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GENERALIZING DISABLITY

*Michael Ashley Stein**

PROFILES, PROBABILITIES, AND STEREOTYPES. By *Frederick Schauer*. Cambridge: Harvard University Press. 2003. Pp. xiii, 359. $29.95.

INTRODUCTION

Published in 1949, Joseph Tussman and Jacobus tenBroek's article *The Equal Protection of the Laws*[1] has exerted longstanding influence on subsequent Fourteenth Amendment scholarship.[2] Insightfully, Tussman and tenBroek identified a paradox: although the very notion of equality jurisprudence is a "pledge of the protection of equal laws," laws themselves frequently classify individuals, and "the very idea of classification is that of inequality."[3] Notably, classification raises two sometimes concurrent varieties of inequality: over-inclusiveness and under-inclusiveness. Of these, over-inclusiveness is a more egregious equal protection violation due to its ability to "reach out to the innocent bystander, the hapless victim of circumstance or association."[4]

Despite this shortcoming of classification, Tussman and tenBroek objected to the process of classification only where the categories were either empirically unsustainable or based on legally proscribed characteristics.[5] The use of classification as a method of administrating

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This review is dedicated to the memory of Hugh Gregory Gallagher, accomplished disability rights activist (responsible for the Architectural Barriers Act of 1968, the first major civil rights legislation for people with disabilities), and disability historian (author of FDR'S SPLENDID DECEPTION, an account of how the president successfully hid his wheelchair use). Hugh was a kind, wise, and joyful friend, and is greatly missed.

1. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

2. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996), for instance, ranked the Tussman & tenBroek article as the fourteenth most cited law review article of all time.

3. Tussman & tenBroek, *supra* note 1, at 344.

4. *Id.* at 351.

5. *Id. passim.*

policy was not itself opposed by the authors, both of whom were distinguished civil libertarians.[6] According to Frederick Schauer's *Profiles, Probabilities, and Stereotypes* ("*Profiles*"),[7] this broad and appropriate acceptance of classification is in stark contrast to current mores, where decisions based on categories and generalizations — what Tussman and tenBroek called classifications — are frequently denigrated as stereotyping, or, even worse, profiling. In response to this now-prevalent sensibility, Schauer defends the morality of using generalizations as a means of mediating modern-day life. He further argues that the use of classifications is inevitable and can also be desirable.

Part I of this Review sets forth Schauer's definitions, theses, and conclusions. Next, Part II critiques some of the assertions presented in *Profiles*. Finally, Part III extrapolates Schauer's analytical framework on generalizations to employment discrimination under the Americans with Disabilities Act ("ADA"),[8] an area not addressed in the book.

I. GENERALLY SPEAKING, GENERALITIES WORK

Profiles defends the morality of decisionmaking based on generalizations against a contemporary inclination to equate such decisionmaking with the unseemly practices of stereotyping and profiling. Moreover, Schauer argues that determinations based on categories are both inevitable and useful.

As a definitional matter, *Profiles* divides generalizations between spurious categories lacking statistical support and nonspurious categories that are empirically sustainable. The nonspurious category contains two further varieties: universal generalizations that are always true because of either definitional ("all bachelors are unmarried") or empirical ("all humans are less than nine feet tall") reasons, and those generalizations that are relatively truer for members of a particular group than they are in general ("bulldogs tend to have poorer hips than most other dogs," or "teenagers are relatively bad drivers in comparison to the overall driving population") (pp. 7-19). It is this last category, in which decisions are

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6. Both were progressive educators at the University of California, Berkeley. Among their many respective accomplishments, Tussman was a constitutional philosopher whose best known academic contribution is THE SUPREME COURT ON RACIAL DISCRIMINATION (Joseph Tussman ed., 1963); tenBroek was a professor of political science, and also founded the National Federation of the Blind, an organization over which he presided for twenty-eight years. THE ABC-CLIO COMPANION TO THE DISABILITY RIGHTS MOVEMENT 303-04 (Fred Pelka ed., 1997).

7. Frederick Shauer is the Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University.

8. 42 U.S.C. §§ 12,111-12,117 (2000).

based on largely accurate proxies, where Schauer focuses most of his attention and that he defends on pragmatic grounds.

Initially, *Profiles* supports generalizations as "an unavoidable feature of our decision-making existence" (p. 76). This is because we live in a complex society where people simply cannot conduct an in-depth and individualized analysis prior to every decision they make (pp. 75-78). Consequently, Schauer asserts that we utilize generalizations as heuristics on a daily basis, whether in determining that flying from Boston to New York is faster than taking the train or in believing that Ford cars and Hotpoint refrigerators are sound products (p. 76). Accordingly, even assessments we think are individualized are not always so (pp. 101-07). He further notes that sustainable generalizations form the bases for valid and rarely contested determinations in a number of areas (pp. 1-6). The Internal Revenue Service, to cite one example, effectively uses a "discriminant function" score to sort through millions of annual tax returns and identify certain criteria that, on the whole, are more likely to be associated with dishonest filing practices. These include the underreporting of income among cash-paid occupations like waitpersons and taxi drivers and the overly aggressive assertion of charitable and tax shelter deductions by physicians and lawyers (pp. 160-67). Even more prevalent are practices used by insurance actuaries who, every day, apply generalizations as to life expectancy, driving ability, neighborhood safety, and the extent of related risks to person and property (pp. 4-6).

