

2. Disability Rights: A Question of Justice or Freedom?

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1. Introduction

The concept of “rights” has, since its development in the modern era, overlapped with a variety of other concepts in the political theory lexicon, but it particularly intersects with the concept of “freedom.” Since the Enlightenment, as a keystone of liberal ideology, the language of rights was used to secure the freedoms of individual citizens against the arbitrary power of the state. Rights are used as tools to secure freedom, they are claims against others who wish to interfere with our liberties, and they are instruments for opening up and promoting new freedoms.

But as disability, feminist, and critical race theorists have asked, freedom for whom? Rights have had an ambiguous relationship to the struggles of oppressed and marginalized groups—an especially egregious problem for western “liberal” democracies like the United States.¹ On the one hand, as critics have argued, rights were constructed specifically for propertied white men and are sustainable only through the subservience of white women, landless workers, and people of color (Jaggar, 1983; and Pateman, 1988). Despite liberalism’s overt attention to diversity, liberal principles such as rights have historically been used to erase difference, in that only some interests, views, bodies, and life plans are seen as worthy by the state and hence protected by rights. As feminists have particularly argued, difference is cast as the opposite of equality, such that women’s bodily specificity must either be ignored in order to claim equal rights (as was the case in *California Federal Savings and Loan v. Guerra*) or else acknowledged but denied equal rights (as happened in *The EEOC v. Sears*) (Scott, 1988; and Eisenstein, 1990). Dean

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¹ Most of my examples do draw on U.S. law but similar cases can be made for European democracies as well, for instance in Germany and France where the “rights” of women to property and voting were relatively late in coming, and where even today “rights” to social welfare benefits are tied to patriarchal policies of reproductive labor. See Mushaben (2001) and Liebert (2001). And certainly not all signatories to the United Nations Convention on the Rights of Persons with Disabilities actually practice the declarations of that convention. In its inconsistency on the implementation of rights for “excluded others,” the U.S. is illustrative but not exceptional.

Spade has noted similar difficulties in the struggle for “trans rights” because rights are so inadequate to address the struggles of those facing “intersecting vectors of harm.” Indeed, linking the contemporary focus on rights with neoliberalism, Spade offers many reasons to be highly suspicious of rights as a tool for liberatory struggle, particularly noting that the creation of “hate crime” legislation, which “provides millions of dollars to enhance police and prosecutorial resources” accordingly declares police “as protectors of queer and trans people against violence, while imprisonment and police brutality were skyrocketing.” (Spade, 2011: 86 and 89).

Disability theory allows us to make a similar claim that rights are constructed for “able” bodies at the expense of “disabled” ones.² As a prominent example, U.S. Court interpretation of the Americans with Disabilities Act (ADA) has entailed a catch-22 that has disarmed rights claims: if plaintiffs were disabled enough to be entitled to accommodation, they were too disabled to hold the job, because “disabled” meant “unable to work” and “worker” meant “able-bodied.” (O’Brien, 2004; Friedland, 1999; and Hahn, 2000). This interpretation hampered the freedom of disabled individuals to earn their living; to, as Jacobus tenBroek put it, “live in the world.” But I think that to at least some extent, this is a result of the tendency to interpret disability rights in terms of “justice” rather than “freedom,” by lawyers and by moral and political philosophers. In this paper I argue that a better approach is to think of disability rights through the lens of freedom. I start by offering my critique of justice as a foundation for rights, then defend my view of the connection between rights and freedom, and suggest ways that thinking about rights through a freedom framework can advance disability rights claims.

I should be clear that I am not, in this chapter, rejecting the concept of justice or its relevance to rights. Given the situation of many people throughout the world who experience economic, social, and political oppression, I by no means believe that justice is irrelevant to rights. Moreover, it is clear that justice claims have a great deal of attractiveness to work on disability and disability rights. Indeed, the theme of the 2011 annual meeting of the Society of Disabilities Studies—a multidisciplinary organization

² Spade makes similar observations about the courts’ interpretation of the Americans with Disabilities Act to deny disability rights (Spade, 2011: 82).

that includes not only activists and academics, but academics in a variety of disciplinary fields such as English, comparative literature, philosophy, sociology, history, and political science-- was “Beyond Rights to Justice,” implying that justice requires the consistent and proactive application of rights, which have not been uniformly enacted or protected.³

Accordingly I will not argue that the concept of justice be evacuated from rights discourse, much less from political and moral philosophy more generally. Indeed, given the inevitable intertwining of the “essentially contested concepts” that make up the core of political philosophy, such a position would be implausible.⁴ Freedom and rights are closely related, but they obviously are not simply synonyms. Other concepts like equality, responsibility, and indeed justice are inevitably connected and related to rights, and to one another: can one have a plausible conception of freedom that does not attend in some way to the concept of equality? Can one develop a notion of equality that does not entertain questions of justice? I think not. Rather, I am making an argument about priority: a “justice approach to rights” talks about rights *primarily* in terms of justice, and takes justice as the animating first principle of rights; it views justice as the *point* of rights. A “freedom approach to rights,” accordingly, talks about rights *primarily* or *first* in terms of freedom, and takes freedom as the animating first principle of rights; it views freedom as the *point* of rights. I favor a freedom approach to rights because I believe that when justice is the *starting point* for thinking about rights, and when it is seen as the *purpose* of having rights, other concepts seem to fade into the background, and the prospects for disability rights start dimming.

I focus my critique on a branch of academic discourse which has done a great deal to advance our thinking about disability, but also hindered it, namely liberal Anglo-American analytic philosophy. As a political theorist, my contribution to understanding

³ This paper was developed in response to that conference’s thematic call, and this paper was first presented at the 2011 meeting. Thanks to Mara Mills for presenting the paper for me when illness prevented me from attending.

⁴ Though I have made extensive critique of rights discourse from a feminist perspective; see Hirschmann, (1999).

disability social rights lies primarily in the theoretical and conceptual realms, as opposed to the applied and practical realms in which other contributors to this volume operate. I think this contribution is important because the ways in which we see and think about rights has inevitable, albeit frequently unacknowledged, effects on how rights are implemented. Moreover, many of my practical examples are drawn from U.S. law and policy because, as a theorist rather than an empirical political scientist, those are the cases with which I am most familiar. The point of using them is not to illustrate the state of disability policy in the U.S., however, but rather to illustrate conceptual and theoretical points about what “rights” mean in the liberal western framework when applied to disability. Liberal Anglo-American analytic philosophy in particular has paid quite a bit of attention to disability over the past few decades. This attention should be applauded, for many philosophers have made vital contributions to our thinking about disability.⁵ But one unfortunate effect, in my view, has been the dominance of the notion of “justice” in its discourse in a way that has often disserved the interests of persons with disabilities. Indeed, one might say that there is a “justice infrastructure” in place, produced by moral philosophers, dominated by Rawlsian as well as by utilitarian philosophy, and largely ignorant of the nuances of power that affect persons with disabilities so profoundly.⁶ I hope that as a political theorist, rather than a philosopher per se, I can bring power back into the idea of rights by shifting our focus from justice to freedom.

2. The Disability Turn to Justice

In considering disability rights and entitlements from a justice perspective, the primary concerns in the philosophical literature seem to be focused on *allocation* of resources to disabled people (whether directly through accommodation, assistive devices, and health

⁵ I should note that this attention to disability in the part of philosophers is significantly attributable to the important efforts of co-contributor Anita Silvers, though she would not endorse many of the arguments made by her colleagues that I will critique in the next section of the paper. As will become clear from my discussion, there are many philosophers whose work on disability I greatly admire and agree with, including Silvers, Eva Kittay, Jonathan Wolff and a host of others, particularly the work of feminist philosophers. See Silvers (1995); Kittay (1998); and Wolff, (2009). I am simply trying to point out a specific problematic aspect of the way in which rights and justice are intertwined. So while my ‘target’ may seem to be a specific subset of one academic field, in fact, the implications of my critique go much further.

