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What Is Healthism?

1.1. INTRODUCTION

The American Health Care Act of 2017 will

> allow insurance companies to require people who have higher health care costs to contribute more to the insurance pool. That helps offset all these costs, thereby reducing the cost to those people who lead good lives, they're healthy, they've done the things to keep their bodies healthy. And right now, those are the people – who've done things the right way – that are seeing their costs skyrocketing.
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> U.S. House of Representatives, Mo Brooks (Republican – Alabama), May 4, 2017

People who "lead good lives" and "who've done things the right way" deserve to pay less for health care. But people who lead "bad lives" and have done things the "wrong way" deserve to pay more. That attitude is the essence of healthism: permitting – and even *encouraging* – discriminatory treatment based on an individual's health status.

Health status, like many prohibited bases for discrimination, often is not the result of good or bad living, or of doing things the right or wrong way. Even conduct that appears voluntary at first blush, in fact, may be the product of myriad interconnected factors. This book comprehensively examines the pervasiveness of health-status discrimination in law and society and urges that, at least in some instances, such discrimination should not be tolerated.

US law recognizes a number of "protected categories," or bases on which individuals may not be treated unfavorably. Current federal law prohibits discrimination (to varying degrees, and in varying contexts) based on race, color, national origin, sexual orientation, sex/gender, pregnancy, disability,

genetic information, religion, military service, immigration status, and age.[1] Conspicuously absent from this list of protected statuses, though, is health. Should the law allow unhealthy individuals to be treated less favorably than healthy ones? Or should we recognize a new category of impermissible discrimination?

This book is about discrimination on the basis of health status, or, as we will call it, "healthism." Political scientists in prior work have used the term *healthism* to refer to the government's establishment of coercive health norms.[2] Under that view, human activities are categorized as healthy or unhealthy, with preference given to the former. Healthy is moral and patriotic, while unhealthy is immoral and polluted. We do not adopt that meaning of the word healthism but instead repurpose it to refer to health-status discrimination by government and private actors. It is a discriminatory "ism" akin to racism, sexism, ageism, and ableism.[3] Distinct from those other protected categories, however, health status does not presently garner independent legal protection.

Once attuned to the concept of healthism, it is easy to spot examples. Employers, insurers, health-care providers, retailers, manufacturers, airlines,

[1] The US Constitution prohibits discrimination on the basis of race, national origin, religion and – to a somewhat lesser degree – gender, illegitimacy, and, perhaps now, sexual orientation. The Equal Protection clause of the US Constitution states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." US Constitution amend. 14, § 1. Courts have interpreted this provision with varying levels of scrutiny depending on the impacted group. *See* 3 Treatise on Const. L. § 18.3(a). While discrimination on the basis of sexual orientation is not officially deemed a suspect class, US Supreme Court jurisprudence may open the door to heightened scrutiny of possible cases of such discrimination. *See* Mark P. Strasser, *Obergefell's Legacy*, 24 *Duke J. Gender L. & Pol'y* 61, 88 (2016). ("Perhaps in light of *Romer*, *Lawrence*, *Windsor* and *Obergefell*, the Court will soon announce that orientation is suspect or quasi-suspect.") The First Amendment outlaws religious discrimination by forbidding any law "respecting an establishment of religion, or prohibiting the free exercise thereof." US Const. amend. 1. By statute, Congress has limited certain private actors from discriminating also on the basis of disability, pregnancy, genetic information, immigration status, or military affiliation. *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-(k)) (1976 & Supp. II 1978); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–213 (2013)); Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 26, 29, and 42 U.S.C.); Immigration and Nationality Act § 247B, 8 U.S.C § 1324b (1996); Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301–35 (2012).

[2] Jessica L. Roberts, *"Healthism": A Critique of the Antidiscrimination Approach to Health Insurance and Health-Care Reform*, 2012 *Univ. Ill. L. Rev.* 1159, 1171 (2012). ("The traditional concept of healthism involves the government's promotion of coercive health norms, and its attempts to impose lifestyle choices deemed 'healthy' on its citizens.")

[3] Jessica L. Roberts and Elizabeth Weeks Leonard, *What Is (And Isn't) Healthism*, 50 *Ga. L. Rev.* 833, 838 (2016); *see also* Jessica L. Roberts, *Healthism and the Law of Employment Discrimination*, 99 *Iowa L. Rev.* 571, 592 (2014).

regulators, and public officials increasingly probe our personal lives and data sources for information that they deem relevant to their operations and interests. Health information is of particular and increasing interest. Both private and public actors make decisions about which opportunities to offer – or to deny – to groups or individuals based on their perceived health, or otherwise disadvantage subject people labeled as unhealthy.