Nevertheless, because of a deep-seated Western cultural bias in favor of particularity, Schauer maintains that generalizations have developed a bad reputation and are therefore disparaged as stereotypes, or even worse, as profiling (pp. 1-3, 15-19). In making this point, *Profiles* illustrates the way generalizations have been treated in the past. For instance, the Eleatic Stranger from Plato's *The Statesman* recognizes the impracticality of tailoring a general rule to each individual. At the same time, however, he states that it would be immoral as well as a "disgrace" not to individualize that general rule whenever possible (pp. 27-41).[9] In a similar vein, Aristotle concluded that an equitable solution should always follow when legal generalizations produce unfair results (pp. 41-48). This concern with individualized justice as a necessary corrective to broadly based decisions motivated the practice of Equity in Western jurisprudence from its inception in Roman law through the role of the Chancery in England (pp. 48-54). Perhaps the most damning assessment of generalizations was made by William Blake, who averred that "to

9. The subject under discussion was a training regime established by a personal trainer for his student to follow in his absence. Pp. 27-41.

generalize is to be an idiot. To particularize is the alone distinction of merit."[10]

To Schauer, this negative estimation of decisionmaking based on empirically sustainable classifications is unjustified for three main reasons. First, nonspurious generalizations are frequently as accurate as individualized analyses. Second, the use of statistically valid generalizations is more efficient than particularized assessments. Third, because of the accuracy and efficiency advantage to generalizations, decisions arising through a generalized process are widely perceived of as having greater uniformity and fairness.

Profiles first asserts, as a general premise, that using sustainable generalizations often produces results at least as accurate as those arising from individualized analyses. This is chiefly because particularized assessments rely on individuals using idiosyncratic judgment to weight and exclude factors, and thus are often statistically less accurate relative to actuarial assessments (pp. 92-101). Consequently, Schauer asserts that in a number of contexts, including predicting criminal-recidivism rates, a formulaic look at relevant factors is a better predictor than an individual determination (pp. 92-101). Even Equity itself was arbitrary and unpredictable and so necessarily reverted to more rule-based processes (pp. 48-54).[11] Hence, according to Schauer, cultural or historic pining for individual decisionmaking as a source of greater justice may be misplaced.

Secondly, *Profiles* avers that relying on statistically valid categories in the decisionmaking process is more efficient than utilizing particularized assessments. Schauer illustrates this argument by citing the example of uniform age-based exclusion (pp. 118-21). Some drivers who are over the maximum allowable driving age would be perfectly safe drivers, just as some individuals not yet entitled to vote or drink would do so responsibly (pp. 118-21). Although using categories will inevitably lead to both over-inclusiveness and under-inclusiveness, he avers that testing the particular abilities of each individual covered by these rules, such as eighty-year-old drivers or

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10. P. 20 (alteration of capitalization without indication in original) (quoting WILLIAM BLAKE, *Blake's Marginalia*, *in* BLAKE'S POETRY AND DESIGNS 429, 440 (Mary Lynn Johnson & John E. Grant eds., 1979). Other cultural references include the philosopher, Baroness O'Neill, and the author, Thomas Hardy. *See* pp. 20, 303 n.14 (citing Onora O'Neill, *Theories of Justice, Traditions of Virtue*, *in* JURISPRUDENCE: CAMBRIDGE ESSAYS 61 (Hyman Gross & Ross Harrison eds., 1992); THOMAS HARDY, TESS OF THE D'URBERVILLES 361 (1999)).

11. In support, *Profiles* quotes Lord Selden's famous remark that "equity is a roguish thing. For law we have a measure . . . Equity is according to the conscious of him that is Chancellor, and as that is longer or narrower so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot." P. 53 (omission and alteration to capitalization without indication in original) (quoting TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock ed., 1927)).

fifteen-year-old imbibers, would be prohibitively expensive.[12] The key to the justness of these rules, Schauer maintains, is not that they limn perfectly accurate categories, but rather that on the whole they are statistically sustainable and not arbitrary (pp.121-26).

As a consequence of the greater accuracy and efficiency obtained through the use of classifications, *Profiles* argues that people perceive decisions based on generalizations as more uniform and fair. A paradigmatic example of uniformity is application of the Federal Sentencing Guidelines ("Guidelines") to determine the length of a criminal's jail time through a quantitative formula.[13] Although some judges have railed against the Guidelines for constraining their individual discretion,[14] Schauer asserts that the Guidelines may promote fewer mistakes exactly because of this limitation. Moreover, when general rules, especially legal rules, are applied evenly to everyone they create a perception of fairness.[15] In other words, uniform Guidelines ensure that those who come before a judge receive equal treatment and perceive that treatment as fair (pp. 260-61).

Finally, because *Profiles* is not procrustean (even though it does affirm that there is something that might be said in favor of Procrustes),[16] two broad exceptions are made from a uniform application of generalizations. First, *Profiles* repeatedly contrasts its

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12. This is because information itself costs something to acquire. As such, real-world results differ from those academic economists observe under a perfect-competition framework where information is free. *See generally* Christopher K. Braun, *A Semiotics of Economics*, *in* LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES 435, 443 (Robin Paul Malloy & Christopher K. Braun eds., 1995) ("[I]n classical economics, the market actors are viewed as having access to perfect information. All parties understand the benefits and detriments of the bargain and neither is under compulsion or duress.").