⁶ For my critique of Rawls on disability, see Hirschmann (2013a).

care, or indirectly through scientific research); *distribution* of resources (which disabilities or illnesses, or which assistive devices or technologies should receive more dollars, which less? Should we retrofit campus buildings or increase the library budget?); *entitlement* to resources (e.g. should expensive medical care be used to prolong the life of a severely impaired infant or should those resources be allocated elsewhere? Is the option to retrofit buildings rational if there is only a small minority of wheelchair users currently on campus?); and *adequacy* of resources (how much is enough?). Questions of responsibility sometimes arise in terms of determining just distribution and entitlement (is the person impaired because of “irresponsible” action, like smoking, or driving a motorcycle without a helmet?), but justice is the primary theoretical concept that one encounters in this disciplinary framework.⁷

I believe this is because, as I read them, many “mainstream” philosophers of justice tend to adopt a “medical model” of disability, and view justice as a means by which injury is repaired; they accept as given the limitations of the built environment, the biases against certain cognitive orientations, and import certain assumptions into their evaluation of what justice requires that distorts the claims of the disabled. The most famous philosopher of justice, John Rawls, is a good example. He limits his understanding of disability to “accidents and illnesses,” with medical care being the appropriate response to “restore people by health care so that once again they are fully cooperating members of society.” (Rawls, 1993: 20 and 184). As Ravi Malhotra maintains, Rawls believes that “examining marginal cases such as people with significant physical or mental disabilities may distract our ability to make accurate moral judgments by ‘leading us to think of persons distant from us whose fate arouses pity and anxiety.’” (Malhotra, 2006: 76; and Rawls, 1993: 83-84). From the start, then, Rawls misunderstands the disability perspective, thereby mandating a response that is unreasonable. The notion that blindness or cerebral palsy or spinal cord damage is a supreme loss to the individual, a tragedy that the individual would want to overcome at all cost, constructs the notion of “the disabled”

⁷ I should point out that these questions are not ones I necessarily endorse; rather, they illustrate the typical questions that philosophers ask, even the philosophers with whom I have considerable sympathy, such as Wolff (2009). See also, Stark (2007).

into a tragic figure, dependent, sick, weak, and unable to make any but the barest contributions to the collective social welfare. Peter Singer is an extreme example, in arguing that “severely” impaired infants should be denied costly medical services and “allowed” to die, or even euthanized (Singer, 1993; Singer and Kuhse, 1985; and Singer and Kuhse, 1994).⁸ Many disability scholars rightly wish to reject his views, but they may be the logical conclusion of this kind of approach.⁹ It is unjust, in this view, to devote so many resources to a life that will never (again, in this view) attain full human status because of the severity of its disabilities, when those resources could be allocated instead in other ways, such as to prevent many other children from starving to death or dying from dehydration due to diarrhea. The starting assumption that impairments make a life less human and less valuable, combined with the *quid pro quo* argument that characterizes Singer’s brand of utilitarianism—the assumption of his scenarios that the thousands of dollars saved from not preserving the life of a severely disabled infant in the U.S. will be directly applied to, say, food aid in Africa, and will not be siphoned off by middle men, or corruption, or any of the other myriad problems that are major contributors to mass starvation—demonstrates the casualness with which many philosophers of justice consider the lives and wellbeing of disabled persons. This casualness may not be conscious or intended, and indeed I believe it is often a byproduct of the abstraction that philosophers deploy in constructing unrealistic hypotheticals. Harriet Johnson captures this when she describes an interlocutor during her visit to Princeton—a “philosophy professor” according to her account—who complains that her “objections to assisted suicide...are grounded in current conditions of political, social and economic inequality.” He claimed such conditions need to be set aside in order “to get to the real basis for the position you take”—ignoring that those conditions constitute an essential part of “the real basis.” (McBryde Johnson, 2003).

⁸ Similarly, Singer suggests that ‘Disability advocates, it seems, are forced to choose between insisting that extending their lives is just as important as extending the lives of people without disabilities, and seeking public support for research into a cure for their condition’, setting up precisely the kind of either/or logic that skirts larger questions of resource allocation that disability thinking asks. See Singer, Peter (2009).

⁹ In response to Singer’s article, Harriet McBryde Johnson, a disability rights lawyer, who was severely disabled by a neuromuscular disease, engaged in a debate with Singer over the value of her life and of what was required to sustain her as an infant. See McBryde Johnson (2003); and (2005).

But even Norman Daniels, who argues that justice requires a system of universal health care, treats disability not as a potentially valuable difference but as something that is a function of “bad luck.” (Daniels, 2007). And of course “resource constraints” feature importantly in the limits to how much health care one is entitled to—again suggesting a medical model rather than a social model of disability. When philosophers put disability in terms of the medical model and focus exclusively on questions of distributive justice, the kinds of expenditures required to deal with disability seem excessive. We have to “cure” paraplegia, for instance, instead of installing ramps and curb cuts.

The problem with justice is that ever since Aristotle it has been tied to the notion of “desert.” There is a tacit underlying assumption that in a just world people get what they deserve, and such assumptions shape our conclusions about just entitlements. It is part and parcel of the concept. So from a justice perspective, if you become impaired by a motorcycle accident in which you failed to wear your helmet, society is not necessarily obliged to pay for your treatment or care. Your irresponsible, risk-taking behavior brought about your injury, so in a sense you’ve gotten what you deserved. Others may feel sorry for you and recognize the tragedy, but “society” has no obligation to spend its collective tax revenues paying for whatever treatment or resources you now need; you have no “rights claim” against it. Justice tends to depend on a notion of desert tied to “personal responsibility” and individuality in evaluating action and its consequences.

This notion of desert within a justice framework has been frequently tied to class—the trope of the “deserving and undeserving poor” goes back at least to the poor laws instituted by Elizabeth I, carrying through to the poor law reforms of the late seventeenth and nineteenth centuries, to debates over “welfare,” or public assistance to poor single mothers throughout the twentieth century. At various points in time, such as the late seventeenth, late nineteenth, and late twentieth centuries, it has taken on particular furor.¹⁰ The deserving poor are, as Linda Gordon put it, “pitied but not entitled” to

¹⁰ For an account of late seventeenth-century ideas about the deserving poor see Hirschmann, (2002). John Locke recommended that beggars be forced into service aboard sailing vessels for two years, that poor mothers should work part time, and that children over the age of two be put into ‘working schools’ which were basically wool factories. My article traces the uncanny resonances between Locke and U.S. welfare reform of the late twentieth century, with work requirements for single mothers and House Speaker Newt

poverty relief, and are subject to excessive regulation and surveillance (Gordon, 1994). And disability is almost always tied up in such considerations of desert.

This theoretical point can be illustrated by considering a policy example from the United States; specifically, how Social Security “old age” insurance (SS) differs from Social Security Disability Insurance (SSDI) and Supplemental Security Insurance (SSI). Social Security old age insurance goes to everyone who attains a certain age and has “paid into the system” by engaging in paid work (though it is important to note that large numbers of Social Security recipients have never engaged in paid work, namely stay-at-home wives). Once this condition is met—working (or marrying a worker)—all recipients have a right to retirement payments, as well as Medicare old-age health insurance. Applying for SS is quite easy, it can be done online or by mail in a matter of minutes. These are rights in the full sense: everyone of a certain age receives it, regardless of need, just as every citizen is entitled to vote when he or she reaches the age of 18, and can (legally) drink alcohol at age 21. You might have an excellent pension, 401K, or even still work for a salary past age 70, but you will receive your SS payments.

By contrast to this is another class of social rights that are means tested: the most common form is “welfare”, or public assistance for poor single mothers. These are “rights” in the sense that if your income falls below the poverty line and you are raising children, you qualify to receive the aid. At least, that is the idea; the reality is that the strict “means testing” of would-be recipients entails an elaborate application process documenting your economic conditions; regular meetings with case-workers including, in the past, in-home visits. And as of the 1990s, recipients are also required to participate in a variety of employment programs, which in many states simply took the form of minimum-wage jobs, often called “workfare,” in order to qualify for benefits; and benefits were generally limited to a maximum of two years (Mink, 2000).¹¹

Gingrich’s advocacy of orphanages for the children of welfare mothers. I discuss John Stuart Mill’s late-nineteenth century speeches on poor law reform, surprisingly harsh for this apparent lover of liberty and early feminist, in Hirschmann (2008), chapter 5. For Locke’s views on how disability intersects with poor laws, see my Hirschmann (2013c).

¹¹ Again, this situation may be more dire in the United States than in Europe, but see Mushaben (2001) and Liebert (2001) for critiques of European public assistance on similar lines.

This does not really sound much like a right: it is extremely discretionary, subjecting the individual to intense state surveillance and arcane bureaucratic requirements that seem designed to make applicants feel shame and humiliation. And indeed, most Americans who do not receive welfare benefits really do not view it as a right at all, but as a privileged set of benefits that are based on need, specifically the need to care for children without a male breadwinner. It is still linked much more to notions of charity than to rights. The history of poor relief coming out of the sixteenth century links it to Christian obligations to alleviate suffering, and indeed it was generally administered through local parishes. As poor relief shifted more to the state, it retained the flavor of Christian charity, as John Stuart Mill so caustically observed in his criticisms of “the base doctrine, that God has decreed there shall always be poor”; he claimed that the charitable wealthy took a fatalistic attitude about the poor because they needed to feel superior to them, and had an interest, though a generally unrecognized one, in perpetuating poverty precisely to sustain those feelings of superiority (Mill, 1965: 369; and Hirschmann, 2008). Yet such feelings generally translate into the policing of behavior and the maintenance of poverty *through* the policy by providing inadequate resources to allow recipients to change anything. As T.H. Marshall, generally seen as the “father” of the idea of social rights, noted, by the middle of the nineteenth century, “The Poor Law treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them—as claims which could be met only if the claimants ceased to be citizens in any true sense of the word.” (Marshall, 1964: 80).

