this chapter proceeds in four sections. Section 2 shows how the assimilationist critique of claims to sameness and inclusion has been articulated specifically in LGBT debates. Section 3 then turns to claims asserted by LGBT advocates on behalf of unmarried same-sex parents. The focus here is on legal evolution specifically in California. Section 4 turns to same-sex couples' claims to inclusion in marriage, both in California and nationwide. Section 5 then shows, through an examination of cases outside California, how the inclusion of same-sex couples in marriage continues to mainstream aspects of same-sex family formation that, for many years, had justified LGBT exclusion.

2. THE ASSIMILATIONIST CRITIQUE IN LGBT DEBATE

Criticism of claims emphasizing sameness and seeking inclusion in dominant institutions is not new. But, in recent years, this criticism has been especially prominent in analysis of LGBT rights (Murray, 2012a, p. 7; Polikoff, 2012, p. 722; Robson, 2002, p. 711). LGBT advocates have faced a common critique: by demanding inclusion in traditional forms of family recognition designed around heterosexual life – namely, marriage and parenthood – gays and lesbians have assimilated to heterosexual norms and have made themselves "like straights" (Spade, 2013, p. 84).[9] On this view, claims asserting sameness – that is, that same-sex couples are "similarly situated" to different-sex couples – and claims on existing institutions – that is, marriage and parenthood – erase the unique dimensions of LGBT life and purport to advance LGBT equality without disturbing the foundational assumptions of heteronormative institutions.[10]

Importantly, scholars associated with this critique support a legal regime that furnishes rights and recognition to same-sex couples and their children. But, these scholars argue, such legal advances need not, and should not, emerge from conformity to norms of heterosexual family life. More specifically, such advances should not arise through marriage (Ettelbrick, 1989, pp. 9, 14; *see also* Warner, 1999, p. 120). On this view, situating same-sex couples as like married different-sex couples both normalizes gays and lesbians (Hequembourg & Arditi, 1999, p. 664) – stressing, as Melissa Murray has argued, their "conformity with marriage's norms of respectability and discipline" – and emphasizes "the deviance of those who could marry and do not" (Murray, 2012b, pp. 419, 423). From this perspective, the decades-long push for marriage accepted, rather than challenged, marriage's privileged position in law and society.

Scholars who have lodged this critique of LGBT advocacy tend to view claims premised on sameness and inclusion as conservative and assimilationist. Legal entitlements, they suggest, have turned on whether same-sex couples adequately replicate heterosexual, marital norms – what Ruthann Robson describes as the "hetero-relationalizing" of gay and lesbian relationships (Robson, 1990, p. 539). Moreover, claims to inclusion in marriage have affirmed traditional understandings of the family and have undermined a progressive agenda seeking to protect and recognize less conventional family forms (Franke, 2011, pp. 1177, 1183; Murray, 2012b, p. 432; Spade & Willse, 2010, pp. 19, 20; Spade, 2013, p. 84).

The critique of claims to marriage includes treatment of not only adult but also parent–child relationships. Scholars have devoted significant attention to

how same-sex couples' parenting relationships became a central focus of same-sex couples' claims to marriage (Murray, 2012b; Polikoff, 2005). Those with children were featured prominently in litigation seeking marriage (Godsoe, 2015, p. 145), and protection of same-sex couples' children was advanced as a central justification for marriage equality.[11] Advocates framed marriage as a concrete route to parental recognition. Married couples, for instance, can adopt each other's children through stepparent adoption. Spouses also enjoy a marital presumption of parentage (or presumption of legitimacy), rendering the birth mother's spouse the legal parent of the child. Advocates also framed marriage as a material and expressive benefit to children – an argument dependent on continued distinctions between marital and nonmarital families as both a legal and cultural matter. From this perspective, marital children not only automatically attain benefits that remain out of reach to nonmarital children, but they also enjoy respect and recognition that derives from the societal importance of marriage and its connection to childrearing.

This child-centered framing, critics have argued, connects same-sex-couple-headed families to ideas of respectability associated with marriage and, at the same time, affirms the inferiority of families living outside marriage (Franke, 2006, pp. 236, 242). Further, in addressing lesbian couples specifically, advocates and courts focused on women's roles as mothers. In Cynthia Godsoe's description, the move to marriage equality on child-centered terms signaled acceptance of "a traditional parenthood paradigm … [that] reflects a maternalist philosophy where a woman's perceived natural and limited role is as an all-sacrificing mother virtually inseparable from her children" (Godsoe, 2015, p. 146).

While criticism of parenting arguments in LGBT advocacy has been channeled most prominently through criticism of claims to marriage, some scholars have focused specifically on claims to parental recognition as distinct from claims to marital recognition. Well before same-sex couples enjoyed access to marriage, scholars offered powerful critiques of LGBT claims to parental recognition – focusing on claims to nonmarital parental recognition, such as second-parent adoption and de facto parenthood. By asking for acceptance of families formed by gays and lesbians to the extent they mapped onto the model of the two-parent family, these claims depended on and required assimilation to heterosexual norms.[12] As Robson has argued, parental recognition "very clearly rewards those lesbians who comply with prevailing norms of parenting – and relationships – and very clearly excludes those who do not" (Robson, 2002, p. 814). In cases in which lesbian co-parents are recognized as "psychological" parents, the salient features of the same-sex couple's family, in Robson's description, "mimic the most traditional of traditional families" (Robson, 2000, pp. 32–33, Robson, 2002, p. 814). Similarly, according to Julie Shapiro,

second-parent adoptions benefit "the most privileged, most assimilated, and least 'threatening' lesbians" (Shapiro, 1999, p. 32). In short, to qualify for parental recognition, "lesbian couples must walk, talk, and act like heterosexual parents, and must conform to the nuclear family model" (Shapiro, 1999, p. 35).

More recently, scholars have focused on post-marriage-equality claims that derive parental recognition from marital status. Married lesbian couples argue that the child's second parent (the nonbiological co-parent) should be recognized as a legal parent *because* she is married to the birth mother. This claim, scholars contend, reiterates conventional understandings that tie parenting to marriage and denigrates unmarried parents and their children (Polikoff, 2012, pp. 721, 722–723).[13]

Each of these strands of argument relates to a broader critique of the LGBT movement as, in a term developed by Katherine Franke, "repronormative"[14] LGBT advocacy, on this view, reiterates, rather than challenges, the normative significance of reproduction and parenting. In doing so, it mutes distinctive features of LGBT life and instead affirms conventional norms.

This scholarship offers important insights regarding the LGBT turn to law and claims to marital and parental recognition specifically. By seeking inclusion in marriage and parenthood as a legal matter, gays and lesbians assimilated to heterosexual norms; forms of intimacy and family that depart from coupled relationships were marginalized. At the same time, though, this scholarship neglects the ways in which assimilation, and assimilationist legal demands specifically, can be generative. By providing a close examination of the historical trajectory and contemporary impact of LGBT claims on marriage and parenthood, the remainder of this chapter shows how claims that sound in assimilationist registers may lead law to reckon with and accommodate difference. In particular, sophisticated advocacy may appeal to sameness and inclusion in ways that subtly transform the grounds on which to understand similarity as well as the legal norms that govern dominant institutions. Again, my argument is not that claims of this kind do not exert assimilative force. Rather, my aim is to carefully attend to arguments premised on sameness and claims to inclusion in ways that resist the relatively wholesale assessments that have proliferated in the scholarly literature.

3. THE CASE FOR UNMARRIED SAME-SEX PARENTS

This section focuses on claims to parental recognition on behalf of unmarried same-sex parents. It shows how lawyers asserted that unmarried same-sex

couples replicated norms of married different-sex couples. But these lawyers did not simply stress LGBT conformity to mainstream norms. In fact, they worked to reduce the salience of traditional assumptions that had long justified same-sex couples' lack of legal recognition. Lawyers focused on emergent forms of different-sex parenting to connect unmarried same-sex couples to their married different-sex counterparts (NeJaime, 2016, p. 1256). Intentional and functional principles of parental recognition – which had been gaining traction in the context of married different-sex couples using ART – could be universalized in ways that would lead parentage law to accommodate unmarried same-sex parents. This dynamic comes into view by attending to the specific grounds on which same-sex couples' claims were asserted and ultimately accepted. By arguing in the register of sameness, LGBT advocates – counterintuitively – imported difference into the law, ultimately contributing to new understandings of marriage and parenthood and reorienting the relationship between same-sex and different-sex couples.[15]

3.1. Marriage, Parenthood, and Different-Sex Couples

LGBT advocates attempted to secure parental rights and recognition for same-sex parents well before same-sex couples enjoyed the right to marry. In doing so, they were aided by the expansion of the sphere of nonmarital parenting, as both a legal and demographic matter. As rates of nonmarital childbirth rose in the second half of the twentieth century, courts and legislatures acted to protect the rights of unmarried parents and their children. Efforts aimed at parental rights were driven primarily by the recognition of unmarried fathers.[16] In fact, in the wake of Supreme Court decisions recognizing the constitutional rights of unmarried fathers and repudiating the legal treatment of "illegitimacy," many states adopted the newly drafted Uniform Parentage Act (UPA), which endeavored to provide equal treatment to nonmarital parent–child relationships and sought to attach both rights and responsibilities to unmarried fathers (UPA, 1973). This development provided important space for eventual advocacy on behalf of same-sex parents, who were excluded from marriage.

Yet a critical distinction existed between unmarried parents recognized by law and unmarried gay and lesbian parents struggling for such recognition: Same-sex couples, unlike their different-sex counterparts, featured a parent without a biological connection to the child. Accordingly, while a parentage system that credited biological ties as a basis for parental recognition could largely accommodate the families formed by unmarried different-sex couples,

unmarried same-sex couples remained outsiders. Equal treatment within a regime organized around biological connection was a hollow promise for gays and lesbians forming families with children.

To argue for legal recognition of nonbiological parents, LGBT advocates looked to marriage. Parents without a biological tie had increasingly achieved parental recognition *inside marriage*. Historically, the marital presumption allowed the husband of the child's mother to claim legal fatherhood, even if he was not in fact the biological father. In the 1960s and 1970s, courts and legislatures extended the marital presumption's nonbiological logic to married couples using donor insemination. When a married woman gives birth to a child conceived with donor sperm, her husband is recognized as the child's legal father, either by virtue of the marital presumption or by operation of more specific statutes regulating donor insemination. Through this lens, marital family formation evidences the couple's intent to co-parent, regardless of the husband's biological connection. Based on marriage to the mother, or consent to his wife's use of assisted reproduction, the husband becomes the legal father.

Whereas married men could achieve parentage without a biological tie to the child, unmarried men generally needed their biological connection as a basis for parentage. In most jurisdictions, when an unmarried woman has a child conceived with donor sperm, her unmarried partner is not initially recognized as a legal parent, even if that unmarried partner intends to raise the child (NeJaime, 2017, pp. 2370–2372). Indeed, in many jurisdictions, the sperm donor who donates sperm for use by an unmarried woman is not legally relieved of parental obligations, as he would be when the recipient of the donor sperm is a married woman. Against this legal backdrop, nonbiological parents in same-sex couples, who were excluded from marriage, struggled to achieve parental rights.[17]

3.2. The Failure of Sameness Arguments

The lesbian baby boom that swept parts of the country in the 1980s and 1990s featured lesbian couples turning to donor insemination to have children. When some of these couples broke up, they found themselves in a position where only the biological mother had a legal relationship to the child. While some couples in some jurisdictions were able to engage in second-parent adoptions to establish a legal relationship between the nonbiological mother and the child, for many this option simply did not exist. The nonbiological co-parent who had not engaged in adoption could not maintain her relationship with the child if her former partner sought to exclude her.

Lawyers who represented the nonbiological mother asserting parental rights to custody or visitation attempted to analogize same-sex couples to different-sex couples who also used donor sperm to have children. Yet because same-sex couples were excluded from marriage, they could not simply argue that the marital presumption, or the more specific donor-insemination statutes, should apply to them. Rather, lawyers discerned principles from the regulation of ART in the context of marital family formation and argued that these same principles should guide the treatment of same-sex couples, *even though same-sex couples were unmarried*. Here, their claims depended on assertions of sameness. Because unmarried same-sex couples engaging in donor insemination acted like married different-sex couples engaging in donor insemination, they merited the same rights and obligations even if they were not – and could not be – married.

At first, the move to compare unmarried same-sex parents to married different-sex parents failed. Gays and lesbians were not seen as legitimate parents. In fact, even gays and lesbians who were biological parents struggled to maintain custody of their children in the context of divorce from a different-sex spouse (Hunter & Polikoff, 1976, p. 691). Perhaps unsurprisingly then, when same-sex couples who had deliberately formed families together later broke up, the nonbiological parent was routinely denied parental rights. Courts viewed the nonbiological parent as analogous to a friend or babysitter, rather than to a married parent lacking a genetic connection to the child.

Consider the arguments made – and rejected – in an early same-sex parenting case from California. In *Nancy S.* v. *Michele G.* (1991), LGBT advocates represented Michele, the nonbiological co-parent, whose longtime partner, Nancy, deprived her of access to their children after dissolution of their relationship. Michele's lawyers depicted the women's relationship, which of course was not eligible for marriage, as marriage-like (NeJaime, 2016, pp. 1205–1206). Nancy and Michele, the lawyers claimed, acted like a married couple and in fact would have married had they been able. Like married couples, they decided to have children together. Both women were listed on the children's birth certificates, and the children's names reflected their relationship to both Nancy and Michele. The two women raised the children together until their relationship dissolved, at which point they continued to share custody. Eventually, though, Nancy denied Michele access to the children.

If Nancy and Michele had been eligible for a legal divorce, a court would have been authorized to award custody or visitation to Michele even though she was not biologically related to the children (Gil de Lamadrid, 1991,

pp. 25–26). Pursuant to the marital presumption, the husband of the woman who gives birth is presumed to be the legal father of the child. (*Michael H.* v. *Gerald D.*, 1989). And even a stepfather in California enjoyed a statutory right to seek visitation upon divorce. But, of course, Nancy and Michele were not married and thus could not legally divorce. Still, LGBT advocates framed Nancy and Michele as married. "The parties in this case," Michele's lawyers argued, "cannot petition for dissolution of *their marriage* because, under the current statutory scheme, *their marriage* cannot be sanctioned by the state" (Appellant's Opening Brief, *Michele A.* v. *Nancy S.*, 1991, p. 12 (emphasis added)). On this view, Nancy and Michele were like a married different-sex couple and now needed the equivalent of a divorce.

Importantly, marriage (and divorce) provided a framework through which to conceptualize the women's parental relationships, but not on a view traditionally associated with marital parenting. Lawyers asserted an analogy to married different-sex couples not because same-sex couples looked like the typical married couple raising children; after all, they did not include a mother and father, and they did not feature children biologically related to both parents. Same-sex couples' similarity to different-sex couples relied on other unifying features – namely, intent and conduct.[18] These features had become salient in unconventional heterosexual family formation. Unmarried same-sex couples with children, like married different-sex couples *with children conceived through donor insemination*, decided to have children together, used donor gametes to facilitate the process, and then raised the children together as co-parents in a family unit.

At this early point, advocates failed in their attempts to vindicate same-sex family formation by analogy to marital family formation. In its 1991 decision, the California Court of Appeal rejected Michele's arguments and instead tethered parental rights to the formal and traditional categories of biological and marital connections. Even though Nancy and Michele had formed a committed relationship, decided to have children together, and raised those children together, the court viewed Michele as a nonparent. "[E]xpanding the definition of a 'parent' in the manner advocated by [Michele]," the court worried, "could expose other natural parents to litigation brought by child-care providers of long standing …" (*Michele A.* v. *Nancy S.*, 1991, p. 219). The lawyers' attempt to depict unmarried same-sex couples in ways that conformed to understandings of married different-sex couples failed to resonate; nonbiological lesbian co-parents were not like husbands whose wives use donor sperm, but instead were like other family outsiders who supplement the caretaking work of biological parents. At this point, courts did not see same-sex couples as sufficiently marriage-like to merit parental recognition

on the same terms. In failing to see same-sex couples as like different-sex couples, courts refused to expand parental recognition in ways that destabilized dominant norms.

3.3. Sameness and Success

Throughout the 1990s and into the 2000s, LGBT advocates continued to make arguments for parental recognition of nonbiological co-parents in same-sex couples, and they did so in ways that leveraged increasing recognition of nonbiological co-parents in married different-sex couples. Husbands had long been recognized as legal fathers when their wives gave birth to children conceived with donor sperm. But determinations of motherhood remained tightly connected to the biological fact of birth. In California, that began to change as courts considered situations arising when married different-sex couples had children through gestational surrogacy.

In *Johnson* v. *Calvert* (1993), a landmark decision, the California Supreme Court announced principles of intentional parenthood to resolve a dispute between a gestational surrogate and a married couple who were the intended parents. The gestational surrogate had carried a child conceived with the husband's sperm and the wife's egg. In determining that the genetic mother, rather than the gestational surrogate, was the legal mother, the court turned to the concept of intent; since each woman could make a claim to maternity, the court reasoned that the woman who intended to be the mother was the legal mother (*Johnson* v. *Calvert*, 1993). In the court's view, because the genetic mother decided to have the child with her husband, she – and not the gestational surrogate – should be recognized as the sole legal mother.

Five years later, in *Marriage of Buzzanca*, the California Court of Appeal extended *Johnson*'s intentional parenthood doctrine to a situation in which the intended mother had neither a gestational nor genetic connection to the child. The Buzzancas, who were married at the time of conception, had used donor egg and sperm and engaged a gestational surrogate. The court found that both the husband and wife were the child's legal parents (In re *Marriage of Buzzanca*, 1998). The principle of intent announced in *Johnson* now came unhooked from biological connection. According to the court's reasoning, because the couple decided to have a child together within the context of a marital relationship and then put into motion the procedures that would produce the child, they should be recognized by law as the child's parents. Even without a biological connection for either the husband or the wife,

marriage provided a sufficient family relationship from which to derive legal parent–child relationships.

Inside marriage, both men and women had achieved parental recognition in the absence of a biological connection to the child. The concept of intent animated both legislative regulation of married couples' use of donor insemination and judicial regulation of married couples' use of gestational surrogacy. LGBT advocates soon attempted to leverage these developments on behalf of unmarried same-sex parents. Again, advocates seized on concepts articulated in the context of unconventional heterosexual family formation and sought to make such concepts more widely applicable.

To attain parental recognition that mirrored the recognition extended to married couples like those in *Johnson* and *Buzzanca*, LGBT advocates stressed same-sex couples' adherence to marital norms. Same-sex couples, advocates suggested, formed committed adult relationships characterized by emotional and economic interdependence. From inside these committed relationships, the couples decided to have and raise children together. The marriage-like relationships of same-sex couples served as a way to understand the parental bonds gays and lesbians formed outside marriage.[19]

Yet advocates emphasized same-sex couples' commonality with married different-sex couples in ways that drew comparison with modes of family formation and recognition that represented the margins, rather than the mainstream. While married women and men typically parented their own biological children, LGBT advocates drew analogies to married parents who turned to ART and created nonbiological parent–child relationships. Just as those individuals could derive parentage from intentional and functional, rather than biological, relationships, nonbiological mothers in same-sex couples asked that they too attain parental rights based on intent and conduct.

Urging the courts to abandon *Nancy S.* and similar precedents from the 1990s, LGBT advocates pressed claims to parental recognition in the California courts (NeJaime, 2016, pp. 1223–1225). By the time the California Supreme Court considered whether unmarried same-sex parents merited parental recognition in the absence of adoption, courts in the state had extended recognition not only to nonbiological mothers and fathers in married different-sex couples, but also to unmarried nonbiological mothers and fathers. In *In re Nicholas H.* (2002), the California Supreme Court found that a man who holds a child out as his own, even if he admits he is not the child's biological father, may nonetheless be adjudicated the child's legal father. (From behind the scenes, LGBT advocates had shaped that litigation, assisting the nonbiological father's lawyer and ghostwriting briefs

in the case.) Soon, the *Nicholas H.* decision extended to a woman who purported to be a child's mother but was not in fact the biological mother (In re *Karen C.*, 2002; In re *Salvador M.*, 2003).

These cases, though, arose outside the context of same-sex parenting. For same-sex couples to benefit from newly expanded parentage principles both inside and outside marriage, they needed to be seen as legitimate families. More specifically, the nonbiological co-parent needed to be viewed not like a nanny or babysitter – the perspective from the early 1990s – but like a parent.

In a trio of decisions issued the same day in 2005, the California Supreme Court repudiated the views of courts in the 1990s and instead embraced same-sex parenting as a legal matter. The court recognized unmarried lesbian parents in ways that emphasized similarities between unmarried same-sex couples and married different-sex couples. Yet, strikingly, the court focused on principles of parental recognition that had defined unconventional heterosexual family formation. Examination of two of the cases decided by the court illustrates this dynamic.

In *K.M.* v. *E.G.* (2005), K.M. and E.G. used K.M.'s eggs and donor sperm to conceive children that E.G. would carry and birth.[20] After the couple broke up, E.G., the birth mother, sought to deny K.M., the genetic mother, access to the children they had been co-parenting. Since the mother–child relationship may be established by proof of giving birth, E.G. asserted her superior position as she attempted to exclude K.M. In response, K.M. asserted claims to parental recognition under the California parentage code.

K.M.'s lawyers sought to leverage the court's earlier decision in *Johnson* by connecting intentional parenthood to marriage-like family formation. In *Johnson*, K.M.'s attorneys argued, "the intent of the genetic parents was *presumed* from the fact that they were a married couple living together in a committed relationship" (Appellant's Opening Brief on the Merits, *K.M.* v. *E.G.*, 2005, p. 44). If the court in that case derived intention from the genetic mother's marriage to the biological father, then the court here, the lawyers urged, should also derive intention from the genetic mother's marriage-like relationship to the birth mother (Appellant's Opening Brief on the Merits, *K.M.* v. *E.G.*, 2005, p. 44). Indeed, "[i]f these same facts arose between a husband and wife during a divorce proceeding in which both parties were the genetic and gestational parents of these children, there would not be any valid dispute over parentage" (Appellant's Opening Brief on the Merits, *K.M.* v. *E.G.*, 2005, p. 11). Marriage furnished a lens through which to view K.M. and E.G.'s relationship, and yet at the same time seemed an arbitrary dividing line for parental recognition.

K.M.'s attorneys mapped the facts of their client's relationship onto the norms of marriage. The women's relationship, K.M.'s lead counsel asserted, was "marked by repeated acts of love and commitment to each other that included a 'marriage' ceremony after the children were born where they exchanged rings, the celebration of their anniversaries, and [municipal] registration as domestic partners for six and a half years" (Appellant's Reply Brief, *K.M.* v. *E.G.*, 2005, p. 11). The "evidence creates a very overwhelming picture of a two-parent, two-child family who operated and functioned in every way familiar to us" (Trial Transcript, *K.M.* v. *E.G.*, 2005, p. 811). Indeed, reminiscent of the framing device deployed more than a decade earlier in *Nancy S.*, K.M.'s attorney characterized the nonmarital relationship between K.M. and E.G. as a marriage, claiming that, in her effort to undermine K.M.'s parental claim, E.G. denied "the intimacy and the deep love they shared for each other and *their marriage*" (Trial Transcript, *K.M.* v. *E.G.*, 2005, p. 812 (emphasis added)) .

Critically, K.M.'s attorneys did not argue that the women's marriage-like relationship itself produced legal parentage but instead that the relationship simply evidenced intent to parent:

> [T]he parties were living together in a committed relationship that antedated the children's conception; the parties were registered as domestic partners with the City and County of San Francisco; the parties *intended* "to remain together as a couple" after the birth of the children; the parties *intended* to provide together a stable and nurturing home for the children[.] (Appellant's Petition for Review, *K.M.* v. *E.G.*, 2005, pp. 19–20) (emphasis added)

Indeed, the lawyers asserted that the "legal standard" for parental recognition should turn in part on "[t]he intent of the parties implied by the type of relationship they have to each other." (Appellant's Reply Brief, *K.M.* v. *E.G.*, 2005, p. 4). Through this lens, K.M. and E.G.'s marriage-like relationship, just like the marriages in *Johnson* and *Buzzanca*, evidenced parental intent and function. Yet marriage itself constituted an arbitrary line for legal parentage, since married different-sex couples and unmarried same-sex couples were similarly situated with respect to principles of intentional and functional parenthood.

Advocates channeled arguments that same-sex couples functioned like different-sex couples primarily through family-law doctrine. But constitutional equal protection arguments supported family-law arguments that women and men, and same-sex and different-sex couples, were similarly situated with respect to parenthood. As K.M.'s lawyers claimed, "Because the only distinction between K.M. and similarly situated males (in whose favor the ['holding out'] presumption has been applied) is her gender, she has been denied equal protection based upon an impermissible classification" (Appellant's Opening Brief on the Merits, *K.M.* v. *E.G.*, 2005, p. 30). As *amicus curiae*, the National

Center for Lesbian Rights (NCLR) asserted that "[f]ailure to apply [intentional and functional parenthood] equally would … discriminate against parents on the basis of their gender and sexual orientation, in violation of the equal protection guarantees of the state and federal Constitutions" (Letter of *amici curiae* in support of petition for review, *K.M.* v. *E.G.*, 2005, p. 6).

Without reaching the constitutional claims, the court recognized K.M. as the children's legal mother under state parentage law. Gender differentiation no longer constituted a barrier to parental recognition. More than a decade earlier, in *Johnson*, the court had developed the doctrine of intentional parenthood but explained that "a child can have only one natural mother" (*Johnson* v. *Calvert*, 1993, p. 781). Now, the court repudiated that limitation. Deriving parental recognition from K.M.'s genetic connection, the court held that two women could be recognized as the "natural" mothers of a child (*K.M.* v. *E.G.*, 2005, p. 681). While its determination did not technically turn on conclusions about intent or function, the court nonetheless emphasized that (notwithstanding E.G.'s contrary contentions) both women appear to have intended that K.M. be the children's mother, and K.M. in fact functioned as the children's mother.

Still, *K.M.* constituted only one step toward same-sex parental recognition. After all, K.M. was a genetic mother, not a nonbiological co-parent. Her claim to parentage bridged different-sex and same-sex family formation by maintaining the salience of biological connection. For judicial intervention to have more far-reaching effects, the court would need to recognize a *nonbiological* mother in a same-sex couple as a legal parent.

In *Elisa B.* v. *Superior Court* (2005), Elisa and Emily, an unmarried same-sex couple, had three children together with the same donor sperm. Emily gave birth to two of the children, and Elisa gave birth to the other child. When the couple broke up, Elisa claimed not to have parental obligations to the two children to whom she was not biologically related. After county officials pursued Elisa for child support, attorneys at NCLR represented Emily, who asserted that Elisa was in fact the legal parent of those children (NeJaime, 2016, pp. 1227–1229).

The attorneys focused on the marriage-like relationship of the unmarried same-sex couple. Emily and Elisa, they explained, "were in a committed relationship for more than six years[,] … had a commitment ceremony, exchanged rings, and pooled their finances" (Opening Brief of Real Party in Interest Emily B., *Elisa B.* v. *El Dorado Cty. Super. Ct.*, 2005, p. 7) (internal citations omitted). Like other couples who solidify their commitment in this way, Emily and Elisa eventually "decided to have children together" (Opening Brief of Real Party in Interest Emily B., *Elisa B.* v. *El Dorado Cty. Super. Ct.*,

2005, p. 7). In this respect, Emily and Elisa represented the growing number of same-sex couples who, like their different-sex counterparts, deliberately form families together.

Indeed, in a separate *amicus curiae* brief filed in the consolidated cases before the court, NCLR and Lambda Legal stressed the marriage-like relationships of the couples in the three cases. Each had "maintained a committed, cohabiting relationship of at least six years" (Brief of *Amici Curiae* Children of Lesbians and Gays Everywhere, et al., in Support of Lisa Ann R., Real Party in Interest, *Kristine H.* v. *Lisa R.*, 2005, pp. 8–9). "[A]ll three were financially interdependent. Each bought their home together. All three presented themselves publicly as intact families during the time the couples lived together" (Brief of *Amici Curiae* Children of Lesbians and Gays Everywhere, et al., in Support of Lisa Ann R., Real Party in Interest, *Kristine H.* v. *Lisa R.*, 2005, p. 9). The marriage-like adult relationships were the foundation for subsequent parent–child relationships, as "[e]ach couple planned together for pregnancy" (Brief of *Amici Curiae* Children of Lesbians and Gays Everywhere, et al., in Support of Lisa Ann R., Real Party in Interest, *Kristine H.* v. *Lisa R.*, 2005, p. 9). In this way, attorneys stressed intent and function, not biological connection or gender differentiation, as unifying themes. While LGBT advocates presented the unmarried couples as embodying the norms of marital domesticity, they did so in ways that unsettled parenting norms that excluded gays and lesbians.

Once again, constitutional principles bolstered family-law arguments for parental recognition. NCLR attorneys asserted that the failure to legally recognize Elisa, the nonbiological co-parent, would run against "equal protection guarantees of the California and federal constitutions" (Opening Brief of Real Party in Interest, Emily B., *Elisa B.* v. *El Dorado Cty. Super. Ct.*, 2005, p. 14). This claim depended on the increasing legal recognition of intended and functional parents in the context of heterosexual family formation:

> [U]nder any form of equal protection analysis, … [i]t is patently irrational to recognize as legal parents: (1) a wife who consents to the insemination of a gestational surrogate by her husband, as in *Johnson*; (2) a wife and a husband who consent to the insemination of a gestational surrogate using a donated egg and donated sperm, as in *Buzzanca*; (3) a man who holds himself out as a child's father, but is neither married to the child's mother nor biologically related to the child, as in *Nicholas H.*; and (4) a woman who holds herself out as a child's mother, but is neither married to the child's father nor biologically related to the child, as in *Karen C.,* but to deny legal parentage to a lesbian who consented to her partner's artificial insemination with the *intention* of parenting the resulting children and who subsequently assumed parental responsibility for the children and *held herself out* as their parent to the world. (Opening Brief of Real Party in Interest, *Emily B., Elisa B.* v. *El Dorado Cty. Super. Ct.,* 2005, 38) (emphasis added)

Lesbian parents, advocates asserted, were similarly situated to the presumptively heterosexual parents recognized in these leading cases. Accordingly, refusal to recognize the nonbiological co-parent now before the court would run afoul of equal protection guarantees.

