Why Incorporate Disability Studies into Teaching Discrimination Law?

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I. INTRODUCTION

Those of us who teach employment discrimination law, particularly as a separate course or part of a course on employment law,¹ are used to covering a broad range of legal models and issues pertaining to the protected classes under Title VII of the Civil Rights Act. The disparate treatment, disparate impact, and hostile environment models of discrimination apply broadly and are often discussed within a framework of feminist, critical race, or other perspectives. For example, I engage the class in a discussion of whether Title VII is color-blind or, indeed, if it makes sense to have a discrimination law that is color-blind.² We engage in a discussion of racial identity status as distinct from, but related to, racial identity performance and what it means for Title VII to have difficulty protecting individuals on the basis of performance of racial identity. We also engage in similar discussions about the performative nature of gender identity, noting that gender identity is complicated because gays, lesbians, and transgenders lack explicit coverage on the basis of their sexual orientation or gender identity under Title VII but also noting that they may receive protection for nontraditional performance of gender itself. And, of course, we note that race and gender are not distinct issues but part of a more complex and

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¹For example, I teach a senior-level course in employment discrimination law and a graduate-level course in employment law in the Management Department at Texas A&M University. The undergraduate course is much more social policy–oriented than the graduate course, but both courses incorporate scholarly, theoretical critiques of employment discrimination law.

nuanced social issue—how do various identities intersect to experience inclusionary or exclusionary patterns in organizations, society, and under the law?

Because my undergraduate course is cross-listed with Women’s Studies, we focus in particular on the myriad ways in which discrimination law both reflects and evolves from feminist theory. Students need to understand the sameness–difference debate that inhabited liberal and cultural feminisms to understand how pregnancy is treated under the Pregnancy Discrimination Act. For them to envision further inclusion for women in organizations, they need to see that the sameness–difference debate is inadequate and that newer feminist perspectives on power, status, and exclusion are important to re-visioning the way in which pregnancy could be treated under the law. In other words, a full discussion of discrimination law need not stop at “this is what the law currently is and this is what it does and does not accomplish,” but can also discuss “this is how the law might be different if we wanted to accomplish X with it.” When employers raise arguments that “women just aren’t interested” in certain jobs and organizations should not be held responsible for not hiring or promoting women, students can either be left to accept that argument at face value as a valid defense under the law, or they can explore a law that would take into account the ways in which organizations shape all employee and applicant preferences for various types of jobs and thus should be held responsible. Students can be led away from inadequate and essentialist notions of what “men are like” and “women are like” and “this is the way the world works” to think critically about what people are like, what they can be like, what shapes people’s identities and preferences, and what

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6 This argument was central, for example, in *E.E.O.C. v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986).
type of interplay between law and society would produce a more egalitarian set of work arrangements.\textsuperscript{7}

It is important to view American discrimination law through a lens of critical race and feminist theory. Indeed, the law as we know it owes much to these perspectives. For example, the hostile environment model might not exist as a form of intentional discrimination had Catharine MacKinnon not put words to the experiences of many women in organizations, ultimately demanding that such abuses of power and status in organizations be recognized as discriminatory.\textsuperscript{8} Racial and ethnic harassment soon became better understood as well, with the particular difficulties experienced by women of color being highlighted by theorists. Thus, the importance of race, ethnic, and gender studies as multidisciplinary enterprises that have influenced law cannot be overemphasized.

In this article I attempt to make a strong case that another theoretical perspective be brought into our discourse of employment discrimination law—that of disability studies. Disability studies is a relatively new field that seeks to examine the multiplicity of ways that people assign meaning to “normal” and “abnormal” lived mind/body experiences, to shed light on how people attempt to eliminate or control that which is considered undesirable regarding human life and at the same time determine through cultural and contextual practices who is entitled to power, wealth, and status and to explicate how humans create, modify, and manage their identities. In particular, it helps us to understand both the evolution of and the limitations of the Americans with Disabilities Act (ADA) (even as amended),\textsuperscript{9}

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\item The ADA was amended by the Americans with Disabilities Act Amendments Act (ADAAA), which went into effect January 1, 2009. Because of the familiarity of both acts to instructors of employment discrimination law, I will not cite provisions to the statutes but just refer to the acts and their provisions more generically. Because case law to date is based primarily on the ADA prior to amendment, my references to the impact of the ADA in the text tend to be based on case law prior to enactment of the ADAAA. I make clear where the ADAAA may, or may not, make a difference in judicial interpretation.
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informing us as to why the ADA cannot fully assist the millions of Americans who would like to obtain and maintain meaningful employment. It also reveals a broad framework for thinking about discrimination law more generally.

