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Introduction: Four Views on Healthism

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INTRODUCTION: FOUR VIEWS ON HEALTHISM

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What does it mean to discriminate based on health? This question has been the focus of our scholarly collaboration for a number of years, and we are excited to see our work in this area culminate in our forthcoming book, *Healthism: Health Status Discrimination and the Law*.¹ Our book is the latest installment of our work on health-status discrimination, or “healthism,” and this Symposium serves a wonderful prelude and proving ground. The Symposium includes set of outstanding articles by a group of leading scholars possessing an array of expertise and insights into matters bearing on our project. We are grateful to Professor Paul Secunda for creating this unique opportunity to invite commentary on our forthcoming book. We also recognize the faculty and staff of the Health Law & Policy Institute at the University of Houston Law Center for hosting a live conference on November 4, 2016, featuring these now-published papers. We also thank the numerous workshop and conference participants, including Marquette Law faculty, who provided invaluable helpful comments on various stages of our healthism project.

The central suggestion in our book is that the law, and, more generally, society at large, should be attuned to the pervasiveness of an under-recognized and under-theorized form of discrimination based on health status. The suggestion is both intuitive and provocative. At first blush, it may seem inherently wrong that an individual should face systematic disadvantaging treatment based on the misfortune of being ill. On closer examination, however, we may find legitimate, rational reasons for treating people differently based on their health status or health-related habits. That tension both complicates and energizes our efforts to define a new protected category for the unhealthy. The opportunity afforded by this Symposium to

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1. JESSICA ROBERTS & ELIZABETH WEEKS, *HEALTHISM: HEALTH STATUS DISCRIMINATION AND THE LAW* (Cambridge U. Press, forthcoming 2017).

engage with our colleagues and receive candid, formal feedback as we finalize our manuscript is a true privilege. Fostering serious conversation is precisely the goal of our larger healthism project. Our book stops short of offering an overarching solution to the problem of health-status discrimination across contexts. What we offer instead is a vocabulary and rubric for naming and categorizing the troubling phenomenon. These Symposium authors engage with our central thesis and vocabulary, testing and expanding on them, drawing from their own knowledge bases and scholarly expertise.

As we write, tectonic changes are afoot in federal politics, changes that may have a dramatic effect on various issues and topics about which we write. The November 2016 federal elections ushered in a notoriously conservative and divisive Presidential Administration and Congress.² Formal and informal discrimination against individuals and groups based on mutable and immutable conditions and statuses seems almost certain to increase in prominence. This is a President who parodied a disabled reporter,³ shamed another one for undergoing plastic surgery,⁴ disparaged a former Miss Universe for gaining weight,⁵ and stereotyped computer programmers as morbidly obese,⁶ among other public expressions of intolerance

2. Nicholas Vardy, *The Most Divisive Election in American History*, STOCK INVESTOR (Nov. 8, 2016, 8:56 PM), <https://www.stockinvestor.com/23720/divisive-election-american-history/> [<https://perma.cc/UEL8-XDBR>]; *Electoral College Prepares to Meet Under Old Rules, New Controversy*, FOX NEWS (Dec. 16, 2016), <http://www.foxnews.com/politics/2016/12/16/electoral-college-prepares-to-meet-under-old-rules-new-controversy.html> [<https://perma.cc/5SU3-76CE>]; *2016 Presidential Election Results*, POLITICO (Dec. 13, 2016, 1:57 PM), <http://www.politico.com/2016-election/results/map/president> [<https://perma.cc/T57F-Z4QW>].

3. Irin Carmon, *Donald Trump's Worst Offense? Mocking Disabled Reporter, Poll Finds*, NBC NEWS (Aug. 11, 2016, 3:24 AM), <http://www.nbcnews.com/politics/2016-election/trump-s-worst-offense-mocking-disabled-reporter-poll-finds-n627736> [<https://perma.cc/R2CV-TDNY>].

4. Laurie Kellman & Jonathan Lemire, *Trump mocks 'Morning Joe' host's looks, brains, sparking bipartisan outrage*, CHICAGO TRIBUNE (June 29, 2017) <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-tweet-mika-brzezinski-20170629-story.html> [<https://perma.cc/NW3F-LN55>].