Consider one university's plan to require all freshmen to wear Fitbits to track their steps, heart rates, and fitness activities.[4] The data are then sent directly to a central computer at the university, accessible by administrators and faculty. Oral Roberts University hails the program as a success and notes that seventy employers have followed suit.[5] Similarly, retailers and employers may be able to learn about a woman's pregnancy, or even her plans to become pregnant, based on her buying patterns or changes in pharmaceutical purchases.[6] Those examples involve use of otherwise private health information to invite a host of potentially discriminatory policies. Other examples reveal outright bias against individuals based on health status. During the 2016 presidential campaign, now President Donald J. Trump commented pejoratively on private individuals' disabilities and physical appearances.[7] Physicians decline to treat high-need patients. Employers adopt policies against hiring individuals who engage in health-risky behaviors, such as tobacco use. Reproductive biologists specifically select against certain chromosomal traits or abnormalities.

Although health-status discrimination is not yet formally recognized, allegations of healthism have generated their fair amount of litigation against a variety of different kinds of defendants, including employers, health-care providers, and businesses. Consider six-year-old Mackenzie Gonzalez, who was

[4] Jessica Chasmar, *Oklahoma University Requires Freshmen to Wear Fitbit, Track 10K Steps per Day, The Washington Times* (Jan. 11, 2016), www.washingtontimes.com/news/2016/jan/11/oklahoma-university-requires-freshmen-to-wear-fitb/; Elizabeth Chuck, *Oral Roberts University to Track Students' Fitness Through Fitbits, NBC News: College Game Plan* (Feb. 3, 2016), www.nbcnews.com/feature/college-game-plan/oral-roberts-university-track-students-fitness-through-fitbits-n507661.

[5] Bill Sherman, *Fitbit Fitness Monitoring Program a Hit at ORU, Tulsa World* (Mar. 20, 2017), available at www.tulsaworld.com/homepagelatest/fitbit-fitness-monitoring-program-a-hit-at-oru/article_eae41a5e-830a-5270-98de-c1aa62aac28d.html.

[6] Kashmir Hill, *How Target Figured Out a Teen Girl Was Pregnant before Her Father Did, Forbes: Tech* (Feb. 16, 2012), www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/#2026394766668.

[7] Jenna Johnson, *Trump Attacks Former Miss Universe Who "Gained a Massive Amount of Weight" and Had "Attitude," The Washington Post: Post Politics* (Sept. 27, 2016), www.washingtonpost.com/news/post-politics/wp/2016/09/27/trump-attacks-former-miss-universe-who-gained-a-massive-amount-of-weight-and-had-attitude/?utm_term=.0701dec95454; www.nbcnews.com/politics/2016-election/trump-s-worst-offense-mocking-disabled-reporter-poll-finds-n627736.

diagnosed with cancer in December 2008.[8] At the time, her father, Yovany Gonzalez, worked for Wells Fargo in Palm Beach, Florida, as a mortgage consultant. Like many Americans with health insurance, Gonzalez held a policy through his employer. In August 2010, however, the bank fired Gonzalez, a mere three days before Mackenzie was scheduled to go into surgery. Along with his job, Gonzalez and his family also lost their health insurance, leaving them unable to afford the costly treatment. As a result, the hospital canceled the surgery. In March 2011, just seven months later, Mackenzie died. In August 2012, Gonzalez filed suit against his former employer, arguing that Wells Fargo terminated him because his daughter's health-care costs were too high.

In 1994, Sidney Abbott got a cavity. Like most people with cavities, she decided to go to the dentist. She chose Dr. Randon Bragdon. On her new patient intake form, Abbott indicated that she was HIV-positive, though asymptomatic. As a result, Dr. Bragdon refused to treat her in his office. Instead, he agreed to fill her cavity in the hospital, but Abbott would have to cover those additional expenses herself. She sued, alleging discrimination on the basis of her HIV status, and took her case all the way to the US Supreme Court.

