

What Good Is the Social Model of Disability?

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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 may suggest not only policy goals but an institutional design. These points are illustrated by recent controversies involving genetic screening, 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.

INTRODUCTION

For many advocates and academics, a social model of disability is foundational. It defines their field of interest 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,¹ and in 1990 the model was successfully

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¹ See The Union of the Physically Impaired Against Segregation and The Disability Alliance, *Fundamental Principles of Disability* (“UPIAS Commentary”) 13 (1976), online at <http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/fundamental%20principles.pdf> (visited Sept 2, 2007).

launched in Western academia by Michael Oliver's *The Politics of Disablement: A Sociological Approach*.²

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 Act³ (ADA) indicate that social settings must be revised to make individual traits less disabling. Reasonable accommodation for employees is an example,⁴ as is the qualified duty to make certain places accessible to mobility-impaired people.⁵ A federal district court recently used similar principles to hold that U.S. paper currency violates the Rehabilitation Act.⁶ The complaint is that our denominations, unlike many foreign bills which vary in size and texture, are not readily distinguishable to blind people.⁷ 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 . . . in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms."⁸ Academics have indicated that the social model is a normative basis for such measures.⁹

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. De-

² Michael Oliver, *The Politics of Disablement: A Sociological Approach* 11 (St. Martin's 1990). See also Tom Shakespeare, *Introduction*, in Tom Shakespeare, ed, *The Disability Reader: Social Science Perspectives* 1, 1 (Cassell 1998) (crediting Oliver).

³ Pub L No 101-336, 104 Stat 327 (1990), codified at 42 USC § 12101 et seq (2000).

⁴ See 42 USC §§ 12111(9), 12112(a), (b)(5)(A).

⁵ See 42 USC §§ 12182(a), (b)(2)(A)(iv), 12183(a).

⁶ Pub L No 93-112, 87 Stat 355 (1973), codified in relevant part as amended at 29 USC § 794 (2000).

⁷ See *American Council of the 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.

⁸ Convention on the Rights of Persons with Disabilities preamble ¶ v (2006), online at <http://www.un.org/disabilities/convention/conventionfull.shtml> (visited Sept 2, 2007). See also id 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 (World Health Organization 2001) (incorporating elements of the social model into a general classification of health states).

⁹ See, for example, Michael Ashley Stein, *Disability Human Rights*, 95 Cal L Rev 75, 88-91 (2007); 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).

cluding how to respond to “disability” 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.¹⁰ 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.¹¹

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 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 should therefore 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 each, 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 accomplishment. But we ought to know precisely what the model can and cannot accomplish.¹² Then more can be done. We might achieve a sophisticated picture of the model’s interaction with general norma-

¹⁰ See, for example, Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 Va L Rev 397, 436–48 (2000); 29 CFR § 1630.2 (2006) (defining “regarded as” disabled for ADA purposes). An affiliated concept is the “civil rights model” of disability policy, distinguished below in Part I.C.

¹¹ 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 the text accompanying notes 93–95.

¹² There is a connection here to 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 text accompanying notes 105–06.

tive 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 may help suggest a class of decisionmakers different from the group that other perspectives suggest. This 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 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 genetic screening techniques, the increase in cochlear implant use, and the organization of sign language communities.¹³ 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 anti-subordination and human capabilities versions. Important work on disability has been done within the egalitarian tradition, which is understandable considering the connection to race and gender studies.¹⁴ 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

¹³ See Parts II.A–B. The capitalized term "Deaf" refers to a cultural movement; "deaf" refers to an individual trait.

¹⁴ See note 121 (collecting sources); Part III.B.3.

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.

I. SOCIAL MODEL BASICS

No restatement of the social model can satisfy everyone. It has no natural form 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 physical or mental impairments 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 that a disabling environment is more easily 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

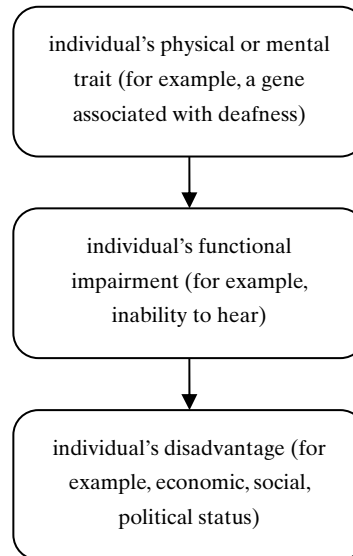
*What is at stake here is the issue of causation.*¹⁵

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.¹⁶

¹⁵ Oliver, *The Politics of Disablement* at 11 (cited in note 2).

¹⁶ Recent restatements of the social model in disabilities legal scholarship include 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); Bagenstos, 86 Va L Rev at 426–30 (cited in

FIGURE 1
A MEDICAL MODEL OF DISABILITY



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.¹⁷ 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.¹⁸ Descriptions of the medical model often include a subordination theme as well. Inspired by Talcott Parsons’s

note 10). A forerunner is Jacobus tenBroek, *The Right to 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 causing disadvantage).

Salient nonlegal descriptions include Colin Barnes, *The Social Model of Disability: A Sociological Phenomenon Ignored by Sociologists?*, in Tom Shakespeare, ed, *The Disability Reader* 65, 65 (cited in note 2); Silvers, *Formal Justice* at 74–76 (cited in note 9); Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* 23, 35–45 (Routledge 1996); Oliver, *The Politics of Disablement* at 11 (cited in note 2) (adopting the UPIAS definition of disability). See also Ron Amundson, *Disability, Handicap, and the Environment*, 23 J Soc Phil 105, 109–10 (1992) (adding the importance of “a particular goal”); 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).

¹⁷ See Michael Oliver, *Understanding Disability: From Theory to Practice* 32 (St Martin’s 1996); Claire H. Liachowitz, *Disability as a Social Construct: Legislative Roots* 12 (UPenn 1988).

¹⁸ See 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 disability benefits in the social security system as based on the “medical/charity paradigm”).

notion of the “sick role” in Western society,¹⁹ 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.²⁰ 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.²¹ Thus the medical model might portray implicit premises in need of scrutiny, rather than a competing intellectual position.

Key to the social model is a distinction between personal impairments and disability.²² 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.²³ Hence 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.²⁴ But their messages are similar.²⁵ Because social set-

¹⁹ See Talcott Parsons, *The Social System* 429–79 (Glencoe 1951); Talcott Parsons, *The Sick Role and the Role of the Physician Reconsidered*, 53 *Health & Socy* 257, 261–62, 266–77 (1975) (suggesting the power inequality of the typical doctor/patient relationship).

²⁰ 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 (JAI 2001); Mark Priestley, *Constructions and Creations: Idealism, Materialism and Disability Theory*, 13 *Disability & Socy* 75, 82–83 (1998). See also Sharon Barnartt, *Using Role Theory to Describe Disability*, in Barnartt and Altman, 2 *Research in Social Science and Disability* 53, 58–68 (discussing disability as a master status); Gerben DeJong, *The Movement for Independent Living: Origins, Ideology and Implications for Disability Research*, in Anne Brechin, Penny Liddiard, and John Swain, eds, *Handicap in a Social World* 239, 244–47 (Hodder and Stoughton 1981) (describing “the impaired role” of permanent dependency).

