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Introduction

As CATHARINE MACKINNON HAS OBSERVED, "IT IS common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it?"[1] This book aspires to build a disability theory that works in practice.

On the basis of my review of the empirical literature, my reading of the relevant statutes and case law, and my experience as a parent raising a child with a disability, I believe that we should measure equality from an anti-subordination perspective. We should adopt practices based on our conviction that they will help individuals with disabilities overcome a history of subordination in our society. Empirical analysis can be an important tool in helping us determine what types of practices are most likely to attain substantive equality. Although integration can be an important tool in our attempts to attain substantive equality, we should not assume that integration is presumptively more effective than tools that have some separate or segregating elements.

I offer those opening remarks with the knowledge that some people will immediately misunderstand me. They will accuse me of being against integration. They will accuse me of not sufficiently valuing individuals with disabilities, and the contributions they offer to society.

[1] Catharine A. MacKinnon, *From Practice to Theory, Or What Is a White Woman Anyway?*, 4 Yale J. L. & Feminism 13 (1981).

But nothing could be further from the truth. I fully embrace integration when we have reason to believe that it is an effective tool to attaining meaningful, substantive equality. I simply do not presume that integration is the same as equality; I insist on proof in concrete situations that integration serves the goal of equality.

On the basis of my review of the relevant literature, I support more segregated tools in some settings and more integrated tools in other settings. For example, children with autism in the public schools should be placed in the regular classroom (with appropriate support) when we believe that educational environment is most likely to serve their educational needs. But that educational environment should not be considered presumptively better than a more segregated educational environment where they can receive one-on-one behavioral therapy. The appropriate educational environment should be chosen on the basis of likely results supported by the empirical literature rather than presumptions. Similarly, students in higher education with learning disabilities should be provided testing practices that are most likely to demonstrate what they have learned in a course. Segregated or special testing practices should not be preferred to more integrated solutions when more integrated solutions are likely to improve testing practices for both students with disabilities and other students. In both contexts, the issue is which practices are likely to be effective, not which practices are integrated rather than segregated.

I have been writing from an "anti-subordination" perspective since I authored an article in the *New York University Law Review* in 1986 entitled "Anti-Subordination Above All: Sex, Race, and Equal Protection."[2] Under this perspective, I argue that we should adopt social and legal policies that help groups, such as women, gay men, lesbians, and racial minorities, overcome a history of subordination. We should not concern ourselves with individual claims of different treatment by

[2] Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986).

dominant groups such as white, heterosexual men because "difference" is not the same as "subordination."

An anti-subordination perspective differs from "formal equality" because it encompasses approval of race- or gender-specific policies that help achieve substantive equality. In the gender context, under this perspective, single-sex schools for women as well as leave policies for the benefit of pregnant women are appropriate, because they can help women overcome historical barriers in education or at the workplace. Formal equality theorists, by contrast, disapprove of gender-specific policies and argue that we should only offer assistance to all parents or people with medical needs rather than single out pregnant women for assistance.[3] Similarly, formal equality theorists would oppose all state-supported single-sex education irrespective of whether the intended beneficiaries are men or women.[4] In the race context, under an anti-subordination perspective, race-conscious affirmative action and Afrocentric schools can be important tools to help overcome a history of racial subordination in our society. Formal equality theorists would oppose both those remedies.[5] An anti-subordination perspective does not accept the premise that "separate is inherently unequal" because it recognizes an important role for gender-specific and race-specific policies in our society as a means of helping create substantive equality.

[3] The Family Medical Leave Act reflects a formal equality perspective. Professor Wendy Williams argued that it was important that this statute not single out pregnant women as being entitled to leaves that would not be available to nonpregnant persons. See Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984–85).

[4] See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating state-supported single-sex university).

[5] On May 20, 2008, a three-judge panel of the D.C. Circuit ruled that the United States Treasury violated federal law by not making the currency accessible to those with visual impairments. It is too soon to know how, if at all, this decision will be implemented. See *American Council of the Blind v. Paulson*, 525 F.3d 1256 (D.C. Cir. 2008).

I began to think about how to apply an anti-subordination perspective to the field of disability discrimination in the late 1980s as I became immersed in litigation on behalf of individuals with disabilities who faced employment discrimination. My primary entry into the field of disability discrimination was the AIDS crisis as I witnessed society overreacting to the risk of HIV transmission by seeking to criminalize consensual sexual behavior and discharging individuals from employment who were perceived as being HIV-positive. I had the opportunity to work on both a legislative and a litigation level to try to protect individuals from discrimination. This work taught me about some of society's deep-seated fears and hatred of some individuals with disabilities.