5. Jenna Johnson, *Trump Attacks Former Miss Universe Who 'gained a massive amount of weight' and had 'attitude'*, WASH. POST (Sept. 27, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/27/trump-attacks-former-miss-universe-who-gained-a-massive-amount-of-weight-and-had-attitude/?utm_term=.f2fe47e0d0fb [<https://perma.cc/XQ6D-L3DBJ>].

6. Sarah Maslin Nir, *400-Pound Hacker? Trump Comments Fuel Dialogue on Fat-Shaming*, N.Y. TIMES (Sept. 29, 2016), https://www.nytimes.com/2016/09/29/well/live/a-400-pound-hacker-trump-comment-ignites-fat-shaming-debate.html?_r=0 [<https://perma.cc/ZJY2-75QU>].

for physical imperfections and ailments.⁷ Even if wholesale repeal and reform of President Obama's signature legislation, the Patient Protection and Affordable Care Act of 2010 (ACA), does not materialize,⁸ other civil rights protections for individuals seem likely to be eroded.⁹

The ACA was a single legal development in eradicating health status discrimination. It expressed a shift in public opinion that treating unhealthy people unfavorably, especially with respect to access to health insurance, is normatively wrong. Despite the popularity of key provisions of the ACA, repealing and replacing that law has been a top agenda item for Republicans, with the efforts only increasing after the November 2016 elections. Even under that pressure, the ACA's antidiscrimination provisions have enjoyed broad public support. According to a December 2016 poll, sixty-nine percent of the public, and sixty-three percent of Republicans, favored prohibiting insurance companies from denying coverage because of a person's medical history.¹⁰

After the 2016 elections, Republican proposals initially focused on repealing the ACA's more controversial provisions, including the individual mandate, employer penalties, Medicaid expansion, and government subsidies for private insurance

7. See Lynn Vavreck, *Measuring Donald Trump's Supporters for Intolerance*, N.Y. TIMES (Feb. 23, 2016), <https://www.nytimes.com/2016/02/25/upshot/measuring-donald-trumps-supporters-for-intolerance.html> <https://perma.cc/P733-6CSF>.

8. Robert Pear, Thomas Kaplan & Maggie Haberman, *In Major Defeat for Trump, Push to Repeal Health Law Fails*, N.Y. TIMES (Mar. 24, 2017), <https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html> <https://perma.cc/M2S2-69UN>; Lauren Fox, *GOP on Verge of Losing Health Care Vote*, CNN (May 2, 2017, 3:49 AM), <http://www.cnn.com/2017/05/01/politics/republicans-continue-to-work-on-health-care/> [<https://perma.cc/3P8V-6AD6>].

9. Ariana de Vogue, Mary Kay Mallonee & Emanuella Grinberg, *Trump Administration Withdraws Federal Protections for Transgender Students*, CNN (Feb. 23, 2017, 10:16 AM), <http://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/> [<https://perma.cc/PB4Y-5AWT>]; Timothy Jost, *ACA Pregnancy Termination, Gender Identity Protections Blocked; Wellness Programs Incentives Survive*, HEALTH AFF. BLOG (Jan. 3, 2017), <http://healthaffairs.org/blog/2017/01/02/aca-pregnancy-termination-gender-identity-protections-blocked-wellness-program-incentives-survive/> [<https://perma.cc/ZGX9-4HPN>]; Julie Moreau, *How Repeal of Affordable Care Act Could Impact LGBTQ Community*, NBC NEWS (Jan. 21, 2017, 11:10 AM), <http://www.nbcnews.com/feature/nbc-out/how-repeal-affordable-care-act-could-impact-lgbtq-community-n710231> [<https://perma.cc/9K6Z-8KVT>].