²¹ See, for example, Stein, 95 *Cal L Rev* at 86 (cited in note 9); Pfeiffer, *The Conceptualization of Disability* at 31 (cited in note 20); Gary L. Albrecht, *The Disability Business: Rehabilitation in America* 67–68 (Sage 1992) (criticizing the influence of the medical model on the rehabilitation industry).

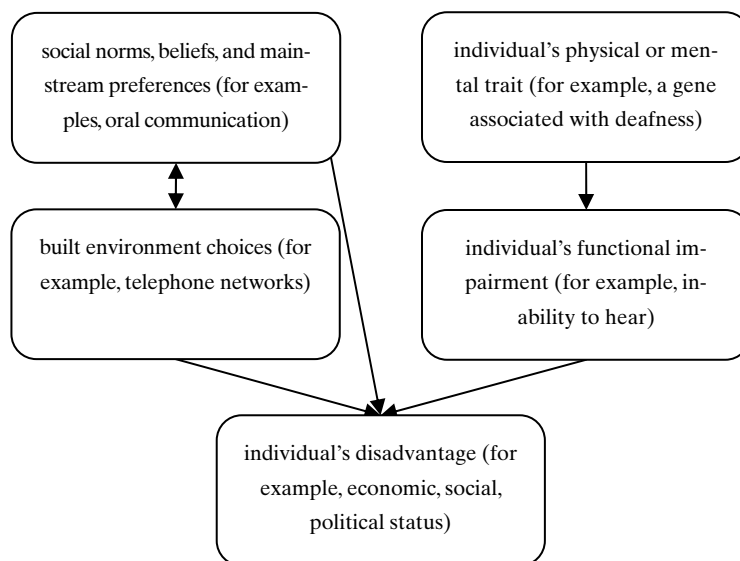
²² See, for example, Silvers, *Formal Justice* at 53–56 (cited in note 9); Oliver, *Understanding Disability* at 32–33 (cited in note 17); Oliver, *The Politics of Disablement* at 10–11 (cited in note 2); Liachowitz, *Disability as a Social Construct* at ch 1 (cited in note 17).

²³ 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.2.

²⁴ See Pfeiffer, *The Conceptualization of Disability* at 32–34 (cited in note 20).

tings change over time and space, disability is not an entailment of impairment but at least sometimes an artifact of environment.²⁶ These settings are generated in part by the choices of others.

FIGURE 2
A SOCIAL MODEL OF DISABILITY



The concept is almost invariably illustrated with architectural barriers faced by wheelchair users.²⁷ It is one thing to be unable to walk. It is quite another matter to be unable to enter a building unas-

²⁵ See Priestley, *Constructions and Creations* at 76–82, 89–90 (cited in note 20) (outlining four approaches among British and American scholars with an “individual-social dimension and [a] materialist-idealist dimension”).

²⁶ On cultural contingency, see 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); 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, 48–49 (Longman 1996); Ida Nicolaisen, *Persons and Nonpersons: Disability and Personhood among the Punah Bah of Central Borneo*, in Benedicte Ingstad and Susan Reynolds Whyte, eds., *Disability and Culture* 38, 44–46 (California 1995) (explaining that the Punah 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); Aud Talle, *A Child Is a Child: Disability and Equality Among the Kenya Maasai*, in Ingstad and Whyte, eds., *Disability and Culture* 56, 56–69 (finding no disfavored category of “disabled” among the Maasai, although certain impairments and deformity are associated with divine punishment or curse).

²⁷ See, for example, Crossley, 75 *Notre Dame L Rev* at 654 (cited in note 9); Minow, *Making All the Difference* at 12 (cited in note 16).

sisted because the architect preferred stairs to ramps. Walkers might find stairs aesthetically pleasing, and new technology may enable stair-climbing by nonwalkers.²⁸ But for most wheelchair users today, stairs are no different from walls while most walkers are 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 prevailing method of communication (for example, spoken word as opposed to written English as opposed to Braille as opposed to sign language). It might even be controversial to use the word “impairment” and its connotation of inferiority. “Trait” better fits the social model’s broadest implications.²⁹

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.³⁰ Yet Groce’s sources indicate that many or most hearing inhabitants became bilingual in spoken English and a form of sign language.³¹ 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.³² 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

²⁸ 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 (visited Sept 2, 2007). Whether stairs are cheaper than ramps in a particular setting is another matter.

²⁹ 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).

³⁰ See Nora Ellen Groce, *Everyone Here Spoke Sign Language: Hereditary Deafness on Martha’s Vineyard* 3 (Harvard 1985) (explaining that 1 in every 155 people were born deaf on Martha’s Vineyard in the nineteenth century, as opposed to 1 in every 5,728 people for the entire country during the same period).

³¹ See *id.* at 3, 53, 93.

³² 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.

shows the absence of a conventional division between groups, given the right social conditions.

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 different types of environmental factors in causing disadvantage. 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 compared to individual traits.³³ Model users are not locked into claiming that social setting overwhelms individual impairment in causing disadvantage. Many forces may be at work in disadvantage and they will shift over time. The effect of this often complex arrangement of causal forces will also depend on individual goals as well as capacities. Perhaps there is no “disadvantage” when an impairment or environmental barrier is irrelevant to a person’s goals. Moreover, one must select a metric for the importance of causal forces and a way to assess the relevance of omissions. With so many factors and judgment calls, substantial disagreement is inevitable. A focus on environmental factors is not the obvious result—unless a normative framework is operating in the background, a point to which I will return.

In any case, 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.³⁴ It 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 human-

³³ See Wasserman, *Philosophical Issues* at 225–28 (cited in note 11) (recognizing the variety of factors and distinguishing between causes and conditions of disability).

³⁴ See Shelley Tremain, *On the Government of Disability*, 27 *Soc Theory & Prac* 617, 630 (2001) (asserting that 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 to include being regarded as having an impairment); *Sutton v United Air Lines, Inc.*, 527 US 471, 489–92 (1999).

made 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 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 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 environmental 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.³⁵ 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

³⁵ Oliver, *Understanding Disability* at 32–33, 35 (cited in note 17). Earlier efforts include Irving K. Zola, *Missing Pieces: A Chronicle of Living with a Disability* 240–46 (Temple 1982) (referring to the process society must go through to come to terms with the disabilities it creates); 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 that can be eliminated if attitudes develop in certain ways).

be ameliorated, but not eliminated, by adjustments to environments.³⁶ 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.*³⁷

For all its conceptual potency, or perhaps because of it, the social model has attracted challenges. One might have expected them 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 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 potent, 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 environment.³⁸ Furthermore, the degree of this independent effect is related to the state of technology. It could be that at time 1 a physical or mental trait is independently

³⁶ See Jonathan Glover, *Choosing Children: Genes, Disability and Design* 6–8 (Oxford 2006); Stein, 153 U Pa L Rev at 602 (cited in note 16) (“There are some workers with disabilities whose impairments cannot be ameliorated through reasonable (or even extra-reasonable) accommodations.”); Crossley, 74 Notre Dame L Rev at 657–58 (cited in note 9); Gareth Williams, *Theorizing Disability*, in Albrecht, ed., *Handbook of Disability Studies* 123, 135 (cited in note 11) (criticizing the strongest instantiations of the social model).

