

# DISABILITY, EQUALITY, AND IDENTITY

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## INTRODUCTION

*One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society. The law works this way because the law can be a teacher. So I do not doubt that the Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society.<sup>1</sup>*

For over forty years,<sup>2</sup> the disability rights movement has sought to re-frame the way people with disabilities are understood by American law, social policy, and society. One of the central tenets of modern disability theory is a shift away from the “medical” model of disability, which “characterizes people with disabilities as having pathological individual attributes, typically linked to incapacity and dependence, which in turn may lead to social and economic isolation,”<sup>3</sup> and toward the view of disability as a socially constructed condition, through which the ‘problem’ is defined as “a dominating attitude by professionals and others, inadequate support services

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1. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring).

2. While this Article makes reference to “the disability rights movement” as that which mobilized in the late 1960s and early 1970s, in doing so I do not mean to discount earlier efforts of disability advocates who sought equality for people with disabilities, such as the League of the Physically Handicapped and the National Federation of the Blind. For a description of some of these early disability rights efforts, see, e.g., PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 53-101 (2003); DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION 5-13, 21-23 (2001).

3. Richard Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 219 (2000).

when compared with society generally, as well as attitudinal, architectural, sensory, cognitive and economic barriers.”<sup>4</sup> Thus, the “socio-political” model of disability views disability as “a product of interaction between health status and the demands of one’s physical and social environment,”<sup>5</sup> and ‘locates’ disability in the interface between the individual and her environment. In doing so, the socio-political model of disability (and a related construct—the minority model) stand in stark contrast to the medical model of disability, “which regards disability as a defect or sickness which must be cured through medical intervention,”<sup>6</sup> and which expressly locates the ‘problem’ in the disabled person.

The enactment of the Americans with Disabilities Act<sup>7</sup> (ADA), was viewed as a watershed in the disability community, not only because of the substantive rights it guaranteed to disabled people, but also because it reflected a departure from the medical model and an adoption of the movement’s socio-political model of disability. This is particularly true of what has been referred to as the statute’s “reasonable accommodation” mandate, which requires both public and private entities to make those modifications to physical structures as well as rules, policies, and practices that are necessary to ensure that people with disabilities have the opportunity to participate in or benefit from society’s employment opportunities,<sup>8</sup> public entities,<sup>9</sup> and places of public accommodation.<sup>10</sup> As such, the reasonable accommodation mandate is grounded in two assumptions: first, that many of the structures and institutions of society—the “built environment”<sup>11</sup>—were (and are) not constructed with disabled people in mind; and second, that in many situations, accommodations to that environment are necessary to ensure that disabled people have meaningful access to society. By including the reasonable accommodation mandate in the ADA, Congress did more than seek “to address the major areas of discrimination faced day-to-day by people with disabilities.”<sup>12</sup> It also embraced and endorsed the socio-political model of disability.

Over the past decade, however, the success of the disability community in infusing the socio-political model of disability into federal law has begun to be eroded by judicial decisions interpreting the ADA that appear to be

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4. Deborah Kaplan, *The Definition of Disability: Perspective of the Disability Community*, 3 J. HEALTH CARE L. & POL’Y 352, 352-53 (2000).

5. Richard Scotch, *Understanding Disability Policy*, 22 POL’Y STUD. J. 170, 172 (1994) (reviewing EDWARD D. BERKOWITZ, *DISABLED POLICY: AMERICA & PROGRAMS FOR THE HANDICAPPED* (1987)).

6. Kaplan, *supra* note 4, at 352.

7. 42 U.S.C. § 12101 (2000).

8. *Id.* § 12111(9)(A)-(B).

9. *Id.* § 12131.

10. *Id.* § 12181(7)(A)-(L).

11. By “built environment” I am referring not only to physical buildings and structures which have, for example, been built without ramps or doorways wide enough to accommodate wheelchairs, but also to the rules, policies, and practices that define our societal institutions in ways that do not consider the range of human functioning.

12. *Id.* § 12101(b)(4).

grounded in—and espousing—the medical model of disability. While there are a number of these decisions that arise in the context of challenges to various parts of the statute,<sup>13</sup> one area that has been particularly heavily litigated in recent years has been claims brought by states arguing that Congress did not properly abrogate the States' sovereign immunity<sup>14</sup> when it enacted the ADA, and therefore that they should be immune from suits (usually for money damages) under the statute. While such challenges are fundamentally jurisdictional questions,<sup>15</sup> the analytical framework by which these questions are decided requires courts to make determinations about the parameters of the Equal Protection Clause, and ultimately, what equality means for people with disabilities. In the process of answering those questions, some courts also have made implicit judgments about people with disabilities—and disability itself—that appear to signify a retrenchment to the medical model of disability that is profoundly at odds with the movement's vision of disability as a societally-constructed condition.

While there are decisions at all levels of the federal courts that implicate these issues,<sup>16</sup> this Article will focus on the United States Supreme Court's opinion in *Board of Trustees of the University of Alabama v. Garrett*<sup>17</sup> to explore more deeply these issues and their implications for the disability rights movement. My particular concern is with that portion of the *Garrett* decision that takes the position that the Equal Protection Clause requires only "formal equality"<sup>18</sup> (that is, treating similarly situated persons the same way) and the Court's construction of the ADA's reasonable accommodation mandate as a form of 'special treatment' that is not consistent with the Constitution's guarantee of equal protection. In doing so, the Court not only has attacked one constitutional underpinning of the statute,<sup>19</sup> but also the foun-

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13. See *infra* note 203 and accompanying text.

14. For over a century, the United States Supreme Court has interpreted the Eleventh Amendment to the Constitution, which grants the states sovereign immunity, to prohibit a citizen from suing her state in federal court. *Hans v. Louisiana*, 134 U.S. 1 (1890). In enacting legislation, Congress may abrogate the states' immunity, but only if it does so pursuant to a valid grant of constitutional authority, which now exists only when Congress legislates pursuant to its authority under Section 5 of the Fourteenth Amendment. See *infra* Part III.A.

15. The holding of *Garrett* is that an individual may not sue a state for money damages under Title I of the ADA in federal court. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-74 (2001). As Justice Rehnquist himself emphasized in the *Garrett* opinion:

Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908).

*Garrett*, 531 U.S. at 374, n.9.

16. See *infra* note 220 and accompanying text.

17. 531 U.S. 356 (2001).

18. Arlene Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535, 538 (2001).

19. The two sources of constitutional authority for the ADA are the Equal Protection Clause of the Fourteenth Amendment and the Article I Commerce Clause. ("It is the purpose of this [Act] . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people

dation of the disability rights movement: that is, the construction of disability itself. In other words, by employing a narrow construction of the Equal Protection Clause to reject the idea that equality encompasses the notion of reasonable accommodation, the *Garrett* Court did not simply make a determination about what constitutes equality, *it also made a statement about the identities of people with disabilities.*

It is here that I wish to focus. Others in this Symposium have explored the limitations that a formal equality construct imposes on the meaning of civil rights for people with disabilities. My concern is what this cramped conception of equality means for the societal construction of the identities of individual people with disabilities, as well as the construction and understanding of disability as a whole. In this way, *Garrett* is fundamentally troubling because the disability movement, like other social movements, has looked to the law—and specifically to the concept of ‘rights’ to “express the politics, vision, and demands of [the] social movement, and to assist in the political self-definition of [the] movement.”<sup>20</sup> To the extent the disability rights movement—like other identity-based social movements<sup>21</sup>—looks to law for guidance about its identity, *Garrett* and similar decisions represent enormous backsliding—not only for the rights and remedies they may take away from disabled people, but also because of the embedded framing of disability as a defect residing in the disabled individual, rather than a limitation that society, not the individual, must overcome.

Part I of this Article examines constructions of disability, beginning with a discussion of the medical model of disability and then moving to the socio-political and civil rights models. Part II explores the enactment of the ADA and the ways in which the statute reflects the socio-political model of disability and a vision of equal protection that goes beyond a “formal equality” or equal treatment construct. Part III analyzes the *Garrett* opinion, first unpacking the Supreme Court’s decision and then discussing the implications of that holding for the meaning of equal protection for people with disabilities. Part IV parses the *Garrett* opinion more carefully to examine the ways in which the Court employed and endorsed the medical model of disability in reaching its conclusion, and rejected the socio-political model of disability. Part V begins by asking why the medical model of disability seems to be so deeply entrenched in the judicial psyche, and given that entrenchment, to what degree and in what ways the movement should continue to rely on the law as a vehicle for social change. Finally, the second segment of Part V examines the reasons why the law and legal rights are too important to the movement to discard wholesale, and invites the disability

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with disabilities.” 42 U.S.C. § 12101(b)(4) (2000.) Questions about whether Congress exceeded its Commerce Clause authority in enacting the ADA are beyond the scope of this Article.

20. Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 605 (1986).

21. I borrow this term from Professor William Eskridge. See William Eskridge, *Channeling Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

movement and the lawyers who work in it and with it to adopt a more collaborative approach with the goal of “reflect[ing on] and occasionally even usher[ing] in the world we hope to create.”<sup>22</sup>

## I. THREE CONSTRUCTIONS OF DISABILITY

### A. *The Medical Model*

While the disability rights movement in this country had begun percolating some years before,<sup>23</sup> the movement began to gather its first significant momentum in the 1970s in response to a long history of statutory, political and societal constructs that viewed people with disabilities as victims of affliction who needed medical treatment, physical rehabilitation, charity, and public assistance.<sup>24</sup> This theory of disability, which was reflected in legislation and social policy during the years prior to 1970, has been generally referred to by scholars and activists as the ‘medical’ or ‘rehabilitation’ model of disability,<sup>25</sup> the defining feature of which is its view of disability as a personal defect residing in the individual that needs to be cured or fixed.<sup>26</sup> Mary Crossley describes the medical model this way:

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22. GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 382 (1992).

23. In his book, *No Pity: People with Disabilities Forging a New Civil Rights Movement*, Joseph Shapiro describes some early instances of “disabled people rising up on their own.” He explains:

Deaf and blind people had been the first to set up national advocacy organizations, beginning in the last two decades of the nineteenth century. Such groups proved effective. Blind relief laws, providing special financial assistance, were enacted in twenty-seven states in the 1920s and early 1930s. . . .

[Additionally, d]isabled people turned to civil disobedience for the first time during the Depression. Historian Paul Longmore tracked down the lost story of the short-lived League for the Physically Handicapped, a group of three hundred disabled New York pensioners—most with polio and a few with cerebral palsy—who occupied the Works Progress Administration offices in Washington to protest that they were being routinely rejected for WPA jobs.

JOSEPH SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1994) 63-64. See also RICHARD SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* (2d ed. 2001).

24. For a description of the history and evolution of the disability rights movement, see DORIS ZAMES FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* (2001); see also PAUL K. LONGMORE, *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 102-115 (2003).

25. Disability studies scholars also refer to the ‘social pathology’ model of disability, which considers disability to be a defect that the disabled individual should seek to cure, and classifies as ‘deviant’ those who are unable or unwilling to eradicate all evidence of their disabilities so as to appear ‘normal.’ See, e.g., Jonathan C. Drimmer, *Cripples, Overcomers and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 *UCLA L. REV.* 1341, 1347 (1993).

26. See, e.g., Pamela Brandwein & Richard Scotch, *The Gender Analogy in the Disability Discrimination Literature*, 62 *OHIO ST. L.J.* 465 (2001); Mary Crossley, *The Disability Kaleidoscope*, 74 *NOTRE DAME L. REV.* 621 (1999); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 *UCLA L. REV.* 1341, 1364-71 (1993); Deborah Kaplan, *The Definition of Disability: Perspective of the Disability Community*, 3 *J. HEALTH CARE L. & POL’Y* 352 (2000); Anita Silvers, *Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights*, 13 *BERKELEY WOMEN’S L.J.* 81 (1998).

The individual is the locus of the disability and, thus, the individual is properly understood as needing aid and assistance in remediating that disability. Under this view, while the cause of impairments may vary, the disabled individual is viewed as innately, biologically different and inferior. . . . Thus, according to the medical model of disability, the disabled individual's problem lies in her impairment.<sup>27</sup>

This perception of disability and people with disabilities necessarily led to social policy and legislation that focused on efforts to 'fix' the disabled person, particularly in the years following World War I when large numbers of disabled war veterans were returning home. In 1918 and 1920, Congress passed significant rehabilitation programs guaranteeing federal money for vocational training and job counseling.<sup>28</sup> In 1921, the federal government established a Veterans Bureau, which provided for disability compensation and vocational rehabilitation for disabled veterans.<sup>29</sup> In addition, in 1935, Congress passed the Social Security Act,<sup>30</sup> which, for the first time, created a program of permanent assistance to disabled adults.<sup>31</sup> The next wave of expansion of federal rehabilitation programs occurred following World War II, and included funds to train medical and rehabilitation professionals, grants for research and development in rehabilitative medicine and engineering, and funding for the alteration of different types of facilities into rehabilitation centers and sheltered workshops.<sup>32</sup> At about this

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27. Crossley, *supra* note 26, at 649-50.

28. *See, e.g.*, Smith-Fess Act of 1920, ch. 219, 41 Stat. 735 (1920) (codified as amended at 29 U.S.C. §§ 731-741 (repealed and reenacted in Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973)) (authorizing limited services for persons with physical disabilities, including vocational training, job placement and counseling). For a general discussion of post-World War I programs and legislation regarding employment of people with disabilities, *see* SHAPIRO, *supra* note 23, at 61; *see also* SCOTCH, *supra* note 23.

29. United States Veterans' Bureau Act, ch. 57, 42 Stat. 148 (1923). In 1921, Congress established the United States Veterans Bureau to consolidate the powers, functions and duties of the independent agencies which administered veterans benefits. This organization took over the functions of the Bureau of War Risk Insurance, consisting of responsibility for vocational education and functions of the Public Health Service that handled physical examination and care and treatment of veterans. *Id.*

30. Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.). With the passage of the Social Security Act, the vocational rehabilitation program was, for the first time, given permanent authorization. In 1940, the program was expanded further to include services to people with disabilities working in sheltered workshops, who were homebound and to people with disabilities who needed vocational rehabilitation services to continue being employed. SCOTCH, *supra* note 23, at 21. In 1943, Congress passed the Barden-LaFollette Act, Pub. L. No. 83-565, 69 Stat. 652 (1954) (codified as amended at 29 U.S.C. §§ 31-42 (repealed 1973)), which provided federal funds for some medical and reconstructive services that had not been covered under earlier statutes. SCOTCH, *supra* note 23, at 22.

31. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.); SHAPIRO, *supra* note 23, at 61-62.

32. SCOTCH, *supra* note 23, at 22. Sheltered workshops appeared in the United States in the 1950s and 1960s with the idea that they would provide work evaluation and determination of abilities of people with disabilities as well as provide disabled people with vocational training and rehabilitation. Jacobus TenBroek, *The Character and Function of Sheltered Workshops*, BLIND AMERICAN, May 1962, reproduced at [www.nfb.org/books/books1/wam13.htm](http://www.nfb.org/books/books1/wam13.htm) (last visited Jan. 7, 2004). Additionally, sheltered workshops were seen as a place of "remunerative employment" for people with disabilities. *Id.* Many in the disability community object to sheltered workshops on the grounds that disabled employees of such workshops are paid at a significantly lower rate than disabled people who work in the competitive labor

same time, the congressionally-chartered Paralyzed Veterans of America organization,<sup>33</sup> a veterans service organization was founded, as well as the President's Committee on Employment of the Handicapped, the latter of which was created to urge businesses to hire disabled war veterans once they finished rehabilitation programs.<sup>34</sup>

In keeping with the predominant view of disability as a medical condition, these programs and organizations were designed to 'help' those who had impairments that were associated with incapacity—in particular, the incapacity to support oneself through work.<sup>35</sup> Consequently, these programs and statutes typically focused on 'fixing' the disabled person, usually in some way that would enable him to return to work,<sup>36</sup> rather than on the ways that society might instead fix itself to adapt to the spectrum of individual ability. By starting from the premise that the 'problem' of disability is an inherent physical flaw, any attempts to require changes to the environment to account for such 'flaws' were necessarily viewed as 'special treatment':

According to the medical model, the disabled individual is the unfortunate victim of some twist of fate, and that misfortune is seen as essentially a personal or family matter—not a misfortune that society is obligated to remedy. For if disability is essentially biological, then the social disadvantages and exclusion that accompany the disability can be explained as natural and not ascribable to any social cause. Because disability is not socially caused, the disabled individual has no claim of right to social remediation, and any benefits or assistance that society chooses to bestow on persons with disabilities can be viewed as a charitable response of 'doing special things.'<sup>37</sup>

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market through a rehabilitation program; that sheltered workshops do not prepare people to work in integrated environments; and that workshops have an inherent incentive to retain the most productive employees, who would be most likely to succeed in the competitive labor market. Steven J. Taylor, *Disabled Workers Deserve Real Choices, Real Jobs, The Center For An Accessible Society*, available at [www.accessiblesociety.org/topics/economics-employment/shelteredwksp.html](http://www.accessiblesociety.org/topics/economics-employment/shelteredwksp.html) (last visited Jan. 7, 2004).

33. The Paralyzed Veterans of America (PVA) serves veterans of the armed forces with spinal cord injury or dysfunction by providing health care, research and education, military benefits and advocacy in disability rights. For more information, see <http://www.pva.org> (last visited Jan. 12, 2004).

34. SHAPIRO, *supra* note 23, at 62-63.

35. Richard K. Scotch, *American Disability Policy in the Twentieth Century*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 386 (Paul K. Longmore & Lauri Umansky eds., 2001).

36. Some disability scholars view these programs as reflecting an "economic" model of disability, which is related to—but distinct from—the medical model. In this model, disability is viewed not simply as a medical condition, but as having particular significance because it affects the individual's ability to be gainfully employed. See, e.g., Harlan Hahn, *Towards a Politics of Disability: Definitions, Disciplines and Policies*, 22 *SOC. SCI. J.* 87, 90 (1985).

37. Crossley, *supra* note 26, at 651-52.

American society's failure to consider social causes of disability continued for decades, with legislation and policy relating to people with disabilities overwhelmingly reflecting the medical model of disability.<sup>38</sup>

The move away from viewing disability purely as the 'problem' of the 'unfortunate victim,' toward an approach that views disability as a societally constructed condition made its first significant headway in the late 1960s and early 1970s with the enactment of the Architectural Barriers Act<sup>39</sup> and section 504 of the Rehabilitation Act of 1973.<sup>40</sup> Disability rights scholars have noted (with some irony) that section 504 was not the "end result of a hard-fought battle"; indeed, disabled people "did not even ask for it [n]or had they lobbied for it."<sup>41</sup> Instead, one disability historian has described section 504 of the Rehabilitation Act of 1973 as "no more than a legislative afterthought."<sup>42</sup> What was significant about section 504 was that it prohibited, for the first time, any entity that received federal funds from discriminating against anyone "solely by reason of . . . handicap."<sup>43</sup> Although the language of section 504 is borrowed verbatim from Title VI of the Civil Rights Act of 1964<sup>44</sup> (which prohibited discrimination on the basis of race, color, or national origin), disability rights scholars have been unable to ascertain from where the decision came to include the civil rights protections for people with disabilities.<sup>45</sup> As Richard Scotch postulates, members of Congress were either unaware of the provision or viewed it as "'little more than a platitude' for a sympathetic group."<sup>46</sup>

People with disabilities, however, particularly those at the forefront of the independent living movement,<sup>47</sup> quickly realized the importance of section 504, and the fight to get implementing regulations promulgated under

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38. See generally SCOTCH, *supra* note 23, at 15-24; Jonathan Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341 (1993); Scotch, *supra* note 35, at 375-92.