10. *After the Election, The Public Remains Sharply Divided on Future of the Affordable Care Act*, THE HENRY J. KAISER FAMILY FOUNDATION (Dec. 1, 2016) <http://www.kff.org/health-reform/press-release/after-the-election-the-public-remains-sharply-divided-on-future-of-the-affordable-care-act/> [<https://perma.cc/9Z7L-NY6N>]

purchases. The ACA's bans on preexisting condition exclusions and premium rate variations based on health status, at first, were not on the chopping block. The American Health Care Act (AHCA),¹¹ as introduced into the House, however, reintroduced significant opportunities for health-status discrimination. First, the AHCA expanded the ACA's permitted age rating bands from 3:1 to 5:1.¹² Second, it eliminated federal subsidies to low-income individuals to reduce out of pocket costs and changed the ACA's income-based premium assistance subsidies into age-based premium assistance subsidies.¹³ The AHCA also proposed gradually rolling back Medicaid expansion and transforming Medicaid from an entitlement program to a grant program,¹⁴ meaning that states with higher Medicaid rolls would simply have to cut or deny benefits if their federal grants ran out. Subsequent amendments to the AHCA allowed states to obtain waivers from key provisions of the ACA, including the community rating requirement (except for individuals who fail to maintain continuous coverage), 5:1 age rating bands, and essential health benefits requirement for health plans.¹⁵

The AHCA passed the House on May 4, 2017, by a near party-line vote of 217 to 213.¹⁶ But the Senate, it failed to pass even a "skinny" repeal of the ACA before the August 2017 recess.¹⁷ Various proposals, many urging state flexibility around various key ACA provisions, including antidiscrimination protections, continue to surface.¹⁸ The future of the law remains

11. H.R. 1628, 115th Cong. (2017).

12. *Summary of the American Health Care Act*, HENRY J. KAISER FAMILY FOUND. (May 2017), <http://files.kff.org/attachment/Proposals-to-Replace-the-Affordable-Care-Act-Summary-of-the-American-Health-Care-Act> [https://perma.cc/6FUG-V3P9].

13. *Id.*

14. *Id.*

15. Timothy Jost, *The MacArthur Amendment Language, Race in the Federal Exchange, and Risk Adjustment Coefficients*, HEALTH AFF. BLOG (Apr. 25, 2017), <http://healthaffairs.org/blog/2017/04/25/the-macarthur-amendment-language-race-in-the-federal-exchange-and-risk-adjustment-coefficients/> [https://perma.cc/G67K-WLHV].

16. Timothy Jost, *House Passes AHCA: How it Happened, What it Would Do, and Its Uncertain Senate Future*, HEALTH AFF. BLOG (May 4, 2017), <http://healthaffairs.org/blog/2017/05/04/house-passes-ahca-how-it-happened-what-it-would-do-and-its-uncertain-senate-future/> [https://perma.cc/285A-L7PT].

17. Jacob Pramuk, *Senate Blocks 'skinny' Obamacare Repeal Bill in Dramatic Late-Night Vote*, CNBC (July 28, 2017, 10:27 AM), <https://www.cnbc.com/2017/07/28/senate-blocks-skinny-obamacare-repeal-bill-in-dramatic-late-night-vote.html> [https://perma.cc/L8JP-E38L].

18. MJ Lee & Tami Luhby, *GOP Senator: Bipartisan Health Care Bill Coming in 10 Days*, CNN (Sept. 8, 2017, 1:47 AM), <http://www.cnn.com/>

uncertain as of this writing. Nevertheless, the House version of the law signals widespread willingness on the part of elected representatives to reintroduce health status discrimination into health insurance.

Moreover, the Trump Administration's other policies and rhetoric display a similar distaste for diversity broadly writ. For example, the Trump Administration has essentially declined to enforce Section 1557 of the ACA,¹⁹ which prohibits discrimination in health insurance on the basis of race, color, national origin, sex, age, and disability, extending existing federal antidiscrimination laws.²⁰ The current Administration's animosity for that law particularly targets the inclusion of gender identity and pregnancy in the definition of "sex" for purposes of antidiscrimination protection.²¹ Trump's Administration has also issued interim final regulations broadening exemptions from the so-called "contraceptive mandate," requiring employers to cover birth control as preventive care under the ACA. That policy potentially discriminates based on both sex and health status. Overall, the current political climate seems to invite more, not less, potential

