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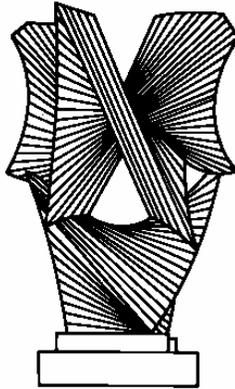
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## WHAT GOOD IS THE SOCIAL MODEL OF DISABILITY?

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## WHAT GOOD IS THE SOCIAL MODEL OF DISABILITY?

Adam M. Samaha\*

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*A social model of disability relates a person's disadvantage to the combination of personal traits and social setting. The model appears to have had a profound impact on academics, politics, and law since the 1970s. Scholars have debated the model's force but its limitations are more severe than have been recognized. This Article claims that the model, like all social construction accounts, has essentially no policy implications. Its impact depends on normative commitments developed by some other logic, such as membership in the disability rights movement or adherence to versions of libertarian, utilitarian, or egalitarian theory that are triggered by the model's causation story. At the same time, a normative framework within which the social model is relevant will suggest not only policy goals but also an institutional design. These points are illustrated by recent controversies involving genetic screening technology, cochlear implants, and sign language communities. Contrary to impressions left in the law literature, the social model has nothing to say about the proper response to such developments, although the model might have a mediated influence on our sense of the best decisionmakers.*

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## INTRODUCTION

For many advocates and academics, a social model of disability is foundational. It defines their field of study and it counsels everyone to see “disability” as disadvantage caused by the confluence of two factors: (1) a person’s physical or mental traits plus (2) the surrounding environment, which is at least partly constructed by others. Both factors might be necessary before disadvantage takes hold. Although once obscure, the model is now standard learning in disability studies. Its causation story has been a message of the disability rights movement since the 1970s,<sup>1</sup> and in 1990 the model was successfully launched in Western academia by Michael Oliver’s The Politics of Disablement: A Sociological Approach.<sup>2</sup>

The simplicity of the social model helps account for its jarring effect on any conventional wisdom that portrays disability as a personal tragedy. Indeed the model has been credited with inspiring change in many forms. Parts of the Americans with Disabilities Act (ADA) indicate that social settings must be revised to make individual traits less disabling. Reasonable accommodation for employees is an example,<sup>3</sup> as is the qualified duty to make certain places accessible to mobility-impaired people.<sup>4</sup> A federal district court recently used similar principles to hold that U.S. paper currency violates the Rehabilitation Act.<sup>5</sup> The complaint is that our denominations, unlike many foreign bills which vary in size and texture, are not readily distinguishable to blind people.<sup>6</sup> In the same basic spirit, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities in December 2006. The Convention stresses the “importance of accessibility to the physical, social, economic and cultural environment

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<sup>1</sup> See Union of the Physically Impaired against Segregation (“UPIAS”), Fundamental Principles of Disability 13 (1976), online at <http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/fundamental%20principles.pdf> (visited April 1, 2007).

<sup>2</sup> Michael Oliver, The Politics of Disablement: A Sociological Approach 11 (St Martin’s 1990); see also Tom Shakespeare, Introduction, in The Disabilities Reader: Social Science Perspectives 1, 1 (1998) (crediting Oliver).

<sup>3</sup> See The Americans with Disabilities Act (“ADA”), 42 USC §§ 12111(9), 12112(a), (b)(5)(A) (2000).

<sup>4</sup> See id §§ 12182(a), (b)(2)(A)(iv), 12183(a).

<sup>5</sup> 29 USC § 794 (2000).

<sup>6</sup> See American Council of Blind v Paulson, 463 F Supp 2d 51, 62–63 (DDC 2006) (granting declaratory relief and certifying the question for interlocutory appeal). It is unclear whether plaintiffs will settle for expedited development of new portable electronic bill-reading devices.

... in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms.”<sup>7</sup> Academics have indicated that the social model is a normative basis for such measures.<sup>8</sup>

Despite the apparent connection between the social model and social change, there just is no necessary relationship there. That is the central claim of this Article. Although the social model is one way to define disability and a field of inquiry, it is not a disability policy. Deciding how to respond to “disability” in law and culture depends on a normative framework that cannot be supplied by the model. This framework might be libertarian, utilitarian, egalitarian, some combination thereof, or something else. The social model itself, however, has essentially nothing to say about which framework to use. One can accept the model’s insight regarding causes of disadvantage without committing to a particular response, even if one believes that disability is simply or importantly the result of people’s attitudes.<sup>9</sup> While legal scholars may concede that the social model does not account for all disadvantage associated with impairments, none seem to acknowledge the logical distance between the model’s causation description and public policy.<sup>10</sup>

The implications are several. First, disability law scholars should stop moving so quickly from assertions about social construction to arguments for social reconstruction. Even if their comparative advantage in scholarship does not include moral theory, their

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<sup>7</sup> Convention on the Rights of Persons with Disabilities preamble ¶ v (2006), online at <http://www.un.org/disabilities/convention/conventionfull.shtml> (visited April 1, 2007); see also id at art 9 ¶ 1 (“Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications . . . and to other facilities and services open or provided to the public . . .”); World Health Organization, International Classification of Functioning, Disability and Health 10–11, 18–20 (2001) (incorporating elements of the social model into a general classification of health states).

<sup>8</sup> See, for example, Mary Crossley, *The Disability Kaleidoscope*, 74 *Notre Dame L Rev* 621, 649, 658 (1999); Anita Silvers, *Formal Justice*, in Anita Silvers et al, eds, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* 13, 75 (Rowman and Littlefield 1998); Michael Ashley Stein, *Disability Human Rights*, 95 *Cal L Rev* 75, 88-91 (2007).

<sup>9</sup> See, for example, Samuel R. Bagenstos, Subordination, Stigma, and “Disability”, 86 *Va L Rev* 397, 436–48 (2000) (concentrating on stigma); 29 CFR § 1630.2 (2006) (defining “regarded as” disabled for ADA purposes). An affiliated concept is the “civil rights model” of disability, distinguished below in Part I.C.

<sup>10</sup> See Part I.C. Outside the law literature, consider David Wasserman, Philosophical Issues in the Definition and Social Response to Disability, in Gary L. Albrecht, ed, Handbook of Disability Studies 219, 222, 229 (Sage 2001). Wasserman’s point is discussed below in text accompanying notes 91–93.

analytical skills often become unhinged without a defensible normative goal. There is no way to set priorities, make unavoidable tradeoffs, or confront cost issues without a normative orientation; even legal formalists must admit this. Second, because of the gap between causation and policy, the stakes are lower for recognizing social forces in human disadvantage. Accepting a degree of social construction is not the end of a policy discussion and so it should be neither shocking nor frightening. It might be intellectually liberating. Third, the argument applies to all social construction observations, including those related to gender, race, sexual orientation, class, deviance, and law itself. For all of them, causation is separable from policy prescription. In fact the argument applies to all causation observations. None determine just outcomes. This is not to dismiss efforts to untangle causal forces in human affairs. The social model of disability, for its part, has been a source of revelation and inspiration for action. It can dispel uncritical assumptions that disadvantage is natural and necessary, which is no small feat. But we ought to know precisely what the model can and cannot accomplish.<sup>11</sup> Then more can be done. We might achieve a sophisticated picture of the model's interaction with general normative frameworks, without relying on membership in the disability rights movement to do the work of argument.

There is another oversight in the scholarship but this weakness underestimates the social model's implications. When the model is doing work within a normative framework, its insight can suggest a class of decisionmakers different from the class other perspectives suggest. This insight might require expertise in addition to or other than medical knowledge. In a way, disability rights advocates who constructed the social model were pointing toward this conclusion all along. Yet the connection between the model and institutional design, however mediated, has not been recognized in the law literature.

Part I of this Article describes the social model of disability and some of its weaknesses. The model identifies a subset of all disadvantage related to physical or mental traits. Critics believe that this subset is small or that the model neglects

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<sup>11</sup> There is a connection here to the legal realists, who broke down the notion that prevailing forms of property and contract law were the natural order—but who were then willing to announce that the merits were open for debate. See below text accompanying notes 103–104.

connections between “impairment” and “disability”; in addition, social modelers do not always spell out the type of disadvantage relevant to them. The model is, nevertheless, a source of truth. The next question is whether acceptance of the social model’s validity is also a commitment to policy. To help answer, Part II presents recent developments surrounding Deaf culture: the emergence of preimplantation genetic screening, the increase in cochlear implant use, and the organization of sign language communities.<sup>12</sup> These developments illustrate possible reactions to a disabling social context, but the social model provides no guidance on the proper response.

Part III further defends this claim and investigates how general normative frameworks might connect to the model. It is true that affinity for the social model is correlated with policy preferences among disability rights advocates. Indeed their movement specified the model alongside a political platform. Also, normative frameworks can be sensitive to the model’s causation account. Three are reviewed here: libertarianism and the possibility of corrective justice, utilitarianism with a dose of hedonic adaptation, and egalitarianism in its antistatist and human capabilities versions. Important work on disability has been done within egalitarianism, which is natural considering the connection to race and gender studies.<sup>13</sup> But the fit with the social model is actually not flush, and the model’s relationship to utilitarianism and libertarianism is unexplored. The latter two frameworks might be equally or more sensitive to the social model’s causation story. In any case, affiliation with the social movement or the normative school motivates the policy response, not the model itself. Yet when the model is relevant for an independent reason, its insight can prompt a change in the mix of decisionmakers. The discussion ends on this brief institutional point.

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<sup>12</sup> See Part II.A.-B. The capitalized term “Deaf” refers to a cultural movement; “deaf” refers to an individual trait.

<sup>13</sup> See note 119 (collecting sources); Part III.B.

## I. SOCIAL MODEL BASICS

No restatement of the social model can satisfy everyone. It has no natural form independent of its application and the volume of writing on the model is almost staggering. This variety of versions yields complications. For some observers, all or nearly all disadvantage suffered by people with disabilities is attributable to their environment. For others, the causal picture is not so tilted. Moreover, those who use the label “social model” might embed implicit normative premises within the term, and they might believe a disabling environment is more easily or justifiably revised once it is recognized as contingent. Hence isolating the model’s insight about causes of disadvantage will seem artificial to some. After all, the social model was generated within a disability rights movement with policy objectives. These problems are taken up later. But it is useful to describe the model in simple terms before adding complications, and this can be done while remaining faithful to influential restatements in contemporary scholarship.

### A. The Causation Account

What is at stake here is the issue of causation . . . .<sup>14</sup>

A field of study requires some agreement as to its subject matter, and disability is no exception. The social model is a proposed definition of disability that is connected to human disadvantage. Stripped down to basics, the model moves causal responsibility for disadvantage from physically and mentally impaired individuals to their architectural, social, and economic environment. Not necessarily moral responsibility, although that might follow, but causal responsibility. Either way, the model is powerful within its domain. This is especially true when conventional wisdom attributes a disabled life to personal tragedy, or curse, or sin, or some other fairly individualized phenomenon. The social model redirects attention to the environment surrounding an impaired individual.<sup>15</sup>

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<sup>14</sup> Oliver, The Politics of Disablement at 11 (cited in note 2).

<sup>15</sup> Recent restatements of the social model in disabilities legal scholarship include Bagenstos, 86 Va L Rev at 426–30 (cited in note 9); Carlos A. Ball, Looking for Theory in All the Rights Places: Feminist and Communitarian Elements of Disability Discrimination Law, 66 Ohio St L J 105, 130–31 (2005); Mary Crossley, Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project, 35 Rutgers L J 861, 875–77 (2004); Michael Ashley Stein, Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination, 153 U Pa L Rev 579, 599 (2004). A forerunner is Jacobus tenBroek, The Right to

Disability scholars contrast the social model with an “individual” or “medical” model of disability. This model focuses on the disadvantaging impact of physical or mental impairments rather than that of the environment in which they operate. The impairments themselves are thought to be disabling.<sup>16</sup> If any assistance is appropriate, therefore, it would presumably be the delivery of individualized services—hearing aids, wheelchairs, guide dogs, personal care attendants, pharmaceuticals, and the like.<sup>17</sup> Descriptions of the medical model often include a subordination theme as well. Inspired by Talcott Parsons’ notion of the “sick role” in Western society,<sup>18</sup> critics of the medical model associate it with belittling norms that relieve impaired persons from social obligations yet demand they abide by professional medical judgment. Both responsibility and liberty are thereby reduced.<sup>19</sup> But it is difficult to find scholars who promote any such “model” of disability. Parsons was interested in describing social equilibria, and disability studies scholars hold out the medical model as error. It is their perception of how traditional health and welfare systems (mis)understand disability.<sup>20</sup>

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Live in the World: The Disabled in the Law of Torts, 54 Cal L Rev 841, 842 (1966) (noting the role of public attitudes in the causation story of the social model).

Salient non-legal descriptions include Oliver, The Politics of Disablement at 11 (cited in note 2) (adopting the UPIAS definition of “disability”); Susan Wendell, The Rejected Body: Feminist Philosophical Reflections on Disability 23, 35–45 (Routledge 1996); Colin Barnes, The Social Model of Disability: A Sociological Phenomenon Ignored by Sociologists?, in Tom Shakespeare, ed, The Disabilities Reader XX, 65 (cited in note 2); Silvers, Formal Justice at 74–76 (cited in note 8). See also Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 12, 85, 110–14 (Cornell 1990) (discussing a social relations perspective on human difference); Ron Amundson, Disability, Handicap, and the Environment, 23 J Soc Phil 105, 109–10 (1992) (adding the importance of “a particular goal”).

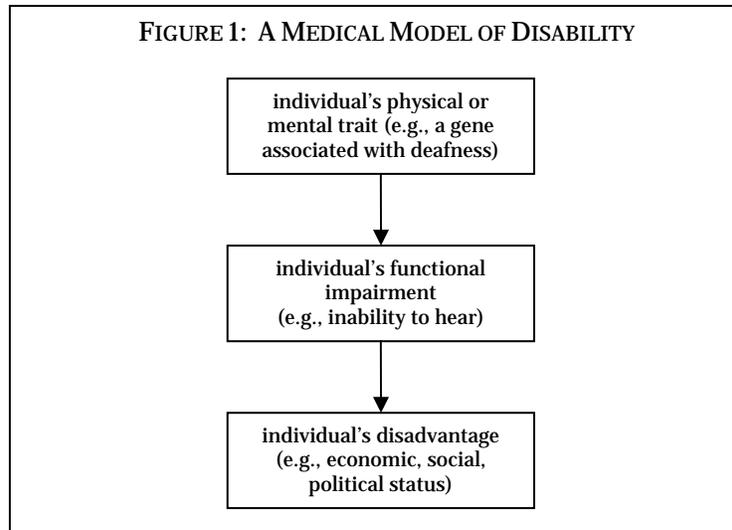
<sup>16</sup> See Claire H. Liachowitz, Disability as a Social Construct: Legislative Roots 12 (UPenn 1988); Michael Oliver, Understanding Disability: From Theory to Practice 31–32 (1996).

<sup>17</sup> Theodore P. Seto and Sande Buhai, Tax and Disability: Ability to Pay and the Taxation of Difference, 154 U Pa L Rev 1053, 1059–62 (2006) (discussing social security as a program based on the “medical/charity paradigm”).

<sup>18</sup> See Talcott Parsons, The Social System 429–79 (1951) (introducing the “sick role” as an institutional role “necessary to enable the physician to bring his competence to bear on the situation”); Talcott Parsons, The Sick Role and the Role of the Physician Reconsidered, 53 Health & Society 257, 261–62, 266–77 (1975) (suggesting the power inequality of the typical doctor/patient relationship).

<sup>19</sup> See David Pfeiffer, The Conceptualization of Disability, in Sharon N. Barnartt and Barbara M. Altman, eds, 2 Research in Social Science and Disability: Exploring Theories and Expanding Methodologies 29, 30–31 (2001); Mark Priestley, Constructions and Creations: Idealism, Materialism and Disability Theory, 13 Disability & Society 75, 82–83 (1998); see also Sharon Barnartt, Using Role Theory to Describe Disability, in 2 Research in Social Science and Disability at 58–68 (cited in note 19) (discussing disability as a master status); Gerben DeJong, The Movement for Independent Living: Origins, Ideology and Implications for Disability Research, in A. Brechin et al, eds, Handicap in a Social World 239, 442–47 (Hodder and Stoughton 1981) (describing “the impaired role” of permanent dependency).

<sup>20</sup> See, for example, Gary L. Albrecht, The Disability Business: Rehabilitation in America 67–68 (Sage



Key to the social model is a distinction between personal impairments and disability.<sup>21</sup> Akin to the sex/gender distinction of the 1970s, the social model indicates that at least some impairments disadvantage only because of their interaction with a social setting.<sup>22</sup> Thus the model defines “disability” as disadvantage caused by the confluence of (1) personal impairment and (2) a social setting comprising architecture, economics, politics, culture, social norms, aesthetic values, and assumptions about ability. Different scholars stress different social factors: some American disability scholars have emphasized stigma and role theory, while some British writers concentrate on the mode of production.<sup>23</sup> But their messages are similar.<sup>24</sup> Because social settings change over time and space, disability is not an entailment of impairment but at least

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1992) (criticizing the influence of the medical model on the rehabilitation industry); Pfeiffer, The Conceptualization of Disability at 31 (cited in note 19); Stein, 95 Cal L Rev at 18 (manuscript) (cited in note 8).