II. Why Focus on Disability Studies?

On the one hand, I will make the radical statement that disability studies provides a unifying framework for understanding all of discrimination law, that it adds something to our understanding of human life that even critical race theory or feminist theory or other such theories cannot. It provides a broad philosophical perspective through which to understand not only disability but constructs such as social relations and power. I will explain this further below. On the other hand, though, I also focus on disability studies because it helped me to understand my own personal identity and put meaning to my experiences in trying to navigate a workplace in which accommodation was necessary and disability was poorly understood.

As feminists have been saying for a long time, the personal is political. The “personal” (e.g., sexual harassment, rape, intimate partner violence) requires public presentation to remove shame and stigma and to eliminate practices that keep it from the reach of public policy. In my case, that meant that my hidden impairment, bipolar disorder, needed to be brought to the forefront so that I need not feel ashamed and isolated, so that I could make informed decisions about how or whether to treat my illness, and so that I could make choices about taking advantage of the university policies and legal protections offered to those who have a disability. How easy it sounds, but how very difficult and confusing it was. Disability studies has helped me to make sense of what this experience meant to me and what it must be like for many others besides me. And perhaps most importantly for this article, it has greatly enhanced my ability to teach employment discrimination law.

III. What Is Disability Studies?

Disability studies is a multidisciplinary field that seeks to understand and expose the continued history of oppression and marginalization of people
who experience disability. As has been noted by one eminent scholar, “People with disabilities have been isolated, incarcerated, observed, written about, operated on, instructed, implanted, regulated, treated, institutionalized, and controlled to a degree probably unequal to that experienced by any other minority group.” People with disabilities constitute a large minority group within the United States, involving millions of people, yet the group historically has been virtually powerless to break down the hegemony of so-called normalcy, escape negative stereotypes and stigmas, and remove barriers to full integration into workplaces and other social institutions. Disability connotes difference in a way that often invites gawking and disgust; it signals deterioration and decline; and, even though it is not caused by aging, it reminds us all that we are mortal and must ultimately succumb to death. Unlike other minority groups, therefore, people who have disabilities are rendered undesirable by virtue of their very existence. The efforts to cure, treat, isolate, and institutionalize can be viewed as reflections of the desire to make the world “normal,” thereby eliminating or reducing the number of reminders that nearly all of us face eventual disability.

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10 The meaning of the word “disability” will be apparent from contextual usage throughout this article. Aside from its more precise definition in the ADA, “disability” is generally used in the ordinary language sense (in the United States) to mean some form of incapacity.

11 The Disability Studies Reader at xv (Lennard Davis ed., 2d ed. 2006) [hereinafter Reader].

12 According to the Centers for Disease Control, the number of U.S. adults reporting a disability increased by 3.4 million between 1999 and 2005, thus bringing the percentage of U.S. adults reporting a disability to 21.8 percent, http://www.cdc.gov/media/pressrel/2009/r090430.htm (last visited May 7, 2009). It is important to remember that this is a highly diverse group, because the common notion of disability spans physical, mental, sensory, psychological, developmental, and other diseases, disorders, and forms of incapacity.

13 In fact, one area of psychology called Terror Management Theory provides a body of research on precisely this topic, noting that “mortality salience” affects the cognitions, feelings, and behaviors of individuals. See, e.g., Jeff Greenberg et al., Evidence for Terror Management Theory II: The Effects of Mortality Salience on Reactions to Those Who Threaten or Bolster the Cultural Worldview, 58 J. PERSONALITY & SOC. PSYCHOL. 308 (1990); Jeff Greenberg et al., Terror Management and Tolerance: Does Mortality Salience Always Intensify Negative Reactions to Others Who Threaten One’s Worldview?, 63 J. PERSONALITY & SOC. PSYCHOL. 212 (1992).