2017/09/07/politics/lamar-alexander-bipartisan-health-care-bill/index.html [https://perma.cc/562J-TFQ4]; Robert Pear, *Governors Rally Around Health Law Fixes as White House Pushes Repeal*, N.Y. TIMES (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/us/politics/governors-obamacare-fixes-trump-repeal.html?_r=0 [https://perma.cc/DU44-DLFY]; Robert Pear, *Work Toward Bipartisan Fix for Health Markets Begins in Senate*, N.Y. TIMES (Sept. 6, 2017), https://www.nytimes.com/2017/09/06/us/politics/senate-health-committee-obamacare-bipartisan-fix.html?rref=collection%2Fbyline%2Frobert-pear&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection [https://perma.cc/KH8M-VR2V]; Timothy Jost, *Calendar's Turn Brings New Congressional Approach to Health Form*, HEALTH AFF. BLOG (Sept. 6, 2017), <http://healthaffairs.org/blog/2017/09/06/calendars-turn-brings-new-congressional-approach-to-health-reform/> [https://perma.cc/DUX4-Q9VR].

19. Trudy Ring, *Trump Moves to Dump Trans-Inclusive Health Care Rule*, ADVOCATE (May 2, 2017, 8:39 PM), <https://www.advocate.com/health/2017/5/02/trump-moves-dump-trans-inclusive-health-care-rule> [https://perma.cc/FA9D-MMYR].

20. Office for Civil Rights, *Section 1157 of the Patient Protection and Affordable Care Act*, U.S. DEP'T OF HEALTH & HUMAN SERV.'S, <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> [https://perma.cc/WX59-8GD4] (last visited Sept. 8, 2017).

21. See Nondiscrimination in Health Programs and Activities; Final Rule, 81 Fed. Reg. 31376 (May 18, 2016) (codified at 45 C.F.R. pt. 92) (final regulations issued under President Obama, including gender identity and pregnancy termination with Section 1557 protections); Defendants' Motion for Voluntary Remand and Stay, *Franciscan All., Inc. v. Price*, No. 7:16-CV-00108-O (N.D. Tex. July 10, 2017), (Trump Administration's motion for voluntary remand and stay of lawsuit challenging Obama-era regulations).

healthism in health insurance and beyond. The current and emerging trend highlights the need for projects like ours to provide a way to talk about these issues that is accessible to the public and also carries the imprimatur of scholarly heft and rigor.

We turn now to our introductory comments on the individual papers, beginning with Professor Brendan Maher, a nationally renowned expert in employee benefits law, who unapologetically embraces the Employee Retirement and Income Security Act (ERISA) as his niche.²² Professor Maher insightfully notes similar broad, process points for his project and ours. Namely, both issues—the prevalence of employer-sponsored health insurance and of health-status discrimination—fly somewhat under the radar, due to lack of awareness and misconceptions by the public, including those directly affected.²³ With respect to employee benefits, Professor Maher notes that *fragility* and *opacity* persistently challenge any attempts to improve and reform the regulatory apparatus supporting employer-sponsored health insurance.²⁴

Employee benefits are *fragile*, he notes, because employers provide them voluntarily, even accepting the so-called employer mandate under the Affordable Care Act, which places penalties on large employers, under certain circumstances, if they decline to provide health insurance to their employees.²⁵ Accordingly, employers, at any time, rationally may conclude that it is not worth offering benefits to their employees.²⁶ At the same time, the majority of working-age Americans rely on employer-sponsored plans for their health insurance coverage. As a result of this tension, the legal regulation of employee benefits must be restrained enough to allow a desirable, voluntary market for employee-sponsored benefits to persist. Overregulation likely would only lead to employers' exit from the market.²⁷

Employee benefits are *opaque*, Professor Maher explains, because the public largely operates under a misconception that

22. Brendan S. Maher, *Some Thoughts on "Healthism" and Employee Benefits in the Age of Trump*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 295 (2017).

23. *Id.* at 310.

24. *Id.* at 307, 309.

25. *Id.* at 308.