Kenlee Tiggeman, who weighed about 300 pounds, was shocked when she tried to board her Southwest Airlines flight in 2011 and was told she needed to purchase a second ticket.[9] According to Tiggeman, Southwest employees humiliated her in front of other passengers by laughing at her and asking for proof of her weight. One gate agent apparently told Tiggeman that she was "too fat to fly." Tiggeman filed a lawsuit against the airline, which was eventually thrown out for procedural reasons.

You will learn more about these and many other stories as you read this book. Were the policies and decisions described fair or rational? Or were they unjust or intrusive? And what, if anything, should the law do to regulate these practices? These are the questions that judges, legislators, and policy-makers must ask themselves. Among developed countries, America spends inordinately on health care, yet our people suffer poorer health status comparatively.[10] The implications for health-status discrimination, thus, are widespread.

[8] Bonnie Kavoussi, *Yovany Gonzalez's Wells Fargo Lawsuit Alleges Bank Fired Him, Cut Dying Daughter's Health Insurance*, *Huffington Post* (Aug. 7, 2012), www.huffingtonpost.com/2012/08/07/wells-fargo-yovany-gonzalez_n_1751461.html; Christine Roberts, *Florida Man Says Wells Fargo Sacked Him Over Daughter's Cancer Treatment Cost*, *NY Daily News* (Aug. 12, 2012), www.nydailynews.com/news/national /florida-man-wells-fargo-sacked-daughter-cancer-treatment-costs-article-1.1134828.

[9] Associated Press, *Judge Rejects Woman's 'Too Fat to Fly' Lawsuit*, *Times-Picayune* (Nov. 1, 2012), www.nola.com/crime/index.ssf/2012/11/judge_rejects_womans_too_fat_t.html.

[10] David Squires and Chloe Anderson, *U.S. Health Care from a Global Perspective: Spending, Use of Services, Prices, and Health in 13 Countries* (The Commonwealth Fund, Oct. 2015),

Our book catalogs the many ways that government and private entities differentiate on the basis of health status and the implications of those policies. It draws examples from a wide range of contexts, including the protections offered by civil rights and privacy laws; the Patient Protection and Affordable Care Act's rejection of health-status discrimination in private health insurance sales and pricing; and the potential for personal injury law to disfavor the unhealthy.

We recognize that the law can be a powerful tool to promote wellness and encourage healthy lifestyle choices. Yet classifying people based on their perceived health can also lead to stigma and compound other disadvantages. Accordingly, we argue that distinctions based on health are desirable in some contexts, but problematic in others. Viewing this issue through the lenses of social advocacy and health promotion, we conclude that sometimes the law should permit or even encourage health-based distinctions, and sometimes it should prohibit them as unlawful. We maintain that our approach more accurately – and more honestly – captures the wide range of concerns facing law and policy-makers.

This book provides a roadmap for navigating the treacherous terrain of health-status discrimination. Chapters 1 and 2 define key terms, explaining more precisely what we mean by the term healthism – answering initial objections to recognizing new prohibited bases for discrimination, and outlining a theoretical framework for approaching the problem – which recognizes that not all forms of differential treatment based on health status are necessarily healthist.

Chapters 3–5 provide real-world examples. We survey key categories of existing US laws that partially, but incompletely, address healthism, thus highlighting the need for a new conceptual framework. In particular, existing laws protecting privacy or prohibiting discrimination based on disability and genetic information fail to capture all instances of health-status discrimination that we would deem undesirable. Health insurance law, much of which is in flux under a new presidential administration, leaves gaping holes through which insurers may discriminate based on health status, as in the Mackenzie Gonzalez example above. Judge-made private law, namely torts and contract, contain ample opportunities for health-status discrimination.

Chapter 6 outlines a framework, containing a set of factors, for distinguishing between "good" (or health-promoting) distinctions and "bad" (or healthist) ones. Thus, the final chapter draws together a critical insight from Chapters 1 and 2

www.commonwealthfund.org/~/media/files/publications/issue-brief/2015/oct/1819_squires_us_hlt_care_global_perspective_oecd_intl_brief_v3.pdf.

that not all instances of health-based differentiations are undesirable or normatively wrong and applies our framework to the various examples of health-status discrimination from Chapters 3 through 5. Indeed, one of the challenges of recognizing a new "ism" based on health is that treating individuals differently based on health is not necessarily harmful. In fact, in some cases, health-status discrimination may benefit the individual or society. Thus, we provide a blueprint for drawing those distinctions and navigating the divide.