In 1990, I read Martha Minow's book *Making All the Difference*[6] and began to think how my "anti-subordination" perspective on race and gender might also apply to disability discrimination. Professor Minow's compelling rendition of the story of Amy Rowley and the Supreme Court's failure to insist that she have a sign language interpreter in her grade school classroom helped me see how principles of formal equality would not be adequate to theorizing about this area of the law. Under the Court's formal equality approach, Amy had little entitlement to extra resources to allow her to participate effectively in the classroom under principles of substantive equality.

In the 1990s, my work in the field of disability discrimination moved beyond my initial work on behalf of individuals who were HIV-positive to include a broad spectrum of disability-related issues in the arenas of employment, housing, transportation, and accessibility. I began to ask: What would it mean to apply an anti-subordination perspective to disability equality theory? How does integration work as the preferred remedy in this area? In Chapter 2, I seek to define an anti-subordination perspective as applied to the disability context. Chapter 3 will seek to

[6] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990).

identify who are individuals with disabilities from an anti-subordination perspective. Chapter 4 will begin a discussion of remedies and the role of integration as a remedy in the educational context.

It has been easy for me to conclude that an anti-subordination perspective makes sense in the disability context because of the history of subordination faced by individuals with disabilities in our society and the inability of a formal equality model to justify important principles such as "reasonable accommodation" that are essential to substantive equality for some individuals with disabilities. I will make that argument more fully in Chapter 2. The harder question has been the role of integration as a remedy in the disability context.

My perspective on integration has been influenced by my personal experience in raising a child with a disability.[7] As I became immersed in disability rights work, I gave birth to my second child, who was diagnosed as having significant impairments when he was about three years old. As do most parents, I want my child to succeed in the mainstream world and worry about whether he will ever be able to live independently and support himself financially. I hope that he will live as an adult under conditions of substantive equality, and I recognize that an integrated environment is likely to be an aspect of the equality that he seeks as an adult. Nonetheless, I do *not* assume that integration is always the correct *tool* for helping him attain substantive equality as a child or as an adult. Segregated, special education tools may be an important vehicle in an effort to provide him and other children with the skills and abilities to live independently as adults. Similarly, adults with mental illness or drug addictions who live on our city streets may experience an "integrated" existence, but it is not one of substantive equality. It is important not to confuse integration with equality. Integration is not a

[7] I hesitate to use the word *disability* in describing my son because it is such an ambiguous term. I use it here to connote that he qualifies for special assistance under the Individuals with Disabilities Education Act as a child with an impairment who needs such assistance to succeed in school.

desirable end, in itself, absent substantive equality. Segregation may be an appropriate tool in the path toward substantive equality.

I have brought my integration skepticism developed in the race and gender context to the table as I help make choices for my child's development (and observe choices that he makes for himself). As a preschooler, for example, he was placed in a classroom for part of the day to receive early intervention services. He was already spending about five hours a day in a traditional preschool, child care classroom but was given the opportunity to spend about three hours per day in a special classroom (in the same building) for children who had been diagnosed as disabled. Most of the children who had disabilities had little or no language development and were very awkward both physically and socially. It was an absolutely wonderful room with as many as three teachers for eight students and my son flourished in that setting for several years before starting elementary school. But there were some odd elements to the class that, with hindsight, I suspect were created to be in compliance with federal law's emphasis on integration. The teachers had to bring in "typical role models" for part of each class to comply with federal law, even though my son and many of the other students were spending the rest of their day in a regular preschool classroom with typically developing children. When I observed the classroom, I saw that the typical role models, with their much greater language development, dominated the class and made the teachers' jobs more difficult. Later, I did empirical research that supported the conclusion that the integration model is not appropriate for all children in all settings. I discuss that literature in Chapter 3. As my son has grown older, I have also seen him sometimes seek more segregated settings as a way to avoid the noise and distraction of a regular classroom. Although he does not have the language to discuss segregation versus integration, he intuitively makes some decisions in favor of segregation to further his educational outcomes.

Despite my observations and research, I am wary of criticizing the integration presumption that is so prevalent in disability theory.

I understand that I might be criticized as an "outsider"[8] who is reinforcing the negative elements of segregation as they have been forced upon individuals with disabilities. Moreover, I worry that my perspective would be viewed as too "paternalistic" since it does evolve, in part, from my experience as a parent. I also know that my critique of integration can easily be misunderstood as opposition to integration. In truth, I simply want to make sure that we keep our focus on substantive equality and do not allow unthinking adherence to integration as a strategy to prevent us from obtaining substantive equality for individuals with disabilities. I maintain my aspirations for my son that he will live an independent existence as an adult under conditions of substantive equality while I also skeptically observe whether integrated settings are the best way to help him achieve those goals.