26. *Id.*

27. *Id.* at 309.

they are gifted to employees out of employer largess.²⁸ Yet in reality employers do not offer employee benefits gratuitously, but rather in lieu of other compensation.²⁹ Federal tax law further incentivizes benefits over salary, creating another business advantage for offering them.³⁰ Opacity of employer-sponsored benefits also derives from a widely held belief that only those who work for it deserve health insurance.³¹ Public policy discussions, accordingly, may indict the non-working members of society as suffering from their own failings, rather than laws or circumstances beyond their control.³² Although underlying most policy discussions bearing on employee benefits systems, fragility and opacity, “are often not considered to be problems worthy of discussion at all.”³³

Professor Maher aptly observes that healthism, like fragility and opacity of employer-sponsored benefits, often drives policymaking even if not overtly recognized.³⁴ Discounting or ignoring these subterranean themes may lead to unintended and undesirable results. The problem of individuals facing socially undesirable differential treatment because of their health conditions or health habits is a pervasive trend that has yet to be fully recognized.³⁵ Thus, just as he would advocate discussions of employee benefits to consider the problems of fragility and opacity, he would urge health care and legal reform conversations to assess the potential for healthism, or undesirable consequences resulting from health status discrimination.³⁶

Jennifer Bennett Shinall, a rising star in employment law and economics, draws particular attention to the importance of healthism in the context of intersectional discrimination, an area of continuing scholarly and legal attention. Intersectionality suggests that the harm to individuals who suffer discrimination on multiple grounds, say, sex and race, or

28. Maher, *supra* note 22, at 310.

29. *Id.*

30. Fred T. Goldberg, Jr., Lily L. Batchelder & Peter R. Orszag, *Reforming Tax Incentives into Uniform Refundable Tax Credits*, THE BROOKINGS INSTITUTION (Aug. 2006), <https://www.brookings.edu/wp-content/uploads/2016/06/pb156.pdf> [<https://perma.cc/A7KD-8R3T>].

31. Maher, *supra* note 22, at 310.

32. *Id.*

33. *Id.*

34. *Id.* at 310-11.

35. *Id.*

36. *Id.*

age and race, is not merely additive but compounded. In other words, even though the law allows a remedy for age discrimination in employment, under the Age Discrimination in Employment Act, and for race discrimination in employment, under Title VII, the combination of those remedies would still fail to make a person marginalized for both her age and her race whole. That is because the total amount of discrimination faced by someone who is a member of multiple protected categories is “*greater than* the sum of its parts.”³⁷

Professor Shinall’s keen insight regarding intersectionality and healthism is that we may have *underplayed* the importance of the problem of healthism by examining the issue and proposing a solution that considers the effect of health-status discrimination in isolation.³⁸ Accordingly, she urges—backed by compelling data—that health-status tends to exacerbate existing grounds for discrimination.³⁹ “Instead, a complete solution to health-status discrimination requires recognition, either by legislatures or courts, that other types of legally prohibited discrimination may serve as aggravating factors.”⁴⁰ In other words, if a reader is skeptical about the need for additional legal protection for unhealthy individuals, given that the law already protects individuals, to a degree, genetic information, disability, age, and other categories that may overlap with health, Professor Shinall rightfully suggests that in some ways our project may not be ambitious enough.

Her data, drawn from her own earlier empirical research, reveal the intersectionality of weight and sex discrimination in the workplace. Namely, women face markedly greater wage penalties in the workplace for being overweight or obese, compared to men of the same weight categories.⁴¹ Overweight (as opposed to obese) men actually experience a wage premium.⁴² Because most plaintiffs must prove their workplace discrimination claims by indirect means, comparing the plaintiff to a similarly situated worker, a woman claiming weight discrimination would have to rebut the employer’s ready assertion that a similarly situated male worker was not

37. Jennifer Bennett Shinall, *Intersectional Complications of Healthism*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 255, 259 (2017).

38. *Id.* 260.

39. *See id.* at 268 (table summarizing findings).

40. *Id.* at 260.

41. *Id.* at 266-68.