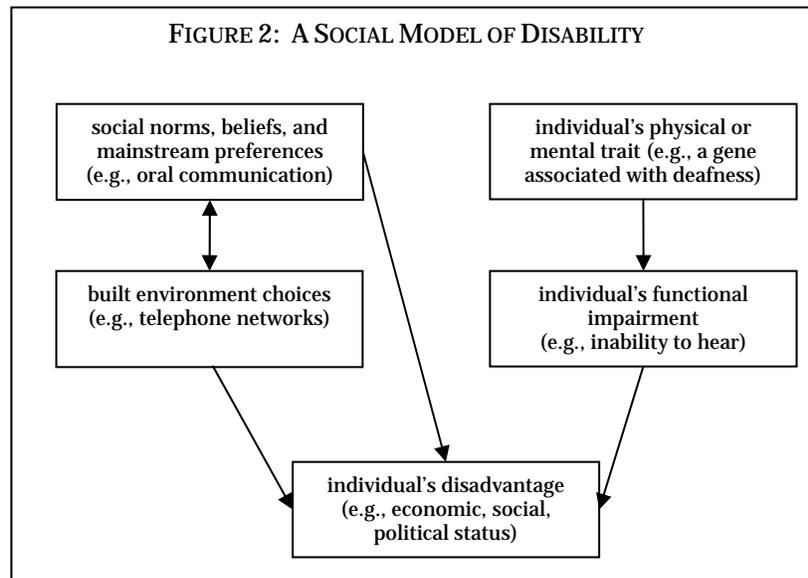
<sup>21</sup> See, for example, Oliver, Understanding Disability at 32–33 (cited in note 16); Oliver, The Politics of Disablement at 10–11 (cited in note 2) (separately defining impairment and disability); Silvers, Formal Justice at 53–56 (cited in note 8) (tracing the development of the conflation of disability and impairment in Western society); see also Liachowitz, Disability as a Social Construct at ch 1 (cited in note 16).

<sup>22</sup> Compare Ann Oakley, Sex, Gender, and Society 204 (Harper & Rowe 1972) (comparing gender to socially constructed caste). Another strain of thought in disability studies emphasizes that some impairments are caused by social systems, like employment and war. See Paul Abberley, The Concept of Oppression and the Development of a Social Theory of Disability, 2 *Disability, Handicap & Socy* 5, 9–13 (1987). I set aside that strain, which is in turn different from the claim that traits become “impairments” only after social construction. See Part I.B.

<sup>23</sup> See Pfeiffer, The Conceptualization of Disability at 32–34 (cited in note 19).

<sup>24</sup> See Priestley, Constructions and Creations at 76–82, 89–90 (cited in note 19) (outlining four approaches among British and American scholars with an “individual-social dimension and [a] materialist-idealist dimension”).

sometimes an artifact of environment.<sup>25</sup> Because these settings are generated in part by the choices of others, causal responsibility for a person’s disadvantage cannot be attributed solely to that person’s impairment.



The concept is almost invariably illustrated with architectural barriers faced by wheelchair users.<sup>26</sup> It is one thing to be unable to walk. It is quite another matter to be unable to enter a building unassisted because the architect preferred stairs to ramps. Walkers might find stairs aesthetically pleasing, and new technology may enable stair-climbing by non-walkers.<sup>27</sup> But for most wheelchair users today, stairs are no different

<sup>25</sup> On cultural contingency, see Colin Barnes, *Theories of Disability and the Origins of the Oppression of Disabled People in Western Society*, in Len Barton, ed, *Disability and Society: Emerging Issues and Insights* 43 (Longman 1996); Martha L. Edwards, *Deaf and Dumb in Ancient Greece*, in Lennard J. Davis, ed, *The Disability Studies Reader* 29, 29, 35–36 (Routledge 1997) (suggesting that Ancient Greek elites connected deafness to intellectual impairment because the latter was connected to linguistic inability); Ida Nicolaisen, *Persons and Nonpersons: Disability and Personhood Among the Punan Bah of Central Borneo*, in Benedicte Ingstad and Susan Reynolds Whyte, eds, *Disability and Culture* 38, 44–46 (University of California 1995) (explaining that the Punan Bah “do not hold the physically and mentally impaired responsible for their condition” because they view these impairments as imperfections in the soul of the body part afflicted, and not the soul of the body itself); Aud Talle, *A Child Is a Child: Disability and Equality Among the Kenya Maasai*, in id at 56, 56–69 (finding no disfavored category of “disabled” among the Maasai, although certain impairments and deformity are associated with divine punishment or curse).

<sup>26</sup> See, for example, Minow, *Making all the Difference* at 12 (cited in note 15); Crossley, 75 *Notre Dame L Rev* at 654 (cited in note 8).

<sup>27</sup> See Yudhijit Bhattacharjee, *Users Discover Pros and Cons in Stair-Climbing Wheelchair*, *NY Times* F7 (Aug 19, 2003) (reporting on the iBOT machine). A video of the device is available at [http://www.ibotnow.com/\\_media/video/ibot4WheelVideo.htm?Function=STAIR](http://www.ibotnow.com/_media/video/ibot4WheelVideo.htm?Function=STAIR) (visited April 1, 2007). Whether stairs are cheaper than ramps in a particular setting is another matter. Here the discussion is about the causes of disability.

from walls while most walkers are perfectly able to traverse both stairs and ramps. Attributing “the” cause of such access problems solely to wheelchair users is arbitrary. Equally poignant examples involve nonphysical barriers. What counts as a bodily deformity worthy of disgust is a matter of taste and social convention. Whether mild intellectual impairments are economically disadvantageous depends on the mix of employment opportunities (for example, simple as opposed to complex). Whether a blind, mute, or deaf person is at a disadvantage when disseminating ideas turns on the dominant method of communication in the relevant context (for example, spoken word as opposed to written English as opposed to Braille as opposed to sign language). It even has become contentious to use the word “impairment” and its connotation of inferiority. “Trait” better fits the social model’s broadest implications.<sup>28</sup>

Consider early Martha’s Vineyard, Massachusetts. As documented by Nora Ellen Groce, an atypically large percentage of deaf people lived on the island from the late 1700s until 1952. The number of deaf inhabitants was nothing like a majority: seventy-two over the entire time period.<sup>29</sup> Yet Groce’s sources indicate that many or most hearing inhabitants became bilingual in spoken English and a form of sign language.<sup>30</sup> The prevalence of sign language seems related to at least three factors. First, many families had at least one deaf member. Second, and perhaps as a consequence, deaf people were socially and economically integrated into the larger island community.<sup>31</sup> Third, hearing islanders understood that sign languages have functional advantages. Signing facilitates communication in loud settings like the open seas, and it permits private conversations near third parties who lack sight lines to the signs. Groce’s reconstruction of Vineyard life shows the absence of a conventional division between groups, given the right social conditions.

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<sup>28</sup> See, for example, Samuel R. Bagenstos, *The Future of Disability Law*, 114 Yale L J 1, 12 (2004) (using the phrase “physical or mental traits” in explaining disability advocates’ arguments).

<sup>29</sup> See Nora Ellen Groce, *Everyone Here Spoke Sign Language: Hereditary Deafness on Martha’s Vineyard* 3 (Harvard 1985) (explaining that this number amounts to one in every 155 people born deaf on Martha’s Vineyard in the nineteenth century, as opposed to one in every 5,728 born in America during the same period).

<sup>30</sup> See *id.* at 3, 53, 93.

<sup>31</sup> See *id.* at 4–5, 77–94, 106–09 (discussing the integration of deaf islanders into education, marriage, family, economic and civic life). No deaf islanders were alive when Groce conducted her interviews. She relied on the memory of hearing islanders and documentary sources.

However attractive the basic thought, a social model can be used to make vastly different claims about causation. One area for disagreement is the relative importance of causal forces within the category of social setting. As noted, some scholars concentrate on one class of social forces over others. Equally significant, a social model allows for different claims about the importance of all environmental factors put together.<sup>32</sup> Model users are not locked into claiming that social setting overwhelms individual impairment in causing disadvantage.

At the micro scale, one can attempt to evaluate the strength of any particular causal relationship between social setting and disadvantage. Many forces may be at work in disadvantage and they will shift over time; they will depend on individual goals as well as capacities. Moreover, one must select a metric for the importance of these forces along with a way to assess the relevance of omissions. But some answers will be uncontested. In fact, the strongest possible causal relationship between social setting and disadvantage is foreclosed. By definition the model targets a combination of environmental and individual traits.<sup>33</sup> It thereby rules out or does not capture the possibility that a social setting alone is the sufficient cause of disadvantage.

Other varieties of causation likewise flush out claims that might be made. Tort law's distinction between but-for and proximate cause is useful here. In one set of situations, the environment will be a necessary cause of disadvantage. The social model is designed to reach these cases, where an individual trait cannot disadvantage on its own. Physical deformity is an example: at least some atypical body features are inhibiting only because other people treat them as aesthetically repulsive or a sign of undesirable traits. In other situations, the environment might be a substantial factor in producing an individual's disadvantage even if it is not a necessary cause. It is possible to view certain

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<sup>32</sup> See Wasserman, Philosophical Issues at 225–28 (cited in note 10) (recognizing the variety of factors and distinguishing between causes and conditions of disability).

<sup>33</sup> See Shelley Tremain, On the Government of Disability, 27 Soc Theory & Prac 617, 630 (2001) (asserting the “unstated premise” of the disability movement in the UK is that although impairment is not a sufficient condition for disadvantage it is a necessary one). A person might be erroneously taken to have a particular trait, which then triggers disadvantage. But these cases are probably rare and prominent restatements of the social model seem uninterested in them. Compare the idea that a person can be “regarded as” disabled even though the person is not otherwise functionally impaired in the relevant way. See 42 USC § 12102(2)(C) (defining disability as including being regarded as having an impairment); Sutton v United Air Lines, Inc., 527 US 471, 489–92 (1999).

mobility impairments this way: paraplegics cannot easily hike up a mountain yet their ability to commute within a city depends on its physical design. Sometimes, moreover, the environment will be both a necessary and a substantial factor in disadvantage. These micro gradations allow us to better conceptualize at the macro scale. We might then consider what portion of all trait related disadvantage (or even all disadvantage) is caused by social factors in the senses just described.

The empirical claims of social model users can be characterized according to these divisions. Some theorists suggest that all disability is socially constructed, in the sense that no personal trait can be disabling without an adverse social setting. The environment is portrayed as a necessary cause, even if not sufficient, and as the predominant factor in all trait related disadvantage. Michael Oliver puts it this way:

[The social model] does not deny the problem of disability but locates it squarely within society. It is not individual limitations, of whatever kind, which are the cause of the problem but society's failure to provide appropriate services and adequately ensure the needs of disabled people are fully taken into account in its social organisation. [¶] Hence disability . . . is all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on. . . . [D]isability is wholly and exclusively social.<sup>34</sup>

Normative prescriptions creep into Oliver's discussion ("the problem," "society's failure"). But the central message is about causation and the emphasis is on the structure of society—including sociological phenomena such as stigma, fear, disgust, disregard, and imperfect assumptions about an impaired person's ability to succeed.

Less ambitious claims exist. Some disability scholars contest the suggestion that personal traits are never sufficient causes of disadvantage. Severe pain or constant hallucinations are surely felt by their victims, usually with negative impact. These experiences can at most be ameliorated, but not eliminated, by adjustments to

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<sup>34</sup> Oliver, Understanding Disability at 32–33, 35 (cited in note 16). Earlier efforts include Victor Finkelstein, Attitudes and Disabled People: Issues for Discussion 1–2, 11–13, 34–36 (International Exchange of Information in Rehabilitation 1980) (describing disability as a social relationship which can be eliminated if attitudes develop in certain ways), and Irving K. Zola, Missing Pieces: A Chronicle of Living with a Disability 240–46 (Temple University 1982) (referring to the process society must go through to come to terms with the disability it creates).

environments.<sup>35</sup> Thick social networks can only do so much. The most isolated of all human beings can suffer from pain or delusion. But even those who are skeptical of the social model in its most robust versions can accept its truth for many people in many situations at many times. Skeptics have a hard time rejecting the steps versus ramps example, even if they object to retrofitting on cost related grounds.

## B. Critiques

[M]ost of us simply cannot pretend with any conviction that our impairments are irrelevant . . . .<sup>36</sup>

For all its conceptual potency, or perhaps because of it, the social model has attracted challenges. One might have expected them to have come earlier. After all, some social model users made strikingly broad claims about disadvantage. Perhaps the emerging critiques are a sign of progress for disability studies scholars, who are sometimes ignored by those worried that the field is too technical, trivial, or partisan. Whatever the case, three lines of critique can be identified. They involve the model's scope, the ambiguity of disadvantage, and the connections between impairment and social setting. Some of these challenges are powerful but none eliminate the model's value.

### 1. Overclaiming

The first concern is common. It is that the strongest claims arising from a social model are indefensible. Personal traits can be inhibiting by themselves or in addition to a disabling social context, albeit depending on the individual's goals.<sup>37</sup> Furthermore, the degree of this independent effect is related to the state of technology. It could be that at

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<sup>35</sup> See Jonathan Glover, Choosing Children: Genes, Disability and Design 6–8 (Oxford 2006); Crossley, 74 Notre Dame L Rev at 657–58 (cited in note 8); Stein, 153 U Pa L Rev at 602 (cited in note 15) (“There are some workers with disabilities whose impairments cannot be ameliorated through reasonable (or even extra-reasonable) accommodations.”); Gareth Williams, Theorizing Disability, in Albrecht, ed, Handbook of Disability Studies at 123, 135 (cited in note 10) (criticizing the strongest instantiations of the social model).

<sup>36</sup> Liz Crow, Including All of Our Lives: Renewing the Social Model of Disability, in Colin Barnes and Geof Mercer, eds, Exploring the Divide 55, 58 (Women's Press 1996).

<sup>37</sup> See Sally French, Disability, Impairment or Something in Between?, in John Swain et al, eds, Disabling Barriers: Enabling Environments 17, 19 (Sage 1993) (claiming that the refusal to admit that traits can be inhibiting oppresses those who experience the inhibitions); Tom Shakespeare and Nicholas Watson, The Social Model of Disability: An Outdated Ideology?, in Barnartt and Altman, eds, Research in Social Science and Disability at 9 (cited in note 19). A similar logic, pointing in a different direction, is the claim that traits can generate unique experiences and valuable cultures.

time 1 a physical or mental trait is independently disadvantageous, while at time 2 inexpensive technology greatly reduces the negative effect. Consider the world before and after eyeglasses. We might guess that a greater proportion of human disadvantage was attributable to personal traits before the invention than afterward—assuming roughly equal levels of stigma suffered by poorly sighted and eyeglass-wearing people. Here disadvantage is shifting but not because of inclusive social forces (apart from technological change). Similar observations can be made about new impairments that are physically debilitating yet not an important source of stigma. Perhaps certain repetitive stress injuries associated with the modern assembly line and keyboard use are illustrative. Now the balance is shifting in the other direction, toward individual impairment as a more significant source of disadvantage. Either way, the relative mix of individual and social factors in producing disability will fluctuate over time. It makes little sense to claim that all “disability” is socially constructed, now and forevermore.

This criticism is empirical. It aims at accuracy in measuring the causes of disadvantage and so it does not necessarily deny that the social model has value. But concluding that the model can account for only a fraction of all impairment related disadvantage will prompt a different concern: critics will begin to question whether the social model contains an acceptably broad definition of “disability.” Once it is granted that some disadvantage happens independently of social context, there will be a class of people the model will not attend to and who nonetheless suffer from a physical or mental trait.<sup>38</sup>

But this critique reveals nothing seriously amiss with a social model of disability. Some proponents acknowledge that the model cannot explain everything about disadvantage. They have chosen the label “disability” for a field of study and concern involving socially produced disadvantage triggered by individual traits. No one can deny that social systems influence disadvantage at least sometimes. The frequency of animus and irrationality as causes of disadvantage is not zero, for example. As long as the model can identify real social factors that contribute to disadvantage more than occasionally, it

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<sup>38</sup> See Shakespeare and Watson, The Social Model of Disability at 16 (cited in note 37) (worrying that the model’s focus might distract us from preventing impairment).

is no devastating objection that the model has limits. Every model does. Oliver's message is perhaps responsible for some of the confusion. Even he acknowledges limits, however. After declaring that "disability is wholly and exclusively social,"<sup>39</sup> he concedes that "the social model is not an attempt to deal with the personal restrictions of impairment."<sup>40</sup> Readers should be aware that social model theorists use the term "disability" in this manner, and theorists ought to concede that the model thereby leaves room for a distinct and perhaps large field of inquiry into independently inhibiting personal traits.

Those who worry that the social model claims "too much" in terms of causation might have been distracted by crude restatements. Those who worry that the model covers "too little" in terms of what is worthy of a policy response are not undermining the model's use. These critics are probably dedicated to helping people who do not fit the model, but that is a separable issue. For the same reason, cost is not an objection to the social model. As will become clear below, the model does not generate costs on its own, beyond any cost of information collection due to its use.

## 2. "Disadvantage"

The second challenge is more serious, although it does not seem to have attracted attention. Social model adherents are often vague about which notion of "disadvantage" or "the problem of disability" they are interested in.<sup>41</sup> There is more than one plausible specification. Clearly social model users are interested in negative consequences produced by traits plus settings. For instance, many scholars are troubled by false inferences of mental incapacity too often associated with traits like stuttering and deafness, while mystical powers associated with blindness are more likely to be used as evidence of cultural contingency.<sup>42</sup> Obviously the social model targets bad consequences. But which?

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<sup>39</sup> Oliver, Understanding Disability at 35 (cited in note 16).

<sup>40</sup> Id at 38; see also id at 41-42.

<sup>41</sup> See, for example, Oliver, Understanding Disability at 32 (cited in note 16) (referring to "the problem" of disability); UPIAS, Fundamental Principles of Disability at 14 (cited in note 1) (referring to "the disadvantage or restriction of activity caused by a contemporary social organisation"). Amundson, 23 J Soc Phil at 108-09 (cited in note 15) (concentrating on lost opportunities to construct life plans).

<sup>42</sup> See Michael E. Monbeck, The Meaning of Blindness 59-63 (Indiana University 1973) (tracing the connection between blindness and mysteriousness in Western culture). But see Silvers, Formal Justice at 57, 56-59 (cited in note 8) (describing a "moral model" of disability).

The options might be separated into absolute and relative disadvantage. First, social model users could incorporate a theory of inadequate human well-being that does not depend on how others are faring. The threshold of inadequacy is difficult to define but this theory is a coherent option. It is related to notions of subordination and human necessities.<sup>43</sup> Second, model users might view disadvantage in a relative sense. There is more than one available baseline, however. The basis for comparison could be the human species norm,<sup>44</sup> or a similarly situated human being the same in every way except for the trait in question, or something else.<sup>45</sup> In addition, decisions must be made with respect to dimensions and severity of disadvantage. Perhaps scholarly attention is not warranted for small negative effects on particular components of human well-being. Rightly or not, disability scholars seem uninterested in male baldness or uncommonly short and tall people, although obesity and ugliness might attract more of their consideration.