39. 42 U.S.C. §§ 4151-57 (2003). The Architectural Barriers Act of 1968 provides for the removal of architectural barriers from new federally-funded buildings. *Id.* An interagency Architectural and Transportation Barriers Compliance Board was created in 1973 to ensure compliance with the Act. 29 U.S.C. § 792 (2000).

40. *Id.* § 794.

41. SHAPIRO, *supra* note 23, at 64-65.

42. *Id.* at 65.

43. *Id.*

44. 42 U.S.C. §§ 2000d-2000d-4a (2003).

45. SHAPIRO, *supra* note 23, at 65.

46. *Id.* (quoting SCOTCH, *supra* note 23, at 54).

47. The independent living movement is built on the philosophy that people with disabilities should have the same civil rights, options, and control over choices in their own lives as do people without disabilities. SHAPIRO, *supra* note 23, at 53-54. The movement arose in the early 1970s, largely as a result of the advocacy of Ed Roberts (who is widely regarded as the father of the movement) and other disability activists in Berkeley. *Id.* These activists at the University of California-Berkeley established the nation's first Center for Independent Living (CIL) in 1972 following their successful development of the Physically Disabled Students Program at Berkeley. *Id.* The core philosophical principles of the CIL were: (1) that it was run by people with disabilities; (2) it viewed disability as socially caused; (3) was open to people with a wide range of disabilities; and (4) had community integration as one of its central goals. *Id.* at 54. For a fascinating account of the rise of the independent living movement, see SHAPIRO, *supra* note 23, at 41-58; see also DORIS ZAMES FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 37-48 (2001).



the statute was the first significant social protest of the modern disability rights movement.<sup>48</sup> A central feature of this movement was the reframing of disability from a medical defect residing in the individual, to a recognition that the major problems associated with disability could be attributed to the external environment.<sup>49</sup>

### B. *The Socio-Political Model of Disability*

The disability rights movement, which began to grow and strengthen in the wake of the passage of the 1973 Rehabilitation Act, conceptualized disability in a fundamentally different way from the medical and rehabilitation models that dominated historical constructions of people with disabilities. The 'socio-political' model of disability, as it is referred to by many in the disability community, views disability "as the product of interaction between individuals and the environment."<sup>50</sup> Harlan Hahn, a prominent disability studies scholar, explains that from the perspective of the socio-political view,

the major problems confronted by people with disabilities can be traced to the restraints imposed by a disabling environment instead of personal defects or deficiencies. This conceptualization can be applied to the architectural barriers that impede the activities of persons with mobility impairments and to the communication barriers that restrict people with sensory impairments. In a world adapted to the needs and interests of everyone, functional limitations (or impairments) would be virtually non-existent. In surroundings adapted to an increasing range of human capabilities, such restrictions would be diminished. Obstacles exist, therefore, because the present environment was basically designed for 'the average person plus or minus half a standard deviation.'<sup>51</sup>

Thus the socio-political model of disability draws a distinction between 'impairments,' which it views as "the physical limitation of a particular illness or chronic physical limitation," and 'disabilities' which it defines as "the social and political conditions that place barriers in the way of that

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48. SHAPIRO, *supra* note 23, at 65-70. In his book, *No Pity: People with Disabilities Forging a New Civil Rights Movement*, Joseph Shapiro provides a wonderful description of the demonstrations conducted by disability rights activists demanding that the Secretary of Health, Education and Welfare (HEW) issue the section 504 regulations. *Id.* One of these demonstrations, which took place in the regional HEW office in San Francisco, consisted of protesters who occupied the sixth floor of the office for twenty-five days. *Id.* at 66-70. On April 28, 1977, four years after the statute had been passed, Secretary of HEW Joseph Califano signed the regulations implementing section 504. *Id.* at 69. For an exhaustive account of the enactment of section 504 and the promulgation of its implementing regulations, see SCOTCH, *supra* note 23, at 41-120.

49. *See generally id.* at 65-70.

50. Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?* 21 BERKELEY J. EMP. & LAB. L. 166, 173 (2000).

51. *Id.* at 173 (citation omitted).

'impairment,' thereby creating a disabling condition."<sup>52</sup> Like the race and gender theory that came before it, the socio-political model of disability "dispute[s] the assumption that 'biology is destiny' and assert[s] that the disadvantages suffered by persons with disabilities, like the disadvantages suffered by women and African-Americans, are the product of social practices and not the inevitable consequence of physical difference."<sup>53</sup> Accordingly, proponents of the socio-political model of disability view disadvantages encountered by people with disabilities not as the unfortunate result of a defective body, but rather as resulting from an at least inhospitable—if not hostile<sup>54</sup>—environment.<sup>55</sup>

This environment exists because much of society historically has not viewed people with disabilities as part of the norm, and therefore society has not built its structures and institutions with a range of needs and abilities in mind. As a result, society has created barriers for those who do not conform to a particular set of expectations about physical and mental ability. As disability theorist Richard Scotch explains, "[s]tairs can limit the entry of people who use wheelchairs; printed words limit those who are blind. . . . Thus, people with disabilities are frequently marginalized by the constraints of a constructed social environment in which assumptions of the inability to participate become self-fulfilling prophecies."<sup>56</sup>

In addition to viewing disability as primarily caused by the built environment, the socio-political model of disability also emphasizes the idea that disability is culturally constructed.<sup>57</sup> The lack of realistic cultural repre-

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52. See, e.g., Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 210 (2000) (citation omitted). See also the World Health Organization's *International Classification of Impairments, Disabilities and Handicaps-2*, which, in response to information and experience learned from the first ICIDH, has adopted a new terminology to describe the 'dimensions' of disablement. Nevertheless, the ICIDH-2 keeps the notion of 'impairment,' which it defines as any abnormality of physiological or anatomical structure or function, and distinguishes impairment from 'disability' (which it refers to as 'activity limitation' or 'participation' and 'participation restriction') to describe how the nature and extent of functioning and involvement in life situations may be limited. World Health Organization, Assessment, Classification and Epidemiology Group, *International Classification of Functioning and Disability: ICIDH-2*, 14 available at [whqlibdoc.who.int/hq/1999/WHO\\_ASC\\_ACE\\_99.1.pdf](http://whqlibdoc.who.int/hq/1999/WHO_ASC_ACE_99.1.pdf).

53. Crossley, *supra* note 26, at 626-27.

54. Hahn, *supra* note 50, at 181. In his article, Hahn discusses social science research that has revealed "a deep-seated animosity toward citizens with visible or labeled disabilities, [though] hardly anyone permits their true feelings about these traits to become conspicuous. Non-disabled opposition to the interests of disabled Americans is almost invariably covert instead of open or public." *Id.*

55. Crossley, *supra* note 26, at 653-54. But critics of the socio-political model have argued that its "fundamental shortcoming" is that "by focusing on environmentally caused disadvantages, it ignores limitations inherent in bodily impairments," pointing out that "[f]or some impairments, such as severe mental retardation, . . . limitations inextricable from the condition and independent of social factors may seem to overwhelm any social discrimination faced by persons with those impairments." *Id.* at 657. Although certain types of impairments may well result in real limitations independent of any disabling social environment, "even this acknowledged limitation does not lessen the social model's force: the social model need not deny that some limitations flow directly from impairment in order to argue that externally imposed disadvantages should be remedied." *Id.* at 658.

56. Scotch, *supra* note 3, at 215.

57. Crossley, *supra* note 26, at 655-56. Related to the idea that disability is culturally constructed is the belief that normalcy itself is a social and cultural construct. *Id.* As many disability theorists and scholars have pointed out, "normal" and "abnormal" are not polar opposites/mutually exclusive, but

sentations of the lives of disabled people in the media and films contributes to nondisabled society's sense that disabled people are "other," which further contributes to their exclusion.<sup>58</sup> While a handful of films, television programs, and news stories portray people with disabilities as part of the mainstream,<sup>59</sup> the majority of media and artistic portrayals continue to feature disabled people as either helpless cripples<sup>60</sup> or courageous overcomers<sup>61</sup> (sometimes referred to by the disability community as "supercrips").<sup>62</sup>

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rather are points along the continuum of human functioning. *See, e.g.*, LENNARD DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS AND THE BODY 11 (1995). "The construction of disability is based on a deconstruction of a continuum." Crossley, *supra* note 26, at 656 (citing DAVIS). Professor David Pfeiffer puts it another way:

It depends upon the concept of normal. That is, being a person with a disability which limits my mobility means that I do not move about in a (so-called) normal way. But what is the normal way to cover a mile . . . ? Some people would walk. Some people would ride a bicycle or a bus or in a taxi or their own car. Others would use a skate board or in line roller blades. Some people use wheelchairs. There is, I argue, no normal way to travel a mile.

DAVID PFEIFFER, THE DISABILITY PARADIGM AND FEDERAL POLICY RELATING TO CHILDREN WITH DISABILITIES 6 (1998) (citation omitted) (unpublished manuscript on file with Journal of Health Care Law & Policy), in Kaplan, *supra* note 4, at 355. Robert Burgdorf, a longtime disability advocate, explains it this way:

Though we are conditioned to think otherwise, human beings do not really exist in two sharply distinct groups of 'people with disabilities' and 'people without disabilities,' . . . Disability is 'a natural part of the human condition resulting from that spectrum—and will touch most of us at one time or another in our lives. The goal is not to fixate on, overreact to or engage in stereotypes about such differences, but to take them into account and allow for reasonable accommodation for individual abilities and impairments that will permit equal participation.

MARY JOHNSON, MAKE THEM GO AWAY 204 (2003) (*quoting* the U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1985)).

58. Crossley, *supra* note 26, at 655-56. *See also* PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 119-146 (2003); MARTIN F. NORDEN, THE CINEMA OF ISOLATION: A HISTORY OF PHYSICAL DISABILITY IN THE MOVIES (1994); ANN POINTON & CHRIS DAVIES, FRAMED: INTERROGATING DISABILITY IN THE MEDIA (1997); CHRISTOPHER R. SMIT & ANTHONY ENNS, SCREENING DISABILITY: ESSAYS ON CINEMA AND DISABILITY (2001).

59. Artistic and media portrayals of people with disabilities that some in the disability community believe to present realistic portrayals of disabled people include films such as *Waterdance* (Samuel Goldwyn Company 1992), *Notting Hill* (PolyGram Filmed Entertainment 1999), *The Replacements* (Warner Brothers 2000) and *Twin Falls Idaho* (Sony Pictures Classics 1999); and television programs such as *E.R.* (NBC), *The West Wing* (NBC), and the children's program *Pelwick* (Nickelodeon).

60. *See, e.g.*, CHARLES DICKENS, A CHRISTMAS CAROL (1843); *PASSION FISH* (Miramax 1992); *SCENT OF A WOMAN* (Universal Pictures 1992). Of course, the most criticized of these programs by many in the disability community is non-fiction: the annual Labor Day Muscular Dystrophy Association Telethon hosted by Jerry Lewis, which is problematic not only because of its depiction of disabled children as "helpless or pathetic creatures," but also because the purpose of the telethon is to raise funds to "cure" the disability, thus reinforcing the idea inherent in the medical model of disability that "elimination of the impairment . . . is the sole appropriate solution to [the] problem." Hahn, *supra* note 50, at 169.

61. *See, e.g.*, *RAIN MAN* (Mirage Entertainment 1988); *MY LEFT FOOT* (Miramax 1989); *SHINE* (Fine Line Features 1996); *A BEAUTIFUL MIND* (Imagine Entertainment 2001).

62. In addition to these characterizations, we also continue to see disabled people portrayed as evil, often with the disability itself as the symbol—the physical manifestation of that evil. In *Screening Stereotypes: Images of Disabled People*, Professor Paul Longmore points to a number of films in which disability is associated with malevolence. He states:

[d]eformity of body symbolizes deformity of soul . . . . [T]he depiction of the disabled person as "monster" and the criminal characterization both express to varying degrees the notion that disability involves the loss of an essential part of one's humanity. Depending on the extent of disability, the individual is perceived as more or less subhuman.

Paul Longmore, *Screening Stereotypes: Images of Disabled People in Television and Motion Pictures*, in

These media and artistic messages frequently operate on a subtextual level for many viewers, and therefore remain an unexamined and powerful shaper of cultural attitudes toward disabled people.

Thus the socio-political model of disability attributes the disadvantages confronted by disabled people to a negligently or hostilely built and organized environment, including the attitudinal environment,<sup>63</sup> which has been created without the needs of disabled people in mind. Additionally, because cultural constructs of disability have rendered disabled people as at best invisible, and at worst, deviant and naturally inferior, these constructs implicitly support the development of the social and legal structures that exclude and devalue them. In particular, the notion that “[t]he configurations of the existing environment confer significant rewards on the non-disabled and corresponding penalties on citizens with disabilities,”<sup>64</sup> coupled with the idea that disability-related disadvantage is therefore amenable to a societal remedy, underpins a third model of disability: the minority group or civil rights model.

### C. *The Minority Group/Civil Rights Model of Disability*

The minority group model of disability is an outgrowth of—and shares many features with—the socio-political model of disability, particularly the idea that the dominant construct of disability is socially-rooted, a concept that “draws on and finds company in critical analyses of gender and race.”<sup>65</sup> The minority group model imports this idea and builds upon it, taking the position that “the functional limitations associated with impairment vary directly with the degree to which society respects the differences of the minority group of impaired individuals, and it demands the eradication of exclusionary social practices and structures as a matter of civil rights for persons with disabilities.”<sup>66</sup> Additionally, the minority group model focuses on

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IMAGES OF THE DISABLED, *DISABILITY IMAGES* 65, 66-68 (Alan Gartner & Tom Joe eds., 1987).

Author Jack Nelson has identified a total of six ways in which people with disabilities are negatively portrayed in the media in the book, *IMAGES THAT INJURE: PICTORIAL STEREOTYPES IN THE MEDIA*, which are (1) The Victim; (2) The Hero/Supercrip; (3) The Threat—Evil and Warped; (4) Unable to Adjust—“Just buck up!”; (5) To Be Cared For—The Burden; and (6) One Who Shouldn’t Have Survived. Jack A. Nelson, *The Invisible Cultural Group: Images of Disability*, in *IMAGES THAT INJURE: PICTORIAL STEREOTYPES IN THE MEDIA* 119 (Paul Martin Lester ed., 1996).

63. See, e.g., Hahn, *supra* note 50, at 174. “When groups of disabled people are asked about the greatest obstacle they confront, the reply usually comes back in a single chorus: ‘attitudes.’” *Id.* at 175.

64. *Id.* at 173-74.

65. *Id.* at 657.

66. Crossley, *supra* note 26, at 659. Additionally, some scholars have studied the minority group model of disability not only in the context of arguing how society should account for the spectrum of individual ability, but also to consider the question of who is disabled. By way of example, Professor Samuel Bagenstos argues that

[t]he distinctive characteristic of [the] group [of disabled people] is systemic, socially contingent disadvantage. “Disability” is a condition in which people—because of present, past, or perceived “impairments”—are viewed as somehow outside of the “norm” for which society’s institutions are designed and therefore are likely to have systematically less opportunity to participate in important areas of public and private life. Even though people with “disabilities” may have vastly different medical conditions—indeed, many may experience no medi-

the idea that people with disabilities have “historically . . . not been viewed as part of the societal norm,” but that they have “a civil right to be considered part of [that] norm and to be allowed to participate meaningfully.”<sup>67</sup>

Harlan Hahn describes the major underlying premises of the minority group model of disability as follows: “(a) the basic problems of disabled persons stem from social attitudes; (b) all facets of the environment are molded by public policy; and (c) policies that have an adverse effect on people with disabilities are a reflection of widespread social attitudes and values.”<sup>68</sup> Hahn then explains that two important implications can be drawn from these premises, the first of which is that the built environment, which functions to exclude many people with disabilities, reflects the power of the nondisabled majority and its ability and/or desire to subordinate the disabled minority. Given the existence of people with disabilities throughout history and the predictable fact that people with disabilities will continue to be members of society in the future, Hahn believes that society has gone beyond inadvertence or simple negligence to something akin to an intentional failure to create an environment accessible to people who function at all points along the spectrum of ability. In his words:

Social structures were designed to enhance the prestige and authority of the non-disabled, but they were not planned “without any mind to” the needs and interests of people with disabilities. Persons with visible or labeled differences stemming from impairments have existed throughout history, and they have usually been the objects of ridicule or scorn. Instead of assuming that environmental barriers to this group occurred as a result of random influences, it would seem unreasonable to believe that, in constructing human habitats, the dominant non-disabled majority was not affected by the motivation to subordinate and separate itself from such people.<sup>69</sup>

Hahn’s second conclusion relates to the idea of the invisibility of dominant culture privilege as it relates to ability and disability, a construct that has been analyzed extensively in race<sup>70</sup> and gender<sup>71</sup> contexts. He explains:

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cal limitations at all—they have one crucial thing in common: a socially assigned group status that tends to result in systematic disadvantage and deprivation of opportunity.

Samuel Bagenstos, *Subordination, Stigma and Disability*, 86 VA. L. REV. 397, 401 (2000).

67. Crossley, *supra* note 26, at 659.

68. Hahn, *supra* note 50, at 178.

69. *Id.*

70. See, e.g., PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Barbara Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 22-33 (Leslie Bender and Daan Braveman eds., 1995).

71. See, e.g., Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 NYU L. REV. 589 (1986).

[T]he surroundings created by public policy have almost invariably conferred advantages upon the non-disabled portion of the population and disadvantages on the disabled minority. . . . Yet, the task of discovering the advantages bestowed on the non-disabled may be even more difficult than the endeavor to identify the disadvantages faced by Americans with disabilities. Perhaps most significantly, these benefits are such an integral facet of the existing environment that they are “taken-for-granted” are largely invisible and unnoticed. The advantages granted to non-disabled people by this environment, however, are extremely relevant to the attempt to establish a standard for evaluating equality between the disabled and non-disabled segments of the population. Any effort to assess the issue of equal rights for citizens with disabilities without considering these “taken-for-granted” privileges would be both incomplete and highly prejudicial.<sup>72</sup>

Of particular significance in both of Hahn’s conclusions is the idea that the historical structural exclusion of disabled people justifies a “claim to remediation of exclusionary structures and practices . . . as a claim of right, rather than as a request for special benefits.”<sup>73</sup> Thus the civil rights/minority model of disability builds on the socio-political model by recognizing that many of the disadvantages attributed to disability are caused by the failure of society to design environments accessible to people across a range of physical and mental abilities, and taking the position that people who reside at all points on that spectrum have a right to be able to participate in society.