13. U.S. SENTENCING GUIDELINES MANUAL. (West 2003).

14. *See, e.g.*, Andrew Cohen, *The Umpires Strike Back*, THE AMERICAN PROSPECT, Mar. 2004, at 15 (compiling complaints by notable judges against their discretion being shackled); Linda Greenhouse, *Chief Justice Attacks a Law As Infringing On Judges*, NEW YORK TIMES, Jan. 1, 2004, at A14 (reporting William Rehnquist's complaints against the Guidelines); Mark Hamblett, *Judge Takes Aim at Congress In Sentencing U.N. Shooter*, THE LEGAL INTELLIGENCER, Oct. 23, 2003, at 4 (detailing how Southern District Judge Robert P. Patterson denounced the Guidelines and protested their application by issuing a lower sentence).

15. Uniformity through generalization also promotes the concept of community. Specifically, Schauer links generality and community by asserting that communities can only exist insofar as each member gives up a certain amount of individualized treatment. Pp. 284-91.

16. Hence the chapter heading "Two Cheers for Procrustes." The limited approbation balances out the particularistic condemnation of the mythic robber. Thus,

> [I]f, rather than stretching or removing body parts, Procrustes had simply said that all guests would be fed the same amount, regardless of size, age, or appetite, or if he had mandated that all guests would have to sleep in the same bed regardless of height or heft, we could more directly replay many of the traditional debates about equality.

P. 222.

advocacy on behalf of empirically sustainable generalizations with its disapproval of spurious categories. For example, Schauer reveals how racial profiling is an egregious example of an unfounded categorization (pp. 175-98) by describing how O'Hare Airport workers subjected African-American women to unnecessary and degrading strip searches (pp. 176-79). He demonstrates further that excluding race as a factor when making safety determinations at airports would lead to equally effective results (pp. 186-87). Any possible offset in accuracy could be made up for by a small amount of added inspection time (p. 190). The same is true for "DWB," or "driving while black" (pp. 191-98).[17] Second, within the context of sustainable categories, Schauer suggests that there may sometimes be good reasons for going against the jurisprudential grain of "treating like cases alike,"[18] to instead treat unlike cases as alike (pp. 199-223). He proffers gender as one example, explaining that discriminators cite gender differences as a justification for their actions despite the fact that those differences are frequently themselves the product of past discrimination (pp. 138-41). Moreover, nonspurious gender classifications have been overused (pp. 138-41). In consequence, Schauer asserts that circumstances exist where the law should choose to remedy historical overuse by choosing not to utilize gender as a category (pp. 141-44).

II. BEING MORE PARTICULAR

Profiles is a delightful, well-written book that is stimulating to legally trained readers and also accessible to lay ones. This is in large part due to Schauer's frequent use of entertaining and accurate hypothetical examples.[19] It is also evident when reading *Profiles* that the author had a good deal of fun when writing, which always bodes well for an enjoyable reading experience.[20]

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17. *See generally* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001). For state-wide studies of this phenomenon, see DWIGHT STEWARD, STEWARD RESEARCH GROUP, RACIAL PROFILING (2004), *available at* http://www.protex.org/criminaljustice/police_accountability/RPreportFinal.pdf (Texas); Press Release, Data Collection Resource Center, IRJ Releases Preliminary Numbers in Massachusetts Racial and Gender Profiling Study, Jan. 20, 2004, *at* http://www.racialprofilinganalysis.neu.edu/article.php?article_type=spotlights&article_id=763 (Massachusetts); North Carolina Center for Crime and Justice Research, The North Carolina Highway Traffic Study, *at* http://www.chass.ncsu.edu/justice/reports/hwy_traffic_study_03.htm (2003) (North Carolina).

18. For perhaps the earliest exposition of this theory, see ARISTOTLE, NICOMACHEAN ETHICS § 1131a-b, at 118 (Martin Ostwald trans., 1962) (professing that "[t]hings that are alike should be treated alike").

19. To cite only the Introduction, Schauer asks, among other things, whether: Swiss cheese has holes, Capricorns are self-confident, teenagers are dangerous drivers, English soccer fans are violent, bulldogs have bad hips, and Volvos are reliable. Pp. 1-19.

20. This is especially apparent when discussing the virtues and vices of pit-bull generalizations. Pp. 55-78.

More significantly, Schauer contributes to the antidiscrimination literature by advocating for the inevitability and desirability of using non-spurious generalizations. His arguments that as individuals we need to employ generalizations to both understand others and to function in an increasingly complex society are well taken. Moreover, these points are infrequently voiced by legal academics[21] who by and large follow a societal norm disfavoring the use of generalizations to mediate social realities.[22] As such, *Profiles* constructively reminds those engaged in academic advocacy that intellectual tools — whether employing classifications,[23] economic analysis,[24] or non-mainstream prudence[25] — are no more than content-neutral devices that can be applied in different settings and to different ends.

