

DISABILITY AND THE LAW: AN ESSAY ON INCLUSION, FROM THEORY TO PRACTICE

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I want future generations to know that we are a people who see our differences as a great gift, that we're a people who value the dignity and worth of every citizen: man and woman, young and old, Black and White, Latino, Asian, immigrant, Native American, gay, straight, Americans with Mental Illness or physical disability.¹

PROLOGUE: "SUFFERING FROM"

Years ago, I was a legal aid lawyer in Missouri. We got a case one day involving a couple whose infant son had been taken away by the juvenile office. I mean a real infant: he was just four days old and still in the hospital when he was taken from his parents. We were pretty sure we knew why he was taken; and indeed, when we got the petition from the juvenile office a week later, our suspicions were confirmed. The sole allegation against the parents was that, in the words of the petition, they were "suffering from mental retardation." It became my case, and I was certain that the way to win it, the only way to win it, was to prove the petition wrong. And so I set out to prove that our clients, these parents—James and Louise were their names—were not, in fact, suffering from mental retardation.

It was a completely misguided effort, and we hope this article clearly explains why.

I. A HISTORY OF DISABILITY

At the root of it (spoiler alert) is the way we understand intellectual disability, or disability in general. We hope to provide a little bit of background on the concept of "disability" and a very brief overview of modern disability law. In fact, we hope to integrate those by examining the evolution of our conception of disability, and the way that evolution is now reflected in the inclusion mandate that drives much—though not all—of modern law and legal practice.

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¹ President Barack H. Obama, Address Before a Joint Session of Congress on the State of the Union (Jan. 20, 2015).

A. Disability Models

There's a remarkable history of disability by a French historian named Henri-Jacques Stiker.² It's a history of the treatment of people with disabilities, and simultaneously an intellectual history of the concept of disability reflected in that treatment.³ Stiker suggests that the concept has evolved through three stages, that there have been three models of disability: a spiritual model, a post-Enlightenment biological/medical model, and now, a social or cultural model (if you are of a philosophical bent, you might think of those as pre-modern, modern, and post-modern understandings).⁴ The account is pretty compelling, and we think that the evolution from the second model to the third is undeniable; and that will be our focus—the transition from the biological model to the social model, and the ways it is reflected (or not) in modern law.

The *spiritual model*—or pre-Enlightenment model—seems characterized above all by a paradox that may still be with us today. On the one hand, disability is perceived as a misfortune—in many respects indistinguishable from other misfortunes, like poverty or illness—and the appropriate spiritual response to that misfortune is compassion: care, concern, and sometimes pity. On the other hand, disability is also perceived as a manifestation of something impure, unclean, or unholy: it reflects the presence of something demonic, something that turns people into monsters. The co-authors' religious traditions are rich with stories of people with disabilities, who are cleansed of those disabilities when evil spirits were driven from them.⁵

That particular impulse—to rid people of their disabilities—persists into the next stage, the stage featuring a *biological or medical model* of disability. With the Enlightenment, of course, the spiritual is largely supplanted by the rational; and with disability, that means the focus will be on a scientific understanding. Compassion at least partly yields to curiosity: disability is an object of study. The goal is to classify and to order, to develop hierarchies of abnormality and subnormality.⁶ In time, this biological model evolves more particularly into a medical model, and the search for understanding disability becomes the search for medically determinable defects or disorders, for natural (vs. spiritual) imperfections.⁷

² HENRI-JACQUES STIKER, *A HISTORY OF DISABILITY* 1 (1997).

³ See generally *id.* at 1-3.

⁴ See *id.* at 117-22.

⁵ See generally E.P. SANDERS, *THE HISTORICAL FIGURE OF JESUS* 144-54 (1994) (surveying the healing miracles and exorcisms attributed to Jesus in the New Testament); see also LOUIS JACOBS, *THE JEWISH RELIGION: A COMPANION* 269 (1995) ("Among the curses threatened for faithlessness to the covenant is 'so that thou shalt be mad for the sake of thine eyes which thou shalt see (Deuteronomy 28:34).' King Saul was terrified by an evil spirit and David was invited to play the harp so that Saul could find relief (I Samuel 16:14-23). David feigned madness when he fled to the court of Achish the king of Gath (I Samuel 21:13-16; Psalms 31:1).").

⁶ See STIKER, *supra* note 2, at 18.

⁷ See *id.*

But the common impulse, in both the spiritual and medical model, is to get rid of disability: in the medical model specifically, to cure it, or to rehabilitate those who suffer from it.⁸ The rehabilitation effort is greatly accelerated early in the twentieth century, partly as a result of advances in medical sciences, substantial increases in the number of people with disabilities, a function of urbanization and industrialization, and also, in very large part, the carnage of World War I.⁹ The goal of medical treatment and rehabilitation is to eliminate disability through drugs; surgery; prostheses; and therapy, physical and mental (for mental disabilities, the therapy, and sometimes the surgery, is not voluntary).¹⁰

The final step in the evolution of disability comes with the transition from the biological model to the social model. There are many significant dates in that transition, but we choose to begin in 1939, the first year of T-4, the pinnacle (or nadir) of the biological model.

The ruling party in Germany in 1939 had come to power promising to make the nation great again, and a plurality of Germans (the Nazi party never got close to a majority in any democratic election¹¹) endorsed their platform for achieving it: a mix of militant and militaristic nationalism, a racist nativism, and an unconditional embrace of eugenics theory.¹² None of this was new—you could find antecedents for all of it, and mature expressions of all of it almost everywhere, certainly here in the United States¹³—but what was distinctive about the Nazi regime, and to a lesser extent the fascist regimes in Italy and Spain, was the synergy between ideology and action, and the way they progressed together to their rational extremes.