³⁷ 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).

³⁸ See generally Tom Shakespeare and Nicholas Watson, *The Social Model of Disability: An Outdated Ideology?*, in Barnartt and Altman, eds., *2 Research in Social Science and Disability* 9 (cited in note 20). See also 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). A similar logic, pointing in a different direction, is the claim that traits can generate unique experiences and valuable cultures.

disadvantageous, while at time 2 inexpensive personal-assistance 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 impairment related disadvantage is socially constructed, now and forevermore.

This criticism is empirical. It aims at accuracy in 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.” There is a class of people to whom the model will not attend but who nonetheless suffer from a physical or mental trait.³⁹

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 architecture and 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 environmental factors that contribute to disadvantage more than occasionally, it 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,”⁴⁰ he concedes that “the social model is not an attempt to deal with the personal restric-

³⁹ See Shakespeare and Watson, *The Social Model of Disability* at 16 (cited in note 38) (worrying that the model’s focus might distract us from preventing impairment).

⁴⁰ Oliver, *Understanding Disability* at 35 (cited in note 17).

tions of impairment.”⁴¹ 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 much attention. Social model adherents are often vague about which notion of “disadvantage” or “the problem of disability” they are interested in.⁴² 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.⁴³ Obviously the social model targets bad consequences. But which?

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 human necessities.⁴⁴ Second, model users might view disadvantage in a relative sense. There is more than one available baseline, however. The basis for comparison

⁴¹ Id at 38. See also id at 41–42.

⁴² See, for example, id at 32 (referring to “the problem” of disability); Amundson, 23 J Soc Phil at 108–09 (cited in note 16) (concentrating on lost opportunities to construct life plans); UPIAS Commentary at 14 (cited in note 1) (referring to “the disadvantage or restriction of activity caused by a contemporary social organisation”).

⁴³ See Michael E. Monbeck, *The Meaning of Blindness* 59–63 (Indiana 1973) (tracing the connection between blindness and mysteriousness in Western culture). But see Silvers, *Formal Justice* at 56–59 (cited in note 9) (describing a “moral model” of disability).

⁴⁴ See Part III.B.3.

could be the human species norm,⁴⁵ or a similarly situated human being the same in every way except for the trait in question, or except for stigmatizing social factors, or something else.⁴⁶ 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 draw 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*.⁴⁷ 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.⁴⁸) The lesson is that a person might be disadvantaged in the two relative senses just noted without falling into an absolute state of disadvantage.⁴⁹ These options begin to suggest the normative judgments that surround—and are not made by—a social model of disability.

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; 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

⁴⁵ 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, 232–38 (2006) (following the Rawlsian, normal-species functioning theory of Norman Daniels, *Just Health Care* 27–28 (Cambridge 1985)).

⁴⁶ See Wasserman, *Philosophical Issues* at 226–27 (cited in note 11).

⁴⁷ 458 US 176 (1982).

⁴⁸ See *id.* at 184–86, 189, 198–204, 209–10 (interpreting the statutory entitlement to a “free appropriate public education” from participating states), 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).

⁴⁹ Conversely, it seems possible for a person to be in a terrible state without being much worse off on account of a personal trait (for example, mildly impaired, severely impoverished children).

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 subordination. The only point is that these two causes of disadvantage will often be impossible to completely separate.⁵⁰

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 of the object.”⁵¹ 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.⁵² But 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

⁵⁰ 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?

⁵¹ Tremain, 21 *Soc Theory & Prac* at 621 (cited in note 34) (emphasis omitted). See also Carol Thomas and Mairian Corker, *A Journey around the Social Model*, in Mairian Corker and Tom Shakespeare, eds, *Disability/Postmodernity: Embodying Disability Theory* 18, 19 (Continuum 2002); Part III.A.1 (discussing relevance judgments and the connection to norms).

⁵² See Shelley Tremain, *On the Subject of Impairment*, in Corker and Shakespeare, eds, *Disability/Postmodernity* 32, 41–42 (cited in note 51) (noting that social modelists do not treat race as an impairment).

insofar as both impairment and disability are socially constructed, disabilities scholarship might miss something important.⁵³ 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 significant 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.

C. Policy Correlations

*Differential treatment becomes ... a problem for which all onlookers are responsible.*⁵⁴

Does the social model recommend social change? Many scholars seem to think so. In the academic literature, prescriptions for environmental restructuring regularly follow discussions 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.⁵⁵ The social

⁵³ See, for example, Shakespeare and Watson, *The Social Model of Disability* at 24 (cited in note 38) (“[W]e are all impaired.”) (emphasis omitted).

⁵⁴ Minow, *Making all the Difference* at 119 (cited in note 16).

⁵⁵ See 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); Crossley, 74 Notre Dame L Rev at 659 (cited in note 9) (“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). See also Bagenstos, 114 Yale L J at 7–8 (cited in note 29) (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).

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.”⁵⁶ 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.”⁵⁷ As well, Sam Bagenstos and Margo Schlanger state that “[t]he social model’s policy implications primarily focus not on rehabilitation or charity but eliminating the physical, social, and attitudinal barriers that make some physical and mental impairments disabling.”⁵⁸

The pattern extends beyond the law journals. In a leading exploration of the subject, philosopher Anita Silvers asserts that “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.”⁵⁹ 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.”⁶⁰ The message of David Pfeiffer’s “disability paradigm” is the same.⁶¹ And the World Health Organization declares:

⁵⁶ Crossley, 74 *Notre Dame L Rev* at 658 (cited in note 9). See also Crossley, 35 *Rutgers L J* at 877–78 (cited in note 16).

⁵⁷ Stein, 95 *Cal L Rev* at 91, 93 (cited in note 9).

⁵⁸ Samuel R. Bagenstos and Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 *Vand L Rev* (forthcoming 2007). See also Satz, *A Jurisprudence of Dysfunction* at 238–39 (cited in note 45) (“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.”); Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 *Harv CR–CL L Rev* 141, 148–49 (2005); Bagenstos, 114 *Yale L J* at 12 (cited in note 29) (“[T]he proper response [under this view] is civil rights legislation.”).

⁵⁹ Silvers, *Formal Justice* at 85 (cited in note 9). See also *id.* at 74.

⁶⁰ Oliver, *Understanding Disability* at 37 (cited in note 17) (stressing political empowerment as the engine of change).

⁶¹ Pfeiffer, *The Conceptualization of Disability* at 46 (cited in note 20). See also Amundson, 23 *J Soc Phil* at 113 (cited in note 16).