Profiles falls a bit short in its — ironically enough — occasional lack of particularity, meaning that a bit more elaboration would have been helpful in bolstering some of Schauer's arguments. For example, he correctly notes that one of the dangers of particularity, insofar as individualized decisionmaking is concerned, is that an adjudicator can too heavily weight one consideration among several when trying to reach a just decision, and thereby render a judgment that is inaccurate or unjust (pp. 48-54, 266-74). By contrast, so long as the metric for generalization is rational (for instance, requiring pilots to retire at

21. For an exception, see Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 572-73 (1998) ("We routinely and necessarily make decisions on the basis of generalizations about various characteristics of the people we meet. Indeed, conducting the interactions that make up our lives would be an overwhelming and unmanageable task without the ability to do exactly this.").

22. Although not specifically referenced by Schauer, this aversion to classification is especially strong among those scholars averring that generalizations manifest an unconscious bias towards biologically atypical individuals. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1174 (1995) (exploring prejudice as "systematic biases in intergroup judgment"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that racism is a persistent phenomenon even when not intended or realized). For application of these concepts to the area of disability, see Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481 (2002).

23. A thoughtful and provocative treatment is Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157 (1991). Kelman argues that federal discrimination law is conceptually too narrow to capture what he avers are four distinct types of discrimination arising from the use of standardized employment tests. *Id.* He further maintains that the distinctions utilized in the employment discrimination context are "unprincipled" because they are grounded in empirically unsubstantiated assumptions. *Id.*

24. For two strong objections to the moral validity of employing cost-benefit analysis, see Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1007-08 (2000), and Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, *in* COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES 135 (Matthew D. Adler & Eric A. Posner eds., 2001).

25. For instance, the use of critical-race, feminist, disability, or queer-theory perspectives.

some uniform age between fifty-eight and sixty-two) as opposed to arbitrary (e.g., mandating retirement at, say, twenty-five or at ninety), the efficiency gained from a uniform rule can outweigh the disadvantages to those individuals for whom greater justice might be achieved under a regime of case-by-case determination (p. 166).

The first difficulty with Schauer's assertion is that it does not sufficiently engage the counter-argument that choosing one rule over another, even within a range of rational rules, can also result in inaccurate or unjust decisions. Specifically, *Profiles* does not elaborate enough on just how a policy maker is to weigh efficiency on the one hand with justice on the other when drawing lines. Similarly, the book could be more forthcoming on how statistically accurate a generalization needs to be in order to justify its licit deployment (i.e., when it matters that pilots retire at one particular age rather than another, even within the range of fifty-eight to sixty-two). The same insufficiency also occurs when Schauer makes some other worthy points along the way, for instance, his explanation for why our culture accepts the use of generalizations in some contexts and not in others (pp. 15-19). In the end, I believe that Schauer is by and large correct in his overall assertions, but that *Profiles* would have benefited from a fuller treatment of certain key issues.[26]

Moreover, *Profiles* would have benefited its readers by providing more normative content. Schauer is right when noting that there are instances of statistically sustainable generalizations that exclude members of particular groups. He offers two telling examples: the higher propensity of women of Jewish-European descent to contract breast cancer and thus be excluded from insurance coverage (pp. 34-40), and the predilection of English soccer fans to engage in violent post-match behavior (pp. 37-40). In the first case, *Profiles* notes that these peoples' identities, as women and as Jews, may be sufficiently morally relevant to compel decisionmakers to ignore empirically verifiable evidence and bear unequal costs. Contrast this to an equally — or perhaps even more — verifiable circumstance of the presence of English soccer hooligans leading to violence.[27] Yet the fact that they

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26. Similarly, a point that is not made in *Profiles*, but which would have bolstered Schauer's arguments is that the same individuals who oppose generalizations as harmful to an antidiscrimination agenda at times favor their use when they forward this agenda. A classic example are the generalizations utilized by plaintiffs bringing disparate-treatment and disparate-impact litigation. *See generally* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 484-510 (5th ed. 2000). As one commentator aptly put it, "antidiscrimination law aims at a wholesale, not a retail, injustice." Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 831 (2003) [hereinafter Bagenstos, *"Rational Discrimination"*].

27. Only a few diseases can be verified as having been caused by genetic anomalies with a 100% expression, meaning that the presence of particular genes invariably manifests in the development of the associated disease. *See* ASSESSING GENETIC RISKS: IMPLICATIONS FOR

are English soccer hooligans does not compel a moral decision to eschew an empirically sustainable action (p. 39). Schauer provides sufficient clues for a reader to infer that the difference lies in whether the group has historically been subject to prejudicial treatment (pp. 138-44). This is a standard line of argument within the antidiscrimination literature by those who advocate the use of regulation as a means of remedying social exclusion,[28] and is certainly known to an august constitutional scholar like Schauer,[29] but it is not made explicit in *Profiles*. Nor does Schauer provide normative guidance for how and where lines might be drawn in making these determinations. This might be because Schauer wanted to frame his argument broadly rather than limit it to discussions of group-based constitutional rights. Nevertheless, because *Profiles* is otherwise such a thoughtful treatment of generalizations and their use, and because legal commentators continue to wrestle with the issue of the proper constraint of antidiscrimination measures, these are unfortunate gaps.