There is no stock answer to which form of disadvantage is most worthy of attention. But these sorts of choices are inevitable. And old. They were raised twenty-five years ago by Hendrick Hudson Central School District Board of Education v Rowley.<sup>46</sup> That case presented the question whether a hearing-impaired child was statutorily entitled to a classroom sign language interpreter to help her excel academically, even though she was already outperforming the average student. (The Supreme Court’s answer was no.<sup>47</sup>) The lesson is that a person might be disadvantaged in the two relative senses just noted without falling into any absolute state of disadvantage.<sup>48</sup> These options begin to suggest the normative judgments that surround—and are not made by—a social model of disability.

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<sup>43</sup> See Part III.B.3.

<sup>44</sup> See Ani B. Satz, A Jurisprudence of Dysfunction: On the Role of “Normal Species Functioning” in Disabilities Analysis, 6 Yale J Health Policy, L & Ethics 221–238 (2006) (following the Rawlsian, normal-species functioning theory of Norman Daniels, Just Health Care 27–28 (Cambridge 1985)).

<sup>45</sup> See Wasserman, Philosophical Issues at 226–27 (cited in note 10).

<sup>46</sup> 458 US 176 (1982).

<sup>47</sup> See *id.* at 184–86, 189, 198–204, 209–10 (interpreting the statutory entitlement to a “free appropriate public education” from participating states); *id.* at 215 (White, dissenting) (asserting that the student understood less than half of what was said in the classroom); but see Cedar Rapids Community School District v Garret F., 526 US 66, 68, 79 (1999) (holding that the statute required provision of a full-time nurse during the day where necessary to keep a ventilator-dependent quadriplegic student in school).

<sup>48</sup> Conversely, it seems possible for a person to be subordinated without being much worse off on account of a personal trait (for example, mildly impaired, severely impoverished children).

Still, vagueness in “disadvantage” is only a problem of specification and judgment about proper emphasis, a gap that can be filled without jeopardizing the social model. Both absolute and relative disadvantages can be produced by an individual trait combined with an adverse social environment. For instance, social stigma attached to what is seen as deformity can result in severe blows to social standing, isolation, and objectively determined subordination; but less severe social responses might yield only disadvantage relative to the nondeformed, or to the similarly situated nondeformed. Other combinations are possible. The upshot is that environmental factors may contribute to all sorts of disadvantage. The social model cannot be discarded on account of any undue reticence.

### 3. Reconnection

A third critique targets the boundary between trait and setting. With the development of postmodernism, this line of attack should have been predictable. The social model presents another conceptual dichotomy within Western thought, nearly all of which are deconstruction targets. In any case, the critique has some force.

To an extent, the two components of the model interact with each other. Physical or mental traits recognized by the community as impairments (or as otherwise significant to interaction) become part of the social setting. It is hard to believe that such traits can be held constant over time, or that changes in their prevalence or features will not affect the social environment. This is not to assert either a hopeful evolutionary path or a self-reinforcing dynamic of stigma and subordination. The only point is that these two causes of disadvantage will often be impossible to completely separate.<sup>49</sup>

Similarly, the model might underestimate the social construction it means to emphasize. Shelley Tremain contends that “impairment” is itself a socially ascribed characteristic, an outgrowth of practices that demand the identification of difference. To her “it seems politically naive to suggest that the term ‘impairment’ is value-neutral, . . . as if there could ever be a description that was not also a prescription for the formulation

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<sup>49</sup> It will sometimes be difficult to discern a “medical” response from a response that restructures the “social” environment. One example is a telecommunications device for the deaf (TDD) or a telecommunications relay service to assist deaf/hearing communication over the telephone. Do these technological and human intermediaries count as personal services or environmental revision?

of the object . . . .”<sup>50</sup> Social model users at least implicitly understand that impairment is a subset of all traits. Even setting aside their disinterest in common ailments such as arthritis and back pain, disability studies scholars seem to prefer a boundary between disability and race or gender studies.<sup>51</sup> But of course race and gender easily fit into a generic connection between traits and social reactions. For disability studies to be even partly independent from these inquiries, a notion of impairment separate from social construction might be necessary. Yet insofar as both impairment and disability are socially constructed, disabilities scholarship might miss something important.<sup>52</sup> When combined, the critiques described in this section suggest that the distinction between impairment and disability begins to collapse.

Still, these deconstruction efforts are hardly at odds with the spirit of the social model. Either perspective channels attention to surrounding social structures rather than people identified as disabled. Neither eliminates the central insight of the social model, or calls for anything like the individualized causation story of the medical model. While it is true that the social model of disability cannot account for every human “disadvantage” linked to every individual trait, the issue is specification and scope. Even its most modest claim—that traits of individual human beings are not always the sufficient cause of disadvantage—is powerful when set against a conventional wisdom that physical and mental disability is only a series of personal tragedies. The fundamental question is what the social model accomplishes on its own.

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<sup>50</sup> Tremain, 21 *Soc Theory & Prac* at 621 (cited in note 33) (emphasis omitted); see also Carol Thomas and Mairian Corker, A Journey Around the Social Model, Mairian Corker and Tom Shakespeare, eds, in Disability/Postmodernity: Embodying Disability Theory 18, 19 (Continuum 2002); see also Part III.A.1. (discussing relevance judgments and the connection to norms).

<sup>51</sup> See Shelley Tremain, On the Subject of Impairment, in Corker and Shakespeare, eds, Disability/Postmodernity at 32, 41-42 (cited in note 50) (noting that social modelists do not treat race as an impairment). Perhaps the field is defined by an interest in stigma plus functional impairment, arbitrary academic convention, and/or a reflection of interest group politics.

<sup>52</sup> See, for example, Shakespeare and Watson, The Social Disability at 24 (cited in note 37) (“[W]e are all impaired.”).

### C. Policy Correlations

Differential treatment becomes . . . a problem for which all onlookers are responsible.<sup>53</sup>

Does the social model recommend social change? Many scholars seem to think so. In the academic literature, prescriptions for environmental restructuring regularly follow on the heels of the social model. This analytical surge from causation to policy is sometimes interrupted or punctuated by the identification of a “civil rights” or “minority group” model of disability. But as used in the law literature, the civil rights model is not simply a causal model of disadvantage. It is a normative orientation emphasizing respect for people with disabilities and their integration with nondisabled people.<sup>54</sup> The social model provides a description of how disadvantage comes about, while the civil rights “model” suggests more or less concrete policy responses by analogy to other social movements. The impression left by academics is that the two ideas not only fit together, but that the former entails the latter.

Consider Mary Crossley’s important contribution. She helped import the social model into legal scholarship. Although Crossley subsequently spells out a civil rights model of disability policy, she also writes that “the main thrust of policy under a social model is to get rid of disability by ‘rehabilitating’ the social and physical structures and systems that serve to impose disadvantages on persons with impairments.”<sup>55</sup> More recently, Michael Stein has asserted that the social model “stresses society’s role in constructing disability and its responsibility to rectify disability-based exclusion,” and “expressly relies on notions of corrective justice.”<sup>56</sup> As well, Sam Bagenstos and Margo Schlanger state that “[t]he social model’s policy implications primarily focus not on

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<sup>53</sup> Minow, Making all the Difference at 119 (cited in note 15).

<sup>54</sup> See Crossley, 74 *Notre Dame L Rev* at 659 (“The minority group model of disability builds on the understanding of disability elaborated by the social model and transforms it into a political call to action.”); Harlan Hahn, Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas, 4 *S Cal Rev L & Women’s Stud* 97, 98, 101–02 (1994) (discussing the “minority group” model of disability and comparing it to “second wave” feminism); Elizabeth A. Pendo, Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation, 35 *UC Davis L Rev* 1175, 1193–94 (2002) (analogizing the concrete goals of the civil rights movement to those of the disability rights movement); see also Bagenstos, 114 *Yale L J* at 7–8 (cited in note 28) (listing anti-paternalism and integration as goals of the movement); Michelle Fine and Adrienne Asch, Disability Beyond Stigma: Social Interaction, Discrimination, and Activism, 44 *J Soc Issues* 3, 8–14 (1988).

<sup>55</sup> Crossley, 74 *Notre Dame L Rev* at 658; see also Crossley, 35 *Rutgers L J* at 877–78 (cited in note 15).

<sup>56</sup> Stein, 95 *Cal L Rev* at 93, 91 (cited in note 8).

rehabilitation or charity but eliminating the physical, social, and attitudinal barriers that make some physical and mental impairments disabling.”<sup>57</sup>

The pattern extends beyond the law journals. In a leading exploration of the subject, philosopher Anita Silvers asserts “the medical model proposes to solve the problem [of misalignment between individuals and social practice] by realigning (eligible) individuals, while on the social model it is society that should be reshaped.”<sup>58</sup> Likewise, Oliver has suggested that “the core of the social model” includes a sense that “[i]t is society that has to change not individuals.”<sup>59</sup> The message of David Pfeiffer’s “disability paradigm” is the same.<sup>60</sup> And the World Health Organization declares:

The social model of disability . . . sees the issue mainly as a socially created problem, and basically as a matter of the full integration of individuals into society . . . . Hence the management of the problem requires social action, and it is the collective responsibility of society at large to make the environmental modifications necessary for the full participation of people with disabilities in all areas of social life. The issue is therefore an attitudinal or ideological one requiring social change, which at the political level becomes a question of human rights. For this model disability is a political issue.<sup>61</sup>

Repeated suggestions that social change follows the social model are perhaps understandable, if for no other reasons than increasing correlations and herding behavior in scholarship. Probably more than this is at work, however. The regular connection to policy might follow from affiliation with the disability rights movement, or a belief that knocking down status quo assumptions about the causes of disadvantage will leave no

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<sup>57</sup> Samuel R. Bagenstos and Margo Schlanger, Hedonic Damages, Hedonic Adaptation, and Disability, 60 Vand L Rev (forthcoming 2007) manuscript at 39; see also Bagenstos, 114 Yale L J at 12 (cited in note 28) (“[T]he proper response [under this view] is civil rights legislation . . . .”); Wendy F. Hensel, The Disabling Impact of Wrongful Birth and Wrongful Life Actions, 40 Harv CR—CL L Rev 141, 148–49 (2005); Satz, A Jurisprudence of Dysfunction at 238–39 (cited in note 44) (“Social models of disability . . . are based upon two premises: a right to participation in certain social endeavors (such as education, work, and travel) and a right to particular outcomes from functioning (as distinguished from modes of functioning) within certain environments”).

<sup>58</sup> Silvers, Formal Justice at 85 (cited in note 8); see also *id.* at 74.

<sup>59</sup> Oliver, Understanding Disability at 37 (cited in note 16) (stressing political empowerment as the engine of change).

<sup>60</sup> Pfeiffer, The Conceptualization of Disability at 46; see also Amundson, 23 J Soc Phil at 113 (cited in note 15).

<sup>61</sup> WHO, International Classification of Functioning, Disability, Health at 20 (cited in note 7) (emphasis omitted).

remaining defenses to a demand for environmental revision.<sup>62</sup> But these conclusions must be explained and justified. No matter how many academics combine the model's causation story with preferences for social reconstruction, the former can and should be disentangled from the latter.

## II. CONTROVERSIES

To help explore the gap between the model and norms, this Part reviews four developments regarding deafness in America. The first two are technological innovations aimed at assisting deaf people or preventing their birth. The other two involve efforts of deaf people to sort themselves into sign language communities. These developments were selected because they present timely controversies and because deafness is a trait suited to social model analysis. And there is more than one public policy option: attempting to eliminate deafness, or attempting to engineer social arrangements such that hearing does not matter.<sup>63</sup>

### A. Technology

For centuries, people believed that only a miracle could restore hearing to the deaf.<sup>64</sup>

Preimplantation diagnosis provides an alternative way forward. . . .<sup>65</sup>

Today's technology makes it easier to treat or prevent deafness. Hearing aids, which simply amplify sound, are familiar. A more invasive option is a cochlear implant, a device approved for commercial use in the 1980s. One part of the device is a microphone that resides outside the ear, while another part processes sounds captured by the microphone. A transmitter sends the processed signals to a receiver implanted under the skin. The receiver converts the signals into electrical impulses, which are collected by electrodes and delivered to the auditory nerve. A cochlear implant does not allow its user

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<sup>62</sup> See below Part III.A.2 (discussing the movement and social construction arguments).

<sup>63</sup> In 2004, about 3.1 percent of the US adult population reported having "a lot of trouble hearing" or being "deaf," but 3.9 percent of those below the poverty level reported as such, as did 4.8 percent of those without a high school diploma or GED. See National Center for Health Statistics, Health: United States 258–59 table 59 (2006).

<sup>64</sup> Philipos C. Loizou, Mimicking the Human Ear, IEEE Signal Processing Magazine 101, 102 (Sept 1998).

<sup>65</sup> Peter Braude et al, Preimplantation Genetic Diagnosis, Nature Reviews Genetics, 3 Nature 941, 942 (Dec 2002).

to “hear” in the same way that hearing-able people do, but the stimulation of the auditory nerve does allow the user to experience representations of sound. For some, perhaps especially young children, the device might help the user develop spoken language ability. The device has been implanted in an estimated 22,000 adults and 15,000 children. In 2000, the Food and Drug Administration lowered the acceptable age for implantation of one such device to twelve months old.<sup>66</sup>

These implants are not perfect. They cost thousands of dollars, there are efficacy problems, and surgery of any kind entails risks.<sup>67</sup> In fact, some members of Deaf culture believe that cochlear implants are a bad choice for others. They perceive an unhealthy urge to “fix” people who are not broken and an underestimation of deaf people’s potential, plus a threat to the number of American Sign Language (ASL) communicants—a core feature of Deaf culture.<sup>68</sup> Doubts about the technology among deaf adults, however, do not mean that hearing-able parents will reject cochlear implants for their children. Those parents will rarely possess ASL skills at the time of their children’s birth, and they might prefer that their children develop whatever imperfect spoken language skills they can. Regardless of warnings and restrictions that are appropriate now, cochlear implants will probably improve their effectiveness and popularity over time, barring adverse regulatory intervention.

Technology is also multiplying the options for prevention, sometimes in ways that soften the objections of moral holdouts. An important advance is preimplantation genetic diagnosis (PGD), which works in conjunction with in vitro fertilization.<sup>69</sup> Eggs are fertilized in the lab, embryos are grown to about eight cells, and one is removed for

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<sup>66</sup> See FDA’s Report on New Health Care Products Approved in 2000 (Jan 18, 2001), online at <http://www.fda.gov/bbs/topics/answers/2001/ANS01066.html> (visited April 1 2007); see generally National Institute on Deafness and Other Communication Disorders, Cochlear Implants, online at [www.nidcd.nih.gov/health/hearing/coch.asp](http://www.nidcd.nih.gov/health/hearing/coch.asp) (visited Apr 1, 2007).

<sup>67</sup> See Jill Elaine Hasday, Mitigation and the Americans with Disabilities Act, 103 Mich L Rev 217, 220–21, 240–42 (2004) (reciting risks and costs of cochlear implant surgery); Jane E. Brody, For Some Who Lost Hearing, Implants Help, NY Times D7 (Oct 3, 2006); but see Thomas J. Balkany et al, Conservation of Residual Acoustic Hearing After Cochlear Implantation, 27 Otology & Neurotology 1083, 1087 (2006) (finding a degree of hearing conservation in most subjects).

<sup>68</sup> See Carol Padden and Tom Humphries, Inside Deaf Culture ch 1, 166–70 (Harvard 2005) (detailing the criticisms of cochlear implant surgery from the perspective of Deaf culture); Carol Padden and Tom Humphries, Deaf in America: Voices from a Culture 2–11 (Harvard 1988).

<sup>69</sup> See Karen E. Adams, Ethical Considerations of Applications of Preimplantation Genetic Diagnosis in the United States, 22 Med & L 489, 490–91 (2003).

genetic testing. With greater knowledge regarding the location of genes that cause particular human traits, medical professionals are better able to screen for genetic conditions. Thus PGD might be used for at least some types of inherited deafness.<sup>70</sup> Standard practice is to discard any embryos judged “affected” by the conditions for which PGD has been requested, and then implant or freeze any “unaffected” embryos. Postfertilization genetic testing is not so new. But selective abortion might be more problematic morally, religiously, or as a matter of health than discarding affected embryos that never enter a human womb. When successful, PGD and selective implantation yield a child whose genetic makeup is the product of two people who wish to assume responsibility for parenting this same child, a result that many people seem to value.

Like cochlear implants, PGD for the purpose of creating hearing children is subject to more than one kind of opposition. The process is ordinarily coupled with drug induced stimulation of the reproductive system, which comes with risks and costs. Moreover, Deaf culture members and others can maintain similar objections to PGD.<sup>71</sup> Preventing deafness in this fashion might be taken to suggest that deaf people are defective and less valuable. A similar power dynamic is in play as well. Prospective parents are making choices about the genetic design of children within a medical institutional framework and without always understanding the real possibilities for “disabled” people. In its worst light the result is a callous eugenics system, however decentralized, with participation limited to those with access to the technology. At the same time, PGD need not work in only one direction. It can be used to increase the likelihood of a trait that mainstream culture regards as “impairment.”<sup>72</sup>

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<sup>70</sup> Genetics might account for more than 50 percent of all hearing loss. See Bronya J.B. Keats and Charles I. Berlin, Introduction and Overview, in Bronya J.B. Keats et al, eds, Genetics and Auditory Disorders 1, 1 (Springer 2002).

<sup>71</sup> See generally Simo Vehmas, Live and Let Die? Disability in Bioethics, 1 New Rev Bioethics 145, 153–55 (2003) (raising ethical concerns about genetic testing).

<sup>72</sup> See generally Carina Dennis, Deaf by Design, 431 Nature 894, (Oct 21, 2004); Darshak M. Sanghavi, Wanting Babies Like Themselves, Some Parents Choose Genetic Defects, NY Times D5 (Dec 5, 2006).