Eugenics theory, for example, proposed the gradual elimination of unwanted populations.¹⁴ In America, that found expression in progressively radical policies: exclusion; institutionalization; compulsory sterilization,¹⁵ and even euthanasia.¹⁶ In Nazi Germany, it progressed to mass murder.

⁸ See STIKER, *supra* note 2, at 23-25, 121.

⁹ See *id.* at 121-22.

¹⁰ See *id.*

¹¹ CORONA BREZINA, NAZI ARCHITECTS OF THE HOLOCAUST 10 (2014).

¹² See Jennie Rothenberg Gritz, *An Insidious Evil*, THE ATLANTIC (Mar. 1, 2004), <https://www.theatlantic.com/entertainment/archive/2004/03/an-insidious-evil/378588/>.

¹³ Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS (Jan. 29, 2016), <http://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/>.

¹⁴ See *id.*

¹⁵ See *generally id.*

¹⁶ No euthanasia laws were adopted in America, but two state legislatures openly considered it—Ohio and Iowa, around 1907—and at least through the first third of the twentieth century, informal practitioners littered hospital staffs throughout the country. See Jacob M. Appel, *A Duty to Kill? A Duty to Die? Rethinking the Euthanasia Crisis of 1906*, 78(3) BULL. HIST. MED. 610, 610-14 (2004).

The T-4 program was the first official program of mass murder in Germany or its occupied territories.¹⁷ And its targets, the first victims of Nazi genocide, were not Slavs or Poles, Communists or Catholics, Gypsies or even Jews. The first targets were people with disabilities.¹⁸ T-4 started with infants with disabilities, who were murdered mostly by starvation; it then added older children, killed by lethal dosages of barbiturates; and then it extended to adults, killed by poison gas.¹⁹ The official program ended after two years due to pressure from families of the victims and from Catholic clergy,²⁰ but it was too late—too late for the more than 70,000 people who were murdered under the program,²¹ and too late because even though the program was officially disbanded, the bureaucracy remained in place,²² and so, too, the ethos (or anti-ethos) in which the murder of people with disabilities was now the norm. We'll never know precisely how many people with disabilities were murdered because of their disabilities after T-4, but it's certainly in the tens of thousands, and probably hundreds of thousands.²³ The defeat of Nazi Germany also meant, at least for a while, the defeat of Nazi ideology. And it helped pave the way for a transformation in the way we think about a lot of things: race, equality, and disability. It's not that the end of the war and the reckoning with genocides gave birth to new understandings of race or disability. The dominant understandings—the biological models of race and disability—had critics for generations, and the alternative model had been around for generations. It's just that now, the limitations of the biological model and the dangers that inhered in it were much more apparent, and the alternative now resonated more fully.

What are the deficits in the biological model, and what is this alternative model that now, fully and finally, seems to take hold?

The essence of the biological model, remember, is that disability can be understood in biological or medical terms—in physiological terms, or psychological terms.²⁴ The locus of disability—where we find it—is entirely in the individual: there is something disabled in me, in my body, in my mind. The focus of the old model, its ethic, was rehabilitation—the fixing of the individual, making whole my body, making whole my mind, ridding me of my disability. The old locus—disability in the individual—maybe sounds

¹⁷ United States Holocaust Memorial Museum, *Euthanasia Program*, HOLOCAUST ENCYCLOPEDIA, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005200> (last visited Feb. 21, 2017).

¹⁸ *Id.*

¹⁹ ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 96-101 (1986).

²⁰ United States Holocaust Memorial Museum, *supra* note 17.

²¹ *Id.*

²² See LIFTON, *supra* note 19, at 96.

²³ See NAZISM: A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS 1041-48 (J. Noakes & G. Pridham, eds., 1988); see also HENRY FRIEDLANDER, *THE ORIGINS OF NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION*, 14-21 (1995); LIFTON, *supra* note 19, at 56.

²⁴ See STIKER, *supra* note 2, at 18-19.

reasonable, and the old focus—on rehabilitation—maybe sounds benign, but they had limits and dangers.

Above all, the biological model and the rehabilitation ethic presume that the individual needs to be fixed, i.e., is broken, is less than whole. That is not only insulting to those who don't desire repair, but it suggests to everyone that a person with a disability is *less than* a whole person—abnormal, indeed *subnormal*, because of the disability. That portends especially bad things for people who are not fully rehabilitated, whose disability cannot be eliminated. Volumes have been written about the sociology behind this, even the psychology behind it,²⁵ but the history is simple and clear: the movement to eliminate disability has too easily slipped into a movement to eliminate people with disabilities. Exclusion, institutionalization, sterilization, euthanasia, mass murder; only the last was unique to Nazi Germany.

B. The Social Model

The alternative model—the *social or cultural model*—is more complete, and its central ethic is much less problematic. The essence of the social model is that disability is a function of two variables: the individual's impairment, but also the social choices that make that impairment consequential, that give it salience.²⁶ The locus of disability, then, is not entirely within the individual: rather, it's in the gap, between an individual's abilities—what I can do, given my impairments—and societal demands—what I am expected or required to do, live, and thrive in my society. And because disability is a function of these two variables and the gap can be closed by adjustments at either end, the focus of the model (its ethic) expands: it can include a rehabilitation of the individual, but it can also include a reconstruction of society.