42. *Id.* at 266.

disadvantaged on the basis of *weight*.⁴³ But if the woman is allowed to assert an intersectional discrimination claim, based on gender and weight, the case becomes much more compelling.⁴⁴

Professor Shinall concludes by observing that instances of what she calls “simple healthism,” meaning discrimination based solely on health status, without other, compounding statuses, such as race, color, national origin, age, disability, or sex,⁴⁵ may be relatively rare. Instead, she expects that health-status discrimination often will combine with and exacerbate the injury inflicted by other historically protected categories.⁴⁶ That astute observation counsels not against the need for recognizing a new protected category based on health status, but for explicitly incorporating healthism and intersectionality into existing civil rights protections.⁴⁷

Jacqueline Fox, a lively, prolific scholar who focuses on health care financing and regulation, and Medicare, in particular, offers a different angle on intersectionality, noting its implications for insurance plan design in both private and public insurance.⁴⁸ Professor Fox’s discussion underscores a point we make in our book—that shifting to a single-payor health care system would not eliminate health-status discrimination.⁴⁹ Even within a hypothetical “Medicare for all,” regulators would still face difficult choices regarding what services to cover for which individuals.⁵⁰ Professor Fox and one of the authors have discussed the inevitability of this form of rationing in other writing.⁵¹ For this Symposium, Professor Fox thoughtfully considers issues of plan design and coverage determinations through the lens of healthism.

She observes that health insurance in the United States—

43. Shinall, *supra* note 37, at 268-69.

44. *Id.* at 269.

45. *See id.* at 269, n. 70.

46. *Id.* at 274.

47. *Id.*

48. Jacqueline Fox, *Healthism, Intersectionality, and Health Insurance*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 279 (2017).

49. WEEKS & ROBERTS, *supra* note 1.

50. *Id.*

51. *See* Jacqueline Fox, *The Hidden Role of Cost: Medicare Decisions, Transparency, and Public Trust*, 79 U. CIN. L. REV. 1 (2011); Jacqueline Fox, *Medicare Should, but Cannot, Consider Cost: Legal Impediments to a Sound Policy*, 53 BUFF. L. REV. 577 (2005); Elizabeth Weeks Leonard, *Death Panels and the Rhetoric of Rationing*, 13 NEV. L.J. 872 (2013).

whether it is a government health care program or a private plan (including both the employer-sponsored and individual, non-group market)—is plagued by many of the hallmarks of healthist policymaking discussed in our book.⁵² That is, health insurance contracts and regulations often are driven by animus, unfairly stigmatize people, punish individuals for private conduct, impede access to care, produce worse health outcomes, and maintain or exacerbate existing disparities.⁵³ With respect to private health insurance, Professor Fox observes (as we have) the many ways in which health-status discrimination persists in private health insurance, even after the ACA's many popular, high-profile reforms aimed at that very problem.⁵⁴ Echoing Professor Maher's opacity point, Professor Fox notes that the ACA, although limiting overt health-status discrimination, leaves many opportunities for health insurers to continue to treat applicants and subscribers differently on that basis.⁵⁵

With respect to public health insurance, Professor Fox focuses her healthism discussion on the Independent Payment Advisory Board (IPAB), a novel regulatory mechanism created in the ACA.⁵⁶ IPAB is aimed at controlling costs in the Medicare program. As Fox has cogently noted elsewhere, IPAB suffers from a variety of structural and substantive flaws.⁵⁷ Its intended purpose is to act as a policymaker and/or catalyst for congressional action to reform Medicare payment methodologies. Employing a remarkable delegation of administrative authority, albeit operating expressly as a non-governmental entity, IPAB is charged with proposing reforms to reduce Medicare spending.⁵⁸ Those reforms, subject to certain parameters, will take effect unless Congress can override them with alternate proposals, generating the equivalent cost-savings, under a statutorily defined abbreviated timeframe.⁵⁹ Professor Fox explains the various junctures at which IPAB's parameters may perpetuate healthist policymaking: reliance on statistical data that tend to favor the easier-to-treat; banning cuts on existing coverage,

52. See generally Fox, *supra* note 48.

53. WEEKS & ROBERTS, *supra* note 1.

54. Fox, *supra* note 48, at 283-84; see also WEEKS & ROBERTS, *supra* note 1.

55. Fox, *supra* note 48, at 283-84.

56. *Id.* at 286.

57. See Jacqueline Fox, *Death Panels: A Defense of the Independent Payment Advisory Board*, 66 ADMIN. L. REV. 131 (2014).

58. See Fox, *supra* note 48, at 286.

59. *Id.* at 287.

which enshrines existing disparities between the haves and have-nots; and outright animus and unconscious bias underlying health policy, particularly when allocation of scarce resources is on the line.⁶⁰ In sum, Professor Fox shares Professor Maher's observation that healthism is pervasive but under-examined and Professor Shinall's suggestion that viewing healthism in isolation of other existing disparities and forms of discrimination fails fully to address the problem.