## B. Sorting

[W]e hold in common this resentment of efforts to fix us.<sup>73</sup>

To create . . . a world of sign language and signing culture.<sup>74</sup>

There are radically different responses to deafness. Rather than ameliorate or eliminate the impairment, one might try to create social settings in which deafness is not disabling. Gallaudet University is one such attempt. The school was chartered by the federal government in 1864 as a university for deaf and hard of hearing students.<sup>75</sup> ASL is central to the Gallaudet community, which was a departure from the policy of American educators in the nationalistic Progressive Era who suppressed sign language at schools for the deaf.<sup>76</sup> They urged that deaf children be pressed to function like the hearing majority, attempting to read lips and vocalize words rather than using the communication method preferred by a small network of what some regarded as defectives. This oralism was, in the kindest light, a well-meaning form of mainstreaming. But it was rejected at Gallaudet. ASL is now the norm on campus and visitors “who do not know sign language are communicatively disabled.”<sup>77</sup> Many Gallaudet students, faculty, staff, and graduates consider sign language a central component of a visually centered Deaf culture.<sup>78</sup> ASL is not, after all, translated English. It is a visual language operating in three dimensions with its own rules, linking together perhaps hundreds of thousands of people in the U.S. alone.<sup>79</sup> Deaf ASL users often do not consider themselves disabled, any more than a French tourist in Maine considers herself disabled.

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<sup>73</sup> I. King Jordan, The Gallaudet Experience: Deafness and Disability, 120 Pubs Mod Lang Assn 625, 626 (2005) (comparing deaf and disability studies).

<sup>74</sup> Marvin T. Miller, A Place of Our Own: Laurent, South Dakota 4 (2003), online at <http://www.thelaurentinstitute.org/wp-content/uploads/2006/10/laurentconceptpaper.pdf> (visited April 1, 2007) (setting out the mission statement of the developers of Laurent, South Dakota).

<sup>75</sup> See Albert W. Atwood, Gallaudet College: Its First One Hundred Years ch 3 (1964).

<sup>76</sup> See Douglas Baynton, Forbidden Signs: American Culture and the Campaign Against Sign Language 4–6, 15–16 (1996) (outlining the history of oralism and opposition to it in Deaf culture).

<sup>77</sup> Jordan, The Gallaudet Experience at 625 (cited in note 73).

<sup>78</sup> See Padden and Humphries, Inside Deaf Culture at 2–5 (cited in note 68); Diana Jean Schemo, Turmoil at Gallaudet Reflects Broader Debate Over Deaf Culture, NY Times A9 (Oct 21, 2006).

<sup>79</sup> See Padden and Humphries, Deaf in America at 7–9 (cited in note 68). We lack reliable estimates of ASL users. See Ross E. Mitchell et al, How Many People Use ASL in the United States? Why Estimates Need Updating, 6 Sign Lang Stud 306, 307, 319–25, 328 (2006) (tracing estimates of 500,000 ASL users to a single survey of deaf people conducted in 1972).

Gallaudet is a designed setting in which the trait of deafness is prevalent, but the disadvantage associated with it in other settings is not. Members of the Gallaudet community are committed to keeping it that way. In 1988, protests by students, alumni, faculty, and staff led to the resignation of a recently appointed president for the university.<sup>80</sup> Gallaudet had never had a deaf president and the protesters believed it was time for the university to illustrate that deaf Americans are suited to positions of authority. The administration relented. In the fall of 2006, the dynamic repeated. This time, protesters demanded that Gallaudet's president be not just deaf but strongly committed to ASL on campus. Protesters again shut down the school and the administration fired its choice for president.<sup>81</sup> Yet Gallaudet represents moderation when other alternatives are considered. For students, the experience is partly temporary. No one is seriously discussing ASL as a language requirement in American schools. That would be an unlikely change in a country where perhaps 600 thousand out of 300 million people are deaf.<sup>82</sup>

There have been more ambitious sorting efforts. A small group of developers worked for three years planning and promoting Laurent, South Dakota as a town for ASL users.<sup>83</sup> The envisioned town was advertised as ASL-friendly and a geographic focal point for Deaf culture. Public spaces would be designed with generous sightlines, schools would teach ASL and teach with it, sirens would be visual, and so on. The whole community would be devoted to signing and Deaf culture. Indeed this could occur with or without lawful authority to mandate ASL proficiency for town residents. People can sort themselves into and away from a new municipality, once the demographics and power structures become clear.<sup>84</sup> Religious, racial, and other groups understand this and

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<sup>80</sup> See generally Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 75–85 (1993).

<sup>81</sup> See Diana Jean Schemo, *At Gallaudet, Board Gives Up On New Leader*, NY Times A1 (Oct 30, 2006); Schemo, *Turmoil at Gallaudet* at A9 (cited in note 78).

<sup>82</sup> Gallaudet Research Institute estimates that 600 thousand people report themselves as “deaf,” fewer than half of whom are under the age of 65. Millions more report having “a lot of trouble” or “a little trouble” hearing. See <http://gri.gallaudet.edu/Demographics/deaf-US.php> (visited Apr 1, 2007).

<sup>83</sup> A summary of their efforts is available online at [www.deafweekly.com/laurent.htm](http://www.deafweekly.com/laurent.htm) (visited Apr 1, 2007).

<sup>84</sup> See Lior J. Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 Mich L Rev 1835, 1850–53 (2006) (identifying exclusionary vibes as a form of informal sorting); Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 Sup Ct Rev 135, 151–56

the leverage that a local government can provide.<sup>85</sup> Laurent was to be a community of interest with political voice in the surrounding areas. The theory was that, in a small pond, political power could be achieved with just a few thousand residents.

If deafness is not “disability,” Laurent was one way to prove it. The plan was to construct a new social reality with no expiration date for its residents. And Laurent was to be in political, economic, and social contact with surrounding populations. It was not meant to be a place where deaf people “[do] not perceive themselves as a distinct social group.”<sup>86</sup> In this it was different from Gallaudet and deafness on Martha’s Vineyard. The Vineyard was a fluke of genetic happenstance, while Gallaudet can envelop its students for only so long. But however bold, Laurent is essentially dead. Although a town plan was drawn up, zoning ordinances were amended, and the idea received mass media attention, the project collapsed at almost the same instant Gallaudet protesters achieved their victory. The Laurent development company disclosed financing hold ups in late 2006, fewer than 200 people had declared their interest in moving to the town, and the developers began considering acquisition of land within an existing municipality as Plan B.<sup>87</sup>

### C. Causation/Response Gaps

Each of these developments has a connection to public policy. Technological innovation and utilization can be demanded, subsidized, discouraged, or outlawed by the state. The same is true of sorting and ASL training. To date, U.S. policy has been relatively decentralized. Cochlear implants and genetic screening have been approved by FDA, but they are neither mandated nor heavily regulated in terms of the reasons for their use. Gallaudet was chartered by the federal government and state law imposes some restrictions on the creation of new municipalities, yet these sorting efforts are largely the

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(discussing signals for sorting). On interlocal sorting and jurisdictional competition in general, see Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J Pol Econ 416, 418, 418 n 12 (1956); see also Paul W. Rhode and Koleman S. Strumpf, Assessing the Importance of Tiebout Sorting: Local Heterogeneity from 1850 to 1990, 93 Am Econ Rev 1648 (2003) (empirically testing for Tiebout sorting).

<sup>85</sup> See, for example, Samaha, 2005 Sup Ct Rev at 151–56 (cited in note 84) (focusing on religious sorting); Ankur J. Goel, Comment, Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control, and the Implications of Being Darker than Brown, 23 Harv CR—CL L Rev 415 (1988); Mary Vallis, Libertarians Flee to New Hampshire, National Post A3 (Oct 31, 2003).

<sup>86</sup> Groce, Everyone Here Spoke Sign Language at 94 (cited in note 29).

<sup>87</sup> Melanie Brandert, Laurent Eyes Small Towns, Sioux Falls Argus Leader 1A (Oct 28, 2006).

product of private choices. With strong enough justifications and political forces, public policy might shift. Society might begin to treat genetic screening and cochlear implants as morally questionable and unjustifiably stigmatizing for the current generation of deaf people, or it might invest more resources in nonverbal communication methods including ASL, or it might heavily subsidize signing communities. Moving policy in the opposite direction is equally possible in theoretical terms. A collective decision might be made to hasten the elimination of deafness-related genes, or to mainstream all deaf people and discourage ASL as inappropriately separatist.

The question is whether the social model can underwrite any policy, in any direction. The answer is no: the model shows us causes of disadvantage, but what we do about it is a matter of contested norms. Opposition to social restructuring as a remedy for disability need not be the product of ignorance, insensitivity, false consciousness, or political immorality. It might be an understandable reaction within a coherent normative framework. There just is no necessary connection between causes of harm (or disadvantage) and remedies for harm (or disadvantage). This simple point can be confirmed by comparing similar situations in which an individual is not the sole cause of his or her disadvantage, and yet it is at least debatable (1) whether any remedy is justified or (2) which remedy is proper. Consider the following:

Your inability to get through this door is caused by the confluence of more than one factor:

1. You murdered your husband to collect insurance proceeds, and because of that we prosecuted, convicted, and imprisoned you.
2. Your skin has a high melanin content, our customers prefer to interact with pink-skinned people, and so we did not hire you.
3. You are Catholic, we hate Catholics, and so we did not hire you.
4. You became wheelchair-bound after diving headfirst into a shallow pool, and we built this building with stairs leading to the entrance.
5. Your genes do not allow you to walk, your parents did not genetically screen and selectively abort such embryos, you use a wheelchair, and we built this building with stairs leading to the entrance.

Each of these statements has a similar logical structure, and that structure mimics the social model of disability. Choices or practices of the broader society are disadvantaging

the subject of the statements. But we can be confident that almost no one will demand social change and liberation of the subject in all of the above examples.

Take statement 1. The subject is deprived of liberty by a physical barrier (her cell door) not only because of her decision to kill her husband (we might say she has the trait of spouse killer), but also because institutional forces responded in a particular way (officers of the state engaged in apprehension, prosecution, imprisonment). They need not have been designed to respond that way or exercised their powers in this case. But they were and they did. Very few observers will object to the response. With the possible exception of the killer, perhaps every observer will support some kind of social response on any of several familiar theories: retribution, incapacitation, specific and general deterrence. Assuming accurate adjudication of guilt, no affirmative defense, defensible sentencing, and so on, no plausible normative theory dictates any liberating remedy for the killer.

Statements 2 and 3 prompt different normative reactions. Like statement 1, these situations involve a subject who suffers on account of a social or institutional reaction to an individual trait. There is nothing natural and immutable about pinker skinned people preferring not to interact with darker skinned people, or non-Catholics hating Catholics—it might not have been a foreordained biological or social development that the pink/dark skin or Catholic/non-Catholic distinctions came about, or that given the distinction people would have the opportunity to interact across those categories. In any event, statements 2 and 3 involve animus or irrational distinctions between people. Statement 2 describes a business decision that is derivative of indefensible social preferences, but the engine of discrimination in those statements is basically the same. If we agree that the traits of skin color and Catholicism are unjustifiable bases for economic outcomes, and that social or institutional practices should be changed rather than those who suffer from the practices, a particular remedy must be selected. And there is room for debate. One might prefer antidiscrimination regulation and litigation over subsidies and public education campaigns (or vice versa), or one might hope that marketplace competition will take care of the problem. But we should perceive a structural similarity among statements 1, 2, and 3 without making anything like the same normative commitment to remedy the identified

disadvantages. At a minimum it should be accepted that a normative framework is mediating a logical gap between causes of disadvantage and the appropriate response.

Finally, consider statements 4 and 5. They are variations on the example nearly always used to illustrate the social model. Here the disadvantage involves a trait that impairs the ability to move by walking in conjunction with the architectural preference of others for stairs. By now, the setup has a familiar form. It is possible to draw a normative distinction between the two statements. One might believe the subject in statement 4 is morally responsible for his impairment, or that society should be careful about awarding remedies where it might reduce incentives to be careful. Either position militates against a legal remedy, without necessarily deciding the outcome in statement 5. That situation effectively removes responsibility for the relevant impairment from the subject, while highlighting the possibility that third parties (here, the parents) could have taken steps to prevent producing a child with the impairment. Perhaps that fact will influence the choice between reconstructing the environment we have been left with and engineering the human beings we create. Even if the parents' opportunity is irrelevant to the policy response, there is still the issue of cost. Is it justifiable to retrofit the building in light of scarce resources and other needs? Should obligations of social restructuring only apply going forward? What is the correct timeframe within which to answer these questions? This choice might be much more difficult than the issue of murder for cash in statement 1; but there is a choice to be made, and it is irreducibly normative in a way that cannot be solved by enhancing the accuracy of our portrait of causation.

All of this applies to the Deaf culture controversies. At least part of any disadvantage associated with deafness fits the social model. Lack of hearing can be inhibiting when others communicate with the spoken word. More than one response to this situation is possible: one might decide that no response is appropriate considering resource constraints, or that deaf people should have subsidized access to cochlear implants, or that genetic screening should be used to minimize the number of deaf people, or that ASL instruction should be expanded, or that deaf people should have greater opportunities to sort themselves into sign language communities—or the opposite of any of these responses. To be sure, our country has progressed to the point where few if any

will attempt to justify treating physically or mentally impaired individuals like the killer in statement 1. It is no longer so impolite to be disabled,<sup>88</sup> and forced segregation is less popular in the U.S. today,<sup>89</sup> let alone coerced sterilization.<sup>90</sup> But the recognition of multiple causal factors in the generation of disadvantage is not an answer to the question, “What do we do now?”

From a different direction, David Wasserman hits this point in an illuminating exploration of how disability studies might productively interface with political and moral philosophy. Wasserman acknowledges the role of social factors in generating disadvantage. Ultimately, however, he indicates that causal responsibility should be irrelevant to societal obligations to alleviate disadvantage. In that sense we ought to “break the link between causation and responsibility.”<sup>91</sup> Even if it were granted that individual impairments must be attributed solely to “natural causes, . . . their source or locus will have no direct relevance on most plausible accounts of distributive justice. What will matter on those accounts is the cost to others of alleviating those disadvantages and the possible intrusiveness or indignity of particular forms of alleviation.”<sup>92</sup> Wasserman’s position complements the argument here. He asserts that social factors are not necessary to trigger moral obligations of environmental reconstruction; in this article I have argued that they are not sufficient for policy responses, either.<sup>93</sup> The degree to which egalitarian (or any other) moral theory obligates society to alleviate this sort of disadvantage is explored below.

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<sup>88</sup> See, for example, Chicago Municipal Code § 36-34 (repealed 1974) (imposing fines on people who are “diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person” to be in a public place).

<sup>89</sup> See, for example, The Individuals with Disabilities Education Act (“IDEA”) 20 USCA § 1412(a)(5)(A) (2000) (conditioning state funding under the IDEA on the promise that, “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled . . .”); Olmstead v L.C., 527 US 581, 587 (1999) (holding that the ADA may sometimes require community-based care for mentally disabled persons).

<sup>90</sup> See, for example, Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act*, 63 Md L Rev 162, 164-73 (2004).

<sup>91</sup> Wasserman, Philosophical Issues at 229 (cited in note 10).

<sup>92</sup> *Id.*

<sup>93</sup> Cf *id.* at 239, 244 (noting the problems of costs and trade-offs for egalitarianism).

### III. SOCIAL MODEL FUNCTIONS

The discussion is quickly reaching the deepest waters of contemporary moral and ethical debate, but the difficulty of the issues makes the social model's limits apparent. Even from a perspective open to perceiving both individual and social causes of disadvantage, the situations just canvassed are still identical without a normative basis for judgment. The social model will not distinguish among them, yet every reader will. It is a minor mystery why this separation between causation and policy is not already explicit in the social model literature. The following pages suggest answers to that question, and then turn to general normative frameworks that might make use of the model.

#### A. Personal and Political

Disability is something imposed on top of our impairments.<sup>94</sup>

To those steeped in disability scholarship, the analysis thus far might seem strangely decoupled from the intellectual underpinnings of the social model. This adverse response could have two bases. One is the manner in which people judge relevance; the other involves the social movement that helped generate the model. But neither is enough to rebut the claim. Separating the social model from policy commitments through the medium of normative frameworks remains logical and useful, even after these two arguments for connection are understood.

##### 1. Judging relevance

One way to connect the social model to social policy is by accepting the mediating role of normative frameworks while questioning how the model's causation story could have been judged important enough to tell.

Countless observations about human events and their causes can be made but are not. Instead people make judgments regarding what is worth understanding and what is better left uninvestigated, even if this judgment is only implicit. Observations that do capture our attention might be the product of a normative framework. I might decide that I am morally obligated to help alleviate the long-term subordination of a class of people whenever the subordination is the product of moral wrongs committed by dominant

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<sup>94</sup> UPIAS Commentary at 14 (cited in note 1) (emphasis added).

human beings. With this normative orientation, certain observations become relevant. I will want to know which classes of people are perpetually driven down by other groups and what the justification for that disadvantage might be. People tend to find what they look for, and the latter is not always randomly determined.<sup>95</sup> This dynamic might be self-reinforcing. Knowledge about one aspect of the world might make additional knowledge within that domain easier to acquire than other information. And what we know can affect what we are willing to do. It is not as if additional information about the world never instigates moral or ethical evolution.

Application of this idea to the social model is straightforward. A reason for paying attention to the model's causation story (perhaps the only strong reason) is because it speaks to normative commitments about what information is relevant to human judgment. Indeed the social model's observation about disadvantage might have been impossible without a normative framework that made the observation important. Oliver himself drew on Marxist themes and was a wheelchair user when he began developing his version of the model,<sup>96</sup> and his forerunners had identified social causes of disability to understand the appropriate remedies.<sup>97</sup> In this way, the model is inescapably normative.

But this does not undercut the claim here—that no policy response is dictated by accepting the model's take on the causes of disadvantage. If anything, the preceding account of relevance judgments strengthens that claim. Insofar as a judgment about relevance suggests a normative framework, those who pay attention to the social model are operating one. All this can demonstrate is a correlation between social model enthusiasts and their norms—even those who learn about the model's causation account before deciding that social change is warranted. We are left without guidance on which frameworks are connected to the social model's causation story (which frameworks make

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<sup>95</sup> See Wasserman, Philosophical Issues at 225-26 (cited in note 10) (following the discussion of causes versus conditions in Robert Wachbroit, Understanding the Genetics of Violence Controversy, in David Wasserman and Robert Wachbroit, eds, Genetics and Criminal Behavior: Meanings, Methods, and Moral 25, 41 (Cambridge 2001)); Barbara M. Altman, Disability Definitions, Models, Classification Schemes, and Applications, in Albrecht, ed, Handbook 97, 112 (cited in note 10) (describing information-gathering and disseminating purposes of shifting WHO definitions of disability).