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.⁶²

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 remaining defenses to a demand for environmental revision.⁶³ 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.⁶⁴

⁶² WHO, *International Classification of Functioning, Disability, and Health* at 20 (cited in note 8) (emphasis omitted).

⁶³ See Part III.A.2 (discussing the movement and social construction arguments).

⁶⁴ In 2004, about 3.1 percent of the U.S. 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).

A. Technology

*For centuries, people believed that only a miracle could restore hearing to the deaf.*⁶⁵

*Preimplantation diagnosis provides an alternative way forward.*⁶⁶

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 then delivered to the auditory nerve. The stimulation of the auditory nerve allows the user to experience representations of sound and might help the user develop spoken language ability. The device has been implanted in an estimated 22,000 adults and 15,000 children.⁶⁷ In 2000, the Food and Drug Administration lowered the acceptable age for implantation of one such device to twelve months old.⁶⁸

These implants are not perfect. They cost thousands of dollars, there are efficacy problems, and surgery of any kind entails risks.⁶⁹ 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.⁷⁰ Doubts about the

⁶⁵ Philipos C. Loizou, *Mimicking the Human Ear*, IEEE Signal Processing Magazine 101, 102 (Sept 1998).

⁶⁶ Peter Braude, et al, *Preimplantation Genetic Diagnosis*, 3 Nature Reviews Genetics 941, 942 (Dec 2002).

⁶⁷ 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 Sept 2, 2007). See generally National Institute on Deafness and Other Communication Disorders, *Cochlear Implants*, online at <http://www.nidcd.nih.gov/health/hearing/coch.asp> (visited Sept 2, 2007).

⁶⁸ See FDA's *Report on New Health Care Products Approved in 2000*.

⁶⁹ 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).

⁷⁰ 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

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 child's birth and they might prefer that their child attempt to develop some spoken language ability. 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.⁷¹ Eggs are fertilized in a laboratory, embryos are grown to about eight cells, and one cell is removed for 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.⁷² Standard practice is to discard any embryos judged "affected" by the conditions for which PGD has been requested, and then implant or cryopreserve any "unaffected" embryos. Postfertilization genetic testing is not so new. But selective abortion might be more problematic morally or as a matter of health than discarding affected embryos that never enter a human womb. When successful, PGD and selective implantation can 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 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.⁷³ 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.

Padden and Tom Humphries, *Deaf in America: Voices from a Culture* 2–11 (Harvard 1988) (explaining that "one of the primary characteristics of [Deaf culture] is its language").

⁷¹ See Karen E. Adams, *Ethical Considerations of Applications of Preimplantation Genetic Diagnosis in the United States*, 22 *Med & L* 489, 490–91 (2003).

⁷² 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).

⁷³ See Simo Vehmas, *Live and Let Die? Disability in Bioethics*, 1 *New Rev Bioethics* 145, 153–55 (2003) (raising ethical concerns about genetic testing).

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.”⁷⁴

B. Sorting

*[W]e hold in common this resentment of efforts to fix us.*⁷⁵

*To create . . . a world of sign language and signing culture.*⁷⁶

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.⁷⁷ ASL is central to the Gallaudet community, which was a departure from the policy of certain American educators in the Progressive Era who suppressed sign language at schools for the deaf.⁷⁸ 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.”⁷⁹ Many Gallaudet students, faculty, staff, and graduates consider sign language a central component of a visually centered Deaf culture.⁸⁰ 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.

⁷⁴ See 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).

⁷⁵ I. King Jordan, *The Gallaudet Experience: Deafness and Disability*, 120 *Pubs Mod Lang Assn* 625, 626 (2005).

⁷⁶ 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 May 10, 2007) (setting out the mission statement of the developers of Laurent, South Dakota).

⁷⁷ See Albert W. Atwood, *Gallaudet College: Its First One Hundred Years* ch 3 (Intelligencer 1964).

⁷⁸ See Douglas Baynton, *Forbidden Signs: American Culture and the Campaign against Sign Language* 4–6, 15–16 (Chicago 1996) (outlining the history of oralism and opposition to it in Deaf culture).

⁷⁹ Jordan, *The Gallaudet Experience* at 625 (cited in note 75).

⁸⁰ See Padden and Humphries, *Inside Deaf Culture* at 2–5 (cited in note 70); Diana Jean Schemo, *Turmoil at Gallaudet Reflects Broader Debate over Deaf Culture*, *NY Times* A9 (Oct 21, 2006).

alone.⁸¹ Deaf ASL users often do not consider themselves disabled, any more than a French tourist in Maine considers herself disabled.

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.⁸² Gallaudet had never had a deaf president and the protesters believed it was time for the university to illustrate that deaf Americans are suited for 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.⁸³ Yet Gallaudet represents moderation when other alternatives are considered. For students, the experience is partly temporary. Nor is anyone in power 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.⁸⁴

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.⁸⁵ 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. 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

⁸¹ See Padden and Humphries, *Deaf in America* at 7–9 (cited in note 70). 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).

⁸² See generally Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 75–85 (Three Rivers 1993).

⁸³ 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 80).

⁸⁴ The Gallaudet Research Institute estimates that 600 thousand people report themselves as “deaf,” fewer than half of whom are under the age of 65. Millions report having “a lot of trouble” or “a little trouble” hearing. See Gallaudet Research Institute, *How Many Deaf People Are in the United States?* (Mar 2, 2007), online at <http://gri.gallaudet.edu/Demographics/deaf-US.php> (visited Sept 2, 2007).

⁸⁵ A summary of their efforts is available online at <http://www.deafweekly.com/laurent.htm> (visited Sept 2, 2007).

become clear.⁸⁶ Religious, racial, and other groups understand this and the leverage that a local government can provide.⁸⁷ 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. 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.”⁸⁸ The plan was thus 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.⁸⁹

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. Neither cochlear implants nor genetic screening is mandated or heavily regulated in terms of the reasons for 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 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

⁸⁶ 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 (discussing signals for sorting).

⁸⁷ See, for example, Samaha, 2005 Sup Ct Rev at 151–56 (cited in note 86) (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).

⁸⁸ Groce, *Everyone Here Spoke Sign Language* at 94 (cited in note 30).

⁸⁹ See Melanie Brandert, *Laurent Eyes Small Towns*, Sioux Falls Argus Leader 1A (Oct 28, 2006).

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 suggests 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 statements.

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 is relatively dark, 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 negligently driving a motorcycle, 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 for such embryos, you now 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 social response. 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 causation portrait.

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 impaired.⁹⁰ And forced segregation is less popular in the U.S. today,⁹¹ let alone coerced sterilization.⁹² 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

⁹⁰ 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” for being in a public place).

⁹¹ See, for example, the Individuals with Disabilities Education Act (IDEA), 20 USC § 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).

⁹² 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).

to “break the link between causation and responsibility.”⁹³ 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.”⁹⁴ 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.⁹⁵ The degree to which egalitarian or any other moral theory obligates society to alleviate this sort of disadvantage is explored below.