As in *K.M.*, the court did not reach the constitutional issues. Instead, it found that Elisa qualified as a legal parent under the state parentage code. Because Elisa held the children out as her own, she satisfied a presumption of paternity traditionally applied to unmarried biological fathers.[21] Even as the court relied on a parentage presumption for unmarried parents, Emily and Elisa's proximity to marriage helped the court understand the parental unit before it (*Elisa B.* v. *El Dorado Cty. Super. Ct.*, 2005).[22] Critically, the court compared the nonbiological mother to a married man who turns to ART, observing that Emily was like "a husband who consented to the artificial insemination of his wife using an anonymous sperm donor" (*Elisa B.* v. *El Dorado Cty. Super. Ct.*, 2005, p. 670). Repudiating *Nancy S.* and other similar decisions from the 1990s (*Elisa B.* v. *El Dorado Cty. Super. Ct.*, 2005, p. 672), the court reasoned that "[t]he paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family" (*Elisa B.* v. *El Dorado Cty. Super. Ct.*, 2005, p. 668). Parental intent and conduct, rather than biological connection or gender differentiation, had become guiding principles.

LGBT advocates' claims to parental recognition on behalf of unmarried same-sex parents relied on assimilationist arguments. Advocates emphasized how same-sex couples, even outside marriage, replicated norms associated with marriage (and therefore with different-sex couples). Yet same-sex couples' adherence to some marital norms allowed advocates to simultaneously emphasize other, less mainstream features that connected same-sex to different-sex couples. Marginal forms of heterosexual family formation provided the lens through which to view family formation more generally. Through this process, central aspects of same-sex family formation influenced understandings of parenthood and shaped the family-law principles governing parental recognition.

4. THE CASE FOR MARRIAGE

LGBT advocates continued to urge courts to recognize the parental rights and obligations of same-sex parents. By the mid-2000s, they were also organizing around marriage as an LGBT priority. Same-sex couples' claims to marriage were not divorced from claims to parental recognition on behalf of

unmarried gays and lesbians. When working on behalf of unmarried same-sex couples, LGBT advocates had appealed to marriage-like relationships in ways that led courts to appreciate the parent–child relationships at stake. With claims to marriage, advocates once again appealed to their constituents' marriage-like relationships, and they included parenting as a key aspect of these relationships (NeJaime, 2016, p. 1231). They asserted that same-sex couples were like different-sex couples with respect to both adult and parent-child relationships.

Scholars have shown how same-sex couples' claims to marriage buttressed a traditional model of family formation and recognition. But they largely have neglected the possibility that marriage claims did this, *and yet also* contributed to new and more progressive understandings of the family (*but see* Joslin, 2017). Fully appreciating the implications of marriage equality claims requires examining how exactly same-sex couples are understood as similarly situated to different-sex couples for purposes of marriage and parenthood. If they are similarly situated in ways that emphasize principles of family formation and recognition historically seen as unconventional, these principles may contribute to new understandings of both marriage and parenthood (NeJaime, 2016, p. 1238). As the discussion below shows, same-sex couples' marriage claims relied on comparisons that destabilized traditional markers of parental recognition. A marital parentage regime that includes same-sex couples must rest on features other than biological connection and gender differentiation. Instead, the common ground between different-sex and same-sex couples rests on concepts of parental intent and function. Pushed by LGBT advocates, courts came to understand parenthood within marriage through the lens of these emerging concepts.

4.1. Seeking Inclusion in Marriage

Those defending same-sex couples' exclusion from marriage attempted to frame marriage as a child-centered institution in which traditional understandings continued to govern (NeJaime, 2016, p. 1236). Inside marriage, they suggested, couples raised their biological children (Joslin, 2013), and women and men brought to parenting different and complementary qualities (NeJaime, 2013a). On this view, marriage channeled procreative sex into stable households, and these households supplied "optimal childrearing," which meant childrearing by a biological mother and father.[23] For example, as the Alabama governor argued at the Supreme Court in support of states opposing same-sex marriage, states have "compelling interests" in "securing the rights

of children to be connected to their biological parents [and] preserving distinct offices for mothers and fathers" (Brief of Robert J. Bentley, Governor of Alabama, as *Amicus Curiae* in Support of Respondents, *Obergefell* v. *Hodges*, 2015, p.5). Biological connection and gender differentiation were each key to this understanding. The governor celebrated "the unique importance and fundamental rights and duties of the biological parent–child relationship," while also claiming that allowing same-sex marriage would "obscure the nonfungible value of mother and father" (Brief of Robert J. Bentley, Governor of Alabama, as *Amicus Curiae* in Support of Respondents, *Obergefell* v. *Hodges*, 2015, pp. 9–10).

LGBT advocates responded by framing marriage in both *adult-centered* and *child-centered* terms. In an attempt to render irrelevant the procreative rationale advanced by those defending same-sex couples' exclusion from marriage, lawyers stressed the adult-centered dimensions of marriage's contemporary meaning. For instance, as lawyers representing same-sex couples from Michigan argued at the Supreme Court in one of the cases consolidated with *Obergefell*, "[t]he State's account of marriage bears little resemblance to actual marriage law in Michigan or other states, which focuses on the spousal bond, not the capacity to bear children" (Reply Brief for Petitioners, *DeBoer* v. *Snyder*, 2015, p.13). Marriage, on this view, neither required procreation nor demanded childrearing. Instead, marriage allowed individuals to form committed relationships characterized by mutual emotional support and economic interdependence, regardless of whether those individuals desired to have and raise children. In the words of the Michigan lawyers, "marriage establishes a legally enforceable commitment from one spouse to another" (Reply Brief for Petitioners, *DeBoer* v. *Snyder*, 2015, p. 13).

Yet, somewhat paradoxically, LGBT advocates also responded to opponents of same-sex marriage by reclaiming marriage as a child-centered institution. Same-sex couples, the Michigan lawyers asserted, are "similarly situated to many different-sex couples with respect to the goal of raising children in a family" (Reply Brief for Petitioners, *DeBoer* v. *Snyder*, 2015, p. 25). On this view, an approach to marriage that prioritizes children should seek to include, rather than exclude, same-sex couples.

As left-progressive scholars critical of the LGBT push for marriage have explained, LGBT advocates seeking marriage depicted same-sex couples as model citizens. Parenting formed an important basis of this depiction (Murray, 2012b, p. 423). Indeed, *unmarried* same-sex couples' lives appeared more ideal – and marriage-like – than their married different-sex counterparts (Murray, 2012a, pp. 1 and 59). As those who have lodged the assimilationist critique of LGBT advocacy have noted, advocates' efforts to connect

marriage to parenting in same-sex marriage litigation rested on a relatively traditional model (Murray, 2012b, pp. 419–423; Polikoff, 2005, pp. 573, 590). Parent–child relationships, on this view, travel with marital relationships and are properly cabined inside the intimate, committed relationships of co-parents.

Scholars, though, largely have neglected the ways in which this conventional approach to marriage and parenthood existed alongside – and, in fact, facilitated – a more expansive and egalitarian approach. Advocates emphasized child-centered dimensions that, on key points, departed from their opponents' characterization of parenting and instead resonated with the lives of same-sex couples.[24] The commonality between same-sex and different-sex couples arose not from biological connection or gender differentiation, but rather from intentional and functional relationships (NeJaime, 2016, p. 1237).

Consider again the arguments that lawyers for Michigan same-sex couples made at the Supreme Court. They began by explaining that "[s]tates confirm different-sex couples' parentage of children conceived through assisted reproduction, and allow married couples … to establish legal parentage in ways aside from biology" (Reply Brief for Petitioners, *DeBoer* v. *Snyder*, 2015, p.16). Same-sex couples, like their different-sex counterparts, together decide to have and raise children, often through assisted reproduction and without regard to biological connection. Yet same-sex couples, the lawyers asserted, were excluded from marriage even though they are "similarly situated to different-sex couples in how and whether they bring children into a marriage" (Reply Brief for Petitioners, *DeBoer* v. *Snyder*, 2015, p. 16). Of course, this argument required an appeal to unconventional practices of heterosexual family formation.

4.2. Ordering Inclusion

In adjudicating claims to marriage, courts confronted two competing views of (marital) parenthood – a biological, gender-differentiated view advanced by opponents of same-sex marriage, and an intentional and functional view advanced by same-sex couples and their supporters. As courts began overwhelmingly to accept same-sex couples' claims (and thus order that same-sex couples have access to marriage), they routinely cited same-sex parenting as a justification for their decisions. In positioning same-sex parenting as a reason to credit claims to marriage, courts set aside conventional norms of marriage and parenting that traditionally animated same-sex couples' exclusion.

Instead, they accepted principles of family formation and recognition – namely, parental intent and conduct – that characterized nontraditional, marginal family configurations and that mapped onto same-sex family formation (NeJaime, 2016, pp. 1236–1237). Marriage related to parenthood in ways that extended the very model of parenting that had been forged by LGBT advocates in earlier efforts to achieve parental recognition on behalf of unmarried parents.

The reasoning of courts involved in the same-sex marriage conflict in California illustrates this dynamic. In 2008, before voters enacted a state constitutional ban on same-sex marriage, the California Supreme Court struck down the state's statutory ban. In doing so, the court found immaterial the difference between same-sex and different-sex couples highlighted by opponents of marriage equality. Rather than allow its decision to turn on the fact that "only a man and a woman can produce children biologically with one another" (In re *Marriage Cases*, 2008, p. 430), the court focused on the "stable two-parent family relationship[s]" formed by both same-sex and different-sex couples (In re *Marriage Cases*, 2008, p. 433). Support for those relationships, the court explained, "is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples" (In re *Marriage Cases*, 2008, p. 433). Commonality between same-sex and different-sex couples emerged with respect to parenting, and that commonality was reflected in the court's approach to marriage.

The California Supreme Court did not have the last word on marriage in the state. Eventually, after voters passed Proposition 8, which amended the state constitution to ban same-sex marriage, federal courts considered whether that measure violated federal constitutional guarantees. In striking down Proposition 8, the U.S. Court of Appeals for the Ninth Circuit, in a decision ultimately vacated by the U.S. Supreme Court, found support in the history of parental recognition under California state law. As earlier litigation involving married different-sex couples as well as unmarried same-sex couples demonstrated, "in California, the parentage statutes place a premium on the 'social relationship,' not the 'biological relationship,' between a parent and a child" (*Perry* v. *Brown*, 2012, p. 1087, vacated by *Hollingsworth* v. *Perry*, 2013). On this view, a model of marriage that vindicates parenting prioritizes not the biological dimensions of the parent–child relationship but rather the social dimensions. Importantly, an approach grounded in social dimensions can value the relationships of both biological and nonbiological parents, and can include both different-sex and same-sex couples.

When the U.S. Supreme Court in 2013 determined that the proponents of Proposition 8 lacked standing to appeal the district court's adverse ruling and thus vacated the Ninth Circuit's decision, that earlier district court ruling became the governing decision in the case. (*Hollingsworth* v. *Perry*, 2013). In striking down Proposition 8 in 2010, the district court had found unpersuasive child-centered arguments for same-sex couples' exclusion from marriage. "California law," the court observed, "permits and encourages gays and lesbians to become parents through adoption … or assistive reproductive technology" (*Perry* v. *Schwarzenegger*, 2010, p. 968). The state's recognition of same-sex parents outside of marriage – recognition earned through years of litigation and legislative advocacy on behalf of unmarried same-sex parents – both rendered same-sex parenting legitimate and made parenting arguments for bans on same-sex marriage appear illogical. If the state embraced same-sex parenting, including the nonbiological parental bonds such parenting necessarily entailed, then it seemed unreasonable to exclude same-sex couples from a mode of family formation (marriage) that valued parent–child relationships.

The reasoning of the various courts involved in California's conflict over same-sex marriage illustrates an important dynamic: Same-sex couples' inclusion in a child-centered model of marriage followed from comparisons between same-sex and different-sex couples along lines that had for many years been understood as unconventional. This dynamic is evident not only in the numerous state and federal decisions leading up to the Supreme Court's resolution of the marriage issue but also in *Obergefell* v. *Hodges* (2015) itself. There the Court ruled that the exclusion of same-sex couples from marriage violated both the due process and equal protection rights of gays and lesbians (*Obergefell* v. *Hodges*, 2015, p. 2604).

In its reasoning, the Court embraced an adult-centered, nonprocreative view of marriage – one that could accommodate same-sex couples. But, tracking advocates' appeal to both adult-centered and child-centered views of marriage, the Court also asserted that, for many, childrearing remains "a central premise" of marriage (*Obergefell* v. *Hodges*, 2015, p. 2600). Of course, in earlier stages of conflict, courts had rejected same-sex couples' claims to marriage by finding that for purposes of this "central premise," same-sex and different-sex couples were not similarly situated.[25] But in *Obergefell*, the Court conceptualized same-sex and different-sex couples as similarly situated with respect to childrearing, focusing on actual parent–child relationships rather than on modes of reproduction or gender-differentiated parenting.

Indeed, it was the dissenting justices who articulated a model of marriage and childrearing that differentiated – and thus justified the exclusion

of – same-sex couples. In dissent, Chief Justice Roberts argued that because "[p]rocreation occurs through sexual relationships between a man and a woman," the government has reason to channel different-sex, but not same-sex, relationships into marriage "for the good of children and society" (*Obergefell* v. *Hodges*, 2015, p. 2613) (Roberts, C.J., dissenting)). The *Obergefell* Court, though, rejected this "traditional, biologically rooted" understanding of marriage (*Obergefell* v. *Hodges*, 2015, p. 2613) (Roberts, C. J., dissenting) and instead connected an understanding of marriage that included same-sex couples to marriage's childrearing function.

Through this lens, we see that LGBT claims to parenthood and marriage were motivated by both assimilative and transformative instincts. Comparisons to married, different-sex couples not only affirmed but also challenged dominant norms of marriage and parenthood. Same-sex couples mapped onto a relatively conventional model of parental recognition in which parenthood followed from intimate, coupled relationships. Yet same-sex couples also advanced more inclusive and capacious principles of parental recognition. The model of parenthood forged by LGBT advocates made traditional markers such as biological connection, gender, and even marital status less determinative of parental recognition. Instead, same-sex couples emphasized intentional and functional models of parenthood (NeJaime, 2016, pp. 1188–1190). In this sense, claims that at first appear conventional may contain within them the seeds of change.

5. PARENTAL RECOGNITION AFTER MARRIAGE

This section explores how same-sex couples' inclusion in marriage affects approaches to parental recognition, primarily inside but also outside marriage. Of course, in significant ways same-sex couples assimilate to dominant understandings of parenthood. Yet, as the following discussion shows, distinctive aspects of same-sex family formation also structure aspects of contemporary parentage law in ways that displace conventional norms. Features that, in earlier conflict, had been sufficiently different to justify same-sex couples' exclusion from marriage now provide principles through which to understand marital family formation and marital parental recognition. Indeed, these principles even bleed outside the boundaries of marriage and contribute to new understandings of parenthood generally.

More specifically, same-sex couples' inclusion in marriage renders intentional and functional concepts of parenthood more influential and comprehensive. At the same time, same-sex couples' inclusion reduces the salience of

both biological connection and gender differentiation in the law of parental recognition. Put differently, the incorporation of same-sex couples into marriage and parenthood – which brings with it an understanding of same-sex couples as like different-sex couples for purposes of marriage and parenthood – mainstreams modes of family formation and parenting that had long been marginal.

5.1. Parentage inside Marriage

Same-sex couples' claims on marital parentage expand notions of parental recognition along some dimensions, even as they affirm traditional understandings along other dimensions. That is, while same-sex parentage claims inside marriage tether parental recognition to intimate, coupled adult relationships, they also displace biological and gender-differentiated approaches to parenthood in favor of intentional and functional approaches. In this sense, the reasoning that facilitated recognition of nonbiological lesbian co-parents *outside marriage* now structures recognition of nonbiological lesbian co-parents *inside marriage* (NeJaime, 2016, pp. 1241–1242).

Consider the marital presumption. Traditionally, the man married to the woman giving birth was presumed to be the biological, and thus, legal father of the child. Of course, the marital presumption traditionally could hide biological facts and thereby allow social understandings of parenthood to prevail (*Michael H.* v. *Gerald D.*, 1989). The mother's husband could pretend he was the biological father. Nonetheless, courts and legislatures generally obscured the marital presumption's capacity to defy biological facts (Kording, 2004, pp. 811 and 818).

Now, with same-sex couples, the marital presumption runs against biological facts in open, obvious, and comprehensive ways (Appleton, 2006, pp. 227 and 230). The presumption, therefore, can no longer be justified as a proxy for biological paternity – as merely a reflection of a biological, gender-differentiated understanding of parenthood. Instead, it must transparently own its function as a mode of recognition of intentional and functional parent–child relationships. As Susan Appleton has explained, with lesbian couples, the marital presumption rests not on assumptions of biological paternity but rather on the couple's agreement with respect to their parental project (Appleton, 2006, p. 286). The key principle of marital parentage now openly reflects the very concepts pressed by advocates in their earlier work seeking both nonmarital parental recognition and marriage equality.

Conflict over application of the marital presumption to same-sex couples illustrates how the rules of marital parentage now raise questions about the reach of intentional and functional principles of parental recognition. Consider the Iowa Supreme Court's decision in *Gartner* v. *Iowa Department of Public Health* (2013). After a same-sex couple had a child through donor insemination, Iowa officials refused to name the biological mother's spouse as the second parent on the child's birth certificate. They relied on the marital presumption embedded in the birth certificate regulations: "If the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child[.]" (IOWA CODE § 144.13(2) (2011)).[26] Situating the regulations within a biological, gender-differentiated model of parenthood, officials asserted that Iowa law "recognizes the biological and 'gendered' roles of 'mother' and 'father,' grounded in the biological fact that a child has one biological mother and one biological father" (*Gartner* v. *Iowa Department of Public Health*, 2013, p. 342). Same-sex marriage, they contended, does not alter that approach to parental recognition.

The Iowa Supreme Court disagreed, extending the logic of marriage equality to questions of parental recognition (*Gartner* v. *Iowa Department of Public Health,* 2013, pp. 351–353).[27] The court focused on the commonality between same-sex and different-sex couples with respect to marital parenting. Given "the government's purpose [in its regulation of birth certificates] of identifying a child as part of [the couple's] family … married lesbian couples are similarly situated to spouses and parents in an opposite-sex marriage" (*Gartner* v. *Iowa Department of Public Health,* 2013, p. 351). Of course, lesbian couples were not similarly situated to different-sex couples with respect to sexual procreation, biological connection, and gender differentiation. But those aspects of family formation were sidelined by the court; instead, same-sex couples were similarly situated to their different-sex counterparts with respect to intentional and functional parent–child relationships.

A traditionally marginal form of family formation – donor insemination – furnished the grounds on which to conceptualize both the state's purpose in issuing birth certificates and the commonality between same-sex and different-sex couples. Iowa handles donor insemination through its general approach to marital parentage; a husband is recognized as the legal father of a child his wife conceives with donor sperm simply in virtue of the marital presumption. In this sense, the state regulated marital parentage in ways that reflected intentional and functional approaches to parenthood.

The state, though, treated "married lesbian couples who conceive through artificial insemination using an anonymous donor differently than married

opposite-sex couples who conceive a child in the same manner" (*Gartner* v. *Iowa Department of Public Health,* 2013, p. 352). This differentiation reflected resistance to the principles of same-sex family formation – principles that overtly disrupt traditional norms rooted in biological procreation and dual-gender parenting (*Gartner* v. *Iowa Department of Public Health,* 2013, p. 353). As the court observed, for a different-sex couple, the state "is not aware the couple conceived the child by an anonymous donor"; that couple can pretend they are the biological parents of the child, and the "birth certificate reflects the male spouse as the father" (*Gartner* v. *Iowa Department of Public Health,* 2013, p. 353). In contrast, the same-sex couple disrupts biological assumptions in clear and open ways. With same-sex couples, conception through donor insemination – a marginal mode of family formation – could no longer be masked or obscured. Instead, the principles that justify nonbiological parenthood needed to be explicitly recognized. Vindicating parental norms that could accommodate both same-sex and different-sex couples who rely on donor insemination, the court ordered the state to apply the birth certificate regulations, and the marital presumption on which they rest, to married lesbian couples (*Gartner* v. *Iowa Department of Public Health,* 2013, p. 354).

Conflict over the marital presumption has continued in the wake of *Obergefell*. Most courts and legislatures that have considered the issue have extended the marital presumption to same-sex couples. Courts have determined that, just like a man, a woman should attain parental recognition in virtue of her marriage to the birth mother.[28] Some legislatures have revised their marital presumption of parentage to provide that the "person" married to the birth mother is the legal "parent" of the child.[29]

Most significantly, in June 2017, in *Pavan* v. *Smith*, the U.S. Supreme Court issued a *per curiam* order requiring Arkansas officials to issue birth certificates that include nonbiological mothers in married same-sex couples. In rejecting the claims of same-sex couples, the Arkansas Supreme Court had narrowed the reach of *Obergefell* and tethered parentage to biological connection (*Smith* v. *Pavan*, 2016).[30] Sympathizing with the state court's view, Justice Gorsuch dissented in *Pavan*. "[N]othing in *Obergefell*," he reasoned, "indicates that a birth registration regime based on biology … offends the Constitution" (*Pavan* v. *Smith*, 2017, p. 2079). But in reversing the Arkansas decision, the Court viewed *Obergefell* – and the equal recognition of same-sex couples it endorsed – as necessarily connected to the recognition of nonbiological same-sex parents.

Critically, unconventional heterosexual family formation became key to understanding the logic of the state's approach to birth registration. As the Court observed, "when an opposite-sex couple conceives a child by way of anonymous sperm donation," Arkansas places the mother's husband on the

birth certificate (*Pavan* v. *Smith*, 2017, p. 2078). Accordingly, the birth certificate is "more than a mere marker of biological relationships" (*Pavan* v. *Smith*, 2017, p. 2078). Given that the state issues birth certificates that recognize the formation of parent–child relationships in married different-sex couples who conceive with donor sperm, it cannot refuse to issue birth certificates that recognize the formation of parent–child relationships in married same-sex couples who conceive with donor sperm. "*Obergefell*," the Court concluded, "proscribes such disparate treatment" (*Pavan* v. *Smith*, 2017, p. 2078).

5.2. Parentage Outside Marriage

This section's discussion up to this point has focused on how understandings of parenthood pressed by same-sex couples shape the regulation of marital parentage. But, as I have argued elsewhere, the transformative implications of including same-sex parents in marriage bleed outside marriage. (NeJaime, 2016, p. 1262). The law's embrace of same-sex parenting as a justification for the inclusion of same-sex couples in marriage – an enduring and privileged institution of family formation – mainstreams principles of parental recognition that accommodate same-sex couples' families. Moreover, *Obergefell*'s equality mandate can be read to reach same-sex parenting, and equality for same-sex parents requires the recognition of nonbiological parental bonds (NeJaime, 2017, p. 2333). Through both marriage equality and sexual orientation equality, the premises of same-sex parenting become more generalizable and far reaching. Intent- and conduct-based principles shape the regulation of both married and unmarried parents, and both same-sex and different-sex couples.

Consider *Brooke S.B.* v. *Elizabeth A.C.C.* (2016), a post-*Obergefell* decision in which the New York high court overturned a damaging precedent dating back to the time of *Nancy S.* In *Alison D.* v. *Virginia M.* (1991), the New York Court of Appeals had refused to recognize an unmarried, nonbiological lesbian co-parent as a legal parent. Instead, the court had maintained parentage as a status rooted in the marital or biological family. Almost two decades later, with the increasing acceptance of same-sex family formation, the court nonetheless affirmed *Alison D.*, even as it pulled back on the decision's implications for some same-sex parents (*Debra H.* v. *Janice R.*, 2010).[31]

But after marriage equality in New York and after *Obergefell*, the New York high court repudiated *Alison D.* and its treatment of same-sex couples' families. The court viewed marriage equality – and *Obergefell* specifically – as an endorsement of family-based equality for same-sex couples. For the court, equality did not simply mean equal treatment under existing principles

of parental recognition. Rather, equality required changes to parentage law to accommodate the distinctive aspects of same-sex couples' family formation. Specifying the meaning of equality with respect to same-sex couples, the court observed that untethering parental recognition from biological connection is necessary to "ensure[] equality for same-sex parents and provide[] the opportunity for their children to have the love and support of two committed parents" (*Brooke S.B.* v. *Elizabeth A.C.C.*, 2016, pp. 498–499).

Through this lens, equality extends not only to married same-sex couples – those exercising rights protected by *Obergefell* – but also to unmarried same-sex couples – those seeking recognition in *Brooke S.B.* On this view, *Obergefell*'s equality mandate, while oriented specifically toward marriage, includes same-sex couples more generally. Nonbiological forms of parental recognition are necessary to treat same-sex couples' families as fully belonging, not only inside but also outside marriage. The understanding of parenthood on which *Obergefell* was premised shapes the regulation of parentage for both marital and nonmarital families.

Moreover, this understanding affects not only same-sex but also different-sex couples. With the New York court's decision, unmarried individuals who engage in ART with a different-sex partner can claim parentage without a biological connection; instead, they may derive parentage by appeal to pre-conception intent. In New York, the principles that underwrite the recognition of same-sex parents, long available to different-sex couples inside marriage, are now available to different-sex couples outside marriage.

The New York case is illustrative of broader trends. Across the country, legislatures are expanding laws regulating ART in ways that reach unmarried couples. For instance, Maine's parentage code now provides that "a person who consents to assisted reproduction by a woman … with the intent to be the parent of a resulting child is a parent of the resulting child" (Me. Stat. tit. 19-A, § 1923 (2016).) Moreover, the UPA was revised in 2017 in ways that extend intent-based recognition without regard to sexual orientation or marital status (UPA, 2017). The new UPA embraces nonbiological parenthood not only across forms of ART – from donor insemination to gestational surrogacy – but also in more general provisions. For example, the UPA replaces the voluntary acknowledgment of paternity – the most common way that unmarried fathers are identified in the United States – with the gender-neutral voluntary acknowledgement of parentage (UPA, 2017, § 301). The voluntary acknowledgement of paternity was premised on biological fatherhood; yet even without a biological tie to the child, a man could falsely claim he was the biological father and, with the consent of the mother, establish paternity through this process. The new voluntary acknowledgement of parentage, in contrast, includes same-sex

couples and transparently accepts its nonbiological capacity; indeed, it explicitly applies to "intended parent[s]" (UPA, 2017, § 301). As these examples illustrate, the principles necessary to recognize gays and lesbians as parents – principles rooted not in biological connection or gender differentiation but instead in intent and function – are reshaping parentage law generally.

6. CONCLUSION – TRANSFORMATION THROUGH ASSIMILATION

In this chapter, I observed a dynamic that might be described as *transformation through assimilation*.[32] This dynamic likely arises in other settings. One can see aspects of it in contestation over the family outside the LGBT context. Consider earlier cases involving unmarried fathers and nonmarital children. Those cases show how sameness arguments (that unmarried couples and unmarried fathers were like married couples and married fathers) and arguments for inclusion (that unmarried fathers be included in legal parenthood) shifted parental norms. Courts protected nonmarital parents and children, even while shoring up some aspects of the status quo (*Stanley* v. *Illinois*, 1972; *Caban* v. *Mohammed*, 1979, p. 391). The extent to which the parents' adult relationship looked marriage-like – the extent to which they acted like a husband and wife – shaped whether the Court understood the parent–child relationship as deserving of constitutional protection (Dolgin, 1994, p. 650; Murray, 2012b, p. 402). As with efforts on behalf of same-sex couples, efforts to expand parenthood in ways that made marital status less salient were shaped by unmarried parents' conformity to marital norms. Yet conformity on some measures facilitated shifts in norms governing parental recognition. Nonmarital bonds of care and commitment were protected in ways that made marriage less central to parenthood.

The dynamic of transformation through assimilation may also exist outside the domains of marriage and parenthood. Future research might address whether other movements have argued in the register of sameness and inclusion in ways that nonetheless import difference into law, reconfiguring the grounds on which similarity is understood and reshaping the institutions at issue. Areas for potential investigation might appear across a variety of movements – from feminist mobilization regarding pregnancy and employment (Franklin, 2010; Mayeri, 2011), to immigration debates over language policies (Rodriguez, 2006, pp. 1714–1716), to disability rights work aimed at access and accommodation (Conway, 2018).[33]

Future research might focus specifically on the conditions under which the type of transformation identified in this chapter is likely to emerge. For instance, in the context explored here, those already included in the relevant institutions were engaging in new practices that challenged the norms governing those institutions. Within marriage, different-sex couples used ART in ways that led them to seek parental recognition in the absence of biological ties. Courts and legislatures accommodated these new family forms by treating them as narrow exceptions to be tolerated but limited or masked. Same-sex couples seized on these exceptional cases to reimagine the logic of parental recognition generally, eventually extending and mainstreaming principles of intent and function. Accordingly, in exploring other contexts, scholars might attend to the extent to which insiders are engaged in norm contestation in ways that aid outsiders making claims on the relevant institution.