14 To think of disability as mental or physical capacity of some sort is to suggest that virtually all humans will at some time in their lives experience disability.
The goal of disability studies is to project disability into a “political, social, and cultural context,”\textsuperscript{15} to theorize and problematize disability. The field wrests disability from any one area of traditional discourse (e.g., medicine) and moves it into a humanistic investigation of how mind, body, and power are historically and socially related. In other words, disability studies challenges the notion of mind and body as essential forms and instead looks at the construction of mind and body as serving complex historical and societal purposes. For example, people who are considered disabled have long been referred to as crippled, handicapped, retarded, insane, mad, deformed, dumb, grotesque, vegetables, monsters, gimps, freaks, crazies, morons, deviants, and an assortment of other terms. Language not only marks someone with a disability as different from the “norm,” it also signifies the undesirability of being attached to the category “disabled” and provides the basis for oppressive, differential treatment. Why do words such as “handicapped,” “crazy,” and “insane” continue to pervade the English language while terms such as “spic” and “bitch” seem so unacceptable? Disability studies reminds us that the everyday usage and acceptability of such denigrating terms signals the “otherness” of those who do not meet norms for able-bodiedness or able-mindedness, and this “otherness” is an acceptable category for exclusion. Of course, as Simi Linton has pointed out, there are much nicer-appearing words that also have been used to describe people with disabilities.\textsuperscript{16} As she notes, referring to someone as “physically challenged” or having “special needs” reveals the paternalism inherent in a “do-gooder” mentality that further manipulates and controls the lives of people with disabilities.\textsuperscript{17} Such euphemistic terms emphasize a perspective that individuals with disabilities have challenges or needs that set them apart from “normal” people in a way that prevents full societal integration. For example, to think of someone as “physically challenged” would be to suggest that any barriers to her

\textsuperscript{15}Reader, supra note 11, at xvi.


\textsuperscript{17}Linton, Reassigning Meaning, supra note 16, at 163–64. It should come as no surprise that the world of Jerry Lewis telethons and “poster children” is viewed as highly offensive within the disability studies community. Many disability activists see Jerry Lewis as quite bigoted when it comes to people with disabilities. See generally Mary Johnson, Make Them Go Away: Clint Eastwood, Christopher Reeve & the Case against Disability Rights (2003).
ability to work and participate fully in social interactions would reside in her own physical limitations instead of being imposed externally by existing work arrangements and social conventions and institutions. Thus, even attempts at constructing more socially acceptable language have emphasized negative characteristics associated with people with disabilities and may, therefore, justify their continued oppression.

Disability studies reveals the historical evolution of the categories of “ability” and “normalcy” and imbues them with relational, instead of absolute, meaning. Our concept of normal, for example, arose from eighteenth-century attempts to equate statistical notions of the “average man” with “ideal man” through the moral virtues of goodness, beauty, and perfectibility. Deviations were viewed as “defects and monstrosities” that were to be eliminated from the body, eventually giving rise to fear of the “abnormal” and even the growth of eugenics. The eugenics movement was mainstream in both the United States and England in the early twentieth century and, through its connection with the development of early statistical methods, has had a lasting effect on the pejorative way in which disability is viewed today. Individual variation, particularly mental and physical variation, was to be eliminated, so that conditions such as mental illness, tuberculosis and other diseases, deafness, blindness, etc. were all to be removed from humankind because they were “abnormal.” These choices are never apolitical, however, so that other conditions and, in particular, behaviors, believed to be associated with such abnormality (e.g., poverty, darker skin, criminality, immorality) were also targeted. In particular, the stereotyped association of disability with criminality and immorality continues to this day.

18 Id.
20 Porter, supra note 19, at 104.
21 Davis, supra note 19, at 7.
22 Id. at 9.
23 Think in particular of people with mental illnesses being viewed as disproportionately violent and responsible for numerous highly publicized shootings on college campuses or in workplaces.
Lest we be too quick to congratulate ourselves that eugenics is no longer endorsed as a formal American social policy, disability studies also reminds us of the modern equivalents—prenatal screening, genetic engineering, etc.\(^{24}\) To the extent that a race of humans who are “normal” and “able” can be produced, those who do not get placed within those categories will find themselves devalued, excluded, and at the margins of society. We need not seek completely to eliminate the abnormal to try to control it, however. Disability studies makes clear that we also encourage those we consider to have abnormalities to mask or hide them or, preferably, “correct” them. Thus, we encourage those who have disabilities to overcome them, celebrating those who appear to excel “despite” their disabilities—in other words, we reward their extraordinary efforts by “forgiving” their disabilities, pretending they are not there.\(^{25}\) We normalize practices such as plastic and cosmetic surgery, the use of prostheses for missing limbs, the wearing of wigs when hair is lost through chemotherapy treatments, and breast reconstruction after mastectomy. We pathologize deviance, encouraging medical treatment for everything from conjoint twins to depression to varicose veins, despite the risks and side effects. Disability studies reveals not only the constant pressure society puts on individuals to conform to normalized standards of appearance, function, and behavior, but also how those standards have come to be equated with goodness and virtue. The current fitness craze exemplifies this very notion. Being overweight, failing to eat appropriate foods, and eschewing exercise have come to signify moral failing and weakness, engendering blame when people who engage in these behaviors experience illness or disability, despite the fact that we cannot demonstrate that disability is actually caused by any of these things.\(^{26}\) But the focus on fitness is not new. In the early twentieth century, during the height of the eugenics movement,