III. DISABILITY AND CLASSIFICATION

Conventional wisdom on the ADA's disability-based reasonable-accommodation mandates holds that providing an accommodation incurs a greater cost than not doing so. Further, and more trenchantly, legal scholars assert that accommodating workers with disabilities under the ADA is theoretically and ethically distinct from conferring remedies under previous civil rights legislation. Building on the analytical framework sketched out in *Profiles* on the use of sustainable categories, this Part argues the imperative of treating disability-related

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HEALTH AND SOCIAL POLICY 59-115 (Lori B. Andrews et al. eds., 1994). In the case of "defective" mutations of the BRCA1 or BRCA2 gene associated with breast or ovarian cancer, approximately 50% to 60% of women who inherit those genes will actually develop cancer during their lifetimes. *See* Elizabeth B. Claus et al., *The Genetic Attributable Risk of Breast and Ovarian Cancer*, 77 CANCER 2318 (1996). For an exploration of the misuse of correlative statistics, the harm it causes, and a proposal for ameliorating this problem, see Anita Silvers & Michael Ashley Stein, *An Equality Paradigm for Preventing Genetic Discrimination*, 55 VAND. L. REV. 1341 (2002).

28. *E.g.*, Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 260-61 (1971). For a discussion within the context of antidiscrimination protection for people with disabilities, see Mark Kelman, *Does Disability Status Matter?*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 91 (Leslie Pickering Francis & Anita Silvers eds., 2000) [hereinafter Kelman, *Disability Status*]; Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 422-68 (2000).

29. His publications include: AMENDING THE PRESUPPOSITIONS OF A CONSTITUTION (1994); CONSTITUTIONAL INTERPRETATION (1999); FIRST AMENDMENT OPPORTUNISM (2000); THE SPEECH-ING OF SEXUAL HARASSMENT (2000).

accommodation on a moral level with corrective measures engendered by longer established antidiscrimination statutes.[30]

A. *The Received Wisdom on the Disability Classification*

Since the ADA's passage, a near-consensus of legal academics have asserted that the statute's reasonable-accommodation mandates qualitatively distinguish the ADA from better ensconced antidiscrimination measures, most notably Title VII of the Civil Rights Act of 1964 ("Title VII").[31] In sum, these commentators maintain that "real anti-discrimination law[s]" remedy the wrongful exclusion of similarly situated members of protected categories from workplace opportunity and thereby bring about equality for certain historically marginalized groups.[32] By contrast, in requiring employers to affirmatively provide workplace accommodations to people with disabilities, the ADA does more than eliminate discrimination. Instead, forcing employers to accommodate those workers pushes the workplace equilibrium and its financial calculus beyond equality.[33]

This paradigm of employment discrimination, which is so pervasive that Christine Jolls terms it "canonical," is economic in nature.[34] Its clearest proponent is Mark Kelman, who distinguishes between regulations preventing "simple discrimination" and those mandating "redistribution."[35] Simple discrimination arises when an employer treats an individual differently from her peers, despite the fact that she is equal as far as any "relevant" characteristic.[36] A relevant characteristic, according to Kelman, is a factor that does not affect that

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30. For further exploration of these issues, see Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. ___ (forthcoming 2004) [hereinafter Stein, *Same Struggle*].

31. 42 U.S.C. §§ 2000e-2000e-17 (2000) (barring employment discrimination on the basis of race, color, religion, sex, and national origin).

32. Erickson v. Bd. of Governors, 207 F.3d 945, 951 (7th Cir. 2000) (Easterbrook, J.).

33. An exhaustive list of legal commentators buying into this notion is provided in Bagenstos, *"Rational Discrimination," supra* note 26, 827 n.3.

34. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643, 643-44 (2001).

35. MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 195-226 (1997); Kelman, *Disability Status, supra* note 28; Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 877-89 (2001) [hereinafter Kelman, *Market Discrimination*]; *see also* MARK KELMAN, STRATEGY OR PRINCIPLE? THE CHOICE BETWEEN REGULATION AND TAXATION 8-9 (1999).

36. Kelman, *Market Discrimination, supra* note 35, at 840; *see also* Kelman, *Disability Status, supra* note 28, at 93 ("Insofar as the employer or owner cares about the person's status or traits that are irrelevant to such person's economic function, he or she is breaching the duty to avoid simple discrimination.").

employee's net marginal product.[37] Consequently, individuals countering practices of simple discrimination are asking only that employers treat them the same as their peers who are "equivalent sources of money."[38] In sharp contrast, a disabled employee requesting accommodation by definition "concedes" her lower net productivity relative to that of a non-requesting employee as a result of accommodation costs.[39] In consequence, this worker is effectively making a "straightforward demand for resource redistribution."[40] To Kelman, an employer that is required through the ADA to provide an accommodation has therefore been subjected to "an implicit 'regulatory tax' " whose proceeds provide in-kind (as opposed to in-cash) benefits to accommodation recipients.[41]

Moreover, as explained by Samuel Issacharoff and Justin Nelson, providing accommodations to disabled workers under the ADA brings about a dynamic that goes beyond equality.[42] Title VII, they aver, was predicated on the idea that certain groups preferred higher paying, safer jobs, but were excluded by discriminatory barriers from obtaining those jobs.[43] By contrast, accommodation requests are unrelated to simple discrimination, and the ADA "does not attempt, even as a formal matter" to ground itself in an anti-subjugation

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37. Kelman, *Market Discrimination*, *supra* note 35, at 841-42; *see also* KELMAN & LESTER, *supra* note 35, at 199-208 (maintaining that employers are chiefly concerned with individual net productivity rather than with aggregate gross-production values); Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, 1198-1204 (1991) (same).