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. The Personal and the Political

*Disability is something imposed on top of our impairments.*⁹⁶

To those steeped in disability scholarship, the analysis thus far might seem strangely decoupled from the 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.

⁹³ Wasserman, *Philosophical Issues* at 229 (cited in note 11).

⁹⁴ *Id.*

⁹⁵ Compare *id.* at 239, 244 (noting the problems of costs and tradeoffs for egalitarianism).

⁹⁶ UPIAS Commentary at 14 (cited in note 1) (emphasis added).

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 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.⁹⁷ 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 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,⁹⁸ while his forerunners had identified social causes of disability to understand the appropriate remedies.⁹⁹ In this way, the model is inescapably normative.

⁹⁷ See Wasserman, *Philosophical Issues* at 225–26 (cited in note 11) (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* 23, 41 (Cambridge 2001)); Barbara M. Altman, *Disability Definitions, Models, Classification Schemes, and Applications*, in Albrecht, ed, *Handbook of Disability Studies* 97, 112 (cited in note 11) (describing information-gathering and disseminating purposes of shifting WHO definitions of disability).

⁹⁸ See Oliver, *The Politics of Disablement* at 7, 40 (cited in note 2).

⁹⁹ 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.”).

But this does not undercut the claim here—that no policy response is indicated 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. We are left without guidance on which frameworks are connected to the social model’s causation story (which frameworks make that story relevant) and on which framework it 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.¹⁰⁰ Similar notions were percolating elsewhere,¹⁰¹ 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. This conception seemed confining: it might direct any disability policy away from environmental revision and 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.¹⁰² This was arguably critical to the

¹⁰⁰ See, for example, Pfeiffer, *The Conceptualization of Disability* at 29–30 (cited in note 20).

¹⁰¹ See Altman, *Disability Definitions* at 111–13 (cited in note 97) (outlining disability models that incorporated societal elements); David L. Braddock and Susan L. Parish, *An Institutional History of Disability*, in Albrecht, ed., *Handbook of Disability Studies* 11, 44 (cited in note 11).

¹⁰² See Wasserman, *Philosophical Issues* at 224–25 (cited in note 11).

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.

This goal has been significant for other movements. Ann Oakley recharacterized gender roles as contingent social constructs, like caste, to repudiate naturalistic defenses of standard operating procedures.¹⁰³ There is also an association with studies of race as socially constructed rather than biologically meaningful.¹⁰⁴ Whether or not race is a biologically meaningful category, one can view racism as a social process that is not “caused” by physical traits but by injurious reactions to such traits. In addition, 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. This version of rights was man-made, norm-laden, and government-backed.¹⁰⁵ At the same time, the realists were not under the impression that eliminating a status quo bias 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.”¹⁰⁶

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.¹⁰⁷ One faction, including the Disability

¹⁰³ See Oakley, *Sex, Gender, and Society* at 204 (cited in note 23).

¹⁰⁴ See, for example, Pierre L. van den Berghe, *Race and Racism: A Comparative Perspective* 9 (Wiley 1967).

¹⁰⁵ 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 Polit 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 Aff 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.

¹⁰⁶ Cohen, 13 Cornell L Q at 14. See also Hale, 38 Polit Sci Q at 471.

¹⁰⁷ See Ken Davis, *On the Movement*, in Swain, et al, eds, *Disabling Barriers* 285, 288–91 (cited in note 38) (detailing the rise of different disability groups and movements in 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 disabled people in the 1970s and 1980s); 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.); Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* 10–14, 24–27, 34–42

Alliance, sought an income support entitlement from the government. Another faction, spearheaded by the Union of the Physically Impaired Against Segregation (UPIAS), considered that effort either inadequate or misguided. UPIAS was formed in part to help people exit residential care facilities.¹⁰⁸ 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: “[I]t is society which disables physically impaired people,” the document asserts, and it goes on to distinguish “the physical impairment” from “the social situation, called ‘disability’, of people with such impairment.”¹⁰⁹

Given this history, it is not surprising that original proponents of the social model supported social reconstruction to ameliorate disadvantage. This 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.¹¹⁰

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 causation story has a positive emotional

(Temple 1984) (discussing the social movement in the U.S. and connecting it to race-based civil rights efforts).

¹⁰⁸ See, for example, Davis, *On the Movement* at 289 (cited in note 107). A parallel effort for independent living was emerging in Berkeley, California. See Scotch, *From Good Will to Civil Rights* at 36 (cited in note 107); DeJong, *The Movement* at 442–47 (cited in note 20).

¹⁰⁹ 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 26).

¹¹⁰ 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 18) (noting that Congress’s response to discrimination against disabled people was modeled on previous civil rights laws).

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.”¹¹¹ Second, the model delivers a simple message for interest group organizing. 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.¹¹² 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.¹¹³

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.¹¹⁴ It moved from interest group device to scholar’s 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.

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

¹¹¹ Crow, *Including All* at 56 (cited in note 37). See also Shakespeare and Watson, *The Social Model* at 9 (cited in note 38).

¹¹² See Shakespeare and Watson, *The Social Model* at 11 (cited in note 38); 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 38) (“[D]isabled people, whatever their impairments, share many problems.”).

¹¹³ See Crow, *Including All* at 57 (cited in note 37); Oliver, *The Politics of Disablement* at 38–39 (cited in note 2).

¹¹⁴ See Catherine J. Kudlick, *Disability History: Why We Need Another “Other,”* 108 Am Hist Rev 763, 763–64 (2003) (describing the growth of disability studies); Simi Linton, *Claiming Disability: Knowledge and Identity* 118–19 (NYU 1998) (outlining the various disciplines incorporating disability studies), 155 (“[D]isability studies is an intellectual as well as political endeavor.”).

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,¹¹⁵ whether “accommodation” is meaningfully different from other antidiscrimination norms,¹¹⁶ and whether transfer payments are an acceptable method of remedying trait-related disadvantage as opposed to social restructuring.¹¹⁷ 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.¹¹⁸ 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.”¹¹⁹

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. And this contested territory might change over time. If all points favoring social change must be granted, and the only issue left open is causation, then the social model can conclude the

¹¹⁵ See Bagenstos, *The Future of Disability Law* at 4–6 (cited in note 10).

¹¹⁶ See, for example, Stein, 153 U Pa L Rev at 583 (cited in note 16); Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv L Rev 642, 644–46 (2001).

¹¹⁷ See 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).

¹¹⁸ General normative frameworks are explored in Part III.B.

¹¹⁹ Some writers might use the term “social model” in a way that bundles together causation observations with a normative commitment to social change. Even when such definitional bundling is obvious to readers, 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.

argument. This might be the sense of many in the disability rights movement today; and perhaps in the 1970s it appeared as if the only resistance to social change was widespread misunderstanding of how disadvantage comes about. But the policy issues are more complicated than that—especially when environmental change requires resources that are in high demand. For those outside the disability rights movement, the role of social forces in the production of disadvantage will not be the only outstanding issue. Often the right principles for decision will be open for discussion. 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.*¹²⁰

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.¹²¹ 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 normative conversation. And it is not as if disability studies scholars outside of the law schools have filled every gap.