\(^{25}\)Note that at the same time this emphasizes the “otherness” of those who are not in a position to be exceptional. See Susan Wendell, *Toward a Feminist Theory of Disability*, in *Reader*, supra note 11, at 251. Note also that seeing people who “overcome” their disabilities as heroic is rather like saying a successful person of color is a credit to his or her race. We recognize the racism and offensiveness of the latter remark without questioning the appropriateness of our view of persons with disabilities. See, e.g., *Johnson*, supra note 17, at 249.

\(^{26}\)For a good discussion of contemporary preoccupation with weight and fitness, see Gina Kolata, *Rethinking Thin: The New Science of Weight Loss—and the Myths and Realities of Dieting* (2007).
fitness was assessed via medical testing to detect desired conditions such as high intelligence and the absence of venereal disease.\(^{27}\) When placed in historical perspective, it becomes easier to see how those who do not meet the culturally determined “fitness” standards—those whose disability or abnormality cannot or will not be suitably controlled or eliminated—can be viewed as marginal and undeserving.

IV. WHAT DOES DISABILITY STUDIES TELL US ABOUT OURSELVES?

As I mentioned above, I believe that disability studies is central to our understanding of humanity, discrimination, and discrimination law. I propose that the mechanism through which this works is that disability studies reveals important truths about ourselves, inviting us to think about mind, body, ability, identity, and the very essence of what it means to be human.

As has been noted by Susan Wendell, “The able-bodied can postpone the luxury of identifying with their real bodies.”\(^{28}\) In other words, virtually all human beings will evolve into disability over the course of their lifetime. Our identities as capable, fully functional, pain-free, mobile, alert, independent, and free individuals are not stable, not even realistic. There is nothing like experienced disability to teach us how interdependent we truly are, how freedom is restricted by external limitations, how any complete view of humanity cannot be predicated on the notion of free choice and individual control over mind and body. It is not “ability” that is the norm; it is “disability.” And disability comes in many variations.

Disability studies therefore teaches us that there are important flaws in our views of mind and body, flaws of which we do not like to be reminded. We do not want to think about the possibility of chronic pain, paralysis, amputation, loss of eyesight, or mental illness happening to us, for example.\(^{29}\) We fear these conditions. It is easier to believe that these

\(^{27}\)Davis, supra note 19, at 10.

\(^{28}\)Wendell, supra note 25, at 248. To this I would remind the reader that able-bodied includes those who are able-minded as well.

\(^{29}\)We also discount the possibility that they could happen to us. For example, promotional materials for the Menninger Clinic (issued in 2009) indicate that 20 percent of all Americans suffer from a mental illness. When my class estimates the incidence of mental illness in the United States, the figure is considerably lower.
conditions are avoidable. It is easier to convince people with these life experiences that they must have done something wrong, that they are not entitled to the full societal participation that those who are “whole” deserve. Those of us with disabilities get the message that only by rehabilitating ourselves through medical miracle or our own heroic efforts do we stand a chance of being fully valued.

V. WHAT CAN DISABILITY STUDIES TELL US ABOUT THE ADA?

Although students may be empathetic to the notion of assisting people with disabilities, they often are resistant to regulation in general and the ADA in particular. In my experience, students exhibit more hostility to the ADA than to other discrimination legislation, primarily because of the reasonable accommodation requirement. This is not surprising given the burgeoning area of research indicating general hostility toward helping others to perform at improved levels in the workplace.\footnote{See, e.g., Ramona L. Paetzold et al., \textit{Perceptions of People with Disabilities: When Is Accommodation Fair?}, 30 Basic & Applied Soc. Psychol. 27 (2008); Ramona L. Paetzold et al., \textit{Manipulating Disability, Accommodation, and Outcomes: Peer Perceptions of Accommodation Unfairness}, 10 J. Occupational Psychol., Employment & Disability, 13 (2008); Lily R. Ren et al., \textit{A Meta-Analysis of Experimental Studies on the Effects of Disabilities on Human Resource Judgments}, 18 Human Resource Mgmt. J. 191 (2008).} It is also not surprising given the common misconception that the ADA has imposed huge burdens on employers to make costly changes in their workplaces.\footnote{One study found that, between 1993 and 1996, the average cost of an accommodation was $45. Peter David Blanck, \textit{Transcending Title I of the Americans with Disabilities Act: A Report on Sears, Roebuck and Co.}, 20 Mental & Physical Disability L. Rep. 278 (1996). Of course, the cost of accommodations depends in part on how adequately employers may be meeting the needs of employees with disabilities.}