A large part of the justification for the civil rights model derives from the idea that people with disabilities “collectively occupy a stigmatized social position . . . a social status analogous to that of racial and ethnic minorities.”<sup>74</sup> According to disability theorist Richard Scotch, like racial and ethnic minorities, disabled people also are subject to prejudiced attitudes, discriminatory behavior and institutional and legal constraints that parallel those experienced by other traditionally marginalized groups.<sup>75</sup> Particularly damaging to people with disabilities are the stereotypes of “dependence on others and a general incapacity to perform social and economic activities,”

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72. Hahn, *supra* note 50, at 178-79. As some disability theorists point out, however, there are also issues with conceptualizing disabled people as a distinct minority group:

First, unlike many members of other racial, ethnic, or religious minority groups, individuals with disabilities often have grown up in isolation from other persons with disabilities and thus have had little opportunity to develop the type of group consciousness or culture that has empowered other minority groups. Similarly . . . disabled people are an extremely heterogeneous bunch. As a result, the experiences of disadvantage or subordination that individuals have encountered may be so diverse that group members may find themselves with little in common. Due to this heterogeneity, disability theorists are particularly sensitive to their inability to speak to the experience of all disabled people.

Crossley, *supra* note 26, at 663-64.

73. *Id.* at 659.

74. Scotch, *supra* note 3, at 215.

75. *Id.* at 215-16.

because these assumptions “can result in exclusion and social isolation, including lack of access to employment, public facilities, voting, and other forms of civic involvement.”<sup>76</sup> The opportunity to participate in these types of institutions and activities has, in our society, traditionally been defined as a civil right, and the exclusion from them as discrimination.

Yet in other ways, the nature of discrimination against people with disabilities is not identical to that based on race or sex, and consequently, the American civil rights construct, at least as it has been historically developed and understood (which has been primarily in the context of race), is not a perfect fit for either describing the nature of the discrimination encountered by disabled people, or for crafting the remedial measures necessary to address it. As discussed earlier, much of the discrimination against people with disabilities occurs because the “built environment” has not been created with a spectrum of needs and abilities in mind, and as a result, those who do not perform within “half a standard deviation” of the norm are often excluded from participation in these structures and institutions.<sup>77</sup>

A logical outgrowth of the socio-political and civil rights models of disability is the idea that since disability is understood as an interaction between the individual and an inhospitable environment, what is therefore necessary to enable disabled people to participate equally is not simply a mandate to treat them the same as anyone else, but a recognition and a requirement that in many situations, people with disabilities must be provided with something different to allow them the *equal opportunity* to participate. As many disability rights lawyers, scholars, and policy analysts have noted,<sup>78</sup> the problem with applying the traditional civil rights approach (i.e., a formal equality construct) in situations involving discrimination on the basis of disability is that in most cases, treating people with disabilities in

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76. *Id.* Indeed, many women with disabilities who struggle against two cultural stereotypes (female and disabled), indicate that the latter is considerably more powerful than the former in shaping how they are treated in society. One woman, quoted in an article by Anita Silvers, stated:

When I joined a women’s consciousness-raising group a few years ago . . . I listened in amazement and awe as the others delivered outraged accounts of their exploitation at the hands of bosses, boyfriends, and passersby . . . [I]t was impossible for me to confess my own reaction to their tales of horror, which was a very real sense of envy. Society had provided a place for them as women, however restricting that place might be. . . . For myself and for other disabled women, sex discrimination is a secondary issue.

Silvers, *supra* note 26, at 91-92. Similarly, disability studies scholar Tom Shakespeare has explained that “disability is a very powerful identity, and one that has the power to transcend other identities . . . . For example, it has the power to de-sex people, so that people are viewed as disabled, not as men or women, straight or gay.” *Id.* at 91 (quoting Tom Shakespeare, *Disability, Identity and Difference*, in *EXPLORING THE DIVIDE: ILLNESS AND DISABILITY* 94, 109 (Colin Barnes & Geof Mercer eds., 1996)).

77. Hahn, *supra* note 50, at 173.

78. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990); Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991); Paul S. Miller, *Disability Civil Rights and a New Paradigm for the 21st Century: The Expansion of Civil Rights Beyond Race, Gender and Age*, 1 U. PA. J. LAB. & EMP. L. 511 (1998); Bonnie P. Tucker, *The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335 (2001); Mayerson & Yee, *supra* note 18.

the same way as nondisabled people will result in their exclusion from societal institutions and structures, rather than inclusion.

To illustrate this concept, Harlan Hahn offers the image of athletes participating in 'the race of life,' which is presumed fair "as long as all of the contestants are lined up evenly at the starting line."<sup>79</sup> But, as Hahn explains,

[i]f the lane of the race track assigned to disabled contestants is filled with obstacles . . . the competition can hardly be considered fair. And, for most disabled children and adults, the obstacles presented by architectural inaccessibility, communication barriers, the effects of stigmatizing attitudes, and the demands of a discriminatory environment often appear to be almost insurmountable.<sup>80</sup>

He concludes his analogy by explaining that "[t]he solution, of course, is to 'clear the track' by changing the environment instead of the person."<sup>81</sup> The point is that 'clearing the track' requires something different from simply inviting everyone to participate in the race—that is, something more is necessary than equal treatment to ensure equal opportunity. Consequently,

[u]nlike the women's movement, which has been hotly debating the wisdom of ever veering from the equal treatment paradigm, the disability movement has known from the outset that for people with disabilities, a civil rights statute based solely on *equal treatment* would fall far short of achieving the goals of inclusion and participation.<sup>82</sup>

The ADA, with its focus on *equality of opportunity*, thus represented a new paradigm in civil rights legislation which reflected a new perception of people with disabilities and the nature of disability.

## II. THE ADA: DISABILITY LEGISLATION REFLECTING THE SOCIO-POLITICAL AND MINORITY MODELS OF DISABILITY

When President Bush signed the ADA into law on July 26, 1990, the statute was called many things: a "sledgehammer" to knock down the "shameful wall of exclusion" separating people with disabilities from American society;<sup>83</sup> a law that "will change the way we live forever,"<sup>84</sup> and legislation that would "bring[] us closer to that day when no Americans will

79. Hahn, *supra* note 50, at 189, n.120.

80. *Id.*

81. *Id.*

82. Mayerson & Yee, *supra* note 18, at 537 (emphasis added) (citation omitted).

83. *Knocking Down a Barrier: Bush Signs Americans With Disabilities Act*, *NEWSDAY* (New York, Nassau and Suffolk ed.), July 27, 1990, at 7 (quoting signing statement of President George Bush).

84. Linda Hamilton Krieger, *Foreward to Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 *BERKELEY J. EMP. & LAB. L.* 1, 1 (2000) (quoting Senator Tom Harkin following the Senate vote in 1990).



ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness.”<sup>85</sup> But perhaps the most important—and now the most contested—description of the statute was its characterization as a civil rights law. The disability movement’s use of a civil rights framework and language to create and describe the ADA was a significant strategic decision that reflected both a claim of identity and a claim to equality.

A. *The ADA Was Founded on the Socio-Political and Minority Models of Disability.*

Framing disability as a civil rights construct was a deliberate choice on the part of the disability movement. In the early 1970s, disability advocates began to borrow some of the methods and approaches of the African-American civil rights movement in an effort to describe the experience of disability in the United States and what legislative requirements needed to be in place to improve that experience. Recognizing the important role that public protests, marches, acts of civil disobedience, and lawsuits had played in the movement for racial equality, disability rights advocates began employing some of these types of measures in their efforts to secure legal guarantees of equality.<sup>86</sup> Professor Matthew Diller, who has studied the influence of the African-American civil rights movement on the disability rights movement, refers to the former as “the prototype of a successful movement combining political mobilization and activism with litigation and legislation to bring about major social changes,” and notes, “[i]t is not surprising that other groups sought to adapt the civil rights model for advocacy, legislation and litigation to their own struggles for equality.”<sup>87</sup> In particular, disability advocates have “employ[ed] the language from [other civil rights] movements, decrying patterns of hierarchy and subordination based upon physical differences.”<sup>88</sup> The disability activists’ slogan, “You Gave Us Your Dimes, Now We Want Our Rights,” reflects the civil rights view of people with disabilities “as equal citizens, individually varying across the spectrum of human abilities, whose over-riding needs are freedom from discrimination and a fair chance to participate fully in society.”<sup>89</sup> A significant reflection of the success of disability advocates in shifting the understanding of disability from a medical model to a civil rights model is the fact that a number of provisions of the ADA are grounded in and create mandates based on the idea of disability as a social construct.<sup>90</sup> While the statutory

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85. Remarks on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1067, 1068 (July 26, 1990).

86. See, e.g., SHAPIRO, *supra* note 23, at 64-70 (describing the twenty-six-day sit-in at HEW offices to compel issuance of section 504 regulations; ADAPT bus protests, etc.); Burgdorf, *supra* note 78, at 427-28.

87. Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 34 (2000).

88. Crossley, *supra* note 26, at 660.

89. Burgdorf, *supra* note 78, at 426-27 (1991).

90. See *infra* Introduction.

language of the ADA demonstrated a legislative understanding and acceptance of the socio-political model of disability,<sup>91</sup> that same understanding and acceptance had not permeated much of American society at the time the statute was enacted into law.

In the years leading up to the drafting of the ADA, the civil rights model of disability was a fundamental part of the vision of disability advocates who were seeking to change American social policy and legislation related to people with disabilities. There was, however, one significant difference between the civil rights movements for racial and gender equality and the disability movement. These earlier movements created significant broad-based awareness and changing of public perception toward African-Americans, women, and the injustices they faced prior to the enactment of legislation to address those injustices. By contrast, most of the nation remained (and still remains) largely unaware of the oppression of people with disabilities in American society and the nature and effect of discrimination on the basis of disability. Consequently, while the civil rights model gained some limited acceptance in Congress as reflected in federal statutes such as the Architectural Barriers Act of 1968,<sup>92</sup> the Education for All Handicapped Children's Act,<sup>93</sup> and, as described above, the Rehabilitation Act of 1973,<sup>94</sup> the model was not widely understood or accepted in American society prior to the enactment of these statutes, and more significantly, prior to the enactment of the ADA.<sup>95</sup> As Joseph Shapiro explains, "disabled people got their rights without dramatic Freedom Rides, church bombings or 'I Have a Dream' speeches to stir the conscience of a guilty nation. African-Americans had changed a nation's attitudes and then won civil rights law. But for disabled Americans the reverse was true."<sup>96</sup> Today, disability activists are still struggling to inform public opinion as to the civil rights foundation for laws that have been in effect for over a dozen years.

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91. But some would contest the characterization of the ADA as a true civil rights statute due to the presence of the "undue hardship"/"undue burden" exceptions as well as the overall "reasonableness" requirement. "By allowing the insertion of 'undue hardship' and 'reasonable accommodation' language into the law, they made it acceptable to believe that the simple moral imperative of giving people access and individual accommodation was not something important enough, morally significant enough, to require." JOHNSON, *supra* note 57, at 224.

92. 42 U.S.C. §§ 4151-57 (2000); *see supra* note 39. The ABA reflected the socio-political model of disability in the sense that it required that all new facilities built with federal money be made accessible to people with disabilities. The ABA sought to achieve accessibility not merely by prohibiting the exclusion of a traditionally marginalized group, but by requiring modifications to future building designs to ensure accessibility for people across the spectrum of physical ability.

93. 20 U.S.C. §§ 1400-87 (2000), now the Individuals with Disabilities Education Act (IDEA), which mandates that each child with a disability is entitled to a "free appropriate public education." *Id.* § 1415.

94. 29 U.S.C. § 794 (1998).

95. *See, e.g.*, JOHNSON, *supra* note 57.

96. SHAPIRO, *supra* note 23, at 324. *See also* Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 489 (2000) ("Although there was certainly a disability rights movement in the United States during the 1970s and 1980s, it was neither as broad-based nor as well disseminated into popular consciousness as the black civil rights movement of the 1950s and '60s, or the women's movement of the 1970s.").

What remains largely unknown to the general public is that the ADA is a self-described antidiscrimination statute that implicitly and explicitly frames the claims of disabled people “as congruent with traditional and broadly accepted values such as equality, fair play and meritocracy.”<sup>97</sup> Of particular significance to the characterization of the ADA as a civil rights statute is the way the statute describes people with disabilities and the systemic barriers to participation they have encountered in American society. The “Findings and Purposes” section of the statute identifies people with disabilities as

*a discrete and insular minority* who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.<sup>98</sup>

The deliberate choice of Congress to characterize people with disabilities as a ‘discrete and insular minority’ is significant because these are ‘constitutional code words’ that historically have been used to designate “an identifiable group of people who experience a common set of obstacles to participation in public and private life.”<sup>99</sup> The accompanying findings describe discrimination encountered by people with disabilities in the form of exclusions from “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services,”<sup>100</sup> and attribute the causes of this discrimination to both “outright intentional exclusion” and “the discriminatory effects of architectural, transportation, and communication barriers” as well as to “overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.”<sup>101</sup> Viewed together, the

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97. Diller, *supra* note 87, at 36.

98. 42 U.S.C. § 12101(a)(7) (2000) (emphasis added).

99. Bagenstos, *supra* note 66, at 419-420. The “discrete and insular minority” language is from footnote 4 to the Supreme Court’s decision in *United States v. Carolene Products*, 304 U.S. 144 (1938), which states:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Carolene Products*, 304 U.S. at 152-53, n.4.

100. 42 U.S.C. § 12101(a)(3) (2000).

101. *Id.* § 12101(a)(5).

characterization of people with disabilities and the description of the types of discrimination they encounter “fully support the notion that disability is a condition marked by the kind of subordination and second-class citizenship that many scholars have taken to be the appropriate target of civil rights laws.”<sup>102</sup>

*B. The ADA Reflects the Socio-Political and Minority Group Models of Disability by Including, in Particular, the Reasonable Accommodation Mandate.*

But the ADA did more than simply reflect/embody traditional civil rights principles—it expanded on those principles to create a broader version of equality. While the analogy to the civil rights tradition provided a strong moral imperative for the enactment of a comprehensive antidiscrimination statute, a direct importation of the traditional civil rights protections offered in statutes such as the Civil Rights Act of 1964<sup>103</sup> would have addressed only a subset of the barriers to participation encountered by people with disabilities. As the socio-political model of disability emphasizes, societal institutions and structures have not been built neutrally—rather, they have been created by the nondisabled majority and therefore often do not account for the spectrum of human needs and ways of doing things, resulting in the exclusion of those who do not look, act, think, move, read, or behave ‘normally.’<sup>104</sup>

Thus to address these types of exclusions, disability advocates recognized that “framing their political demands as purely a claim to equal treatment on a level playing field” would not achieve equality,<sup>105</sup> because in most cases, treating people with disabilities in the same manner as people without disabilities serves to exclude people with disabilities from mainstream society, rather than include them.<sup>106</sup> Standing at the top of the courthouse steps and telling a litigant who uses a wheelchair, “You may come in,” is a disingenuous statement of equal opportunity.<sup>107</sup> Explaining to deaf person that his right to participate in a trial has been met by virtue of his physical presence in the courtroom when the proceedings have been conducted in spoken English and without a sign language interpreter does not

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102. Bagenstos, *supra* note 66, at 420.

103. 42 U.S.C. § 2000a (2000).

104. Anita Silvers uses an exercise she refers to as ‘historical counterfactualizing’ to illustrate, for example, the ways our society would look different if the majority of people used wheelchairs—i.e., buildings constructed without stairs, wider doorways, etc. She concludes from this exercise, “[b]y hypothesizing what social arrangements would be in place were persons with disabilities dominant rather than suppressed, it becomes evident that systematic exclusion of the disabled is a consequence not of their natural inferiority but of their minority social status.” Crossley, *supra* note 26, at 661 (quoting Anita Silvers, *Reconciling Equality to Difference: Caring (F)or Justice for People with Disabilities*, HYPATIA, Winter 1995, at 48).

105. Crossley, *supra* note 26, at 664.

106. MINOW, *supra* note 78.

107. See, e.g., *Lane v. State of Tenn.*, 315 F.3d 680 (6th Cir. 2003).

constitute meaningful access to a fundamental right.<sup>108</sup> Consequently, a different paradigm for equality needed to be used in the ADA—one that would give recognition to the incontrovertible fact that “to provide individuals with disabilities with equal opportunities[,] the civil rights model must be amended or expanded to incorporate the concept of accommodations.”<sup>109</sup>

For this reason, Robert Burgdorf, the principal drafter of the original version of the statute, calls the ADA “a second-generation civil rights statute that goes beyond the ‘naked framework’ of earlier statutes and adds much flesh and refinement to traditional nondiscrimination law.”<sup>110</sup> Arguably, the most significant aspect of this ‘flesh’ and ‘refinement’ is the reasonable accommodation mandate, which appears in varying forms in Titles I,<sup>111</sup> II,<sup>112</sup> and III<sup>113</sup> of the ADA, but which may be generally understood as requiring both public and private entities to make those changes to the “built environment” that are necessary to ensure that people with disabilities are able to participate in society’s institutions (so long, of course, as those changes are not too expensive or burdensome to make).<sup>114</sup> The reasonable accommodation mandate has two premises embedded in it, both of which are rooted in the socio-political model of disability. First, that the ‘problem’ of disability is not solely located in the person who, for example, uses a wheelchair for mobility, but rather that the problem resides in many of our societal structures and institutions that have been constructed without a

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108. *Popovich v. Cuyahoga County Ct. Com. Pl.*, 276 F.3d 808 (6th Cir. 2002).

109. Tucker, *supra* note 78, at 344 (2001).

110. Burgdorf, *supra* note 78, at 415.

111. Title I of the ADA, which applies to private employers, requires those employers to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.” 42 U.S.C. § 12112(b)(5)(A) (2000).

112. Title II of the ADA, which applies to state and local government entities, requires those entities to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7) (2003); 42 U.S.C. § 12132 (2000). Additionally, the Department of Justice regulations implementing Title II require that “[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not . . . require a public entity to take any action that it can demonstrate would result in a fundamental alteration . . . or in undue financial and administrative burdens.” 28 C.F.R. § 35.150(a)(3) (2003).

113. Title III of the ADA, which applies to public accommodations and services operated by private entities, requires those entities to “make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.” 42 U.S.C. § 12182(b)(2)(A)(ii) (2000). Additionally, Title III defines discrimination as “a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” *Id.* § 12182(b)(2)(A)(iii). Finally, the statute also makes unlawful the “failure to remove architectural barriers, and communication barriers that are structural in nature . . . where such removal is readily achievable.” *Id.* § 12182(b)(2)(A)(iv).