In 1980, the World Health Organization (“WHO”) offered a new set of disability definitions reflecting the ascendance of the social model. Briefly, it defined an impairment as a physiological loss or abnormality; this is biological.²⁷ But it shifted the focus to the consequences: disability, it said, was the practical consequence, and handicap was the social consequence.²⁸ The use of three different terms may have had some transient benefits, but it ultimately proved to be confusing, so a new set of definitions was adopted in 2001 that brings these three things—the physiological, the practical consequence, and the social consequence—within the parameters of the

²⁵ See, e.g., Sara Green et al., *Living Stigma: The Impact of Labeling, Stereotyping, Separation, Status Loss, and Discrimination in the Lives of Individuals with Disabilities and Their Families*, 75(2) SOCIOLOGICAL INQUIRY 197, 198 (2005); see also J.W. Vargo, *Some Psychological Effects of Physical Disabilities*, 32 AMER. J. OCCUPATIONAL THERAPY 31, 31-34 (1978).

²⁶ See STIKER, *supra* note 2, at 121.

²⁷ World Health Organization, *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease*, at 47 (1980).

²⁸ *Id.* at 28-29.

umbrella term “disability.”²⁹ That probably makes the central point more clear: disability includes social consequences, and is in part a reflection of social choices.

Thus far, this has been painfully abstract, so let us illustrate with three very brief examples.

First, we know a retired law teacher with a variety of vision deficits. We want to focus on just one of those deficits: the rods and receptors in his eyes are defective. The WHO would call that an impairment. It has practical consequences: this teacher (here’s another spoiler, it’s one of the co-authors) cannot accurately perceive color, as he is color blind. In 1980, the WHO would have called that a disability. But there is very little in the way of social consequence; under the 1980 lingo, he is rarely handicapped by the impairment. In other words, he is disabled in the biological sense, but he does not experience it as a disability, not in social terms. However, that’s a function of his vocational choice: as a lawyer or law teacher, color perception was not very critical (though it had a decided impact on his wardrobe); it might have been different if he were a house painter, but even then, it only would have been different if he lived in a society that insisted on certain norms of color coordination. In this society, he experiences his color blindness as a disability primarily in one setting: when he is driving and approaches a traffic light. You don’t want to want to ride with him at night. We don’t know who it was that had the bright idea that street traffic should be regulated by a system of colored lights, but we do know one thing about that person: they weren’t color-blind (or they were a self-hating color-blind person).

Here is another, less trivial example involving someone else we know: one of the co-author’s uncles, Uncle Ted. Uncle Ted was a coal miner, and he was in his twenties when the mine he was working in collapsed and broke his back. He had an impairment—honestly, we never knew what it was; the family always said his back was broken—and there was no doubt that he had a physiological abnormality. There were practical consequences: he had pain and he couldn’t stand or walk on his own. And there were social consequences. Ted was married and had two kids, the only work he had ever done was as a coal miner, he couldn’t do it anymore, and he and his family needed the money. There are a lot of social choices implicit there, but we want to focus on something else.

²⁹ The new definitions are as follows:

Disabilities is an umbrella term, covering impairments, activity limitations, and participation restrictions. An impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations.

Ted loved woodworking, so he and his wife, Emma, converted their garage into a wheelchair accessible workshop. Uncle Ted became a master craftsman and made and sold beautiful furniture. In his workshop, Ted still experienced some pain and could not stand or walk on his own. But it was when he left the workshop that he really felt disabled. For most of his life, Uncle Ted could not ride the busses in his hometown, he could not enter many of the buildings in his hometown, and if he got in them he could not move from floor to floor or use their bathrooms. Uncle Ted could not cross the quiet street in front of his house on his own to visit his neighbor because of the curbs. Uncle Ted had an impairment, but it was not that impairment alone that was disabling him: it was the choices that we made when we designed our buses, our buildings, and our sidewalks. And maybe, when we first designed those things, we just didn't think about Uncle Ted; maybe it was ignorance, or maybe we didn't know. But then he told us, and still for years, decades, and generations, we didn't change anything. It became clear then that it was no longer so much that we didn't know; it was that we didn't care. That, too, was a social choice.

Here's the final example: James and Louise, the couple from the Prologue, whose infant son was taken by the juvenile office. Their attorney—again, one of the co-authors—was in the middle of trying to gather evidence that they were not, in the words of the petition against them, “suffering from mental retardation.” The attorney had arranged for all sorts of testing, but the results had been mixed. Then they all met one morning, and without anything obvious that caused it, James started to cry, and then Louise started crying. The attorney asked—because he really didn't know—what was wrong. James, through his tears, said, “I think we lost Jimmy forever.”

The attorney wasn't a parent back then, but he is now, and it just confirms what he felt at the time: that he'd want to lose his life before he lost his son. So, he could share enough of their pain to know that he fundamentally misunderstood their case. The juvenile office was right: James and Louise were suffering from mental retardation, but not, of course, in the way the juvenile office imagined. It imagined that James and Louise were innately disabled, that they had come to us—from God or nature—stamped defective, and that because of their defects, beyond rehabilitation, their immutable destiny was to live a life of suffering. It was simple biology: James and Louise were—and always must be—suffering from mental retardation.

But that was wrong. Because we chose, for reasons good, bad, or indifferent, to give tests—IQ tests—to James and Louise; we chose, based on the scores we gave them on the tests we designed, to call them “mentally retarded”; and we chose, because of the name we called them, based on the scores we gave them on the tests we designed, to exclude them from our classrooms, our workplaces, our neighborhoods; deny them the right to vote, to marry, to have children; and if they did have children, we chose to take from them their sons and daughters. We made those choices; *we* made them suffer.