NOTES

1. Nonetheless, the analysis finds common ground with work in other disciplines. As writer and scholar Thomas Ferraro has shown in his treatment of immigrant narratives, the dominant culture can be criticized and remade through the very process of assimilation. Ethnic writers, Ferraro argues, discover in their own communities shifting practices and norms, and they also participate in the transformation of an American culture responding to the practices of new members (Ferraro, 1993, pp. 10–11, 192–193).
2. This dynamic resonates with William Eskridge's concept of "transformative equality," in which "equality … offers opportunities for the modern state to rethink past practices and reconfigure institutions in ways that are better for society as a whole, and not just for the previously marginalized group" (see Eskridge, 2003, p. 176).
3. There are traces of this argument in Amy Hequembourg and Jorge Arditi's political, as opposed to legal, analysis (Hequembourg & Arditi, 1999). As they argue, "what is commonly termed 'assimilationism' does not involve a simple embrace of dominant structures but … in its own way, it helps to change, or at least has the potential to change, the practices of categorization of mainstream society fundamentally" (664).
4. This is not to suggest that sociolegal scholars have not focused on the doctrinal and constitutive effects of substantive legal arguments. See, e.g., Cummings (2014, pp. 944–945) and McCann and Silverstein (1998, pp. 273–274).
5. *See* Robson (2002), "Inclusion requires conformity" (p. 725). *See*, for instance, Robson's (2002) characterization of women's rights advocacy. She asserts that "litigating the exclusion of women from all male institutions necessarily implicates the question of women's assimilability," as "the notion of the dominant and idealized group [i.e., men] … becomes the group to which outsiders such as women are to be assimilated" (pp. 716–717).

6. For a contemporary critique of the "sameness theory" embedded in Title VII's prohibition on sex discrimination, specifically with respect to addressing pregnancy and work-family conflict, see Suk (2010, p. 16). Suk questions the power of a legal anti-stereotyping principle in light of the social reality of women's differential family burdens (Suk, 2010, p. 60).
7. This resonates with the argument made by Hequembourg and Arditi outside the context of legal mobilization. They explain how assimilationist strategies can "change the categories through which the mainstream constructs itself and therefore [have] the potential of changing the very terms of the foundational plane on which the oppression of gays and lesbians rests" (Hequembourg & Arditi, 1999, pp. 663, 676).
8. Clearly, an antidiscrimination regime designed around an assimilationist logic can require conformity to dominant norms and punish those who refuse to mute salient aspects of identity. *See* Yoshino (2006).
9. *See also* Chang (2016), describing "a strategy of assimilation," (5) in which "the goal of marriage equality venerates marriage as an ideal to be emulated and achieved by gay couples, which in turn promotes further homogeneity with normative family structures" (23); Shapiro (2005, pp. 657, 661) ("Marriage was … identified as essentially assimilation. It was and is a tool of inclusion and exclusion … [that] subjects individuals and couples to coercive pressure to conform to the degree needed to gain inclusion.").
10. *See* Barker (2012, pp. 109–110) ("Formal equality arguments do not engage with the institution of marriage in a critical way, instead seeking access to it for same-sex relationships on the basis that they are the same as heterosexual relationships and thus deserving of the same legal provisions and recognition."); Joshi (2014, p. 235), ("[T]he legal and social movement for recognizing same-sex marriage has emphasized gay and lesbian couples' *sameness* to heterosexuals, while downplaying their differences … in order to establish couples' … heteronormativity,"); Robson (2002, p. 710) (asserting that "a legal reform movement … is insufficient" because activists should "seek restructuring rather than mere inclusion").
11. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *Obergefell* v. *Hodges* (2015); Brief for Gary J. Gates as Amicus Curiae in Support of Petitioners, *Obergefell* v. *Hodges* (2015); Brief of Amici Curiae Family Equality Council, Colage, and Kinsey Morrison in Support of Petitioners, Addressing the Merits and Supporting Reversal, *Obergefell* v. *Hodges* (2015).
12. *See* Shapiro (1999, pp. 17, 35). *See also* Ghaziani (2011, pp. 99–100) (describing the phenomenon of assimilation of gays and lesbians into mainstream society); Murphy (2013, pp. 1104, 1105, 1115) (discussing pressure to parent in ways that conform to heteronormative models of family).
13. *See also* Grossman (2012, p. 671).
14. Franke developed this concept in her work on feminist legal theory. *See* Franke (2001, pp. 181, 184). *See also* Quinn (2002, pp. 447, 477–478) (criticizing repronormativity and heteronormativity as negative normalizing regimes).
15. Importantly, seeing claims to sameness in this light not only pushes against the assimilationist critique but also challenges the views of proponents of same-sex marriage who assume that the inclusion of same-sex couples does little to shift the underlying norms that govern dominant institutions. Indeed, from their perspective, assimilation is a feature, not a bug.

16. For a brief summary, see NeJaime (2016, p. 1230).
17. For an important argument against the marriage-specific regulation of family formation through ART, see Joslin (2010).
18. An NCLR attorney asserted, "If there were marriage (for homosexuals), we would not be before the court" (Hendrix, 1990, p. A1).
19. This dynamic resonates with Ariela Dubler's "shadow of marriage" concept. *See* Dubler (2003, p. 1641).
20. As the appellate courts did, I use the women's initials, rather than their names.
21. A man enjoyed a presumption of paternity if he "receives the child into his home and openly holds out the child as his natural child." Cal. Fam. Code § 7611(d). In *Nicholas H.* (2002), the court had applied this presumption to an unmarried man who lacked a biological connection to the child.
22. "They introduced each other to friends as their 'partner,' exchanged rings, opened a joint bank account, and believed they were in a committed relationship. Elisa and Emily discussed having children and decided that they both wished to give birth. Because Elisa earned more than twice as much money as Emily, they decided that Emily 'would be the stay-at-home mother' and Elisa 'would be the primary breadwinner for the family.' At a sperm bank, they chose a donor they both would use so the children would 'be biological brothers and sisters'" (*Elisa B.* v. *El Dorado Cty. Super. Ct.,* 2005, p. 663).
23. See, e.g., Amici Curiae Brief of Robert P. George, et al. in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal, *Hollingsworth* v. *Perry*, and *United States* v. *Windsor*, 2012).
24. See, e.g., First Amended Complaint for Declaratory and Injunctive Relief, *Baskin* v. *Bogan*, 2014) ("[T]he State denies the child Plaintiffs and other children of same-sex couples equal access to dignity, legitimacy, protections, benefits, support, and security conferred on children of married parents under state and federal law.").
25. See *Morrison* v. *Sadler* (2005); *Standhardt* v. *Super. Ct. ex rel. County of Maricopa* (2003).
26. A birth certificate is merely evidence of parentage. For the statutory marital presumption, see Iowa Code § 252A.3.
27. Relying on *Varnum* v. *Brien* (2009).
28. See, e.g., *Henderson* v. *Adams* (2016) and *McLaughlin* v. *Jones* (2016).
29. See, e.g., Cal. Fam. Code § 7611 (West Supp. 2016); Me. Stat. tit. 19-A, § 1881 (2016).
30. For a similar result, see In re *A.E.*, 2017.
31. In *Debra H.*, the court extended parental recognition to a nonbiological lesbian co-parent based on her civil union (authorized by Vermont) to the child's biological mother.
32. In some ways, this is an inverse dynamic of what Reva Siegel has identified as "preservation through transformation." *See* Siegel (1996, p. 2119, 1997, p. 1113). On this point, see Cahill (2016) ("NeJaime's analysis of marriage equality's evolution and, in his words, its 'transformative aspects' represents an intriguing example of the inverse of Reva Siegel's theory of 'preservation through transformation.'").
33. Of course, important differences might exist across domains. For instance, as David Engel and Frank Munger argued in their seminal treatment of disability rights, under the Americans with Disabilities Act, "attaining the right to inclusion in mainstream settings and activities is accompanied by a demonstration that one is marked indelibly by one's disability" (Engel & Munger, 2003, p. 89).

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CHAPTER 2

EMBODYING THE LAW: NEGOTIATING DISABILITY IDENTITY AND CIVIL RIGHTS

Megan A. Conway

ABSTRACT

This chapter explores the relationship between disability identity, civil rights, and the law. Twenty-five years after the passage of the Americans with Disabilities Act, the question remains why disability rights legislation does not go far enough toward addressing access, stigma, and discrimination issues. People with disabilities have found empowerment from disability rights laws, but these laws are also restrictive because they define people in relation to medical aspects of their disabilities and narrowly define society's obligation for inclusion. The successes and failures of disability rights laws are an important contribution to the study of conceptions of difference.

Keywords: disability rights; civil rights; Americans with Disabilities Act; discrimination

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INTRODUCTION

Disabled people, just like other disenfranchised groups, have identified themselves as "different" from the mainstream to address perceived injustices under policy and law. Yet at the same time people with disabilities have demanded to be perceived as "the same" in an attempt to combat the stigma that leads to discrimination. The impact of these seemingly opposite goals has been a political and legal system that does not know how to handle disability, with real-world outcomes that vary from significant advances in the accessibility of public places to a staggering unemployment rate for people with disabilities that continues to grow by the decade.

What is so exceptional about disability? Part of the reaction against exceptionality is that recognizing one person as exceptional says that another person is not exceptional. The field of Disability Studies has a variety of paradigms that explore the question of how society perceives and addresses the "difference" presented by disability. Those most relevant to the field of Legal Studies include the Minority Model, the Social Model, and the Civil Rights Model, which in one way or another, treat disabled people as similar to other minority groups, addressing discrimination and stigma as the root causes of disadvantage. The treatment for disadvantage is civil rights legislation. However, despite civil rights legislation that either encompasses disability or directly addresses it, people with disabilities still face significant barriers in their everyday lives. Scholars and advocates need to ask, maybe people with disabilities are not like other groups and that is why the civil rights approach has not been as successful as anticipated. For example, the need for accommodations by people with disabilities denotes special consideration that goes beyond equal treatment. Additionally, it has been noted that other disenfranchised groups such as Blacks, women, and gays garnered public support before civil remedies were employed, whereas people with disabilities are still trying to explain why civil rights legislation on their behalf is even necessary.

Recent discussion in the field has tended toward shifting the conversation to a human variation and human rights approach that address broader issues of social structure that contribute to disadvantage. Incorporating new perspectives and legal strategies might also lead us back to commonalities that people with disabilities share with other minority groups and address issues of multiple identity. A shift in perspective does not mean abandoning civil rights. The fact is that discrimination and stigma on the part of the majority contribute to devaluation of all minorities, including people with disabilities. But people with disabilities cannot rely exclusively on minority identity remedies.

Advocates need to ensure that disability is on the table when questions of human diversity are considered. Human diversity remedies for people with disabilities can also inform remedies for other minority groups, for example, looking at how flexible work practices benefit a variety of workers, or how healthcare reform benefits all kinds of people, or how the right to a quality education helps all kinds of children. But people with disabilities also need to hold strong to their identity to earn a place at the table. This is achieved through an ironic balance of claiming one's disability and claiming that one is just like everyone else.

For those of us in the disability community, we must overcome the fear that talking about shortcomings of the civil rights approach will result in the dissolution of protections. The purpose of this study is not to solve the "problem" of disability as difference in the law, but to bring to light and synthesize the issues that surround the relationship between disability and the law. Martha Minow, in a fascinating discussion of the "dilemma of difference" within Special and Bilingual education, writes compellingly that talking about the "difference dilemma" leads not to solutions, but to a more productive struggle:

> We cannot change our world simply by thinking about it differently, nor can we change it unless we think differently enough to see where we are, and, with this sight, act differently. (Minow, 1985, p. 159)

Tension between Sameness and Difference

For many people with disabilities, there is an inherent tension between integration and celebrating disability as a separate group identity (Shakespeare, 1996). On the one hand, because people with disabilities have long been excluded from many aspects of community living, such as access to an education and the capacity to travel through public spaces, the goals of advocates for people with disabilities encompass language such as "integration" and "inclusion", with an emphasis on "equal access" that will essentially allow people with disabilities to do the same things that everyone else is able to do. The goal of inclusion infers that people with disabilities desire and need to be the same as everyone else. On the other hand, disability marks people as different. Whether via visible bodily characteristics or "invisible" workings of the brain or bodily functions, disability is linked to difference, and this difference sets the individual apart from people who do not share their body distinction. It is the difference of disability that burdens people with stigma, prejudice, and exclusion, and makes them "eligible" for protection under the law.

People with disabilities have turned the stigma of disability on its head and have a personal and group identity that is deeply and positively rooted in their disabilities (Jones, 2002; Shakespeare, 1996). Many people in the Deaf community, by contrast, do not even view themselves as "disabled" at all (Padden & Humphries, 1988). This positive sense of identity often comes into conflict with societal perceptions of disability as a negative attribute.

How Difference Is Defined

A key challenge for disability advocates, legislators, and the courts is how exactly to define the difference that constitutes disability so that discrimination is addressed, barriers are ameliorated, and the tension between disability as a positive identity with a negative impact is resolved. While there is general agreement that laws such as the Americans with Disabilities Act (ADA, 1990), the Rehabilitation Act (Rehabilitation Act, 1973), and the Individuals with Disabilities Education Act (IDEA, 1975), which address disability specifically as a civil rights issue, have broadened access to many aspects of society for people with disabilities, there remains concern that these laws have flaws that do not address the core issues that people with disabilities face (Harris, 2015). At the root of these concerns is how disability is described and defined. The ADA, for example, was crafted to include language that disability advocates viewed as progressive and orientated toward revealing social causes of disability such as stigma and architectural barriers, yet in practice both in the courts and in other public policy arenas, disability is still seen as a personal medical problem with people with disabilities caught between having to prove that they are incapacitated on the one hand and capable on the other (Horejes & Lauderdale, 2014). Further, the emphasis in the execution of these laws and policies is often on bureaucratic definitions of who is disabled and who is not disabled, rather than on how to provide access for the individual. Many laws and policies that concern disability have completely different definitions of who is, in fact, disabled (Rothstein & Irzyk, 2016). These varying definitions and high stakes focus on whether or not a bodily difference is a disability detracts from progress in gaining civil rights for individuals with disabilities.

How Best to Achieve Civil Rights

If the law is like a reflecting pool, both mirroring and shaping how society views difference, then there is little mystery as to why people with disabilities

are in practice viewed as only partial citizens who need to be "cured" to gain full consideration. The law assumes that people with disabilities are equal citizens who just need a "leg up," yet this view is idealistic. The reality is that people with disabilities are in many cases so far below the rest of society in terms of equality that simple legal measures are not enough to attain real citizenship (Hirschmann & Linker, 2014). How best to achieve actual civil equality for people with disabilities is still a conundrum. By all accounts, the intention of the crafters of the ADA was to directly address inequality, and failure of previous laws to do so, by designing a law that was more sociologically orientated, and would clearly specify who is disabled and what society needs to do to ensure civil rights for disabled citizens (Burgdorf, 1991). However, in practice, the ADA has resulted in additional medicalization of disability and advanced the perception that people with disabilities must be "productive" to be of value to society (Drimmer, 1993; Horejes & Lauderdale, 2014). The stigma of disability sometimes seems too embedded to be extracted by legal measures. So the question remains, is the quest for civil rights best achieved by continuing to find a "better way" of crafting law, or are their other avenues that need to be pursued?

How to Learn from and Capitalize on Progress

It is easy to bemoan the failings of the law to address civil rights advances for people with disabilities, when in fact civil rights legislation that treats disability as different has resulted in advancements in the accessibility of both public and private spaces for specific people with disabilities. In a study of the perceptions of disability cause lawyers, a majority of lawyers felt that despite narrow interpretations of disability law by the courts, they have been able to make a positive impact on the lives of individual clients and certain groups of clients, although not always in as direct and sweeping a way as the crafters of the law might have envisioned (Waterstone, Stein, & Wilkins, 2012). In particular, lawyers felt that lawsuits concerning disability rights "make a point" to certain industries and encourage them to change their behavior. Other issues such as lack of judicial understanding of disability as a positive identity rather than a defect (Perju, 2011) and problems of disability as a "special" classification (Minow, 1985; Porter, 2016) although daunting seem addressable through education and legislative modifications. In addition to listing the problems associated with addressing disability through the law, legal scholars have recommended a wealth of both practical and creative solutions to these problems. These will be synthesized at the end of this chapter, with a view to creating a path forward.

WHY DISABILITY RIGHTS LEGISLATION?

To those in the disability rights or disability studies field, the need for disability rights legislation seems obvious. People with disabilities have historically been discriminated against, and legislation, with the resulting court action, is necessary to prevent and remedy this discrimination. But to those outside of the community of disabled people, their families and their advocates, the desirability of using the law to address what seems like a personal medical problem rather than a pervasive societal pattern of exclusion is less clear. To explore the place of disability within the realm of difference and the law on a broader level, this section describes the history of oppression and discrimination that led to the passage of key disability rights legislation and provides a brief overview of key disability rights legislation.

History of Oppression and Discrimination

The most significant barrier to full participation in any sphere of life for people with disabilities has been the practice of confining them to institutions (Ben-Moshe, 2017). Especially from the mid-1800s to the mid-1900s, people with all kinds of disabilities were placed in institutions where they spent their entire lives. People with intellectual and psychiatric disabilities were most commonly placed in institutions, but people with sensory and physical disabilities were also institutionalized, even if just for their childhood and young adulthood when they were educated in "special schools." Although we like to think that the practice of institutionalizing disabled people is a thing of the past, there are still disabled people living in nursing homes, and in large or small institutions or other segregated settings. Cost and the need for "special care" is often cited as the reason for such living environments, yet despite evidence that there are multiple other models of supporting people with disabilities to live outside of institutions, many of which are actually cheaper than institutional settings, some people with disabilities continue to live their lives in institutional settings (National Council on Disability, 2003a).

Current statistics on the numbers of people with disabilities who live in institutional settings are inconsistent, incomplete, and mostly limited to the incarcerated population and the population of individuals with intellectual and developmental disabilities (IDD) who receive State services. A 2006 report by the Cornell University Institute for Policy Research (She & Stapleton, 2006) estimated that 6% of people with disabilities in the United States lived in institutions at that time. A 2012 report (Larson et al., 2017)

focuses on individuals with IDD and estimates that of the 4.7 million people in the United States who have IDD, only 1.3 million people receive IDD services (and thus are the basis for statistical data), and of those, 21,000 people lived in state IDD institutions in 2012. This number is significantly lower than the numbers of people with IDD who lived in State institutions in 1977 (951,000); however, there is concern that some of this population has simply been pushed into the justice system. A third of people who are incarcerated have a disability (Vallas, 2016).

Oppression takes other forms as well. People with disabilities are on average the poorest of the poor, are unemployed or underemployed at shocking rates, have lower graduation rates than the general population, vote at lower rates, and are at higher risk of being isolated from other people because of their disability (Burgdorf, 1991). For example, recent statistics from the American Community Survey ("Characteristics of the Group Quarters Population in the United States 2011–2015 American Community Survey 5-year Estimates," 2016) shows that of the 12.6% of the U.S. population reporting a disability in 2015, 34.9% of people with disabilities in the U.S. ages 18–64 living in the community were employed compared to 76.0% for people without disabilities. More than one in five (21.2%) U.S. civilians with disabilities of working age in 2015 were living in poverty, compared to 13.8% for people without disabilities. Environmental, institutional, and programmatic barriers also lend to oppression. Everything from steps leading into a building, to websites that are not navigable, to classroom that base all measures on the "normal" learner present barriers to participation by people with disabilities and further isolates them from the rest of humanity (Burgdorf).

The oppression of people with disabilities is due in large part to a simple lack of consideration beyond what is thought to be a "normal" body, and in no small part to stereotypes about disability that engender disgust, fear, and avoidance. In recounting some of the more poignant testimony given in support of passage of the ADA, Burgdorf (1991) highlights blatant discrimination against people with disabilities:

> Anecdotal instances of discrimination on the basis of disability abound. Examples noted in the ADA committee reports include…A New Jersey zoo keeper refused to admit children with Down's syndrome because he feared they would upset the chimpanzees…A woman disabled by arthritis was denied a job at a college, not because of doubts that she could perform the job, but because the college trustees believed that 'normal students shouldn't see her'… [And] a child with cerebral palsy was excluded from public school, although he was academically competitive and his condition was not actually physically disruptive, because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates… (p. 418)

But discrimination and oppression are more often subtle. For example, while most employers these days will say that they do not consider a person's disability when making a hiring decision, the fact remains that in practice they believe people with disabilities are not as capable as other workers, or will create morale problems with other workers (Porter, 2016).

Key Disability Rights Legislation

This chapter will not provide a comprehensive overview of Disability Rights Legislation or its history. Two excellent resources for more comprehensive overviews of this legislation can be found for legal scholars and advocates by Rothstein and Irzyk (2016), as well as for the layperson on the Department of Justice's ADA website ("A Guide to Disability Rights Laws," n.d.). Brief descriptions of laws referred to in this chapter include the following.

Americans with Disabilities Act

> The ADA prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the United States Congress. To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered. (ADA, 1990)

Individuals with Disabilities Education Act

> The Individuals with Disabilities Education Act (formerly called P.L. 94-142 or the Education for all Handicapped Children Act of 1975) requires public schools to make available to all eligible children with disabilities a free appropriate public education in the least restrictive environment appropriate to their individual needs. (Individuals with Disabilities Education Act, 1975)

Civil Rights of Institutionalized Persons Act

> The Civil Rights of Institutionalized Persons Act (CRIPA) authorizes the U.S. Attorney General to investigate conditions of confinement at State and local government institutions such as prisons, jails, pretrial detention centers, juvenile correctional facilities,

> publicly operated nursing homes, and institutions for people with psychiatric or developmental disabilities. Its purpose is to allow the Attorney General to uncover and correct widespread deficiencies that seriously jeopardize the health and safety of residents of institutions. The Attorney General does not have authority under CRIPA to investigate isolated incidents or to represent individual institutionalized persons. (Civil Rights of Institutionalized Persons Act, 1997)

Rehabilitation Act

> The Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by Federal agencies, in programs receiving Federal financial assistance, in Federal employment, and in the employment practices of Federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in title I of the Americans with Disabilities Act. (Rehabilitation Act, 1973)

Several other U.S. laws pertain to the rights of individuals with disabilities and include, but are not limited to the *Architectural Barriers Act* (1968), the *Fair Housing Amendments Act* (1988), the *Air Carrier Access Act* (1986), the *Telecommunications Act* (1996), and the *Voting Accessibility for the Elderly and the Handicapped Act* (1994).

RELATIONSHIP BETWEEN DISABILITY, IDENTITY, AND THE LAW

This section will explore the relationship between disability, identity, and the law, through a discussion of the interplay between the fields of Disability Studies, Deaf Cultural Studies, and Disability Legal Studies. In particular, issues of stigma and disability are explored, as stigma plays an especially important role in both defining who is disabled and how the law treats disability as a social justice category.

Disability Studies, Deaf Culture, and Identity

Just as with Black Studies, Women's Studies, LGBTQ+ Studies and similar studies, the academic fields of Disability Studies and Deaf Cultural Studies are closely linked to a civil rights movement, both as a consequence of the movement and as an influence on the movement. One definition of Disability Studies, offered by well-known Disability Studies scholar Simi Linton (Kanter, 2011) is:

> Disability Studies reframes the study of disability by focusing on it as a social phenomenon, social construct, metaphor, and culture utilizing a minority group model. It examines ideas related to disability in all forms of cultural representations throughout history, and examines the policies and practices of all societies to understand the social, rather than the physical or psychological, determinants of the experience of disability. Disability Studies both emanates from and supports the Disability Rights Movement, which advocates for civil rights and self-determination. (p. 408)

Many people in the field of Disability Studies feel that being disabled constitutes a distinct cultural experience, although the strongest proponents of a cultural model are people in the Deaf community who believe that deafness is a cultural identity rather than a disability identity. This creates an interesting complexity to the question of disability and/or Deaf identity and its relationship to how the law defines and addresses disability.

Disability Studies and Identity – Role of Stigma

Erving Goffman's work on stigma has been influential in defining the relationship between how society views disability and disability identity. Goffman (2017) defines stigma as follows:

> A person becomes stigmatized [when they are] reduced in our minds from a whole and usual person to a tainted, discounted one.

Stigma is often based on physical traits, hence the relationship to disability, but it can also be based on religion, geography, class, sexuality, and any other number of human variations. At the root of stigma is, in fact, the observation and ranking of differences. Stigma occurs when a negative value judgment is made based on these differences and can have profoundly harmful effects on the stigmatized. It is interesting that measures of "difference" are not a given, but depend on a relationship between at least two people. Writing about Special Education 30 years ago in words that still ring true today, Martha Minow (1985) observes that "The 'normal' child depends on the existence of the 'different' child for the label of normal" (p. 205).

While the capacity of humans to stigmatize differences seems boundless, disability is universally the most stigmatizing of any other human characteristic. Disability is one of those characteristics that even other stigmatized people stigmatize. Disability is commonly associated with words such as "defective," "weak," "stupid," "incompetent," "incapacitated," and "worthless." Even seemingly altruistic associations such as those of sympathy, compassion, and admiration (at "overcoming" disability) stigmatize people with disabilities as being of lesser value than other people. The stigma of disability is the root

cause, both intentionally and unintentionally, of much of the discrimination against people with disabilities by society and by individuals. Discriminatory attitudes do not necessarily manifest themselves in overt hostility. People can hold both negative feelings (i.e., fear, repulsion) and positive feelings (i.e., sympathy) about disability that both result in discrimination (Weber, 2015).

An interesting manifestation of stigma can be the formation of group identity. Historically, groups of people who are stigmatized, by reasons of race, sexuality, etc., have formed a strong and positive group identity with boundaries and rules of membership. Brewer (1991) writes:

> Having any salient feature that distinguishes oneself from everyone else in a social context…is at least uncomfortable and at worst devastating to self-esteem. One way to combat the non-optimality of stigmatization is to convert the stigma from a feature of personal identity to a basis of social identity. (p. 481)

Thus, people with disabilities have, as a stigmatized group that is seen by others as "abnormal," formed positive identification around their disabilities to normalize themselves (Jones, 2002).

Tom Shakespeare is a well-known disability studies scholar who was one of a group of British sociologists who first made popular the social model of disability, which challenged the well-established view of disability as personal tragedy. In a discussion of disability and identity, Shakespeare (1996) describes how social movements and "the stories that we tell to ourselves" form a basis for identity. The social movement allows people to tell their own stories rather having their stories defined by other people. In the case of people with disabilities, reformation of the disability identity in a more positive light has introduced new narratives about what disability is and what disability is not. Shakespeare clearly distinguishes between two main approaches to disability and group identity. One approach is what is now commonly referred to as the "medical model," and which Shakespeare describes in terms of "physicality":

> [This] approach conceives of disability as the outcome of impairment…Disabled people are defined as that group of people whose bodies do not work; or look different or act differently; or who cannot do productive work… (Shakespeare, 1996).

The other approach to disability identity, Shakespeare (1996) defines as a "social process", of which he identifies five sub-approaches (pp. 3–4): (a) the Social model, where disability is construed as the outcome of barriers, both physical and attitudinal, constructed by society; (b) the Minority Group model, where disabled people are "an oppressed group"; (c) the Weberian/Foucauldian model, which views disability as a category within political processes; (d) the Social Research model, where disability is a byproduct

of population research; and (e) the Cultural model, which focuses on stereotypes, prejudice, and otherness. What is important to recognize is that disability is not a static or easily identifiable category of human difference. Depending on perspective and context, disability can be described as both a medical condition and a group identity, with many variations within these broader categories.

Deaf Culture and Identity – Not Disabled

Although there are clear linkages between social constructions of disability and social constructions of Deafness, many Deaf people see themselves as being part of a Deaf culture (and it should be noted that "D" is used instead of "d" within the Deaf community to symbolize cultural identity as opposed to physiology) that is distinct not only from what they term "hearing culture" but also from a disabled identity. Carol Padden and Tom Humphries, both Deaf, are leading scholars in the field of Deaf Cultural Studies. They have published numerous works on this topic, but one of their earlier works has provided a foundation for Deaf Cultural Studies and makes a strong case for Deaf identity as not only different from the identity of non-Deaf people, but as a distinct and definable culture (Padden & Humphries, 1988). They describe culture as "a set of learned behaviors of a group of people who have their own language, values, rules for behaviors, and traditions" and apply this definition to Deaf culture stating that Deaf people behave similarly, use the same language, and share the same beliefs. In more recent work (Padden & Humphries, 2009) they describe how, despite growing acceptance of, and in some cases a fascination with, Deaf culture and sign language, Deaf people still remain isolated from society as a whole and deafness is still perceived as a negative attribute by those outside the Deaf community.

This persistent isolation and stigma is the key to Deaf people's embracing of a Deaf cultural identity and their rejection of a disabled one (Jones, 2002). Completely cut off from society, Deaf people have re-imagined Deafness as a positive cultural identity rather than a medical condition. Because disability is so highly stigmatizing, embracing disability flies in the face of Deafness as a positive source of identity. In an article for the *Atlantic Monthly*, Dolnick (1993) quotes two advocates for Deaf culture who say, "The term 'disabled' describes those who are blind or physically handicapped, not Deaf people" (pp. 37–38). However, there is also some argument that proponents of Deaf culture ignore the experiences of the wider deaf community that includes people of varying etiologies, and linguistic, racial, and ethnic backgrounds. Burch and Joyner (2014), for example, argue that Deaf culture is largely built

on an idealistic view of Deafness created by white Deaf people who attended schools for the Deaf. This idealized cultural identity trumps the Deaf identity over all other identities, especially those of people of color who may have complex multiple identities and a different collective history from the Deaf "mainstream." The insistence that Deafness constitutes a single and unique experience, argue Burch and Joyner, impedes the drive for social justice for people with disabilities as a whole. This rejection of disability on the part of some members of the Deaf community, along with the complexities of what exactly comprises the "Deaf" identity, creates a problem of definition for those developing legislation and policies to protect the civil rights of Deaf people, and for Deaf, or deaf, people seeking relief under the law.