Here, in Chapter 1, we begin with the concept of healthism. We contend that an entity discriminates on the basis of health status when it distinguishes – intentionally or unintentionally – based on health in such a way that produces a normative wrong. Drawing from antidiscrimination theory, we unpack essential elements of that definition, including "health," "health status," and "normative wrong." This clear definition of healthism allows us to distinguish between socially harmful and socially beneficial differentiations based on health status in later chapters.

1.2. HEALTHISM: THE CENTRAL CONCEPT

The fact that healthism has not already been the subject of widespread legal regulation begs the question: Why is it problematic? We propose that healthism matters for at least two main reasons. First, people perceive many healthist practices to be unfair. In other words, while much of healthism is legal, it still may raise important – and legitimate – moral concerns. Second, healthist practices threaten to exacerbate existing social inequalities, including health disparities.

People face real disadvantages based on their health-related attributes. Rates of weight discrimination – particularly among women – rival those of race discrimination and permeate all aspects of life, including education, health care, public life, and employment.[11] This negative differential treatment has financial as well as psychosocial implications, with weight discrimination linked to depression, anxiety, social rejection, suicide, avoiding medical treatment, and unhealthy behaviors.[12] Perhaps not surprisingly, this widespread discrimination likely stems from negative stereotypes that heavier individuals are lazy, stupid, undisciplined, sloppy, and at fault for their weight.[13] Yet despite these beliefs, the support for laws prohibiting weight discrimination has continued

[11] Jennifer L. Pomeranz and Rebecca M. Puhl, *New Developments in the Law for Obesity Discrimination Protection*, 21 *Obesity* 469, 469 (2013).
[12] Ibid.
[13] Rebecca M. Puhl, Young Suh, and Xun Li, *Legislating for Weight-based Equality: National Trends in Public Support for Laws to Prohibit Weight Discrimination*, *Internat'l J. Obesity* 1, 1 (2016).

to increase among liberals and conservatives alike. A 2016 survey found that 78 percent of respondents support laws forbidding weight discrimination in employment.[14]

In fact, eighty-eight percent of Americans believe that employers should not make hiring decisions based on whether an applicant smokes or is overweight.[15] Yet despite public opinion, a wide range of employers have adopted policies that ban hiring nicotine users. Not surprisingly, many viewed the policies as unfair. One public health professor called nicotine hiring bans "a form of employment discrimination," in part because they involve an employer "making a hiring decision based on a group someone belongs to, not his or her qualifications for the job."[16] And a state politician stated that "[e]ven if [the obesity ban] wasn't *illegal*, the policy was *discriminatory*."[17]

In addition to being discriminatory, critics also described the nicotine hiring ban as "an invasion of privacy and really overreaching"[18] and as "a step too far" that "extends far too deeply into the private lives of prospective workers."[19] Commentators feared that those policies were the tip of the iceberg and could lead to even more intrusive kinds of actions by employers. One editorial inquired: "If employers routinely reject people who engage in risky, but legal, behavior on their own time, what about such things as overeating or drinking too much alcohol?"[20]

Permitting healthism could eventually lead to restrictions on all kinds of private actions because so much of our conduct affects our health,[21] including

[14] Ibid.

[15] Rebecca Riffkin, *Hiring Discrimination for Smokers, Obese Rejected in U.S.*, *Gallup* (July 22, 2014), www.gallup.com/poll/174035/hiring-discrimination-smokers-obese-rejected.aspx.

[16] Roberts, note 3, at 571, 592 (quoting Renée C. Lee, *Hospitals Turn Away Applicants Who Smoke*, *Hous. Chron.* (Oct. 19, 2012) (quoting Michael Siegel), www.chron.com/news/houston-texas/houston/article/Hospitals-turn-away-applicants-who-smoke-3988931.php).

[17] Ibid. at 593 (quoting Erin Pradia, *Citizens Medical Center Reverses Ban on Hiring Obese People*, *Victoria Advoc.* (Apr. 12, 2012) (quoting Alex Hernandez), www.victoriaadvocate.com/news/2012/apr/11/ep_citizens_health_041212_173212).

[18] Ibid. at 592 (quoting Renée C. Lee, *Hospitals Turn Away Applicants Who Smoke*, *Hous. Chron.* (Oct. 19, 2012) (quoting Dotty Griffith), www.chron.com/news/houston-texas/houston/article/Hospitals-turn-away-applicants-who-smoke-3988931.php).