To this day, we don't know whether James and Louise had intellectual disabilities. We do know for certain that they were—at least for a time—suffering from mental retardation.

II. DISABILITY LAW: THE FEDERAL STATUTES

The remarkable feature of modern disability law (and we think the key to its transformative potential) is that it reflects these understandings. Its very premises are that people with impairments are too often disabled by our choices, and so we need to start making different choices. We know, and we care.

A. Overview: Federal Disability Legislation

The congressional response has been slow in coming. The statutory effort to secure racial equality began during the First Reconstruction,³⁰ and the effort to promote gender equality was a significant part of the Second.³¹ For people with disabilities, the effort starts a bit later. Discretionary federal funding for students with disabilities begins in 1965, culminating in Title VI of the Elementary and Secondary Education Act Amendments of 1970, also known as the Education of the Handicapped Act.³² Interestingly, the numbers of qualifying students—especially racial minorities with “mental retardation”—were staggering, far exceeding the scope of allocated funds. The response is an interesting exercise in the construction of disability: in 1973, the American Association on Mental Deficiency (now the “American Association on Intellectual and Developmental Disabilities”) changed the defining criteria for mental retardation to include IQ scores two standard deviations below the mean (a score of 70) rather than one (a score of 85), thereby reducing the number of people with mental retardation from 16% of the general population to just above 2%.³³

But the congressional effort to end discrimination against people with disabilities really begins in earnest with the Rehabilitation Act of 1973, which prohibits discrimination against people with disabilities in federally funded programs.³⁴ Today, that proscription extends into almost every context. And importantly, every one of the federal disability laws—Section

³⁰ See, e.g., Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (Apr. 9, 1866), *reenacted by* Civil Rights Act of 1870, ch. 114, 16 Stat. 144 (May 31, 1870) (codified at 42 U.S.C. §§ 1981, 1982).

³¹ See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012) (prohibiting certain employers from refusing to hire and discharging employees on the basis of gender).

³² Pub. L. No. 91-230, 84 Stat. 175 (1970). It should be noted that this statute is *not* the Education of All Handicapped Children Act of 1975, now called the Individuals with Disabilities Education Act. 20 U.S.C. § 1400(d) (2016).

³³ J. David Smith, *Social Constructions of Mental Retardation: Impersonal Histories and the Hope for Personal Futures*, in MENTAL RETARDATION IN THE 21ST CENTURY 381-82 (Michael L. Wehmeyer & James R. Patton eds., 1999).

³⁴ 29 U.S.C. § 794 (2012).

504 of the Rehabilitation Act for federally funded programs³⁵; the Fair Housing Amendments Act for housing³⁶; the Individuals with Disabilities Education Act for educational disabilities³⁷; and the Americans with Disabilities Act for employment, public services, and public accommodations³⁸—all require, either in the statutory language or its authoritative construction, adjustments or accommodations in social choices to close the disability gap and to bring about inclusion.³⁹

B. Employment Discrimination: The ADA

The first version of the ADA died an ignominious death in Congress in 1988; it was largely ignored by the press, and President Reagan was apparently unaware of its existence.⁴⁰ A pared-down version of the bill—one that limited the mandate for structural revisions and eliminated the possibility of punitive damages for discrimination claims⁴¹—fared better. It found powerful allies both in Congress and the White House, many with intimate personal experience with disability. The original House sponsor was Tony Coelho, a California Congressman with epilepsy, and the Senate sponsor was Lowell Weicker, father of a son with Down syndrome.⁴² When the revised bill was introduced, its new House sponsor was Steny Hoyer; almost no one knew that Hoyer's wife—like Coelho—had epilepsy.⁴³ The new Senate sponsor was Tom Harkin; Harkin's Senate speech in support of the bill was delivered partly in sign language for the benefit of his deaf brother.⁴⁴ Edward Kennedy spoke passionately of his son, deprived of a leg by cancer⁴⁵; Orrin Hatch cried when he spoke of his brother-in-law, disabled by polio.⁴⁶ And Bob Dole provided a constant visible reminder of the reach of disability: Dole lost the use of his right arm as a result of his service in the Second World War.⁴⁷ The most unlikely supporter was in the White House.

³⁵ 29 U.S.C. § 794 (2012).

³⁶ 42 U.S.C. §§ 3601-3606 (2012).

³⁷ 20 U.S.C. § 1400(d) (2012).

³⁸ 42 U.S.C. §§ 12101-213 (2012).

³⁹ *See, e.g.*, 42 U.S.C. § 12112(b)(5)(A) (2012) (noting that discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee . . .”); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676-77 (2001) (“The phrase ‘public accommodation’ is defined in terms of 12 extensive categories, which the legislative history indicates ‘should be construed liberally’ to afford people with disabilities ‘equal access’ to the wide variety of establishments available to the nondisabled.” (footnotes omitted)).

⁴⁰ JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 113-14 (1994).

⁴¹ *Id.* at 114.

⁴² *Id.* at 117-18.

⁴³ *Id.* at 118.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ SHAPIRO, *supra* note 40, at 118.