¹²⁰ UPIAS Commentary at 13 (cited in note 1).

¹²¹ 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 Amartya Sen); Crossley, 35 Rutgers L J at 880–84 (cited in note 16) (referencing John Rawls and Ronald Dworkin); Bagentos, 86 Va L Rev at 401–02, 445–66 (cited in note 10) (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 generally Mark S. Stein, *Distributive Justice and Disability: Utilitarianism against Egalitarianism* (Yale 2006) (promoting utilitarianism).

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 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.¹²² The results are sometimes unexpected.

1. Libertarian.

Among other frameworks, 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.¹²³ 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 many actions premised on that plurality of visions, depending on precisely how the boundaries of “harm” and “cause” are worked out. Preservation of a properly defined individual liberty can be described as a deontological side-constraint that needs no (in fact it defies) utilitarian justification regarding any collective good.¹²⁴ 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,

¹²² 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, losses, and available alternatives. Each of these questions is in play below.

¹²³ 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).

¹²⁴ See, for example, Nozick, *Anarchy* at 29–35 (cited in note 123).

against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”¹²⁵

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 state¹²⁶). This public/private distinction was not so prominent for Mill, who expressed fears about oppressive social norms.¹²⁷ 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”¹²⁸), 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 is also possible for squishy classical liberals—without dropping suspicions regarding the motives, competence, or efficacy of officials insulated from market pressures.¹²⁹ 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.¹³⁰ Otherwise, a minimal state is the norm.

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.¹³¹ Regardless of whether disabled people are now in an unjustly disadvantaged position, many libertarians will doubt that the

¹²⁵ Mill, *On Liberty* at 68 (cited in note 123).

¹²⁶ See Cohen, 13 Cornell L Q at 11 (cited in note 105); Hale, 38 Polit Sci Q at 470–73 (cited in note 105) (relating the law of property to economic ordering).

¹²⁷ See Mill, *On Liberty* at 68 (cited in note 123) (referring to “the moral coercion of public opinion”).

¹²⁸ Arneson, 111 Ethics at 41 (cited in note 123).

¹²⁹ 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.”). But see Fried, 32 Phil & Pub Aff at 70 (cited in note 105) (critiquing separation of self and resource ownership via Locke’s proviso).

¹³⁰ See Nozick, *Anarchy* at 151–53, 173, 230–31 (cited in note 123).

¹³¹ See Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* 482–88 (Harvard 1992).

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 for 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—to the extent that the purchaser or his/her contract for private insurance will cover the costs. Yet tax-paid subsidies for any of these activities seem extremely unlikely. Furthermore, doubts about the efficacy and efficiency of regulation might be supported by empirical studies in employment. They suggest that certain ADA employer mandates have at best not changed the employment prospects of impaired people, and might have worsened them.¹³² Now, such data do not speak to other disability legislation; it might be that other 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.¹³³ 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

¹³² See Bagenstos, 114 *Yale L J* at 19–22 (cited in note 29) (collecting studies); 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) (distinguishing accommodation mandates from other mandates and connecting negative employment effects to whether the ADA was an innovation compared to prior state law). Compare 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 Association Annual Meetings Paper No 62, 2004), online at <http://law.bepress.com/cgi/viewcontent.cgi?article=1078&context=alea> (visited Sept 2, 2007) (finding some positive effect on educational participation in three states that had no pre-ADA employment discrimination protection for disability). It should be noted that tracking effects on people who are “disabled” as defined by the ADA is extremely difficult.

¹³³ See text accompanying notes 105–06106.

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.¹³⁴

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 rest. First is the possibility of rectifying past injustice, even across generations. The idea can be traced to Aristotle’s corrective justice,¹³⁵ whereby (identifiable) wrongdoers must correct wrongs they have done to (identifiable) victims commensurate with the injury caused.¹³⁶ Some forms of oppression suffered by impaired people qualify for such correction. Acts of unjustifiable oppression against impaired people are no doubt 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 in

¹³⁴ See Kelman, *Strategy or Principle?* at 10 n 8 (cited in note 117). 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 121); (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.

¹³⁵ 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 latter with merit).

¹³⁶ 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).

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.¹³⁷ Another division might occur over the propriety of collective responsibility of any kind.¹³⁸ 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.¹³⁹ That said, it is not hard to imagine a specification of corrective justice reaching groups and “their” histories. Nozick’s rectification principle, which turns on the historical propriety of present entitlements, seems to allow for it.¹⁴⁰

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.¹⁴¹ Retrofitting is typically expensive, but maybe

¹³⁷ Compare Wyman, *Is There a Moral Justification* at 22–29 (cited in note 136) (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).

¹³⁸ See Ellen Frankel Paul, *Set-Asides, Reparations, and Compensatory Justice*, in John W. Chapman, ed., *NOMOS XXXIII: Compensatory Justice* 97, 101–02, 114–15, 120–22 (NYU 1991) (detailing and criticizing different arguments on group compensation).

¹³⁹ See Jeremy Waldron, *Redressing Historic Injustice*, 52 *U Toronto L J* 135, 152–60 (2002) (discussing suppression of historic injustice by changed circumstances).

¹⁴⁰ See Nozick, *Anarchy* at 150–53 (cited in note 123). See also Crossley, 35 *Rutgers L J* at 884–88 (cited in note 16) (discussing accommodation for people with disabilities as an implication of corrective justice for exclusionary social structures).

¹⁴¹ See Silvers, *Formal Justice* at 74 (cited in 9) (“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 compare Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *Tex L Rev* 1705, 1718 (1999)

past decisions to ignore the interests of wheelchair users missed 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 impairment-related disadvantage, there is still a way in which the social model might be relevant. Libertarian theory is designed to allow private charity.¹⁴² 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 causes. This seems especially likely if the best libertarian theory would demand a government remedy for disability, 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 pro bono resources are most appropriately targeted at disadvantage-causing social change. Any social reengineering that the disability rights lobby desires could be subsidized by private charity and comport with libertarian principles. Depending on the moral sensibilities of individual donors, the social model of disability might even make such objectives more appealing.

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 connection

(“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.”).

¹⁴² 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.

worth exploring runs through the notion of corrective justice, along with the possibility that individual charitable choices will be directed at social reengineering.

More certain is the perspective from which such difficult policy judgments must be made. It is not especially persuasive for disability rights advocates to demand 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 may sacrifice precision in exchange for general applicability. Yet they prompt an inclusive orientation toward the range of issues faced by a complex society with a multitude of competing visions and tradeoffs.

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.¹⁴³ 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).¹⁴⁴ Utility can be defined in more than one way, of course.¹⁴⁵ Bentham's hedonic utilitarianism was 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 val-

¹⁴³ See John Stuart Mill, *Utilitarianism* 8 (Longmans, Green 1897); Henry Sidgwick, 6 *The Methods of Ethics* 379–85 (MacMillan 1901); 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 J.J.C. Smart and Bernard Williams, eds, *Utilitarianism: For and Against* 3, 27–28 (Cambridge 1973) (noting the average versus total utility problem).