This legacy has left what I like to call the “charity hangover”; the degeneration of ideals of Christian love and charity into suspicion and denigration of its recipients, resulting in begrudgingly stingy and punitive policies that not only provide little more than bare subsistence, but subject recipients to the kind of second class behavior associated with criminality more than genuine charity, much less citizen rights. It is particularly evident today in contemporary discourse over welfare reform in the United States--and to a lesser degree in various European countries--throughout the last decades of the twentieth century, which repeatedly invoked imagery of the undeserving poor who were too lazy to

help themselves and thus had to be forced to work, and too irresponsible to stop having children.¹²

I maintain that SSI and SSDI are more like this than like SS, and suffer similarly from the “charity hangover.” This is most obviously the case for SSI, which involves means testing, and exerts limits on the amount of income or savings a recipient can have. SSDI, like SS, depends on “paying into the system” for a minimum amount of time, and makes no consideration of other sources of income such as a spouse’s salary, investment income, or prior savings. Thus, like SS, it should logically be free of the stigma and surveillance to which recipients of SSI and welfare are subject. But in fact SSDI may suffer even more from the “charity hangover” than SSI. Both SSDI and SSI are “needs based” in the sense that you must prove that you are disabled and thereby unable to work: the “need” may not be a strictly economic one--though the reality of SSDI is that it is often logically bound to be linked to economic need if the applicant’s primary source of income used to be paid work which she can no longer perform because of the disability. And as Weber notes, even for employed disabled persons, “disability often, though not always, diminishes what persons with disabilities may have to offer in the labor market” due to issues of stamina, physical strength or particular intellectual skills, depending on the disability (Weber, 2008-2009). But the disability itself establishes need. And this, as in income-based programs such as SSI and welfare, means that SSDI recipients are subject to the same kind of strict state scrutiny, ongoing surveillance, and its accompanying suspicion and humiliation to which welfare recipients are subject. The documentation to establish eligibility is generally time-consuming and burdensome involving considerable invasion of privacy (though the degree of difficulty can vary from state to state¹³), creating an “adversary climate that envelops the physician, the patient-claimant, and the

¹² See Hirschmann and Liebert (eds.) (2001), particularly essays by Dodson, Fineman, Hartmann and Yi, and Hirschmann.

¹³ Burkhauser, Butler and Weathers II (2001/2). The authors note that ‘higher state allowance rates increase the hazard of SSDI application’, implying with this phrasing the negative significance of such applications, though at the same time using this data to encourage employers to accommodate workers, since ‘employer Accommodations...significantly reduced the risk of application.’

administrators.”(Hadler, 1982). Insurance investigators often check up on recipients’ doctors’ visits and even video-record them when they leave the house.¹⁴

Economically-needs-based SSI, like welfare, pays inadequately, providing payments equivalent to seventy percent of the poverty level. And “the standard for disability is also very severe....of all the individuals placed on the DI [disability insurance] rolls in a given year, one eighth die within two years. The proportion of individuals who die during their first six months on DI is fourteen times that of retirees during their first six months on the Social Security old-age insurance.”(Weber, 2008-2009: 600). Despite such statistics, media hysteria over “disability fraud” in the United States following the 2008 economic downturn demonstrated that the trope of the “deserving” and “undeserving poor” takes new forms with disability: the question is not simply whether one has economic need, but rather whether one is “truly” disabled.¹⁵ The frequent assumption is that recipients of disability insurance are cheats who want something for nothing; the resentment of nondisabled workers who are tired of working so hard and failing to get ahead, instead of being directed at the appropriate targets, are instead directed toward those who are unable to work. Michael Prince has made similar observations about the Canadian Pension Plan-Disability (Prince, 2008). And Samuel Bagenstos carries this argument further to suggest that even the ADA was construed as a “welfare reform act,” developed to the end of reducing the number of citizens on public assistance of any kind.¹⁶

I suggest that such attitudes toward and treatment of disabled persons are tied to the justice foundations of such so-called “rights.” The demand for justice unavoidably replicates and depends on the able-bodied view of the disabled as “injured,” diminished, lacking, less. Justice is always a remedy for injury. It claims to be forward looking, for a more just future, but it is inevitably backward looking, to redress past injury. So it locks

¹⁴ See for instance Disabledworld.com, *Claiming Disability? Beware Your Insurance Company May Be Watching*, accessed online 27 June 2014, <<http://www.disabled-world.com/disability/social-security/cheats/claiming.php>>.

¹⁵ See, for example, Slobodien (2013), *How Broken is the Social Security Disability Insurance Program?*, The Hill.com, accessed 26 June 2014, <<http://thehill.com/blogs/congress-blog/economy-budget/191509-how-broken-is-the-social-security-disability-insurance>>.

¹⁶ Bagenstos (2003), p. 945. This point is in fact illustrated in Burkhauser, Butler and Weathers (1999), in which they argue that the more responsive an employer is at responding to requests for accommodation, the less likely it is that the employee will apply for the company’s disability insurance.

the justice seeker into Nietzsche's *ressentiment*; the injured seeking redress. This is exactly what disability scholars and activists have been fighting against for the past quarter century, seeking to gain recognition of bodily diversity and rearrange social institutions to accommodate those bodies. But such arguments rarely change the able-bodied view of disability as a "state of injury" that seeks redress, and of "accommodation" as "special consideration;" or worse, as an attempt to bring able-bodied persons "down" to the level of disabled persons, as Nietzsche might frame it.

As a result, even branches of philosophy that might intuitively seem friendlier to a disability perspective, such as luck egalitarianism, are caught up in this negative feedback loop. Luck egalitarianism takes off from Rawls's claim in *A Theory of Justice* that many of our capabilities and limitations—from the class of the family we are born into, to the talents and skills we are born with, to, as mentioned earlier, "accidents"—are not "deserved" by individuals, but are the function of chance or "luck." This might seem to fit the disability argument that "we are all disabled" in the sense that any "able bodied" person could experience serious impairment at any moment of her life, thus universalizing the concept of disability. But it can just as easily serve to deepen the "otherizing" dimensions of able-bodied thinking about disability. This is because the "luck" that results in disability is uniformly considered bad luck, not good.

Moreover, the trope of the deserving and undeserving poor bleeds into this view of luck to entail a further underlying distinction between those who are "genuinely" victims of "bad luck" and those who have in a sense "made their own luck." Consider the common reaction to the motorcycle rider who is injured by not wearing his helmet: he has contributed, through irresponsible behavior, to his injury. He has in part made his own luck. Such behavior exonerates the state from—or at least reduces its responsibility for—obligations to provide care for the injured person.¹⁷ But does the motorcycle rider think "I like the feel of the wind in my hair, *and* if I get injured in an accident the state will pay

¹⁷ Anderson (1999). Voigt (2007), might suggest that my first question overstates the 'harshness objection' to luck egalitarianism; but my second and third versions of the scenario, I believe, escape her response because they fall outside of the entire framework of the luck egalitarian's assessment of what constitutes good and bad luck.

for my care so it's a win-win proposition for me"? Of course not: at most he thinks the former, and dismisses the possibility of an accident, because like most nondisabled people he cannot imagine becoming disabled. Or, again like many nondisabled people, perhaps he thinks "I'd rather be dead than disabled, and by not wearing my helmet, I get to enjoy my ride *and* decrease the chances of a permanent injury by increasing my risk of death." In the event that he unluckily has an accident, and *doesn't* get his preferred outcome of dying but instead survives with a disabling injury, what is the state to do? Do we say that we will provide no resources so that his life is truly miserable, thereby hastening his death, or even helping to motivate him to kill himself, thus maximizing the outcome he prefers? But what if, after getting over the initial shock of his accident, he adjusts to his new life and experiences the same levels of happiness that he experienced before? Studies routinely show that disabled individuals have overall levels of happiness equal to the nondisabled. So now, perhaps, his preference has changed: he wants to live, and to live as well as he can. Are we supposed to say "But you *said* you would rather be dead, that preference is what motivated your choice which caused your disability, so it's your problem"?