<sup>96</sup> See Oliver, The Politics of Disablement at 7, 40 (cited in note 2).

<sup>97</sup> See UPIAS Commentary at 13 (cited in note 1) (“Any scientist, seeking to deal effectively with a problem, knows that the cause must first be identified.”).

that story relevant) and still less guidance on which framework is most convincing. One can logically accept that the relevance of a factual observation is linked to normative objectives and yet reject any allegiance to those objectives. This rejection might be morally wrong but it need not result from misunderstanding the relationship between social practices and disadvantage.

## 2. The movement

The second connection is more apparent. The social model's intellectual history might show a correlation between acceptance of the model and a fairly predictable range of policy positions. Indeed, the social model was an outgrowth of social movements. The raw material for it can be found in post-1960s organizing by people with physical and mental impairments.<sup>98</sup> Similar notions were percolating elsewhere,<sup>99</sup> but a social model of disability was driven to the forefront by a movement of disabled people dissatisfied with existing institutions and policies.

Participants sought to define disability, and thus the movement, in accord with their experience and objectives. A social model could help communicate objections to status quo thinking that treated impairments as defects that should be fixed by individualized medical care. That conception seemed confining: it could direct any disability policy away from environmental revision and it might suggest that any moral responsibility for adjustment rests with the impaired individual (acting in accord with doctor's orders). A social model of disability would push the other way. It had the potential to destabilize unexamined assumptions about disadvantage, and weaken resistance to change based on the conviction that impairment-related disadvantage was the invariable product of nature and necessity.<sup>100</sup> This was arguably critical to the movement. Even if a social model entails nothing particularly affirmative about the shape of public policy, it might knock out the first line of defense for the status quo. A social model of disability might break open the policy space.

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<sup>98</sup> See, for example, Pfeiffer, The Conceptualization of Disability at 29-30 (cited in note 19).

<sup>99</sup> See Altman, Disability Definitions at 111-13 (cited in note 95) (outlining disability models that incorporated societal elements); David L. Braddock and Susan L. Parish, An Institutional History of Disability, in Albrecht, ed, Handbook 11, 44 (cited in note 10) (describing the development of the social model of disability).

<sup>100</sup> See Wasserman, Philosophical Issues at 224-25 (cited in note 10).

This goal has been significant for other intellectual movements. Ann Oakley recharacterized gender roles as contingent social constructs, like caste, to repudiate naturalistic defenses of standard operating procedures.<sup>101</sup> There is also an association with studies of race as socially constructed rather than biologically meaningful.<sup>102</sup> As well, legal realists and their intellectual compatriots charted a similar path. Some of them worked to demolish the idea that classical liberal rights of property and contract—to the extent they could be made coherent—were the predestined natural order of things. That version of rights was man-made, norm-laden, and government-backed.<sup>103</sup> At the same time, the realists were not under the impression that eliminating status quo defenses established the proper contours of law. “[T]he recognition of private property as a form of sovereignty is not itself an argument against it,” Morris Cohen wrote; instead “it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.”<sup>104</sup>

Returning to the disability rights movement, developments in England become especially important. In the 1970s, a debate emerged among those interested in improving the welfare of physically impaired people in Great Britain.<sup>105</sup> One faction, including the Disability Alliance, sought an income support entitlement from the government. Another faction, spearheaded by the Union of the Physically Impaired Against Segregation

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<sup>101</sup> See Oakley, Sex, Gender, and Society at 204 (cited in note 22).

<sup>102</sup> See, for example, Pierre L. van den Berghe, Race and Racism: A Comparative Perspective 9 (Wiley 1967).

<sup>103</sup> See Morris R. Cohen, Property and Sovereignty, 13 Cornell L Q 8, 14 (1927); Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol Sci Q 470, 470-71 (1923); see also Cass R. Sunstein, The Partial Constitution 51-59 (Harvard 1996) (tracing the recognition that property rights are legal creations); Barbara H. Fried, Left-Libertarianism: A Review Essay, 32 Phil & Pub Affairs 66, 74 (2004) (analyzing the realists’ contribution to the idea that property rights are socially chosen). I thank Eric Posner and Cass Sunstein for suggesting and elaborating this connection.

<sup>104</sup> Cohen, 13 Cornell L Q at 14 (cited in note 103); see also Hale, 38 Pol Sci Q at 471 (cited in note 103).

<sup>105</sup> See Oliver, The Politics of Disablement at 20 (cited in note 2); Ken Davis, On the Movement, in Swain, et al, ed, Barriers 285, 288-91 (cited in note 37) (analyzing British history); see also Diane Driedger, The Last Civil Rights Movement: Disabled Peoples’ International 1-5, 28-46 (St. Martin 1989) (describing the international movement of the disabled in the 1970’s and 80’s); Richard K. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy 10-14, 24-27, 34-42 (Temple 1984) (detailing the social movement in the U.S. and connecting it to race-based civil rights efforts); Richard K. Scotch, Politics and Policy in the History of the Disability Rights Movement, 67 Milbank Q 380, 385-90 (1989) (pointing to forced sorting and civil rights movement models as factors facilitating collective identity and action in the U.S.).

(UPIAS), considered that effort either inadequate or misguided. UPIAS was formed in part to help people exit residential care facilities.<sup>106</sup> For them, cash payments were of less concern than transforming their day-to-day living arrangements from dependence on caregivers to independence and wider social integration. In this essentially institutionalized setting, medical and bureaucratic “experts” were sometimes seen as more problem than solution. Members of UPIAS and the Alliance met in 1976 to discuss their differences. The rift was not eliminated and each faction issued a statement. UPIAS members coalesced around a commentary drafted in important part by Victor Finkelstein and entitled Fundamental Principles of Disability. It includes a clear declaration of what would later become known as the social model: “it is society which disables physically impaired people,” the document asserts, and goes on to distinguish “the physical impairment” from “the social situation, called ‘disability’, of people with such impairment.”<sup>107</sup>

Given this history, it is not surprising that original proponents of the social model supported social reconstruction to ameliorate disadvantage. That goal was the inspiration for the model in the first place. Like the argument from relevance above, social model originators were already in the process of committing to social change to improve their situation. The model was an accoutrement to the movement. In addition, the disability rights social movement was taking place shortly after important successes of the black civil rights movement in the U.S. One part of that movement repudiated notions that skin color was associated with inferiority, and demanded the end of racial segregation. A significant part of the disability rights message was not much different.<sup>108</sup>

This context, moreover, included incentives to push the causation claims of the social model every bit as far as they could logically reach, plus some. First, the model’s

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<sup>106</sup> See, for example, Davis, On the Movement at 289 (cited in note 105). A parallel effort for independent living was emerging in Berkeley. See Scotch, From Good Will to Civil Rights at 36 (cited in note 105); DeJong, The Movement at 442-47 (cited in note 19).

<sup>107</sup> UPIAS Commentary at 14 (cited in note 1). The argument has been pushed beyond physical impairment. See Barnes, Theories of Disability at 46 (cited in note 25).

<sup>108</sup> See, for example, Ruth Colker, The Disability Integration Presumption: Thirty Years Later, 154 U Pa L Rev 789, 792, 803, 809 (2006) (describing the judicial approach to integration as similar to that used for racial segregation analysis); Seto and Buhai, 154 U Pa L Rev at 1063-64 (cited in note 17) (noting that Congress’s response to discrimination against disabled people was modeled on previous civil rights laws).

causation story has a positive emotional and psychological effect on some people with impairments. The effect is not uniform across all individuals, obviously, but it does appear that self-esteem can be elevated when one shares causal responsibility for hardship with others—especially if those others produced the hardship out of ignorance or spite. Liz Crow, who questions claims that social factors dictate all disability, also writes that the model “gave me an understanding of my life, shared with thousands, even millions, of other people around the world, and I clung to it.”<sup>109</sup> Second, the model delivers a simple message for interest group organizing. Social movement organizers could tap into masses of impaired people who were otherwise dissimilar but who shared a latent outrage or desire not to be artificially disadvantaged.<sup>110</sup> Third, the message of shared or shifted responsibility undermined conventional wisdom insofar as it affiliated with the medical model. By deemphasizing any significant functional limitation flowing from individual traits, including pain, members of the social movement also avoided providing fuel for the medical model. Directing attention away from personal impairment might make it easier for others to see equal human worth.<sup>111</sup>

As physically impaired people such as Finkelstein and Oliver became academics, and as others in academia continued to work on disability issues in the 1980s, the social model became an intellectual export.<sup>112</sup> It moved from interest group device to intellectual tool. If one views disability studies scholars as members of the disability rights social movement, then perhaps there is nothing more to say about the connection between the social model and public policy. Even if the two are not necessarily connected as a matter of logic, they are wound together as a matter of history and politics. That the movement expanded into university positions makes no difference on this score.

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<sup>109</sup> Crow, Including All at 55 (cited in note 36). See also Shakespeare and Watson, The Social Model at 9 (cited in note 37).

<sup>110</sup> See Shakespeare and Watson, The Social Model at 11 (cited in note 37); Sue A. Krenk, Note, Beyond Reasonable Accommodation, 72 Tex L Rev 1969, 1977 (1994) (“The very exclusion that kept people with disabilities from participating in society eventually served as a catalyst for the formation of the disability-rights movement.”); French, Disability at 24 (cited in note 37) (“[D]isabled people, whatever their impairments, share many problems.”).

<sup>111</sup> See Oliver, The Politics of Disablement at 38-39 (cited in note 2); Crow, Including All at 57 (cited in note 36).

<sup>112</sup> See Simi Linton, Claiming Disability: Knowledge and Identity 118-19 (NYU 1998) (outlining the various disciplines incorporating disability studies); id at 155 (“[D]isability studies is an intellectual as well as political endeavor.”); Catherine J. Kudlick, Disability History: Why We Need Another “Other”, 108 Amer Hist Rev 763, 763-64 (2003) (describing the growth of disability studies).

And yet the model cannot be so easily appropriated. Its idea of causation is not the intellectual property of a social movement or its academic adherents. The idea can be communicated to and adopted by others. In fact, the social movement itself has been committed to spreading the model beyond its membership. Once the audience becomes more skeptical about social change, however, even self-interested advocates might shift their arguments. If nothing else, this is a tactical necessity. But of course more than interest group tactics should be considered. Outsiders to the movement will often be operating within regularized analytical structures. They might have selected some relatively generic normative approach with which to assess public policy, moral obligation, and ethical choices. If so, the link between social causes and social restructuring is anything but obvious.

Two points of caution and clarification are worth making here. First, there is no denying that disability law scholarship is often overtly normative. Academics debate whether disability should be treated like a species of stigma-based inequality,<sup>113</sup> whether “accommodation” is meaningfully different from other antidiscrimination norms,<sup>114</sup> and whether transfer payments are an acceptable method of remedying trait-related disadvantage as opposed to social restructuring.<sup>115</sup> These are important issues. Participants in these debates are often working toward normative theories that will help guide policymaking. A problem arises, however, when the social model’s account of causation is presented as reason for social change. This is true regardless of one’s normative standard for evaluating disability policy—be it antidiscrimination law to combat stigma, social welfare rights to achieve greater equality, or something else.<sup>116</sup> Perceiving the social factors contributing to disadvantage will deepen our understanding of causation and it might illuminate possibilities for action; but it will not independently justify that action. Neither “is” nor “can” equals “ought.”<sup>117</sup>

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<sup>113</sup> See Bagenstos, The Future of Disability Law, at 4-6 (cited in note 9).

<sup>114</sup> See, for example, Christine Jolls, Antidiscrimination and Accommodation, 115 Harv L Rev 642, 644-46 (2001); Stein, Same Struggle (cited in note 15).

<sup>115</sup> See generally Mark Kelman, Strategy or Principle? The Choice Between Regulation and Taxation 1-9 (Michigan 1999) (analyzing comparative costs and benefits of regulatory mandates versus tax-and-spend policy).

<sup>116</sup> General normative frameworks are explored in Part III.B.

<sup>117</sup> Some writers might use the term “social model” in a way that bundles together causation observations

Second and related, the social model's inability to justify social change is a function of the amount of normative argument that cannot be taken for granted. Of course if all points favoring social change must be granted, and the only issue left open is causation, then the social model can conclude the argument. This might be the sense of many in the disability rights movement. For others, however, much less territory will be settled and the recognition of social forces will not be the only outstanding issue. In these cases, the right principles for decision will be open for discussion, or at least the social model will provide no help in selecting them. Like legal realists assessing the character of property and contract law, thoughtful participants should want to understand the extent of social construction in disability while—not instead of—grappling with policy options.

## B. Policy Goals

The social problem of the poverty of physically impaired people requires for its solution the same intellectual rigour as any other problem which is approached scientifically, not less.<sup>118</sup>

A fairly small percentage of the population can be counted as members of the disability rights social movement. But many other members of society, perhaps all, have a responsibility or an opportunity to think about which disability policy we should have. One manner in which this thinking takes place is through general normative frameworks; and a few disability law scholars are using them.<sup>119</sup> But progress has been slow. The law literature is marked by undefended commitments and occasional formalism. True, the dissection of statutes and case law deserves an important place in legal scholarship. It can be unmatched in significance for practicing lawyers, judges, and regulators and it is often poorly done by nonlawyers. At the same time, this focus dramatically narrows the

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with a normative commitment to social change. There is nothing inherently wrong with this, assuming the combination is apparent to readers. But even when such definitional bundling is obvious, one should be careful not to merge the two claims conceptually. The causation claim on its own will not establish the normative claim, while the normative claim can, if accepted, make the causation claim important.

<sup>118</sup> UPIAS Commentary at 13 (cited in note 1).

<sup>119</sup> See generally Elizabeth A. Pendo, Substantially Limited Justice? The Possibilities and Limits of a New Rawlsian Analysis of Disability-Based Discrimination, 77 St. John's L Rev 225 (2003) (proposing a framework for ADA cases); Carlos A. Ball, Autonomy, Justice, and Disability, 47 UCLA L Rev 599 (2000) (critiquing libertarianism and following Sen); Crossley, 35 Rutgers L J at 880-84 (cited in note 15) (referencing Rawls and Dworkin); Bagenstos, 86 Va L Rev at 401-02, 445-66 (cited in note 9) (interpreting the ADA in accord with social movement objectives); Pamela S. Karlan and George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L J 1, 22-41 (1996) (investigating ADA premises); see also Mark S. Stein, Distributive Justice and Disability: Utilitarianism Against Egalitarianism (Yale 2006) (promoting utilitarianism).

normative conversation. And it is not as if disability studies scholars outside of the law schools have filled every gap.

The argument here is not that a general normative framework is superior to overtly partisan interests. There is no perfect method of knowing whether rigorous adherence to Kantian duties is a better experience than being part of the disability rights movement. In terms of individual fulfillment, one might not be any deeper or different than the other. Nor will I privilege one normative orientation over another. My limited ambition is to illustrate ways in which the social model interacts with general normative frameworks. The frameworks will be stylized to keep the analysis moving, and boundaries might be suggested where there is great nuance. But this simplification will not preclude judgments on two questions that some scholars believe are already answered by accepting a social model view of causation: whether a given normative framework will yield (1) any policy response to disability and, if so, (2) social reconstruction rather than personal assistance.<sup>120</sup> The results are sometimes unexpected.

#### 1. Libertarian

The libertarian creed is excited by the worth of individual persons and their choices, as long as those choices do not cause harm to nonconsenting third parties.<sup>121</sup> It recognizes human agents as possessing ownership over themselves along with rights to acquire property under certain conditions. Libertarianism can therefore purport to accommodate a range of ideas about the good life, and even many actions premised on that plurality of visions, depending on precisely how the boundaries of “harm” and “cause” are worked out. Under this approach, preservation of a properly defined individual liberty can be described as a deontological side-constraint that needs no (in

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<sup>120</sup> This simple bifurcation for the purpose of analysis hopefully will not obscure all of the steps and uncertainties in a persuasive argument about disability policy. Among them are: (1) whether the disadvantage at issue is morally relevant—whether it ought to be considered a social problem; (2) whether one can accurately identify a social cause of disadvantage in the given situation; (3) whether any such social cause is unjustified, irrational, or illegitimate; (4) whether attempting to eliminate any such social cause is feasible and cost-justified in light of predictable gains and available alternatives. Each of these questions is in play below.

<sup>121</sup> See John Stuart Mill, On Liberty ch 1 (Penguin Books 1974); Robert Nozick, Anarchy, State, and Utopia 33 (Basic Books 1974); Richard J. Arneson, Perfectionism and Politics, 111 *Ethics* 37, 41 (2000) (explaining that, for libertarians, “the theory of right fences in the theory of good”); Jan Narveson, The Libertarian Idea 7, 13, 59-60 (Temple 1988).

fact it defies) utilitarian justification regarding any collective good.<sup>122</sup> The basic thought is linked to John Stuart Mill, among others, although he was a self-described utilitarian whose conclusions differ from modern libertarianism. He famously wrote that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”<sup>123</sup>

A second streak in libertarian thought is a selective skepticism of government action and the promotion of private ordering (albeit often backed by the force of the state<sup>124</sup>). This public/private distinction was not so prominent for Mill, who expressed fears about oppressive social norms.<sup>125</sup> But modern proponents tend to be clear about their preference for private ordering. Thus today’s libertarian is likely to oppose any social welfare rights (“rights to be given positive assistance, aid, or nurturance by others”<sup>126</sup>), even though these disfavored rights will be defined to preserve coercive government enforcement of contracts, property rights, and anti-fraud laws. The provision of certain public goods, such as national defense, financed by mandatory taxation are also possibilities for squishy classical liberals—without dropping suspicions regarding the motives, competence, or efficacy of officials insulated from market pressures.<sup>127</sup> And some brands of libertarian theory, such as Robert Nozick’s, leave room for government efforts to rectify past injustice presently disadvantaging a class of people. This state function might include compensating a presently disadvantaged class for injustice in a past generation.<sup>128</sup> Otherwise, a minimalist state is the norm.