114. *Id.* § 12183(a)(2).

range of needs and abilities in mind, such as streets without curb cuts, narrow doorways and entrances without ramps.<sup>115</sup> The second premise is that given these hard-wired, systematic social exclusions, society therefore has an obligation to make reasonable modifications to those structures and institutions as part of any meaningful commitment to equality for people with disabilities.<sup>116</sup>

The reasonable accommodation mandate has been called a “transformative” aspect of the law because it “challenge[s] preexisting consensus definitions of particular categories or concepts, and . . . attempt[s] to redefine, or ‘reinstitutionalize’ them with a different set of constituent social meanings, values, and normative principles.”<sup>117</sup> Indeed, by acknowledging that there must be modifications made to the built environment in order to allow for participation by disabled people, the reasonable accommodation mandate necessarily embraces the socio-political approach to disability. As Linda Krieger explains, by including the reasonable accommodation requirement in the ADA, “the drafters . . . sought to transform the institution of disability by locating responsibility for disablement not only in a disabled person’s impairment, but also in ‘disabling’ physical or structural environments.”<sup>118</sup> With this transformation comes a different understanding not only of disability, which is no longer “a container holding tragedy, or occasion for pity, charity, or exemption from the ordinary obligations attending membership in society,” but now “also, or to a certain extent instead, contains rights to and societal responsibility for making enabling environmental adaptations.”<sup>119</sup>

Many scholars and theorists have written about the reasonable accommodation mandate and how to construe it.<sup>120</sup> Some consider the failure to

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115. Davis, *supra* note 52, at 197.

116. While the “accommodation” part of the reasonable accommodation mandate points up one difference between the ADA and other civil rights statutes (i.e., the idea that modifications to the built environment are necessary to allow participation by people with disabilities), the “reasonableness” part of the mandate (as well as the requirement that a person demonstrate she is “qualified” for the particular position, program, or activity) points to another difference between the protected class that is the beneficiary of the ADA (i.e., people with disabilities) and the protected classes that are the subject of other civil rights statutes. Specifically, disability, unlike race or gender, may in some circumstances have a direct impact on a person’s ability to perform a job or to participate in a program or activity. The classic (and overused) illustration of this is the situation of the blind person who applies for a position as a bus driver. While it would be possible to accommodate this person by providing an assistant who would actually drive the bus while the blind person collected fares, the end result would essentially require the employer to pay two people to do the job of one person—hence the need for the ‘reasonableness’ part of the reasonable accommodation mandate. By requiring employers and other public and private entities to provide only those accommodations that are reasonable, the ADA represented a significant step toward political and legal endorsement of the socio-political model of disability on the part of the federal government.

117. Krieger, *supra* note 96, at 480.

118. *Id.* at 481.

119. *Id.*

120. See, e.g., Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Pamela Karlan & George Rutherglen, *Disabilities, Discrimination and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996); Arlene Mayerson & Sylvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535 (2001); J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385 (2003).

provide such accommodations as disparate treatment discrimination,<sup>121</sup> while others view such refusals as disparate impact discrimination.<sup>122</sup> Still others, such as Samuel Bagenstos, consider the reasonable accommodation mandate to constitute a “mild regime of affirmative action.”<sup>123</sup> Interestingly, though, according to at least one author, the drafters of the ADA did not engage in the debate of how to conceptualize the reasonable accommodation mandate at the time they wrote the statute. Arlene Mayerson, executive director of the Disability Rights Education and Defense Fund,<sup>124</sup> explains, “[a]s drafters of the ADA, we never discussed theories of equality. Using the rhetoric of traditional civil rights, which focuses on equal treatment, we incorporated nondiscrimination provisions from section 504 implementing regulations<sup>125</sup> that assured that different treatment would be provided when necessary to achieve equal opportunity.”<sup>126</sup>

This seemed a logical approach for two reasons. First, disability advocates had spent the two decades leading up to the ADA reconceptualizing the understanding of disability from a medical/pathological defect to disability as a societal construct. As described above, inherent in this construct is the idea that disability arises as a result of society’s failure to consider the needs of people with a broad range of abilities in creating the built environment. Consequently, any understanding of discrimination against people with disabilities must necessarily include a failure to ameliorate such situations where possible. The second reason it was logical for the ADA drafters to have not considered theories of equality in drafting the statute was because such theories had not been called into question by courts interpreting

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121. See *Int’l Bd. of Trs. v. United States*, 431 U.S. 324, 335 n.15 (1977) (explaining the disparate impact and disparate treatment theories of liability).

122. In disparate impact cases, a neutral employment practice has a greater adverse effect on a protected group than on another group. *Id.* The employer can be held liable unless he can demonstrate the practice is a business necessity. *Id.*

123. Bagenstos, *supra* note 66, at 457. Professor Bagenstos explains:

To the core nondiscrimination requirement, the ADA adds the mandate of ‘reasonable accommodation,’ . . . which serves a very similar purpose. Like an affirmative action policy, that mandate singles out members of a particular group . . . and gives them a benefit that nonmembers lack (here, the right to individualized accommodation). Like an affirmative action program, it serves remedial, prophylactic, and inclusionary functions.

*Id.* at 458.

124. The Disability Rights Education and Defense Fund (DREDF) is a national law and policy center founded in 1979 that is dedicated to protecting and advancing the civil rights of people with disabilities through legislation, litigation, advocacy, technical assistance, and education and training of attorneys, advocates, people with disabilities and parents of children with disabilities. For more information, see <http://www.dredf.org> (last visited Jan. 12, 2004). Arlene Mayerson has been the Directing Attorney of DREDF since 1981 and has testified before Congress on major pieces of disability rights legislation, including the ADA. *Id.*

125. While section 504 is sometimes viewed as virtually identical to the ADA with the exception of the entities it reaches, one important difference between the ADA and section 504 is that the ADA, in its statutory mandate, defines “discrimination” as the failure to provide reasonable accommodations, while section 504 simply prohibits an entity receiving or distributing federal funds from excluding disabled people from participation in, denying them the benefits of, or subjecting them to discrimination under any of its covered programs or activities. Regulations implementing section 504, however, provide for reasonable accommodations and modifications.

126. Mayerson & Yee, *supra* note 18, at 536-37.

the requirements of section 504, despite the fact that the reasonable accommodation provisions in the section 504 regulations (though not the statute itself) had been in place for over thirteen years.<sup>127</sup> Within a decade of the enactment of the ADA, however, theories of equality had moved to the forefront of judicial interpretations of the statute.<sup>128</sup>

III. *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT:*  
GIANT STEPS BACKWARD IN THE MEANING OF  
EQUALITY/EQUAL PROTECTION

A. *The Backdrop to Garrett*

In *Board of Trustees of the University of Alabama v. Garrett*,<sup>129</sup> the Supreme Court held that state employers are not subject to private federal lawsuits for monetary damages under Title I of the ADA because Congress did not validly abrogate the states' Eleventh Amendment immunity when it passed the statute.<sup>130</sup> In reaching this conclusion, the Court challenged the ADA's reasonable accommodation mandate as being inconsistent with equal protection, and in so doing, made significant statements about the boundaries of equality that have implications not only for the rights of disabled people in state employment settings,<sup>131</sup> but also for the construction of

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127. Although section 504 of the Rehabilitation Act was signed into law in 1973, it was not until 1977 that the implementing regulations containing the reasonable accommodation mandate were promulgated.

128. Another reason why the interpretation of "equal protection" may not have come up with respect to section 504 was because in addition to being enacted pursuant to Congress' authority under Section 5 of the Fourteenth Amendment, section 504 was also enacted pursuant to Congress' Spending Clause authority. Indeed, using this theory, Patricia Garrett and Milton Ash were able to reinstate their federal court actions for money damages under section 504 after the U.S. Supreme Court determined that such damages were not available against the State of Alabama under the ADA because of its finding that Congress did not validly abrogate the states' Eleventh Amendment immunity when it passed the statute. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001); see *infra* Part IV. In September 2003, the United States Court of Appeals for the Eleventh Circuit held that pursuant to 42 U.S.C. § 2000d-7, a state waives immunity from federal suit under section 504 if it continues to receive federal funds. *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 193 F.3d 1214 (11th Cir. 2003). The United States Court of Appeals for the Second Circuit, however, reached the opposite conclusion on the same issue, holding that a state could not knowingly waive immunity under section 504 because the state would believe that Congress had already abolished its immunity under the ADA. *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 113-14 (2001).

129. 531 U.S. 356, 372 (2001).

130. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Although the plain language of the Eleventh Amendment only prohibits suits against a state by citizens of a different state, the Supreme Court in *Hans v. Louisiana*, 134 U.S. 1 (1980), interpreted the Eleventh Amendment more broadly to also include a grant of immunity to the states from suits brought by their own citizens. *Id.* at 11.

131. In *Garrett*, the Court did not reach the question of whether Title II is constitutional because "no party ha[d] briefed the question whether Title II of the ADA, dealing with the 'services, programs or activities of a public entity,' 42 U.S.C. § 12132, is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject." *Garrett*, 531 U.S. at 360 n.1. In the 2002-03 term, however, the Supreme Court granted certiorari in *Medical Board of California v. Hason*, 537 U.S. 1028 (2002), to address these issues. The Court did not decide the case because the petitioner, the Cali-



disability and disabled people's identities. To provide some context for understanding both, it is necessary first to examine the reasoning employed by the Court to assess the constitutionality of federal legislation that lies at the intersection of the Eleventh and Fourteenth Amendments to see how this led to the result in *Garrett*.

State sovereign immunity and federal civil rights legislation that abrogates a state's immunity involves the intersection of three areas of law: the legislation itself, the Eleventh Amendment, and the Fourteenth Amendment. Pursuant to the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*,<sup>132</sup> Congress' constitutional authority to enact legislation that, like the ADA, applies directly to the states, now derives only from the Fourteenth Amendment.<sup>133</sup> There are five sections of the Fourteenth Amendment, of which only Sections 1 and 5 are relevant to this discussion. Section 1 states that:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>134</sup>

In order to give effect to Section 1, Section 5 grants Congress the authority "to enforce, by appropriate legislation, the provisions of this article."<sup>135</sup>

In its 1997 decision in *City of Boerne v. Flores*,<sup>136</sup> the Supreme Court stated that the standard for "appropriate legislation" must meet a two-

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fornia State Board of Medical Examiners withdrew its petition for appeal and the case was dismissed. *Med. Bd. of Cal. v. Hason*, 123 S. Ct. 1779 (2003). In July, 2003, however, the Supreme Court once again granted certiorari in a Title II case, *Tenn. v. Lane*, 315 F.3d 680 (6th Cir. 2003), in which two disabled wheelchair users sued the State of Tennessee under Title II of the ADA for failing to remove physical barriers that denied them access to the courts in 26 counties. The State successfully defended the suit on sovereign immunity grounds at the district court level, but lost on appeal to the United States Court of Appeals to the Sixth Circuit, which held that Title II validly abrogates state sovereign immunity in cases in which the statute enforces due process principles. *Id.* at 682.

132. 517 U.S. 44 (1996).

133. Prior to 1996, the Supreme Court had held that Congress could abrogate state sovereign immunity under either its Article I Commerce Clause powers or under Section 5 of the Fourteenth Amendment. However, the Court retreated from this position in its 1996 decision in *Seminole Tribe of Florida v. Florida*, where it held that legislation passed pursuant to the Commerce Clause powers was no longer a valid means of Eleventh Amendment abrogation. 517 U.S. at 59. As a result, Section 5 of the Fourteenth Amendment is now the primary means by which Congress can abrogate state immunity.

134. U.S. CONST. amend. XIV, § 1.

135. U.S. CONST. amend. XIV, § 5.

136. 521 U.S. 507 (1997). In *Boerne*, the Court reviewed the validity of the Religious Freedom Restoration Act (RFRA), which Congress enacted pursuant to its Section 5 powers. In its opinion, the Court noted that Section 5 "is 'a positive grant of legislative power' to Congress" and that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" 521 U.S. at 517, 518, (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). The Court qualified this statement, however, by explaining that Congress' Section 5 enforcement power is not limitless, as it "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment," not to

pronged “congruence and proportionality” test.<sup>137</sup> The “congruence and proportionality” test requires a reviewing court to identify (1) whether there is a historical pattern of unconstitutional wrongs that Congress sought to remedy through the statute at issue, and (2) whether the corrective means set forth is proportional to the remedial goal.<sup>138</sup> The first prong involves two separate inquiries: first, whether the legislative history of the statute reflects a clear pattern and practice of discrimination by states, and second whether that discrimination is unconstitutional under the level of protection granted by Section 1 of the Fourteenth Amendment.<sup>139</sup>

### B. *The Garrett Decision*

The first time the Court applied the ‘congruence and proportionality’ test to the ADA was in *Board of Trustees of the University of Alabama v. Garrett*,<sup>140</sup> decided in its 2001 term.<sup>141</sup> In *Garrett*, the Court was asked to

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“decree[ing] the substance of [its] restrictions on the States.” *Id.* at 519 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)). While the *Boerne* majority recognized that “the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies,” it nevertheless concluded that “the distinction exists and must be observed.” *Id.* at 519-20.

137. *Id.* at 520.

138. *Id.* at 520.

139. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). At least one commentator has questioned whether the proportionality requirement “[s]hould . . . be viewed as a distinct inquiry from ‘congruence.’”

The *Boerne* Court speaks obliquely of ‘congruence and proportionality’ as describing the appropriate nexus between the “injury to be prevented or remedied and the means adopted to that end.” [521 U.S. at 508.] The role of proportionality is confusing because the initial analysis of whether the legislation is designed to prevent unconstitutional discrimination by its nature seems, as a practical matter, to require courts to simultaneously look to the remedial burdens that a given statute imposes upon states. . . . To answer the essential question of whether the legislation was designed to ‘remedy’ such unconstitutional discrimination seems to require an inquiry into remedies even before we ask the clear ‘proportionality’ question of whether remedies are narrowly tailored to the goal of weeding out discrimination.

Matthew D. Taggart, *Title II of the Americans with Disabilities Act After Garrett: Defective Abrogation of Sovereign Immunity and Its Remedial Impact*, 91 CAL. L. REV. 827, 846-47 (2003).

140. 531 U.S. 356 (2001).

141. The Court’s first application of *Boerne*’s Section 5 test to a civil rights statute that Congress had passed to enforce the Equal Protection Clause occurred in the year before *Garrett* was decided, in *Kimel v. Florida Board of Regents*. 528 U.S. 62 (2000). *Kimel* presented the issue of whether the Age Discrimination in Employment Act of 1967 (ADEA) was valid section 5 legislation. Because the ADEA was a civil rights statute passed by Congress to address unconstitutional age discrimination under the Equal Protection Clause, the Court invoked the three-tiered standard of review it had developed over the prior sixty years for legislation that classifies or categorizes groups of individuals, in order to determine if state laws deny their citizens the equal protection of the laws.

In *Kimel*, the Supreme Court looked to its prior equal protection decisions to determine the applicable standard of review for discrimination on the basis of age, and reaffirmed those earlier decisions holding that state laws that discriminated on the basis of age are only subject to rational basis review. Thus, the Court stated that the “congruence and proportionality” of the ADEA would be determined under the rational basis test. Under this lenient level of scrutiny, the Court concluded that the ADEA, “through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.” *Kimel*, 528 U.S. at 86. The Court next noted that the ADEA’s sweeping prohibition of state age discrimination did “not alone provide the answer to [its] Section 5 inquiry,” as “[d]ifficult and intractable problems often require powerful remedies.” *Id.* at 88.

decide whether Congress had properly abrogated the states' Eleventh Amendment immunity when it enacted the ADA.

When Congress passed the ADA, it "invoke[d] the sweep of [its] authority, including the power to enforce the [F]ourteenth [A]mendment . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."<sup>142</sup> To preempt any concern that the Eleventh Amendment's sovereign immunity shield might prevent the antidiscrimination provisions from applying to the states, Congress expressly provided in Title V of the ADA that

A State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in Federal or State court . . . for a violation of [the ADA]. In any action against a State for a violation of [the ADA], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available . . . against any public or private entity other than a State.<sup>143</sup>

At issue in *Garrett* was Title I of the ADA, which prohibits discrimination against a qualified individual with a disability in regard to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>144</sup> Title I includes states within the definition of an "employer."<sup>145</sup> Under Title I, discrimination includes actions such as "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee,"<sup>146</sup> and "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability."<sup>147</sup> The definition of discrimination also includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disabil-

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Nevertheless, the Court concluded that there was not sufficient evidence of discrimination in the statute's legislative history to justify Congress' response in enacting the ADEA. Therefore, because Congress had "never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation," the Court found that the ADEA was not congruent and proportional to the evil in question, since that evil included more constitutional than unconstitutional behavior. *Id.* at 89, 91.

142. 42 U.S.C. § 12101(b)(4) (2000).

143. *Id.* § 12202. In *Seminole Tribe*, the Supreme Court held that, in addition to the requirement that Congress abrogate Eleventh Amendment immunity pursuant to an express constitutional grant of authority (that is, Section 5 of the Fourteenth Amendment), that abrogation is improper absent an "unmistakably clear" statement in the legislation of Congress' intent to abrogate. *Seminole Tribe*, 517 U.S. at 56 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989)).

144. 42 U.S.C. § 12112(a) (2000).

145. Title I defines an employer as "a person engaged in an industry affecting commerce who has 15 or more employees." *Id.* § 12111(5). The ADA's definition of "person" expressly includes states. *Id.* § 12111(7) (adopting the definition provided in *Id.* § 2000e(a)).

146. *Id.* § 12112(b)(1) (2000).

147. *Id.* § 12112(b)(3)(A) (2000).

ity who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship,”<sup>148</sup> and “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.”<sup>149</sup> It is these latter conceptions of discrimination—specifically, the idea that a refusal to provide reasonable accommodation constitutes discrimination—that the Supreme Court excluded from its notion of equal protection in the *Garrett* case.

*Garrett* was a consolidation of two cases brought by Patricia Garrett and Milton Ash, both of whom were employees of the State of Alabama.<sup>150</sup> Ms. Garrett was employed as the Director of Nursing for the University of Alabama at Birmingham Hospital. In 1994, Ms. Garrett was diagnosed with breast cancer and underwent significant treatments that required her to take a “substantial” leave from work.<sup>151</sup> When she returned, she was demoted to a lower paying position.<sup>152</sup> Mr. Ash was employed as a security officer for the Alabama Department of Youth Services. Mr. Ash had two disabilities, asthma and sleep apnea, and requested that his employer accommodate him by minimizing his exposure to substances that would aggravate his asthma, and by reassigning him to day shifts as an accommodation for his sleep apnea. The Department of Youth Services denied both of Mr. Ash’s requests.<sup>153</sup>

Ms. Garrett and Mr. Ash filed separate lawsuits against the State of Alabama<sup>154</sup> alleging that the State discriminated against them under Title I of the ADA and seeking monetary damages.<sup>155</sup> The State moved for summary judgment on sovereign immunity grounds.<sup>156</sup> The district court granted the State’s motion and both cases were consolidated on appeal to the Eleventh Circuit, which reversed the district court and held that the ADA did validly abrogate the States’ immunity.<sup>157</sup> The Supreme Court granted certiorari and reversed the Court of Appeals, holding that Congress did not properly abrogate states’ Eleventh Amendment immunity in enacting the ADA, and therefore that state employees could not bring federal claims for monetary damages against their employers under Title I.<sup>158</sup>

In arriving at its holding, the Court applied the two-part test it articulated in *City of Boerne*, in which it first assessed the scope of the constitu-

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148. *Id.* § 12112(b)(5)(A) (2000).