Even if most of us recoil (or laugh) at such arguments, such absurdities *logically* follow from taking an exclusive or even primary focus on justice. That is in part because what the motorcycle rider cared about in the first place was not justice at all, but freedom. And I maintain that that is what most disabled people care about. They/we ask for accommodation, not cure. They/we ask not that *they/we* be changed, but the built environment, and even more significantly, biased attitudes. As Elizabeth Anderson puts it in her critique of luck egalitarianism, disabled people "do not ask that they be compensated for the disability itself. Rather, they ask that the social disadvantages others impose on them for having the disability be removed." (Anderson, 1999: 334). She says this to the end of creating a better model of justice. But I think instead that it is an issue of freedom, of changing the model altogether.

Indeed, I believe that freedom is the animating question of justice, for claims of justice arise when individuals—or classes of individuals—are prevented from doing things they wish to do. When we bring up questions of justice, we do so only because someone is

trying to prevent us from doing what we want, limiting us, denying us resources to enable us to earn a living, go to school, get into a building, use public transportation, to work, to play, “to live in the world,” as tenBroek put it. What makes something unjust entails the inhibition of people’s liberty in various ways, and theories of justice intend to compensate for, if not overcome, the unequal distribution of freedom that results from such inequalities of ability. In fact, Rawls’s first principle of justice states “Each person has an equal right to the most extensive scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.” (Rawls, 1971: 52). Not an equal right to money, or resources, or power, but freedom. Money, resources, and power may be *instruments* for freedom, but freedom is the *point* of justice. Granted that the “freedom” he has in mind is primarily negative freedom; but those very same resources, money, and power will similarly shape disabled persons’ desires, conceptions of the themselves, and conceptions of what they want, or as Rawls would put it, their “life plans.”¹⁸

3. The Connection Between Rights and Freedom

Despite my account of the justice orientation of *disability* rights in particular, the more general connection between rights and freedom is actually fairly common among rights scholars, although not always in a positive direction. Indeed, some of the literature linking freedom and rights see them as opposed: that A’s rights to X violate B’s freedom to Y, such as in cases where protecting intellectual property conflicts with the public’s use of information, such as when Myriad Genetics tried to patent the human genome, a

¹⁸ I should note that when many of these philosophers use concepts like “desire” and “life plan,” they commonly presuppose that the agent in question develops these through the use of rationality, a concept that has been challenged by feminists but is particularly challenged by intellectual disability: particularly for those with severe cognitive disabilities, how can desires be expressed and communicated? What if such desires seem to put the person in a position of harm? Given the profound history of paternalism regarding treatment of persons with cognitive and intellectual disabilities, I prefer to err on the side of accepting at face value the expressed desires of all disabled persons equally; this may strike readers as impractical in specific cases, but for theoretical purposes of developing the concept of freedom it is essential, and does not foreclose the question of whether I should be free to enact a desire; for instance, if I desire to kill my husband after he cheats on me, most would agree that I should be restrained from doing so. In cases where it appears difficult to discern what the person’s desire is because of severe cognitive impairment, I agree with scholars like Stacy Clifford (2012) that we need to figure out better ways to listen and attend to such persons’ subjectivity; and though this does not provide a practical answer how to proceed in the meantime, I must reiterate that the point of this essay is to establish a theoretical argument for the underpinning of rights. How rights then get implemented under this redefinition is an additional matter, but the underlying foundation nevertheless matters.

move that would have seriously undermined many scientists' ability to pursue their research, not to mention various people's protection of their health (Reichmann and Franklin, 1998). But this already suggests the complementary positive linking of freedom and rights, which are indeed sometimes treated as cognates of each other: every conflict of rights is also a conflict of freedoms, and to have a right is to have a freedom. In an article that is about the relationship between liberty and property, for instance, Gerald Gaus accepts as a matter of course that rights are the ways in which humans (at least in western liberal societies) negotiate their freedom and their property (Gaus, 1994). Others place rights and freedom in such close relationship as to almost collapse them (Pattanaik, 1994). For others, certain specific freedoms, particularly economic, are essential to human rights, though others enshrine different rights such as conscience and speech (Sen, 1999; and McGinnis, 1998-1998). According to Martin, rights "represent important interests of...persons (in personal autonomy and participation in the institutions and practices of self-governance, as well as interests in security, dignity, health and well-being)" which "are vulnerable to specific threats." (Martin, 2013: 99). Henry Shue's account of "basic rights" offers subsistence and liberty as the two most basic rights, rejecting at length arguments found from the Shah of Iran to John Rawls that it may be necessary to give up some freedom to obtain the economic development necessary for subsistence (Shue, 1980: 65-67). And former UN Secretary General Kofi Annan's 2009 report entitled "In Larger Freedom - Towards Development, Security and Human Rights for All" once again used freedom as the canvass on which to paint his picture of human rights.¹⁹ And indeed, in Marshall's own account of social rights, "the civil element" of citizenship "is composed of the rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice." (Marshall, 1964: 71). For him, as I argue here, justice is a *part of* freedom, and subsidiary to it.

The meaning of "freedom" deployed in these arguments is fairly straightforward and familiar to many: the classic "negative liberty" view articulated by Isaiah Berlin in his

¹⁹ Report access 26 Feb 2009 via UN Dept. of Political Affairs online < <http://www.un.org/Depts/dpa/>>.

famous essay “Two Concepts of Liberty” as the absence of obstacles.²⁰ Freedom on this view means being able to do as a person wishes, “to pursue his own good, in his own way” as Mill put it. On this conception, A’s right to X is frequently all about the clash between freedoms, viz. between A’s wanting to do X (I want to keep construction costs down) which is incompatible with B’s wanting to do Y (you want to get to an office on the second floor, which requires me to spend more money to install an elevator). So surely, every rights claim holds the potential to limit the freedom of another, but only because the notion of “equal liberty” that classical liberals like Locke and Mill articulated meant that if everyone is to be free, nobody can have unlimited freedom. As the old adage goes, “my right to swing my arm”—a clear image of bodily freedom--“ends where the other guy’s nose begins.” It is often when some become greedy for more and more space in which to swing their arms that the issues of conflicts of freedom come out, and rights serve as tools to adjudicate those conflicts of freedoms. Justice comes out of this adjudication and determination of equal freedom.

Within disability scholarship, the dominant understanding of freedom, particularly within the fight for disability rights, frequently follows this negative liberty model through the “social model of disability”; namely the idea that what makes something a “disability” per se is not a specific body’s perceived deformity or lack of capability, but rather factors in the society, such as the built environment, discriminatory attitudes, punitive and harsh public policies. These all are considered to be obstacles to disabled persons’ doing things they want to; the number of doors open to them, to borrow again from Berlin, is fewer than if they were not disabled. But disability arguments push on this concept by arguing that, for instance, a flight of stairs is a barrier to the freedom of someone who uses a wheelchair—rather than a “fact” that the wheelchair user must confront by herself. Such disability arguments employing the “social model” perspective expand our assumptions about what constitutes a “barrier” to freedom by taking things that are accepted as normal background conditions and showing that they are the active products of social relations

²⁰ Berlin (1971). Berlin elaborated this concept to include the presence of “open doors” or options in Berlin (1979).

that can and should be changed.²¹ Yet at the same time, such arguments retain the basic form of this model of freedom: freedom is a property of individuals who desire and seek to do particular things that other people, whether directly (such as an employer not hiring a Deaf person because he doesn't want to install TDD technology) or indirectly (architects and builders who do not make their buildings accessible to a variety of disabilities) prevent them from doing.

Such imagery reinforces the idea that rights are generally individual, much like freedom; whereas justice by its very nature presupposes a set of relationships and a social structure, freedom is largely an individualistic matter. Even defenders of group rights like Peter Jones maintains that such rights are “underwritten by the human right to freedom of association,” which would make sense only if “human” meant “individual persons” who wish to *form* a group (Jones, 2013: 102). That is, although groups may have rights to do things as groups, such as engaging in group religious practices, it is only because individuals want to practice such beliefs that rights come into play. Accordingly, the Universal Declaration of Human Rights begins by saying that “the inherent dignity and...the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”²² The document thus conceives rights as equally foundational to freedom and justice; but also holds the reverse, that freedom is the foundation for rights and for justice alike. Hence the UNDHR mentions the word “freedom” twenty-one times; and often uses the phrase “rights and freedoms” as if they were interchangeable concepts, or at least inextricably linked. Moreover, the specific rights enumerated all have to do with various specific freedoms, such as speech and association, many of which are explicitly articulated *as* freedoms. Article 1 says “All human beings are born free and equal in dignity and rights” and Article 3 states “Everyone has the right to life, liberty and security of person” whereas Article 4 rejects slavery as the first and foremost practice that violates human rights, even before torture

²¹ In doing this, the strict negative liberty model may well be challenged rather than simply expanded; see my discussion of the consideration of ‘poverty’ or ‘sexism’ as a barrier to freedom on the negative liberty model in Hirschmann (2003), chapter 1.