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<sup>122</sup> See, for example, Nozick, Anarchy at 29-35 (cited in note 121).

<sup>123</sup> Mill, On Liberty at 68 (cited in note 121).

<sup>124</sup> See Cohen, 13 Cornell L Q at 11 (cited in note 103); Hale, 38 Pol Sci Q at 470-73 (cited in note 103) (relating the law of property to economic ordering).

<sup>125</sup> See Mills, On Liberty at 68 (cited in note 121) (referring to “the moral coercion of public opinion”).

<sup>126</sup> Arneson, 111 Ethics at 41 (cited in note 121).

<sup>127</sup> See Richard A. Epstein, Can Anyone Beat the Flat Tax?, 19 Soc Phil & Policy 140, 142-49 (2002) (reviewing the libertarian debate over the proper form and function of taxation). See also Hadley Arkes, News for the Libertarians: The Moral Tradition Already Contains the Libertarian Premises, 29 Harv J L & Pub Policy 61, 65 (2005) (“[B]efore we remove private choice and restrict personal freedom, the law carries the burden of showing that there is something truly wrong.”); cf Fried, 32 Phil & Pub Affairs at 70 (cited in note 103) (critiquing separation of self- and resource ownership via Locke’s proviso).

<sup>128</sup> See Nozick, Anarchy at 151-53, 173, 230-21 (cited in note 121).

Straightaway we should expect difficulties in triggering a policy response to disability. The barrier to action, moreover, spans both relevant inquiries: whether a given normative framework suggests any policy response at all and, if so, whether the response ought to be individualized support or social restructuring. The modern libertarian's skepticism of state action is an obvious problem for disability rights advocates.<sup>129</sup> Regardless of whether disabled people are now in an unjustly disadvantaged position, many libertarians will doubt that the heavy hand of government regulation will do more good than harm. Consider the ADA. Whatever positive results it might deliver to its class of beneficiaries, libertarian theory directs us to protect the choices of people who would rather not interact with mentally or physically impaired people. Whether a vast majority of the political community disagrees with those preferences is irrelevant.

Even setting aside robust protection of discriminatory preferences, the existence of disadvantage is not a sufficient reason to justify state assistance. Libertarianism makes certain forced wealth transfers impermissible. This might apply to assistance for medical technology and sign language communities. Libertarianism presumably will allow privately organized sorting efforts and ASL training, along with private choices to purchase cochlear implants or genetic screening services (whether to maximize or minimize the probability that a deaf child will be born), to the extent that the purchaser or his/her contract for private insurance will cover the costs. But tax-paid subsidies for any of these activities seem extremely unlikely. Doubts about the efficacy and efficiency of regulation might be supported by empirical studies in employment. They suggest that ADA employer mandates have at best not changed the employment prospects of disabled people, and might have worsened them.<sup>130</sup> Now, such data do not speak to other disability

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<sup>129</sup> See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 482-88 (Harvard 1992).

<sup>130</sup> See Bagenstos, 114 Yale L J at 19-22 (cited in note 28) (collecting studies); Christine Jolls, Identifying the Effects of the Americans with Disabilities Act Using State-Law Variation: Preliminary Evidence on Educational Participation Effects 9 (American Law and Economics Assoc Annual Meetings Paper No 62, 2004), online at <http://law.bepress.com/cgi/viewcontent.cgi?article=1078&context=alea> (visited Mar 31, 2007) (finding a positive effect on educational participation in three states that had no pre-ADA employment discrimination protection for disability); Christine Jolls and J.J. Prescott, The Effects of "Reasonable Accommodation" Requirements and Firing Costs on the Employment of Individuals with Disabilities 26-28 (unpublished manuscript, 2004), online at <http://client.norc.org/jole/SOLEweb/jolls03.pdf> (visited Mar 31, 2007) (distinguishing accommodation mandates from other mandates, and connecting negative employment effects to whether the ADA was an

legislation; it might be that architectural changes, cash subsidies, or education campaigns will show greater success. But at first cut, libertarianism might seem insensitive to demands for disability law of any kind, and certainly the kind of social engineering promoted by many disability rights advocates.

There are complications, however. One of them is connected to the social model and the legal realist assault on classical liberal rights.<sup>131</sup> In short, there is room to seriously question the coherence of libertarianism as characterized so far. Recall that a motivation for highlighting social forces in creating disability was to eviscerate status quo perceptions that disadvantage is natural or unavoidable. The truth is that some disadvantage can be moderated or eliminated if standard operating procedures are adjusted. Sometimes the cost of that adjustment will be considered modest and not injurious to others affected by the change; in other circumstances adjustment will be considered expensive and painful. Either way, by complicating causal responsibility for disadvantage, the social model might destabilize certain ostensibly libertarian policy outcomes. Libertarians need a protocol for assigning entitlements, defining compensable harm, and identifying relevant causal chains. Perhaps a social model of disability reveals these tasks as more difficult or even impossible without additional normative architecture. Is it apparent that an unemployed deaf person has not been “harmed” by predominant modes of communication chosen by potential employers? That her physical makeup “caused” this problem? That the standard method of communication is “necessary”? Why? There are methods for resolving these questions but libertarianism is not clearly one of them.<sup>132</sup>

If libertarianism is viable, perhaps with additional assumptions about harms and rights, it might nevertheless leave two grounds on which a response to disability might

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innovation compared to prior state law). It could be that those who qualify as “disabled” under the ADA and who obtain jobs are thereafter more likely to keep them because of the statute.

<sup>131</sup> See text accompanying notes 103-104.

<sup>132</sup> See Kelman, *Strategy or Principle?*, at 10 n 8 (cited in note 115). Other complications with a no-disability-policy vision of libertarianism are (1) government might expend greater resources per capita to protect the property rights of the weakest among us, including people with mental and physical impairments, see Ball, 47 UCLA L Rev at 622-24 (cited in note 119), (2) government may retain power to charter municipalities or universities and therefore would at least facilitate sorting efforts, and (3) a policy decision would have to be made as to whether people enjoy liberty to genetically engineer or surgically alter children before they are (legally) emancipated. These zones of “private” conduct are not law-free.

rest. First is the possibility of rectifying past injustice, even across generations. The idea can be traced to Aristotle's corrective justice,<sup>133</sup> whereby (identifiable) wrongdoers must correct wrongs they have done to (identifiable) victims commensurate with the injury caused.<sup>134</sup> Some forms of oppression suffered by impaired people qualify for such correction. There are no doubt acts of unjustifiable oppression against impaired people taking place today.

There is a larger and more interesting question. It is whether a libertarian position can endorse state assistance to rectify group disadvantage caused by the unjust acts or omissions of another group and in the distant past. This seems possible, although everything depends upon specification of the normative theory and the particular historical facts surrounding a given disabled class. The issue has been debated in the context of slavery reparations where some suggest that corrective justice reaches only harms done within a more direct personal relationship, while others accept no such restriction on the basic principle.<sup>135</sup> Another division might occur over the propriety of collective responsibility of any kind.<sup>136</sup> Finally, there will be disagreement over remedies. Commonly the wrong will not be perfectly reversible, or not without enormous social costs, especially when multiple generations are involved. Imperfect substitutes and rough compensation might then be in order, assuming any remedy is still appropriate.<sup>137</sup> That said, it is not hard to imagine a specification of corrective justice reaching groups and

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<sup>133</sup> See Aristotle, The Nicomachean Ethics Book V.ii at 267 (Harvard 1926) (H. Rackham, trans) (describing particular justice as divided into corrective and distributive, the former dealing with injury and the later with merit).

<sup>134</sup> See, for example, Jules L. Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory 15 (Oxford 2001) (“[I]ndividuals who are responsible for the wrongful losses of others have a duty to repair the losses.”); Stephen R. Perry, On the Relationship Between Corrective Justice and Distributive Justice, in Jeremy Horder, Oxford Essays in Jurisprudence 237, 237-38, 263 (Oxford 2000); Ernest J. Weinrib, The Idea of Private Law chs 3-4 (Harvard 1995). A helpful review of the Aristotelian and Nozickian corrective justice ideas is Katrina M. Wyman, Is There a Moral Justification for Redressing Historical Injustices? 20-41 (unpublished manuscript, 2007) (on file with author).

<sup>135</sup> Compare Wyman, Is There a Moral Justification at 22-29 (cited in note 134) (discussing both an identity condition and the theoretical longevity of collective agents), with David Lyons, Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow, 84 BU L Rev 1375, 1384-86, 1396-97 (2004) (emphasizing the federal government's responsibility as an ongoing institution and the continuing inequality in life prospects).

<sup>136</sup> See Ellen Frankel Paul, Set-Asides, Reparations, and Compensatory Justice, in John W. Chapman, ed, NOMOS XXXII: Compensatory Justice 97, 101-102, 114-15, 120-22 (1991).

<sup>137</sup> See Jeremy Waldron, Redressing Historic Injustice, 52 U Toronto L J 135, 152-160 (2002) (discussing suppression of historic injustice by changed circumstances).

“their” histories. Nozick’s rectification principle, which turns on the historical propriety of present entitlements, seems to allow for it.<sup>138</sup>

Thus the segregation of deaf people and the systematic effort to eliminate sign language in schools could qualify as misconduct warranting government remedies. Although it might not be clear when Deaf culture came about, and past generations of deaf people are not necessarily biologically related to today’s, in this instance arguably one cohesive group suffered unjustifiably at the hands of another with some residual disadvantages carrying forward. Concerted exclusion of certain disabled people from the political process might also qualify. Deprivation of political voice, a libertarian might conclude, is an injustice that distorts policy outcomes in a compensation-warranting manner. Perhaps this account fits the prevalence of stairs over ramps in pre-ADA architecture.<sup>139</sup> Retrofitting is typically expensive, but maybe past decisions to ignore the interests of wheelchair users passed up cheap opportunities for universal design and were morally indefensible. Finally, it could be that lasting disadvantage must be corrected even at the expense of relatively innocent people. It is not clear what kind of remedy would be in order, but the argument for social reconstruction is at least on the table.

Even if libertarianism cannot support rectification for disability-related disadvantage, there is still a way in which the social model might be relevant. Libertarian theory is designed to allow private charity.<sup>140</sup> Individuals may choose to support others, regardless of whether government welfare programs should be abolished. Each person might have a different preference for donating and for the identity of worthy recipients. Nevertheless, individuals living in the libertarian fantasy will be making charitable choices and those choices might depend on an understanding of disadvantage and its

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<sup>138</sup> See Nozick, *Anarchy* at 150-53 (cited in note 121). See also Crossley, 35 Rutgers L J at 884-88 (cited in note 15) (discussing accommodation for people with disabilities as an implication of corrective justice for exclusionary social structures).

<sup>139</sup> See Silvers, *Formal Justice* at 74 (cited in 8) (“If the majority of people, instead of just a few, wheeled rather than walked, graceful spiral ramps instead of jarringly angular staircases would connect lower to upper floors of buildings.”). But see Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex L Rev 1705, 1718 (1999) (“Without some idea of how much influence or power a group should enjoy, it is hard to conclude that its influence or power has been diluted.”).

<sup>140</sup> I mean charity in its broadest sense, including any voluntary efforts or gifts to assist others. Whether private charity is a good substitute for government, considering collective action problems and countervailing moral claims to equitable outcomes, is another issue.

causes. This seems especially likely if the best libertarian theory would demand a government remedy for disability-based disadvantage, but for practical doubts about the efficacy and efficiency of such state action. Individual private choice to assist disabled people is not subject to the same objection. Assuming a desire and an effective method of delivering charity, then, donors will be forced to decide how their assistance ought to be used.

No apparent reason dictates that charitable assistance would or should come in the form of cash or medical technology or psychological counseling for disabled people. A donor is equally free to determine that her money, time, or other pro bono resources are most appropriately—even morally required to be—targeted at disadvantage-causing social change. Any social reengineering that the disability rights lobby desires could be subsidized by private charity and still comport with libertarian principles. Depending on the moral sensibilities of individual donors, the social model of disability might even make such objectives more appealing. To be sure, members of the disability rights movement are likely to find reference to “charity” dangerously associated with stereotypes about helplessness and inferiority. This discussion is not interested in following the movement, however. It is an investigation of possible logical connections between general normative frameworks and the social model.

Exactly how libertarianism ought to respond to disability rights claims and the social model is not well understood. Two points are worth underscoring. First, a coherent libertarian theory might well deny any government policy to assist the disadvantaged in general and the disabled in particular. Adherents of such theory could then accept the social model without committing to social change, at least not through public policy. Second and in contrast, different versions of libertarianism might be triggered by the social model. The interconnection worth exploring is corrective justice, along with the possibility that individual charitable choices will be directed at social reengineering.

Much more certain is the perspective from which these judgments must be made. It is inadequate for disability rights advocates to demand either resources or environmental revision simply because it will improve the status of disabled people. In accord with its character, a general normative framework—libertarian or otherwise—

must be able to process countless demands for change. These frameworks sacrifice precision and sometimes sophistication in exchange for their general applicability. Yet they prompt an inclusive orientation toward the range of issues faced by a complex society with a multitude of competing visions. Unfiltered parochialism of a social movement, however satisfying for adherents, cannot fare well within these theories.

## 2. Utilitarian

Utilitarianism is a type of consequentialist theory that assesses the morality of conduct by the effect it has on the total or average utility of the relevant community.<sup>141</sup> In its common forms, the theory includes three separable commitments: judging actions according to the state of affairs they produce (consequentialism), judging states of affairs by information regarding utility (welfarism), and adding together individuals' utility to calculate social welfare (sum-ranking).<sup>142</sup> Utility can be defined in more than one way, of course.<sup>143</sup> Bentham's hedonic utilitarianism is pegged to mental states of pleasure and pain. Others count preference satisfaction as utility even if not accompanied by the sensation of pleasure; this makes room for long-term designs, no-pain-no-gain exercise enthusiasm, horror-film fanaticism, and masochism. Mill asserted that certain higher pleasures made possible by human faculties could be judged superior in kind by those with experience; perhaps uninformed preferences should be less valued. And Harsanyi refused to count antisocial preferences such as sadism, envy, or malice.<sup>144</sup> These divisions within utilitarianism are important but they should not greatly affect the relationship to the social model. The general message is plain enough: pay attention to

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<sup>141</sup> See John Stuart Mill, Utilitarianism 8 (Longmans, Green 1897); Henry Sidgwick, The Methods of Ethics 379-85 (1877); Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 1-7, 24-69 (Oxford 1781). See also Robert E. Goodin, Utilitarianism as a Public Philosophy 4 (Cambridge 1995) (suggesting utilitarianism is a better guide to public policy than personal conduct); J.J.C. Smart, An Outline of a System of Utilitarian Ethics, in Utilitarianism: For and Against 3, 27-28 (1973) (noting the average versus total utility problem).

<sup>142</sup> A critical review that draws these distinctions is Amartya Sen and Bernard Williams, Introduction, in Amartya Sen and Bernard Williams, eds, Utilitarianism and Beyond 1, 3-5 (Cambridge 1982). See also Louis Kaplow and Steven Shavell, Fairness Versus Welfare 27 (PUBLISHER 2002) (declining to take a position on the third commitment). To be clear, I use utilitarianism to illustrate rather than to privilege it over other kinds of welfarism.

<sup>143</sup> A quick summary is Goodin, Utilitarianism as a Public Philosophy at 13-14 (cited in note 141).

<sup>144</sup> John C. Harsanyi, Morality and the Theory of Rational Behaviour, in Utilitarianism at 39, 65 (cited in note 142) (finding "a general goodwill and human sympathy" in utilitarianism).

the consequences of every action for people's utility and aim to maximize the sum total of their utility.

An important element of the framework is the concept of marginal utility, and a plausible assumption that it is sometimes inversely related to quantity.<sup>145</sup> The same increment of a useful resource might radically escalate the well-being of one person, while doing almost nothing for another. Cash receipts provide a simple example. The unemployed person living in poverty might value an additional \$1,000 much more than a billionaire. The ideal distribution of resources under utilitarianism, therefore, ought to account for such differences and attempt to allocate resources such that marginal utility is equalized. Thus the sort of coerced redistribution barred by libertarian theory might be defended. Of course, government run welfare programs come with risks that utilitarians must consider. Marginal utility rates can be difficult to ascertain and easy to fake. Redistribution can affect incentives to engage in welfare-enhancing activities that, in turn, dampen the need for redistribution in the first place. Plus there will be alternative uses for resources that might produce even greater total welfare, including the possibility that gains to the well-off [A1] will more than compensate for deprivations elsewhere. Equally significant, however, is that utilitarianism opens the possibility of government assistance to the disadvantaged in ways that libertarianism does not.<sup>146</sup>

Return to our central inquiries: whether utilitarianism suggests any policy response to disability and, if so, whether that response is more likely to address individual impairments or social environments. An answer to the first question depends on empirical data and educated guesswork. Utilitarians should want to know whether a physical or mental impairment increases marginal utility such that an additional unit of at least one resource will increase the welfare of an impaired person more than otherwise, or more than it would for alternative beneficiaries. The very label "impairment" might suggest the answer is yes. But it could be that people adjust to challenging circumstances by emotionally accepting their lot, or by focusing on the positive, or by setting a different

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<sup>145</sup> The assumption is complicated by, for example, differing preferences, goods that cannot be individuated, and goods which depend on other goods or opportunities for their value.

<sup>146</sup> It is unclear whether utilitarianism must consider the well-being of future generations beyond the preferences of today's generation for the well-being of that future generation.

baseline for judging new experiences;<sup>147</sup> that they lead lives no less fulfilling than others similarly situated; and that they would benefit no more than others from additional resources. In fact, impairment might be seen as “character building” and indelibly attached to identity. This is a sort of Triumph of the Human Spirit story for disability, and it is related to the academic field of hedonic adaptation.<sup>148</sup>

As best we can tell, adaptation varies with impairment. Mark Stein offers a potentially instructive division. He separates physical, emotional, and intellectual impairments.<sup>149</sup> First, as to physical impairments such as quadriplegia, respondents often indicate lower happiness scores than control groups. The gap may close over time but not always completely. Two prominent studies are summarized in Table 1 (which includes a small sample of respondents whose spinal chord injuries took place within the year)<sup>150</sup> and Table 2 (which has a larger sample and where the injuries occurred on average thirty-years earlier).<sup>151</sup> Second, different emotional problems appear to generate different happiness outcomes. Depression is almost by definition unhappiness, while

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<sup>147</sup> See G.G. Whiteneck, et al, Mortality, Morbidity, and Psychosocial Outcomes of Persons Spinal Cord Injured More than 20 Years Ago, 30 *Paraplegia* 617, 628-29 (1992) (concluding that respondents rated the importance of some goods higher and some lower than the general population).

