

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.

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Healthism

HEALTH-STATUS DISCRIMINATION AND THE LAW

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*For DF and LJF
And JDW, GCW, and EJJL*

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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

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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.

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