²² UN General Assembly, *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res 217 A(III).

(the subject of Article 5). So that there is a close relationship between rights and liberty does not seem a particularly controversial claim.

This is particularly true for disability; the “group” of disabled persons is an ascriptive group that marks a particular set of human differences that are often used to deny individual rights. (And indeed, many accounts of group rights are problematic for a disability perspective).²³ Disabled persons have a right not to be discriminated against in employment, for instance, but such a right is invoked when individuals apply for jobs and are denied them solely on the basis of their disability. Their disability involves their inclusion in a group that leads to the discrimination—the employer makes his judgment not on the merits of the individual before him (who must be otherwise qualified for the job if a claim of discrimination is to be considered valid), but rather on assumptions about what “disabled persons” can and cannot do (viz. ignoring qualifications and assuming the person is unqualified by virtue of the disability). And multiple disabled individuals could, for instance, sue the same employer for similar experiences of discrimination.

Such an individualist view seems to be the philosophy underlying the United Nations Convention on Rights for Disabled Persons (UNCRPD), which, recognizing that “disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,” lists rights to equality under the law and nondiscrimination; equal access to physical environment (including public transportation, buildings, and

²³ This is not just because of how different disabilities are from one another, but also because of the way group rights are often conceptualised. Jones (2013), for instance considers groups rights as ‘ “special” rights—rights that they [group members] have only if and because they belong to the relevant group.’ But the notion of ‘special’ rights is exactly what disability theorists reject: it is not that, because I use a wheelchair, I have a ‘special’ right to a ramp or elevator. Rather, it is to create an elevator or ramp so that anyone can use it *without* having to establish membership in the group ‘disabled persons’. The ramp or elevator should be accessible to everyone. A Deaf employee’s request for an adaptive telephone device might seem to better fit the ‘special accommodation’ language, for this device is obviously specific to her, and her hearing colleagues would not need it; but the right she is demanding is not for the phone itself, but rather for equality of access to the tools she needs to do her job—other employees have phones in their offices that are suited to their abilities. Further, Jones talks about groups as things to which ‘people can belong or not belong as they see fit’; yet, while disabled persons can choose whether or not to associate with political action groups that agitate for disability services, or consciously adopt a political identity of disability, the fact remains that most people do not choose whether or not to have an impairment that society treats in a disabling way--for if we accept the social model analysis of disability, *nobody ever* ‘chooses’ to be disabled, that choice is always made for us by others who disfavour our particular bodies.

public walkways); and information and free expression (including Braille, sign language, and TDD).(UNCRPD, preamble section e). Though these rights obviously employ other of the “essentially contested concepts” like equality, community, membership, and even justice, freedom would seem to be the primary and foundational value underlying these claims. And indeed, the general movement among disability scholars for “independence” rests foundationally on the linkage of human rights with the ideals of negative freedom, freedom from interference with, and obstacles to, doing what I want.

4. Rethinking Freedom for Disability Rights

But the idea of freedom starts to shift with documents and statements like UNCRPD: freedom is not simply having a door open to me, or an obstacle removed, as Berlin described negative liberty, but something more than that, entailing the recognition that who we are, and what we desire, is shaped by the social, physical, epistemological and moral conditions in which we live. Thus UNCRPD also lists “employment and an adequate standard of living; participation in political and social life,” and a right “to live independently and participate fully in all aspects of life.” Such rights as these might be seen to cohere with a broader conception of freedom that philosophers have called “positive liberty,” which differs from negative liberty in a variety of ways. First, it requires provision of the resources or conditions necessary to take advantage of negative liberties: for instance, reduced tuition for lower income individuals, or wheel-chair access to buildings for those with mobility impairments. These are indeed sometimes considered “positive rights,” right *to* a positive provision rather than a negative right of noninterference (Shue, 1980). In positive liberty, moreover, supposedly “individual” conditions such as disability or poverty are recast as social barriers to freedom that can be overcome by some sort of collective action that the individual cannot take by herself, an idea that has obvious resonance with disability’s social model.

Second, positive liberty recognizes the I can have conflicting desires, some of which are truer or more genuine. On this view, the absence of external restraints is insufficient to make me free, because my own desires may thwart my will, such as when an argument with a colleague makes me crave a cigarette, compromising my efforts to quit smoking. I can want two mutually exclusive things at the same time, such as smoking and quitting,

and my will can be divided about how to respond to my various desires. Freedom requires me to make a decision about which desire is more valuable to me, more important, or otherwise better.

But in such a situation, I might need the help of others to enable me to see that. Thus, an “intervention” by a drug addict’s family, or a spouse who pours an alcoholic’s liquor down the drain, or a friend who prevents you from humiliating yourself in front of your ex-lover, all have a certain appeal on the grounds of freedom. But this also raises certain dangers, for disabled persons, like women, have experienced a long history of others declaring that they know better than the individual herself what her “true” interests are. I have argued elsewhere that this objection can be addressed and generally misreads positive liberty, and in the interest of space I will not rehearse those arguments here (Hirschmann, 2003; and Hirschmann, forthcoming 2016).²⁴ For what I think is most useful for disability social rights is the idea that freedom requires us to understand that desire is a complex thing that exists within contexts and social relations. That is, if it is possible to say that we can have conflicting desires, and if it is possible to rank these desires as better or worse, more and less valuable, then the issue of who I am is introduced: How is it that I have the desires I have? Why do I make the choices I do? Such questions invite us to consider the social construction of the choosing subject, of the individual agent who has desires and makes choices within specific social, historical, and institutional contexts.

Social constructivism maintains that human beings and their world are not given or natural, but the product of historical configurations of relationships. Our desires,

²⁴ But briefly, such objections relate to Rousseau’s infamous claim that when the citizen is forced by the state to obey the law, he is only being “forced to be free” (Rousseau 1991, Book I ch. 7) because it prevents him from acting on narrow self-interest and instead directing him to follow his “higher” will which is consonant with the public welfare. However, liberal democracy makes the exact same argument—when we receive a ticket for running a stop sign, for instance, it is to the end of keeping the roads safe for all, and thus facilitating our freedom of movement. Moreover, Taylor (1979) points out that individuals themselves can be and generally are aware when they have conflicts of interest, such as when my desire for a slice of chocolate cake interferes with my desire to lose weight. In other cases, such as when my friend pours a bottle of liquor down the drain to help me stick to my resolve to remain sober, most people are more sympathetic to the idea of others’ involvement in facilitating my freedom. Such examples are obviously and qualitatively different from a husband forcibly impregnating his wife against her will in the belief that her “natural” calling is to be a mother, or from doctors sterilizing a disabled woman to prevent her from becoming pregnant because they deem that to be in her best interest.

preferences, beliefs, values, indeed the way in which we see the world and define reality, are all shaped by the particular constellation of personal and institutional social relationships that constitute our individual and collective identities. The interactions of these relationships with their historical, social, and political contexts are what make meaning possible. These constructions can take place even at the level of the body: for instance, though all humans experience hunger, we differ quite radically in the foods we find palatable and repulsive, and those are affected strongly by cultural practices that may have developed over centuries in response to geography (the kinds of foods available in a particular climate, such as whale blubber or extremely hot spices) but nevertheless become embedded in culture and language.