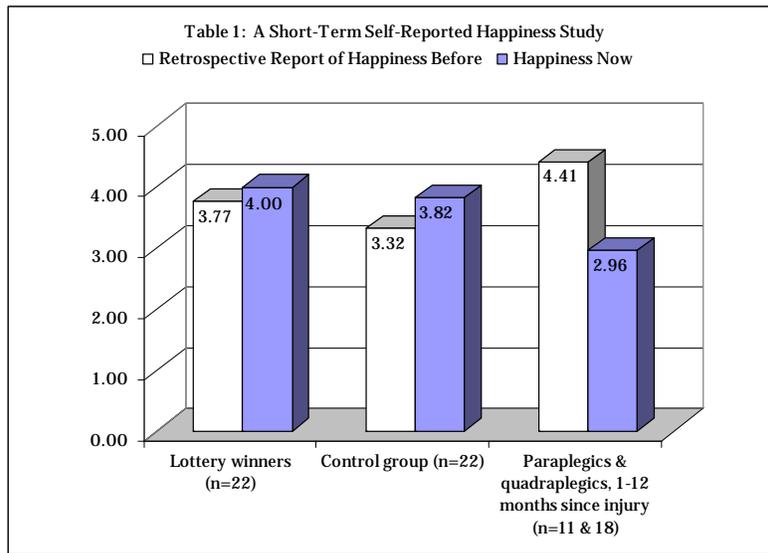
<sup>148</sup> See Shane Frederick and George Loewenstein, Hedonic Adaptation, in Daniel Kahneman, Ed Diener, and Norbert Schwarz, eds, Well-Being: The Foundations of Hedonic Psychology 302, 312 (Russell Sage 1999) (reviewing studies on adaptation). For a literature review that emphasizes similarities in happiness scores for impaired and unimpaired respondents, see Bagenstos and Schlanger, 60 *Vand L Rev* at \_ (cited in note 57). See also Daniel Gilbert, Stumbling on Happiness 103-04, 152-53 (2006).

<sup>149</sup> See Stein, Distributive Justice at 25-32 (cited in note 119)

<sup>150</sup> See Philip Brickman, Dan Coates and Ronnie Janoff-Bulman, Lottery Winners and Accident Victims: Is Happiness Relative?, 36 *J Personality & Soc Psych* 917, 921 (1978). The data is cross-sectional so happiness scores before the relevant event were based on retrospective estimates of respondents. The control group was asked about their happiness six months ago on a scale of zero to five; the paraplegic and quadriplegic respondents became impaired one to twelve months before the survey and were full-time patients in a rehabilitation institute; the lottery winners won \$50,000-\$1,000,000 within 1.5 years of the survey. See *id* at 918-20. The authors found statistically significant differences in present and past happiness reports from the control group as opposed to the paraplegic and quadriplegic respondents. See *id* at 920-21.

<sup>151</sup> See Richard Schulz and Susan Decker, Long-Term Adjustment to Physical Disability: The Role of Social Support, Perceived Control, and Self-Blame, 48 *J Personality & Soc Psych* 1162, 1167 (1985). The data is cross-sectional. Respondents were 100 paraplegics and quadriplegics living in noninstitutional settings. Their sample was over age forty, 90% male, and the average time since injury was more than thirty years. See *id* at 1163-64. Three surveys designed to test psychological well-being were administered to the sample and compared to more general population responses reported in other studies. See *id* at 1166-68. Only one of the comparisons is displayed in the table below but the other two are similar. Higher scores indicate higher life satisfaction on a scale of zero to eighteen, measured by multiple questions. See *id* at 1167. Statistical significance is not estimated by the authors in this study.

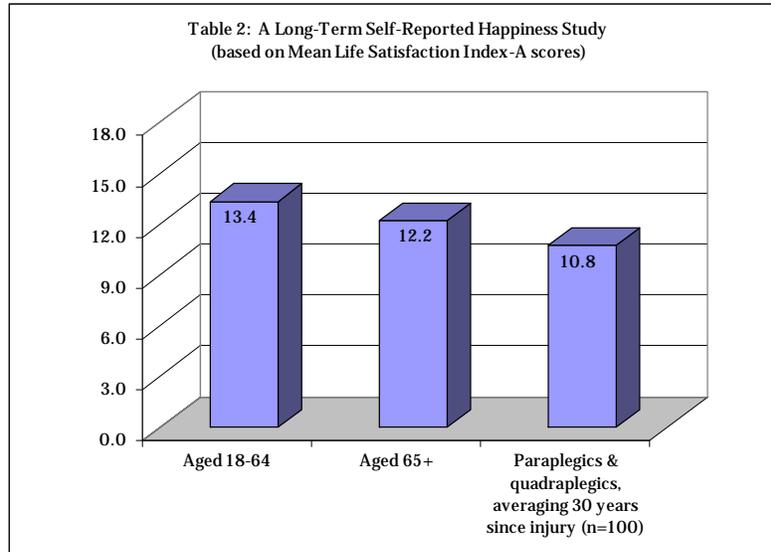
schizophrenics will not necessarily report significantly lower happiness scores.<sup>152</sup> Third, intellectual impairments might not be associated with any reduction in happiness.<sup>153</sup> A person can have a low IQ score and be equally content with life as the median respondent. Finally, Shane Frederick and George Loewenstein report that “[t]here is less evidence of adaptation to chronic or progressive diseases such as chronic rheumatoid arthritis, multiple sclerosis, and other degenerative disorders.”<sup>154</sup>



<sup>152</sup> See Stein, Distributive Justice at 30 (cited in note 119) (citing H.T. Koivumaa-Honkanen, et al, Correlates of Life Satisfaction Among Psychiatric Patients, 94 Acta Psychiatrica Scandinavica 372, 376 (1996)).

<sup>153</sup> See id at 31; A. Verri, et al, An Italian-Australian Comparison of Quality of Life among People with Intellectual Disability Living in the Community, 43 J Intellectual Disability Research 513, 518-21 & tbl.4 (1999) (noting difficulties in scoring for those with cognitive impairments).

<sup>154</sup> Frederick and Loewenstein, Hedonic Adaptation at 312 (cited in note 148) (citations omitted).



Consumers of the adaptation literature must treat it with care.<sup>155</sup> The studies can be weakened by problems including scale norming, politically correct responses (“I’m fine; how are you?”), lack of control for important variables, use of cross-sectional as opposed to longitudinal or panel data, and—critically for utilitarians—failure to measure marginal utility. If there is an uncomplicated message in this research, it is that impairments do not entail misery, that people are often able to adapt to them at least partly, and that others might underestimate those possibilities; but that relatively lower happiness scores are correlated with certain forms of impairment.<sup>156</sup> Because adaptation can be incomplete, and impairment might well be associated with increased marginal utility rates, utilitarianism could have room for a policy to improve the situation of impaired people. Equally important, third-party effects should be considered. One reason

<sup>155</sup> Some of the methodological problems are explained in id at 307-11.

<sup>156</sup> See also Andrew J. Oswald and Nattavudh Powdthavee, Does Happiness Adapt? A Longitudinal Study of Disability with Implications for Economists and Judges 6-15 (IZA Discussion Paper No 2208, 2006), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=921040](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921040) (visited March 31, 2007) (using British panel data and regressions to suggest some, but not complete, recovery in life satisfaction (LS) scores over time among respondents who became disabled and noting lower average pre-disability LS scores for those who became disabled); C. Lundqvist, et al, Spinal Cord Injuries: Clinical, Functional, and Emotional Status, 16 Spine 78, 81-82 & fig. 1 (1991) (finding lower quality of life scores for a group of Swedish tetraplegics, but less so after four years of injury); Thomas Mehnert, et al, Correlates of Life Satisfaction in Those with Disabling Conditions, 35 Rehabilitation Psych 3, 4, 9-11 & tbl 2, 13 & tbl 3 (1990) (reporting higher LS scores for those with sensory impairments and less life-limiting impairments than for other physical impairments, and even higher LS scores for nondisabled people)a. One of the first and least sophisticated studies is Paul Cameron, et al, The Life Satisfaction of Nonnormal Persons, 41 J Consulting & Clinical Psych 207, 207-11 (1973) (finding little difference in LS scores between controls and an amalgamated class of respondents who were paralyzed, blind, hearing impaired, had a “deformed limb,” etc.).

impaired people might return to the median happiness level is that costly services are being provided by family and friends, and because of this care provision their marginal utility for resources may rise. Friends, family, and coworkers might suffer nonfinancial welfare losses, too,<sup>157</sup> even if the “victim” is not so badly off. So perhaps there is a prima facie case for a utilitarian disability policy, with respect to at least certain classes of impairments.<sup>158</sup>

The second inquiry is about the form of any utilitarian policy response. Does the social model have any influence? One possibility is that people actually prefer to devote scarce resources to remedying disabling social settings that were, in their judgment, unjustly designed. And it is possible that this preference is stronger than any impulse to “fix” impairments that contribute to such disabilities. All of this is partly speculation, yet one would think utilitarianism must incorporate such preferences into its social welfare calculations. The analysis of libertarian corrective justice then carries over into the utilitarian policy analysis.

Setting aside this possibility, a utilitarian might investigate the source of welfare losses and the cost-efficient response. These might be personal, social, or both. For some individuals, pain and depression will dominate any loss of well-being connected to impairment, and utilitarianism might then suggest subsidies for medical palliatives.<sup>159</sup> For others, medical costs might be the least of their troubles. A class of impaired people might readily adapt to unusual personal traits but for social responses thereto. Social isolation, or ridicule, or patronizing assumptions of unequal human value surely can be sources of welfare loss. The same is true of various access barriers, from architectural to economic.<sup>160</sup> In addition, if the applicable version of utilitarianism bars consideration of

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<sup>157</sup> See Elizabeth F. Emens, The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA, 94 *Georgetown L J* 399, 428-39 (2006) (collecting and analyzing studies).

<sup>158</sup> See David A. Weisbach, A Welfarist Approach to Disabilities 13 (unpublished manuscript, 2007) (on file with author) (noting difficulty in ascertaining marginal utility rates).

<sup>159</sup> Bentham thought “bodily imperfection” tends to reduce the effect of pleasurable circumstances, while at the same time “increas[ing] that of any afflictive one.” Bentham, An Introduction at 47 (cited in note 141). But he seems to have been guessing.

<sup>160</sup> See Schulz and Decker, 48 *J Personality & Soc Psych* at 1170 (cited in note 151) (statistically connecting the well-being of paraplegic and quadriplegic respondents to social support, social networks, and a sense of control); I. Ville, J.-F. Ravaud, and Tetrafigap Group, Subjective Well-Being and Severe Motor Impairments: The Tetrafigap Survey on the Long-Term Outcome of Tetraplegic Spinal Cord Injured

sadistic or uninformed preferences, then defenses for the environmental status quo become weaker. Such preferences are one factor in perpetuating disadvantage, although their relative significance may be debated. In any event the proper utilitarian policy might be social reengineering—depending on the relative costs and benefits.

“Might” is a serious qualifier. Critical issues remain open. One pragmatic concern is that improving the well-being of disabled people cannot be effectively or efficiently achieved by the state. Actually disabled people must be differentiated from malingerers.<sup>161</sup> Even if the government can accomplish this at a tolerable cost, state action must be compared with private ordering and alternative uses of resources. Especially insofar as welfare losses can be alleviated by individualized medical care, private insurance offers a partial solution. To the extent private action is inadequate, the utilitarian will consider how much good can be done at the same cost but directed at other goals. This is yet another empirical question about marginal utility. Given a limited budget, the utilitarian will demand information (at a reasonable cost) regarding the alternatives. Sometimes a relatively inexpensive environmental fix will produce major welfare gains for impaired people and others. Curb cuts are an example: at least for new construction, they cost little in the short run and they benefit wheelchair users, stroller pushers, and skateboard riders over the long run. On other occasions, personalized medical care will be the utility maximizing option, even if the beneficiaries prefer other remedies. In yet other circumstances, resources will be better spent on softening the burdens of poverty or some other societal problem for which the marginal gains per unit of effort are greater.

The appropriate utilitarian response to congenital deafness is probably closest to the latter circumstance. If the claims of Deaf culture members are accurate, there is almost no deafness disability warranting a remedy. Once ASL skills are acquired, deaf people may plug into a vibrant culture of language, art, literature, and other visual values.

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*Persons*, 52 Soc Sci & Med 369, 379-82 (2001) (reporting a mixture of sources of diminished well-being including pain, a sense of dependence, and inhibited social participation).

<sup>161</sup> See Weisbach, *A Welfarist Approach* at 40-43 (cited in note 158) (posing solutions, such as in-kind benefits, commodity subsidies, and accommodations that are more attractive to only disabled people). This opacity problem is not peculiar to impairment or disability; marginal utility is often difficult to observe and verify.

There could be a place for antidiscrimination laws, however, depending on their prospects for success. Deaf people, like other minority groups, can suffer from stereotypical assumptions and invidious discrimination. It is also possible that subsidies for cochlear implants and genetic screening can be justified to utilitarian satisfaction. However happy deaf people come to be, the vast majority of society uses the spoken word as part of its communications repertoire. Adjusting to this environment requires effort, especially when a deaf child is born to hearing parents. A utilitarian might take this as cause for policies that reduce the number of children born deaf.<sup>162</sup>

Such responses have at best a tenuous relationship to the social model of disability. The assistance would be for personalized medical services and we have not assumed the justification is a mass preference for corrective justice. Without that assumption, state-led changes in the environment seem unlikely. On an implausible factual showing, the Laurent development effort might be entitled to subsidy. On a more likely foundation, utilitarians might support expenditures for ASL training and Gallaudet. But not every American would be taught ASL in order to benefit so few. Other physical and mental impairments might be treated very differently by the utilitarian state. For deafness, however, a claim to large-scale social change seems weak.

Disability rights advocates might reject the utilitarian framework altogether.<sup>163</sup> But their worst fears are misplaced. Unlike libertarianism, nothing about utilitarianism inherently disfavors state-orchestrated assistance to the disadvantaged. It could be that coerced wealth transfers to disabled people would benefit them more than the transfer would hurt donors and their incentives going forward. It could be that social reengineering generates even greater welfare gains, depending on the particulars, timeframe, and discount rate. Or the opposite could be true. The upshot is that the social model is relevant to utilitarianism, albeit in a different and possibly more significant way than it is to libertarianism. The social model can identify root causes of disadvantage,

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<sup>162</sup> Moral outrage at any of these policy positions, it would seem, must be considered by utilitarians when calculating whether the policy helps maximize welfare.

<sup>163</sup> See Barnes, *Theories of Disability* at 50, 56 (cited in note 25) (linking liberal utilitarianism to minority oppression and infanticide); Pfeiffer, *The Conceptualization of Disability* at 41-42 (cited in note 19) (“[C]ivil rights are NOT dependent on available funding or even the appropriation of funds.”) (citations omitted).

which might seriously reduce an impaired individual's well-being and be alleviated efficiently by state action.

### 3. Egalitarian

Libertarianism yielded some but not much responsiveness to the social model, while utilitarianism suggested additional sensitivity without anything like a firm commitment to environmental engineering. In fact, both frameworks will produce no public policy responses to disability in a variety of situations. Egalitarian theories might do more in that they stress particular forms of equality over, or in addition to, individual liberty and social welfare. Egalitarian theories are diverse in content,<sup>164</sup> and so this subsection will follow the pattern above by stylizing the framework and then concentrating on the questions of policy response and its target.<sup>165</sup>

Egalitarian normative frameworks speak to distributive justice. These claims are usually about results, and contemporary theories are often unwilling to validate distributions produced within a system of largely private ordering. But there is disagreement regarding which valuable assets should be the subject of distributive concern and what qualifies as a just distribution. Egalitarian interest certainly includes economic resources, yet nonmaterial assets such as health care and genetic engineering opportunities have been the subject of concern.<sup>166</sup> Moreover, the claim to a given distribution could be based on different commitments, even if equal human dignity and entitlement to respect is accepted as the starting point. The concepts of equality and equitable distribution are essentially empty without further argument; recall the murderer's disadvantageous situation in statement 1, above.<sup>167</sup>

Identifying a comfortable motivation for resource distribution might take three routes. One is procedural, the second returns to corrective justice, and the third is directly

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<sup>164</sup> See Samuel Fleischacker, A Short History of Distributive Justice 9-10 (Harvard 2004).

<sup>165</sup> Egalitarianism is hardly new to disability scholarship, as evidenced by the civil rights model of disability policy. See, for example, Hahn, 4 S Cal Rev L & Women's Studies at 98-99 (cited in note 54).

<sup>166</sup> See, for example, Daniels, Just Health Care at 23-27, 36-58 (cited in note 44) (connecting health care necessary to "species-typical normal functioning" with opportunities for life plans); Fleischacker, A Short History at 122-23 (cited in note 164) (citing Allen Buchanan, et al, From Chance to Choice: Genetics and Justice (Cambridge 2000) for the idea that distributive justice may apply to genetic engineering).

<sup>167</sup> Part II.C. See also Peter Westen, The Empty Idea of Equality, 95 Harv L Rev 537, 547 (1982) ("[T]reatments can be alike only in reference to some moral rule.").

concerned with outcomes. The procedural route is exemplified by John Rawls. He asks us to picture an initial position in which parties deliberating about basic principles and institutions are stripped of knowledge about their position in life after the negotiation is over and are roughly equal in their ability to negotiate. Rawls draws certain conclusions about the outcome of this hypothetical negotiation process, including the controversial assertion that economic inequalities would be tolerated only under narrow conditions.<sup>168</sup> There are ongoing debates regarding these conclusions and Rawls's decision to exclude severely impaired people from the hypothetical parties in his original position.<sup>169</sup> These controversies will be ignored here. Assessing the propriety of Rawls's analytical devices is not essential for reaching conclusions about the social model's connection to egalitarian normative frameworks. That Rawls suggests a spirit of equality that might encompass assistance for physically and mentally impaired people is of some interest, but more intellectual mileage can be traveled with less effort by shifting attention to more overtly outcome-based theory.