149. *Id.* § 1211(b)(5)(B).

150. 531 U.S. 356, 362 (2001).

151. *Id.*

152. *Id.*

153. *Id.*

154. These cases were later consolidated by the district court.

155. *Garrett*, 531 U.S. at 362.

156. *Id.* (citing *Garrett v. Bd. of Trs. of Univ. of Ala.*, 989 F. Supp. 1409, 1410 (N.D. Ala. 1998)).

157. *Garrett v. Bd. of Trs. of Univ. of Ala.*, 193 F.3d 1214 (11th Cir. 1999).

158. *Garrett*, 531 U.S. at 363-74.

tional right at issue (that is, the Equal Protection Clause in Section 1 of the Fourteenth Amendment), and then inquired as to whether, to the extent Title I reached beyond the precise scope of Section 1's protections, the remedies afforded by the ADA were 'congruent and proportional' to the targeted constitutional violation under its construction of the Fourteenth Amendment.<sup>159</sup>

In order to define the scope of the constitutional right at issue, the Court first sought to determine to what extent Section 1 rights were implicated by the states' treatment of people with disabilities. To do so, the Court looked to its prior decisions regarding classifications of disabled people, specifically, its 1985 decision in *City of Cleburne v. Cleburne Living Center, Inc.*<sup>160</sup> In *Cleburne*, the Court held that people with mental retardation were not a quasi-suspect class and therefore that courts need not apply a heightened level of equal protection scrutiny to laws singling them out for special treatment.<sup>161</sup> The *Cleburne* Court, therefore, held that classifications on the basis of disability (or at least mental retardation) were entitled only to rational basis review.<sup>162</sup>

In *Garrett*, the Court imported the *Cleburne* rational basis standard to assess the constitutionality of state-based employment discrimination against people with all disabilities.<sup>163</sup> In doing so, the Court found that

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159. *Id.* The Court also imposed a third requirement for proper abrogation: that Congress "unequivocally intend[] to do so," but disposed of this requirement quickly, finding that this requirement "is not in dispute here." *Id.* at 363-64.

160. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

161. *Id.* At issue in *Cleburne* was a municipal zoning ordinance that required a special use permit for the operation of group homes for mentally retarded persons. While the Court found that the application of the ordinance to the Cleburne Living Center deprived the plaintiffs of the equal protection of the laws, it did so under a rational basis standard of review, rather than under a more heightened level of scrutiny. In declining to apply an intermediate level of scrutiny to classifications involving mentally retarded people, the Court stated:

[b]ecause mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

*Id.* at 446. The Court went on to hold that "[t]o withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate government purpose." *Id.* Historically, application by the Court of the lenient rational basis standard of review had resulted in the Court virtually always upholding the constitutionality of the challenged legislation or classification at issue. In *Cleburne*, however, by engaging in what Justice Marshall called "second order rational-basis review," *id.* at 458, the Court found that the singling out of the group home for a special use permit "appears to . . . rest on an irrational prejudice against the mentally retarded," and therefore that the City's actions violated the Fourteenth Amendment. *Id.* at 450.

162. In his concurring opinion in *Cleburne*, however, Justice Marshall pointed out that the Court's application of the rational basis standard of review in this case was more exacting than traditional rational basis review: "The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation." *Id.* at 456 (Marshall, J., concurring and dissenting in part). Some scholars writing about the *Cleburne* decision have described the Court's analysis as "rational basis with bite." See, e.g., Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

163. *Garrett*, 531 U.S. at 366-68. *Cleburne* only involved persons with mental retardation.

[u]nder rational-basis review, where a group possesses ‘distinguishing characteristics relevant to interests the State has the authority to implement,’ a State’s decision to act on the basis of those differences does not give rise to a constitutional violation. . . . ‘Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.’<sup>164</sup>

Thus, so long as a State could articulate any conceivable legitimate end for its discrimination, and its discrimination was a minimally rational way to achieve that end, its conduct would not be deemed to run afoul of the Equal Protection Clause. Additionally, the Court noted that a “legitimate” state goal is defined broadly enough to encompass administrative efficiency and saving the state money.<sup>165</sup> On this basis, the Court explained that a decision by a state employer to refuse to provide an accommodation—even a reasonable accommodation—to enable an individual with a disability to perform a job, would be perfectly rational and therefore constitutional.<sup>166</sup> As the Court stated, states “could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.”<sup>167</sup>

With this equal protection formulation as a backdrop, the Court next concluded that Title I of the ADA was not valid Section 5 legislation for two reasons: first, because Congress did not identify a pattern of constitutional violations by states against their disabled employees; and second, because even if such a pattern had existed, the provisions of Title I prohibited too much constitutional state action to make them “congruent and proportional” to the problem Congress sought to address in enacting the ADA.<sup>168</sup> The Court based its first conclusion on the fact that the plaintiffs’ brief cited only “half a dozen” instances of state employers discriminating against disabled people from the ADA’s legislative history,<sup>169</sup> and took the position that even though at least ‘several’ of those incidents “undoubtedly evidence an unwillingness on the part of state officials to make the sort of

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164. *Id.* at 366-67 (internal citations omitted).

165. *Id.* at 372.

166. *Id.* at 367.

167. *Id.* at 367-68. Aviam Soifer, who has written a scathing critique of the *Garrett* opinion, interrogates this language from Justice Rehnquist’s opinion:

Prior to *Garrett*, would anyone have thought that the Equal Protection Clause is somehow distinct from and apparently less than positive law? Startling as this notion may be, it is consistent with the Chief Justice’s dichotomous world view. States’ rights severely limit or even eliminate federal authority to enact positive law. Under *Garrett*, every state’s understandable and even commendable desire to ‘conserve scarce financial resources’ becomes a trump.

Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1296-97 (2003).

168. *Garrett*, 531 U.S. at 368-74.

169. *Id.* at 369.

accommodations for the disabled required by the ADA,”<sup>170</sup> “[w]hether they were irrational under our decision in *Cleburne* is more debatable.”<sup>171</sup> Additionally, even if all the cited examples constituted unconstitutional discrimination, the Court concluded, six instances did not amount to a “pattern.”<sup>172</sup>

The Court next found, in the alternative, that even if it were possible to “squeeze out of these examples a pattern of unconstitutional discrimination by the States,”<sup>173</sup> Title I of the ADA was still not valid Section 5 legislation because its prohibitions on constitutional state action were too broad. By way of example, the Court attacked Title I’s reasonable accommodation mandate, stating: “[W]hereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to ‘mak[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities.’”<sup>174</sup>

The Court took the position that even with the “undue hardship” exception to the reasonable accommodation requirement, “the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer.”<sup>175</sup> Although the Court recognized that Congress was not required to legislate with absolute precision when it sought to remedy equal protection violations, it nonetheless concluded that the gap between the amount of state action that Title I of the ADA prohibited and the requirements that the Constitution imposed on the states was too large to make Title I “congruent and proportional” to the problem of unconstitutional state discrimination against disabled employees.<sup>176</sup> Consequently, the Court held that the application of Title I to state employers was an impermissible expansion of Congress’ Section 5 authority, and was therefore unconstitutional.<sup>177</sup>

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170. *Id.* at 370.

171. *Id.*

172. *Id.* In concluding that there were only six examples of state-based employment discrimination against disabled people, the Court explicitly excluded from consideration the information contained in Appendix C to the *Garrett* opinion, which consisted of firsthand accounts of employment discrimination in all 50 states. *Id.* at 370-72. The Court dismissed these accounts as “unexamined” and “anecdotal” and noted that they were not even reported to Congress but rather to a special task force investigating disability discrimination. *Id.* at 370-71. The Court took the position that if Congress had believed that the task force information constituted a pattern of unconstitutional discrimination, it would have said so in the ADA’s legislative history. The fact that it did not do so explicitly, according to the Court, “reflects [Congress’] judgment that no pattern of unconstitutional state action had been documented.” *Id.* at 372.

173. *Id.* at 372.

174. *Id.* (citing 42 U.S.C. §§ 12112(5)(B), 12111(9) (2000)).

175. *Id.* (emphasis added). The Court was also concerned about the fact that “[t]he ADA also forbids ‘utilizing standards, criteria, or methods of administration’ that disparately impact the disabled, without regard to whether such conduct has a rational basis.” *Id.* (citing 42 U.S.C. § 12112(b)(3)(A) (2000)). The Court observed that disparate impact discrimination alone was not enough to render a statute unconstitutional under its Fourteenth Amendment jurisprudence, and pointed to the disparate impact provisions of Title I as another constitutional infirmity in the statute. *Id.* at 373.

176. *Id.* at 374.

177. *Id.*

### C. A Cramped Conception of Equal Protection

In concluding that Congress did not properly abrogate the states' Eleventh Amendment immunity under Title I of the ADA for actions for money damages against state employers, the *Garrett* Court conceptualized equal protection not as requiring "equal opportunity" for people with disabilities, but rather as requiring only "equal treatment." The Court took the position that the reasonable accommodation mandate was a measure beyond that which was required by the rational basis test. In so doing, the Court effectively removed the law's reasonable accommodation mandate (the equal opportunity concept) and instead held that—at least under the Equal Protection Clause—people with disabilities were entitled only to equal treatment. Under an "equal treatment" construct, also known as "formal equality," the law treats similarly situated people the same. "The underpinnings of this paradigm is that goods should be distributed according to merit and all individuals are able to compete equally if treated equally."<sup>178</sup> But for reasons discussed earlier in this Article, people with disabilities often start from a disadvantaged position, sometimes because of biology, more often because the built environment (including the attitudinal environment) was constructed with only a narrow spectrum of ability in mind.<sup>179</sup>

Given this, the disability community—and Congress—recognized that a formal equality approach to antidiscrimination addresses only a limited amount of the discrimination encountered by people with disabilities and ignores the disabling effects of seemingly "neutral" societal structures and institutions. To make the guarantee of equality meaningful, the ADA needed to and did include requirements for covered entities to take affirmative steps to eliminate barriers to participation. But in so doing, it crashed into "[t]he canonical idea of antidiscrimination in the United States,"<sup>180</sup> in which "'antidiscrimination' focuses on 'equal treatment,' while 'accommodation' focuses on 'special' treatment."<sup>181</sup> The United States Court of Appeals for the Seventh Circuit perhaps said it most bluntly: ". . . '[D]iscrimination,' as the ADA defines it, . . . has little in common with 'discrimination' in constitutional law."<sup>182</sup>

Others in this Symposium and elsewhere have questioned the limitations of the formal equality construct of American equal protection jurisprudence,<sup>183</sup> and it is not my purpose to revisit that issue here. Rather, my

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178. Mayerson & Yee, *supra* note 18, at 541.

179. See *supra* Part I.B.-C.

180. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643 (2001).

181. *Id.* at 643.

182. *Erickson v. Bd. of Governors*, 207 F.3d 945, 950 (7th Cir. 2001).

183. See, e.g., Ruth Colker, *The Antisubordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59 (1987). Some of these scholars have focused on equal protection jurisprudence by exploring the differences between an antidiscrimination approach and an antisubordination approach. Professor Ruth Colker, who has written extensively about equal protection and disability law, explained the antisubordination principle as follows:



focus is on that part of the *Garrett* Court's opinion that views Title I's reasonable accommodation provisions as a form of "special treatment" rather than as antidiscrimination measures necessary to remedy violations of the Equal Protection Clause, and specifically, what the implications of that opinion are for the disability rights movement and the legal construction of disability and the identities of people with disabilities.

One obvious area of danger, given the Court's holding, is that the reasoning on which *Garrett* is based will be employed to dismantle much of Title II of the ADA.<sup>184</sup> But there is another, less obvious and perhaps more insidious effect of this aspect of the *Garrett* decision: in taking the position that reasonable accommodation goes beyond the constitutional guarantee of equal protection, the Court espoused a view of people with disabilities that is diametrically opposed to how many such individuals—and the disability rights movement—view themselves and disability.

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[It is] premised on the assumption that society is a racial patriarchy. The problem with this hierarchy is that people at the bottom, e.g., women and blacks, do not have sufficient power to control or value their own lives. The evil is therefore the lack of power and control, not differentiations. . . . The antisubordination principle is a group-based perspective grounded in an understanding of the way certain groups have been historically treated unequally.

*Id.* at 64. Colker and other scholars have considered the antisubordination principle in the context of disability as well to argue that an antisubordination approach—rather than an antidifferentiation approach—should underlie the notion of equal protection. *See, e.g.,* Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000), in which Professor Colker argues:

Although some commentators might argue that any legislation that deviates from the pure color-blind or antidifferentiation framework by granting special protection or antisubordination rights violates the guarantee to equal protection, I argue below that such a position is inconsistent with the history and case law under the Equal Protection Clause. The history of the Fourteenth Amendment suggests that the ratifying Congress of 1868 was well aware of the debate between antidifferentiation and antisubordination perspectives.

*Id.* at 680-81.

184. Title II of the ADA contemplates awards of compensatory damages in situations where people with disabilities are able to prove that state or local government entities have violated their rights under the statute. Three circuits have stated that suits against states by private individuals under Title II exceed Congress' authority under Section 5 to abrogate state sovereign immunity. *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001); *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001); *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999). Other circuits have decided that in some circumstances, Congress exceeded its authority in abrogating state immunity when remedying violations of the Equal Protection Clause, but not when it acted to remedy violations of due process due to discrimination on the basis of disability. *Lane v. State of Tenn.*, 315 F.3d 680 (6th Cir. 2003); *Popovich v. Cuyahoga County Ct. C.P.*, 276 F.3d 808 (6th Cir. 2002); *Garcia v. S.U.N.Y. Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001); *Brown v. N.C. Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999). The Ninth Circuit, however, has unequivocally held that the abrogation of immunity under Title II of the ADA was proper. *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167 (9th Cir. 2002); *Dare v. Cal. Dep't of Motor Vehicles*, 191 F.3d 1167 (9th Cir. 1999). The United States Supreme Court will decide the issue in its 2003-04 term in the case of *State of Tennessee v. Lane*.

IV. IMPLICATIONS FOR (RE)CONSTRUCTING THE IDENTITY  
OF DISABLED PEOPLE

A. *By Employing a Formal Equality Construct of Equal Protection, Garrett Not Only Made a Statement About Equal Protection, It Also Made a Statement About How Disability Should Be Constructed and Understood.*

By taking the position that the Equal Protection Clause (and, by extension, any statute grounded in Congress' Section Five authority) does not require states to make "special" accommodations for people with disabilities, the *Garrett* court made a statement not only about the parameters of equal protection, but also about the identities of people with disabilities and about how society should construct and understand disability. In particular, by *explicitly* characterizing the reasonable accommodation mandate as "special treatment" that is outside the bounds of equal protection, the Court *implicitly* communicated the idea that this treatment is "special" precisely because there is something "wrong" with the disabled person that makes her unable to interact "normally" with the environment—the view of disability espoused by the medical model. The Court, rather than considering the idea that the plaintiffs' job environments were disabling, instead located disability in Patricia Garrett and Milton Ash. As one author explains it, "[t]he restructuring of job requirements or the dismantling of physical barriers can be seen as 'special accommodation' only if one conceives of the original way in which the job is structured as natural, and any modifications as something beyond dismantling employment discrimination."<sup>185</sup> Instead of adopting the socio-political model of disability to analyze whether the *Garrett* plaintiffs' employment situations and requirements were structured in ways that excluded people with certain disabilities, the Court instead viewed the plaintiffs' claims through the lens of the medical model of disability, and therefore concluded that such accommodations were "special" and beyond what is required by equal protection.

A closer look at some of the language in the *Garrett* opinion is instructive. For example, the Court could only have concluded that it is rational for state employers to refuse to provide even the most minimal accommodations for employees with disabilities by first (at least implicitly) concluding that there is nothing inherently discriminatory in a built environment that was not constructed with people with many types of disabilities in mind. The premise is this: when people and their needs are so far outside the "norm," it is not irrational to make choices about how to design institutions and structures without considering them, nor is it irrational to later refuse to do "special" things to "help" them when they are unable to participate in the

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185. Jennifer Lav, *Conceptualizations of Disability and the Constitutionality of Remedial Schemes Under the Americans with Disabilities Act*, 34 COLUM. HUM. RTS. L. REV. 197, 226 (2002).

society that was constructed without their needs in mind. The reason for this is because it is the *disabled person* who is special, who is broken, and who needs help—in short, the medical/pathological model of disability.<sup>186</sup>

This “biology is destiny” theme that underlies the *Garrett* Court’s exclusion of the reasonable accommodation mandate from its construction of equal protection is further compounded by the Court’s use of the term “special” to describe the accommodations required by the ADA. “Special” is a very loaded word with respect to disability, primarily because “it is always very clear, although we don’t use the words, that ‘special’ means segregated.”<sup>187</sup> In looking at examples such as special education, Special Olympics, special buses, Very Special Arts, etc., Mary Johnson notes that while many people who believe that “special” is the “correct solution to the disability problem,” come to that belief “with a generous heart,” it is almost always the case that “such people see the disabled person’s problems as being of a personal, medical nature, stemming wholly from their disability.”<sup>188</sup> As Johnson explains: “They need help, assistance. They need something that likely wouldn’t work for the rest of society—something special that works for them and their very different needs.”<sup>189</sup> And although a generosity of spirit may start out motivating the “special” solution, it can quickly evaporate or turn into outright hostility if that “solution” is perceived as something given to “them” that takes something away from “us.”<sup>190</sup> Disability studies scholar Lennard Davis, who has examined the constructions of people with disabilities in judicial opinions in disability rights cases, takes the position that the use of the term “special” in many of these cases invokes an image of the disabled plaintiff as self-centered and narcissistic.<sup>191</sup> After analyzing one such decision in detail,<sup>192</sup> Professor

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186. In an article focusing exclusively on the *Garrett* opinion, Susan Bandes compares the way in which the Court describes the states to the way in which it describes the plaintiffs, finding that:

The language about Garrett tends to portray her as an agent acting to bring on her fate, rather than being acted upon—she undergoes various treatments, she takes substantial time off from work. . . . She is portrayed as acting to move to another position rather than as being forced to do so. . . . [T]he sympathy and outrage in this opinion are not for Patricia Garrett, but for the state.