More germane to my topic here, however, are the kinds of desires that are more clearly identified as “social.” Feminists, for instance, have pointed out the ways in which “femininity” has been constructed throughout history in ways that seem antithetical to women’s ability to make choices for themselves. It might be considered similar to socialization, as when women are socialized to be wives and mothers while men are socialized to be wage earners, but goes much deeper to address the ways in which “a subject upon whom socialization can do its work is being produced” (Ferguson, 1993: 129). Though the thoroughgoing versions of social constructivism embraced by “postmodern” theorists may seem to run contrary to notions of agency and self-determination that I deploy here, I find it helpful to think of social constructivism as interacting layers of ideology, discourse, and material institutional and social relations. A brief example may provide an efficient illustration. In previous centuries, the ideological belief that women are not rational resulted in their denial of education and of access to professional training. Due to this lack of education however, women were ensured not to develop skills in rational thinking. As a result, the meaning of “woman” and “femininity” adhered to this reality; women did not develop desires to be, say, philosophers, but to marry and raise children (and of course this ideology of femininity is extremely class based). When some women nevertheless were motivated to educate themselves and strove to become lawyers or doctors or philosophers, they were not only denied entry to graduate school and professional positions, but were viewed as “unfeminine” or “manly” thus reinforcing the original

ideological claim that women are irrational (this time, for wanting to do what they are ‘constitutionally’ unfit to do).²⁵

This process of the social construction of femininity entails the production of individuals called “women” who desire the very things that patriarchy needs them to be and do. In my example, the desire to be philosophers or lawyers or doctors is placed out of consideration for most women; women assume that they cannot, and therefore will not want to, become philosophers in circular fashion. This is not to deny that some women “broke barriers” to enter these professions; but nor is it to say that such women are necessarily more free than those who did not, for these professions themselves are key social conduits for discriminatory attitudes and behaviors along lines of gender, race and class. The ways that norms change very gradually over time suggests that social constructivism is, as Foucault put it, “totalizing” but not determinative (Foucault 1982, 782). Gaps and openings in existing structures create possibilities for imagining ourselves differently and forming desires accordingly; but even radically challenging desires are not necessarily “innocent” of social construction. In a feminist view, then, understanding freedom requires cutting through the layers of desire, limit and possibility to understand the complicated ways in which women and men alike are simultaneously restricted from and compelled towards particular expressions of will and desire.

Social constructivism is something that disability theorists have not really engaged, and certainly not from the perspective of freedom.²⁶ Perhaps this is because disability has such a variable experience from individual to individual that identifying one large macro construction like “sexism” is not possible. Or perhaps it is because disabled persons have been so severely excluded from the “normal” categories that to have the opportunity to *be* constructed as “normal” men or women would be welcome. As Jacobus tenBroek so aptly described in “The Right to Live in the World:”

²⁵ This is an argument I develop further in Hirschmann (2003).

²⁶ It has been touched on, but not developed, in Tremain (2005) who stresses the negative and repressive aspects of social construction rather than the productive aspects. Liachowitz (1998) treats social construction as closer to socialisation.

The actual physical limitations resulting from the disability more often than not play little role in determining whether the physically disabled are allowed to move about and be in public places. Rather, that judgment for the most part results from a variety of considerations related to public attitudes, attitudes which not infrequently are quite erroneous and misconceived. These include public imaginings about what the inherent physical limitations must be; public solicitude about the safety to be achieved by keeping the disabled out of harm's way; public feelings of protective care and custodial security; public doubts about why the disabled should want to be abroad anyway. (tenBroek, 1966: 842).

As tenBroek suggests, the social construction of disability starts with ableist ideology that disabled persons are inferior, which results in material treatment that produces that very result: a deaf person who is never taught sign language, never educated, and treated as if she were “retarded” or “mentally ill,” is likely to develop in ways that appear to follow such diagnosis (Burch and Joyner, 2014). A person with cerebral palsy who will lose financial support from the state that pays for necessary assistive equipment if he works becomes unemployable (Longmore, 2003). A mobility impaired person who cannot climb up or down the stairs of her fifth-floor walk-up apartment without someone to help her becomes a “shut-in” who is “better off” at home (Crocker, 2013; and Hirschmann (2013b). This materialization of disability in turn informs our conceptual understanding of what “disability” means: weak, helpless, powerless, isolated, tragic, bordering on the nonhuman. So the deaf person who struggles against her institutionalization, the paraplegic who demands assistance getting out of his apartment on a daily basis, the cognitively impaired person who wants a job, simply prove how out of touch with “reality” they are, how “unreasonable” (tenBroek, 1966: 917).

To fight this and claim freedom, disabled persons have to be able to participate in the processes of social construction; social construction is a “process” because it is ongoing, a function of relationships in language and time. Disabled people need to be, as they are increasingly, more involved in the institutions, practices, and social formations that shape the opportunities for and meanings of disability, ranging from legislation like the ADA to workplace attitudes and policies to public presence in the media and on the streets to the altering of linguistic categories for talking about disability. This may mean,

of course, that we inadvertently participate in the perpetuation of unbalanced power relations; for instance, though the ADA increased disabled persons' access to the workplace, it was simultaneously part of the conservative "personal responsibility" movement of the 1990s that resulted in punitive policies toward poor people. But the fact is that many disabled people *want* to work and have been denied the opportunity by discriminatory attitudes that have constructed them as "unfit" for work.

Thus positive liberty holds a great deal of potential for disability, particularly within the context of disability rights, by helping deepen our critiques of the ways in which disability is produced by an unfriendly, even hostile, physical and social environment. It can strengthen the demand for positive resources and universal access by identifying ways in which the "normal" social and physical landscape is not natural or inevitable but rather is the result of social choice. It can simultaneously identify the ways in which such "normality" is defined against, and in such a way as to exclude, disability experience. It can help disabled persons participate more fully in the creation of their own narratives by enabling us to point out how the current narrative is both ideologically false and at the same time socially produced. Such narratives intimately and complexly shape desire, which is the foundation for freedom. But in the context of rights in particular, negative liberty needs to be retained as well, enabling us to point out the ways in which society arbitrarily limits disabled persons by and through those narratives and the material social formations that emerge from and in turn produce them.

5. Freedom and Disability Rights

This last idea is key because rights, throughout history, have been more strongly allied with negative liberty. They have been conceptualized as claims against others, even what Ronald Dworkin calls a "trump" and Richard Flathman a "warrant," and combative imagery is often deployed in talking about rights (Dworkin, 1978; and Flathman, 1967: 62 and 161). But both positive and negative liberty need to be integrated within the concept of disability rights in order to serve as a *foundation* for rights. As I said earlier, taking freedom as the starting point for rights does not mean that justice is irrelevant, but it does reorient the questions that we ask, the evidence that we deem relevant to answering those questions, and the goals that we seek to attain.

In particular, I maintain that a freedom approach to rights can help imbue social rights with greater social respect. Indeed, freedom rather than justice was the animating first principle of the ADA, and certainly of the ADAAA; they were motivated by the desire of disabled people to hold jobs, to have access to public spaces, and to engage other sorts of freedoms that able bodied people so take for granted that they might not even see them as “freedoms.” When the courts frustrated those efforts, and continued to deny disabled persons access, such decisions may have been seen as “unjust,” but that is because disabled persons were blocked from these basic freedoms. Even granting the criticism that the ADA was part of the “welfare reform” effort to get people “off the dole,” we must remember what Marx taught us: not being able to earn a living wage is the most *political* problem that humans face in capitalist society. Even if conservative politics turned this political fact into a tool to harm those who receive public assistance, it simultaneously produced real advances in enabling workers to live in a world where disability is more widely accepted.²⁷

Aside from law and policy, though, an equally important theoretical and ethical contribution that the freedom approach to rights makes is the recognition of the importance of difference to the concept of rights. Frédéric Mégret argues that rights indicate unity, sameness; (Mégret, 2008) and that expresses a commonly held belief of theorists, lawyers, and philosophers. What Sulmasy calls “the Standard Civil Rights Formula” depends on the individual’s being identical to all others in order to claim a right (Sulmasy, 2009). Difference should be seen as irrelevant, or at least much less important than an underlying sameness. There is much to be said for this view from the disability perspective. A key strategy in pursuing the ADA was to stress the “normal” capacities of disabled persons: disabled persons can work just like nondisabled ones, they can be productive members of the economy and society, the costs of accommodation outweigh our contributions to productivity, and so forth. The erasure of difference is the underlying discourse of such claims for rights.

²⁷ As Davis (2000) points out, Court interpretation of the ADA was similarly political, specifically guarding against an ‘attack [on] the very nature of capitalism itself. It is important for the court that the history of activism that led to the passage of the ADA not be seen as radical in nature, nor the effect become radical in intent or action’, at 202.

But it is also highly problematic. Feminists have long critiqued the demand for sameness because it has been used to deny women maternity leave, redress for sexual harassment and pay inequity. Similarly, assumptions of sameness cover over the significant particularities of different experiences of disability and impairment in ways that risk normalizing disabled persons in a negative way. Indeed, Matthew Diller notes that key to the ADA was “the principle that differential treatment, rather than the same treatment, is necessary to create equality” (Diller, 2000: 40)—a feature to which he attributes employers’ resistance to, and workplace difficulties with, the original ADA.²⁸ Certainly disabled persons share with nondisabled persons all the particular and intersecting differences that feminist, critical race and “queer” theorists have articulated along lines of race, class, sexuality, ethnicity, age, religion, ethnicity and so forth, for disability crosses all other existing boundaries of identity. But beyond that, “disability” itself is multiple: we cannot simply add “dis/ability” to the list of cross-cutting features, because the variety of disabilities is so vast. Wheelchair use differs considerably from blindness, from Deafness (and from deafness),²⁹ from upper-body limb amputation, from diabetes, from post-polio syndrome. And even within the category “wheelchair users” there are considerable differences: from those who experience lower body paralysis to whole body paralysis to those with amputated legs or feet, to multiple sclerosis to cerebral palsy to those who can walk but often need to reserve their strength. Some persons considered “blind” may be completely blind but others may be partially sighted, with different people having vision impairments to different degrees. Such differences create different abilities, different relationships to the physical environment, to the society, to particular others, and indeed to the self.