¹⁴⁴ 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 (Harvard 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.

¹⁴⁵ A quick summary is Goodin, *Utilitarianism as a Public Philosophy* at 13–14 (cited in note 143).

ued. And Harsanyi refused to count antisocial preferences such as sadism, envy, or malice.¹⁴⁶ 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 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.¹⁴⁷ 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 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.¹⁴⁸

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 their impairments by emotional acceptance, or by focusing on the positive, or by setting a

¹⁴⁶ See John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in Sen and Williams, eds, *Utilitarianism* 39, 56 (cited in note 144).

¹⁴⁷ The assumption is complicated by, for example, differing preferences, goods that cannot be individuated, and goods that depend on other goods or opportunities for their value.

¹⁴⁸ 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.

different baseline for judging new experiences;¹⁴⁹ that they lead lives no less fulfilling than others who are otherwise similarly situated; and that they would benefit no more than others from additional resources. Impairment might even be seen as “character building” and 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.¹⁵⁰

As best we can tell, adaptation varies with impairment. Mark Stein offers a potentially instructive division. He separates physical, emotional, and intellectual impairments.¹⁵¹ First, as to physical impairments such as quadriplegia, respondents often indicate lower happiness or life-satisfaction 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)¹⁵² and Table 2 (which has a larger sample and where the injuries occurred on average thirty-years earlier).¹⁵³ Second, different emotional problems appear to generate different happiness outcomes. Depression is almost by definition unhappiness, while schizophrenics will not necessarily report

¹⁴⁹ 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).

¹⁵⁰ 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* (forthcoming 2007) (cited in note 58). See also Daniel Gilbert, *Stumbling on Happiness* 103–04, 152–53 (Knopf 2006).

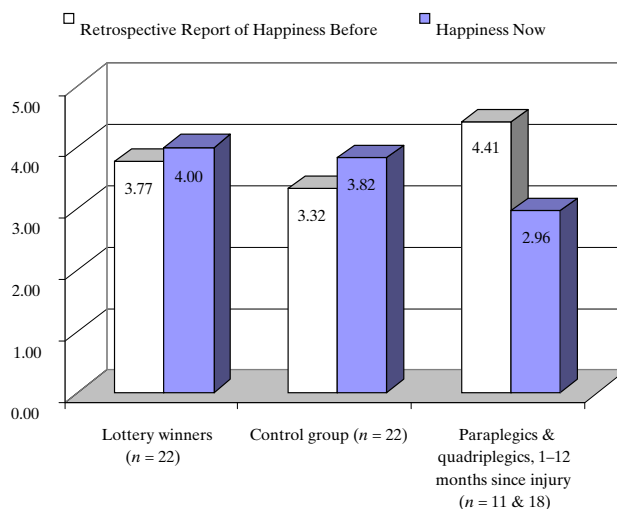
¹⁵¹ See Stein, *Distributive Justice* at 25–32 (cited in note 121).

¹⁵² 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 the *retrospective estimates* of the 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.

¹⁵³ 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 one hundred paraplegics and quadriplegics living in noninstitutional settings. The sample was over age forty, 90 percent 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 above but the other two are similar. Higher scores indicate higher life satisfaction on a scale of zero to eighteen. See *id.* at 1167. Statistical significance is not estimated by the authors in this study.

significantly lower happiness scores.¹⁵⁴ Third, intellectual impairments might not be associated with any reduction in happiness.¹⁵⁵ 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.”¹⁵⁶

TABLE 1
A SHORT-TERM SELF-REPORTED HAPPINESS STUDY



¹⁵⁴ See Stein, *Distributive Justice* at 30 (cited in note 121), citing H.T. Koivumaa-Honkanen, et al, *Correlates of Life Satisfaction among Psychiatric Patients*, 94 *Acta Psychiatrica Scandinavica* 372, 376 (1996).

¹⁵⁵ See Stein, *Distributive Justice* 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 & table 4 (1999) (noting difficulties in scoring for those with cognitive impairments).

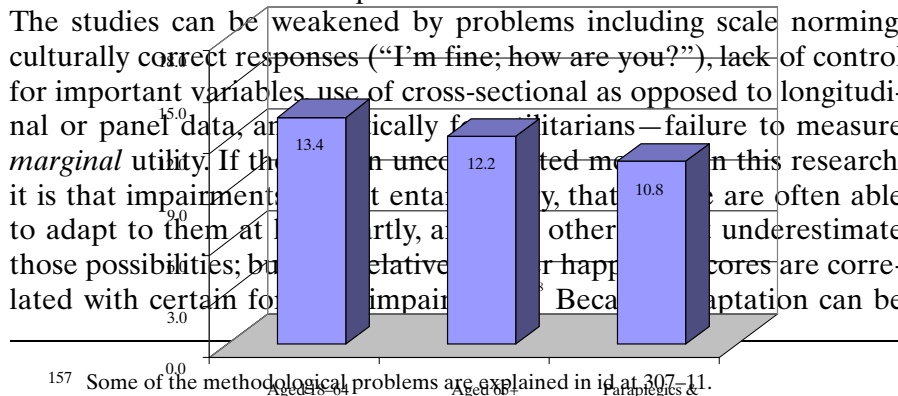
¹⁵⁶ Frederick and Loewenstein, *Hedonic Adaptation* at 312 (cited in note 150) (citations omitted).

TABLE 2
A LONG-TERM SELF-REPORTED HAPPINESS STUDY

(based on Mean Life Satisfaction Index-A scores)

Consumers of the adaptation literature must treat it with care.¹⁵⁷

The studies can be weakened by problems including scale norming, culturally 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, especially for utilitarians—failure to measure *marginal utility*. If the use of uncorrected means in this research, it is that impairment is not entailed by, that people are often able to adapt to them at least partly, and other people underestimate those possibilities; but relative happiness scores are correlated with certain forms of impairment. Because adaptation can be



¹⁵⁷ Some of the methodological problems are explained in id at 307–11.

¹⁵⁸ See 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 (visited Sept 2, 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, although 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 & figure 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 & table 2, 13 table 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 nonimpaired people). 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

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 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 co-workers might suffer nonfinancial welfare losses, too,¹⁵⁹ 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.¹⁶⁰

The second inquiry is about the form of any utilitarian policy response. Does the social model have any influence? A possibility is that people 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. 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.¹⁶¹ 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.¹⁶² In addition, if the applicable version of utilitarianism bars

between controls and an amalgamated class of respondents who were paralyzed, blind, hearing impaired, had a “deformed limb,” etc.).

¹⁵⁹ 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).

¹⁶⁰ See David A. Weisbach, *A Welfarist Approach to Disabilities* 18–19 (unpublished manuscript, 2007) (noting difficulty in ascertaining marginal utility rates).