⁴⁷ *Id.*

George H. W. Bush, who as Vice President helped lead the federal *de*-regulation effort, was a gradual convert to the disability movement.⁴⁸ He knew about disability: he lost a young daughter to leukemia in 1953, has a son (Neil) with a severe learning disability, and another son (Marvin) who wears an ostomy bag.⁴⁹

“With the support of a powerful coalition of disabled people and their families, politicians, and disability professionals,” Joseph Shapiro writes, “the ADA moved swiftly through Congress.”⁵⁰

On July 26, 1990, Bush signed the ADA into law with three thousand joyous members of the “hidden army” on the South Lawn of the White House. The President greeted one of the guests, Lisa Carl of Tacoma, Washington, who “now will always be admitted to her hometown theater,” the president noted. To applause, Bush declared, “Let the shameful wall of exclusion finally come tumbling down.” He put his pen to the bill.

. . . The law took effect in 1992. Many companies, particularly large ones, complied eagerly and reaped the rewards—new customers, new workers, and good publicity. Passage of the ADA was an earthshaking event for disabled people. It signaled a radical transformation in the way they saw themselves—as a minority that now had rights to challenge its exclusion. But it was an odd victory; as radical as the ADA’s passage would be for disabled people, nondisabled Americans still had little understanding that this group now demanded rights, not pity.⁵¹

Section 504 of the Rehabilitation Act and the three main titles of the ADA share a common definition of “disability.” It means: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such impairment.”⁵² The Supreme Court has interpreted “major life activities” to include important and significant activities, whether or not they have a “public, economic, or daily dimension”; they thus include, among many other things, walking, breathing, seeing, and reproduction.⁵³ And a congressional revision of the law, overturning decisions of the Court,

⁴⁸ SHAPIRO, *supra* note 40, at 120; *see generally id.* at 119-21 (discussing George Bush’s encounters with disabled persons, a grassroots constituency, and disability-rights activist during the disability rights movement).

⁴⁹ *Id.* at 119-20.

⁵⁰ *Id.* at 140-41.

⁵¹ *Id.*

⁵² 42 U.S.C. § 12102(1) (2012).

⁵³ *See* *Bragdon v. Abbott*, 524 U.S. 624, 638-39 (1998).

makes clear that the disability definition includes impairments that substantially limit the individual only in an uncorrected or unmitigated state (like, for example, hypertension controllable with drugs).⁵⁴ Finally, most of the legislative provisions limit their protections to “otherwise qualified” persons with disabilities.⁵⁵

Most importantly for present purposes, the discrimination under the various statutes embraces not just the outright exclusion of people with disabilities, but also the failure to make accommodations and modifications. Indeed, the accommodation mandate may well be the most critical part of the law.

First, consider the scope of the problem. In the employment context, for people with disabilities, exclusion seems very much the norm. According to a 2016 report of the Bureau of Labor Statistics, just 17.5% of people with disabilities are employed.⁵⁶ That report concluded that “across all levels of education, persons with a disability were much less likely to be employed than were their counterparts with no disability.”⁵⁷

As for the legal profession specifically, the American Bar Association reports that just 6.87% of its members identify themselves as having a disability.⁵⁸ Meanwhile, the National Association for Law Placement found in 2014 that just one-third of one percent of law firm partners reported having a disability, a higher rate, incredibly, than they had previously found.⁵⁹

A 2003 report by the U.S. Equal Employment Opportunity Commission (“EEOC”) entitled “Diversity in Law Firms” noted that “the importance of the legal profession in today’s society is unquestionable,” and that “[l]awyers are often powerful players in social, economic and political circles”⁶⁰ But as the EEOC later acknowledged, that report on diversity examined race

⁵⁴ Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as 42 U.S.C. § 12101) (overturning *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002), where the Court found that qualifying for disabled must meet a “demanding standard,” and overturning *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), where the Court found that an individual’s uncorrected state cannot be taken into account when determining whether such a person is disabled under the ADA).

⁵⁵ See, e.g., 42 U.S.C. § 12112(b)(5)(A) (2009) (noting that discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee . . .”).

⁵⁶ BUREAU OF LABOR STATISTICS, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS SUMMARY (2016), <https://www.bls.gov/news.release/disabl.nr0.htm> (last visited Mar. 8, 2017).

⁵⁷ *Id.*

⁵⁸ American Bar Association Committee on Mental and Physical Disability Law, *ABA Disabilities Statistics Report*, ABA (2011), http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314_aba_disability_statistics_report.authcheckdam.pdf (last visited Mar. 8, 2017).

⁵⁹ *Diversity Numbers at Law Firms Eke Out Small Gains – Number for Women Associates Edge Up After Four Years of Decline*, NALP (Feb. 17, 2015), http://www.nalp.org/lawfirmdiversity_feb2015.

⁶⁰ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DIVERSITY IN LAW FIRMS (2003), <https://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/#intro> (last visited Mar. 8, 2017).

and gender, but made no mention of disability.⁶¹

That omission, and the continued exclusion of people with disabilities from the legal profession, is fundamentally at odds with the vision of Title I of the ADA. Here, briefly, is why.

Title I requires private, state, and local government employers with fifteen or more employees to reasonably accommodate qualified employees or applicants with disabilities, unless doing so would pose an undue hardship.⁶²

Until 2009, most employment discrimination cases centered around whether the plaintiff was a qualified individual person with a disability.⁶³ The impact was devastating for plaintiffs, with some circuits reporting plaintiff success rates in the single digits.⁶⁴ Congress reconsidered this, and in the ADA Amendments Act of 2008 clarified the definition of disability so that cases would not be summarily rejected on those grounds.⁶⁵

The class of people now coming within the scope of Title I of the ADA still bears the burden of proving discrimination.⁶⁶ They can meet that burden by proving disparate treatment (in effect, intentional discrimination), by proving disparate impact (i.e., that otherwise “neutral” practices or policies have the effect of excluding people with disabilities), or by proving a refusal or failure to make a reasonable accommodation.⁶⁷ This last is the focus of our analysis.