Disability studies provides an interesting lens for evaluating the ADA. On the one hand, I first discuss the historical context leading up to the ADA and suggest that the ADA falls short of meeting the challenges posed by that context. This is a criticism expected by the students—because I inform them that I have a disability that has required accommodation, they are not surprised to learn that I may find that the ADA has not been as helpful as they may think. On the other hand, however, by discussing the underpinnings of normalcy and (dis-)ability, students can begin to think
about the shortcomings of the ADA in a new way—the ADA serves a paternalistic goal that stems from setting “ability” instead of “disability” as the norm. This provides a point from which we can begin to think about disability law in a world where disability is the norm.

A. The Social Model of Disability and the ADA

Early British disability activists are credited with forwarding the notion of a social model of disability, one in which exclusion and disadvantage (i.e., disability) is viewed as distinct from impairment (physical or mental limitation). The social model was viewed as beneficial because it located disability in the social environment or context instead of in the individual; it made recognizable a group of people who could be viewed as disabled by society. This portrayal of disability highlighted its oppressive nature, so that a civil rights movement that sought to remove discrimination and eliminate societal barriers to inclusion could be spawned. It is within this context that the ADA was passed. The ADA is touted as having adopted the social model of disability in large part, distinguishing between impairment and disability and imposing obligations on employers and others to accommodate (i.e., remove barriers) to inclusion.

But the ADA has not been a perfect match to the social model of disability. For example, the definition of disability is not distinguished from impairment in the way envisioned by disability activists. Because Congress defined disability as an impairment that substantially limits a major life activity, it conflated “disability” with “limitation.” For example, if breathing is a major life activity, any impairment that seriously affects breathing is a disability within the meaning of the ADA, regardless of social exclusion. A person with severe emphysema who is able to carry portable oxygen everywhere would have a disability under the ADA even though societal

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32 This could be viewed in contrast with the efforts of some well-publicized persons with disabilities who held on to the medical model. For example, Christopher Reeve was highly criticized by disability rights activists because he held on to notions of medical cure and recovery instead of viewing himself as being disabled by social restrictions and the attitudes of others. Reeve was quoted as saying that he no longer felt like a human being after he became quadriplegic, that “[w]e were meant to be walking upright with all of our body systems fully functional . . . ” (as quoted in Johnson, supra note 17, at 128).

33 Tom Shakespeare, The Social Model of Disability, in Reader, supra note 11, at 199.

barriers to inclusion would be virtually nonexistent. The disability in this case has little to do with the social model and much more to do with the older medical model—that is, disability resides in the individual’s illness. On the other hand, if social interaction with others is not a major life activity, an impairment that seriously limits a person’s ability to engage in social interaction will not be a disability under the ADA, even though there is considerable social exclusion. And, it does not matter whether that social exclusion results from the existence of societal barriers. If social interaction is not a major life activity, then no disability can exist under the ADA even though a person’s ability to engage in social interaction may be prevented by a lack of physical access to others (i.e., societal barriers). Also, not all barriers are physical. The social model envisioned the removal of stigma and barriers caused by negative stereotypes and ignorance as well. To date, the ADA has not been particularly effective at accomplishing this, particularly in the case of mental or psychiatric disorders.35 The requirement of substantial limitation in a major life activity has been particularly devastating for persons experiencing mental illnesses and other brain disorders, because what leads to their social exclusion is often the attitudes of others, a factor that is not even considered in whether they have a disability. Thus, the ADA definition of disability is both under- and overinclusive under the social model: It sweeps in people who may not experience barriers to participation and inclusion, and it excludes others. “Substantial limitation” of “major life activities” simply has nothing to do with advancing the goals of the social model of disability.36

Another goal of the social vis-à-vis the medical model of disability was to eliminate pressure on people with disabilities to seek cure or treatment