Susan Bandes, *Fear and Degradation in Alabama: The Emotional Subtext of University of Alabama v. Garrett*, 5 U. Pa. J. Const. L. 520, 526 (2003). Professor Bandes’ description suggests that the Court may have viewed Ms. Garrett not only as disabled, but perhaps also as somehow responsible for her disability (if not malingering or worse). She explains:

Emotional intensity does not attach to Patricia Garrett, breast cancer victim, or any of the other plaintiffs. The language describing disability discrimination in *Garrett* . . . tends toward the skeptical, dismissive, sometimes even approving—references to the rationality, or inconsequentiality, of refusing to provide special accommodations for the disabled. . . . There is never a sense in these opinions of a Court engaged in figuring out how best to respond to disability or age discrimination; never a sense of regret at the inability to afford a remedy, or responsibility for the fate of those left remediless.

*Id.* at 534-35.

187. JOHNSON, *supra* note 57, at 94.

188. *Id.*

189. *Id.*

190. *Id.* at 84.

191. Davis, *supra* note 52, at 196-98.

192. *DeSario v. Thomas*, 139 F.3d 80 (2d Cir. 1998).

Davis concludes that “[w]hen ‘special needs’ (and let us notice the valence of that term) are required, too often the requester is seen as overly self-concerned, overly demanding. . . . Because they are regarded as narcissists, people with disabilities are seen as demanding exceptions for themselves that overstep what employers can or should provide.”<sup>193</sup>

In light of the *Garrett* Court’s characterization of the reasonable accommodation mandate as “special treatment” a closer look at the particular employment situations of Ms. Garrett and Mr. Ash that gave rise to their claims of discrimination is warranted. Ms. Garrett, who had breast cancer, was terminated from her Director of Nursing position at the University of Alabama at Birmingham (UAB) after she returned to work from a leave to undergo chemotherapy and radiation, and was forced to accept a lower paying and ranking position as a nurse manager instead.<sup>194</sup> Although the Court did not provide much detail about Ms. Garrett’s situation, it appears that the only accommodation she requested for her disability was the four-month medical leave, which was allowable under UAB policy.<sup>195</sup> The Court did list the accommodations Mr. Ash requested: modification of duties to minimize exposure to carbon monoxide and cigarette smoke (to accommodate his asthma) and reassignment from a night shift to a day shift (to accommodate his sleep apnea).<sup>196</sup> The Court did not discuss the specific facts of either plaintiff’s situation throughout the rest of the opinion.<sup>197</sup> However, in analyzing the general issue of a state’s failure to provide reasonable accommodations as mandated by Title I, the Court presumed that in many situations, such discrimination would be “rational” and therefore would not violate the Equal Protection Clause.<sup>198</sup> The Court did not explore, for example, whether the Director of Nursing position could not allow for a leave of absence, or whether the duties associated with Mr. Ash’s security position could not have been modified to allow for less exposure to harmful substances—in short, to question whether the requirements of plaintiffs’ jobs were indispensable or whether they were constructed social conditions that had operated to exclude the plaintiffs from meeting employment requirements.<sup>199</sup> Instead, the Court viewed the situations that gave rise to the requests for accommodations as problems belonging to and residing in the individu-

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193. Davis, *supra* note 52, at 197.

194. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 362 (2001).

195. See *The Plaintiffs in the Garrett Case*, at <http://www.bazon.org/issues/disabilityrights/resources/garrett/plaintiffs.htm> (last visited Mar. 8, 2004). According to this description of the *Garrett* plaintiffs provided by the Bazelon Center for Mental Health Law, Ms. Garrett’s request for the leave was recommended by her physician, in part, because of the stress she sustained as a result of her employment situation once she disclosed that she had breast cancer. *Id.*

196. *Garrett*, 531 U.S. at 362. Both of these accommodations were recommended by Mr. Ash’s physician. *Id.*

197. A more detailed description of the nature of both plaintiffs’ disabilities and employment situations may be found in *The Plaintiffs in the Garrett Case*, at [www.bazon.org/issues/disabilityrights/resources/garrett/plaintiffs.htm](http://www.bazon.org/issues/disabilityrights/resources/garrett/plaintiffs.htm) (last visited Jan. 6, 2004).

198. *Garrett*, 531 U.S. at 372.

199. *Id.*

als.<sup>200</sup> In doing so, the Court employed—and endorsed—the medical model of disability, and rejected the socio-political model embraced by the disability community and Congress in enacting the ADA.

A logical conclusion when starting from the premise of the medical model of disability is that while it may be nice, charitable, or even noble to provide a sign language interpreter or to reassign an employee with sleep apnea to a different shift, it is not constitutionally permissible under the Equal Protection Clause to require (at least state) employers to do these sorts of things because doing so amounts to making those employers accountable for a problem that belongs to the different, disabled employee. By viewing disability through the lens of the medical model, the Court has not only begun to chip away at the viability of the reasonable accommodation mandate—an important vehicle toward achieving meaningful equality for people with disabilities, but in doing so, it has also judicially constructed the identities of people with disabilities in ways that locate the “problem” of disability in the individual, rather than in the interface between the individual, her impairment, and the built environment.

In this decision, the Supreme Court undermined decades of effort by the disability community to shift society’s view of disability away from the medical model and toward the socio-political and minority models of disability. In this sense, the *Garrett* decision represents a severe example of “the failure of the judiciary to adopt, or even to acknowledge, the sociopolitical perspective [of disability].”<sup>201</sup> But it is far from the only one. As Harlan Hahn explains in describing a number of pre-*Garrett* ADA decisions:

Most judicial decisions about disability rights in the ADA and related measures have steadfastly clung to the dubious proposition that the problems of disabled citizens are a direct result of their impairments. One major source of this confusion of disability and impairments probably can be ascribed to the failure of disabled people to surmount an initial hurdle to their social and political recognition, namely, they have frequently been unsuccessful in refuting implicit or explicit allegations of biological inferiority. Hence, by definition, people with disabilities are inherently unequal because they are functionally impaired.<sup>202</sup>

The *Garrett* decision is only one of the most significant recent illustrations<sup>203</sup> of the judiciary’s construction of people with disabilities as inher-

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200. *Id.*

201. Hahn, *supra* note 50, at 174 (citation omitted).

202. *Id.* at 170.

203. *See, e.g.*, *Wessel v. Glendening*, 306 F.3d 203, 212 (4th Cir. 2002) (offering as an example of conduct that would not be prohibited under the Equal Protection Clause the complaints of disabled voters that polling places were inaccessible, thus requiring them to vote by absentee ballot, and stating, “it is not necessarily irrational for a state to require disabled voters to submit absentee ballots rather than

ently broken, and as having “pathological individual attributes, typically linked to incapacity and dependence, which in turn may lead to social and economic isolation.”<sup>204</sup> While the medical model can, as Richard Scotch notes, “accommodate recognition of discrimination as a problem associated with disability,” it also “emphasizes that people with disabilities must ‘overcome’ the limitations of their impairments in order to function in society.”<sup>205</sup> This is directly at odds with the socio-political model of disability, which instead emphasizes the need for society to make adjustments to its structures and institutions in order to be accessible to people with a broad range of abilities.

Perhaps what is most disheartening about *Garrett* is that it reflects some of the same stereotypes and misconceptions that the Supreme Court held nearly 25 years ago when it decided *Southeastern Community College v. Davis*,<sup>206</sup> the first case interpreting section 504 of the Rehabilitation Act to reach the Supreme Court. In that case, the Court held that Frances Davis, a deaf woman, could be denied admission to a nurses’ training program at a community college because of administrators’ assertions that there were no reasonable accommodations that could be made that would allow her to participate in the clinical training part of the program.<sup>207</sup>

In describing that decision, Harlan Hahn outlined several types of accommodations that could have been made that would have permitted Ms. Davis to participate in the program (sign language interpreters, flashing notification lights, teachers who could sign), none of which seemed to have been meaningfully considered by the Court. Hahn observes, “[t]he justices seemed to imply that even a slight deviation from a model designed exclusively for a non-disabled person could be construed as a special favor to people with disabilities.”<sup>208</sup> In this sense, *Garrett* seems no different—the

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going to the expense of retrofitting or relocating an established polling place” or for a state to “refuse to provide special access for the disabled to courtrooms and public meetings”); *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98 (2d Cir. 2001) (holding that money damages are available as a remedy in private suits under Title II of the ADA only where the plaintiff can show that the violation was motivated by “discriminatory animus” as opposed to a “knowing” violation of the statute); *Thompson v. Colorado*, 258 F.3d 1241, 1252 (10th Cir. 2001) (holding that Title II is not congruent or proportional to the prescriptions of the Fourteenth Amendment because “[i]n contrast to the Equal Protection Clause prohibition on invidious discrimination against the disabled and irrational distinctions between the disabled and the nondisabled, Title II requires public entities to recognize the unique position of the disabled and to make favorable accommodations on their behalf.”).

While these disability rights cases have, like *Garrett*, arisen in the context of an equal protection analysis, others have presented in different ways. For example, in *Sutton v. United Airlines*, 527 U.S. 471 (1999), the Supreme Court held that persons with impairments that can be mitigated through devices, medication, etc., are not truly “disabled” within the meaning of the ADA. *Id.* at 475. Because people with these sorts of impairments sometimes do not “seem” disabled in the way the medical/pathological model envisions disability, the Court categorically excluded such persons from the definition of “individuals with disabilities” and also from protection from discrimination under the ADA. *Id.* at 482.

204. Scotch, *supra* note 3, at 219.

205. *Id.*

206. 442 U.S. 397 (1979).

207. *Id.* at 414.

208. Hahn, *supra* note 50, at 186.

Court seems to be perceiving whatever problems Ms. Garrett and Mr. Ash have with their employer as *their* problems, caused by *their* bodies not functioning as they should, and for which the State may properly absolve itself of any responsibility.

*Garrett* is a dramatic recent illustration of the fact that although the ADA seemed to represent significant legislative progress in the law's recognition of the socio-political model of disability, the cases interpreting the ADA, in particular its reasonable accommodation mandate, actually may be moving the disability rights movement significantly backward in terms of the courts' impact on societal constructions of people with disabilities. By characterizing the reasonable accommodation mandate as 'special treatment,' and those who try to enforce it as people seeking to externalize responsibility for a biological defect that resides in them (and is not the fault of society), the legal system may be undoing, rather than advancing the cause of the disability advocacy movement.

*B. Setbacks Caused by Judicial Interpretations of the ADA Endanger Identity-Based Social Movements Such as the Disability Movement.*

It is hard to know what to do with this. In tangible and intangible ways, the law and the formulation of the guarantees embodied in the ADA as "legal rights" are vitally important for a couple of reasons. First and most obviously, the substantive provisions of the ADA (if followed) can and have made an enormous difference in the day-to-day lives of some people with disabilities. I have witnessed this myself in working with clients with disabilities who have used the ADA to secure health insurance coverage, to obtain sign language interpreter services for doctors' appointments or court appearances, to secure the accommodations necessary to enable them to work, and to remove structural barriers that had prohibited their entry into public businesses. The second point is more subtle but equally important: the formulation of those guarantees as "legal rights" has been and may continue to be very important to both the self-identity and societal understandings of people with disabilities as members of a minority group, subjected to a history of oppression and subordination, and not a loose collection of individuals who have "something wrong with their bodies."

Professor William Eskridge has studied extensively the effect of the law on identity based social movements (IBSMs) and vice versa, and has concluded that the two are deeply intertwined in any number of ways, including the initial formulation of such movements.<sup>209</sup> Specifically, he postulates that legal rules and institutions were necessary elements of three preconditions for the IBSMs of the late twentieth century, such as women's liberation, gay rights, and the disability rights movement:

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209. Eskridge, *supra* note 21, at 419.

First, law helped define a class of people whose social identity was dominated by a legally stigmatizing trait. The extra economic and psychic costs imposed by law gave various groups stronger reasons to band together and to transform social attitudes. Second, legal institutions simultaneously provided stigmatized minorities with forums where they could object to exclusion and discrimination. . . . Third, other legal actors hostile to minorities gave minority agenda entrepreneurs the crises or dramatic events they needed to trigger mass mobilization against stigmatizing policies and attitudes.<sup>210</sup>

All three of these preconditions—definition of a class, forums to object, and events to trigger community mobilization—are, to at least some degree, reflected in the experience of the disability rights movement. For much of American history, people with disabilities were classified—and excluded based on those classifications—from many aspects of society, including education,<sup>211</sup> voting,<sup>212</sup> and in some circumstances, even from bearing children.<sup>213</sup> Simultaneously (and subsequently), legal institutions—courts and legislative bodies—provided people with disabilities with forums to address these exclusions, and there has been no shortage of crises or dramatic events to trigger mobilization of the movement.<sup>214</sup>

In addition to serving as both a catalyst and environment for the development of IBSMs such as the disability rights movement, Professor Eskridge also asserts that the law can play a significant role in the development of the identity of the group itself. He explains: “Legal rules and their enforcers strongly reinforced stigmas and disadvantages that not only provided important incentives and goals for minorities, but helped give concrete meaning to the ‘minority group’ itself.”<sup>215</sup> Depending on the circumstances, this may or may not be desirable, because when law channels the strategies of IBSMs, it channels their discourses as well. And “[a]s law channels the movements’ discourses, law changes those discourses, and those movements.”<sup>216</sup> An important question for the disability movement is whether that current channeling is compatible with the goals and vision of the movement, or whether it takes it in different directions and requires

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210. *Id.* at 425-26.

211. *See* Drimmer, *supra* note 25, at 1360-61.

212. *See, e.g.,* Kay Schriener et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 *BERKELEY J. EMP. & LAB. L.* 437 (2000).

213. *See* *Buck v. Bell*, 274 U.S. 200 (1927).

214. *See supra* notes 85-87 and accompanying text.

Some scholars, however, have argued that the lack of similarity among people with very different types of disabilities has led to a diffuseness of the disability rights movement that perhaps has made mobilization more difficult, and has made construction of a group-based identity very challenging. People with AIDS, for example, do not confront the same issues as those who are deaf or who have traumatic brain injuries. *See supra* note 72. A related point is that, unlike racial or ethnic minorities or women, many people with disabilities do not encounter others in their minority group from birth, and may only find others in their community upon reaching adulthood. *Id.*

215. Eskridge, *supra* note 21, at 422.

216. *Id.* at 460.



formulations of people with disabilities and society's obligations to them that may not be congruent with what the movement has or wants to envision for itself.

While the ADA, for the most part, seems compatible with the vision of the disability movement, as I look at the *Garrett* decision and its implications for social justice for people with disabilities, I become increasingly concerned about these issues. As I have argued elsewhere,<sup>217</sup> the law has already put people with disabilities in the position of having to self-identify with the ADA's definition of "individuals with disabilities" as a condition of invoking the statute's substantive protections—a definition that, at least in part, frames the person as being "impaired" in some way that "substantially limits" her participation in one or more "major life activities."<sup>218</sup> Such a definition may not be congruent with how at least some people with disabilities—particularly Deaf people—see themselves.<sup>219</sup> Thus, the law may already present at least some people with disabilities with a difficult choice: accept the legal label of "disabled" (and its attendant stereotypes), or reject the label and be denied the opportunity to use the ADA to enforce their rights.

Now, with the *Garrett* decision and its progeny<sup>220</sup> framing reasonable accommodation as "special treatment" rather than equal protection, the disability movement is once again confronting the risk of having its "rhetoric and perhaps even [its] ideologies [channeled] into the furrows plowed by judges and law professors."<sup>221</sup> As Eskridge points out, this is a particular risk with respect to equal protection issues,<sup>222</sup> where "formal equality has dominated other goals of the movement, because lawyers feast on formalisms[. T]he movement has tended toward assimilationist and reformist

217. See Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2 UTAH L. REV. 247, 273-75 (2001). The definition of "individuals with disabilities" in the ADA does include persons who are "regarded as" having a physical or mental impairment that substantially limits one or more major life activities, but this prong of the definition has virtually been written out of the statute by judicial decisions. See *id.*; *Doyal v. Okla. Heart, Inc.*, 213 F.3d 492, 494 (10th Cir. 2000); *Equal Employment Opportunity Comm'n v. Browning-Ferris, Inc.*, 225 F.3d 653 (4th Cir. 2000) (unpublished opinion).

218. 42 U.S.C. § 12102(2) (2000); Rovner, *supra* note 217, at 273-75.

219. The "D" in "deaf" is capitalized by people who view themselves not as "hearing-impaired"—or disabled in any way—but rather as members of a cultural and linguistic minority. OLIVER SACKS, *SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF* 3 (1989).

220. See, e.g., *Carten v. Kent State Univ.*, 282 F.3d 391 (6th Cir. 2002); *Popovich v. Cuyahoga County Ct. C.P.*, 276 F.3d 808 (6th Cir. 2002); *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002); *Robinson v. Univ. of Akron Sch. of Law*, 307 F.3d 409 (6th Cir. 2002); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001); *Thompson v. Colorado*, 258 F.3d 1241 (10th Cir. 2001); *Garcia v. SUNY Health Scis. Ctr.*, 280 F.3d 98 (2d Cir. 2001); *Denmeade v. King*, 2002 WL 31018148 (W.D.N.Y. 2002).

221. Eskridge, *supra* note 21, at 480.

222. The constitutional hallmark of an [identity based social movement's] shift to a politics of recognition, however, was a shift from due process aspirations to equal protection ones. . . . The basic stance was that any discrimination based upon a stigmatized trait was unconstitutional, at least for symbolic reasons. Although the civil rights movement sought economic advances as well, its core norm was dignitary: the state is not respecting black people unless it accords them all the same rights as white people.

Eskridge, *supra* note 21, at 484-85.

rather than separatist and radical stances, because lawyers cannot defend the latter before judges and legislators who are their audience.”<sup>223</sup> As the *Garrett* decision’s rejection of reasonable accommodation as equal protection illustrates, the “legal furrows” may be at best different from—and at worst antithetical to—the core goals of the disability advocacy movement, and more significantly—the vision of disability and people with disabilities put forth by the movement. The question therefore naturally arises: to what extent should the disability advocacy movement continue to cleave to the law and legal strategies as a means of defining and achieving its goals?

Michael Wald raised a similar question at a symposium sponsored by the University of California-Berkeley’s *Journal of Employment and Labor Law* in 2000, in which participants came together to explore the backlash to the ADA in the ten years since it had been enacted.<sup>224</sup> Professor Wald suggested several reasons why the disability movement’s reliance on the law as a vehicle for social change is problematic. First, he posited that such reliance “can deter, rather than bring about, political mobilization.”<sup>225</sup> Second, he suggested that “to win a legal victory frequently requires framing issues in ways that may undermine the kind of moral claims that people want to make.”<sup>226</sup> Finally, he pointed out that “under the ADA, litigation will consist of a lot of individual cases; it is really hard to build a movement in this manner. Future advances will require developing grassroots political activity, in addition to using the courts.”<sup>227</sup>

Yet the reaction to Wald’s point is instructive. As Linda Hamilton Krieger described it, “this notion provoked a great deal of discussion—and no small measure of consternation—among disability activists who rejoined that the right to assert a legal claim to access had transformed their individual and collective self-conceptions and their relationship to society.”<sup>228</sup> She summarizes: “Law, in this view, had brought the movement a long, long way.”<sup>229</sup>

It is for exactly this reason that many critical race<sup>230</sup> and critical feminist scholars<sup>231</sup> have rejected the Critical Legal Studies (CLS) position that a

223. *Id.* at 467.