[19] Ibid. at 592 (quoting *Editorial: Not Hiring Smokers Crosses Privacy Line*, *USA Today* (Jan. 29, 2012), http://usatoday30.usatoday.com/news/opinion/editorials/story/2012-01-29/not-hiring-smokers-privacy/52874348/1).

[20] Ibid. at 593 (quoting *Editorial: Not Hiring Smokers Crosses Privacy Line*, *USA Today*, Jan. 29, 2012, http://usatoday30.usatoday.com/news/opinion/editorials/story/2012-01-29/not-hiring-smokers-privacy/52874348/1).

[21] Lewis Maltby, president of the National Workrights Institute, has observed: "The more we learn about the relationships between behavior and health, the more we realize that everything we do in our private lives affects our health. If employers are permitted to control private behavior when it is related to health, virtually every aspect of our private lives is subject to employer

our eating choices, sex lives, recreational conduct, and sleep patterns. Thus, in addition to fairness, opponents of healthism also raise related concerns about protecting privacy, respecting autonomy, and avoiding paternalism. Unchecked, healthism could threaten our ability to freely make decisions about our private lives.

Healthist practices also demand legal attention because they disproportionately impact certain historically disadvantaged populations.[22] Health disparities research from 2016 found that non-white and low-income populations have reduced health-care access, are less likely to have health insurance, and are more likely to encounter barriers when seeking health care.[23] Likewise, people with disabilities are less likely to receive preventative care, and are more likely to have poor health outcomes and to engage in unhealthy behaviors.[24] Because members of those groups are in poorer relative health, policies that discriminate based on health status will inevitably have a greater impact on them. Thus, in addition to the challenges that they already face, these populations have the added disadvantage of discriminatory treatment on the basis of health, whether it is in the context of health insurance, employment, health-care access, public health, government programs, or commerce. Accordingly, facially neutral policies, such as taxes on tobacco products or sugary soft drinks, may disparately impact certain already-disadvantaged groups.

Further complicating matters is the reality that disadvantaged populations encounter greater structural barriers to adopting health-promoting behaviors.[25] People need resources to purchase healthy food, find opportunities to exercise, quit smoking, and even get enough sleep. Existing literature on social determinants of health reveals that certain populations encounter roadblocks on their paths toward healthy living.[26] Common structural barriers include

control." Lewis Maltby, *Whose Life Is It Anyway?: Employer Control of Off-Duty Smoking and Individual Autonomy*, 34 *Wm. Mitchell L. Rev.* 1639, 1641 (2008).

[22] Roberts, note 3, at 616–18.

[23] Agency for Healthcare Research and Quality, National Healthcare Quality and Disparities Report: Chartbook on Access to Healthcare (2016).

[24] Disability and Health, Healthy People 2020, www.healthypeople.gov/2020/topics-objectives/topic/disability-and-health.

[25] Roberts, note 3, at 616–18; Jessica L. Roberts and Leah Fowler, *How Assuming Autonomy Undermines Wellness Programs*, 27 *Health Matrix* 101 (2017).

[26] For example, medical ethicist Harald Schmidt explains: "A law school graduate from a wealthy family who has a gym on the top floor of his condominium block is more likely to succeed in losing weight if he tries than is a teenage mother who grew up and continues to live and work odd jobs in a poor neighborhood with limited access to healthy food and exercise opportunities. And he is more likely to try." Harald Schmidt, Kristin Voigt, and Daniel Wikler, *Carrots, Sticks, and Health Care Reform – Problems with Wellness Incentives*, 362 *New Engl. J. Med.* e3(1) (2010).

living in a food desert (or a fast food swamp); lacking access to safe, affordable opportunities to exercise like parks or public pools; and not being able to pay for the child care necessary to make time to exercise or sleep. Rationalizing healthism as a means to encourage people to be healthy assumes that they are in poor health for reasons within their control. We explore the limits of personal autonomy to achieve optimal health status throughout this book.

Thus far we have established that healthism is not only potentially stigmatizing, unfair, and intrusive but also may perpetuate – or even fortify – existing social disparities, creating further impediments for already-disadvantaged populations. If we wish to regulate healthism, however, we will first need a clear definition of precisely which kinds of distinctions based on health status may constitute discrimination. Explanations of key components of our definition – including discrimination, healthy, health status, and normative wrong – follow.