The failure to make a reasonable accommodation claim usually arises in one or more three contexts—job application process, modification of work environment, or equal benefit and privileges of employment.⁶⁸

⁶¹ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES (2011), <https://www.eeoc.gov/facts/accommodations-attorneys.html> (last visited Mar. 8, 2017).

⁶² 42 U.S.C. § 12112(b)(5)(A) (2009).

⁶³ See, e.g., *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1239 (11th Cir. 2005) (answering whether the plaintiff’s vertigo constituted her as a qualified individual); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1159 (10th Cir. 1999) (answering “whether an employee can be a ‘qualified individual with a disability’ when that employee is unable to perform the essential functions of his or her present job, regardless of the level of accommodation offered, but could perform the essential functions of other available jobs within the company with or without a reasonable accommodation”); *Siebers v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1023 (7th Cir. 1997) (finding that the blind plaintiff who was denied an accommodation was not a qualified individual because no reasonable accommodation would have enabled her to perform the job).

⁶⁴ See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 107-09 (1999) (finding that of 615 ADA employment discrimination cases from across the nation, nearly 93% were resolved in favor of the defendant-employer).

⁶⁵ Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as 42 U.S.C. § 12101).

⁶⁶ See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

⁶⁷ See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003) (discussing the difference between disparate treatment and disparate impact claims of discrimination).

⁶⁸ See 29 C.F.R. § 1630.2(o)(1)(i-iii) (2017).

Prospective employers are required to make reasonable accommodations in the application process.⁶⁹ There are some clear dos and don'ts with respect to the application process. An employer should not ask a job applicant if he or she will need a reasonable accommodation unless: (a) it is obvious; or (b) the applicant voluntarily reveals it.⁷⁰ If either of these is the case, then the employer may ask two questions: (1) Do you need an accommodation; and (2) What accommodation will you need?⁷¹ It is important to remember: the applicant's need for accommodation is *not* a valid basis for denying employment.⁷²

Workplace modifications may also be required as reasonable accommodations.⁷³ Typical accommodations might include:

- Physical modifications—ramps, visual cue phones and alarms, software to read out documents, moving parking space or moving the employee's worksite to an accessible location
- Job restructuring—some duties could be shifted to someone else without causing a hardship, and other duties could be added that fit better. Changing mode of feedback from in person to email could help someone with some emotional impairments.
- Schedule change—starting the day later, or leaving earlier to accommodate therapy, medications regimens, or simply the demands of the work.
- Aids—Sign Language interpreter, assistive technology, readers, software, drivers, companions; there are all sorts of accommodations that can be reasonable.⁷⁴

Finally, reasonable accommodations may be needed to ensure equal access to the "benefits and privileges of employment."⁷⁵ These might include such things as financial benefits; parking, food, or recreational services; conferences, meetings, retreats or social outings; and telephone, email, and other communication services.⁷⁶

The process for requesting a reasonable accommodation is meant to be an interactive one. It can be initiated by either the employee or the employer, and should be, in either event, a joint problem-solving effort.⁷⁷ No magic

⁶⁹ 29 C.F.R. § 1630.2(o)(1)(i) (2017).

⁷⁰ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DIVERSITY IN LAW FIRMS (2003), <https://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/#intro> (last visited Mar. 8, 2017).

⁷¹ *Id.*

⁷² *Id.*

⁷³ 29 C.F.R. § 1630.2(o)(1)(ii) (2017).

⁷⁴ 29 C.F.R. § 1630.2(o) (2017).

⁷⁵ 29 C.F.R. § 1630.2(o)(1)(iii) (2017).

⁷⁶ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES (2011), <https://www.eeoc.gov/facts/accommodations-attorneys.html> (last visited Mar. 8, 2017).

⁷⁷ See generally *id.*

words are needed to initiate the process, and the request for accommodations can be made at any time. The employee may suggest accommodations and the employer may suggest alternatives. If a number of possible accommodations are reasonable and effective, an employer may fairly choose among them.⁷⁸

Above all, what the ADA envisions—consistent with our new understanding of disability—is the creation of a culture of accommodation: policies and procedures that allow for flexibility and accommodation; training to ensure that colleagues and supervisors are sensitive, responsive and flexible; and a determination to solve problems, not create them. Accommodations are to be thought of as opportunities, not burdens, as the result will be a more diverse workforce, with all its attendant benefits.

But at what cost? Hardly any. A survey of more than a thousand employers by the Job Accommodation Network revealed that 37% of the provided accommodations cost less than \$500 on an annual basis; just 4% cost more than that.⁷⁹ More than half of the accommodations (59%) cost nothing at all.⁸⁰

III. DISABILITY PRACTICE

The modern understanding of disability as a social phenomenon, a function in part of social choices, is thus clearly reflected in disability law, above all in the accommodation mandate. It is also reflected, we think, in an exciting development in legal practice.

Here's another story. This one is from Boston, where a boy with asthma showed up in an emergency room. The doctor stopped the attack and sent the boy home with a treatment plan, which the boy faithfully followed. A week later, the boy was back in the emergency room. That cycle repeated a couple times before the doctor decided to do a more thorough investigation of the kid's environment. The boy was living in substandard housing, filled with mold and roaches. The landlord wouldn't do anything about. So the doctor prescribed the strongest medicine he could find: a lawyer. He hired a lawyer, the lawyer sent a complaint to the landlord, the landlord cleaned up and fixed the apartment, and the boy's asthma was brought under control. Thus was born the medical-legal partnership.