224. See generally Symposium, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Struggles—A Symposium on the Americans with Disabilities Act*, 21 *BERKELEY J. EMP. & LAB. L.* 1 (2000) *et seq.*

225. Michael Wald, *Moving Forward, Some Thoughts On Strategies*, 21 *BERKELEY J. EMP. & LAB. L.* 473, 474 (2000).

226. *Id.*

227. *Id.*

228. Krieger, *supra* note 96, at 476.

229. *Id.*

230. See, e.g., WILLIAMS, *supra* note 70; Kimberle’ Williams Crenshaw, Comment, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988); Richard Delgado, *The Ethical Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *HARV. C.R.-C.L. L. REV.* 301 (1987); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323 (1987); Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 *HARV. C.R.-C.L. L. REV.* 297 (1987); Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401 (1987).

“rights” construct hampers, rather than furthers, the political advancement of traditionally marginalized groups.<sup>232</sup> The critical race and critical feminist theorists (and some disability theorists as well) take the position that the CLS critique of rights “seems to discount entirely the voice and the experiences of [racial minorities] in this country, for whom politically effective action has occurred mainly in connection with asserting or extending rights.”<sup>233</sup> Particularly for the disability advocacy movement, which has only obtained meaningful legal rights relatively recently, Patricia Williams’ words may resonate quite strongly:

For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one’s status from human body to social being. For blacks, then, the attainment of rights signifies the due, the respectful behavior, the collective responsibility properly owed by a society to one of its own.<sup>234</sup>

The point is equally applicable to people with disabilities, because “[r]ights empower people with disabilities. With rights, people with disabilities may legitimately contest what they perceive to be illegitimate treatment of them. . . . No longer must they endure arrangements that disadvantage them to the advantage of nondisabled citizens.”<sup>235</sup> Framing a request as rights-based imbues it both with legitimacy and morality.

Paul Higgins makes a related point about the role that rights play in the disability advocacy movement, in particular, the idea that in the absence of a rights construct, society tends to “look[] to individual characteristics to understand the difficulties experienced by people with disabilities,”<sup>236</sup> but that rights “encourage us, even require us, to evaluate our practices that may limit people with disabilities.”<sup>237</sup> In this sense, a rights construct can be seen as an integral part of the socio-political model of disability, with its focus on locating disability in the built environment rather than in the individual.

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231. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education, or “The Fem-Crits Go to Law School,”* 28 J. LEGAL EDUC. 61 (1988); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589 (1986).

232. See, e.g., Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

233. Williams, *supra* note 230, at 411-12.

234. *Id.* at 416.

235. PAUL C. HIGGINS, MAKING DISABILITY: EXPLORING THE SOCIAL TRANSFORMATION OF HUMAN VARIATION 199-200 (1992).

236. *Id.* at 199.

237. *Id.*

And so the question remains of exactly what role the law—and lawyers—can and should continue to play in the disability advocacy movement. While the law and, in particular, the legal rights conferred by the ADA significantly advance the movement's goals and the framing of disability as a social construct, judicial decisions interpreting the ADA have turned the statute on its head in ways that undermine the movement's ideals and vision in fundamental ways. The disability movement and the lawyers who work in and with it need to explore more fully the reasons for the disjuncture between the movement's understanding of disability and that of the judiciary in order to assess to what degree legal strategies—especially ADA lawsuits—are likely to advance the movement's goals.

#### V. BEYOND *GARRETT*—LAWYERING AND THE DISABILITY RIGHTS MOVEMENT

*“Show me the words that will reorder the world, or else keep silent.”*<sup>238</sup>

What then, might this mean for those of us who practice in the area of disability rights law, in particular, those lawyers who identify with and care deeply about the disability rights movement? What should we be discussing with the clients and disability communities with whom we work, who seek to use the ADA to enforce their rights, and more broadly, to create social change?<sup>239</sup>

##### A. *“A Law Cannot Guarantee What a Culture Will Not Give.”*<sup>240</sup>

As we explore these questions, one fundamental issue that disability rights clients and lawyers must acknowledge and grapple with is the idea that disability as a civil rights construct had not meaningfully taken hold in our national consciousness at the time the ADA was passed,<sup>241</sup> and that fourteen years later, there has been little significant progress in that direction.<sup>242</sup> Although the statute was patterned after federal civil rights law,<sup>243</sup>

238. TONY KUSHNER, *ANGELS IN AMERICA: A GAY FANTASIA ON NATIONAL THEMES, PART TWO: PERESTROIKA* 14 (1995).

239. Obviously, any discussion of the potential remedies available to a disability rights plaintiff bringing an action for employment discrimination against a state employer will necessarily include an explanation of what the *Garrett* holding means regarding the availability of compensatory damages.

240. JOHNSON, *supra* note 57, at IX.

241. Interestingly, the ADA was enacted with wide bi-partisan support—passing the Senate with ninety-nine votes in favor and only one opposed. It passed the House with a vote of 355 in favor and 58 opposed. 136 CONG. REC. 4611, 4614 (1990).

242. Indeed, a number of scholars and commentators have written about the ‘backlash’ to the ADA that has developed over the past decade. *See, e.g., Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies—A Symposium on the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000); BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (CORPorealities, Discourses of Disability) (Linda Hamilton Krieger ed., 2003).

243. *See supra* Part II.A.

and disability advocates invoked the language of civil rights to describe the barriers they encountered in the years leading up to the enactment of the statute, “[the ADA’s] major philosophical underpinnings had never really entered the national consciousness.”<sup>244</sup>

In her book, *Make Them Go Away*, journalist and author Mary Johnson documents in detail a number of reasons for and illustrations of this phenomenon, virtually all of which are grounded in the nation’s inability to let go of the medical/pathological model as a way of understanding disability.<sup>245</sup> As Johnson explains, “[r]easonable accommodation, demedicalization, universal design, customization and integration are simple enough concepts to understand, but hard to implement when the society you live in continues to see people with disabilities as having something wrong with them, needing cure or charitable help.”<sup>246</sup>

The entrenchment of the medical model meant that the ADA was enacted in a political and social environment that was simply not ready for it in the sense that much of the nation still viewed disability as a personal, medical problem that required an individualized medical solution, rather than as “[a] ‘group’ problem caused by society or that social policy should be used to ameliorate.”<sup>247</sup> Without any sense that society might be equally—if not more—responsible for the disabling effects of a person’s impairment, it was (and continues to be) virtually impossible to muster the collective moral outrage about society’s treatment of people with disabilities that is a necessary prerequisite to understanding the need for—or caring about—a disability discrimination law.

Johnson believes that the failure to create/foster this outrage, and to educate the public about the need for the ADA, was a conscious choice on the part of disability advocates, but that this choice (while understandable) may have had significant negative repercussions for the way the ADA has been understood by people—including judges—over the past decade.<sup>248</sup> Johnson notes that unlike other social movements, such as those for racial and gender equality, which made significant efforts to influence public opinion prior to attempting legislative initiatives, disability advocates did little to marshal public support for disability rights:

In a move exactly counter to that employed by organizers who’d planned Mississippi Freedom Summer in a bid to draw national attention to the situation of Southern blacks, in a move counter to that undertaken by the Campaign for Military Service to draw national attention to the Pentagon policy of dismissing gays in the armed forces . . . the organized disabled who labored in Washington to

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244. JOHNSON, *supra* note 57, at XII.

245. *Id.*

246. *Id.* at XVII.

247. *Id.* at 27.

248. *Id.* at 12-13.

craft what would become the only major piece of civil rights legislation to pass in nearly a quarter century eschewed trying to educate the public about the moral wrongness of disability discrimination.<sup>249</sup>

When asked why the disability movement had not made a significant effort to explain the ADA's antidiscrimination mandate to the press, one advocate responded, "we would have been forced to spend half our time trying to teach reporters what's wrong with their stereotypes of people with disabilities."<sup>250</sup>

Yet this kind of education may have been exactly what was necessary to help the media, and in turn the public, understand the fact and nature of discrimination against people with disabilities and the need for a comprehensive antidiscrimination statute such as the ADA.<sup>251</sup> As Johnson explains in the context of the African-American civil rights movement: "the nation heard, and eventually believed, that slavery was wrong. It heard and learned to believe that Jim Crow segregation was wrong; that treating people different simply because of their race was morally wrong," but that "the nation passed disability laws with almost . . . no public discussion of the moral issues that led people who themselves had disabilities to push for those laws."<sup>252</sup>

Because Americans understood (and still understand) disability primarily as a medical—rather than a political—phenomenon, "there has never been any 'disability question' as there was a 'Negro question' a century ago. There was never any real question in peoples' minds as to the proper way to handle the nation's truly disabled: Their problems were their nonfunctioning bodies; the solution, cure."<sup>253</sup> Consequently, disability as a civil rights con-

249. *Id.*

250. *Id.* at 13.

251. This is not to say that the media, politicians and the American people could not, with some effort, have found out about the sociopolitical model of disability, the nature of disability discrimination and the extraordinary harms inflicted on people as a result of that discrimination. Disability studies scholars such as Harlan Hahn, Richard Scotch, Robert Burgdorf, Steve Taylor, Bonnie Shultz and others had been writing in these areas for decades. Similarly, *Mouth Magazine*, *Ragged Edge* (formerly *The Disability Rag*) (disability rights periodicals) had been in print since 1981. Additionally, national disability organizations such as the National Council on Disability, the National Association of the Deaf, the National Federation of the Blind and National Council of the Blind, DREDF, etc., had been writing, talking and litigating about disability as a civil rights construct for decades.

252. JOHNSON, *supra* note 57, at 43.

253. *Id.* at 43. One of the other factors that Johnson points to as a cause of the entrenchment of the medical model of disability and the rejection of the civil rights model was that although there was a disability rights movement, it was "hard to find it." *Id.* at 23. In particular, there was no real 'face' to the disability rights movement. Unlike the African-American civil rights movement that had Martin Luther King, Jr. and Jesse Jackson or the feminist movement with Gloria Steinem and Patricia Ireland, there was no 'name' anyone knew that was associated with the disability rights movement.

Which is not to say there were not any famous people with disabilities—only that most of them did not self-identify as members of the disability advocacy movement. The most prominent example of this is Christopher Reeve, the actor who played Superman and was therefore well-known to the public, who became disabled as the result of an equestrian accident in 1995. Reeve explicitly rejected the sociopolitical view of disability and the disability rights movement, instead choosing to focus his efforts (and extraordinary financial resources) on finding a cure for his paralysis. In an interview with *New Mobility* magazine, he stated, "People say to me, 'why don't you give up on that [cure business] and work for

struct—and, more particularly, the ADA as an antidiscrimination statute—simply made no sense to many people because they perceived civil rights as the wrong lens through which to view the problems encountered by people with disabilities. Or as Johnson puts it: “the reason people pay so little attention to the claims of disability rights is that for most of us it doesn’t answer any need. The nation feels it doesn’t need the disability rights solution; it has a time-honored solution already: ‘help the handicapped.’”<sup>254</sup> And indeed, the ‘help the handicapped’ solution makes sense when the ‘problem’ of disability is viewed through the lens of the medical model. But that model has become so entrenched, so essentially unchallenged in our society, that it makes it extremely difficult to see other ‘solutions’ to the ‘problem’ of disability—such as antidiscrimination legislation like the ADA that is grounded in the socio-political model of disability.

The *Garrett* decision is a perfect illustration of this. By viewing the plaintiffs’ claims—as well as the entire reasonable accommodation mandate—through the lens of the medical model of disability, the Court reached the conclusion that an employer’s refusal to try solutions such as modifying job duties or changing shift assignments was “entirely rational,”<sup>255</sup> and in doing so, further lodged in American jurisprudence the view of disability as an individualized medical condition. The fact that, eleven years after comprehensive disability rights legislation was passed by Congress, at least five justices on the Supreme Court either did not understand or explicitly rejected the socio-political model of disability that underlies the ADA suggests three things: first, that litigation under the ADA with the current societal/political/judicial status quo is likely to be unsuccessful as a way to correct discriminatory behavior and vindicate individual rights;<sup>256</sup> second, that given the fundamental misunderstanding of disability on the part of the public and the judiciary, continued litigation under the ADA may well further entrench judicial and public construction of disability as a medi-

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better conditions for people with disabilities? Work harder for the ADA, bring up people on charges who fail to meet the [access] codes?” I can’t do both effectively, in my opinion.” Sam Maddox, *Christopher Reeve: Making Sense Out of Chaos*, NEW MOBILITY (Aug. 1996).

This wholesale rejection of the socio-political model of disability and the embracing of the medical model of disability by arguably the nation’s most well-known disabled figure did much to further entrench society’s view of disability as personal medical condition rather than a societal one: “As the most famous disabled person since Roosevelt, Reeve, perhaps inadvertently, bolstered the case against disability rights by offering a story of the disability experience that concurred with those who insisted that what people with severe disabilities faced were personal, medical problems, that what they needed was compassion—and a cure.” JOHNSON, *supra* note 57, at 129.

254. *Id.* at 43. Perhaps the single most significant example of this ‘time honored’ solution of ‘helping the handicapped’ is the Jerry Lewis Muscular Dystrophy Association Telethon. In 1990, the year the ADA was enacted, the MDA Telethon raised \$44 million in pledged donations. It was the twenty-fifth anniversary of the telethon; in those twenty-five years, Lewis had raised over one billion dollars. *Id.* at 131.

255. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372 (2001).

256. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-100 (1999) (finding that “defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level,” and that defendants prevail in eighty-four percent of appeals; “only prisoner rights cases fare as poorly.”).

cal/pathological condition; and third, that the only hope for eliminating discrimination against people with disabilities (through the vehicle of the ADA or otherwise) requires a sea change in the way that the public (including the judiciary) understand disability and the problems encountered by people with disabilities.

Professor Deborah Stone, who has written about the ways problems become (or do not become) part of political agendas, has stated that “[p]roblem definition is a process of image making, where the images have to do fundamentally with attributing cause, blame and responsibility.”<sup>257</sup> As described above, disability advocates have worked successfully *within* the disability community to remake the image of disability—but the socio-political model has really only gained acceptance within the disability community itself, and has not secured a meaningful foothold in the nondisabled consciousness. Given this fact, I have come to believe that before we will see more significant litigation successes under the ADA, the disability movement will need to make considerably more headway in recreating the image of disability in the minds of the nondisabled public, including those (mostly able-bodied) judges who are called upon to interpret the statute.<sup>258</sup> As Johnson explains, “it is only by viewing disability from this [socio-political] perspective that we can come to any true comprehension of why people with disabilities form ‘a discrete and insular minority,’ or understand the real nature of disability discrimination, which so many judges seem to miss.”<sup>259</sup>

I believe there is a role for lawyers in this process of helping the nation do the work of re-learning/re-understanding disability. Even more, I believe that disability rights lawyering in the second decade of the ADA, if it is to help achieve any measure of equality for people with disabilities, must include more than just litigation.<sup>260</sup> I think it must also embrace what scholars have alternatively called ‘political’ lawyering<sup>261</sup> or ‘collaborative’ lawyer-

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257. Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281 (1989).

258. I am not suggesting that this will be an easy task. Deborah Stone has identified four conditions that make some causal stories more likely to be successful than others: “if the proponents have visibility, access to media, and prominent positions; if the theory accords with widespread and deeply held cultural values; if it somehow captures or responds to a “national mood;” and if its implicit prescription entails no radical redistribution of power or wealth.” *Id.* at 294. The disability movement has an uphill battle on every one of the four.

259. JOHNSON, *supra* note 57, at 174.

260. The need to explore vehicles for social change other than litigation is not unique to the disability rights situation. As Martha Minow explained in a 1996 symposium on political lawyering, “courts, though briefly available to assist progressive struggles, are now more likely to set back progressive causes. Consider the decades of conservative appointments to the federal bench, restrictive rulings on basic procedural issues . . . and apparent limitations of judicially mandated social change even where court victories occur. There may still be room for some test-case impact litigation, but such strategies can no longer be the flagship of contemporary political lawyering.” Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287, 291 (1996).

261. See, e.g., *id.*; Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996).



ing<sup>262</sup> or ‘rebellious’ lawyering<sup>263</sup>—in short, a vision of lawyering that involves collaborating with clients and client communities<sup>264</sup> to alter structural and societal impediments to equality and decency.<sup>265</sup>

### B. A Renewed Call for Collaborative Lawyering

In making this call for more collaborative lawyering on the part of disability rights lawyers, I am referring to theories of lawyering first developed in the late 1980s and early 1990s, primarily by clinical scholars who shared a sense that traditional models of lawyering—even those that advocated a client-centered approach<sup>266</sup>—disserved clients and communities because of a lack of client participation in the framing and resolution of issues, as well as the implementation of remedial strategies.<sup>267</sup> Reacting in part to the tradi-

262. See, e.g., Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992); Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

263. See, e.g., LOPEZ, *supra* note 22; Gerald R. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989).

264. In describing the idea of community for purposes of discussing community lawyering, Andrea Seielstad writes that

[t]he concept of community can have a multitude of meanings, depending on the context in which it is expressed. It may refer to a group of people united by a common geography, for instance, or a group joined by common interest, cause, or sharing another common background such as class, gender, ethnicity or culture, and/or race. Its contours depend on definitional categories and boundaries. . . . Alternatively, a group of people organized and assembled by a common cause or commitment to a particular set of legal rights or political, economic or social status may constitute a community.

Andrea Seielstad, *Community Building As a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445, 449 (2002).

265. Minow, *supra* note 260, at 285. Other terms for this type of lawyering include “critical lawyering theory,” “the new poverty law scholarship,” and “the theoretics of practice movement.” Piomelli, *supra* note 262, at 441-42 nn.62-67.

266. The client-centered psychologist Carl Rogers has been identified by several scholars as a central figure in the development of the client-centered model of lawyering. See Stephen Ellman, *Empathy and Approval*, 43 HASTINGS L.J. 991, 1011, n.60 (1992); William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 511-12, n.92 (1984). The client-centered approach to lawyering takes the position that lawyers should work with clients in a way that allows clients to make decisions themselves, emphasizing the client’s importance in resolving her own legal problems. DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991). “Together, the lawyer and her client consider the various alternatives available in the case and the likely consequences of these alternatives and then weigh the advantages and disadvantages of the alternatives in reaching a decision.” Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 503 (1994).