Importance of Disabled Identity to the Law

How we define a disabled identity is of the utmost importance to how we address the exclusion of people with *disabilities* from society. On the one hand, we need to define disability to identify who is protected under civil rights legislation. And how we define disability impacts how the court views disabled plaintiffs and the types of remedies that are available to them. As will be described below, many legal scholars argue that a medical model approach to the law and disability has hindered civil rights for disabled people by focusing on the classification of disability rather than on actual remedies for inclusion and the pursuit of equality. Harris (2015), for example, goes so far as to say that despite a history of "state sponsored denial of citizenship" the law still treats people with disabilities as "incapacitated" and "separate and unequal." Scholars also argue that even the ADA, which advocates say is intended to take a more social model approach to disability and which has recently been amended (ADA Amendments Act (ADAAA), 2008) to address issues of classification obsession in the courts, still forces people with disabilities to define themselves as incapacitated yet useful. Other scholars argue that disability as a social identity is problematic within the realm of the law and that social model narratives confuse the courts and detract from the achievement of basic human rights for people with disabilities. Samaha (2007) critiques the use of the social model in the law, saying that it has been widely adopted but has no direct policy implications.

Identifying as Disabled under the Law

To seek protection under the law, a person has to identify themselves as a protected class. For people with disabilities, this means both accepting themselves

as a person with a disability, and accepting the way that the law defines the classification of who is and who is not disabled. Both the stigma of disability, with its associated stereotypes of incapacity, defective, so on, and most particularly disability as a positive cultural identity presents problems to this classification. The ADA, for example, defines a person with a disability as:

> …A person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment… (Americans with Disabilities Act of 1990 42 U.S.C. §§ 12101 et. seq.)

Utilizing the ADA in advocacy efforts or in a lawsuit requires a person to define themselves as "impaired" as described by the ADA (Horejes & Lauderdale, 2014; Rovner, 2004). Perceptions of disability as a positive personal identity and cultural affiliation are insignificant.

An interesting paradox of the way that stereotypes about disability impact how disability rights laws are interpreted is when, in the eyes of the courts, "disabled" equals "incapacity," where the courts cannot grasp that a person can be capable and still need protection. This has especially come to light in the areas of employment and disability benefits. Burgdorf (1991) points out that to claim discrimination in employment, a plaintiff has to be two-faced, first proving that they are incapacitated (fit the definition of a "person with a disability") and then proving that they are capable of the work at hand ("otherwise qualified"). In a discussion of disability benefits appeals, Newman (2015) writes that to apply for disability assistance, namely Supplemental Security Income and Supplemental Security Disability Insurance, a person has to show that they are incompetent and cannot cope with their disability. Furthermore, Newman argues that in trying to conform to criteria for benefits or legal intervention, people with disabilities are forced to present their personal narratives in a way that shows them as helpless, evokes sympathy, and reinforces common stereotypes about disability. The need to present themselves as pitiful makes disabled people appear and feel powerless. Benefits and employment law often intersect, as well, where claiming disability benefits can negate an argument of "otherwise qualified" in the context of employment (Diller, 2000). Essentially if you can work you are not disabled and if you are disabled you cannot work.

The interplay with how disability is perceived within the context of the law and how people with disabilities are forced to present themselves because of these perceptions further establishes disabled people as "other" both in the eyes of the law and in the eyes of society. Separating out disability as a unique classification under the law can result in further stigma and segregation.

Rovner (2004) stresses the importance of the law to identity in civil rights movements in general. Thus, if the law defines disability as a defect, she argues, then that is how people with disabilities will perceive themselves and how others will perceive them. For example, Porter (2016) describes "special treatment stigma" in the workplace where co-workers will often resent disability-related accommodations, especially when a person is not visibly disabled or when workers believe accommodations for others places more of a burden on them. Special education law, namely IDEA, has also fostered stigma in the name of special education placement. Labeling under IDEA subjects students to the stigma of "otherness" and negative associations with disability such as stupidity (Perlin, 2009). Another significant impact of stereotyping and stigma within the Special Education system is the overrepresentation of African American boys. Disability Studies in Education scholars have pointed out that Special Education has, both intentionally and unintentionally, been utilized to essentially re-segregate children of color in the public schools (Ferri & Connor, 2005; Minow, 1985).

A common societal misperception is that disability is the fault of the disabled person and therefore they are not worthy of accommodation. This misperception is reflected in current law that reinforces disabled people's perceptions that they are inferior and only worthy of accommodations or treatment that does not cost society too much (Drimmer, 1993). Weber (2015) explains that judges in disability discrimination cases may hold the same attitudes and habits of mind as those they are being asked to judge, thus if a person is seen as having caused their disability then accommodations are viewed less favorably. Employment is an area where attitudes about accommodations have been put to the test, and where employers have most often prevailed. One problem is that specific ideas about workplace "norms" are ingrained in American society, and any exception to what is seen as normative operations is met with resistance (Porter, 2016).

Overemphasis on Classification

Conceptions of disability as different and separate have contributed directly to an over emphasis on the classification of disability and an under emphasis on remedying disability discrimination and supporting inclusion of persons with disabilities in society. Many advocates and scholars feel that the ADA has not "lived up to its promise" to secure civil rights for disabled people. The overemphasis on classification has been one of the main discussion points for disability legal scholars since passage of the ADA and was a primary impetus for changes to the law made during passage of the ADAAA of 2008

(National Council on Disability, 2013). Crossley (1999) traces the emphasis on classifying who is disabled back to how disability is defined in legislation prior to the ADA. Definitions of disability have historically been very medically and economically based, starting with the Social Security Act (1935), which defines a "disabled" person as someone who is unable to work, followed by the Rehabilitation Act, which defines a disabled person as needing support to work, and culminating in the ADA, which though intended to represent a more sociological and civil rights approach, still depends on medicalized categories to define who is protected. Befort (2013) writes:

> Many activists and observers were optimistic that the ADA was structured to go a long way toward achieving the stated objective of eradicating disability discrimination. But the optimists overlooked one important fact: unlike the all-encompassing nature of race and gender under Title VII, the notion of disability under ADA is a term of limitation. While everyone has a race and gender, not everyone is disabled. (pp. 2034–2035)

An obsession with who is and who is not disabled has not completely stymied progress under the ADA. As noted previously, Waterstone et al. (2012) conducted a survey of disability cause lawyers and found that most of these lawyers believe they have achieved significant progress in public access and civil rights for certain categories of people with disabilities, that is, blind people, wheelchair users:

> Our findings reveal that disability cause lawyers have brought, and continue to bring, high-profile and successful cases despite the Court's decisions, although perhaps in a narrowed issue area in the face of a hostile Supreme Court. This suggests that the ADA's impact may be two tiered-one for individuals who clearly meet the statute's definition of disability and another for the larger group that does not. (p. 1350)

MINORITY RIGHTS VERSUS HUMAN DIVERSITY/ HUMAN RIGHTS

For younger people with disabilities today it is difficult to imagine a time when there was not at least some recourse in the law to address issues of unfairness. Despite persistent issues of access and equality, there is a sense of power that comes from knowing that the law is behind you, at least in theory. Some older generation disabled people worry that because the younger generation has grown up in a world that is much more accessible than the one in which they grew up in, there is complacency and stagnation in moving beyond basic rights of access to more complex and meaningful rights to full inclusiveness.

However, much of what has already been established in the United States in terms of rights for disabled people comes from a civil rights approach that separates out disability as constituting a minority and is grounded in the struggles of other minority groups such as Blacks and women. The question remains whether disability rights can progress further under this civil rights model, or whether other models and strategies need to be employed.

Disability Rights as Minority Rights: Opportunities and Challenges

It is useful when discussing the law and difference to look at commonalities and differences between disability and other groups who have experienced exclusion and sought civil rights remedies to address discrimination. These commonalities and differences hold important clues to how a vision of "difference" has helped and hindered rights for people with disabilities, and what lessons can be learned for both people with disabilities and other excluded groups.

Scholars and advocates have argued that disabled people constitute a distinct minority group that holds similarities with other minority groups such as powerlessness, third-class citizenship, and perceptions of inferiority that have resulted in cohesion of the group around a more positive identity and a common social movement. Writes Crossley (1999):

> The minority group model goes beyond simple recognition that disability has social roots. It argues that the functional limitations associated with impairment vary directly with the degree to which society respects the differences of the minority group of impaired individuals, and it demands the eradication of exclusionary social practices and structures as a matter of civil rights for persons with disabilities. (p. 659)

A significant remedy for injustices and outcome of the resulting social movement has been in the form of civil rights laws. These laws have achieved greater visibility and access to society; however, outcomes of the civil rights approach still fall far from equality with other members of society. One problem is that civil rights remedies for people with disabilities do not mirror those of other minority groups because of the unique functional aspects of disability. In many cases people with disabilities need specific accommodations and modifications to existing spaces and practices to gain access to them. Simply providing "equal treatment" does not create "equal access" (Rovner, 2004; Weber, 2015). Weber writes that for people with disabilities, "Equality lies in treating what is different differently as much as in treating what is the same the same" (p. 2503). Minow (1990) also examines the meaning of "equality"

and its relationship to difference. In the law, "equality" has come to mean that we must treat all people the same if they are the same, but differently if they are "really different". According to Minow (1985):

> Equality itself can be understood as founded on the belief that people are fundamentally the same or unchangeable…The problem with this concept of equality is that it makes the recognition of differences a threat to the premises behind equality…to be different is to be deviant. (pp. 202–203)

One issue is that disenfranchised or minority groups tend to use terms such as "equality," "inclusion," and "equal treatment" interchangeably in the context of achieving a desired social aim – typically that of justice for its members in areas where they have been disadvantaged or mistreated by "the majority." These terms can have much less fluid interpretations in the context of the law. Courts seek consistent definitions to guide decisions. A social interpretation of "equality" for a disabled person would be seen by disabled advocates as having been achieved when "you can do the same things that everyone else can do." The courts, however, might perceive "equality" as "equal treatment" or "equal protection," which is a more restrictive definition meaning "to be treated the same as everyone else." Ne Jaime (2017) discusses this problem of definition in the context of parental rights for gays and lesbians, writing that "equal protection" is difficult to apply to questions of parenthood because of underlying assumptions about biology and gender. Treating same-sex couples equally to different-sex couples in issues of parenthood is essentially impossible, thus he argues that courts need to consider socially orientated definitions of parenthood in its decisions

It may seem desirable to fit disability neatly within a civil rights framework modeled after other groups who have experienced discrimination and disenfranchisement. The disability rights movement was inspired by, and still takes hope from, other civil rights movements, in no large part because these movements do seem to inspire both political and social change. Disability scholars also see themselves fitting within the context of "intersectionality," where theories of race, gender, sexuality, and disability draw from each other to shape new theories and intersections. However, there is also an unease with neat parallels between disability and other forms of identity, both within and outside of disability circles. Some of this unease stems from the question of identity itself – who is and who is not disabled? Is disability a positive or a negative attribute? Is disability entirely socially constructed or are there personal and medical aspects of disability that also need to be addressed? How does the law deal with this "identity crises"? Other factors influencing unease are external to identity and have more to do with public support for civil

rights legislation and how to address the impact of disability within the scope of the law. Unlike other civil rights movements, where civil unrest typically foreshadowed and catapulted public support and then legislative action, disability rights have been garnered primarily through legislative initiative independent of broad public support. This is not to say that significant grassroots efforts were not required to garner legislative initiative; however, these efforts were not widely publicized. These issues have a potentially negative impact on the applicability of purely legal measures for addressing the problem of differences and people with disabilities.

Impact of Minority Model on Interpretations of the Law

While the legislative perception that disability is a difference that merits civil rights protection, and people with disabilities are as such a minority group, has resulted in the passage of important civil rights legislation such as Section 504 of the Rehabilitation Act and the ADA, this approach has presented difficulties in the court's interpretations of these laws. Most recently, a significant challenge is the way that courts interpret the ADA as opposed to the legislative intentions of the Act. At the heart of this misalignment between purpose and interpretation is the very question of how "different" a person needs to be to be considered "disabled," and society's obligation to address disability as difference. Some of this misalignment has been addressed by the passage of the ADAAA in 2008 (National Council on Disability, 2013), but other challenges persist.

The National Council on Disability (2003b) wrote a policy brief raising the concern that the ADA had been narrowed by court rulings and that the Act did not "provide the same scope of opportunities and protections expressed by those involved in creation and passage of the ADA." They urged Congress to pass legislation that would restore the original intent of the Act. Of primary concern was a myopic focus by courts on the definition of "disability," which many advocates have termed the "ADA Backlash":

> Supreme Court cases involving disability, then, have not been key movement moments in announcing new rights or formulating visions of equality. Rather, such cases have generally involved the interpretation of various parts of the ADA. The greatest concentration of those cases has involved the ADA's definition of disability, with the court interpreting it in a consistently restrictive manner that limits the number of people who could be considered covered under the statute. (Waterstone, 2015, p. 842)

Kaminer (2016) describes two key Supreme Court cases that significantly restricted the ADA: *Sutton* v. *United Airlines Inc.* (*Sutton* v. *United Airlines Inc.*,

1999) and *Toyota Motor Mfg., Kentucky, Inc.* v. *Williams* (*Toyota Motor Mfg., Kentucky, Inc.* v. *Williams*, 2002), which ruled, respectively, that an individual's disability should be examined in its "mitigated state" and that "substantially limiting" impairment must "prevent or severely restrict" an individual from doing an activity that is of "central importance to most people's daily lives." Writes Kaminer:

> Under the *Sutton* and *Toyota* decisions, plaintiffs were often put in a catch-22 situation where they were too disabled to qualify for or keep the jobs that they wanted, but they were not disabled enough to merit protection under the ADA. As a result, plaintiffs in employment discrimination cases filed under the ADA had dismal win rates. One study found that plaintiffs in Title I ADA employment discrimination cases lost 97% of the time. (p. 211)

Thus, despite the promise of a civil rights approach of justice for people with disabilities, narrow court interpretations grounded in medicalized perceptions of disability continue to impede the full potential of the ADA to move beyond perceptions of disability as deficit to a richer civil rights approach (Hirschmann & Linker, 2014).

Second- and Third-Class Citizens

If women, racial minorities, and sexual minorities are second-class citizens, people with disabilities are third-class citizens (Hirschmann & Linker, 2014). One reason for "third-class" citizenship is the historical absence of disability as a protected class in general civil rights measures. For example, Hirschmann and Linker write that disability was not included as part of the Civil Rights Act (1964) because disability was seen as a defect rather than as resulting from prejudice. However, they also point out that other groups fighting for civil rights may not want to be associated with disability because "disability" has often been used as the basis for denying rights to other minority groups, whether through the use of "defect-based" language to describe these groups, or through institutionalization and denial of rights based on perceptions of incapacity. Therefore, despite the fact that disabled people are the most marginalized of all minority groups (Hirschmann & Linker, 2014), political efforts and civil rights legislation for people with disabilities have often evolved separately from that of other groups (Perju, 2011).

Positive Identity and Social Movement

A strong and important element that ties disability together with other groups that have identified as excluded minorities is positive identity formation

around civil rights action. This positive identity forms the basis of greater recognition both within a group and outside of it, resulting in more cohesive political action and wider acceptance of minority status and civil rights remedies. Drimmer (1993) writes:

> Reaffirmation of one's "disabled identity", like that of any other minority, as well as an exploration of disabled culture, are crucial for a proper societal acknowledgement of people with disabilities. If "diversity in culture is a good thing," then intolerance of other cultures and other human experiences is a bad thing. People with disabilities are not freaks or inherently inferior human beings, but they share the common experience of other cultures that are stigmatized on a daily basis. (pp. 289–290)

Viewing disability as constituting minority status and its relationship to civil rights approaches has brought people with disabilities together, provided a foundation for easily explaining how stigma and discrimination are similar to that experienced by other minority groups, and generated public sympathy for the barriers faced by disabled people (Scotch & Schriner, 1997). As Areheart (2011) describes disability discrimination, in a discussion of "disability trouble" that the author equates to issues of "gender trouble" in gender discrimination, "Social cause justifies social responsibility, even if stereotypes persist" (p. 202).

There are interesting connections between the law and social movements, and the disability rights movement holds many similarities to other movements in this respect. Eskridge (Rovner, 2004) talks about this relationship, writing that law "channels the discourses" of a movement. In her discussion of the need for broader attention to Disability Legal Studies, Kanter (2011) presents an interesting analysis of the similarities between Martin Luther King Jr. and Jacobus tenBroek, a blind disability rights legal scholar and founder of the National Federation of the Blind; noting that both focus their rhetoric on issues of humanity, personhood, and belonging.

The Inferior Body

A common thread in discussions of how disability discrimination is similar to discrimination based on gender, race, and sexual orientation is a focus on the inferior body (Rovner, 2004). In all of these cases of discrimination based on "difference," an "impaired" body is judged against a body that is presumed to be "normal" (Hirschmann & Linker, 2014). These presumptions about normality are socially constructed, for example, as with the "gender/sex" binary and the "disablement/ impairment" binary (Areheart, 2011). And as with racism and sexism, disablism can be unacknowledged and unintentional, yet still

harmful (Horejes & Lauderdale, 2014; Weber, 2015). Drimmer (1993) links disability discrimination to discussions of stigma mirroring that of others with "inferior" bodies, where people with disabilities are viewed by society as being "ruined," writing:

> Although current social views of disability are different from those of other minorities in that revulsion, condescension, pity, and discomfort are perhaps more common than outright hostility, the effects of all prejudice and discrimination are the same-a view of inherent inferiority, leading to exclusion from society. The remedies countering discrimination are the same as well, ensuring that the excluded group be afforded the same privileges and opportunities as all other citizens. (p. 1375)

The Same But Different

Disability studies scholars can grapple with identity politics with the best of them, but the fact remains that disability is still finding a foothold in the broader arena of discussions of difference. Shakespeare (1996) brings up two important complexities to viewing disability as a minority identity. One is that disabled people are likely to have multiple identities (i.e., gay, black, disabled) and that other identities may supersede disability identity. This is especially true in relation to race and gender, where, similarly to gays, people with disabilities often do not grow up with disabled role models and may be isolated from the disability community and ashamed of their disability. In a discussion of the similarities and differences between disability and gender issues, Areheart (2011) points out that although people with disabilities share similarities with women in terms of how society views them, namely a body that is not "typical" and the need to be treated differently to achieve equality, there are also some key differences that merit attention. One important difference is that if we were to take away the social aspects of how gender is perceived, most likely women would achieve equality with men. With disability, however, even without social barriers there would still remain limiting elements of impairment that would affect equality. Areheart also points out that gender can effectively be chosen, whereas disability is not volitional (although I would argue that disability identity is in fact volitional).

There is still much resistance to viewing disability as a minority label in the courts, in society at large, and among other minority groups. A large part of this reluctance comes from the persistent stereotype that disability is a personal problem that needs a cure rather than civil rights remedies (Rovner, 2004) and a lack of understanding or acceptance of disability as rooted in social perceptions and other societal barriers. Perju (2011) writes:

> At the core of the [social] model, one finds both a transformative insight and its central shortcoming. The insight is that the cause of disability is not a medical impairment but society's reaction to that impairment. Over the past four decades, this insight has formed the basis of disability reforms and changed the status of persons with disabilities from passive "objects of rehabilitation and cure" to rights holders entitled to make demands on social institutions. The shortcoming, as we have seen, is the readiness to gloss over medical impairments altogether, and in this process, to generate distortion effects that courts have been unwilling or unable to rectify. (p. 284).

Two related issues are strangely in opposition to one another. One is that achieving civil rights may require unequal treatment, which is particularly so in the case of disability, and this fact is threatening to non-disabled people (Diller, 2000). Another issue comes from other groups seeking civil rights, who may be afraid that adding disability as a protected class alongside other classes in civil rights legislation may actually weaken these acts (Burgdorf, 1991).

As mentioned above, a key element of disability rights law is the need for accommodations to achieve equality. Many disability law scholars point out this significant difference between disability rights laws and other civil rights laws, but Rovner (2004) presents a particularly succinct argument. She points out that "equal treatment" actually excludes people with disabilities. Leveling the playing field is not enough – people with disabilities often need accommodations and modifications to achieve equality. The need for accommodations requires a different kind of definition of equality and different kinds of civil rights legislation, what Robert Burgdorf (as quoted in Rovner in reference to the ADA) calls "second generation civil rights law."

The Path to Justice: Garnering Public Support

Several scholars have pointed out that for most civil rights movements, legislative remedies are preceded by social activism, and it is activism that changes public attitudes and garners public support for such legislation. In this respect the disability rights movement does not run parallel to other movements (Hirschmann & Linker, 2014; Horejes & Lauderdale, 2014; Rovner, 2004; Waterstone, 2015). Although there was, and still is, a recognizable disability rights social movement, activism resulted in a shift in legislative understandings of societal barriers for people with disabilities, without the impetus of a shift in public understanding. While the hope was that a change in public attitude would follow the visibility of people with disabilities in society, which in turn would foster understanding, those changes in attitude have been slow to come (Rovner, 2004).

Hirschmann and Linker (2014) argue that other civil rights movements, in particular the Black civil rights movement, actually further marginalized people with disabilities because of its strong rejection of images of disability. The paradox is that despite many similarities in social stigmas of Blackness and disability, and despite many similarities in the impact of these stigmas such as poverty and educational disparities, these two movements remain inherently separate.

Disability as Human Diversity

A number of scholars and advocates have embraced the human diversity, or human rights approach as a means of addressing perceived shortcomings of a civil rights approach to equality for people with disabilities. They highlight the complex causes and remedies for disability and point to international human rights approaches such as the UN Convention on the Rights of Persons with Disabilities (CRPD) as a means of moving beyond the limitations of a civil rights approach. At the core of a human diversity paradigm is the inescapable fact that society must grapple with the universal reality that disabled people struggle to achieve the right to be seen and treated as human beings (Hirschmann & Linker, 2014).

Complexity of Causes and Remedies for Disability

In their introduction to *Civil Disabilities: Citizenship, Membership and Belonging*, Hirschmann and Linker (2014) discuss the complexity of social systems and note that social rights must extend beyond legal protection to economic security, employment policies, and health care. In a chapter focused on the intersections of disability with race, gender, and class, Burch and Joyner (2014) extend this discussion of social systems to argue that "interdependence" is a more appropriate concept than "intersectionality" when looking for approaches to address the placement of disability in society. Scotch and Shriner (1997) take this issue a step further, pointing out that although civil rights legislation has helped to combat discrimination for both African Americans and people with disabilities, in some ways both people with disabilities and poor Blacks are worse off despite this legislation, especially economically. In the case of people with disabilities:

> Many people with disabilities are disadvantaged in the labor market by inadequate education and cultural capital, by work disincentives built into benefit and insurance programs, and by inadequate systems of social support. While each of these disadvantages can be attributed to a legacy of stigmatization and isolation, they may not be overcome solely by

> framing the problem in terms of discrimination. Further, disability interacts with class, race, gender, and age in complex ways that compound isolation and inequity. (p. 153)

Scotch and Shriner acknowledge the social constructions of disability, but contend that "disability is associated with problems beyond discrimination" that can be attributed to human variation and problems of functioning.

Comparison of Minority Rights Approach to Human Diversity Approach and CRPD

In 2012, Congress failed to ratify the UN CRPD (United Nations, 2007), dashing the hopes of many disability rights advocates who had hoped to bolster U.S. disability rights protections with the human rights approach of the UN Convention. The very act of bringing the CRPD up for vote, however, brought forth valuable discussions about the contributions of a human rights approach to addressing disability inequalities. The National Council on Disability (2008) published a policy brief in favor of passage of the CRPD, noting that it aligns with U.S. law (some opponents have suggested that it does not), but provides a more holistic approach to disability that takes into account needed change to U.S. institutional structures and disability policy schemes, such as health insurance, employment policies, and rehabilitation services. According to the NCD:

> Concepts from the CRPD (as well as the other human rights treaties referenced and incorporated in the Preamble) such as non-discrimination can be seen as falling readily within the gambit of civil rights protection. By contrast, CRPD notions such as respect, dignity, equal worth, the full enjoyment of all rights, equality of opportunity, mandated legislation and governmental activities, the use of special measures as well as other economic and social rights, and duties relating to proactive alteration of the social understanding of disability, lie beyond the currently conceived parameters of United States law. (p. 9)

One area where civil rights legislation, specifically the ADA, has disappointed expectations is employment. Scotch and Shriner (1997) make the case for a human diversity approach in the case of employment that would focus on maximizing each individual's productivity rather than focusing on minority rights. They argue that a human diversity approach would lead to the reformulation of inflexible hiring and management policies that currently impede employment for people with disabilities. Hinckley agrees, arguing that adoption of the CPRD would shift the focus of disability employment law away from a welfare model and toward an inclusion model (Hinckley, 2010).

Stein (2007) wrote a compelling article advocating for a "human rights approach" to disability, an approach that he argues:

> Maintains as a moral imperative that every person is entitled to the means necessary to develop and express his or her own individual talent. This paradigm compels societies to acknowledge the value of all persons based on inherent human worth, rather than basing value on an individual's measured functional ability to contribute to society. (p. 77)

Stein also discusses "first generation" versus "second generation" rights, a distinction that other scholars have also brought up as necessary to move beyond current limitations to disability rights. Rather than simply rejecting civil remedies for disability discrimination, Stein writes that, "Disability-based human rights necessarily invoke both civil and political ('first-generation') rights, as well as economic, social, and cultural ('second-generation') rights to a greater degree than previous human rights paradigms" (pp. 77–78). Stein makes the important leap to recognizing the value of disability human rights to other human rights issues:

> Applying a disability paradigm highlights the effect of social exclusion, and points out the need of ensuring that the human rights of all socially marginalized groups are protected…The disability framework also maintains that human rights protections should be applied to other marginalized people… (p. 78)

Despite these compelling arguments for a human rights approach to disability, and by extension ratification of the CPRD, Congress failed to embrace the extension of "second generation" rights to people with disabilities in the United States. It is possible that Congress, like the court, struggles to recognize the complex nature of disability. However, the roots of opposition to the CPRD point to more deeply embedded prejudices that highlight the significant barriers to equality for people with disabilities. Patricia Morrissey (2014) maintained a blog, later published in book format, during the months leading up to Congress' vote on the CPRD. She highlights the importance of the CPRD to realizing civil rights for people with disabilities in a more concrete and comprehensive way. For example, the CPRD includes specific articles on health, education, transportation, parenting, and even awareness raising. She discusses, and attempts to counter, the primary arguments used by those against ratification: (a) the perceived threat to state sovereignty, (b) fear of extending abortion rights, and (c) fear of diminishing the right to homeschool. Concerns about extending abortion rights and constricting homeschooling rights seem odd in a discussion of disability rights. According to Morrissey, abortion rights opponents were concerned that provisions of the CPRD established an equal right to health care, including "reproductive healthcare." The homeschooling lobby, similarly, were concerned that giving children with disabilities the same rights to an education as other children would threaten the rights of parents to exert control over their children's education.

Upon closer examination it would appear that, connecting back to the earlier discussions of similarities to other classes such as race, the restriction of disability rights is being used yet again as a means to a different end.

END GAME: HOW TO ACHIEVE INCLUSION AND ACCEPTANCE

And so we come back to the paradox of "the same but different." To achieve inclusion and acceptance of people with disabilities, we must tackle the problem of disability as "sameness" as a normal human condition that runs across and holds commonalities with race, class, gender, sexuality, religion, and any other form of human variation of which we can conceive. We also need to grapple with disability as "differences," because whether we look at social causes, environmental causes, or individual causes, disability is unique in its impact on the human experience and the way an individual interacts with the world. Thus there is no way to make the problem of "how to deal with disability" go away from the point of view of the law. The real question is, "Given the complexities of disability as difference, how can we achieve the end game?" If we can even begin to answer that question for disability, we will have a toolbox of both legal and humanistic strategies at our disposal that have the potential to impact other social justice issues. At the very least, unpacking our toolbox clarifies what we have to work with and may lead to more creative uses of the tools that we have.

The Law as a Tool for Change

Despite the feeling among many scholars and advocates that once perceived "groundbreaking" legislation such as the ADA has not extended rights for people with disabilities to the extent anticipated, the fact remains that a civil rights approach has achieved desirable outcomes. Most people who experienced life before passage of the Rehabilitation Act, IDEA, and the ADA can list multiple ways that the United States is more inclusive and accessible than it used to be before these laws were passed. Lawyering on behalf of disabled people using the legal tools at hand does make a difference (Waterstone et al., 2012). In many respects, failings in the application of civil rights laws have been used to improve them during the reauthorization and amendment process. The impact of passage of the ADAAA of 2008 is a perfect example of

how law can be shaped to make further strides to achieve desired outcomes. Befort (2013) conducted a study of case law after passage of the ADAAA and found that "the ADAAA is having the intended effect of fostering a broad construction of the revised disability definition" as well as clarifying that disability is present despite "mitigating measures" (p. 2049).

Others have noted additional strategies for strengthening the ADA in particular. Harris (2015) discusses how confidentiality mandates in disability rights laws impede understanding and acceptance of disability, arguing that more open hearings would reduce stigma and educate the public about disability discrimination. In a discussion of disability and employment barriers, Knapp (2012) suggests that the ADA should be amended to mandate a more interactive process between employers and employees before discrimination cases are filed. And both Areheart (2011) and Crossley (1999) make the case for listing certain types of disability as understood to be stigmatizing under the ADA so that plaintiffs do not need to first prove that they are disabled.