Professor Lindsay Freeman Wiley is a leading public health law scholar, and co-author of a leading treatise.⁶¹ Wiley's recent scholarship has focused on law and policy responses to obesity. Her article here, like her other writing, is thoroughly explicated, exhaustively researched, and rich in detailed, highly salient examples. We could hardly imagine proceeding with our book without running our healthism concept and decisional rubric through Professor Wiley's head. Her careful analysis of tobacco denormalization, healthism, and health justice surely did not disappoint.⁶²

Professor Wiley discusses seven different forms of tobacco control policies and then evaluates them comparatively through three lenses: health justice (a concept emphasized in her and other public health scholarship), libertarian anti-healthism (associated with scholars Robert Crawford and Petr Skrabanek), and egalitarian anti-healthism (the term she uses to describe our approach).⁶³ Denormalization involves associating negative social norms with a particular activity, thereby discouraging individuals from engaging in the activity.⁶⁴ The tobacco denormalization strategies that Professor Wiley considers include "sin" taxes, product regulations (e.g., prohibiting flavored products typically aimed at children), advertising restrictions designed to decrease consumers' (again, particularly young people's) exposure, counter-advertising emphasizing the harmful effects, mandatory product warnings, "smoke-free" bans on smoking in workplaces or other locations, and laws expressly permitting discrimination against tobacco users (including but

60. *Id.* at 288.

61. LAWRENCE GOSTIN & LINDSAY WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* (U. of California Press 2016).

62. Lindsay F. Wiley, *Tobacco Denormalization, Anti-healthism, and Health Justice*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 203 (2017).

63. *Id.* at 207.

64. *Id.* at 203.

not limited to the ACA's tobacco rating bands).⁶⁵

Professor Wiley's description of the various strategies is engaging and informative in its own right. But her analysis under the three lenses, in particular, provides a way of testing the limits of our healthism concept and rubric against concrete examples and noting our tension and overlap with competing concepts. Not surprisingly, she is somewhat biased in favor of the health justice lens as most fully capturing the salient issues.⁶⁶ Professor Wiley does not hesitate to point out where she finds our theory unnecessary, underdeveloped, or short of the mark. For example, product regulation, banning certain tobacco products from sale, is clearly problematic from a libertarian anti-healthism perspective because that approach limits individual choice.⁶⁷ Yet that approach may be acceptable from both the health justice and egalitarian anti-healthism perspectives.⁶⁸ Health justice supports product regulation, like the New York City sugary drink portion-control law, because it operates on a social-ecological level.⁶⁹ We also find that such laws, on balance, do not constitute healthism, even if driven by animus against smokers or the obese, because they do not impede access to care or exacerbate existing disparities, and have the tendency to improve health outcomes.⁷⁰

As Professor Wiley notes, however, the extent to which our analysis turns on the efficacy of such interventions to improve health outcomes largely overlaps with work already being done by regulatory impact analyses in public health and administrative law.⁷¹ She also notes that our discrimination lens, as contrasted to her justice approach, presents certain limits, including the necessity of demonstrating discriminatory intent or impact.⁷² In sum, she wonders if our approach may be "too simplistic a principle to provide useful insights regarding more complex matters such as taxes, advertising restrictions, and anti-smoking advertising campaigns."⁷³ All fair points to be sure, but we remain satisfied that our project is having the effect

65. *Id.*

66. *Id.* at 230.

67. *Id.*

68. Wiley, *supra* note 62, at 238.

69. *Id.* at 239.

70. *See id.* at 238; *see also* WEEKS & ROBERTS, *supra* note 1.

71. *Id.* at 237.

72. *Id.*

73. *Id.* at 251.

we would hope – engaging serious scholars, the public, and (we hope) lawmakers in serious discussion of the pervasiveness of health-status discrimination. We certainly do not purport for our work on healthism to offer the last word on health policy or legal reform but merely wish for it to enter the conversation. Thanks in large part to Professor Secunda and the *Marquette Benefits and Social Welfare Law Review*, our wish has been granted.

