HEALTHISM

Can an employer refuse to hire someone who tests positive for nicotine or alcohol? Can an airline or movie theatre require overweight customers to purchase two seats? Can a health insurance company refuse to sell policies to those most in need of medical care? Can the government condition public assistance on wellness program participation or work activity? In this illuminating book, Jessica L. Roberts and Elizabeth Weeks consider these and similar questions, offering readers a nuanced analysis of when and why discrimination based on health status – or "healthism" – should be allowed, and when it should not. They provide a methodology to distinguish desirable health-based classifications from the undesirable and propose law and policy solutions to encourage the former and limit the latter. This work should be read by anyone concerned with how government does – and does not – regulate based on health.

Jessica L. Roberts directs the Health Law & Policy Institute at the University of Houston Law Center. A noted expert on diverse issues of health law, she has been interviewed by the BBC World Service, the *New York Times*, the *Houston Chronicle*, and National Public Radio. She has participated in a congressional briefing on the Genetic Information Nondiscrimination Act, presented at NASA, and served as a consultant for the Football Players Health Study at Harvard. Professor Roberts is also a Greenwall Faculty Scholar in Bioethics and a Health Policy Scholar with Baylor College of Medicine's Center for Medical Ethics & Health Policy.

Elizabeth Weeks is Associate Dean for Faculty Development at the University of Georgia School of Law. In addition to numerous law review articles and book chapters, she is coauthor of *The Law of American Health Care*. She is past Chair of the Association of American Law Schools Section on Law, Medicine & Bioethics, and has received numerous awards and honors, Health Law Scholars Award, giving by the American Society of Law, Medicine & Ethics, University of Kansas Docking Faculty Scholar Award, and University of Kansas School of Law Immel Teaching Award.

Healthism

HEALTH-STATUS DISCRIMINATION AND THE LAW

JESSICA L. ROBERTS
University of Houston Law Center

ELIZABETH WEEKS
University of Georgia School of Law

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107160385
DOI: 10.1017/9781316675601

First published 2018

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication data
NAMES: Roberts, Jessica L., author. | Leonard, Elizabeth Weeks, author.
TITLE: Healthism : health-status discrimination and the law / Jessica L. Roberts, Elizabeth Weeks.
DESCRIPTION: Cambridge, United Kingdom ; New York, NY: Cambridge University Press, 2019. | Includes bibliographical references and index.
IDENTIFIERS: LCCN 2018012839| ISBN 9781107160385 (hardback : alk. paper) | ISBN 9781316613429 (paperback : alk. paper)
SUBJECTS: | MESH: Healthcare Disparities—legislation & jurisprudence | Social Discrimination—legislation & jurisprudence | Privacy—legislation & jurisprudence | Insurance, Health—legislation & jurisprudence | Health Status Disparities | United States
CLASSIFICATION: LCC RA412.3 | NLM W 33 AA1 | DDC 368.38/2—dc23
LC record available at https://lccn.loc.gov/2018012839

ISBN 978-1-107-16038-5 Hardback
ISBN 978-1-316-61342-9 Paperback

For DF and LJF
And JDW, GGW, and EJL

The State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.

John Locke, *Second Treatise*, § 6

Contents

Preface

The US Constitution requires that people receive equal protection regardless of their race, ethnicity, national origin, or religion, absent a compelling governmental interest. To a somewhat lesser degree, the government is prohibited from discriminating on the basis of gender, illegitimacy, and sexual orientation. By statute, the US Congress also has limited certain private actors from discriminating in certain contexts on the basis of race, age, disability, pregnancy, genetic information, immigration status, or military affiliation. Conspicuously absent from this list of protected statuses is health. This book proposes a new protected category – the unhealthy – and a new form of discrimination – healthism.

"Healthism," like the other, previously recognized "isms," describes socially undesirable differentiation on the basis of a particular trait, in this case, health status. So used, the term carries a pejorative meaning. But not all differentiation on the basis of health necessarily constitutes healthism. In fact, differentiating on the basis of health can be neutral and, in some cases, even desirable. Hence, our project is to distinguish the "good" health-based distinctions from the "bad," or "healthist," ones. This book surveys and evaluates the legal regulation of health in a variety of settings, both historically and following comprehensive federal health-care reform. The Patient Protection and Affordable Care Act of 2010 (ACA) signaled a sea change in the public's and lawmakers' tolerance for health-status discrimination. The ACA aspires to end discrimination against the unhealthy, at least with respect to access to health insurance. No longer may public or private insurers deny coverage or charge more to the unhealthy. As we discuss, however, the ACA's gains are limited by various exceptions and vulnerable to shifting political winds. As of this writing, Congress has eroded significant components of the ACA that may well reintroduce health-status discrimination in health insurance.

Our survey of health-status discrimination is by no means limited to federal health reform or health insurance. The following chapters catalog the many ways that government and private entities differentiate based on health status and the implications of those policies. We explore examples from a wide range of contexts, including employment, medical care, commercial goods and services, judicial rules and remedies, public benefits, housing, and public and political discourse. We explain the inadequacy of existing disability and other antidiscrimination laws to fully protect the unhealthy from unfavorable treatment, thus justifying the need for our new paradigm.

We recognize that the law can be a powerful tool to promote wellness and encourage healthy lifestyle choices. But such differentiation can also perpetuate stigma and compound other disadvantages. Accordingly, our thesis is that differentiation on the basis of health status is desirable when it promotes responsible, healthy behaviors, yet undesirable when it perpetuates or exacerbates existing health disparities and social disadvantage. Our approach is distinct from other scholarship in this area, which tends to focus on the potential for health-based distinctions to infringe on personal liberty. Instead, we view the issue through the lenses of social advocacy and health promotion, allowing that even some arguably paternalistic laws, policies, and practices may not be "healthist" inasmuch as they encourage and support healthier lifestyles. We conclude that sometimes the law should permit – or even encourage – health-based distinctions and sometimes it should prohibit them. Although it challenges the tidiness of our methodology, we maintain that this equivocal stance more accurately and honestly captures the wide range of contexts that health touches.

The book concludes by offering a roadmap for navigating the treacherous terrain of health-status discrimination. In some instances, we advocate legal responses to healthist practices and policies, identifying gaps in existing protections for the unhealthy and proposing appropriate reforms. In other instances, we endorse laws that promote healthier behaviors and conduct, with a cautionary eye toward the potential for those laws to perpetuate discrimination and stigmatization of disfavored groups. Most importantly, our book introduces the concept of healthism into the lexicon and invites an ongoing dialogue about the merits and demerits of treating individuals differently based on their health statuses.

Acknowledgments

The authors wish to acknowledge and thank Ifeoma Ajunwa, Kent Barnett, Josh Blackman, Cyndi Canup, Kyle Chapel, Danielle Charron, Jessica Clarke, Dave Fagundes, Elaine Fiala, Jacqueline Fox, Caroline Jozefczyk, Emily Lawson, Brendan Maher, April Moreno, James Nelson, Paul Secunda, Jennifer Shinall, Lauren Wallace, Mike Wells, Lindsay Wiley, Mary Dovel, Bradley Tipper, Hannah-Alise Rogers, Mark Rothstein, Kate Thorne, and T. J. Striepe.