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On Health Status, Choice, and Immunity

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On Health Status, Choice, and Immutability

Jessica A. Clarke, *Against Immutability,* 125 **Yale L. J.** (forthcoming, 2015), available at **SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569843]** .

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Jessica Clarke's insightful forthcoming Yale Law Journal article, *Against Immutability* will be of particular interest to those of us writing and thinking about disability, obesity, equal protection, and discrimination. I found it especially helpful for ongoing work on health status discrimination—or, **healthism [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118960]** —that **Jessica Roberts [https://www.law.uh.edu/faculty/main.asp?PID=4797]** and I are conducting. Professor Clarke's thoughts are especially timely in light of the Supreme Court's landmark decision in ***Obergefell v. Hodges*** **[http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf]** . Although Justice Kennedy did not rely on immutability explicitly in recognizing the constitutional right to same-sex marriage, that reasoning implicitly underlies the Court's reasoning.

Historically, discrimination law has drawn distinctions between "immutable" and "mutable" traits, recognizing the constitutional guarantee of equal protection for the "immutable" (*e.g.*, race, gender,

ethnicity, national origin) but not the "mutable". The rationale is that individuals should not be disadvantaged on the basis of traits that they are powerless to change, or—put another way—traits that are not the individual's choice or fault (the Court has referred to these as "accidents of birth," *see* ***Frontiero v. Richardson*** *[https://supreme.justia.com/cases/federal/us/411/677/]* , 411 U.S. 677, 686 (1973)). On the other hand, if the trait or characteristic is something within individuals' control, it seems fair to treat them differently on that basis. In that way, the law can even serve to appropriately incentivize individuals to alter their "bad" conduct or choices and thereby gain the privileges enjoyed by others making the "right" choices.

As Clarke demonstrates, and many courts and commentators, are finding, this is a very difficult line to draw.

First, it is not always clear what conduct or traits are truly "voluntary." Although it may be tempting to think of obesity as the result of poor self-control, overeating, and lack of exercise, in some cases it may in fact be the product of a physiological condition or body chemistry that the individual cannot control. Even more nettlesome, individuals often are limited in their choices about diet and exercise by socioeconomic conditions, including education, income, and access to healthy foods and safe recreational options—what the public health literature refers to as "social determinants of health."

To be fair, the courts have long recognized that immutability does not encompass all anti-discrimination law. For example, the Constitution prohibits discrimination based on religious beliefs, even though religion is a trait that can be changed and may be the product of voluntary choice. The rationale for extending equal protection to that realm is that religion in such a core trait or characteristic that "it would be abhorrent for the government to penalize a person for refusing to change" (Clarke, quoting ***Watkins v. U.S. Army*** *[http://law.justia.com/cases/federal/appellate-courts/F2/875/699/179345/]* , 875 F.2d 699, 703 (9th Cir. 1989) (Norris, J., concurring)). Relying on this "new immutability" rationale, advocates have argued for constitutional equal protection for sexual orientation, and statutory protection from employment discrimination for various "mutable" traits, including pregnancy, marital status, union affiliation, and military service.

The new immutability rationale operates from the premise that some traits are so fundamental to personhood that they are not proper bases for differential treatment. So framed, however, the analysis turns immutability on its head, providing legal protection precisely because the individual has made certain choices about her identity, rather than because she is powerless to do so. Additionally, new immutability creates significant line-drawing problems, with the legal protection deriving from moral judgments about which traits the court deems fundamental or personhood-defining at any given time. For example, one person may consider sexual orientation central to her personhood while another may consider religious beliefs that reject homosexuality core to his. Moreover, by deeming certain traits, even if chosen, as "immutable" while excluding others, the analysis reinforces stigma and stereotypes of the

excluded traits.

Those problems led Clarke to reject reliance on the new immutability rationale to extend legal protection for new forms of unfair differential treatment. Instead, she advocates incremental expansion of targeted antidiscrimination protection through legislative, judicial, and private industry protections for various forms of systemic bias. Clarke's focus on systemic forms of discrimination better targets the legal response to underlying stereotypes and stigma as well as social and institutional causes of unfair unequal treatment, just as our healthism project aims to do. Moreover, her approach allows the possibility of legal protection for conditions such as obesity, pregnancy, alcoholism, AIDS, cancer resulting from tobacco use, criminal records, and other conditions that individuals may not consider core to their sense of personhood but nevertheless subject them to systemic bias. In accord, our definition of healthism similarly emphasizes the same sort of structural impediments to equal opportunity, or **what Joseph Fishkin has called "bottlenecks."** **[http://concurringopinions.com/archives/2014/02/health-as-a-bottleneck.html]** In sum, Clarke offers a probing, carefully analyzed rejection of a popular conception of discrimination law, which will surely be useful to other health law projects besides my own.

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