1.2.1. *Discrimination*

The first step to a working definition of healthism is to spell out precisely what we mean by "discrimination." In the simple, dictionary sense, to discriminate simply means to differentiate.[27] People then discriminate on a daily basis. Insurers discriminate based on risk, lenders discriminate based on financial history, and employers discriminate based on education and experience. We even discriminate when we choose friends and romantic partners. This definition of discriminate is what forms the root of adjective *indiscriminate*, meaning not selective.[28]

In that sense, prohibiting people from discriminating, or differentiating, altogether would be not only undesirable but also nearly impossible. Consequently, when we talk about antidiscrimination law, we are inevitably talking about a particular subset of discriminatory actions. Yet which ones? The answer is the types of differentiation that violate certain important social norms, typically, fairness and equality. While discrimination has a value-neutral meaning, frequently when people say an action is "discriminatory"

[27] *See The Oxford English Dictionary* 757–8 (Oxford University Press, 2nd edn., 1989) (defining "to discriminate" as "to divide, separate, distinguish"); *see also* Robert K. Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis* 10–11 (Roman & Littlefield Publishers, 1980) (explaining that the term "discrimination" is "morally neutral"); *see also* Roberts, note 2, at 1163; Roberts, note 3, at 591; Jessica L. Roberts, *Protecting Privacy to Prevent Discrimination*, 56 *Wm. and Mary L. Rev.* 2097, 2109 (2015); Roberts and Leonard, note 3, at 838–9.

[28] "Indiscriminate," *The Oxford English Dictionary* (3rd edn., 2010) (defining an indiscriminate person as "not using or exercising discrimination").

they mean that the differentiation is somehow wrong or unfair.[29] In other words, there is an inherent value judgment. In fact, the legal and political meaning of discrimination is so widely accepted as pejorative that merely *calling* something discriminatory may be enough for some people to consider it problematic. Discrimination is the kind of distinction that goes against the way at least some people think the world *should* be. We refer to these violations of social mores as "normative wrongs." Thus, for differentiation to be "discrimination" it must result in a normative wrong. We further consider the meaning of normative wrong below and in Chapter 2.

Importantly, discrimination is not limited to differentiations that *intentionally* produce disadvantage. Discrimination can also encompass disadvantage that is unconscious or otherwise unintentional. Antidiscrimination law sometimes allows people to sue for "disparate impact," when an action or policy disproportionately harms a particular group, regardless of intent.[30] Disparate impact signifies discrimination by result, not by design.[31] Height requirements provide a prototypical example. While an employer that requires its employees to be 5′77″ so that they can properly operate equipment does not intend to exclude women, more men than woman will be eligible for the position simply because men tend to be taller.[32] With respect to healthism, weight requirements disparately impact overweight people, and occupational standards may screen out people who have health conditions like hepatitis that make them more vulnerable to toxicity. We explore how these kinds of cases have played out in the courts in Chapter 3.

Next, consider how socially undesirable differentiation operates. One popular set of frameworks for understanding discrimination is anticlassification versus antisubordination.[33] On one hand, discrimination can mean merely *classifying* people based on a particular protected status – for instance, race, sex/gender, or disability. On the other hand, discrimination can also signify *subordinating*

[29] Roberts, note 2, at 1172–4; Roberts, note 3, at 591; Roberts, note 27, at 2109–12; Roberts and Leonard, note 3, at 839.

[30] *See* Lex K. Larson, *Employment Discrimination*, ch. 20: The Basics of Disparate Impact Theory 2–20 (Matthew Bender, 2nd edn., 2016); *see also* Roberts, note 2, at 1172–3; Roberts, note 27, at 2120–1; Roberts, note 3, at 617; Roberts and Leonard, note 3, at 840.

[31] *Alexander* v. *Choate*, 469 U.S. 287, 292 (1985).

[32] *See e.g.*, *Boyd* v. *Ozark Air Lines*, 568 F.2d. 50, 53 (8th Cir. 1977) (holding that a height requirement of 5'7" has a disparate impact on women and instituting a 5'55" requirement as a less discriminatory alternative).

[33] Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 *U. Miami L. Rev.* 9, 9–10 (2003); *see also* Roberts, note 27, at 2123–5; Roberts and Leonard, note 3, at 839–40. There are of course other antidiscrimination paradigms. *See* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 *N.Y.U. L. Rev.* 101, 145–55 (2017) (discussing the antiessentialism and anti-balkanization theories of antidiscrimination).