36 Note that the ADAAA has not changed this definition for an actual disability. And one court has already determined that driving is not a major life activity under the ADA (as amended), despite Congress’s message that the definition of disability was to be construed more broadly. Winsley v. Cook County Dep’t of Public Health, No. 08-2339, 2009 WL 1066065 (7th Cir. Apr. 22, 2009) (holding that a nurse with posttraumatic stress disorder who could have a panic attack while driving did not have a disability under the ADA because driving was not a major life activity).
or somehow be “rehabilitated.” Instead, the focus was supposed to shift to the realization that narrow norms of acceptable appearances and behaviors, discriminatory attitudes, and other contextual and environmental issues resulted in disability. Because the ADA requires adjustments to the work environment as a way of eliminating barriers for employees and applicants found to have disabilities, it is often believed that the ADA incorporated this aspect of the social model. In practice, however, although the ADA may have removed some physical barriers from workplaces, it has been less effective at things such as requiring organizations to tolerate a wider range of “nontraditional” behaviors, educate coworkers and supervisors, and produce more flexible work arrangements.\(^{37}\) And, there is still a widespread focus on medical treatment for mental and physical conditions believed to be outside of the norm. For example, suppose that through medication it was possible to reduce the amount of time an employee with bipolar disorder experienced manic bursts of energy that coworkers or supervisors viewed as too aggressive. Rather than having to educate its workforce about the nature of mania, the organization most likely would be in the position of coercing the employee to take the medication in order to try to keep the job. Without the medication, the risk of the employee being fired would increase, with the organization being able to claim that no reasonable accommodation was possible.\(^{38}\) Thus, the ADA has not truly assisted in demedicalizing what is seen as outside appropriate mind/body norms. It reinforces a world in which ability, instead of disability, is the norm.

It is also not clear that the social model is evidenced through the “reasonable accommodation” portion of the ADA, although this employer obligation to make some changes to the workplace may most closely represent, on its face, the goals of the social model. Reasonable accommodation represents the acknowledgement that aspects of the workplace itself may be limiting (i.e., disabling) for people who have impairments, as the social model maintains. Courts have limited the reasonable accommoda-


\(^{38}\)Id. The employee could be in the difficult position of having to take the medication to avoid being dismissed for “inappropriate” conduct, even though the medication may interfere with cognitive processing and produce other side effects that could endanger health and/or interfere with job performance. See also Paetzold, supra note 35.
tion requirements by, among other things, upholding seniority system rights,\(^3^9\) enforcing employer policies against absenteeism,\(^4^0\) limiting employee ability to disengage from stressful workplace interactions or contexts,\(^4^1\) and putting a large burden on plaintiffs to initiate the process and identify accommodations that are “reasonable.”\(^4^2\) Additionally, there is in some cases an inherent conflict between the meaning of “disability” under the ADA and the notion of reasonable accommodation. For example, if interacting with others is the employee’s major life activity that is substantially limited, it could be that no reasonable accommodation could render the employee able to perform his or her job if the job involves a significant amount of social interaction.\(^4^3\) Thus, even if considered to be a person with a disability under the ADA, it may be difficult to obtain a reasonable accommodation to help remove social, contextual, or environmental aspects of the disability.

**B. Beyond the Social Model**

The re-visioning of workplaces (and society) that the social model of disability was supposed to bring has not happened through the ADA. Disability studies reveals that not only does the ADA fall short of accomplishing this goal, but so does the social model of disability itself. As Shelley Tremain has illuminated, the social model of disability is predicated on the assumption that impairment is required for disability to occur, and thus they are not truly distinct categories.\(^4^4\) Instead, impairments are not stable,


\(^{4^0}\) See, e.g., Vande Zande v. State of Wisconsin, 44 F.3d 538 (7th Cir. 1995) (working at home generally not reasonable because employees must be present to obtain supervision).

\(^{4^1}\) See, e.g., Reed v. LePage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001).

\(^{4^2}\) See, e.g., id. (requiring the plaintiff to provide notice of specific disability and request for accommodation); Vande Zande v. State of Wisconsin, 44 F.3d 538 (7th Cir. 1995) (indicating that plaintiff must show not only that requested accommodation is effective, but that it is reasonable in the general run of cases).