38. Kelman, *Market Discrimination*, *supra* note 35, at 835.

39. *Id.* at 843. Thus, she "does not claim to merit the treatment she asks for because she has the same relevant traits as the person who" was not accommodated. *Id. But see* Ron Amundson, *Disability, Handicap, and the Environment*, J. SOC. PHIL., Spring 1992, at 113 ("Someone whose disadvantage occurs as a result of a social decision has a more obvious claim for social remediation.").

40. Kelman, *Market Discrimination*, *supra* note 35, at 880.

41. *Id.* Kelman further distinguishes between simple discrimination and accommodation by explaining that the former invokes an unlimited-cost qualified duty, while the latter must compete against all other demands for available social resources. Finally, Kelman distinguishes the two norms on the ground that the non-accommodator bases his decision on retaining real social resources (i.e., acting in an economically rational manner) rather than on personal preferences (meaning idiosyncratic or illegitimate motivations). *Id.* at 852-54. At the same time, it should be noted that Kelman has consistently pointed out that employers frequently believe they are dealing with disabled employees whose traits make them less net-productive, when in fact those workers would be equally net-productive but-for the non-inclusive organizational decisions made by those same employers. *See, e.g.*, *id.* at 846-48, 877-78 n. 71.

42. Samuel Issacharoff & Justin Nelson, *Discrimination With a Difference: Can Employment Discrimination Law Accommodate the Americans With Disabilities Act?*, 79 N.C. L. REV. 307 (2001). For a farther-reaching application of Kelman's thesis, see Samuel Issacharoff, *Bearing the Costs*, 53 STAN. L. REV. 519 (2000).

43. Issacharoff & Nelson, *supra* note 42, at 313.

command.[44] Accordingly, while traditional antidiscrimination provisions remedy past prejudice, the ADA "eschews this formal equality command" and instead seeks to raise the disabled to a position that is more than equal.[45]

B. *The Subordination Exception to Generalization*

Recall that in appraising the use of generalizations, *Profiles* distinguishes between spurious and nonspurious categories. Additionally, Schauer notes that nonspurious classifications contain both universal generalizations that are always true, and generalizations that are relatively more accurate for members of a particular group than for the public at large. *Profiles* defends the morality of making decisions based on this last category, except in circumstances when the empirical data upon which the decision maker relies is itself the result of prior discriminatory practice. Although Schauer does not sufficiently elaborate the normative basis for this exemption from the general use of sustainable classifications, the arguments he makes in *Profiles* reflects a well-known body of academic literature when setting forth a subordination exception to generalization.

From an empirical perspective, the accuracy of the generalization about accommodated workers with disabilities being relatively more expensive is uncertain. Nevertheless, because I have addressed this topic at length elsewhere,[46] and in order to engage the strongest argument put forth by these scholars, let us assume that this generalization is nonspurious, and also universally true. The key question then becomes whether from an ethical perspective the classification may be utilized as a proxy, or if instead it ought to be disregarded. In other words, is the case of accommodating disabled employees more like that of English soccer hooligans with a predilection for violence, or like women of Jewish-European descent with a genetic predisposition to breast cancer?

From a jurisprudential perspective, the paradigm of simple discrimination contrasted with redistribution reverberates with the philosophical scheme dividing formal (or corrective) justice from distributive (or material) justice. The first concept refers to the notion

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44. *Id.* at 311-14, 357.

45. *Id.* at 317.

46. *See* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 103-08 (2003) [hereinafter Stein, *Accommodations*] (presenting and critiquing the accommodation cost studies in depth); Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1677-81 (2000) (same).

of treating similarly situated individuals in a similar manner,[47] or what Schauer referred to as "treating like cases alike" (pp. 199-223). The second category, drawn from the social-justice province, advocates treating all individuals equally, whether or not they are in fact equal,[48] which *Profiles* described as "treating unlike cases alike" (pp. 199-223).

Although the typical academic examination of the ADA does not overtly articulate the paradigm in these jurisprudential terms[49] — instead expressing itself in economic ones — adherence to this philosophical dichotomy is logically necessary. This is because, in order to conclude that ADA-compelled accommodations bring about something more than equality rather than remedying historical prejudice, one must first assume that the disabled are not equal in terms of relevant factors.[50] Doing so requires a belief that

47. *See, e.g.*, JOHN STUART MILL, UTILITARIANISM (1861), *reprinted in* 10 COLLECTED WORKS OF JOHN STUART MILL 205, 243 (J.M. Robson ed., 1969) ("Fifthly, it is, by universal admission, inconsistent with justice to be *partial*; to show favour or preference to one person over another, in matters to which favour and preference do not properly apply."); HENRY SIDGWICK, THE METHODS OF ETHICS 267 (1907) (noting that "the only sense in which justice requires a law to be equal is that its execution must affect equally all the individuals belonging to any of the classes specified in the law").

48. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 302-3 (1971) (defining distributive justice generally as the theory that "[a]ll social primary goods — liberty and opportunity, income and wealth, and the bases of self-respect — are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored"); AMARTYA SEN, INEQUALITY REEXAMINED 73-87, 129-52 (1992) (advancing Rawls's conception of distributive justice by exploring the dynamic interplay of equality and diversity). A few commentators have applied Rawlsian theory to people with disabilities. *See, e.g.*, Norman Daniels, *Justice and Health Care*, *in* HEALTH CARE ETHICS 290 (Donald VanDeVeer & Tom Regan eds., 1987) (maintaining that society ought to redistribute resources in the form of health care to disabled people whose functioning would be enabled with such resources); Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 599 (2000) (arguing that redistribution of material goods sufficient to make disabled people functional, and hence autonomous, is a moral obligation on society); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981) (suggesting that people with disabilities should receive wealth redistribution as part of a behind-the-veil insurance schema).

49. A slightly confusing exception is Issacharoff & Nelson, who assert that the ADA's accommodation mandate begins from a "unique . . . claim that differently situated persons should be treated differently," by which they mean that the ADA requires the treatment of disabled persons (who are different in a lesser sense) as nonetheless equal. *Supra* note 42, at 315.

50. A few commentators take this point further by asserting that ADA-mandated reasonable accommodations are in fact a form of affirmative action. *See, e.g.*, SAMUEL LEITER & WILLIAM M. LEITER, AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY: AN OVERVIEW AND SYNTHESIS 53 (2002) (asserting confluence between the provision of reasonable-accommodation and affirmative-action policies); Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 75 (1999) (arguing that because reasonable accommodation "is a concept alien to most antidiscrimination claims brought under Title VII," it "is, in essence, a form of affirmative action for disabled individuals"); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 3 (1996) (disabled workers seeking accommodations "insist upon discrimination in their favor").

accommodation costs are endogenously engendered due to the disabled's biological inability, rather than exogenously caused by socially contingent conditions. Conversely, if one views accommodation expenses as remedying unnecessary historical exclusion, then their provision levels an uneven playing field much in the same way as other antidiscrimination statutes.[51]

Contrary to the prevailing perspective of inherent limitations restricting disabled participation, disability-studies scholars[52] have long argued on behalf of a "social" or "minority" model of disability.[53] According to this framework, the physical environment, and the attitudes which form it, play a crucial role towards creating the "disability" classification. Thus, factors exogenous to a person's own impairments largely determine the extent to which a given disabled individual can participate in society.[54] This notion is in stark contrast to the "medical model" of disability which, influencing the received wisdom, views a disabled person's limitations as inherently (and thus, morally and properly) excluding her from the mainstream.[55]

An early contribution to the social model of disability was made by Jacobus tenBroek, who argued that disabled peoples' functional

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51. For a prudential discussion of why employers, rather than society at large, ought to bear these costs, see Stein, *Same Struggle*, *supra* note 30.

52. Disability studies is an academic discipline analogous to that of critical race or feminist theory, with dedicated university departments. Gary L. Albrecht et al., *The Formation of Disability Studies*, *in* HANDBOOK OF DISABILITY STUDIES 1-12 (Gary L. Albrecht et al. eds., 2001). For discussion of how the discipline has moved from the margin to the mainstream, see SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY (1998), and Catherine J. Kudlick, *Disability History: Why We Need Another "Other,"* 108 AM. HIST. REV. 763 (2003).

53. As explained by one of the originators of the theory, the minority-rights model:

> is based on three major postulates: (1) the primary problems faced by disabled persons stem from social attitudes rather than from functional limitations; (2) all facets of the man-made environment are shaped or molded by public policy; and (3) in a democratic society, public policies represent prevailing public attitudes and values.

Harlan Hahn, *Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas*, 4. S. CAL. REV. L. & WOMEN'S STUD. 97, 105 (1994); *see also id.* at 101 ("[D]isability is attributed primarily to a disabling environment instead of bodily defects or deficiencies.").

54. *See, e.g.*, CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT (1988) (tracing the legal, limiting, classification of disability); SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 35 (1996) (noting the difficulty in marking "the distinction between the biological reality of a disability and the social construction of a disability"); Amundson, *supra* note 39, at 110 (1992) (stating that "a handicap results from the interaction between a disability and an environment"); Richard K. Scotch, *Making Change: the ADA and an Instrument of Social Reform*, *in* AMERICANS WITH DISABILITIES, *supra* note 28, at 275 ("[A] social model of disability that conceptualizes disability as a social construction that is the result of interaction between physical or mental impairment and the social environment.").

55. *See generally* Kenny Fries, *Introduction* to STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT 6-7 (Kenny Fries ed., 1997) (noting that "this view of disability . . . puts the blame squarely on the individual.").

impairments were contingent on "a variety of considerations related to public attitudes," most of which were "quite erroneous and misconceived."[56] A more contemporary expression of the social model of disability, and one applied to the ADA, has been proffered by Anita Silvers.[57] Silvers argues that the social framework traces the source of disabled peoples' relative disadvantage to the existence of a hostile environment that is "artificial and remediable" as opposed to "natural and immutable."[58] According to her, the ADA seeks to dislodge traditional practices by sanctioning intervention into existing social constructs through questioning an environment that unnecessarily disadvantages people with disabilities.[59] She therefore concludes that it is erroneous to characterize the provision of a reasonable accommodation "as advantaging the individual for whom it is made."[60] Instead, Silvers explains that from the viewpoint of a person mobilized in a wheelchair, disablement is experienced by lack of access to workplaces, educational programs, medical services, and other areas otherwise open to the public.