¹⁶¹ 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 143). But he seems to have been guessing.

¹⁶² See I. Ville, J.-F. Ravaut, and Tetrafigap Group, *Subjective Well-Being and Severe Motor Impairments: The Tetrafigap Survey on the Long-Term Outcome of Tetraplegic Spinal Cord Injured 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); Schulz and Decker, 48 *J Personality & Soc Psych* at 1170 (cited in note 153) (statistically connecting the

consideration of 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.¹⁶³ 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. 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. How-

well-being of paraplegic and quadriplegic respondents to social support, social networks, and a sense of control).

¹⁶³ See Weisbach, *A Welfarist Approach* at 53–57 (cited in note 160) (posing solutions, such as in-kind benefits, commodity subsidies, and accommodations that are more attractive to only disabled people). See also Mark Kelman and Gillian Lester, *Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities* 10 (Harvard 1997). This opacity problem is not peculiar to impairment or disability; marginal utility is often difficult to observe and verify.

ever 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.¹⁶⁴

Such responses have at best a tenuous relationship to the social model of disability. The envisioned assistance involves mostly personalized 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 to benefit so few. Other 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.¹⁶⁵ 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 useful 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 which might seriously reduce an impaired individual's well-being, increase marginal utility, 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

¹⁶⁴ Moral outrage at any of these policy positions, it would seem, must be considered by utilitarians when calculating whether the policy helps maximize social welfare.

¹⁶⁵ See Pfeiffer, *The Conceptualization of Disability* at 41–42 (cited in note 20) (“[C]ivil rights are NOT dependent on available funding or even the appropriation of funds.”) (internal citations omitted); Barnes, *Theories of Disability* at 50, 56 (cited in note 26) (linking liberal utilitarianism to minority oppression and infanticide).

more in that they stress particular forms of equality over, or in addition to, individualism and private ordering or aggregate social welfare. Egalitarian theories are diverse in content,¹⁶⁶ 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.¹⁶⁷

Egalitarian normative frameworks speak to distributive justice. These claims are usually about results and 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.¹⁶⁸ 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.¹⁶⁹

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 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 deliberation is over and are roughly equal in their ability to participate in deliberations. Rawls projects certain outcomes from this hypothetical process, including the controversial assertion that economic inequalities would be tolerated only under narrow conditions.¹⁷⁰ There are ongoing debates regarding these conclusions and Rawls's decision to exclude severely impaired people from the hypothetical

¹⁶⁶ See Samuel Fleischacker, *A Short History of Distributive Justice* 9–10 (Harvard 2004).

¹⁶⁷ 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 55).

¹⁶⁸ See, for example, Fleischacker, *A Short History* at 122–23 (cited in note 166), citing Allen Buchanan, et al, *From Chance to Choice: Genetics and Justice* (Cambridge 2000) (supplying the idea that distributive justice may apply to genetic engineering); Daniels, *Just Health Care* at 23–27, 36–58 (cited in note 45) (connecting health care necessary to “species-typical normal functioning” with opportunities for life plans).

¹⁶⁹ See 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.”).

¹⁷⁰ 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).

parties in his original position.¹⁷¹ 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.

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.¹⁷² 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 co-

¹⁷¹ See John Rawls, *Political Liberalism* 183–85 (Columbia 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”).

¹⁷² See Sunstein, *The Partial Constitution* at 339–44 (cited in note 105) (stressing morally irrelevant differences and disadvantage on multiple dimensions of welfare); Cass R. Sunstein, *The Anticaste Principle*, 92 *Mich L Rev* 2410, 2411 (1994); 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); 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 Aff* 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).

hesion and order.¹⁷³ 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,¹⁷⁴ it resembles Rawls's notion of primary goods.¹⁷⁵ 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.¹⁷⁶ People may choose whether to exercise these opportunities. But everyone must have these opportunities before a social system is minimally just;¹⁷⁷ 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

¹⁷³ See Fiss, 5 Phil & Pub Aff at 151 (cited in note 172).

¹⁷⁴ 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, 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 170) (“[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.”).

¹⁷⁵ See Rawls, *A Theory of Justice* at 63–64, 90–95 (cited in note 171) (including the social basis of self-respect).

¹⁷⁶ But see Nussbaum, *Frontiers* at 172–73 (cited in note 174) (excepting dignity, children, and those with severe mental impairments, where actual functioning is the goal).

¹⁷⁷ See Nussbaum, *Women* at 71 (cited in note 174); Sen, *Inequality Reexamined* at 39 (cited in note 174).

defend as the measure of well-being without accounting for health, self-respect, political participation, and so on.¹⁷⁸ 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.¹⁷⁹ 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 judged unworthy of respect. The theory will not honor aspirations moderated in the face of unjustly oppressive circumstances, however defined.¹⁸⁰ 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 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 anti-

¹⁷⁸ See Sen, *Inequality Reexamined* at 31 (cited in note 174); Amartya Sen, *Equality of What?* 217 (Tanner Lecture on Human Values, Stanford 1979), online at <http://www.tannerlectures.utah.edu/lectures/sen80.pdf> (visited Sept 2, 2007).

¹⁷⁹ See Nussbaum, *Women* at 78–82 (cited in note 174) (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 174) (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. Id at 56–57.

¹⁸⁰ See Sen, *Inequality Reexamined* at 55 (cited in note 174); Nussbaum, *Women* at 136–43 (cited in note 174). On the problem of adaptive preferences, see Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* ch 3 (Cambridge 1983); Cass R. Sunstein, *Free Markets and Social Justice* 25–30 (Oxford 1997).

tlement to assistance is unrelated to a history of socially imposed oppression or even a contemporary social cause of this individual's or that 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 might not be able to assess condemnations and defenses of 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.¹⁸¹ Capabilities theorists understand that adverse social settings can prevent individuals from having real opportunity.¹⁸² 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

¹⁸¹ See Nussbaum, *Women* at 84–85 (cited in note 174) (defining "combined capabilities").

¹⁸² See *id.* at 84–86; Nussbaum, *Frontiers* at 167–68, 221–22 (cited in note 174) (discussing wheelchairs and noting hierarchy and stigma dynamics). See also *id.* at 169–70 (remarking on the importance of individualized care for mentally impaired people).

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. 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 could 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.*¹⁸³

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 decisionmakers 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.¹⁸⁴ 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 normative framework yields social change as the goal. Personalized medical services are rejected as the solution to disadvantage. 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

¹⁸³ UPIAS Commentary at 16 (cited in note 1) (referring to charity efforts).

¹⁸⁴ 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); Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 5 (Chicago 1994).

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.

This was an outcome hoped for by the disability rights community at 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.¹⁸⁵ More important, their mission and skills were not tailored to liberating social change. Once a commitment to environmental reengineering is made, that set of decisionmakers 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

¹⁸⁵ See Part III.A.2.

supersede other expertise and competing policy considerations. But these are issues at the margins. The key 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 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 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 unreflective reliance on an otherwise valuable intellectual contribution of the movement.