Other Tools in the Toolbox – Strengthening the Capacity of the Law to Create Change

It is important to view civil rights law as a tool, a means rather than the end of the struggle for equality for people with disabilities (Diller, 2000). If disability is both the same and different, then we need to address disability rights in a more nuanced way and from a variety of angles including civil rights, human rights, and welfare policy (Weber, 2011). Scholars and advocates have offered a wide variety of strategies for meeting this need, strategies that if applied in tandem will ultimately strengthen the ability of the law to create change for people with disabilities.

Acknowledge Both the Incredible Stigma of Disability and Disability as a Positive Identity

As a community and a society, we need to encourage positive self-identity of disability as a minority group and nurture disability culture. Laws in turn should reflect this positive identity and the right to full citizenship for people with disabilities (Drimmer, 1993). Newman (2015) talks of the need to "reframe both master narratives and individual narratives" of disability so they are presented in the most empowering way and are based on civil and human rights. Professionals, whether lawyers, doctors, social workers, or educators, tend to guide clients toward narrating their stories about disability in

a way that fits the system they are helping a client to navigate, stories about themselves that clients may come to believe. Newman believes that the key to balancing positive self-identity with the needs of a system that demands a specific narrative of disability is to be honest with clients about how the system works and give them choices about how to present themselves:

> Having the conversation about stereotypes and how they are used in Social Security takes away from their power over us as advocates and our clients as benefit-seekers. In making a conscious decision about how to situate their story within the law's master narrative, clients are reminded of the difference between "living a story and telling a story." (p. 128)

Siebers (2015) talks about the importance of identity politics, and the role of disability studies in nurturing those politics, as a means of cohesion for people with disabilities, because they are usually not connected by such factors as family history, race, or geographic origin. Identity politics is not just about appreciating diversity but about changing social conditions via "changing laws, economic distribution, rules of political engagement, public policy, and the material and social conditions of the built environment" (p. 234).

Integrate Human Rights as well as Civil Rights Perspectives into the Language of the Law and its Applications

Many in the international community have both been galvanized by the civil rights approach initiated in the United States and have embraced human rights paradigms (Newman, 2015). In the United States, we have discovered that a civil rights approach to disability rights will only take us so far. We need to supplement our approach with the use of a disability human rights perspective that addresses second-generation rights (economic, social, cultural) as well as first-generation rights (civil, political) (Stein, 2007). This involves a paradigm shift from focusing on a group to focusing on the individual, a shift that has the potential to benefit other minority groups as well. Writes Stein (2007):

> [Consider] the ability of disability-based notions to enrich the rights of already protected groups rather than analyzing the ability of traditionally accepted norms to be applied to the disabled…Many societies have viewed and continue to view [the] social exclusion [of people with disabilities] as natural, or even a warranted consequence of the inherent inabilities of disabled persons. Adopting a disability human rights model – and then extending it to other groups – repositions disability as a universal and inclusive concept. (p. 121).

Carefully Consider Similarities and Differences between Disability and Other Minority Groups and Craft Laws Accordingly

The history of stigma and discrimination based on bodily "difference" links disabled people with other groups such as women, gays, and racial minorities. The disability rights movement has taken inspiration from other social movements related to difference. The need for accommodations and modifications, however, seem to separate disability from other groups. But both Burgdorf (1991) and Porter (2016) agree with Stein (2007) that other groups could benefit from the expansion of civil rights provided by laws such as the ADA with its definition of "public accommodation." Accommodating everyone, with and without disabilities, for example, in terms of workplace practices, would have a positive effect on perceptions of disability accommodations. It would also have a positive effect on the workplace. Minow (1985) suggests such an approach in relation to the dilemma of difference in Special Education. Why not, she suggests, normalize difference by providing a "special" education to all children (i.e., all children in a class learn sign language regardless of hearing etiology, all students have a rotating schedule where they are "pulled out" for various activities).

Weber (2013), in a comparison of disability policy in the United States and Canada, provides an excellent discussion of how background social structures have an impact on access for people with disabilities. In employment, for example, whether or not you can dismiss an employee without cause, the power of unions, and benefits programs all have an impact on the employment of people with disabilities. Thus, reforming these policies can also create change in employment outcomes for disabled people.

Make Difference Normal by Applying Universal Design

Since the 1980s, when a disabled architect named Ron Mace coined the term "Universal Design" to explain his work designing accessible spaces, Universal Design has come to mean a broader consideration of usability:

> Universal Design is a framework for the design of places, things, information, communication and policy to be usable by the widest range of people operating in the widest range of situations without special or separate design. Most simply, Universal Design is human-centered design of everything with everyone in mind. (Institute for Human Centered Design, n.d.)

Universal Design is attractive to disability advocates because of its emphasis on the seamless use of the environment by all people, regardless of human characteristics and without the need for "special" accommodation. A simple example of the application of Universal Design is the presence of an elevator

in a multi-story building. While the elevator could be viewed as an accommodation for a wheelchair user, the fact is that elevators are designed to make it easier for all people to access the higher floors of a building with a minimal amount of effort. A wonderful application of Universal Design can be seen in the design of the Ed Roberts Campus in Berkeley, California (Ed Roberts Campus, n.d.). The Campus houses numerous disability advocacy, resource, and service organizations under one roof, is integrated into a public transportation hub, and features an aesthetically-pleasing, snail-shaped ramp to the second floor in place of a stairway.

Universal Design principles have been applied beyond architecture to the realms education and learning, technology, and management. Several scholars have written about the need for broader understanding of "Universal Design for Learning" in law schools, where students are increasingly diverse and where there is often a gap between how professors teach and how students learn (Jolly-Ryan, 2012). Universal Design holds promise for shifting the focus of the law away from isolating people with disabilities to accommodate them, to focusing on solutions for inclusion (Hums, Schmidt, Novak, & Wolff, 2016).

Tackle Problem of Stigma in the Court System

Judges and lawyers are both impacted by societal perceptions of disability and have enormous power in shaping those perceptions. There is a need to develop robust scholarship around Disability Legal Studies, and Disability Legal Studies must be integrated into legal education just as other studies of difference. Kanter (2011) outlines the importance of studying disability at every stage of legal education, arguing that the relationship between disability and the law not only reduces the stigma of disability but informs students about the legal system:

> Disability Studies…offers the law and legal education the opportunity to critically examine the role of 'normalcy' within the law and within society, generally. It challenges us to examine our unstated assumptions and requires us to recognize, appreciate, and most importantly, value differences among us. (p. 406)

Disability Studies is a valuable aspect of teaching about marginalization and exclusion, just as with feminist and ethnic studies.

Get "Buy In" from the Public during All Phases of Civil Protection

Waterstone (2015) argues that we need judicial history, backlash, public struggle, and public support to realize the promise of the ADA. How to achieve public support for disability rights has proved to be a sticking point

for many advocates. Disability rights advocates need to move from convincing the disability community that disability is a compelling social issue, to convincing the general public, including judges, that disability is a compelling social issue (Rovner, 2004). Rovner suggests several ways of doing this. First there is "collaborative lawyering," where lawyers work with members of the disability community to combine persuasive storytelling with political action. Second is education of the media to help change public perceptions of what it means to be disabled. Overall, Rovner argues that there is a need to create an urgency for change in the general public to foster outrage at the wrongs that people with disabilities experience and a desire to right these wrongs through political processes.

Fostering outrage for a single social justice issue is not an easy task in a modern world where social justice advocates jockey with one another to be heard. One strategy is for people with disabilities to find common ground with other movements and increase their visibility within these movements. The key is visibility – the public needs to see people with disabilities actively participating in public life both as people with disabilities and as part of a larger whole.

CONCLUSIONS

Disability is often seen as an exception and an unsolvable problem. We as a society can never quite seem to get a handle on the meaning or importance of disability; let alone establish how best to fit disability into the law. In recent decades disability has emerged as an increasingly important and sometimes baffling category of difference. At first glance, disability seems to share straightforward commonalities and differences with other social categories such as race and gender. People with disabilities share a common history of oppression, stigmatization, and discrimination. Yet remedying the negative impacts of disability also demands a certain attention to individuality and attenuation to difference that is not shared by other social categories. Furthermore, "disability" is a fluctuating category that changes depending on the context, both legal and situational. When we pick apart the need for "special" accommodation by people with disabilities, all that makes disability different is that others are not eligible for these accommodations.

It is evident that civil rights legislation for people with disabilities is both necessary as a remedy for discrimination and as a guidepost for negotiating what it means to be an active citizen of our country. And yet even with passage

of important legislation such as the ADA, people with disabilities as a whole are still not able to achieve basic human rights such as access to healthcare, employment, education, family, and community life. Regardless of whether we see disability as the same or different, there is a pressing need to employ a variety of strategies to strengthen and expand on existing civil rights legislation and build upon social policies and practices that together will truly make a difference, not only for people with disabilities, but for all people.

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CHAPTER 3

BEING EXCEPTIONAL

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ABSTRACT

This chapter contributes to the discourse of difference by problematizing the sameness/difference trope through the lens of the exceptional. It explores the nature of being exceptional with an expectation that its nature is contingent and variable. At the heart of understanding what constitutes exceptional is its implicit comparison with the average. While exceptional is defined to include both individuals who achieve in extraordinary ways and individuals with a physical or mental impairment, the two definitions are consonant in that both describe individuals who deviate from expected norms. Relying on the insights from pragmatism, this chapter considers community habits exceptional individuals must confront in forming their choices. In this way, it further adheres to the lessons from pragmatism for norm change. The strategies individuals use to alter the effects of being perceived as exceptional contribute to the overall discourse in equality and equal protection and potentially constitute the individual action that formulates change. It examines some approaches to the Americans with Disabilities Act (ADA) derived from civil rights and from economic perspectives and the relevant matrix of choices available to the exceptional to understand the potential for productive change. With this foreground, it examines the choice of exceptional individuals to cover or convey matters

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of their identity. This chapter pays particular attention to these choices in seeking accommodations under the ADA. Ultimately, this study strives to participate in the conversation seeking to maximize human potential.

Keywords: Americans with Disabilities Act; civil rights; economic theory; tort doctrine; pragmatism, identity; difference discourse; disability rights

1. INTRODUCTION

Being exceptional is exemplified by someone who deviates from expected norms. The dictionary defines exceptional to include both individuals who perform at extraordinary levels and individuals with disabilities (American Heritage, 2002). In both ways, exceptional is defined in comparison to the perceived average. People often strive to be regarded as exceptional in the performance of specified activities or as a matter of general status, but the label is one that may also be imposed, independent of individual choice of pursuit. Exceptional, denoting someone with a disability, is a significant aspect of human existence (Gustafson, 2006). The human body, as with human existence, is in constant fluctuation and is unpredictable. The nature of any given disability is fluid and mercurial. The term disability is itself discursive – used sometimes to denote diagnosable physical or psychological impairment,[1] sometimes to denote social disadvantage, and sometimes to denote nonnormative difference. Perhaps because of the discursive nature of disability, society often conflates it with difference or disadvantage. This conflation is incongruous given that the alternate definition is being one who surpasses expectations. Further, being regarded as exceptional in one sense does not preclude one from being so regarded in some other sense.

The average has become the ideal (Davis, 2006); the unstated and uninterrogated average, white, male, heterosexual, financially stable, able-bodied individual presumably represents norms in conversation or written analysis. Yet, perceptions of the average are context dependent and socially defined through multidimensional lenses, including disability, race, gender, and other socially construed, historically affirmed, aspects of identity. This multidimensional lens corresponds, imperfectly, with the various facets of identity. Accepted as neutral and objective, the unstated norm makes more pronounced "the other" (Davis, 2006). Being exceptional, and the self-identifying choices, may not be divorced from the other aspects of identity, nor from how other aspects contribute to external perceptions of the normative or average.

Exceptional individuals must contend with the stereotypes, biases, obstacles, and barriers related to perceptions about their own deviation from the average, sometimes in conjunction with assessment about other aspects of their identities.

Regardless of whether one's personal trait is visible or otherwise obvious to others in society, every individual chooses how to navigate social perceptions of self by highlighting or obscuring aspects of her identity. Kenji Yoshino (2006) identifies the social strategy of "covering," where an individual minimizes one or more, typically socially "disfavored," aspect of her identity to "fit in." If the need to cover arises from difference and the perceived need for self-preservation, then its ubiquity is unsurprising. According to Yoshino (2006), the real and perceived need to cover is a product of the failure in civil rights protections. Yoshino (2006) identifies two exceptions to the expectations of covering, both cases where individuals may seek legal protection and accommodations for their distinctive needs based on religious observance or for an identified disability. However, Yoshino (2006) also asserts that everyone engages in covering, including individuals entitled to seek exemption.

For purposes of this study, covering is synonymous with an individual's efforts to obscure an aspect of her identity. Further, since there is social pressure, as well as subconscious individual aims, to be regarded as "normal," covering also describes the efforts of talented individuals, who achieve beyond normative expectation, to downplay or omit their achievements under selected circumstances in order to be perceived as average. Covering, along with the pursuit of the normative ideal is central to this discussion, focused on the identity choices of exceptional individuals. Instead of covering, an individual may choose to highlight, promote, or "convey" aspects of her identity, simply as a matter personal confidence or for personal advancement. Additionally, an individual may highlight a "disfavored" characteristic as a public statement of personal esteem, as a deliberate stance as role modeling, or as a form of activism and advocacy. Of course, a person may be perceived as exceptional regardless of her choosing. Nevertheless, even for an individual who cannot change or otherwise avoid outward expression or external perception, she can control the degree of "covering" or "conveyance" affecting those perceptions. In fact, the possibility, or perhaps pervasion, of doubly exceptional individuals suggests a matrix by which individuals chose to cover/convey as a coding activity, strategically influencing norm recognition (Dillard Segrin, & Harden, 1989; Roth, Malouf, & Murnighan, 1981).

Pragmatism emphasizes the role of habits in constituting social meaning, norms, and reality (Dewey, 1922; Peirce, 1955 [1877]; Schmidt, 2014).

This centrality is demonstrated in Peirce's community of philosophy in, Dewey's habit formation and in Mead's concept that the self only materializes through social interaction (Schmidt, 2014). Because social meaning originates in habits, norm change can only occur through action (Peirce, 1955 [1877]). Individual self-definition, necessarily accomplished in reference to the community, is an essential element affecting norm change. Classical pragmatism was influenced by Darwin; the ideas of habits, community, and the nature of norm change resonate for Darwin as well as pragmatists (Gronow, 2011). Relying on the insights of pragmatism, Schmidt (2014) outlines a framework for purposeful creativeness as an integral part of norm change. He points out that habits "provide the contextual understanding of the problem and play a crucial role in acting as resources for the development of new habits" (Schmidt, 2014, p. 820).

Being exceptional includes having a willingness to *be* different. Consistent with Mead's concept that mind and self only emerge through social interaction (Mead, 1967), the most exceptional individuals affirm their entire beings and claim their standing within society. Very few individuals reach this level of exceptionalism; all others strive to navigate the normative expectations in their pathways to self-actualization. "The subject is embedded in praxis and sociality prior to any form of conscious intentionality of action" (Joas, 1993, p. 59; Schmidt, 2014, p. 819). This endeavor has the ability to impact social perceptions and reality. Dworkin (2002, p. 6) refers to this endeavor as "ethical individualism." Regarding these human actions, the insights from classical pragmatism are directly applicable.

It is the ability of individuals to adapt and, in the process, affect not only the formation of self, but also the social environment in which the self exists (Mead, 1967). "It implies a view of evolution in which the individual affects its own environment as well as being affected by it" (Mead, 1967, p. 214). Necessarily, each individual influences the opinions of others "so that the problem becomes how to fix belief, not in the individual merely, but in the community" (Peirce, 1955 [1877], p. 13). Citing Hans Joas, Schmidt points out that the individual creativity emphasized by Mead "provides a point of origin for emergence of new norms as expressed in novel habits (Joas, 1996; Schmidt, 2014, p. 821).

The strategies individuals use to alter the effects of being perceived as exceptional contribute to the overall discourse in equality and equal protection. This perspective is an important voice in the conversation, lest it be utterly controlled by those who create and reinforce subordination in its categories. "Pragmatism's unique contribution is its emphasis on reflexivity – the potential for the actor to reflect on his or her practices – and deliberation in

the reconstitution of action that establishes new modes of appropriate behavior" (Schmidt, 2014, p. 821). Specifically, the perspective of exceptional individuals making identity choices in the context of seeking accommodation may influence interpretation of the Americans with Disabilities Act (ADA) by employers and judges or may have some relevance for future amendments or other legislative efforts.

Some scholars include the ADA as part of a broader civil rights schema and assert that ADA accommodations hold promise for new directions (e.g., Calloway, 1995; Karlan & Rutherglen, 1996). These advocates celebrate the ADA as a means for social justice and seek its extension to other areas. Unfortunately, judicial readings of the first iteration of the ADA were quite narrow, prompting Congress to amend and clarify its intentions that interpretations of the ADA ought to be broad (ADAAA). Nevertheless, initial court construal of the ADA set the tone, arresting the original intentions of the ADA and muting any derivative theories for civil rights. For example, the ADAAA explicitly limits protections for individuals who rely solely on the "regarded as" provision to seek accommodations (42 U.S.C. §12201(h); *Darcy* v. *City of New York*, 2011).

Before the revisions, it was conceivable that the "regarded as" provision could be extended to cover women or minority men for claims of discrimination on the basis of being "regarded as" impaired in the performance of major life activities (Karlan & Rutherglen, 1996). Under the ADAAA, in order to meet the requirements of "being regarded as having such an impairment," an individual must establish that she has been subjected to discrimination because of an actual or perceived disability (42 U.S.C. §12102(3)(A)), making interpretation of this provision analogous to other areas of civil rights canons (cf. *Washington* v. *Davis*, 1976; *In Personnel Administrator of Massachusetts* v. *Feeney*, 1977) and making the "regarded as provision" an empty vehicle to extend the ADA framework (42 U.S.C. §12201(h)). Rather than civil rights advocates looking to the promise of ADA innovations disability rights advocates should be prepared to encounter more hurdles erected in comparable contexts.

Some commenters seek to limit the applicability of the ADA on the view that it unfairly transfers wealth from corporate actors to otherwise unemployable individuals or that accommodations unduly burden employers. These commenters seek to limit the reach of the ADA and protect business prerogative. Ironically, this view is based on the same ideas embraced by advocates of social welfare justifications for the ADA as a device to reduce welfare. These supporters view the ADA as a productive device to reduce the number of individuals receiving welfare payments (Bagenstos, 2004; Diller, 2000;

Issacharoff & Nelson, 2001; Krieger, 2010; Rosen, 1991) by ensuring employers hire individuals they otherwise may pass over (Verkerke, 2003).

Supporters of corporate profit maximization frequently resort to a torts-based approach as a means of limiting required accommodations and the associated costs. However, those who borrow from tort to analyze accommodations generally overlook the broad foundational tort goals of loss spreading, deterrence, or corrective justice, as well as the specifics of secondary and enterprise liability. This to say that, in the context of the ADA, tort is advanced to limit costs, but is not sufficiently advanced as justification for the imposition of responsibility.

Both the civil rights framework and the torts derived theory are considerations of which exceptional individuals are generally aware, informing their choices to cover or convey. These choices may confirm concepts of the normative, or average, while simultaneously having the ability to shape, or in some instances, counteract them. Since identity is not mono-faceted, this essay explores identity choices within conflicting incentive structures. Race, gender, and sexuality as examples of significance are an important part of navigating personal identity. Even while the discussions in this essay may be quite relevant to religious accommodations,[2] particularly in an era of burgeoning bias toward adherents of the Muslim faith and the often presumed national and ethnic membership of those individuals, the religious aspect of identity and the relevant accommodations sought are not directly examined in this essay.[3]

This chapter contributes to the discourse of difference and problematizes the sameness/difference trope. It uses exceptional in a manner intended to be unifying, even though such usage may collapse difference and make comparison illogical. Nevertheless, at its core, this essay is a step toward a rational re-conception of categories. Thus, the identity choices exceptional individuals make regarding whether to cover or convey is a perspective from which to examine norm change. Section 2 endeavors to address how the ADA affects the rights and identity choices of exceptional individuals. This effort considers the systemic nature of disability discrimination, the appropriateness of a civil rights rubric, as well as a workplace efficiency rubric for informing choice to publicly convey identity. The elements that inform individual identity are important for developing prospective civil rights strategies. These choices have the potential to influence interpretations of the vague ADA language describing both disability and the circumstances requiring accommodation through social awareness acceptance of relevance. Thus, Section 2 focuses more directly on the promise of the ADA. It evaluates approaches to the ADA and includes it within a broader civil rights dialogue. It further

evaluates the application of tort theory and doctrine in the accommodations terrain and provides a framework for understanding both the limitations and broader applicability of the ADA. Notably, the same themes important in understanding exceptionalism – multidimensional realities requiring context-specific analyses – are also important for interpreting the ADA. Ultimately, reviewing approaches to the ADA is meant to discover better means for maximizing human potential and for furthering the goal of human flourishing.

Section 3 interrogates concepts of the average and its role in defining difference. It explores definitions of exceptional as well as relevant situational designations. The focus here is on exceptional individuals but also includes other aspects of identity that are socially constructed as outside the norm. This section ultimately examines the difficult identity choices, to cover or convey, routinely confronted by exceptional individuals.

2. THE LANDSCAPE OF DIFFERENCE

> I have realized that, just as with the identification of racism or sexism, identification of a personal disability does not require me to ensure the comfort of others. (Fenton, 2011, p. 70)

Being exceptional inherently is complex and only is coherent in comparison to presumed average. The nature of difference may be subtle or imperceptible to external observers and thus the nature of physical impairments experienced by some individuals may not be fully apparent or apprehended accurately. Especially for an exceptional individual with "silent" or hidden differences, she may occasionally have the choice of whether or not to cover or convey the nature of any difference. Exceptional individuals with a more prominent difference also must decide how to navigate choices in identity, but for obvious distinction, are more limited in their ability to influence external perceptions.

Yoshino (2006) believes that covering portends the end of civil rights because it is a forced assimilation, extinguishing group-based protections. He notes potential exceptions to covering, where the law provides protections such as those offered under the ADA. Focusing on individuals who may claim these exemptions and choose to not cover, but instead convey, may be helpful for understanding the actions of individuals without such protections. Ultimately, the focus on individual choice may point to avenues for furthering civil rights. The importance of self is obtained through the

performance of a social function, fulfilling the duty to direct the community by "finding out what is to be done and going about to do it" (Mead, 1967, pp. 315–316).

2.1. Average/Normal/Regular

Average, "normative," "ordinary," or "regular," the apparent ideal and the measure against which all else is judged (Davis, 2006), too often denote mediocre (Davis, 2006). Yet, the belief that norms are objective is the primary basis for the differential treatment of exceptional individuals. Without a specific context, the unstated and un-interrogated average,[4] white, male, heterosexual, Protestant, financially stable, able-bodied individual is the assumptive norm in conversation or written inquiry (Minow, 1990, p. 51). "The normative prescription of habits is not usually articulated and instead inhere in their execution, forming and, often unexamined, foundation from which individuals act" (Schmidt, 2014, p. 819). Presumed neutral and objective, the unstated norm makes the "other" more pronounced (Davis, 2006). Paradoxically, "normal" is unstable and defies description and, like disability, is contingent. The presumption of objectivity, essential for a norm, is "manifested in architecture that is inaccessible to people who use wheelchairs, canes, or crutches to get around" (Minow, 1990, p. 59) in the comprehension of only one language (Groce, 1985), or in the illusion that an employee does not have a personal life, family, or caretaker responsibilities.

There are myriad studies confirming characteristic-based patterns of differential treatment for hiring, in employment settings, in access to housing, and in education (e.g., Bertrand & Mullainathan, 2004; Paludi & Strayer, 1985; Reeves, 2014; Rosciguo, Karafin, & Tester, 2009). Education often sets the stage for the acceptance of identity-based, differential treatment. Even in early and primary education, learning disability classifications were created through the efforts of "largely white, middle-class parents in the late 1950s and early 1960s to gain resources for…their 'under-achieving' children" (Kelman & Lester, 1997, p. 4) and were not used exclusively to address disability. This is to say, accommodations for learning disabilities were originally created to counteract what would otherwise be characterized as "average." Used as a political tool for social engineering, learning disability is a label disproportionally imposed on black boys for the purpose of tracking, a form of intra-school segregation (Fenton, 2013). This example also points to a dynamic whereby one subordinated status is used to sustain another. Thus, the complex nature of identity and subordinated status may be mutually confirming, but most especially, may reaffirm the status quo.

Prerequisite for countless forms of employment, higher education plays a significant role in the perpetuation of identity perceptions. Leaving aside evidence of cultural bias in the criteria or ideals of merit, underlying admissions decisions in most universities and colleges are manipulated to achieve a specific class composition, intended to replicate the perceived average society, in all aspects (Roithmayr, 1997). Controversial since its inception, Affirmative Action has successfully ensured admissions of women and minority men (Thomas, 1990). Given considerably less notice, and causing much less outrage, special consideration is routinely given to those within the presumed norm, for example, legacies and athletes (Espenshade, Chung, & Walling, 2004). Yet, more telling is the phenomenon that might be deemed affirmative action for Caucasians in relation to Asian students. "A 2009 Princeton study showed Asian-Americans had to score 140 points higher on their SATs than whites" even though the relative numbers are not reflected in elite institution admissions (Lam, 2017). This example makes clear that merit is not always the most important consideration, but the most important illusion. It also makes apparent that what constitutes the normative is designed to reaffirm itself and in accordance with entitlement (Fenton, 2007).

2.2. Exceptional

That one person can be exceptional within multiple realities is a valuable starting point for grasping the complexities of identity. Even remaining within the conferred definitions, a single individual may be exceptional in more than one regard; that is, she may have extraordinary capacities while simultaneously managing a physical or mental impairment. The coexistence of exceptional traits may be quite obvious, as in the case of a successful athlete who must use prostheses to compensate for a physical difference, Aimee Mullins comes to mind (Rosenbaum & Zak, 2012), or the first amputee to be certified as a navy diver and the first African American to achieve Master diver rank, Carl Brashear (Naval Institute). Concurrent exceptional traits may also exist with one or more hidden, silent, or less obvious characteristic as in the case of a high performing intellectual who manages a psychological disorder; prominent examples here include John F. Nash, Jr. (Goode, 2015) or possibly Ludwig van Beethoven (Goodnick, 1998; Mai, 2007). There are innumerable examples across history and from all walks of life, of individuals in general society, spanning the extremes.

Exceptional individuals may be deemed so because of natural ability and talent, or because of personal drive and determination (Grant, 2008;

McClelland, 1985). Even this distinction may be one that prompts envy from the real and perceived advantages of difference. Yet, much achievement is anonymous, accomplished by individuals remote from the lime light. Exceptional individuals sometimes choose to cover their abilities and achievements, to be perceived as average and to fit in or otherwise not attract attention (Solomon, 2012). This may be especially true for young prodigies, but the dynamic of social pressure also applies to adults who are genius (Solomon, 2012). It may also apply for high achievers under more routine considerations, such as identification of educational degrees or other achievements, lest one be considered a braggart and a bore (Berman et al., 2015). Thus, though we often think that covering is only done by those who do not meet the predefined normative standard, covering may also be a device used by those who exceed it.

For an exceptional individual with a "silent" or "hidden" disability, it may be a genuine choice whether to reveal a disability, whether or not in conjunction with a request for an accommodation (Colella, 2001). For this individual, the matrix of choices is more complex. If this individual is able to perform beyond expectations, even without accommodation, knowing that her success could lead to the denial of accommodation for others with a similar impairment, she has at least two choices: She may either cover and hide her condition or convey and advocate on her own behalf and for others similarly situated. "Self-sacrifice means a self-maiming which asks for compulsory pay in some later possession or indulgence" (Dewey, 1922, p. 139). For exceptional individuals who have a visible physical or otherwise noticeable impairment, the options for covering are less available and imperfect. For instance, lip reading may enable someone who is deaf to "cover" an inability to hear, but may mean a more imperfect communication than realized between two hearing individuals (Dodd & Campbell, 1987; cf., Murray, 2005; Nelson, Jin, Carney, & Nelson, 2003). Where such options exist, the personal or financial costs may be high, but she still has some choice in how she presents herself to the world and to what degree she attempts to replicate normative ideals (Balbridge & Veiga, 2001; Goffman, 2006) and, correspondingly, whether to seek accommodation under the ADA.

Success, for many who have one or more subordinated identity characteristics, frequently means operating and achieving at levels beyond the "normative." While "exceptional" commonly is used as a compliment, it may also serve to denigrate for perceived arrogance or superiority, or merely for the fact of deviation from the believed norm. Further, achievement past the "normative" and that which surpasses the expectations embedded in stereotype need not be mutually exclusive and may be one in the same, yet social perceptions

too often emphasize the latter. "For a time, a self, a person, carries in his own habits against the forces of the immediate environment, a good which the existing environment denies" (Dewey, 1922, p. 55).

Expectations and labels as exceptional may be informed by multifarious aspects of identity in coordination and, thus, a delineation as "exceptional" may, in fact, be contempt. In certain social contexts and when an exceptional individual identifies with more than one socially subordinated status, such as race, gender, sexuality, or disability (also a form of exceptional), some tributes may denote denigration, even when intended as compliments. When a coworker, supervisor, or person in a position of authority describes someone as exceptional in a manner such as: "I forgot you were ___";[5] or perhaps states, "you're not like other ___ people"; "You are cooler than/smarter than/not as threatening as other ___ people," the description may sound like a compliment, yet, the inherent comparative effectively perpetuates stereotype and thereby denigrates both the person purportedly complimented and the referent community (Minow, 1990). Since an inherent part of the definition of exceptional is an unstated deviation from the perceived norm, such a compliment necessarily is a combination of praise and scorn. With average as the standard, in any context where an individual is identified as outside the norm, exceptionalism may be a tool for subordination.