These differences in turn create different needs and desires, which are the foundation for rights claims. Justice creates a false universality; hence Supreme Court interpretation of

²⁸ As he puts it, ‘this war [for disability rights] has not been going well in recent years for those asserting that equality requires differential treatment of socially subordinated groups’ (Diller, 2000:, 44-46).

²⁹ Though Deaf people do not view themselves as disabled, or even having an impairment, but just a difference, there are many hearing impaired people who consider deafness as a disability. See for instance Chorost, 2005.

the ADA denied disability claims because a universal idea of disability as, in effect, being unable to work failed to attend to specific abilities and needs of particular workers.³⁰ Freedom, however, is all about difference: the different desires and needs we have, the different things we want to do, are part and parcel of what makes us individuals. From a freedom perspective, in fact, difference is why we need to invoke “rights” in the first place. A demand for rights calls difference into view. That is, if we are in agreement with others about what we need and want, there is no need to invoke rights; it is only when people try to stop me that rights need to be invoked. Such stopping is almost always a function of difference; I want X, you want Y. Even if we want the same thing, the fact that we are different people is what creates the conflict. The emphasis on sameness in rights discourse obscures this fact; difference is “an occasion for rights” (Hirschmann, 1999).

Attending to difference thus does not leave rights solely in the domain of freedom; equality, power, and justice are relevant to determining how best to work out rights conflicts. Freedom should be the “lead actor”, but justice can still play a supporting role; it is when justice hogs the stage that things become distorted. For instance, imagine a university considering whether to spend a recent bequest on retrofitting an old campus building to allow wheelchair accessibility when there are only five wheelchair users on campus, or to create a new high-tech “learning center” in the library. If we start from justice considerations, we immediately jump to the issue of numbers of people affected—five people versus the entire campus—and are led to utilitarian considerations of the greatest happiness for the greatest number, in which case the learning center is the logical

³⁰ O’Brien (2004) offers an insightful reading of both *Sutton v. United Airlines, Inc.* (1999) (97-1943) 527 U.S. 471 and *Toyota Motor Mfg., KY., Inc. v. Williams* (2002), (00-1089) 534 U.S. 184 that persuasively argues that the Court found for the corporations in both cases because it based its decision on a definition of disability as, in effect, being unable to work. Hahn, (2000) also documents the ways in which the ADA has been interpreted by courts through a definition of disability as unable to work through the requirement that litigants be “otherwise qualified” for a job: “the conjunction of a restricted functional definition of disability and the clause about qualifications forms a narrow gauntlet through which disabled plaintiffs must pass in order to file lawsuits under the ADA. If employees are qualified, they are not disabled; and if they are disabled, they must not be qualified” (187). This interpretation, he argues, led the Courts to allow employers not to provide specific accommodations needed for specific disabilities in order for the employees to perform their jobs.

choice. Or we might appeal to Rawls's difference principle, arguing that wheelchair users benefit from the learning center as well and therefore they should rationally prefer that benefit since their inequality (nonaccess to one older building) makes them better off (a state of the art library). Either way, justice determines that because expenditures on the library are preferable, we never even get to the point of saying that there *is* a right to the retrofit. Starting with justice never allows the rights claim to get off the ground, because as Diller notes, in ADA cases plaintiffs usually "do not appear to judges as potential victims. Rather, they appear as supplicants," potential recipients of charity rather than holders of rights (Diller, 2000: 48).

By contrast, if we start with freedom—particularly freedom of access—then the right to retrofit is more solidly lodged: all members of the university have a fundamental right to access the resources needed for the education for which they (or the scholarships they have earned) are paying tuition dollars. But that is, I want to stress, a starting point; freedom is not necessarily dispositive in isolation. Once the right is claimed on the grounds of freedom, justice can *then* enter in helping to determine *how* to meet that right, and *how* we might figure out a different way to address competing demands for freedom. For instance, if the library is built to be accessible, might the resources in the old building be transferred to the new one so that wheelchair users have no need to enter the older building anymore?

Starting with freedom certainly will not eliminate conflict; and it even may not make dilemmas more easily resolvable in many cases. But it prevents the conversation from being hijacked by the dominant ableist assumptions of desert and distribution by asserting the presence of disabled persons as rights-bearers in the first place; as free and equal human beings, in keeping with the liberal Enlightenment foundations of western moral norms, cultural practices, and civil law. A freedom approach to rights, I suggest, holds more potential for world in which disability social rights can be more fully realized and more consistently enacted.

References

- Anderson, Elizabeth (January, 1999), 'What Is the Point of Equality?' *Ethics*, Vol. 109, No. 2, pp 287-337.
- Bagenstos, Samuel (2003), 'The Americans with Disabilities Act as Welfare Reform', *William and Mary Law Review*, Vol. 44, No. 3, pp. 921-1027.
- Berlin, Isaiah (1971), 'Two Concepts of Liberty', in Author, *Four Essays on Liberty* (New York: Oxford University Press).
- (1979), 'From Hope and Fear Set Free', in Author, *Concepts and Categories: Philosophical Essays* (New York: The Viking Press).
- Bruch, Susan and Hannah Joyner (2014), 'The Disremembered Past', in Hirschmann, Nancy J. and Beth Linker (eds.) *Civil Disabilities: Citizenship, Membership and Belonging*, (Philadelphia: The University of Pennsylvania Press).
- Burkhauser, Richard V., J.S. Butler and Robert R. Weathers II (2001/2002), 'How Policy Variables Influence the Timing of Social Security Disability Insurance Applications', Research Brief, *Social Security Bulletin*, Vol. 64, No. 1, 52-83.
- Chorost, Michael (2005), *Rebuilt: How Becoming Part Computer Made Me More Human* (New York: Houghton Mifflin).
- Clifford, Stacy (2012), "Making Disability Public in Deliberative Democracy," *Contemporary Political Theory* Vol.11 No. 2, pp. 211-228.
- Crocker, Ruth (2013), "'No-one Sees Her": The Feminist Biographer Reads Disability,' *Journal of Historical Biography*; Vol. 13, pp. 27-57.
- Daniels, Norman (2007), *Just Health: Meeting Health Needs Fairly* (New York: Cambridge University Press).
- Davis, Lennard J. (2000), 'Bending over Backwards: Disability, Narcissism, and the Law', *Berkeley J. Emp. & Lab. L.*, Vol. 21, No. 1, pp. 193-212.
- Diller, Matthew (2000), 'Judicial Backlash, the ADA, and the Civil Rights Model', *Berkeley Journal of Employment and Labor Law*, Vol. 21, pp. 19-52.
- Disabledworld.com, *Claiming Disability? Beware Your Insurance Company May Be Watching*, accessed online 27 June 2014, <<http://www.disabled-world.com/disability/social-security/cheats/claiming.php>>.
- Dworkin, Ronald (1978), *Taking Rights Seriously* (Cambridge: Harvard University Press)
- Ferguson, Kathy (1993), *The Man Question: Visions of Subjectivity in Feminist Theory* (Berkeley: University of California).
- Flathman, Richard E. (1967), *The Practice of Rights* (London, Cambridge University Press).
- Foucault, Michel (1982), 'The Subject and Power,' *Critical Inquiry*, Vol. 8 No. 4, pp. 777-95.

Gaus, Gerald (1994), 'Property, Rights, and Freedom', *Social Philosophy and Policy*, Vol. 11 No. 2, pp. 209-240.

Gordon, Linda (1994), *Pitied But Not Entitled: Single Mothers and the History of Welfare* (New York: Free Press).

Hadler, Nortin M. (1982), 'Medical Ramifications of the Federal Regulation of the Social Security Disability Insurance Program: Social Security and Medicine', *Annals of Internal Medicine*, Vol. 96, No. 5, pp. 665-669.

Hahn, Harlan (2000), 'Accommodations and the ADA: Unreasonable Bias or Unbiased Reasoning?' *Berkeley Journal of Employment and Labor Law*, Vol. 21 No. 1, pp. 166-92.