267. The three leading contributors to the development of this body of theory and scholarship were Gerald Lopez, Lucie White, and Anthony Alfieri. Piomelli, *supra* note 262, at 432. See *supra* notes 258-59. Collaborative (or community) lawyering scholarship has developed extensively over the past decade. For a sampling, see, e.g., Susan Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URB. L.J. 771 (1998); Christine Zuni Cruz, *[On The] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Shin Imai, *A Counter-Pedagogy for Social Justice:*

tional public interest lawyering wisdom that “strategic litigation, coordinated and conducted by expert, seasoned attorneys, is the most effective response and antidote to governmental oppression of the relatively powerless,”<sup>268</sup> collaborative lawyering theorists believe “it is naively sanguine to expect litigation, unaccompanied by political mobilization, to effect significant social change or to preserve gains previously won.”<sup>269</sup> Recognizing that most of the issues confronting traditionally marginalized people are fundamentally political, proponents of collaborative lawyering view the core lawyering activity as persuasion, and value clients and communities’ active participation in individual and collective persuasive efforts to change the status quo. One scholar explains the approach of collaborative lawyers this way:

They view lawyering as fundamentally a process of persuasive storytelling, in which the depiction or ‘re-presentation’ of clients is central to obtaining desired responses from others. Framing who clients and other actors are, and what happened or is happening is [sic] to them, is central to persuasion, and thus lawyering. For reasons of politics, ethics and efficacy, these scholars believe that lawyers should encourage clients and their lay (i.e., nonlawyer) allies to participate actively in this framing.<sup>270</sup>

Also significant is the idea that the persuasive work of collaborative lawyering should happen wherever and whenever possible, rather than waiting for “‘big’ chances to change things in a ‘big’ way all at once.”<sup>271</sup> With this in mind, collaborative lawyering theory teaches that lawyers should “regard every form of group work as important to mobilization,” and should “consider educational aims as central to every form of mobilization.”<sup>272</sup>

Given the problems that currently confront the disability rights movement—in particular, the fact that most of society still understands disability as a medical problem rather than a social one—I believe that a collaborative lawyering approach has much to offer lawyers who are working with disabled clients and communities toward achieving meaningful equality for people with disabilities.<sup>273</sup> First, by envisioning lawyering as the work of a wide range of “co-eminent practitioners”<sup>274</sup> such as lawyers, clients, community activists, organizers, media, administrators, policy makers, research-

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*Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195 (2002); Karen L. Loewy, *Lawyering for Social Change*, 27 FORDHAM URB. L.J. 1869 (2000); Seielstad, *supra* note 264.

268. Piomelli, *supra* note 262, at 455.

269. *Id.* at 456.

270. *Id.* at 439.

271. *Id.* at 483 (citing LOPEZ, *supra* note 22, at 73).

272. LOPEZ, *supra* note 22, at 77.

273. This is not to say that there are no disability rights lawyers who employ a collaborative lawyering approach. One such attorney is Steve Gold, who practices in Philadelphia and works with individual clients as well as disability activist organizations, such as ADAPT and Not Dead Yet.

274. LOPEZ, *supra* note 22, at 55.

ers, and funders, the collaborative approach brings to bear the experiences and expertise of a wide range of people to the enterprise of persuasion, thus increasing the possibilities and opportunities to educate society that disability needs to be viewed as a socio-political construct.<sup>275</sup> Additionally, by expanding the vision of the lawyer's role to include everything from political activist to counselor to mediator, facilitator, collaborator, or statesman,<sup>276</sup> disability rights lawyers working with the disability community can invoke a broad array of problem-solving skills to help shift the way that society understands disability and the issues that disabled people confront.

An additional benefit of the collaborative approach derives from the fact that collaborative lawyering views the relationship between clients and lawyers as a true alliance,<sup>277</sup> and therefore seeks to avoid the imbalance of power that exists in traditional attorney-client relationships.<sup>278</sup> While lawyers are, in some circumstances, expert in ways that clients are not, lawyers and clients seeking to employ a collaborative approach must "guard against the tyranny of expertise."<sup>279</sup> As Lopez explains, "[t]oo often, especially when working with the politically and socially subordinated, lawyers presume that theirs is the only knowledge that counts."<sup>280</sup> This is of even greater concern in situations in which able-bodied attorneys speak 'on behalf of' disabled clients and tell their stories, as the dynamic in this type of relationship replicates the very sort of oppression that disabled people are frequently subjected to by well-meaning 'experts' in other areas of their lives, and which has functioned in legal and other contexts to deny them

275. As Michael Wald notes, further coalition-building, both within and outside the disability movement, is essential to the enterprise of moving the socio-political model of disability into more widespread acceptance in society. Wald, *supra* note 225, at 475.

276. Seielstad, *supra* note 264, at 451.

277. The late Gary Bellow stated, "[a]lliance' seems as good a word as any to describe this relationship because alliance generates bonds and dependencies and is grounded, at least in aspiration, in forms of respect and mutuality that are far more personal and compelling, for many of us who do political legal work, than the demands of some notion of client-centered lawyering, no matter how strongly held." Bellow, *supra* note 261, at 303.

278. Ascanio Piomelli thus describes an important advantage of collaborative lawyering as "its integration of problem-solving approach and progressive politics. Collaborative lawyers' means and ends are consistent: The path into the promised land of an egalitarian, participatory democracy is pursued by means of egalitarian, participatory democracy." Piomelli, *supra* note 262, at 486.

279. This "tyranny" can take a number of forms and can arise from a variety of causes, including an inability on the part of the lawyer to see that the legal frame by which she defines the client's problem may not reflect the problem (or significant aspects of it) in the way that the client sees it. In describing his early experience of working as a staff attorney at Keewaytinok Native Legal Services, Professor Shin Imai recounts some difficult early experiences, and explains how a collaborative lawyering approach might have been beneficial:

I would have been better prepared for these encounters if, in law school, I had been made more conscious of the fact that, while I was being taught law, I was also being taught to structure reality. In Moosonee, by dissecting a treaty rights dispute and organizing its components into legal categories, I was promoting the structure of reality that I had been taught in downtown Toronto. I began, in problem-solving terminology, with the wrong "problem space." . . . In other words, rather than fragmenting the First Nation's reality to fit into categories of law, I should have fragmented mainstream law to fit into the categories of the First Nations.

Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195, 219 (2002).

280. Lopez, *supra* note 263, at 1629.

basic rights of participation and self-determination.<sup>281</sup> Lawyers seeking to employ a more collaborative approach with disability rights clients and communities must “acknowledge both that [disabled people] bring unique insights to their collaborations with lawyers (and other allies) and that the interaction of their knowledge with that of their collaborators promises not only mutual growth but substantial strategic payoffs.”<sup>282</sup> By being vigilant in finding ways to “portray, represent, and characterize” legal claims in ways that are grounded in the daily, lived experiences of people with disabilities, lawyers employing a collaborative approach are more likely to help clients have a more “politically satisfying” experience, and also “to generate a far more effective legal product.”<sup>283</sup> We cannot expect society—including judges—to understand and accept the socio-political model of disability without greater exposure to it; helping to create forums (legal and other) where disabled people can tell their stories and share their lived experiences in moving through society with disabilities is an important role that lawyers can play in the movement for disability rights.

A final and related point is that because collaboration assumes that lawyers and clients will teach and learn from each other and will work together to develop and carry out persuasive strategies, “[c]ollaboration entails a level of engagement that cannot help but change the participants.”<sup>284</sup> This necessarily involves lawyers regarding clients as people “with experiences worth sharing, with knowledge worth evaluating, and with a will to fight that might well prove itself invaluable in dealing with life’s hardships and in pursuing its possibilities.”<sup>285</sup> It also means going beyond paternalistic acceptance of the ideas of disabled people or the placing of disabled clients and communities on pedestals. Indeed, true collaboration involves not simply adding “to each other’s knowledge, a bit of this and a bit of that coexisting easily,” but also envisions a “desire to challenge what each knows—how each gained it, what each believes about it, how each shares and uses it.”<sup>286</sup> In this way, collaborative lawyers engage their clients as true equals, “worthy of respect but also of caring confrontation.”<sup>287</sup> In considering, for example, an initial interview with a client who comes to a lawyer with a disability rights issue, “[t]he core of the process,” as Gerald Lopez explains, “is the [lawyer’s] effort to understand the client’s story in his own terms and [for the lawyer to] use her own knowledge and experience to help the client refine his understanding, while,” at the same time, “[the lawyer is thinking] about the stories she might tell on behalf of the client (or coach the client to

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281. I have discussed the risks of this dynamic elsewhere. See Rovner, *supra* note 217, at 307-13.

282. Lopez, *supra* note 263, at 1629.

283. *Id.* at 1710.

284. Piomelli, *supra* note 262, at 448.

285. Gerald Lopez, *An Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 HARV. C.R.-C.L. REV. 315, 322 (1996) (describing the lawyering of Professor Gary Bellow).

286. LOPEZ, *supra* note 22, at 53.

287. Piomelli, *supra* note 262, at 479.

tell on his own behalf) to various audiences.”<sup>288</sup> This in itself can be an extraordinarily empowering experience, particularly for some people with disabilities who have consistently had their own knowledge and expertise about their experiences of being in the world dismissed and devalued, or tacitly accepted without any critical inquiry.

Given the extraordinary entrenchment of the medical model of disability and the myriad ways in which the model affects everything from social policy, legislation, judicial decisions, and individual and societal perceptions about disability, those who seek to change the status quo face a daunting task—the need to develop a compelling moral vision (or visions) to overcome the perception of disability as pathology. By employing a collaborative approach, disability rights lawyers and their clients and communities can draw on each other’s expertise to develop and disseminate that vision to people who will hopefully understand and begin to respond in ways that will result in true equality for people with disabilities.<sup>289</sup>

## VI. CONCLUSION

It is January 13, 2004, and I am listening to Nina Totenberg<sup>290</sup> describe the oral argument at the Supreme Court earlier today in *Tennessee v. Lane*.<sup>291</sup> At issue in *Lane* is whether Congress had the constitutional authority to require states to pay money damages for violations of Title II of the ADA.<sup>292</sup> One of the plaintiffs in the case, George Lane, is paralyzed and uses a wheelchair for mobility.<sup>293</sup> Because of Tennessee’s failure to make its courthouses accessible in twenty-six counties, including the one in Polk County where Mr. Lane lives, he was forced to crawl up two flights of stairs

288. Lopez, *supra* note 263, at 1613.

289. In encouraging a more collaborative approach to lawyering, I am not suggesting that the disability rights movement wholly abandon litigation under the ADA as a strategy for achieving equal rights. While many judicial decisions under the ADA have been harmful to the interests of people with disabilities and the disability rights movement, both in terms of whittling away rights and remedies under the ADA as well as the medical/pathological constructions of disability that some of these decisions perpetuate, there have been some ADA decisions that have afforded disabled people remedies that likely would not have been available elsewhere. *See, e.g.*, *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); *Olmstead v. L.C.*, 527 U.S. 581 (1999); *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206 (1998); *Bragdon v. Abbott*, 524 U.S. 624 (1998). For this and other reasons (*see* discussion of importance of rights to traditionally subordinated groups *supra*), I do not think it is in the best interests of the disability movement to abandon ADA litigation wholesale. Rather, I am suggesting that disability rights clients and lawyers must “learn to link [ADA] litigation with other strategies,” both to advance the goals of the movement and to “challenge the traditional understanding of the lawyer-client relationship.” Lopez, *supra* note 263, at 1705.

290. *Supreme Court Hears Disabled Access Case, All Things Considered* (National Public Radio, Jan. 13, 2004), available at <http://www.npr.org/run downs/run down.php?prgId=2&prgDate=13-Jan-2004>.

291. *Tennessee v. Lane*, 315 F.3d 680 (6th Cir.2003), cert. granted --U.S.--, 123 S.Ct. 2622 (2003).

292. *See id.* at 3, 23, and generally.

293. A second plaintiff in the case is Beverly Jones, who is also paralyzed and who is employed as a court reporter in Tennessee. Because the State has not made its courthouses accessible in many counties, Ms. Jones was unable to work in those courthouses, or was required to be carried upstairs, often by strangers. Other plaintiffs in the case include Ann Marie Zappola, Ralph E. Ramsey, Sr., Dennis Cantrel, and A. Russell Larson, all of whom have disabilities that make it difficult or impossible for them to climb stairs.

to attend an arraignment on misdemeanor traffic charges.<sup>294</sup> When he refused to do so at a second hearing and also refused to be carried up the stairs because he feared for his safety, the State arrested and jailed him for failure to appear at the hearing. Lane and five others with mobility impairments sued the State of Tennessee and several of its counties alleging that the defendants violated Title II of the ADA by maintaining inaccessible courthouses.<sup>295</sup> Standing on the steps of the United States Supreme Court before the argument, Michael Moore, the Tennessee Solicitor General, summarized the State's position: "[t]he mere existence of a staircase doesn't deny anyone a constitutional right."<sup>296</sup>

Because Title II of the ADA applies to state and local government entities, it protects people with disabilities against exclusion from or unequal treatment in courthouses, schools, health care programs, public libraries, social services offices, polling places—in short, every aspect of public life. When, at the oral argument, the United States Solicitor General<sup>297</sup> pointed out that many aspects of public life, such as voting, involve fundamental rights, the following exchange ensued:

Question: . . . What does it mean to say discrimination in voting? Does that mean that a person was actually not allowed to vote?

Mr. Clement: In some cases.

Question: How many cases do you have where the person was not actually allowed to vote instead of not being facilitated the ability to vote?

Mr. Clement: Well, Mr. Chief Justice, let me say the relevant congressional committee heard testimony of individuals that were turned away from the voting place on election day . . .

Question: What do you mean turned away? Turned away because there was no elevator?

Mr. Clement: Turned away because there was no elevator—

Question: Is that a constitutional violation? . . . So if you want to vote, you have to find assistance to get up there. . . . Is that a

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294. *All Things Considered*, *supra* note 290..

295. The plaintiffs sought both damages and injunctive relief. The State moved to dismiss on Eleventh Amendment grounds, the district court denied the motion, and the State appealed. As amended on rehearing, the Sixth Circuit affirmed the district court's decision. *Lane v. State of Tenn.*, 315 F.3d 680 (6th Cir. 2003). The State subsequently sought review by the Supreme Court.

296. *All Things Considered*, *supra* note 290.

297. The United States intervened in the suit to defend the constitutionality of Title II.

constitutional violation? . . . How many of these instances did Congress find of people who were actually refused the right to vote?

Mr. Clement: . . . [T]o give you a feel for the sort of order of magnitude, in the state task force reports that Congress authorized, there were 35 instances of inaccessible voting places. Now, I can't tell you the breakdown of how many of those involved people refused at the door and how many of those involved simply physical barriers. But I do think it shows there was a significant problem in this area.

Question: I don't think it does at all. Inaccessible voting place proves nothing at all. It just proves that the state did not go out of its way to make it easy for the handicapped to vote, as it should, but as it is not constitutionally required to do. To simply say many voting places are inaccessible proves nothing at all . . . They're not saying you can't vote, they're saying we don't have facilities for you to get into the voting place.<sup>298</sup>

These exchanges confirm my belief that the legal and social meaning of disability is in danger. They illustrate that fourteen years after the enactment of the ADA, at least some members of the Court continue to view the built environment as natural and normal, and that those who move in, communicate with and perceive the world in ways that are more than "half a standard deviation from the norm"<sup>299</sup> are themselves flawed. "*So if you want to vote, you have to find assistance to get up there.*" "*They're not saying you can't vote, they're saying we don't have facilities for you to get into the voting place.*" The implication is that it is the disabled person who is broken, who is different in ways that cannot have been anticipated and planned for by the State, and therefore that there is nothing wrong with having to be carried up the stairs to a courtroom if you are paralyzed,<sup>300</sup> or, if you are blind, having to tell someone else how you wish to vote so that someone else can do it for you. The subtext is this: "you are so different, your needs are so extreme that being subjected to these violations of your dignity and privacy is nothing. Really, you are lucky we let you participate at all."

The notion of disability and people with disabilities that underlies the statements made by some of the justices is antithetical to the socio-political model of disability developed by the disability rights movement, which has

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298. *Tenn v. Lane*, No. 02-1667, Transcript of Oral Argument at 38-40.

299. Hahn, *supra* note 50, at 173.

300. At another point in the *Lane* argument, counsel for the *Lane* plaintiffs was asked: "He [George Lane] has a constitutional right for the state to provide him the means of being present at his trial. Now, does the means have to be an elevator or could it be someone assisting up the stairs? Now, there—it . . . may be less dignified in the latter . . . situation, and that's a proper subject for statutory activity, but is it a constitutional violation . . . ?" *Lane* Transcript, *supra* note 2918, at 31.

long urged that the key to understanding disability is a recognition that the range of human difference is extensive, and that in order to ensure equality for people with disabilities, such differences must be afforded legal protection in the form of accommodations to the built environment. The ADA—in particular the reasonable accommodation mandate—represented a significant step toward this vision of equality, and of disability itself as a socio-political construct.

Yet only a decade later, we have seen *Garrett* and similar judicial decisions employ formalistic equal protection jurisprudence relating to race (which is properly based on notions of sameness) to de-core this socio-political theory of disability. The result of this legalistic legerdemain<sup>301</sup> is disastrous: not only are the rights of disabled people in jeopardy, but the basic conception of their identities may be swallowed by a legally misplaced idea of who the judiciary believes they should be, based in part on legal principles about race that do not properly translate in the context of disability and disability-based discrimination.

In the process of reaching its holding in *Garrett*, and in the questions of some of the Justices at the *Lane* argument, the Court both employed and espoused a medical model of disability, and in doing so, may have further entrenched that model in a society that has already been resistant to understanding disability as a civil rights construct. The work of disability advocates that ultimately persuaded Congress to enact the ADA—a civil rights statute that employs the socio-political model of disability—was, for the most part, unnoticed by most of the able-bodied public, who still seem to be unaware of the debate about how disability should be understood.

Before we can hope to see broader understanding of the idea of equality for people with disabilities, we need to create opportunities for the dialogues that are necessary predicates to that understanding. As Mary Johnson writes, “[p]eople have to deal with their own constructs of disability, in their own minds. As a nation we have barely begun that work; barely recognized, even, that it is work desperately needing to be done, and that, contrary to everything we have been taught, this is public, not private work. We need to talk about the experience of disability as a political and cultural one, not a personal, medical one.”<sup>303</sup>

As *Garrett* and now *Lane* illustrate, lawyers have a role to play in this enterprise of talking about disability as a civil rights construct, and opportunities to do so exist both within and without client-lawyer relationships. Through those discussions, wherever we can find and create them, lawyers, disabled clients, and disability communities may be able to help shape societal understanding of disability. By employing a collaborative approach, lawyers working together with the disability rights movement may be able

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301. I borrow this term from my colleague, Patti Alleva.

302. Matthew Diller, *Judicial Backlash, the ADA and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 34 (2000); JOHNSON, *supra* note 57, at 231.

303. JOHNSON, *supra* note 57, at 231.



to help influence the negotiation over the meaning of disability in ways that honor and respect how people with disabilities view themselves, disability, and equality.