\(^{4^3}\) Note that interacting with others is still not specifically listed as a major life activity under the ADAAA, leaving courts to decide whether it is to be included. Some courts have previously excluded it. See, e.g., Hensel, supra note 34.

natural, preexisting essences of the mind or body, but can themselves be viewed as cultural manifestations or creations that provide for regulation of the mind and body. Without a concept of impairment, there would be no mechanism for attempting to bring abnormality and nonconformance into the norm and for exerting disciplinary power over them. Impairment creates the illusion of a unified category or identity for those who are not “normal” and denies the reality of the variation of all of human existence. Thus, disability studies reveals that impairment and disability are both social artifacts that justify regulation of the mind and body through legislation such as the ADA, legislation that supposedly “benefits” the “unfortunate” members of society. It treats people with disabilities as “special” instead of realizing that we all have individual circumstances that require individual solutions or accommodations. As a class we can investigate and critique this notion of “special”: how is special different than “separate” or “segregated,” and why is this acceptable?

Needless to say, all of this presents a very different view of the ADA than students expect or have heard in the past. A discussion focused on “social normalcy” (as it emerged in the nineteenth century) through the eugenics movement of the early twentieth century sets the background for an understanding of ability and disability in the twenty-first century. A discussion of theorizing from disability studies scholars sensitizes students to the notions that impairment and disability are not fixed, ahistorical concepts; that they serve a social purpose; and that supposedly beneficial regulation may be viewed by some as being just as paternalistic as charity or pity. Disability studies provides a critical viewpoint for thinking about the ADA in new ways. At this point we can explore as a class what organizations would look like if human variation was viewed as the norm, where all such variation was constituent of ability, where no concept of disability existed. There are no correct answers, but there are lots of good questions. Temporarily, at least, the role of the ADA is destabilized and uncertain for the students. Students begin to realize that their view of people with disabilities

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45The notion of impairment itself requires some form recognition or “diagnosis” under a medical model of disability. For further discussion see Davis, supra note 19, at 237.

46In other words, both impairment and disability are constructed socially to justify holding “ability” as the norm and marking others as outside of the norm.

47At this point, it is interesting to discuss the view in Vande Zande v. State of Wisconsin, 44 F.3d 538 (7th Cir. 1995) that it is acceptable, and not stigmatizing, for the plaintiff (who uses a wheelchair) to use separate facilities from her coworkers for washing up after a meal.
is one based on their own imagination of what it might be like to have a
disability and does not necessarily reflect the lived experiences of people
with disabilities. And, as we begin to explore whether an all-inclusive, ideal
world could ever exist, we can begin to think about how a law could be
crafted to handle flawed realities of organizations and society.

VI. WHAT CAN DISABILITY STUDIES TELL US ABOUT
DISCRIMINATION LAW?

Interestingly, disability studies provides a theoretical framework for un-
derstanding all of discrimination law, because, as Lennard Davis has ar-
ticulated, disability may be the one identity that links all other identities.48
He makes this claim because discourses about other social identities such as
race, gender, and sexuality all began in the nineteenth century with the
budding interest in the scientific study of humans and the use of statistical
empiricism to link the average to the ideal. The eugenics movement that
grew out of this effort provided a clear link among a variety of types viewed
as troublesome (not just the disabled), types to be “improved” or elimi-
nated for so-called improvement of the human race: women, people of
color, gays and lesbians, lower classes, etc. All of these groups have been
oppressed under the guise of social improvement and, as Davis as noted,
“the most oppressed person in the world is a disabled female, Third
World, homosexual, woman of color.”49

Still, life is not a contest to know who is or who has been the most
oppressed. The point is to recognize the similar position of all groups that
discrimination laws initially set out to protect and then to make the leap
beyond that to recognize that all of us—the entire population—have been
disadvantaged. We all need protection. We are united in our difference
and variation, we are all both dependent and interdependent, we all ex-
perience barriers to full workplace and societal integration, and we are all
“disabled by injustice and oppression.”50

48Davis, supra note 19, at 233.
49Id. at 240.
50Id. at 241. Davis distinguishes this from the concept that we are all disabled. Assumptions
about how society is to be arranged, and the consequences of those assumptions, determine
disability, according to disability studies theorists. Disability cannot exist in a vacuum.
This view highlights the conflict between the political philosophy underlying our legal system and the reality of universal (dis)ability. American liberalism is based on notions of independence and free will, all of which are counter to the very premise of universal difference and interdependence. Disability studies reveals that oppression will continue as long as people are assumed to be autonomous instead of in need of mutual care and assistance. Liberalism guarantees that there will always be people who will be viewed as “disabled”—people who will lose out in a race for the American dream—in a “survival of the fittest” mentality that accompanies notions of individual perseverance, effort, and free choice as essential to success. These people will be marginalized as misfits and will be viewed as weak in their perceived extraordinary need for social assistance. They will comprise a lower class with fewer economic and educational resources at its disposal; they will be disproportionately excluded from American workplaces. Liberalism guarantees that discrimination law will be enacted because it also guarantees societal failure to provide full inclusion and integration of human variation.