Hirschmann, Nancy J. (Summer, 1999), 'Difference as an Occasion for Rights: A Feminist Rethinking of Rights, Liberalism, and Difference', *Critical Review of International Social and Political Philosophy*, Vol. 2, No. 1, pp. 27-55.

--- (September, 2002). 'Liberal-Conservatism Once and Again: Locke's Essay on the Poor Law and U.S. Welfare Reform', *Constellations: An International Journal of Critical and Democratic Theory*, Vol. 9, No. 3, pp. 335-55.

--- (2003), *The Subject of Liberty: Toward a Feminist Theory of Freedom* (New Jersey, Princeton University Press).

--- (2008), *Gender, Class and Freedom in Modern Political Theory* (New Jersey: Princeton University Press).

--- (2013a), 'Rawls, Freedom, and Disability: A Feminist Rereading', in Ruth Abbey (ed.), *Feminist Interpretations of John Rawls* (Philadelphia, PA: Pennsylvania State University Press).

--- (2013b), 'Invisibility, Power, and Women's Lives', *Journal of Historical Biography*, Vol. 13, pp. 1-26.

--- (2013c), 'Freedom and (Dis)Ability in Early Modern Political Thought', in Hobgood, Allison and David Wood (eds.), *Recovering Disability in Early Modern England* (Columbus, Ohio: Ohio State University Press).

--- (forthcoming 2016), 'What's Right With Positive Liberty: Agency, Autonomy, and the Other', in Levy, Jacob and Daniel Weinstock (eds.), *Reading Charles Taylor* (Montreal: McGill-Queens University Press).

Hirschmann, Nancy J. and Ulrike Liebert (eds.) (2001), *Women and Welfare: Theory and Practice in the United States and Europe* (New Jersey: Rutgers University Press).

Jaggar, Alison (1983), *Feminist Politics and Human Nature* (Totowa, NJ: Roman and Allenheld); and Pateman, Carole (1988), *The Sexual Contract* (Palo Alto: Stanford University Press).

Jones, Peter (2013), 'Groups and Human Rights', in Holder, Cindy and David Reidy (eds.) *Human Rights: The Hard Questions* (New York: Cambridge University Press).

- Kittay, Eva (1998), *Love's Labor: Essays on Women, Equality, and Dependency* (New York: Routledge).
- Liachowitz, Claire (1998), *Disability as a Social Construct: Legislative Roots* (Philadelphia: The University of Pennsylvania Press).
- Liebert, Ulrike (2001), 'Degendering Care and Engendering Freedom: Social Welfare in the European Union,' in *Women and Welfare: Theory and Practice in the United States and Europe*, ed. Nancy J. Hirschmann, and Ulrike Liebert (New Jersey: Rutgers University Press).
- Longmore, Paul K. (2003), *Why I Burned My Book and Other Essays on Disability* (Philadelphia: Temple University Press, 2003).
- Malhotra, Ravi (2006), 'Justice as Fairness and Critical Theory', in Diane Pothier and Richard Devlin (eds.), *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press).
- Marshall, T.H. (1964), 'Citizenship and Social Class', in AUTHOR, *Class, Citizenship, and Social Development* (New York: Doubleday).
- Martin, Rex (2013), 'Are Human Rights Universal?', in Holder, Cindy and David Reidy (eds.) *Human Rights: The Hard Questions* (New York: Cambridge University Press).
- McBryde Johnson, Harriet (16 February 2003), 'Unspeakable Conversations', *The New York Times Magazine*.
- McBryde Johnson, Harriet (2005), *Too Late to Die Young: Nearly True Tales from a Life* (New York: Henry Holt and Co.).
- McGinnis, John O. (1998-1999), 'New Agenda for International Human Rights: Economic Freedom', *Catholic University Law Review*, Vol. 48, pp. 1029-34.
- Mégret, Frédéric (May, 2008), 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?', *Human Rights Quarterly*, Vol. 30, No. 2, pp. 494-516.
- Mill, John Stuart (1965), 'Principles of Political Economy: With Some of Their Applications to Social Philosophy', in Robson, J. M. (ed.), Mill, *Collected Works*, Vol. 2, (Toronto: University of Toronto Press).
- Mink, Gwendolyn (2000), *Welfare's End* (New York: Cornell University Press).
- Mushaben, Joyce (2001), "Challenging the Maternalist Presumption: The Gender Politics of Welfare Reform in Germany and the United States," in *Women and Welfare: Theory and Practice in the United States and Europe*, ed. Nancy J. Hirschmann, and Ulrike Liebert (New Jersey: Rutgers University Press).
- O'Brien, Ruth (2004), *Voices from the Edge: Narratives about the Americans with Disabilities Act* (New York: Oxford University Press).
- Pattanaik, Prasanta K. (April, 1994), 'Rights and Freedom in Welfare Economics', *European Economic Review*, Vol. 38, Iss. 3-4, pp. 731-738.
- Plato (2008), *The Republic*, trans. R.E. Allan (New Haven: Yale University Press).

Prince, Michael J. (2008), 'Claiming Disability Benefits as Contested Social Citizenship', in Moss, Pamela and Katherine Teghtsoonian (eds.), *Contesting Illness: Processes and Practice*, (Toronto: University of Toronto Press), pp. 28-46.

Rawls, John (1971), *A Theory of Justice* (Cambridge: Harvard University Press).

--- (1993), *Political Liberalism* (New York: Columbia University Press).

Reichman, J.H. and Jonathan A. Franklin (1998), 'Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information', *University of Pennsylvania Law Review*, Vol. 147, pp. 876-970.

Rousseau, Jean Jacques (1991), *The Social Contract*, in *The Social Contract and Discourses*, trans. G.D.H. Cole, revised and augmented by J. H. Brumfitt and John C. Hall. Everyman's Library. London: J.M. Dent-Rutland, VT: Charles Tuttle.

Scott, Joan W. (Spring, 1988), 'Deconstructing Equality-Versus-Difference: Or, the Uses of Post-structuralist Theory for Feminism', *Feminist Studies*, Vol. 14, No. 1, pp. 33-50; and Eisenstein, Zillah (1990) *The Female Body and the Law* (Oakland, CA: University of California Press).

Sen, Amartya (1999), *Development as Freedom* (New York: Knopf)

Shue, Henry (1980), *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (New Jersey: Princeton University Press).

Silvers, Anita (Winter, 1995) 'Reconciling Justice to Equality: Caring (f)or Justice for People with Disabilities', *Hypatia*, Vol. 10 No. 1, pp. 30-55.

Singer, Peter (19 July, 2009), 'Why We Must Ration Health Care', *The New York Times*.

Singer, Peter 'Taking Life: Humans', in AUTHOR, *Practical Ethics*, 2nd edition (New York: Cambridge University Press)

Singer, Peter and Helga Kuhse (1985), *Should the Baby Live? The Problem of Handicapped Infants* (Oxford, UK: Oxford University Press)

--- (1994), 'Bioethics and the Limits of Tolerance' in *The Journal of Medicine and Philosophy*, Vol. 19, pp. 129-145.

Slobodien, MacMillin (2013), *How Broken is the Social Security Disability Insurance Program?*, The Hill.com, accessed 26 June 2014, <<http://thehill.com/blogs/congress-blog/economy-budget/191509-how-broken-is-the-social-security-disability-insurance>>.

Stark, Cynthia (2007), 'How to Include the Severely Disabled in a Contractarian Theory of Justice', *The Journal of Political Philosophy*, Vol. 15, No 2, pp. 127-145.

Sulmasy, Daniel P. (2009), 'Dignity, Disability, Difference, and Rights', in Ralston, D. Christopher and Justin Ho (eds.), *Philosophical Reflections on Disability* (New York:: Springer).

tenBroek, Jacobus (May, 1966), 'The Right to Live in the World: The Disabled in the Law of Torts', *California Law Review*, Vol. 54, No. 2, pp. 841-919.

Tremain, Shelley (2005), *Foucault and the Government of Disability* (Ann Arbor: University of Michigan).

United Nations Convention on the Rights of Persons with Disabilities, accessed online at <http://www.un.org/disabilities/convention/conventionfull.shtml> on May 10, 2015.

Voigt, Kristin (2007), 'The Harshness Objection: Is Luck Egalitarianism Too Harsh on the Victims of Option Luck?', *Ethical Theory and Moral Practice*, Vol. 10, No. 4, pp. 389-407.

Weber, Mark C. (2008-09), 'Disability Rights, Disability Discrimination, and Social Insurance', *Georgia State University Law Review*, Vol. 25, pp. 575-605.

Wolff, Jonathan (2009), 'Disability, Status Enhancement, Personal Enhancement and Resource Allocation', *Economics and Philosophy*, Vol. 25, pp. 49-68.