The medical-legal partnership combines the efforts of lawyers, doctors, nurses, and social workers—all collaborating to take a holistic approach to the problems of at-risk populations: poor people, pregnant women and first-time mothers, veterans, and people with disabilities.

⁷⁸ See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 76.

⁷⁹ Beth Loy, *Workplace Accommodations: Low Cost, High Impact*, JOB ACCOMMODATION NETWORK, 3 (2016), <https://askjan.org/media/downloads/LowCostHighImpact.pdf> (last visited Mar. 8, 2017).

⁸⁰ *Id.* at 4.

That collaboration has facilitated a growing awareness of the ways in which policies—social choices—affect our physical being, the ways, for example, that the mold and roaches in substandard housing can trigger asthma attacks; or the ways that the lead in paint and pipes in housing can lead to organic brain damage; the ways the environments we create, or permit, can cause and exacerbate physical, psychological, and cognitive impairments. These collaborations thus allow us to challenge the disability gap at both ends: legal and health care professionals working together to bring about changes for individuals and whole communities that reduce the severity or effect of impairments, and working together to change the social choices that make those impairments disabling.

IV. A CAUTIONARY NOTE

There is much to celebrate in modern disability law, but there are also reasons to temper the celebration. Some of the requirements of the law, after all, are modest, even timid, particularly as interpreted by the Supreme Court.⁸¹ And applications of the laws have been remarkably uneven, or in some contexts (employment may be the most conspicuous) consistent, but consistently bad for plaintiffs. They have thus far failed to produce material change.⁸²

And there's this: that now outmoded understanding of disability, the too limited and potentially dangerous biological model. It's rejected in civil rights law, but according to the Supreme Court, it's still the constitutional norm.

⁸¹ The laws, remember, limit their requirements to “reasonable” accommodations and modifications, and the burden of proof is on the plaintiff to demonstrate that the requested accommodation is reasonable. *See supra* notes 62-67 and accompanying text. Moreover, proof that a defendant has discriminated against an otherwise qualified person with a disability does not end the statutory claim under any of the provisions, because each affords a variety of defenses. First, the statutes generally excuse defendants from having to make modifications or accommodations—even otherwise reasonable ones—where those alterations will create an “undue burden” or “undue hardship” for the defendant. 42 U.S.C. § 12112(b)(5)(A) (2009). Second, the statutes allow for qualification criteria that effectively screen out people with disabilities where those criteria are “consistent with business necessity” (Title I of the ADA) or are “necessary for the provision of the . . . services” (Title III of the ADA). 42 U.S.C. § 12182(b)(2)(A) (2012); 42 U.S.C. § 12112(b)(6) (2009). Third, the statutes exempt from their coverage those situations where the inclusion of an individual with disabilities would “pose a direct threat to the health or safety of others.” 42 U.S.C. § 12182(b)(3) (2012). For Title I of the ADA (and Section 504 of the Rehabilitation Act) this exception has been extended by interpretive regulation to include not only threats to others, but “threats to self,” 29 C.F.R. § 1630.15(b)(2) (2015), and that extension has been sustained by the Supreme Court. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 84 (2002). Finally—and of substantial significance to many of the claims, real and hypothesized, involving athletes with disabilities—the ADA excuses the failure to make modifications that would “fundamentally alter the nature” of the service or accommodation at issue. 42 U.S.C. § 12182(b)(2)(A) (2012).

⁸² *See Colker, supra* note 64, at 107-09.

In 2001, the Supreme Court struck down Title I (employment title) of the ADA as it applied to state employers. The case was *Board of Trustees v. Garrett*,⁸³ and technically, it's an 11th Amendment case⁸⁴ (really technically; it's not even that: it's a sovereign immunity case outside any reasonable interpretation of the 11th Amendment), but its essence is pretty simple: the ADA was unconstitutional because it guaranteed to people with disabilities too much equality, way more than is required by the Equal Protection Clause.

According to a slim majority of the Court (it was a 5-4 decision⁸⁵), the ADA goes too far because, among other things, it requires these reasonable accommodations. Again, that, of course, is the very core of the modern understanding of disability: that we disable by our choices, that we should stop disabling people by our choices, and that we should start making different choices and offering reasonable accommodations. But the Constitution, according to the Court, reflects no such understanding, requires no such change, and no such accommodations. And so, as Chief Justice Rehnquist put it, a state employer could, consistent with the Constitution, "quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled."⁸⁶ You see, under the Constitution, discrimination against people with disabilities is okay as long as it's reasonable, and it can be reasonable to refuse to make any accommodation at all. How is that possible? How is that reasonable? Because, as Chief Justice Rehnquist explained, it might save money, and on that basis (to save money) an employer could simply refuse to hire people with disabilities altogether. "[I]t would be entirely rational," he wrote, "(and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities"⁸⁷

On the surface, the *Garrett* case is about the balance of power between the state and federal governments: the ADA, according to the majority, impermissibly abridges the right of the states to be immune from suits.⁸⁸ But there is something far more significant happening in *Garrett*, and it has to do with the Court's understanding of disability.

It is worth reconsidering the Court's position for a moment: it is reasonable for the states—in their responses to people with disabilities—to be hardheaded and hardhearted, to refuse accommodation, and to exclude from consideration simply to save money. The Constitution permits the states to be hardheaded and hardhearted; and to the extent that Congress seeks to require more of the states, it is demanding more than the Constitution requires, more than the Constitution allows.

⁸³ 531 U.S. 356, 374 (2001).

⁸⁴ *See id.* at 363-74.