Thus, disability studies can be argued to provide perhaps the most comprehensive way of understanding the human condition. More than race, sex, gender, sexual orientation, and a number of other ways that the population can be categorized and theorized, disability forces to the forefront the notion that the human condition is about variety, both within and across individuals. Every classification system is unstable, but the mind and body are constantly changing, and ability can flow into disability at the blink of an eye. How we think about ability is absolutely critical to our understanding of society and the American workplace. The key insight is that “ability” has always been the bedrock of all discrimination law (i.e., protecting selected groups that have been traditionally excluded or disadvantaged so that they are able, full participants). Discrimination law, in other words, has sought to take groups such as women and people of color and convert them from disabled to abled. As described above, disability studies suggests to us that this effort will ultimately fail as long as we continue to

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51 Our minds and bodies shift in appearance, form, and function over time, so that “capacity” does not remain the same, and in that sense we can be viewed as shifting from having ability to disability (or back). We also shift in the sense that the concepts of ability and disability vary across time, cultures, contexts, etc.

52 For example, Black women may be discouraged from engaging in identity performance because it renders them “disabled” in a way that identity status does not. For a discussion of
hold on to the myth of self-reliance, as long as we seek to obtain equality for individuals viewed as independent and autonomous subjects.

VII. CONCLUSION

Although some courses on employment discrimination law may be taught from a more “traditional” legal perspective, focusing only on the law and its application, many undoubtedly are not. Like my courses, they may involve greater discussion of the theoretical and philosophical approaches to understanding discrimination law. It is for these courses that I argue that an investigation of disability studies can provide an interesting framework for rethinking discrimination law in general and the ADA in particular. Of course, an instructor could emphasize the latter and forego the former, if desired.

For disability studies to be relevant to the course as a whole, it would be helpful to present excerpts from articles that provide the broadest exploration of the meaning of disability and its relevance to other social categorizations. This reading could also include excerpts regarding the social statistics movement of the nineteenth century and literature on the history of the eugenics movement. Ideally, these materials would appear at both the beginning and end of the course to bookend the course material. A brief list of possible sources for these readings is provided in Appendix A.

For better understanding of the ADA, a discussion of the differences between the medical and social models of disability is essential. Numerous articles have discussed the ADA’s failure to meet the goals of the social model and its continued reliance on the medical model, and these can easily be excerpted. Cases can also be selected to highlight the failures, and a consideration of changes to the ADA can inform class discussions regarding whether the ADAAA will make this area of discrimination law correspond more closely to the social model of disability. No discussion would be complete, however, without some reflection on criticisms of the social model itself and why disability activists might consider it inadequate for eliminating discrimination and oppression. A brief list of resources for this portion of the course is provided in Appendix B.

Perhaps the most positive outcome of the introduction of the disability studies perspective is that it generates a lively discussion of disablement and enablement in our society. Students question their own assumptions about ability and entitlement; the American workplace is dissected in new ways. There is often greater sharing of the various ways students may consider themselves to be “disabled,” whether it be by virtue of medical diagnosis, educational or social constraints, stereotypes and stigmas, or other mechanisms or categorizations. And, importantly for a law course, students learn to understand and question the law, reflecting on its effect on the lives of all of us, perhaps in ways they might not otherwise have done.

APPENDIX A: DISABILITY, SOCIAL CATEGORIZATION, AND THE EUGENICS MOVEMENT

Materials Related to the Social Statistics Movement


Materials Related to the Eugenics Movement


Francis Galton, Composite Portraits. 18 Nature 97 (1878).


Daniel J. Kevles, In the Name of Eugenics: Genetics and the Uses of Human Heredity (1985).
APPENDIX B: MODELS OF DISABILITY, THE ADA, AND DISABILITY STUDIES

Books Related to Disability Studies and the ADA


General Disability Studies Materials

COLIN BARNES, LEN BARTON & MARK OLIVER eds., DISABILITY STUDIES TODAY (2002).