2.3. Exceptional Choices

Since society seems to revere the average, when conveyance of an exceptional aspect of someone's identity is optional, resort to covering may be seductive. If this individual chooses to cover a trait that otherwise would entitle her to seek an accommodation, her success in meeting average expectations, in and of itself, makes her exceptional. Nevertheless, if an individual chooses not to disclose the existence of a disability to her employer, she will not have protection under the ADA. No matter how appealing personal privacy may be, an individual with a nonapparent, physical impairment must reveal it to justify accommodations (ADA).

The core paradox for an exceptional individual is that if she can manage without accommodation, her employer may believe that she does not need one; yet, if she requests an accommodation, her employer may determine that she is unable to do the job (Balbridge & Veiga, 2001, p. 93). Relatedly, because ad hoc assessments are the means for granting accommodations, an employer may grant whatever is requested and needed by some employees, while granting to other employees with similar needs the bare minimum, sufficient to meet legal requirements. When an employer grants full accommodation, it

is sometimes because the productivity of the requesting employee exceeds expectations or because her contribution otherwise is valued. When an employer grants the minimum or fully denies accommodation, without assistance an employee still must meet workplace average expectations.

By detailing the challenges and barriers experienced on the pathway of her success, an exceptional individual may garner further accolades and solidify her status as exceptional. Further, she may be taking one step in raising awareness necessary for procuring social change. Simultaneously, she may be signaling that an accommodation previously granted by her employer is no longer, or never was, necessary. In the process, she may jeopardize her employer's willingness to provide an accommodation she legitimately needs, or more broadly, affect her employer's perceptions regarding the requirements of similarly situated individuals. This is to say that exceptional individuals who exceed expectations for average performance with minimal or no accommodation may make the ability of other individuals with the same impairment unable to obtain necessary accommodation, for the comparison. In this scenario, an exceptional individual may feel the need to engage in reverse-covering (Yoshino, 2006) to highlight difference to obviate her subordinated status and ensure the continued availability of accommodation, for self or others. Regardless, exceptional individuals may be in the wrenching position of simultaneously reinforcing stereotype while reducing available remedies.

For exceptional individuals who inhabit multiple identity spaces, the variables to navigate are more labyrinthine. For example, a common understanding in the plight to combat stereotype is that women and minority men "must work twice as hard to be considered half as good" (Whitton, 1963). Assuming this is true, even perceptibly, an individual already identified in one or more socially subordinated category, confronted with having to request an accommodation and correspondingly revealing an impairment, may resist the option for fear of confirming stereotype, associated with one or more of those categories, regarding lack of ability or slothfulness, and necessitating that she work exponentially harder to satisfy a perception of average. This may be so, even under circumstances where such revelations would indicate demonstrably superior capabilities because of the fact of accomplishment in the face of great challenges. Thus, some exceptional individuals must cope with the "double bind" of having to work harder and achieve more, while nevertheless, being perceived as inferior or otherwise undeserving (Radin, 1991).

Conversely, for some exceptional individuals, the challenges and barriers placed in their pathways, navigating multiple aspects of identity, may induce them to stoically encounter additional challenges as simply supplementary. In these cases, the individual may decide not to request an accommodation

that would otherwise be regarded as necessary and reasonable. Even more perniciously, revelation of a physical or mental impairment may contribute to real and perceived weakness, effectively making that individual a more attractive target for predators (Jones & Remland, 1992). In these cases, an exceptional individual must also calculate the consequences for personal safety. Of course, individual choice varies in accordance with time and circumstance. From the sheer fact of confronting these complex questions, regardless of her choices, an individual is exceptional.

Yet, the contrary reality for exceptional individuals, inhabiting multiple identity spaces, is that employers, schools, and other institutional entities readily and prominently boast these individuals in an "all-purpose" way to establish a workplace compliance/nondiscrimination/open environment reputation. The "all-purpose body," already exceptional as someone succeeding in the face of perceived difference, may be asked to further meet more expectations, not only through performing marketing, administrative, or policy tasks, but also in the expectation that she represent the presumed "unitary voice" of one or more, underrepresented community. This phenomenon suggests that there are intangibles valuable to an employer, appropriately included as a variable in a cost-benefit assessment of accommodations. This also presents another occasion for negotiating identity, typically for the benefit of the exceptional individual. That is, being exceptional in one fashion may present an opportunity to seek accommodation for other exceptional attributes without resistance from the employer or even to seek general workplace change.

An individual's choice to cover or convey is part of the ongoing endeavor to define self and is essential in furthering community change (Mead, 1967). "The thing actually at stake in any serious deliberation is…what kind of person one is to become, what sort of self is in the making, what kind of a world is in the making" (Dewey, 1922, p. 217). A person can only develop self in relation to others and to the community. The self is a reflection of the community to which it belongs because she captures social mores into her own conduct (Mead, 1967). A person's self-conception is inherently tied to the perception of, and treatment by, other individuals in society (Minow, 1990). This reality "is not in the least incompatible with, or destructive of, the fact that every individual self has its own peculiar individuality, its own unique pattern" (Mead, 1967, p. 201). Individual action is what defines self and concomitantly forms social habits and community (Dewey, 1922; Peirce, 1955 [1877]).

As part of her personal appraisal, an individual may have to confront a conflict of interest from the potential application of multiple legal frameworks (cf., Crenshaw, 1991), conflicts in doctrinal application from distinct legislation as well as a conflict of motivation in choosing to act in furtherance of one or any

other. "In addition to the general psychology of habit, …we need to find out just how different customs shape the desired, beliefs, purposes of those who are affected by them" (Dewey, 1922, p. 63). A single individual may choose to cover or convey alternate aspects of their identity, independently or simultaneously, to suit or counter a given situation. The complexity of being an individual, much less an exceptional one, is reflective of the complexity comprising society.

3. APPROACHES TO THE ADA

Understanding complexity inherent in individuals' choices in navigating the aspects of their identities may be useful for interpreting and applying the ADA. The ADA defines an individual with a disability as a person who has "a physical or mental impairment that substantially limits one or more major life activities," has a recorded history of such an impairment, or is regarded by others as having such an impairment (ADA). Nonprovision of reasonable accommodations constitutes discrimination under the ADA as does denial of employment opportunities to qualified individuals who require accommodation (ADA § 35.108). As originally passed, the ADA did not provide much guidance regarding the finding of disability (Lanctot, 1997) save detailing the conditions excluded from the definition (42 U.S.C. § 12211, 1994). For want of guidance, courts interpreted the ADA narrowly (Bagenstos, 2000, 2003; Barry, 2013). Congress responded by clarifying that the ADA ought to be applied broadly (ADAAA). After the amendments, judicial interpretations of the ADA improved, but the ADA continues to lack clarity (Areheart, 2011). Under these conditions, accommodations under the ADA have largely been met through ad hoc, individualized assessments (Barry, 2013; Travis, 2012).

This section will focus on theories ascribed to the ADA and its application. It divides the approaches to the ADA into two categories. First, for some scholars, accommodations are a valuable tool for comparison in the difference discourse and a hope for advancing civil rights and social justice (e.g., Bagenstos, 2000; Calloway, 1995; Karlan & Rutherglen, 1996). At the heart of these theories is a view of ADA accommodations as a device that might be extended to individuals in other protected classes. A comparison of the ADA to the Civil Rights Act is instructive, both for gauging the parameters for accommodations under the ADA as well as any separate legal limitations that an exceptional individual must consider in the decision to cover or convey. Of great significance, with the nature of individuated assessment, consideration of an ADA accommodation forewarns of bias in the process.

Second, a different set of commentators view the accommodations framework as a social engineering scheme for wealth redistribution (e.g., Issacharoff & Nelson, 2001; Weaver, 1991). These commenters focus on compliance issues and limiting the corporate costs associated with providing accommodations. They hope to minimize the impact of the ADA on employers, often through the appropriation of tort schema. To facilitate the individualized assessments used to determine required ADA accommodations, analogy to tort methodology and theory, requiring assessment under specific context, has proven effective (Schwab & Wilborn, 2003) and results in ad hoc assessments. Bias is inherent in this approach as it promotes the rationalization of minor distinctions among similar cases. As a compliment, this section explores tort rationales for mandating broad corporate responsibility for ADA accommodations.

As the perspective of the accommodation seeker ought to be a more prominent component of the literature discussing work-place compliance (Crampton & Hodge, 2003), this section uses the considerations of these two approaches for understanding personal choices which affirm or avoid identity. It focuses on such choices by exceptional individuals with the intention of furthering an antidiscrimination objective. Coincidentally, the themes affecting identity and choices for exceptional individuals are inherently relevant for analyses of the ADA.

3.1. ADA as Civil Rights

Because they could identify its anti-discrimination objectives as fundamentally consistent as with other civil rights legislation (Bagenstos, 2000; Calloway, 1995; Karlan & Rutherglen, 1996), scholars initially predicted that the ADA would bring new direction for civil rights. Both the ADA and the Civil Rights Act (The Civil Rights Act of 1964) attempt to eliminate group-based subordination, derived from myths and stereotypes, contributing to differential treatment and segregation in employment and beyond (Bagenstos, 2000; H.R. REP. No. 101-485, 1990, p. 40; Lanctot, 1997).

While seeming opposites, both accommodation and anti-discrimination require that employers eschew categorical generalizations, with the aim of treating each person as an individual (Bagenstos, 2000). Notwithstanding the appeal of a colorblind ideology, prohibitions on discrimination entail a conscious awareness to eliminate barriers with the goal of maximizing human potential. ADA accommodations more directly require a conscious awareness of difference, with the deliberate intention to maximize human potential (Bagenstos, 2000; Schwab & Willborn, 2003). “Constitutionalism agrees

with versions of democratic theory that hold respect for equal human dignity, defined to include a wide degree of individual liberty, to be the fundamental value of any truly just society" (Murphy, 2007, pp. 6–7). This awareness is especially important to effectuate an appropriate accommodation.[6] Once a qualifying disability is identified under the ADA, a reasonable accommodation is required, while for individuals in other protected classes, accommodation is not mandated. This distinction is at the heart of how the ADA may be regarded as the more effective (Strauss, 1986).

Both the ADA and the Civil Rights Act assist "otherwise qualified individuals" (*compare* 42 U.S.C. § 2000e-2(e) *to* 42 U.S.C. §12112 (a)) in confronting social barriers or obstacles. One might compare Affirmative Action, a tool used to further the goals of the Civil Rights Act, to accommodation, a tool used to further the goals of the ADA. However, unlike claims of discrimination under the Civil Rights Act, requests for accommodation do not require proof of prior wrong doing or intentional misconduct. ADA accommodations have the potential to be more effective and might be viewed as the natural extension of existing civil rights protections. Under this view, accommodations ought to be available to members of all protected classes for overcoming obstacles and barriers (Bagenstos, 2000). However, defining the relevant obstacles and barriers for the analogous accommodation requests made independently from traditionally defined disability may prove elusive.

Despite the ADA encompassing both an anti-discrimination component and an accommodation requirement (Karlan & Rutherglen, 1996), most reviewers rely on an act/omission distinction to find a fundamental incongruence between these measures (Bagenstos, 2000; Kelman, 2001; Rosen 1991; but see, Jolls, 2001; Rabin-Margalioth, 2003). Application of the two approaches under similar circumstances demonstrate instances where there are advantages from accommodation over affirmative action, and some instances where the advantages are reversed, and occasions when neither is effective (Karlan & Rutherglen, 1996; Schwab & Willborn, 2002). One significant difference entails cost considerations, central to determining required ADA accommodations (Schwab & Willborn, 2002). While this contrast is prominent, it may be illusory as interpretations of Title VII also avoid the imposition of costs on employers (Schwab & Willborn, 2002).[7] Furthermore, deference to employers on accommodation costs is comparable to the requirement that individuals in a protected class demonstrate "discriminatory purpose" when seeking redress (*In Personnel Administrator of Massachusetts* v. *Feeney*, 1977; *Washington* v. *Davis*, 1976).

An objective of both the ADA and the Civil Rights Act is to combat group-based subordination. At the same time, employer cost minimization (Karlan & Rutherglen, 1996) is an objective also supported within anti-discrimination

jurisprudence. Nevertheless, the fine-grained approach necessary in disability accommodations has never been extended to individuals in other anti-discrimination contexts (Karlan & Rutherglen, 1996). On the other hand, since bias is inherent the fine-grained, ad hoc approach to accommodations, the process itself may be a means of permeating discrimination and enabling differential treatment of similar cases.

Even though hope for an extension of ADA accommodations to members of other subordinated groups is not wholly unrealistic, advocates should nevertheless worry that previous civil rights jurisprudence will have a limiting effect on the promises of the ADA. Individuals who must navigate scrutiny of their own identities are aware of the legal machinations that may provide protections or limitations in their endeavors.

3.2 Profit Maximization and Tort Calculations

Under the ADA, accommodation seekers must justify their requests as "reasonable." To acquire accommodation under the ADA, a requesters proposal must first be "reasonable on its face" (*U.S. Airways* v. *Barnett*, 2002). In response to such a request, an employer may assert impracticality only if he can demonstrate "undue hardship" under the circumstances (Id.). If this is the case, then the employer need not provide the requested accommodation. When the test for required accommodation is based in a "reasonableness" evaluation and includes an "undue hardship" standard, suggesting a cost/benefit analysis, the appropriation of tort analyses is perhaps obvious (Karlan & Rutherglen, 1996; Schwab & Wilborn, 2003).

Since "reasonable requires something less than the maximum possible care" (*Vande Zande* v. *Wisconsin Dept. of Admin.*, 1995, p. 542), a tort-inspired approach benefits employers. An "undue hardship" standard evokes a cost/benefit analysis, an established doctrinal method for evaluation in negligence. Scholars often attribute cost/benefit analyses to economics (Epstein, 1995; Posner, 1972), and typically view it as a means for protecting business interests (Mitchel & Coles, 2003). "The internalization of norms through habituation may seem highly efficient because it reduces the cost of compliance," even if the norms created are dysfunctional for society (Posner, 2004, p. 293).

As with the requirement to demonstrate a "discriminatory purpose" for Title VII relief, the requirement to justify costs of accommodations presumes that "existing social and economic arrangements are natural and neutral… From this viewpoint, any departure from the status quo risks nonneutralitity and interference with free choice" (Minow, 1990, p. 52). Furthermore, "once a practice

becomes habitual, the benefit-cost ratio of compliance becomes strongly positive, so that an interruption is felt as a real cost even when the actual harm from the interruption is trivial" (Posner, 2004, p. 126). So embedded are the views of what constitutes the normative, some analysts consider accommodations under the ADA as a form of wealth redistribution (Epstein, 1992; Posner, 1983; Weaver, 1991). Some have gone so far as to suggest that the ADA accommodations provision is mandated charity (*U.S. Airways* v. *Barnett (Scalia, J.)*, 2002), and counterproductive for reducing dependence (Bagenstos, 2004; Diller, 2000; Issacharoff & Nelson, 2001; Krieger, 2003; Rosen, 1991; Wax, 2002). A fear of mandatory redistribution or of "good Samaritan" obligations further influence the limitation on required accommodation (Tucker, 2001).

Notwithstanding broader interpretations driven by its 2008 amendments act, the ADA continues to be inexact in the parameters for required accommodations, dictating a need for an individualized approach (Barry, 2013; Travis, 2012). From an approach based on negligence, ad hoc evaluations readily follow but also permit differential treatment by finely made distinctions, allowing bias as an integral input. Simultaneously, employers routinely make individualized accommodations for workers, regardless of disability (Blanck, 1997, 1999; Jolls, 2001; Stein, 2000); typically, accommodations provided to individuals with a disability are not more burdensome or costly than accommodations made to any other individuals within the workforce (Jolls, 2001). This reality sharpens the nature of being exceptional and the norms relevant for creating socially constructed difference. It also brings into focus the fact that difference is in perception. An exceptional individual is aware of the potential resentments spurred by the conference of accommodations (Colella, 2001). "Breach of custom or habit is the source of sympathetic resentment, while overt approbation goes out to fidelity to custom maintained under exceptional circumstances" (Dewey, 1922, p. 76).

By creating preferences for individuals with disabilities over other workers with more favorable productivity profiles, the ADA "creates labor market preferences for individuals with disabilities" (Schwab & Wilborn, 2002, pp. 1211–1212). Stein points out that from an employer's perspective, there is no real difference between:

> (1) a worker with a disability who does not require an accommodation but who is less productive than a nondisabled peer; (2) the equally productive disabled worker provided with a reasonable accommodation; or (3) the comparatively hyper-productive worker with a disability provided with a proportionately hyper-reasonable accommodation expense (Stein, 2000, p. 133).

However, only the second worker has assured ADA protection (Stein, 2000).

Verkerke (2003) argues that the ADA promotes efficiency by matching accommodations to skill sets. ADA accommodations are efficient only with complete information so that an employer can appropriately match an employee with a job function. Accommodations allow an employer to avoid inefficiencies related to high turnover, nonproductive workers, and poor hiring decisions (Verkerke, 2003). "A market system tends to magnify differences in innate ability, driving a wedge between the natural lottery and income… A system of wealth maximization ratifies and perfects and essentially arbitrary distribution of wealth" (Posner, 2004, pp. 101–102). Verkerke specifically points out that discriminatory hiring practices cause increased business costs and serious inefficiencies emanating from the arbitrary behaviors associated with economic Darwinism (Clark, 1991; Sloth & Whitta-Jacobsen, 2011; Verkerke, 2003). Uncritical cost benefit analyses set the stage for economic Darwinism.

What is not often directly discussed as part of the calculations is the value of human capital. Most especially common perceptions on who is a worker have been subject to alteration in accordance with history, context and identity. Cost/benefit analyses are intended to assess costs, not lives (Broome, 2000; Kornhauser, 2000; Posner, 2004). During the era of enslavement,[8] racially determined but without regard for gender, profit was found in these devalued bodies with physical and psychological impairments, while the contemporary "dominant paradigm conceive[s] of disabled bodies as having little economic value" (Erevelles, 2011, p. 39.) The confluence of one subordinated category alters perceptions and the corresponding valuation of individuals in the work force. Sojourner Truth (1851), an early critic of gendered perceptions in the workplace, pointed out that race destabilizes gender roles. For women subject to enslavement, there was not much question about her ability to work while being a parent, while modern-day critics are compelled to focus on the effects of parenting roles on the workplace.

Economics cannot be divorced from culture and political hierarchy. Thus, if tort doctrine and theory is a derivative source for analyzing the ADA, it should be used in a comprehensive manner. Tort also contemplates cost spreading, deterrence, and corrective justice (Weinrib, 2013). It also contemplates secondary and enterprise liability (Schwab & Willborn, 2003). Even cost/benefit also has strong foundations in social welfare and moral theory (Calabresi, 2008; Coleman, 1992; Seavey, 1942; Terry, 1915). If tort approaches and theory are appropriate as an evaluative tool in the ad hoc application of accommodations, they should also be appropriate in holding accountable the entities with a large a role in creating and perpetuating disability.

Precisely because they are significant creators of disability (Revile & Schoeni, 2003), employer and corporate responsibility is at the core of such tort fields as workers' compensation, products liability, and the corresponding field of medical malpractice. In a similar vein, the department of labor, Occupational Safety and Health Act of 1970 (OSHA) is intended to reduce workplace hazards. While some employers may view the ADA as an inappropriate imposition on business, it is nevertheless true that tort devices are insufficient to hold accountable corporate actors for the harms they cause, even in their own workplaces (Bureau of Labor Statistics, 2016; Leigh & Robbins, 2004; Reville & Schoeni, 2003; U.S. Census Bureau, 2015). Perhaps the imperfections in tort and in the ADA are a reasonable trade-off, each cancelling out the missing pieces of the other.

4. CONCLUSIONS – NORM CHANGE

This essay's focus on the identity performance by, and agency of, exceptional individuals is a means to accept difference and accommodate norm variation with the intention of maximizing human potential. The idea of maximizing human potential is harmonious with Aristotelian ideals of Eudaimonia, or human flourishing. Human flourishing is connected to the "exercise of rational activity and agency" (Hinchliffe, 2004, p. 536), which includes the wisdom to recognize human potential. The concept also apprehends the constituents of Eudaimonia exercising "a certain ability or cleverness which converts the mere apprehension of what is to be done into the actual doing of it" (Hinchliffe, 2004, p. 537). The pragmatist's enterprise is in accord with these ideas as it explains that the means to challenge habitualized beliefs is for individuals to act and bring two or more habits into conflict, and "release [...] impulsive activities which in their manifestation require a modification of habit, of custom and convention" (Dewey, 1922, p. 87). In the face of institutional resistance, "the actor must determine not only what means to select to reach a given end, but also what exactly the end of goal of action should be in the new situation" (Schmidt, 2014, p. 820).

Instead of resorting to positivist assumption, pragmatists teach that through deliberation and experimentation, "the development of new habits in the face of uncertainty is an inherently contingent and creative process that does not lend itself to prediction" (Schmidt, 2014, p. 820) This experimentation in pursuit of a common humanity, while appreciating individual difference, inherently is a "ragged, untidy process of groping for, and sometimes

grasping, something of how the world is – is a human thing" (Haack, 2008, pp. 34–35).

Along with pragmatism's focus on practice and community as the basis for meaning, a cover/convey matrix suggests strategic, interactive, game theory with aggregative influence on social norms (Dillard et al., 1989; Roth et al., 1981). Pragmatists would encourage practice that requires nondiscrimination in broader contexts, especially for individuals who convey, as well as practice designed to eliminating the need for "accommodations" as currently constructed. That is accommodations should be approached as if all are practical and benefit from economies of scale as a part of norm production. Since norm entitlement is contingent (cf. Marx, 1964 [1844]), abolition of the category in reference to individuals in favor of an associational focus, should bring greater equality as a foundational human inclination. Individuals should be free to define their own normal, selecting the combination of relevant accommodations for their individual needs. In other words, pragmatists would promote community habits that create a "new normal" (Dewey, 1922; Mead, 1967; Peirce, 1955 [1877]), with the ultimate goal to eschew a presumed categorical normal.

Interpretation and use of the ADA is fertile ground, not only for understanding the choices of exceptional individuals, but also for finding means to maximize human potential, human flourishing. Human flourishing has both a social and economic dimension whereby an equal share in community resources is essential (Dworkin, 1985). Even the doctrinal devices for cost/benefit analyses have strong foundations in social welfare and moral theory (Calabresi, 2008; Coleman, 1992; Seavey, 1942; Terry, 1915) and may contribute to creating equal access. "The equality in question attaches not to any property of people but to the importance that their lives come to something rather than being wasted" (Dworkin, 2000, p. 5). Taking notice of how exceptional individuals make determinations regarding the conveyance of identity, as one element in the process of norm change, is a useful input in advocacy for future interpretations, amendments, new laws, and social inclusion of difference within its definitions of norms.

NOTES

1. The distinction between mental and physical is sophistical as mental impairments are physically based and some physical impairments psychologically based (Breedlove, Rosenzweig, & Watson, 2002). Nevertheless, "feelings and beliefs among persons with the same and different impairments and disabilities in a variety of areas,

including rehabilitation and medical needs, employment experiences, and family concerns… [foster] political organizing and collective action within what has come to be known as the disability community" (Putnam, 2005, p. 188). While this chapter's reference to the physical is not intended to have any medical or scientific bases, it does proceed with the understanding that physical impairment and disability are social constructs, like all other categories of subordination.

2. Under the First Amendment free exercise clause, religious adherents are not guaranteed accommodation from laws of general applicability that do not directly target religion (*Employment Division, Department of Human Resources of Oregon* v. *Smith*, 1990).

3. Notwithstanding Constitutional strictures (*International Refugee Assistance Project* v. *Trump*, 2017; Liptak, 2017) and despite Islam being the world's second largest religion with only 20% of adherents from countries in the Middle East (Berkley Center for Religion, Peace & World Affairs), President Trump issued an executive order banning immigration from nations with large Muslim populations (Thrush, 2017).

4. In contrast to pragmatist epistemology, discourse theorists, like Wittgenstein or Foucault, prioritize "the unarticulated and unreflective basis of rule-following" (Schmidt, 2014, p. 821), whereby, discourse analysis is privileged over practice (Neumann, 2002). Discourse, a system for the formation of statements (identifying Wittgenstein and Foucault as the seminal thinkers in discourse analysis). While this chapter focuses on habits, foundational to pragmatism, it cannot escape notice that it engages in discourse to endorse practice for transformation.

5. This chapter uses blank spaces here to suggest a variety of potential identities, including, but not limited to race, gender, religious affiliation, sexuality, physical capacity, each context dependent.

6. The conscious awareness of difference, as with the alternative deliberate disregard of difference, are necessary to address inequality, yet may simultaneously exacerbate the associated problems. Minow (1990) describes this paradox as the dilemma of difference.

7. While Title VII shies away from imposing costs on employers (*EEOC* v. *Univ. of Tex. Health Sci. Ctr*., 1983; *Fesel* v. *Masonic Home of Del*., 1978), "[w]hen employers can prove that employees of a particular sex will be less productive because of discriminatory customer preferences, they win the cases" (Schwab & Willborn, 2003, p. 1236).

8. The confluence of race and disability was forged during the era of slavery. "Racist ideologies defined male and female African Americans as fundamentally inferior specimens with deformed bodies and minds who were best confined to slavery" (Kim Nielson, 2012, p. 50). Black bodies were maimed, mutilated, and killed through the auspices of the institution of slavery, forcing survivors of this brutal institution into submission. Id.

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CHAPTER 4

FEMINIST CONSTITUTIONALISM AND THE ENTRENCHMENT OF MOTHERHOOD

Julie C. Suk

ABSTRACT

This chapter examines the relationship between constitutional guarantees of sex equality, understood as prohibiting unequal treatment between men and women, and the constitutional protections of maternity. Textual guarantees of sex equality are nearly universal in constitutions around the world, and many constitutions in Europe, Latin America, and Asia also include provisions guaranteeing mothers the special protection of the state. In the United States, by contrast, the special treatment of mothers has long been contested as a threat to gender equality, and the efforts to add a sex equality amendment to the U.S. constitution have failed over the past century because of conflicts about the status of motherhood. This study traces the origins and jurisprudential development of maternity clauses in European constitutions to shed light on the possibility of synthesizing maternity protection with a constitutional commitment to gender equality.

Keywords: Comparative constitutional law; sex equality; pregnancy; Equal Rights Amendment; women and the law

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For the past century, the movement for sex equality in the United States has resisted the special protection of mothers. Constitutional sex equality doctrine has viewed the law's perpetuation of women's role as mothers as a paradigmatic threat to sex equality. Meanwhile, other constitutions around the world explicitly guarantee sex equality while also entitling mothers to special protection. This chapter puts American sex discrimination law in conversation with the postwar European constitutions that committed to sex equality and the protection of motherhood at the same time. The simultaneous constitutional entrenchment of equality and difference was the work of women who participated in constitution making in Europe. The postwar European constitutions that have been copied globally throughout the twentieth century had "founding mothers" who made their constitutions speak explicitly to the problems affecting women and mothers. They built coalitions across divisions of ideology and political party, engendering a constitutional law that synthesized the norm of equal treatment with the special and different protection of women as mothers. The history and subsequent jurisprudential development of constitutional equality and maternity protection in Europe provides an illuminating counterpoint to the trajectory of legal feminism in the United States.

In the United States, the law of sex equality has not successfully synthesized equality and difference. As a result, legal strategies to combat gender inequality have inadequately addressed the economic, political, and social disadvantages that women continue to experience in the twenty-first century. Although the sources of gender inequality are complex, it is clear that motherhood is a significant factor in the dynamics of gendered disadvantage. Treating women the same as men can freeze existing disparities resulting from the burdens of motherhood. But providing women with special treatment can perpetuate the cultural expectation that women continue to bear these burdens, and that expectation can limit women's freedom to transcend the constraints of motherhood. Both same treatment and special treatment come with complex dangers and problems. In the United States, legal feminism has been divided and stymied by disagreement over the pros and cons of equal versus special treatment.

The main purpose of this chapter is to introduce the European synthesis of equal and special treatment by unveiling its historical origins and some of its legislative and jurisprudential implementation. To underscore the significance of this European counternarrative, I begin with an account of women's twenty-first century disadvantages that U.S. sex equality law has not adequately addressed, and a brief summary of U.S. maternity jurisprudence, to set the stage for the achievements of women constitution makers in Europe.

1. TWENTY-FIRST CENTURY GENDER INEQUALITY AND MOTHERHOOD

Despite almost a century of women's suffrage, and half a century of prohibiting sex discrimination in many realms, American women remain economically and politically disadvantaged relative to men. Women make 80 cents to the men's dollar (Bureau of Labor Statistics, 2016). Although women have been voting for almost a hundred years, and have been eligible to run for office even longer, women constitute only 19.4% of Congress, including 20 Senators and 84 members of the House of Representatives. Women are 35% more likely than men to live in poverty (Tucker & Lowell, 2016). Women are also more likely than men to face poverty in retirement, and even when they are not poor, lower levels of attachment to work throughout one's career produce gender gaps in retirement income (Brown, Lee, Saad-Lessler, & Oaklen, 2016).