I generally agree with the disability studies perspective that the ADA is an appropriate antidiscrimination device because it remedies avoidable exclusion. At the same time, the strongest version of the argument also has limitations. Not *all* exclusion from the workplace is artificial; *some* barriers are both natural and necessary. Moreover, there are workers with disabilities whose impairments even reasonable (or super-reasonable) accommodations will be unable to ameliorate.[61] The issue is where to draw the line between artificial and inherent exclusion. Although an exhaustive discussion is well beyond the boundaries of this Review,[62] it bears noting that one way to differentiate these concepts is by assessing the physically constructed environment through Universal Design principles.[63] This is an architectural concept that seeks to create "environments and products

56. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 842 (1966).

57. Anita Silvers, *Formal Justice*, *in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13 (1998).

58. *Id.* at 75.

59. *Id.* at 124.

60. *Id.* at 132.

61. For an in-depth discussion, see Stein, *Accommodations*, *supra* note 46, at 90-109. As an aside, in passing the ADA Congress also agreed with this perspective. *See* Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151 (2004).

62. I attempt to do so in Stein, *Same Struggle*, *supra* note 30.

63. *See generally* Robert Imrie, Inclusive Design: Designing and Developing Accessible Environments (2001).

that are usable by all people to the greatest extent possible."[64] From a disability rights perspective, a clear example of artificial exclusion caused by non-Universal Design are the courthouse stairs that precipitated the recent Supreme Court case *Tennessee v. Lane*.[65] The Justices never discussed Universal Design in ruling that States did not have sovereign immunity to suits seeking court access under Title II of the ADA. Nevertheless, in order to find that people with disabilities had been subject to unequal admittance to judicial services, the Court had to believe that this physical barrier was unnecessarily exclusionary; to hold otherwise (as did the Chief Justice in dissent) is to view the exclusion of people with disabilities as opportune, if unfortunate.[66] If allowed to add her own concurring opinion, a disability rights advocate would point out that there is no intrinsic reason for constructing a public building in a manner that as a practical matter excludes members of the public, including those with disabilities.[67] Hence, the provision of reasonable accommodation to the courthouse ameliorates an insensitive and unnecessarily exclusionary social construction of the physical environment.[68]

Finally, it bears noting that arguments similar to those now used by scholars to distinguish disability-related accommodations from more traditional antidiscrimination remedies, parallel assertions previously made against equalizing measures for women and for African Americans.[69] The prevailing social convention for most of the nineteenth- and twentieth-centuries held that women were physically less capable than men.[70] In consequence, women were excluded from occupational opportunity on the basis of unfounded stereotypical assumptions.[71] Similarly, the manner in which prevailing wisdom

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64. R. Mace et al., *Accessible Environments: Toward Universal Design*, *in* DESIGN INTERVENTIONS: TOWARDS A MORE HUMANE ARCHITECTURE 156 (Wolfgang Prieser et al. eds., 1991).

65. 124 S. Ct. 1978 (2004).

66. *Id.*; *see also* Bd. of Trustees v. Garrett, 531 U.S. 356, 367-68 (2001) (state actors "could quite hardheadedly — and perhaps hardheartedly" exclude disabled persons from employment opportunities) (Rehnquist, C.J.).

67. Other possibly excluded individuals include the (nondisabled) elderly and very young, as well as people with orthopedic impairments, physical injuries and limitations, and obesity.

68. Admittedly less obvious is the related impact that changes in physical design have in ameliorating exclusionary methods of job structuring and administration.

69. Ironically, while these selfsame scholars uniformly and rigorously adhere to their position about disability, they would most likely be greatly offended by anyone expressing a parallel but equally retrogressive view about race or sex.

70. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421-22 (1908) (stating as a given that "woman's physical structure and the performance of maternal functions" which "place her at a disadvantage" relative to man with whom "she is not an equal competitor").

71. *See generally* JULIE NOVOKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 131-82

distinguishes the treatment of the disabled from that of other protected groups by conceiving of disability as a biologically compelled reality, rather than as a contingent social construct, echoes the historical treatment of race.[72] In so doing, these scholars similarly drape an issue of adaptable and variable social construction in the guise of fixed and scientific veracity.[73]

CONCLUSION

Profiles provides a refreshing re-interpretation of decisionmaking based on sustainable classifications. Schauer argues that the use of generalizations is an inevitable process in a complex society, as well as a useful tool in mediating social reality, because generalizations are often more accurate and efficient than particularized decisionmaking. As a result, uniform determinations arising from the use of statistically sustainable categories appear fairer to the general public. Nonetheless, a prominent exception to the morality of decisionmaking based on broad classifications are instances where the sustainable empirical facts are themselves by-products of past discrimination against those groups. Although legal scholars assert that workers with disabilities are less economically viable than their peers, and that providing them workplace accommodations raises them above an equality equilibrium, this Review has offered some thoughts as to a contrary account.

(2001) (describing the ascendancy of regulation precluding women's workplace participation).

72. *See generally* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998); Ian F. Haney Lopez, *The Social Construction of Race*, *in* MIXED RACE AMERICA AND THE LAW 101, 102 (Kevin R. Johnson ed., 2003).

73. *See, e.g.*, STEPHEN JAY GOULD, THE MISMEASURE OF MAN 30-72 (1981) (describing how scientific thought has been historically misused to influence people into mistakenly believing that blacks were intellectually inferior).