I also realize that a critique of integration should not be based on merely the example of K–12 public education. I have therefore sought to understand how that critique might be useful in other areas of the law. Chapter 6 extends that critique to the voting rights area, asking how we might better serve the interests of voters with disabilities if we do not single-mindedly seek integrated remedies. While recognizing that it is important to make public polling places as accessible as possible for those who desire to vote in integrated environments, I conclude that we need to do more to make it possible for people to vote from the privacy of their homes. While federal law has made enormous strides in making public voting more accessible, the integration focus has deterred us from thinking about those who do not desire to vote in public polling places.

In this book, I only have space to consider a few examples in depth of the results that might be attained under an anti-subordination perspective that is agnostic about the remedy of integration. I invite the

[8] By most conventional definitions of disability, I am what is called the "temporarily able bodied." I have strabismus and monocular vision but, aside from my tennis game and a few scratches on my car, those visual impairments have little impact on my life.

reader to consider how this perspective might be applied to other areas. For example, the federal courts have recently become involved in the legal issue of whether the United States Treasury is violating federal disability law by using a currency that is not readily distinguishable to individuals with visual impairments.[9] This lawsuit was brought by the American Council of the Blind (ACB), which emphasizes the importance of this issue to the independent functioning of individuals with visual impairments in our society. The National Federation of the Blind (NFB), however, considers this lawsuit to be a waste of time, arguing that it distracts the public from the real issue, which is that "the blind need jobs and real opportunities to earn money, not feel-good gimmicks that misinform the public about our capabilities."[10] From an anti-subordination perspective, is it important to change the currency so that blind people can lead more independent lives, or is this problem really a nonissue, as claimed by NFB, because blind people learn gimmicks such as folding paper money to distinguish between denominations? What tools are most likely to improve the economic independence of individuals with visual impairments – a goal shared by both ACB and NFB? I do not know the answer to that question but suggest that it can best be answered from an anti-subordination perspective that is agnostic about integrated versus segregated remedies and seeks to make decisions based on sound empirical research.

Chapter 7 concludes this book with reflections on racial integration. My investigation of disability equality from an anti-subordination perspective has heightened my thinking about some of the difficult issues facing society in the racial context, particularly K–12 education. In the final chapter, I closely examine the available empirical data on effective educational environments and argue that formal equality has impeded the courts from recognizing that we need *more*, not less, attention to race-conscious remedies in the public education context. Ironically,

[9] *American Council of the Blind v. Paulson*, 463 F. Supp.2d 51 (D. D.C. 2006).
[10] http://www.nfb.org/nfb/NewsBot.asp?MODE=VIEW&ID=102&SnID=111849590.

the law of race discrimination has made it virtually impossible for school districts to create the kind of race-conscious educational plans that are likely to be the most effective in attaining substantive equality.

In sum, formal equality has outlived its usefulness. By focusing, instead, on how to achieve positive outcomes for all our citizens, we may be able to attain more substantive equality. An anti-subordination perspective needs to dictate our future in the race, sexual orientation, gender, and disability contexts with a close and balanced consideration of empirical data. The remedy of integration has a role in that process, but it should not be the only remedy we pursue in our search for substantive equality. Data rather than unsupported presumptions should guide our policies.

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Anti-Subordination Above All: A Disability Perspective

THE FIELD OF DISABILITY DISCRIMINATION IS undertheorized; it conflates "separate" and "unequal." Theories of justice typically do not consider the example of disability or, if they do, proceed from a pure "integrationist" perspective. Although an integrationist perspective played an important historical and structural role in helping to close some horrendous disability-only institutions, it fails to recognize that the government may need to retain some disability-only services and institutions for those who need or want them while protecting others from coercively being required to accept such services or being placed in such institutions. An absolutist integrationist perspective disserves the disability community by supporting an inappropriately high threshold for the development and retention of disability-only services and institutions. An anti-subordination perspective should replace it.

Well-known equality theorists have incompletely considered the example of disability discrimination. John Rawls's theory of justice, for example, presumes that society consists of "free and equal persons . . . who can play the role of fully cooperating members."[1] Douglas Rae mentions individuals with disabilities in passing as part of his "need-based person-regarding" equality, but his discussion of disability is degrading with passages such as "Perhaps, *no* services

[1] John Rawls, *Justice as Fairness: A Restatement* 24 (Erwin Kelly ed. 2001).