The burdens and dynamics of motherhood are a significant source of these remaining inequalities. Most adult women in the United States do become mothers. In 2014, 85% of women aged 40–44 had become biological mothers (Livingston, 2015). Although this is a decline from the mid-1970s, when 90% of women in that age group had become mothers, the fact that such a large majority of women are mothers must play a role in understanding the sources and dynamics of women's disadvantage. Recent studies by economists suggest that the gender wage gap is largely a motherhood gap (Blau & Kahn, 2016; Bertrand, Goldin, & Katz, 2009). In the workplace, mothers fare worse in terms of pay, rates of employment, and attainment of higher-status positions, as compared to fathers and childless women.

There are two different dynamics that disadvantage mothers. Mothers are more likely to work in jobs that are compatible with bearing, caring for, and raising children (Schieder & Gould, 2016). Such jobs may involve fewer hours and thus be lower paid than jobs taken by parents who spend little or no time caring for or raising their children. If jobs are generally not compatible with bearing and raising children, primary caregivers will be disadvantaged in employment. Historically, women have been primary caregivers.

Furthermore, it is not only women's choices and efforts to combine primary caregiving with working that explains mothers' disadvantage. Even in situations where the mother has chosen not to be a primary caregiver, by taking on a demanding full-time job and by delegating the primary caregiver role to the child's father or a paid nanny, mothers are subject to stereotypes that disadvantage them at work. Joan Williams (2004) identified the "maternal wall," a set of employer attitudes and policies that presume that women are primary caregivers and therefore less committed to her job than workers

who do not have conflicting loyalties and responsibilities. This discrimination against mothers prevents many qualified women from attaining promotions to positions of responsibility, power, and higher incomes.

U.S. sex equality law, which strikes most strongly against gender classifications, gender stereotypes, and intentional discrimination, is evolving to remedy the second dynamic (discrimination against mothers) but not the first (incompatibility of work and primary caregiving). Throughout the twentieth century, an increasing number of mothers became full-time workers and breadwinners. By 1970, 30% of women were in the workforce; today it is 59%. Among mothers with children under the age of 18, 70% now participate in the labor market (U.S. Dept of Labor, Women in the Labor Force, 2017). But they did not and could not abandon their role as primary caregivers because neither the economy nor our public institutions adapted to this new reality. Most families with children need two incomes to afford housing, healthcare, education, and other basic needs (Warren & Tyagi, 2003, p. 8). As of 2006, two-paycheck couples were more numerous than male-breadwinner households were in 1970 (Gerson, 2010, p. 4). In addition, nearly 40% of families with children have a sole female breadwinner. Fewer than one-third of children in 2012 lived in a family with a stay-at-home caregiver (Boushey, 2016).

If the market work of mothers is a normal and necessary feature of American life in the twenty-first century, the incompatibility of work with pregnancy, childbirth, and the raising of children will make it difficult for women to stay employed, be promoted, and flourish like fathers and nonparents. The law of sex equality, if it is concerned with reducing gendered economic, political, and social inequalities, must do something to disrupt the disadvantaging burdens of motherhood. It is often noted in American news stories and scholarly work that European countries do much better on this score, with laws guaranteeing pregnancy accommodations, paid maternity leave, and preschool education for small children. In Europe, the oft-envied policies grew out of the constitutional commitment to protecting mothers, not out of the constitutional guarantee of equality. In the United States, mandatory maternity leave and any other special benefits uniquely for pregnant women and mothers would be regarded as threats to constitutional sex equality. Yet, in Europe, more recent cases synthesize motherhood protection with norms of equality, and this synthesis has catalyzed legislative efforts to nudge fathers to do more primary caregiving. By contrast, only 12% of American workers of any gender have access to paid parental leave, and the law does not require pregnancy accommodations in the workplace, except when accommodations are already voluntarily provided to similarly incapacitated nonpregnant employees.

Paid maternity leave and the accommodation of pregnancy in the workplace are two examples, among many, of policies that could significantly reduce women's disadvantages in the workplace. The absence of such policies is explained not only by a politics that is generally skeptical of social welfare benefits and regulation of employers, but also by a sex equality doctrine that is equally skeptical of protecting mothers. Not only is special or more favorable treatment of mothers not required, but throughout the twentieth century, leading American advocates of women's constitutional equality conceptualized the special treatment of women, particularly on grounds of their traditional role as wives and mothers, as itself a threat to sex equality.

2. PREGNANCY AND MATERNITY IN U.S. LAW

We can begin with a recent illustration of U.S. law's orientation toward special treatment for mothers. In 2015, the Supreme Court decided *Young* v. *UPS* in favor of a pregnant employee who had been denied an accommodation on the job. The lower courts had ruled in favor of summary judgment for the employer, where the employer's explanation for denying the accommodation was simply that it only accommodated workers with work limitations stemming from on-the-job injuries. The Supreme Court held that summary judgment was inappropriate, giving the pregnant worker the opportunity to show that the employer's policy of limiting accommodations to workers injured on the job was pretextual; under some circumstances a jury can infer that the burden on pregnant workers is imposed because of hostility to pregnant workers. Even though the pregnant plaintiff won, the Supreme Court agreed with the employer that the Pregnancy Discrimination Act (PDA) did not require more favorable treatment of pregnant workers. Pregnant employees are entitled under the statute to be treated the same as any other worker who is similar in ability to work. As Justice Breyer put it, the PDA does not require "most favored nation status" for pregnant employees (*UPS* v. *Young*, 2015, p. 1351). Employers are legally permitted to deny pregnancy accommodations as long as they are equally ungenerous with other incapacitating conditions. Even when employers are more generous with other incapacitating conditions, such as on-the-job injuries, that remains legally permitted as long as the employer applies the policy consistently, for example, by not providing exceptions to men with off-the-job injuries that it would not provide to the pregnant worker. *UPS* v. *Young* is not surprising; it is simply the most recent illustration of the equal treatment approach that has dominated U.S. sex discrimination doctrine since the 1970s.

In the 1970s, the U.S. Supreme Court struck down, on Equal Protection grounds, several laws that treated men and women differently based on assumptions about maternity. These cases included *Reed* v. *Reed*, which invalidated an Idaho statute which preferred, among equally qualified administrators of an estate, males over females; *Frontiero* v. *Richardson*, which invalidated a federal statute that imposed greater burdens on female members of uniformed services to prove the dependent status of their husbands than it did on male members invoking the dependent status of their wives, and *Weinberger* v. *Wiesenfeld*, which invalidated a provision of the Social Security Act that awarded "mother's insurance benefits" only to widows, but not to widowers, upon the death of a working parent. In these decisions, the Supreme Court established the legal principle that law should not treat men and women differently because of women's traditional role as primary caregivers within the family. The principle of treating men and women the same was a reaction against the nineteenth-century equal protection jurisprudence, exemplified by Justice Bradley's concurrence in *Bradwell* v. *Illinois*, which had upheld the exclusion of women from the legal profession as consistent with equal protection, on grounds of women's "noble and benign offices of wife and mother" (*Bradwell* v. *Illinois*, 1872, p. 141). A century later, in *Frontiero* v. *Richardson*, Justice Brennan repudiated this "long and unfortunate history of sex discrimination" and explicitly attacked Justice Bradley's account of womanhood. In Frontiero, the Court viewed efforts to protect women as wives and mothers as "'romantic paternalism,' which, in practical effect, put women not on a pedestal, but in a cage" (*Frontiero* v. *Richardson*, 1973, p. 684). This line of cases embraced the powerful idea that the glorification of maternity was confining to women and a threat to their liberty and full citizenship.

This norm of treating men and women the same then got applied in the context of pregnancy. When pregnancy was treated adversely by a social welfare regime or a state, the U.S. Supreme Court concluded in *Gedludig* v. *Aiello* that it did not constitute sex discrimination because not all women were pregnant, and also because pregnancy was a real biological difference that justified different treatment. Nonetheless, in a contemporaneous case during this era, the Supreme Court invalidated a public employer's imposition of mandatory unpaid maternity leave as a violation of the Due Process Clause. In *Cleveland Board of Education* v. *Lafleur*, which rejected mandatory maternity leave, Justice Powell noted in a concurrence that mandatory maternity leave violated the Equal Protection Clause because of its use of an irrational classification. Congress reacted to the Supreme Court's approach to pregnancy by amending Title VII, which clarified that discrimination on the basis of pregnancy was sex discrimination. The PDA entitled pregnant workers to be

treated "the same" as similarly incapacitated workers, but since no body of law at the time required accommodations for disabled workers, a failure to accommodate pregnancy remained usually legitimate. Today, the Americans with Disabilities Act (ADA) requires accommodations for disabled employees, but initially, this was not read to include normal pregnancies, which can be incapacitating. Although more pregnancies are covered after the 2008 ADA Amendments Act, the disability framework does not guarantee protection to every pregnant worker (Williams, Devaux, Fuschetti, & Salmon, 2013, pp. 112–117).

A barrier that is unique to the American jurisprudential context is that gender classifications, and indeed all forms of different treatment based on sex, are scrutinized under both statutory and constitutional sex discrimination doctrine. When California required employers to provide leave and reinstatement to women who took leave for pregnancy, the state law was challenged as pre-empted by Title VII's prohibition of discrimination on the basis of sex and pregnancy. In the 1989 decision, *California Federal Savings and Loan Association* v. *Guerra* ("Cal Fed") the U.S. Supreme Court upheld the California maternity leave law as not pre-empted by Title VII, suggesting that the special, more favorable treatment of mothers is permissible. Nonetheless, two years later, Title VII was interpreted in *UAW* v. *Johnson Controls* to prohibit employers from adopting rules that attempted to protect women's biological reproductive capacities from lead injuries. In that case, the employer prohibited women of childbearing age from working in positions involving lead exposure. The Court held that this violated Title VII, channeling Frontiero's powerful insight that efforts to protect motherhood harm women.

One may doubt the enduring force of Cal Fed in light of the Supreme Court's holding and rhetoric in *Nevada* v. *Hibbs* in 2003. The Supreme Court upheld the Family and Medical Leave Act (FMLA)'s statutory guarantee of unpaid family leave as a valid exercise of Congress's enforcement power under Section V of the Fourteenth Amendment. But the way in which it did so strongly suggests that any legislation guaranteeing maternity leave would be unconstitutional. Under Section V doctrine, the Court had to identify the constitutional Equal Protection violation that Congress was proportionately attempting to remedy by adopting FMLA's guarantee of family leave. The Court noted that state policies and practices of providing maternity leave only to women in civil service employment were the constitutional problem to which the gender-neutral family leave of the FMLA was the appropriate Congressional remedy. Since Hibbs, it is understood that gender neutrality in parental leave is a constitutional requirement. When President Trump unveiled a proposal to introduce paid maternity leave, the American Civil Liberties

Union (ACLU) urged that it was unconstitutional because it did not include men or fathers (Sherwin, 2017). Meanwhile, it is assumed that the status quo – no paid leave for mothers or fathers alike – does not raise a constitutional equality problem, even though the lack of paid maternity leave perpetuates women's economic disadvantage relative to men in the twenty-first century.

While it is not obvious that the absence of paid parental leave must be seen as a problem for sex equality, it is worth understanding the vantage point of constitutional regimes that would more easily arrive at that conclusion. The following thought experiment should illuminate the comparison and also highlight the usefulness of comparative constitutional inquiry: Imagine there are three policy outcomes that must be measured and ranked, based on how far they achieve the constitutional vision of sex equality. (A) Paid parental leave for all mothers and fathers. (B) No paid parental leave for anyone. (C) Paid maternity leave and pregnancy leave for women only. Legal feminists everywhere would likely agree that (A) scores the highest. American antidiscrimination jurisprudence, largely implementing the views of legal feminists who advocated for the Equal Rights Amendment (ERA) to the U.S. Constitution from the 1920s to the 1970s, clearly ranks (B) before (C). European constitutional orders, on the other hand, put (C) ahead of (B), and, in doing so, created a viable path to paid parental leave for all mothers and fathers, as well as additional policies that incentivize egalitarian parenting. In short, the special protection of mothers was a significant step in the path toward egalitarian gender relations, rather than the retrograde step feared by American proponents of equal treatment.

The American path toward sameness without special treatment is not a necessary one. Indeed, it is noteworthy that, in the paragraph where the Hibbs Court rejected *Bradwell* v. *Illinois*'s divine glorification of motherhood, it simultaneously repudiated several other precedents that had upheld the protection of motherhood, purportedly to women's detriment. Hibbs casts *Muller* v. *Oregon*, which upheld Oregon's maximum hours legislation for women workers, as a threat to women's constitutional equality, because Muller depended on the sociological premise that long hours undermined women's "maternal function" (*Nevada* v. *Hibbs*, 2003, p. 729). Hibbs erases the feminist history of Muller, and of the feminist division that caused the Court to reject protective labor legislation for women in 1923 and then uphold such laws again in 1933. The Supreme Court's maternalist logic in Muller was largely shaped by the Brandeis Brief, which Louis Brandeis wrote for the National Consumers League, headed by Florence Kelley. Florence Kelley was a fierce advocate for women's rights, but her feminism was largely shaped by her encounter with German socialism during her studies abroad in

Europe (Sklar, 1998, pp. 83–90). She had translated many of Engels' writings into English and joined the Social Democratic Party while living in Germany. The Brandeis brief drew on European legislative and governmental reports, specifically those written by German and French reformers of the late nineteenth century (Brief for the State of Oregon: *41). These European sources were not only concerned with women's health, as such, but the implications of women's health for the whole human race. Because of women's biological reproductive role, as well as their social role as mothers raising the next generation, legislatures were justified in affording them special treatment.

After the Muller case, Florence Kelley and other advocates of mother-protective labor legislation joined the suffragist cause. At the same time, they clashed with leading suffragist Alice Paul regarding the ERA to the U.S. Constitution that Alice Paul drafted and proposed in 1923. Paul believed that full legal equality for men and women was the logical next step after suffrage, and, at that historical moment, Paul construed legal equality as gender neutrality in protecting workers. Alice Paul rejected a coalition with the women who wanted to continue fighting for special labor legislation.

In 1922, Florence Kelley declared her opposition to the ERA. While she acknowledged that all modern-minded people desired women's full political equality and access to the bench, the bar, and the civil service, she expressed concern that an ERA would nullify all laws that benefited women, such as mothers' pensions. She raised questions about whether deserting husbands could be required to support their wives and children. In wiping out special protections for women workers, Kelley feared that this would leave women disadvantaged in competing for work with men in the labor market (Woloch, 2015, p. 130).

Florence Kelley believed that special protection for women would pave the way to universal labor protections and favored a political strategy that began with women-only laws. By contrast, Alice Paul firmly believed that special protections for mothers went against legal equality between women and men. The Supreme Court in 1923 anchored this idea in the Nineteenth Amendment and invalidated legislation enacting a mandatory minimum wage for women and children in *Adkins* v. *Children's Hospital*. Citing Lochner, it determined that the Nineteenth Amendment required a retreat from its earlier reasoning in *Muller* v. *Oregon*:

> In view of the great – not to say revolutionary – changes which have taken place since [Muller] …, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours

> or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. In passing, it may be noted that the instant statute applies in the case of a woman employer contracting with a woman employee as it does when the former is a man. (*Adkins* v. *Children's Hospital*, 1923, p. 553)

Alice Paul had been an adviser to the employer's lawyers in the Adkins case and in December of the same year that Adkins was decided, the ERA that she had drafted was introduced in Congress (Woloch, 2015. p. 124). Even though the ERA was not adopted by Congress for almost another 50 years, it was framed from the beginning as incompatible with laws that gave any special protection to women.

3. THE CONSTITUTIONAL PROTECTION OF MOTHERHOOD

By contrast, women across the political spectrum in Europe built coalitions and debated with one another to arrive at the simultaneous equality/difference entrenchment that is widespread in constitutions around the world today. It is worth noting that many of the world's constitutions, unlike the U.S. Constitution, explicitly guarantee sex equality. Most constitutions mention equality between men and women, and/or they prohibit discrimination or denial of rights on grounds of sex. Furthermore, many constitutions that guarantee sex equality also explicitly afford special protection to mothers or maternity. In Europe, the constitutions of Germany, France, Italy, Spain, Poland, Romania, Greece, Portugal, the Czech Republic, Hungary, Austria, Bulgaria, Slovakia, Ireland, Croatia, Lithuania, and Switzerland all contain provisions on the status or rights mothers or pregnant women, without a symmetrical protection for fathers. The special protection of mothers is not limited to European constitutionalism. In Latin America, the authority or duty to protect mothers is found in the constitutions of Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Panama, Paraguay, Peru, Uruguay, and Venezuela. In Asia, the constitutions of China, South Korea, and Mongolia contain motherhood protection clauses. In Africa, motherhood is specially protected in the constitutions of Ethiopia, Madagascar, Niger. While this

survey of maternity clauses in the world's constitutions is not exhaustive, it is clear that the special protection of mothers is widespread, and highly relevant to the status of women in global constitutionalism. How should such clauses be understood in relation to constitutional guarantees of sex equality and non-discrimination on the basis of sex?

In Germany, France, and Italy, women were elected to constituent assembles that adopted these clauses after World War II, and they advocated in favor of constitutional protection for mothers. The "founding mothers" disagreed about the meaning of equality for men and women as well as the justification and scope of the protection of motherhood. Nonetheless, once the rights of mothers were in the constitution, they were invoked and interpreted in many different ways.

4. SEX EQUALITY AND MATERNITY IN THE WEIMAR CONSTITUTION

Consider the moment of German constitution-making at Weimar in 1919 following World War I. The Weimar Constitution was the first in the Western World that contained this maternity protection clause. The 1919 Weimar Constitution was the most progressive and democratic constitution ever adopted up until that moment. Women had won the vote in Germany in 1918, and 41 women were immediately elected in January 1919 (Frevert, 1989, p. 169) to the Weimarer Nationalversammlung, the constituent assembly that adopted the new constitution of the new German republic. Almost 10% of the Weimar National Assembly were women. The Weimar National Assembly that adopted the 1919 constitution was the first German legislative body elected after women got the suffrage. Ninety percent of eligible women voted in the Parliamentary elections of 1919 (Bookbinder, 1993, p. 183). Of the 41 women constitution-makers 22 were members of the Social Democratic Party (Sozialdemokratische Partei Deutschland, SPD), and many had been active in the social democratic women's movement of early twentieth-century Germany. By that point, the far-left Bolshevik Independent Social Democratic Party (Unabhängige Sozialdemokratische Partei Deutschlands, USPD) had split off from the SPD, and elected notable women to the constituent assembly as well. While the majority of the Weimar women were social democrats, there were also several women from the liberal German Democratic Party (Deutsche Demokratische Partei, DDP) who had participated in the bourgeois women's movement in the decades prior to the adoption of the Weimar Constitution.

The constitutional provisions on equality and maternity protection grew out of the debates within a robust and pluralistic German feminist movement that had taken shape for the first two decades of the twentieth century. Whereas eighteenth and nineteenth century constitutions only guaranteed equality before the law to all citizens in broad and universal terms, the Weimar Constitution contained at least two additional clauses that seemed to guarantee formal equality and nondiscrimination on grounds of sex. In addition to the general equal protection guarantee, there was an additional provision referencing equality between men and women and a provision prohibiting sex discrimination in selection for the civil service. Article 109 was a general equal protection clause, analogous to those found in enlightenment constitutions such as the French Declaration of Rights of Man of 1789 (Article 6) and in the Fourteenth Amendment to the U.S. Constitution in 1868, following the Civil War. Article 109 further stated, "All Germans are equal before the law. Men and women have basically the same rights and duties of citizenship."

In this vein, Article 128, addressing public offices, declared positions open to all, much like Article 6 of the French Declaration of the Rights of Man dating to 1789. In addition, this article included a sentence invalidating the exclusion of women from the civil service: "All citizens, without distinction, are eligible according to their abilities and accomplishments to open public offices, in accordance with law. All regulations making exceptions against female civil servants are abolished."

These provisions guaranteeing women equality and nondiscrimination in the public sphere gave women a stature that was relatively new. Women achieved suffrage only in 1918, and from 1850 to 1908, regional German governments had prohibited women from attending meetings of political organizations. Women were not permitted to be enrolled or even audit a class at a Prussian university without the express permission of the Ministry of Education until 1896; in 1908 they could officially be admitted as students (Sklar, 1993, p. 33).

During the era when women were banned from participating in political organizations, they formed organizations that were not explicitly political. Many German women who were interested in justice and reform founded organizations devoted to social services. In this work, they were engaging with great interest the work of American women like Jane Addams who were active in the settlement house movement. Thus, women organized around social issues, such as care of children and the poor.

Thus, it is not surprising that, once they entered the realm of law and politics, these women focused on social issues and reform. The women in the Constituent Assembly embraced and advocated for a constitutional provision

protecting motherhood. "Motherhood has an entitlement to the care and protection of the State." The motherhood protection clause in Article 119 was one of several other clauses within the same article addressing other social issues. The three prior sentences guarantee protection to marriage, the family, and particularly large families with more than three children.

As the guarantee of equality for women would be new, qualifying language was put into the clause. Men and women were guaranteed "basically" or "in principle" ("grundsätzlich") the same rights and duties of citizenship. The addition of the word "grundsätzlich" made it clear that the same treatment of men and women would not be rigidly required in all possible situations. As the moment of constitution making at Weimar was immediately following World War I, a concrete issue that was explicitly discussed with regard to this provision was whether women would have the same duty as men to serve in the military. The "in principle" or "basically" qualifier in the declaration of equal rights and duties was justified as a way of protecting women from the obligations of military service. In response to such a justification, Luise Zietz from the USPD argued that the "in principle" qualifier was unnecessary (Deutsche Nationalversammlung, July 15, 1919, p. 3813). It was unnecessary, in part because one should not assume that equality is incompatible with recognizing difference. In Zietz's view, one could coherently say that men and women had the same rights and responsibilities even if men were subject to military service obligations and women were not, as long as women were fulfilling other similar obligations of citizenship, such as educating and raising children. Furthermore Zietz noted that, because the peace treaty had prohibited German armament, neither men nor women would be subject to the obligation of military service.

The idea that women fulfilled their obligations of citizenship by educating and raising children was central to German socialist women's understanding of the constitutional protection of motherhood (Pore, 1981, p. 44). Article 119's provision entitling motherhood to the special protection and support of the state did not garner opposition in the Constituent Assembly, but the debates focused on what it would mean, particularly for unwed mothers and their children born out of wedlock. When a clause entitling motherhood to the protection and care of the state was introduced, the Social Democrats linked it to the question of whether children born out of wedlock would have constitutional protection. Ultimately, the provision that prevailed was Article 121, which granted children born out of wedlock the same opportunities as those born in marriage for physical, social, and psychological development. This Article was a compromise, as the SPD and the USPD wanted children born out of wedlock to have equal legal status

in all matters, including the entitlement to the name and property of their fathers (Deutsche Nationalversammlung, July 16, 1919, p. 3916). But women from the Democratic and Zentrum parties argued in favor of separating the provision on children born out of wedlock into a separate constitutional provision from the language guaranteeing protection to mothers (Deutsche Nationalversammlung, July 16, 1919, pp. 3942–3950). They feared that granting full equal status to children born out of wedlock would undermine the principles underlying the constitutional protections of marriage and motherhood, which ended up in Article 119. Conservative parties also introduced the possibility of placing the protection of mothers in the same sentence as the sentence guaranteeing the state's special protection of marriage. But instead, Article 119 included a separate sentence on mothers' claim to the special care and protection of the state, suggesting that all mothers, not only those who became mothers in marriage, would have such entitlements. Conservative concerns about the incompatibility of motherhood with work were also raised in the discussion of Article 128, which outlawed the exclusion of women from civil service jobs. Marie Schmitz (Zentrum) pointed out that combining a career with motherhood or familial duties was difficult and undesirable. Nonetheless, the Left prevailed in preserving women's access to the civil service by prohibiting the exclusion of women.

The fact that the mothers' protection clause engendered disagreements about the constitutional status of children born out of wedlock reveals conflicting understandings of the provision. Conservatives saw the respect for motherhood as justifying mothers' exclusion from the public sphere. Socialists, on the other hand, saw the recognition of motherhood as protecting the rights of unmarried women, by way of their children, to resources affecting their social and economic prospects. Unresolved by the text adopted at Weimar, these questions returned to Parliamentary debates about the West German Basic Law that was adopted following World War II in 1949.

After World War II, only four women participated in a much smaller constituent assembly charged with making a new constitution for West Germany. The parliamentary assembly that convened in Bonn consisted of only 65 representatives, chosen this time by the regional legislatures (those of the German Länder) rather than elected in national Parliamentary elections. Elisabeth Selbert, one of the women selected to participate, was a lawyer, jurist, and specialist of constitutional law (Baer, 2010, p. 75). The possibility of having such a "founding mother" was new, since women were authorized to enter the legal profession in 1922, after the adoption of the Weimar Constitution.

The drafters in 1948 took the Weimar Constitution as a template and starting point, albeit with an awareness of the weaknesses of the Weimar

Constitution that had enabled its own demise under Nazi power. The rights provisions of the 1949 Constitution, while owing much to similar provisions in the Weimar Constitution, were also explicitly redrafted as reactions against the experience of the Nazi state. Curiously, however, the draft of the new constitution that was introduced in 1948 did not include the Weimar Constitution's explicit mention of women. It guaranteed equality before the law and banned discrimination in general terms. The SPD proposed the formulation that "men and women have the same rights," which was rejected in December 1948 (Moeller, 1993). Women trade unionists and women's organizations devoted to social work reacted. Selbert traveled the country to advocate in favor of including an equality provision explicitly referencing men and women in the constitution (Baer, 2010, p. 75).

The debate over the equality provision resumed in January 1949, and the liberal Free Democratic Party (FDP) and the Christian Democratic parties (the Christian Democratic Union (CDU)/the Christian Social Union (CSU)) had to clarify their positions in response to the negative publicity. Male leaders of the CDU and FDP now publicly stated that they supported full equality for women, but expressed concern that a constitutional guarantee of equal rights could be deployed to harm women. For example, could equal rights lead to the denial of spousal support to women in cases of divorce? In addition the centrist and Christian Democratic parties invoked the rejection of Communism. The Soviets compelled women to work outside the home, making it harder for women to fully realize their roles as wives and mothers.

Selbert responded to this rhetoric by insisting that guaranteeing equal rights for men and women was perfectly consistent with the law's different treatment of men and women. Selbert argued that women should have the right to pursue wage work, but that many married women who might choose not to work outside the home must have equal status to their husbands. She argued that "the husband's obligation to support [the family] is the equivalent of the wife's obligation to educate the children and run the household." Such statements promoted a vision of equality that did not disrupt traditional sex roles within the family and the state. Equality did not have to mean that women would have a duty to serve in the military. Rather, equality would require placing equal value on the distinctively female contributions to society: "The work of the housewife is sociologically of the same worth as the work of the woman employed outside the home" (Parlamentarischer Rat, January 19, 1949, pp. 539–541). In making such arguments, Selbert distinguished herself from a "frauenrechtlerin" (literally women's rights advocate, or feminist). The term was identified with the bourgeois women's groups, and Selbert insisted that, as a member of SPD, she had no need to be a "frauenrechtlerin." She depicted "Frauenrechtlerin" as

wanting the law to treat men and women the same. By contrast, she argued that there should be a male-female synthesis (Selbert, 1949).

Echoing their predecessors at Weimar, women in the Parliamentary Assembly of 1948–1949 disagreed about the extent and manner in which children born out of wedlock should be constitutionally protected. The rights of children born out of wedlock undoubtedly affected the status of unwed mothers, and there were disagreements about whether and why unwed mothers should be protected as married mothers of legitimate children were. In the Parliamentary Assembly, Selbert and Frieda Nadig, the other woman delegate from the SPD, frequently invoked the frauenüberschuss – the surplus of women in the postwar population. There were 7 million more women than men. Most of these women were between the ages of 22 and 45. Thus, Nadig recognized that single motherhood would be a social reality of postwar Germany: "In the future we will have a mother-family," Nadig declared (Parlamentarischer Rat, December 7, 1948, p. 240). Many of these women would pursue their "natural calling as mothers" without getting married, as there were not enough men for all of them to marry. Nadig and many members of the SPD argued that these mothers and their children should be treated equally to married mothers and their legitimate children. They understood Article 6's entitlement of mothers to the special protection and care of the state to include unwed mothers.

The women representing the Christian Democratic parties in the Parliamentary Assembly viewed the protection of unwed mothers as constrained by the first sentence of Article 6, which entitles marriage to the special protection of the state. Helene Wessel believed that marriage and the family constituted the starting point for an ordered society, and provided the foundation on which "the construction of our state and social community can begin" (Parlamentarischer Rat, December 7, 1948, p. 240). For Helene Weber, the only woman who participated in both the Weimar constituent assembly and the 1948 constituent assembly in Bonn, protecting mothers in the context of protecting marriage and the family would enable women to devote themselves to family life. From this perspective, the wartime necessity of women's market work diverted women away from the family, their true source of fulfillment. If a mother had to work outside the home, such a situation would be regarded as unfortunate. Therefore, protecting the mothers in postwar peace meant creating the conditions by which the male wage could sufficiently support a dependent wife and children. This would liberate and enable women to be mothers.

While the Christian Democrats wanted all mothers and all children to be protected by the state, they feared that equality between children born in and

out of marriage would undermine efforts to protect the family. This disagreement was not resolved. With the Social Democrats' discussion of "mother-families" as a social reality due to the surplus of women in postwar Germany, protection of the family and motherhood implicitly included an expanded definition of the family. For Christian Democrats, protection of the family and motherhood were a constitutional attempt to restore the traditional family, which they believed that the war had uprooted. The constitutional text was consistent with both visions.