A second division of egalitarian theorizing might borrow from ideas of corrective justice. This option stands between procedural and purely outcome based theories. The argument is that identifiable classes of people have been treated unjustly, they are at a relative disadvantage for no reason now thought acceptable, and the situation ought to be corrected. This claim was discussed above and those remarks carry over here. It is worth repeating that traditional corrective justice arguments do not fit perfectly with group-suffered and group-imposed injustices over extended time periods. In addition, the claim probably will be unavailable to some disabled groups—and yet helpful to even the most well-off members of historically disadvantaged groups (think about physically impaired law professors who write about disability law). Finally, the remedy will not necessarily be social restructuring.

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<sup>168</sup> See John Rawls, A Theory of Justice 76 (Harvard 1999). See also Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality 66-83, 331-50 (Harvard 2000) (attempting to distinguish loss following calculated gambles from brute bad luck, and suggesting resource transfers to respond to the latter but not the former).

<sup>169</sup> See John Rawls, Political Liberalism 183-85 (1993); John Rawls, Kantian Constructivism in Moral Theory, 77 *J Phil* 515, 546 (1980) (assuming “everyone has sufficient intellectual powers to play a normal part in society, and no one suffers from unusual needs”).

This leaves a third possibility: grounding egalitarianism claims for distributive justice primarily on outcomes. In this space, two prominent subdivisions can be described. The first concentrates on the problem of group subordination or caste.<sup>170</sup> Anti-subordination claims are commonly fueled with corrective justice-like histories, along the lines of racial discrimination. But this is not necessary. It could be morally intolerable for a group of people to be systematically disadvantaged in socioeconomic well-being and political power simply out of respect for their dignity, and even aside from pragmatic interests in social cohesion and order.<sup>171</sup> The cause might be a negligent political process failure, illiberal hatred, bad luck, or something else. An extension of this thought is to require honest interrogation of the justifications for subordination. A moral theory might demand an explanation for the outcome that we can now accept as rational and persuasive. Either way, anti-subordination theories do not turn on aggregate welfare maximization; the suffering of a subordinated group (at least presumptively) cannot be offset by the welfare gains of the winners. Additionally, anti-subordination arguments might cover greater range than the most generous versions of corrective justice. Of course there are complications and doubts to be raised. The theory calls for a method of recognizing relevant groups, for one thing, and it relies on a conception of rationality or persuasiveness that might be contested. Nevertheless, anti-subordination is an outcome-oriented alternative to libertarianism and utilitarianism in their simple forms.

A second outcome-based alternative involves human capabilities. Associated with Amartya Sen and Martha Nussbaum,<sup>172</sup> it resembles Rawls's notion of primary goods.<sup>173</sup>

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<sup>170</sup> See Sunstein, The Partial Constitution at 339-44 (cited in note 103) (stressing morally irrelevant differences and disadvantage on multiple dimensions of welfare); Iris Marion Young, Justice and the Politics of Difference 32-38 (Princeton 1990) (discussing oppression and domination); Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 36-37 (Harvard 1987); Cass R. Sunstein, The Anticaste Principle, 92 Mich L Rev 2410, 2411 (1994); Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn L Rev 1049, 1053-54, 1061-63 (1978); Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil & Pub Affairs 107, 148-52 (1976) (concentrating on the threat of deep and persistent socioeconomic and political subordination, without depending on claims of past discrimination or compensation). For a review and critique focusing on race, see Andrew Koppelman, Antidiscrimination Law and Social Equality 76-99 (Yale 1996).

<sup>171</sup> See Fiss, 5 Phil & Pub Affairs at 151 (cited in note 170).

<sup>172</sup> See Martha C. Nussbaum, Women and Human Development: The Capabilities Approach 4-6 (Cambridge 2000); Amartya Sen, Inequality Reexamined 39-55 (Harvard 1992). See also Martha C. Nussbaum, Frontiers of Justice: Disability, Nationality, Species Membership ch 3 (Harvard 2006); Martha C. Nussbaum, Capabilities as Fundamental Entitlements: Sen and Social Justice, in Alexander Kaufman,

The theory commits to the development of capabilities (opportunities to achieve certain functionings) that make possible a good human life, rather than the actual achievement of any particular function.<sup>174</sup> People may choose whether to exercise these opportunities. But everyone must have these opportunities before a social system is minimally just;<sup>175</sup> there is no set-off for the well-being of the more fortunate. The theory also requires attention to individual differences. People are diverse in their goals, values, biology, and other attributes, and they interact within distinct social settings. This can make standardized packages of consumption goods hard to defend as the measure of well-being without accounting for health, self-respect, political participation, and so on.<sup>176</sup> At the same time, modesty is inherent in versions of the theory that seek a minimum threshold level of opportunity across a limited list of capabilities.<sup>177</sup> This suggests theoretical humility, by setting aside many issues of distributive justice and allowing evolution over time. It offers the possibility of overlapping consensus, by drafting a minimalist capabilities set that might be agreeable from several normative perspectives. And it implicitly prioritizes the use of scarce resources, by identifying projects worthy of immediate attention. Finally, the capabilities approach disregards adaptive preferences

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ed, *Capabilities Equality: Basic Issues and Problems* 44, 46-47, 54-57, 66-67 (Routledge 2006) (exploring distinctions with Sen); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *Ethics* 287, 317-18, 334 (1999) (stating that democratic equality provides for the capabilities necessary to function as a citizen). For some egalitarian caution, see David Wasserman, *Disability, Capability, and Thresholds for Distributive Justice*, in Kaufman, *Capabilities Equality* 214, 215; Dworkin, *Sovereign Virtue* at 303 (cited in note 168) (“[T]he equality we seek is in personal and impersonal resources themselves, not in people’s capacities to achieve welfare or well-being with those resources.”).

<sup>173</sup> See Rawls, *A Theory of Justice* at 63-64, 90-95 (cited in note 169) (including the social basis of self-respect).

<sup>174</sup> But see Nussbaum, *Frontiers* at 172-73 (cited in note 172) (excepting dignity, children, and those with severe mental impairments, where actual functioning is the goal).

<sup>175</sup> See Nussbaum, *Women* at 71 (cited in note 172); Sen, *Inequality Reexamined* at 39 (cited in note 172).

<sup>176</sup> See Sen, *Inequality Reexamined* at 31 (cited in note 172); Amartya Sen, *Equality of What?* 217 (Tanner Lectures on Human Values, May 1979), online at <http://www.tannerlectures.utah.edu/lectures/sen80.pdf> (visited Mar 31, 2007).

<sup>177</sup> See Nussbaum, *Women* at 78-82 (cited in note 172) (stressing practical reason and affiliation, along with a life of normal length, adequate bodily health, nourishment and shelter, bodily integrity, senses and thinking, emotion, living with other species, play, and control over political and material environment); Sen, *Inequality Reexamined* at 39-40, 44-45 & n 19 (cited in note 172) (listing adequate nourishment and shelter, good health, avoidance of escapable morbidity and premature mortality, happiness, self respect, and participating in community). See also *id.* at 49-53 (explaining that capability to achieve functionings itself might be a component of well-being). Sen distinguishes “agency freedom” as the ability to realize objectives not so directly related to that person’s individual well-being, such as national independence. Sen, *Inequality Reexamined* at 56-57 (cited in note 172).

judged unworthy of respect. The theory will not honor aspirations moderated in the face of unjustly oppressive circumstances, however defined.<sup>178</sup> This account leaves open many questions, such as the precise list of capabilities that must be guaranteed along with inevitable implementation issues. But the basic idea is clear enough.

On these elaborations and at first look, egalitarianism seems perfectly suited to certain disability rights claims. It is all about rectifying disadvantage. Such theories therefore point toward the opportunity for disabled people to claim a policy response to their disadvantage (even if their claims are not categorically different from others). Not every disabled person will fit the conditions for assistance under anti-subordination or capabilities approaches. But surely some will. A far more challenging problem is the relevance, if any, of the social model. Does one need to understand that impairment-related disadvantage can be the result of social settings?

From one angle, the answer is no. Anti-subordination and capabilities theories are triggered by severe group disadvantage and individual lack of minimum opportunities, respectively. On the face of it, an entitlement to assistance is unrelated to a history of socially imposed oppression or even a contemporary social cause of this individual's or this group's particular disadvantage. An impaired person's situation might be attributed to his personal traits or to some unknown cause and these egalitarian theories would apply nonetheless. To be sure, one must comprehend the social structure to test whether a group is subordinated; that condition is relational. Likewise, certain human capabilities are joined to social circumstance, such as the opportunity to affiliate with other human beings. Yet to be precise about the matter, the social model's attempt to locate social factors in disadvantage does not seem required. For these theories and at this level of abstraction, it is the resulting disadvantage, rather than its etiology, that matters.

An only slightly deeper review of these theories, however, exposes connections to the social model. With respect to anti-subordination, justifications for disadvantage are important. Policymakers cannot hope to assess condemnations and defenses of

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<sup>178</sup> See Sen, Inequality Reexamined at 55 (cited in note 172); Nussbaum, Women at 136-43 (cited in note 172). On the problem of adaptive preferences, see Jon Elster, Sour Grapes: Studies in the Subversion of Rationality ch 3 (1983), and Cass R. Sunstein, Free Markets and Social Justice 25-30 (1997).

disadvantage without understanding the causal factors. The social model speaks to this inquiry. With respect to both theories, there is the issue of adaptive preferences. Neither approach is willing to abide by preferences that are the product of unjust conditions. This is a delicate inquiry, of course, because both theories aim to promote human freedom. Understanding these unjust conditions accurately is therefore critical. A social model of disability fits here, as well. Its application reveals multiple sources of disadvantage, which will assist the egalitarian in understanding whether the stated preferences of impaired people ought to be reflected in public policy or overridden in favor of other objectives. Beyond this, the social model's nexus with egalitarianism is more complicated.

The most significant remaining issue is about policy form: whether anti-subordination and capabilities theories make use of the social model in designing remedies. The answer is a qualified “yes.” As to capabilities, there clearly is an environmental component to several candidates for the list, perhaps all of them. Associative opportunities and the power to affect the surrounding material environment are good examples.<sup>179</sup> Capabilities theorists understand that adverse social settings can prevent individuals from realizing core freedom.<sup>180</sup> Moreover, all of these capabilities must be afforded to every member of society before a rudimentary measure of social justice is achieved. For at least some impaired people, then, socially dependent capabilities must be enjoyed regardless of other opportunities and this can depend on environmental change. Similar thoughts apply to subordination remedies. If the subordinated status of a group sharing a physical trait like deformity is the product of irrationally imposed social stigma, then one would think the social dynamic needs to be corrected without “fixing” the subject of disadvantage. So surely there are conditions under which an egalitarian will strongly prefer social reengineering over personalized services.

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<sup>179</sup> See Nussbaum, Women at 84-85 (cited in note 172) (defining “combined capabilities”).

<sup>180</sup> See *id.* at 84-86; Nussbaum, Frontiers at 167-68, 221-22 (cited in note 172) (discussing wheelchairs and noting hierarchy and stigma dynamics). Compare Nussbaum, Frontiers at 169-70 (cited in note 172) (marking on the importance of individualized care for mentally impaired people).

Yet there is a fair question as to exactly what these conditions are. It does not seem inherent within either anti-subordination or capabilities theories to systematically bias policy in favor of social change if there is a feasible alternative remedy directed at the victim of disadvantage. Of course, a capabilities proponent is not going to sacrifice the bodily integrity of impaired people and force them into corrective surgery, as long as they are exercising practical reason and not following discardable adaptive preferences. But what about closer cases? The answer is not apparent. This seems especially true of the capabilities approach. Part of its inspiration is practical: however distributionally unjust the present world, limited resources is a brute fact. Now suppose that a medical service will alleviate the relevant disadvantage to the same degree as some type of environmental restructuring, but the cost of the latter vastly outruns the cost of the former. What now?

The problem can be made more concrete with a final return to the controversies of Deaf culture. The average deaf person might not meet the test of subordination, yet it is possible that many are left without adequate capabilities or must bear too great a sacrifice in meeting those minimum levels. This might be implausible for this particular disability, but for the sake of argument assume that a capabilities theory is applicable. The public policy response might be directed at reducing or eliminating deafness through medicine and technology. Cochlear implants and genetic screening could be subsidized, or even mandated. In the alternative or in addition, the state might support environments in which lack of hearing is not disabling. Gallaudet University and other sign language communities are the models, but more could be accomplished including widespread instruction in ASL. Egalitarian theorists might consider it perverse for the state to rectify disadvantage with a medical device mandate. Even with this course off the agenda, we are left with a range of options, including subsidies instead of penalties. And the comparative cost analysis might be little different from utilitarianism.

This might not have been anticipated. An important strand of egalitarianism, a framework designed for the type of disadvantage located by the social model, might not have much use for the social model. To be sure, there is more than one brand of egalitarianism. Some will be more attentive to remedial social costs than others. Some

might be worked out logically to privilege environmental restructuring over personal care directed to individuals who are at serious disadvantage attributable to the animus, disregard, or irrationality of society at large. And there might be forward-looking consequences that support social change. For now, however, it is enough to recognize that the social model of disability influences very little of the normative analysis, and only then as a consequence of the chosen normative framework.

### C. Institutional Design and Expertise

[T]he so called “experts” suffer a poverty of thinking.<sup>181</sup>

The foregoing has struggled against the potential normative implications of the social model. Before closing, a different conclusion can be reached with respect to remedies for disadvantage. This is the practical issue of institutional choice and design. Now, even here normative premises drive the analysis and, to reiterate, identifying causes of disadvantage is not the same as finding sensible solutions. There can be a significant distance between the two, perhaps especially as time passes. But after social causes become relevant to policy on some moral theory, a special set of decision-makers might be needed. This mediated, institutional-expertise implication of the social model seems to have been overlooked.

Much legal and philosophical inquiry involves goal choices and nobody doubts their importance. But goals are nearly useless absent a feasible strategy for their accomplishment. Selections must be made among available institutions and among possible designs within those institutions.<sup>182</sup> Once we move beyond the admittedly formidable question of normative objective, the institutional issues begin to crystallize. Institutional and goal problems play off each other but they are to a degree discrete. And sometimes the mechanics of institutional analysis are less daunting than the struggle of overtly normative debate.

Assume, then, that the correct general normative framework yields social change as the goal. Personalized medical services are rejected as the solution to disadvantage.

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<sup>181</sup> UPIAS Commentary at 16 (cited in note 1) (referring to charity efforts).

<sup>182</sup> On institutional choice and design generally, see David L. Weimer, Institutional Design: Overview, in David L. Weimer, ed, Institutional Design 1, 12 (Kluwer Academic 1995), and Neil K. Komisar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 5 (Chicago 1994).

We might also assume that the social model of disability helped make that selection, although this is not strictly necessary to the analysis. Perhaps the best specification of corrective justice was triggered by the social model's account of causation for some particular disabled group. The social cause of disadvantage turned out to be unjustly imposed and it now must be corrected in an effective and efficient manner. These parameters dictate the choice of institution and its design for the implementation of disability policy. And now the social model of disability seems relevant.

Compare the sensible institutional design choices when social and environmental change is necessary, as opposed to personalized medical and technological services. The relevant expertise will sometimes be very different. While economic cost considerations might call for a similar set of accounting skills, and medical knowledge is surely relevant to nearly any public policy involving physical and mental traits, social and environmental reengineering depend on additional skills if the policy mission is to be successful. If government will subsidize cochlear implants or genetic screening, doctors and medical technicians along with economists will be useful. But if government intends to manufacture social settings in which deafness and other impairments are not socially disadvantageous, the policymakers and executors ought to be a more diverse group if not simply different. Now sociologists, architects, political scientists, social psychologists, anthropologists, historians, and others with unique skill sets become more valuable. Understanding disadvantageous environments, whether built or the product of social interaction, can be a matter of uncommon knowledge. Physicians, however, might be the last people asked for their opinion. Whatever their lack, the developers of Laurent, South Dakota were not in need of medical advice.

In an important respect, this is an outcome hoped for by the disability rights community from the start, albeit through a different analytical route. An early motivation for the movement was the sense that medical experts and government welfare officials were dictating important life choices for disabled people.<sup>183</sup> More important, their mission and skills were not tailored to liberating social change. Once a commitment to

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<sup>183</sup> See Part III.A.2.

environmental reengineering is made, that set of decision-makers loses its authority. One might then consider the social movement vindicated.

Still, the analysis above does not necessarily move disabled people from the status of “sick role” to the masters of public policy. Disabled people will quite probably rest somewhere in between. This group has demonstrated its ability to communicate the problems of disadvantage and the possibilities of social change (sometimes rather trivial change) that can escalate their opportunities for a rewarding life. That information is indispensable to sensible institutional choice and design. One should not immediately reach the further conclusion, however, that the knowledge and preferences of disabled people must supersede other expertise and competing policy considerations. But these are issues at the margins. The important finding is that the social model can influence institutional choices by shifting the demand for expertise, although only in conjunction with the right normative framework.

#### CONCLUSION

The social model of disability is not a justification for any policy goal. A causal account of disadvantage, however insightful, is no substitute for norms. That the contrary is often taken for granted reflects the character of disability legal studies, which is partly an outgrowth of the disability rights social movement. I make no claim that social movement membership is shallow or less enlightening than operating within abstract moral theory. At some point, however, disability rights proponents might choose to confront more effectively the problems of limited resources and competing claims of justice. Devotion to elevating the status of a single interest group is not conducive to that task.

Egalitarian, utilitarian, and libertarian frameworks offer relatively sweeping methods of analysis. Certain specifications of these frameworks show responsiveness to the social model’s identification of environmental factors in the production of disadvantage. Those causal factors are real. They are often ignored. And the social model is a revelatory corrective. The model thus has the potential to knock out ill-considered defenses of the status quo based on nature and necessity, just as legal realism and other reform advocacy attempted to unsettle assumptions in the past. But justifying change

takes more. It would be tragic, in an utterly uncondescending meaning of the word, if disability scholarship is marginalized by its own unreflective reliance on an otherwise valuable intellectual contribution of the movement.

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