⁸⁵ *Id.* at 358.

⁸⁶ *Id.* at 367-68.

⁸⁷ *Id.* at 372.

⁸⁸ *See id.* (stating that "the rights and remedies created by the ADA against the States would raise . . . concerns as to congruence and proportionality . . .").

That appears to be quite a repudiation of the understanding of disability manifested in the ADA. In requiring accommodations, the ADA clearly evidences an appreciation of the fact that disability inheres not in the individual, but in the gap between the abilities of an individual with an impairment and the demands of the society in which she lives. The gap is a social one; it is made by society and can be reduced—or eliminated—by social action. The ADA mandates precisely these modifications, at least where they are feasible. But the *Garrett* Court dismisses these changes as “special accommodations”⁸⁹; nothing in the Constitution requires state employers to “make allowance for the disabled.”⁹⁰

There is work left to be done.

For disability and civil rights advocates, the *Garrett* decision was a horrible one, on many levels. But here is the critical challenge: how do you make the case that *Garrett* is wrong? You can argue that it doesn’t respect precedent, that it violates separation of powers norms, and that it misreads the evidence of discrimination compiled by Congress, but the dissenters made those arguments⁹¹ and lost. So, how do you make the case that the dissenters’ arguments were the right ones?

Here’s a possibility: the *Garrett* decision was wrong because it was bad. It reflected not merely doctrinal errors, but normatively bad choices.

As lawyers, we think that argument puts us in uncomfortable territory. We’re good with the descriptive stuff—with categories of cases, and rules for cases, elements of rules, and rules for interpreting elements of rules—but when it comes to making the normative argument—not merely that this is the law, but this is what the law should be—our usual authorities don’t help us. We often, quite literally, can’t find the words.

Consider what we’ve written about here. We can re-conceive disability, and we can realize that re-conception in law, but why should we? We can close the disability gap by making different social choices, we can support collaborative efforts like medical-legal partnerships to close the gap with action at both ends, but why should we? And we can interpret the Constitution to guarantee to people with disabilities a real equality, unburdened by ignorance and indifference, but why should we?

Here’s a proposal, offered tentatively and with more than a little reluctance. It’s the kind of proposal you can make only if you’re a senior partner, an executive director, a tenured professor, or best of all, if you’re retired and it’s time for you to be eccentric anyhow.

Shortly after one of our sons was born, his grandmother (that one would be one of our mothers) began to assemble a scrapbook for him. She didn’t finish it; she ran out of time. She beat breast cancer twice, but not the third time. But she did complete a section on her parents and her childhood. We knew much of the story: her family didn’t have much money, and her father, to put it euphemistically, didn’t have much patience. She had a tough

⁸⁹ *Garrett*, 531 U.S. at 367.

⁹⁰ *Id.* at 368.

⁹¹ *See id.* at 376-89 (Breyer, J., dissenting).

childhood—but not, she insisted, an unhappy one. And she wanted her grandson to know what her mother taught her: “that even though you are poor in money,” she wrote, “you can still be rich in love.”

Your co-author first read that after she was gone and he was disappointed by the words that she left; he wished she had shared something less sentimental, something more profound. Almost immediately, he felt ashamed. How cynical had he become, how lost was he that he could no longer grasp that elegant truth, that what mattered above all was love. He blamed law school for this; he blames it for most everything, but this was deserved. Because in law school we are taught—and we teach—that love *is* trite, that it is *not* relevant; that it can neither sustain nor withstand rigorous analysis. We divorce comprehension and compassion, justice and mercy, law and love. And the pages of our casebooks are filled with the price that we pay.

That bit of maternal wisdom might have been lost on me, but it just skipped a generation: somehow his son got it. A few summers after his mom died, his son was at a birthday party for one of his small friends. One of the parents asked the kids what they wanted to be when they grew up. They took turns answering, and the answers were mostly predictable: animal doctor, artist, teacher. One little boy in a Scooby-Doo t-shirt said he wanted to be Shaggy. And then it was his son’s turn: “Caleb, what do you want to be when you grow up?” And his son, barely in elementary school, said, “I want to be the person who gives food to people who don’t have any.”

Maybe he was saying he wants to be a waiter, but we favor another interpretation. From the time he was little, the boy loved to play with little toy figures—first animals, then football players, then knights and elves and orcs. And while he knew the names of all the animals, the NFL teams, and the Lord of the Rings characters, when he played he always divided the figures into just two categories: nice and nasty. It’s a division that rules his world to this day. He’s seventeen now, but whether we’re talking football or politics or anything else, his first question is always the same: do you think that person is nice or nasty?

We have taught and written about law for more than twenty years, and we have encountered all sorts of elaborate schemes for organizing and evaluating the Supreme Court’s decisions, and we have even come up with a couple schemes of our own. But we can’t help but think that we’ve made it more complicated than it needs to be. In the end, maybe there’s only one organizing principle that counts, only one meaningful criterion for assessing the worth of a decision. Maybe it really is that simple: the good Supreme Court decisions are nice, and the bad ones—*Scott v. Sandford*,⁹² *Plessy v. Ferguson*,⁹³ *Buck v. Bell*,⁹⁴ *Bowers v. Hardwick*,⁹⁵ and yes, *Board of Trustees*

⁹² 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁹³ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954).

⁹⁴ 274 U.S. 200 (1927).

⁹⁵ 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

v. Garrett—are nasty. What separates them is the presence or absence of human love.

So we close with this hope: that the next President, if not this one, will appoint to the Supreme Court qualified justices who unfailingly write opinions that are openly rich in love.