5. MATERNITY PROTECTION IN THE 1946 PREAMBLE IN FRANCE

In France, the Preamble of the 1946 Constitution that emerged after World War II contained clauses guaranteeing women's equality and the special protection of mothers. Unlike Germany, France and Italy extended the suffrage to women no earlier than this post-World War-II moment. In France, Paragraph 3 of 1946 Preamble declares, "The law guarantees women equal rights to those of men in all spheres." Paragraph 11 provides, "It [the nation] guarantees to all, especially to the child, the mother, and to old workers, the protection of health, material security, rest, and leisure." At the time that it was drafted, the Preamble was not intended to be judicially enforceable. Nonetheless, it articulated the principles of sex equality and motherhood protection, as did the unenforceable Weimar Constitution, without construing these principles as being in conflict.

In addition, the Constitution of 1946 was adopted by a constituent assembly, which, like that at Weimar, contained the first women legislators in France. A 1944 decree extended the vote to women, and their participation in the October 1945 elections led to the election of 33 women delegates to the parliamentary assembly charged with task of drafting a new constitution. They constituted only 7% of the constituent assembly. Nonetheless, some of these women were vocal on the questions of women's equality and motherhood protection. Of these 33 women, there were 17 communists, 6 socialists, and 9 from center-right parties. The National Assembly had adopted a draft Constitution in May 1946 by a vote of 309 to 249, subject to approval by referendum. French voters rejected the draft constitution in May 1946, and a new text, including a redrafted declaration of rights in the Preamble, was debated in August 1946. Gilberte Roca, a Communist deputy, framed the Preamble Paragraph 11's protection of mothers and children as a concrete realization

of the abstract declaration of equal rights for women in Paragraph 3. Having mentioned the constitutionalization of woman's suffrage, she continued:

> But, in our opinion, the right to vote is only the beginning of equality. It is not enough to give woman the right to vote, and to make her a citizen, if, in all her actions in life, she remains a diminished citizen, if, to take a few examples, she cannot, because she is married, open a bank account, sell her own belongings without the consent of her husband, if she does not have access to all the careers and she cannot freely engage in commerce or a profession because her husband is opposed to it, ultimately, if she does not have the same rights as the father over her children. (*Journal Officiel Assemblée Nationale*, 1946, p. 3332)

This is why, Madame Roca argued, the declaration of women's equal rights had to be framed differently from a mere equality before the law.

> Also, women will read with pleasure the third paragraph of the Preamble, which says, "Men and women are equal before the law;" nonetheless we would prefer the old text, which said, "The law guarantees to the woman, in all domains, equal rights to that of man."

Ultimately, the second version was adopted into the Preamble, suggesting a conception of sex equality that went beyond formal equal protection, and was broad in scope to cover all domains.

If woman's suffrage was only the beginning, with a robust guarantee of women's equal rights in all domains the next necessary component, Madame Roca went on to present motherhood protection as representing the next phase of women's equality. ""But if women rejoice that their rights are being recognized, they know that it is not enough to grant women equality of rights, but that it is also necessary to give her the possibility of exercising them." She then noted that, during the war, eight million women worked in industry, surpassing the number of men working in these jobs. In addition, there were by that moment many female-dominated jobs, such as teaching. Given how many women participated in market work, she observed:

> Today, it is difficult for a woman to, at the same time, perform her tasks as a worker, as a mother, and then to find time to engage the problems of national life, ultimately, to fully exercise her role as a citizen.

Roca noted that the earlier constitutional text, which had been rejected in the referendum, had addressed this conflict by guaranteeing to women the "possibility of exercising the functions of citizenship and worker in conditions which permit her to fulfill her role as a mother and her social mission." The earlier text had also protected "all mothers and all children by legislation and appropriate institutions," and, in Roca's interpretation, this language had sought to obliterate the inequality between legitimate and illegitimate children. Roca then noted the social reality, following the war, of population decline, and invoked the need to encourage childbearing. In the spirit of the earlier

constitutional draft, and in light of the need to reproduce the French nation, Roca defended the new Preamble's language protecting mothers and children, specifically, "The Nation guarantees to all, especially to the child, the mother, and older workers the protection of health and material security." The protection of mothers thus combined women's equal rights as citizens with the project of rebuilding the postwar nation. Roca noted that the Preamble merely articulated the framework, and that the principles articulated on paper should lead legislatures to realize them by regulating work, improving housing, instituting a system of nurseries, childcare centers, afterschool programs, cafeterias, basically, "all the undertakings that will allow the woman to be no longer a servant but the guardian of her household and to participate with all of the might of her intelligence and her heart in the French rebirth." Although the Left, represented by Roca, clearly viewed the protection of mothers as a realization of sex equality in the social state, the Preamble language that had made this idea more explicit had been rejected by referendum in May 1946, after a campaign against the draft constitution by conservatives and Christian democrats.

6. CONSTITUTIONAL RIGHTS OF WORKING WOMEN IN ITALY

But in Italy, the maternity protection language that prevailed in the postwar constitution was similar to that found in the failed draft in France. The Italian Constitution included an article which, in the same breath, guaranteed equal pay for women workers, while also proclaiming women's traditional role as mother within the family. Article 37 provides: "The woman worker has the same rights, and for equal works the same compensation paid to male workers. The conditions of work must permit the fulfillment of her essential functions in the family and assures to the mother and to the child a special and adequate protection.") This was not the only provision that pertained to women's equality in the Italian constitution. Like the Weimar Constitution, the postwar Italian constitution also guaranteed the equality of the spouses in marriage, in the article providing for the special protection of marriage:

> The Republic recognizes the right of the family as a natural society founded on marriage.
>
> Marriage is based on the moral and legal equality of the spouses, with limits established by law to guarantee the unity of the family.

In addition, the general equality provision at Article 3 specifically mentions sex as a prohibited ground upon which inequality might emerge.

The Italian Constitution's equality clause explicitly defined equality in a manner that imposed positive rights on the state to implement:

> All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.
>
> It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

In Italy, as in France, women attained the suffrage immediately following World War II, in 1946. Like the constituent assemblies at Weimar and Bonn in Germany, as well as in France, the Italian constituent assembly that was charged with the drafting of a postwar constitution in 1945 included women. Of the 556 elected members of the constituent assembly, 21 were women, from across the political spectrum, 9 were from the Christian Democratic Party, 9 from the Communist Party, 2 from the Socialist Party, and 1 from the Uomo Qualunque Party. (Biblioteca del Sehasto, 2008, p. 1). Of the 21 women who participated in the constituent assembly, four were elected by the assembly to join a "Committee of 75," tasked with drafting the constitution to be debated and voted on by the larger Assembly. Nilde Iotti, Teresa Noce, Lina Merlin, and Maria Federici participated in the Committee of 75 and played a significant role in advocating for the specific mention of sex in the equality guarantee in Article 3, spousal equality in Article 29, and the rights of women workers in Article 37. Nilde Iotti and Teresa Noce represented the Communist Party and were particularly vocal about the rights of women workers. Noce advanced a vision of Article 37 – the guarantee of equality for women workers compatible with their "essential family function" – as a revolutionary vision of female citizenship in which women could choose how and when to work, as well as how and when to have children (Tambor, 2014, p. 79). Lina Merlin was from the Socialist Party, and her contributions focused on the inclusion of sex in Article 3. Maria Federici was a Christian Democrat and a Catholic. In her contributions to debates about Article 3 and Article 37, Federici focused on the need for the state to provide support to single mothers, many of whom had become heads of their families after losing their husbands in war. Federici was concerned about creating the conditions by which these women could raise and educate their children, even though circumstances made it necessary for them to work.

Looking closely at these women's contributions to the debates on the constitutional commission and the larger constituent assembly regarding the constitutionalization of maternity protection, one must rethink the twenty-first-century assumption that these provisions entrenched the traditional role

of women and mothers in a paternalistic manner that undermined women's full equality or autonomy. Rather, postwar women constitution-makers from all sides of the political spectrum viewed the protection of maternity as a vehicle to women's full equality, autonomy, and citizenship. When the Committee for the Constitution met to discuss economic and social rights to family support, Angelina Merlin began by affirming the need for family protection in the Constitution. She then noted that the woman "had a decisive importance in the formation of the family." "A woman, even if she is not married, if she has children, can constitute a proper family." Like the SPD women in Germany of the same period, Merlin wanted the constitution to acknowledge "mother-families" that could exist without marriage and without men. She also noted, like her French counterparts, that the protection of mothers was not merely a question that concerned women and their right to equality, but also an important investment in the nation: "Note, then, that the recognition of the social function of maternity interests not only the woman, or the man, or the family, it interests all of society. Protecting the mother means protecting society at its roots, because around all mothers that constitute the family and, through the mother, one guarantees the future of society" (Commissione per la Constituzione, September 13, 1946, p. 2105).

Maria Federici, in this discussion, focused on guaranteeing equality between women workers who were heads of families and male workers who were heads of families. She wanted these workers to receive the same forms of social support, integrated with the protections of maternity and children. Federici's contributions suggest that the heterosexual breadwinner-caregiver family is the normal family from which the single mother is an unfortunate deviation, giving rise to the duty to reduce her disadvantage. Thus, while it appears that women across the political spectrum agreed on the need to protect mothers, the participants had different normative orientations towards mother-families. Nonetheless, Federici acknowledged that women became heads of families "due to widowhood or other reasons."

Teresa Noce of the Communist Party went further than Merlin in constitutionalizing a normative vision of mother-families. She proposed the following text to protect mothers in the Constitution:

> The Italian Republic recognizes that maternity is a social function and that the protection of maternity is the collective and national interest. The Italian State guarantees to each woman, regardless of her juridical and social situation, the possibility to procreate in good economic, hygienic, and health conditions, including:
>
> a) for industrial workers, a period of rest, before and after childbirth, paid at full salary;
> b) the institution of a pregnancy allowance for all other mother workers;

c) medical-obstetric assistance for all gestating mothers, without distinction;
d) the institution of a breastfeeding wage. (Commissione per la costituzione: 102)

Ultimately, it was Merlin's proposed text, with some adjustments, and not Noce's, which got adopted in the Constituent Assembly and became Article 37 of the Italian Constitution. Nonetheless, Teresa Noce proposed legislation in Parliament immediately after the Constitution was adopted to clarify the meaning and scope of Article 37. Adopted in 1950, the "Legge Noce" required women to abstain from work before and after childbirth for varying periods depending on their category of work, paid at 80% of their full pay, protected women's jobs for a year after maternity leave, and two hours a day of breaks for nursing paid as work time rather than as break time. It is interesting to note that, in this very first discussion of maternity protection in the Constitution, taking place on September 13, 1946, at the committee level, women dominated the debate. Merlin, Federici, and Noce offered three different texts and gave lengthy speeches and reports about their relative merits. The men interjected very occasionally. This was unusual; in discussions of all other constitutional provisions, the women participated more sparingly.

7. CONCLUSION: LAW'S IMAGINING OF MOTHERHOOD'S DIFFERENCE

The histories of constitutional maternity protection in Europe draw out two important themes. The first is maternity protection as a strategy for promoting work–family balance and reducing the disadvantaging burdens of working mothers. This was not the only understanding of maternity protection that came up in constitutional debates; conservatives echoed Justice Bradley in *Bradwell* v. *Illinois* in believing that women's maternal functions required her exclusion from work and public life. It is certainly possible to trace Hitler's glorification of motherhood ("Kinder, Kirche, Küche" or "Children, Church, Kitchen") (Koonz, 1987) from the Weimar Constitution's declaration that mothers were entitled to the care of the state. But it should be clear that this is not the only possibility; there are other roads that are imagined and pursued by the advocates of maternity protection, including the introduction of compulsory paid maternity leave, pregnant worker protections, and rights to childcare.

Second, constitutional maternity protection is the work of "founding mothers," the women constitution-makers. Although women only constituted a small minority of the constituent assemblies, it is remarkable by

comparison to the United States that European women are governed today by a document that was produced with the participation of women as well as men, including mothers. The women participated most substantially in debates about the sex equality and motherhood provisions. These debates reflect efforts by the founding mothers to build coalitions and form compromises around the meaning of equality and its relationship to the recognition of difference. Ultimately, the equality and motherhood provisions that were adopted enabled various changing visions of work-family balance to be promoted by the state.

In Europe, constitutional maternity clauses are not merely a relic of a bygone era. For example, the German Constitutional Court in 2006 held that legislation imposing mandatory paid maternity leave was constitutionally required (1BvL 10/01 2006). In 1994, the German constitution had been amended in connection with German reunification to clarify the sex equality guarantee at Article 3.2. A new sentence inserted in 1994 reads, "The state shall promote the actual implementation of equal rights for men and women and take steps to eliminate disadvantages that now exist." Reading this sentence in light of Article 6.4 entitling mothers to special protection of the community, the German Constitutional Court held that a statutory unemployment insurance scheme must ensure that there are no disadvantages in benefits resulting from a woman's absence from work due to mandatory maternity leave. In the twenty-first century, if the protection of motherhood leads to women's disadvantages in employment, the state has a duty to eliminate those disadvantages to work toward the actual implementation of equal rights. In recent years, the German Constitutional Court has upheld legislative efforts to incentivize fathers to take paid parental leave as measures to eliminate women's disadvantage, toward the actual implementation of sex equality (1BvL 15/11 2011).

In the United States, there was no convergence, other than woman's suffrage, between advocates of constitutional sex equality and social feminists who advocated for maternity protection as an initial step toward an egalitarian social welfare state. The failure to build coalitions and to compromise on this subject shaped a limited approach to legal sex equality that insufficiently addresses the inequalities resulting from the role of women as mothers. Women's maternal functions have contributed significantly to the economic and political development of the nation. Nonetheless, legal feminists in the United States fear that recognizing maternity in the law will confine women to maternity. One consequence is that legal guarantees of sex equality now inhibit, rather than promote, measures that would ease the burdens of motherhood and promote real equality of opportunity.

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CHAPTER 5

COMMENT: DIFFERENCES AND (IN)EQUALITIES

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ABSTRACT

This chapter comments on the papers produced as part of the symposium on Law and the Imagining of Difference. The chapter observes that the diversity that marks the human species gives rise to differences across individuals and groups. These differences create a challenge for law, for legal rules, and categories tend, among other things, to flatten or suppress difference. How to ensure that law treats differences properly? One way is to require that legal rules be rationally related to a proper purpose. Another is to require that persons be treated equally. If the principle of equality solves certain problems of flattening, it also may create problems. The key to applying properly the principle of equality, then, is to answer a set of antecedent questions: "who" must be treated as equal to whom, "with respect to what" rights or interests, and "how"? Martha Minow has provided rubrics for addressing these questions in ways that uncover problematic applications of the principle of equality. The chapter addresses the distinct versions of equality presupposed in claims for Douglas NeJaime's arguments for same-sex marriage, Julie C. Suk's social and economic approach to sex-based equality, and Megan A. Conway's and

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Zanita E. Fenton's ambitious explorations of the value of equality in the law of disabled persons. The chapter concludes that law can be directly responsive to some claims of inequality, but that other claims will require something other than law.

Keywords: Diversity; equality; law; same-sex marriage; gender; disability

The human species is breathtaking in its diversity. This diversity – and the differences that mark it – is woven into the human genome, into the social expressions of human existence, and into the experiences of individual human beings. Diversity and difference, however, create a challenge for law, because law deals in categories. And categories, by their nature, classify. In classifying they also simplify. They flatten. They suppress images of difference.

Consider, for example, two familiar categories of law. One is drawn from the law of torts. The doctrine of negligence imposes liability on a person who breaches a duty of care in a way that proximately causes legally cognizable injury to another party. The central category, as Justice Cardozo discussed in *Palsgraf v. Long Island Railroad* (1928), is the duty of care, and the standard for adjudicating whether liability holds in a given case is the standard of reasonableness. If you have acted unreasonably, you owe compensation to a party to whom you have caused injury. If you have not breached a duty of care, if you have not acted unreasonably, you are not liable, even if your actions have proximately resulted in injury to another. Another example comes from the American law of income taxation, which presently establishes that one's liability for income tax depends in part on one's status. If you are married and file jointly, you pay income tax at a different rate than if you are unmarried or file as an individual. Similarly, your liability for tax will be different if you have dependents under your care, than if you can claim no legally cognizable dependent. These categories – reasonableness (in the law of torts), married, or responsible for a dependent (in the law of taxation) – bring together classes of persons who share certain traits, but may vary widely among other traits.

Law may deal with the challenge of flattening in a variety of ways. Among them are two important principles. The first is the principle of rationality: that categories and criteria for inclusion should be rationally related to authoritative ends and grounded in evidence. The second is the principle of equality: that law should treat equally those who fall within the boundaries that define or circumscribe categories and, conversely, those who fall outside. This is sometimes described as treating likes alike or as treating equally those who are similarly situated. The principles of rationality and equality are related to

each other. For now, however, I'll focus on the principle of equality, because it is profoundly implicated in the theme of this volume and in the fine essays that constitute it.

If the principle of equality solves some of the problems posed by flattening, equality, too, can flatten and simplify – sometimes, overly so. There are a couple of notable examples of this from the history of American constitutional law. The first comes from Oliver Wendell Holmes's opinion for the Supreme Court in *Buck* v. *Bell* (1927). This was a case involving the constitutionality of a state's compulsory sterilization of ostensible "mental defectives" (as the statute put it). Holmes said that such a policy did not violate the principle of equality:

> The law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as means allow.

This is a baseline definition of equality rooted in the notion of general rules of equal application – or of treating likes alike. There's a slightly different version of this notion in the argument offered by the State of Virginia in *Loving* v. *Virginia* (1967). The question in *Loving* was whether it was constitutionally permissible for a state to prohibit persons of different races from marrying each other. The State had defended its prohibition through the baseline definition: in short, we are not treating persons differently, because we are punishing all persons equally, regardless of their race, when they enter into a "different-race" marriage.

The fact that the positions presented by Justice Holmes and by the State of Virginia are jarring (at least to many persons) suggests that the baseline definition of legal equality may not be adequate or persuasive in some contexts, with respect to some persons or classes of persons. The risks are at least twofold: One is that adjudicators might treat persons differently on the basis of extra-legal traits. A second risk is that the traits specified in legal categories – whether of legislative, judicial, or administrative origin – may themselves be problematic, because they may be motivated by unthinking habit, prejudice, or first-order animus, or because they are irrelevant to any permissible governmental purpose. In short, they may not be rationally defensible. In modern societies, there's an additional layer of complexity, in that civil society and the economy and, for that matter, families in modernity operate partially autonomous from law. This means that inequalities may arise or be reinforced partially independent from the operation of law at any given time. On this view in Western liberal societies, the adjudication of some manifestations of difference – or the resolution of some problems of inequality – is properly the

province or product of individual choices, the workings of civil society, or the marketplace. If inequalities are not themselves produced by law, what should be the proper role of law in addressing (or redressing) them?

The answer to this question is complex. This complexity suggests that the principle of equality is not so much a single principle as it is a set of questions. First, who should/must be treated differently from whom? In these four fine papers, we have three takes on the question of "who": We have women, same-sex couples, and disabled persons. Second, "with respect to what" goods should/must they be treated as equal? What sorts of rights or interests are at stake? What social contexts are in play? Third, "how" – by which institutions, through what means – should/may/must equality be promoted or achieved?

The sum and substance of these questions is a version of the question of "when": when should we worry, as a legal matter, about inequalities? Martha Minow's insightful book – *Making All the Difference* (1990) – helps answer that question in analytically useful ways. She says there are at least five inexplicit assumptions or mistakes or oversights that may signal problems with a policy or practice, from the standpoint of the principle of equality. It's worth noting here that she is not necessarily claiming that a policy or practice that embodies such problems is *ipso facto* unconstitutional or otherwise invalid. She claims merely that such problems trigger – or should trigger – reflection on the motives and consequences of the policy or practice.

First is the assumption that the difference in question is intrinsic, and not merely relational or comparative. For example, to borrow from one of our papers, hearing is as different from deafness as deafness is to hearing. But the law (and social practices) surrounding disability tend to treat the deaf person as the different person. The category of disability comes to define an intrinsic difference – and an intrinsically different person – when the difference in fact is relational, not intrinsic. This is the problem of neutrality (my word, not Minow's).

Second, and related, is the assumption that the norm (or the normal) need not be stated. Put somewhat differently, law and social practice sometimes rely upon a normative baseline that is drawn inexplicitly from a particular point of view. The canonical example, seen in mountains of feminist scholarship, is that policies and practices having an impact on sex-based differences often proceed from the male point of view. And that viewpoint is treated as the norm, from which women (or pregnant women, or child-rearing women) are different. This is the problem of inexplicit normativity.

Third, and related again, is the assumption that an observer can see without having a perspective. This, says Minow, is the problem of objectivity or of impartiality. Here we have a puzzle. On the one hand, everyone, unavoidably,

stands some place. Everyone, that is, has a perspective and a point of view that derive in part from the place where one stands. On the other hand, we want to hold open the possibility of impartiality – at least when cases or conflicts are being decided by judges or other governmental officials. We need to be attentive, says Minow, to claims of both objectivity and impartiality. We need to examine such claims with care, because claims of or presumptions to objectivity can sometimes disguise the presence of subjectivity or point of view.

Fourth, and still related, is the assumption that other perspectives are irrelevant. Following from this assumption is the mistake of ignoring the perspectives of those being observed or judged. This is a failure of empathy. Finally, there is the assumption that existing arrangements – whether social, or economic, or legal – are natural, or uncoerced, or valid, or good, or desirable. This is the problem of status quo-ism.

As I've suggested above, there is an additional set of questions. Assuming that we can see inequality – or, *à la* Minow, that we can see assumptions, mistakes, or oversights that may signify problems with respect to equality – what is to be done? What is the proper role of law in rectifying inequality or in aiming at (or attempting to achieve) equality? Which legal institutions are the proper voices or instruments of law in promoting equality in particular contexts? And how should they act? It's worth noting that, if the question is one of what law *may* do, it is typically a matter of legislative or administrative discretion. If it's a question of what law *should* do, it's a question of policy, which is often informed by considerations of efficiency and social welfare. If it's a question of what law *must* do, it's typically (at least in the United States and frequently in other countries as well) a matter of constitutional law. These are the questions of remedy. There's still one more question, and it's a question largely of political morality, whether connected to the Constitution or independent from it: what should be the ultimate ends or goals of law or policy or social practice?

These are the framing questions that thread their way through each of the excellent essays that are the meat of the inquiry of this volume. I shall say a few brief words about each of them before concluding.

In more than one way, the most straightforward of the papers, from the standpoint of both doctrine and remedy, is Prof. Douglas NeJaime's. As a doctrinal matter, there are two things to be unpacked. The first is whether marriage is intrinsically about natural, opposite-sex reproduction. The second is whether same-sex couples are within the class of persons entitled to consideration with respect to access to marriage (and other aspects of familial life). By the time of *Obergefell v. Hodges* (2015), American constitutional law had clearly signaled an answer to each of those questions.

Is marriage intrinsically about reproduction? It is not, at least according to states' policies that permitted the aged and infertile to marry. And the Supreme Court agreed in several decisions, including most significantly *Turner* v. *Safley* (1987). There the Court considered whether a state could prohibit an inmate – any inmate – of a prison from marrying a person in the outside world. The Court held that the state could not constitutionally bar the marriage of an inmate, and the Court reached this conclusion on the basis of a definition of marriage that was distinctly companionate, not (merely) procreative. For one thing, the Court held, "inmate marriages, like others, are expressions of emotional support and emotional commitment. These elements are an important and significant aspect of the marital relationship." For another, "many religions recognize marriage as having spiritual significance."

Are same-sex couples entitled to consideration with respect to access to marriage or other aspects of family life? The American constitutional jurisprudence concerning lesbian, gay, bisexual, and transgender (LGBT) persons had gradually evolved on this question. By 2015, we could say two things with confidence. First, disadvantaging persons on the basis of sexual orientation was quasi-suspect (*Romer* v. *Evans,* 1996). Second, LGBT persons are indeed entitled to consideration with respect to family life (*U.S.* v. *Windsor,* 2013). In these two lines, we have the doctrinal interplay of decisions and policies concerning the rights of LGBT persons, on the one hand, and the generic right to marry, on the other. By the time of *Obergefell*, then, the doctrinal table had been set. And claimants for same-sex marriage could frame their legal demand in fairly simple terms: we want access to marriage. We want what they have, nothing more, nothing less. We want equality, pure, and simple.

The claims of women (in Prof. Suk's essay) and of disabled persons (in the essays by Prof. Conway and Prof. Fenton) are more complex, from the standpoint of both doctrine and remedy. I'll take Julie Suk's paper first. Are women equal to men? In formal terms, the answer may well be Yes, at least with respect to political and legal rights. But Suk digs more deeply, mining statistically and existentially differences between men and women with respect to income, access to certain types of jobs, and access to positions of power. What accounts for these differences? The answer, she says, boils down to pregnancy and child-rearing. It's worth noting, for the purposes of this volume, that pregnancy is not an imagined difference; it is real. It is a biological fact that distinguishes women from men. Responsibility for child-rearing is a socially prescribed role that has appeared naturally to grow out from the fact that only women can bear children.

How to address these persistent inequalities? Suk's answer is interesting, because it doesn't aim at equality, pure, and simple. To put the point directly,

women should be treated like men, except where difference is unique to women, in which case women may be treated differently from men. This challenges a precept of the prevailing brand of American legal feminism, pioneered by Ruth Bader Ginsburg, which holds that women and men should be treated the same, down the line, period. Suk posits that the principle of equality aims at interests beyond political rights and beyond equal treatment under law. Genuine equality aims also at social and economic rights. Put differently, genuine equality aims at rectifying inequalities in the social and economic realms. Although these realms are "private" (in Catherine MacKinnon's, 1989 sense of the word), Prof. Suk urges that should not be exempt from the accommodating regulation of law.

There are three questions that pertain to Prof. Suk's analysis. The first is whether her remedy might reinforce ancient stereotypes of and paternalism toward women's role and responsibility where children are concerned. In short, is the remedy partially self-defeating? The second is whether carving out rights to accommodation might engender reaction and resentment, precisely because of special treatment – in the way that affirmative action sometimes breeds reaction and resentment? These are partly tactical questions, but there are also questions about principle. In short, is Prof. Suk's remedy compatible with the prevailing American view of equality, which tends to be fairly formalist? Isn't the fact of the prevalence of the formalist approach to equality precisely why Ruth Bader Ginsburg adopted the litigation strategy that she did (before she was appointed to the bench)? And doesn't the hold that the formalist approach has on the American jurisprudential mind (and heart) help explain the impressive success of same-sex couples in gaining equal access to marriage? Third, in light of Prof. Suk's comparative analysis of polities in Europe, might one upshot of her essay be that it is time for a new constitution-making moment in the United States? If her analysis is pregnant with this possibility, can we be confident that the moment would produce the outcome Prof. Suk seeks, even if women are able to participate as founders?

The two essays on the law of disability move beyond both NeJaime and Suk, and they do so in conceptually interesting ways. For one thing, for the most part, they can't rely on constitutional doctrine. For another, claims to equality by the disabled – or the differently able – reside in a world that assumes that disability is inconsistent with both ability and merit. This assumption produces disadvantage on several related levels: stigma (as the able-bodied and able-minded fear or recoil at the sight of disability); discrimination (as persons in the social and economic spheres treat the disabled differently, in part because of prejudicial assumptions about ability, in part for reasons rooted in fear, discomfort, or distaste); and outright exclusion (deriving from architectural barriers, barriers to civic life, and barriers to work that's consistent with abilities).

These essays deserve careful attention for a number of reasons. But I want here to focus on the innovative light the papers shed on the question of remedy and, by extension, on the question of political morality. Ironically, the very struggle for recognition, for access, and for inclusion have helped create a distinctive identity among disabled persons. The challenge for law and policy is this: how to acknowledge, in Prof. Zanita Fenton's terms, that the exceptional character of disability is not merely a stigma but also a positive aspect of the formation of identity? Or, to put it in terms closer to Prof. Megan Conway's paper, the challenge is that law and social practice should recognize disability without circumscribing or asserting dominion over the identity and self-conception of disabled persons. In short, disabled persons should be able to lay claim to the benefits of law, while not being prisoners to law's categories.

That's a tall order, and in my more skeptical moments, I wonder whether it is achievable. To be less skeptical – and more analytical – about this question of remedy, both essays lay claim to sets of rights that law may well help to achieve: rights to formal equality at law; political rights (which, among other things, allow the disabled to form coalitions with others in order to secure their interests); rights of access and inclusion (to buildings, to work, to civic spaces and civic life). These are social and economic rights that go beyond what Prof. Suk proposes for women. I say this in part because the position of the disabled as a class is in some respects more tenuous than that of women as a class, and in part because the remedies proposed by Profs. Conway and Fenton strike closer to the heart of prevailing views of merit, which have enormous power in the U.S., particularly in the economic sphere.

But Prof. Fenton and especially Prof. Conway nod toward another value, or set of values, that extends beyond mere rights. (In using the word "mere," I have in mind Mary Ann Glendon's *Rights Talk,* 1991.) The values toward which the essays point implicate larger questions of political morality. There's more than one way to frame them, more than one perspective from which to approach them. Consider, for example, the concept of human dignity as deployed by Walter F. Murphy (1980, 2007) and Justice Anthony Kennedy (in, e.g., *Obergefell* v. *Hodges,* 2015), equal concern and respect as defended by Ronald Dworkin (1978), and Aristotelian notions of human (or constitutional) aspiration as deployed by Sotirios Barber (1984, 1993) and human flourishing as revived by John Finnis (1980, 1983). However, these values are framed, they rely for their realization on something other than – something in addition to – rights. They rely on the formation and maintenance of a good society, animated by an ethic of compassion, care, and the common good. It will take more than law to achieve that society.

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