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Socio-Legal Backlash

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Publication Date

2001-06-01

AFTERWORD:
SOCIO-LEGAL BACKLASH

Linda Hamilton Krieger*

INTRODUCTION

Near the end of the March 1999 Symposium meetings,¹ commenter Mike Wald suggested that at this point in its history, the disability movement's heavy reliance on law may represent its greatest problem. This notion provoked a great deal of discussion -- and no small measure of consternation -- among disability activists who responded that the right to assert a legal claim to access had transformed both their individual and collective self-conceptions and their relationship to society. Law, in this view, had brought the movement a long, long way.

On the other hand, one found broad based agreement that, in many critical respects, implementation of the Americans with Disabilities Act was not unfolding as its supporters had planned. Whether decrying the crabbed constructions of the ADA characterizing federal judicial decisions or excavating derisive media portrayals of the Act's beneficiaries and enforcers, symposium presenters, commenters, and audience participants repeatedly lamented, "They just don't get it."

Professor Wald's suggestion that the movement may be over-relying on the power of law to

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¹A transcript of Professor Wald's commentary appears earlier in this volume. Michael Wald, [insert title here], *infra* p. [insert first page # of Wald piece here].

transform culture and disability activists' frustrated observations that people outside the disability community "just don't get" the ADA may point in the same direction. Both suggest that the ADA, at least as its drafters conceived it, somehow got too far ahead of most people's ability to understand the social and moral vision on which it was premised.

Curiously, one obscure definition of backlash metaphorically describes such a condition. The *Webster's Third New International Dictionary* defines backlash, among other ways, as "a snarl in that part of a fishing line which is wound on the spool, caused by overrunning of the spool." The image is one of a fishing reel that has been overcast – that has gotten ahead of itself – and has for that reason become entangled. Backlash, this image suggests, has something to do with one part of a process or mechanism getting too far ahead of another.

In this article, I offer a theory of backlash premised on this image, and situate that theory within a larger model of socio-legal change and retrenchment. My central premise is simple: backlash is about the relationship between a legal regime enacted to effect social change and the system of existing norms and institutionalized practices into which it is introduced. Specifically, backlash tends to emerge when the application of a transformative legal regime generates outcomes that diverge too sharply from entrenched norms and institutions to which influential segments of the relevant population retain strong, conscious normative allegiance. In some situations, these norms and institutions may be those directly targeted by the new law. In such a case, normative conflict is probably inevitable. In other cases however, transformative law may have collateral effects, conflicting with norms and institutions which the law's promoters did not aim to destabilize. In either case, preventing backlash, or reckoning with it when it emerges, requires careful attention to *existing* patterns of normative commitment, and to

existing institutionalized practices and social meaning systems, not merely attention to the *aspirational* norms, institutions, and understandings which the new law seeks to reify.

My inquiry comprises three parts. Part I defines various important terms and concepts and situates my inquiry within related areas of intellectual discourse. It goes on to construct a theoretical model of socio-legal change and retrenchment, then examines how elements of that model explain diverse aspects of public, media, and judicial responses to the Americans with Disabilities Act. Part II proposes a specific definition of backlash, and through the use of three case studies, attempts to distinguish backlash from other forms of socio-legal retrenchment, both in terms of their respective manifestations, and in terms of their causal antecedents. Part III deepens the analysis of causal antecedents begun in Part II, and applies that analysis to various problematic features of the ADA.

I. LAWS, NORMS & INSTITUTIONS

In attempting to understand the relationship between law and the larger society of which it is a part, it is useful to distinguish between laws designed to enforce existing social norms and laws enacted to displace or transform them.² Similarly, it is important to differentiate laws that reinforce established institutions and social meaning systems from laws designed to destabilize, subvert, and ultimately reconstruct them. Laws function quite differently, and the threats to their effective deployment vary significantly, in these two contexts. Before elaborating this thesis, or exploring its relationship to the concept of backlash generally or to popular, media, and judicial reactions to the ADA in particular,

²For an earlier exploration of the ideas developed in this Part, see Linda Hamilton Krieger, *The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Civil Rights Law*, 47 AMER. J. COMP. LAW 89 (1999).

various foundational terms, concepts and principles should be introduced and explicated.

Consider first the relationship between formal law and informal social norms. Formal law, whether found in statutes, administrative regulations, constitutions, or cases, represents only one broad class of restraint imposing limits on acceptable behavior.³ In any society having a formal legal system, legal rules exist within a larger system of informal social norms. By social norms, I means those standards of conduct to which people conform their behavior not because the law requires it, but because conformity is conditioned by subtle and/or overt forms of social sanction.

Informal social norms not only constrain our conduct in relation to others, they also shape our expectations about how others will behave toward us. We generally expect other people to comply with the social norms associated with a particular context. Violation, either by oneself or by another, generates a kind of “normative dissonance,”⁴ a state which, like its cognitive cousin, creates an unpleasant sensation that people generally attempt to reduce. Through these processes of conditioning,

³A rich legal studies literature exists on this subject. Interested readers may wish to explore, among others, the following influential sources: Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PENN. L. REV. 1643 (1996) (exploring the relationship between formal law and informal social norms in economic relationships); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (providing general theoretical account of law and social norms, with particular focus on the power of the former in changing the latter); Richard H. MacAdams, *Cooperation and Conflict: The Economics of Group Status Competition and Race Discrimination*, 108 HARV. L. REV. 1003 (1995) (exploring how social norms function to promote race discrimination); Robert L. Rabin & Stephen D. Sugarman eds., *SMOKING POLICY: LAW, POLITICS, AND CULTURE* (1993) (offering various treatments of the relationship between anti-smoking laws and cultural changes in attitudes towards smoking before and after those laws’ enactment); Robert Ellickson, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991)(exploring relative roles of informal social norms and formal legal rules in the resolution of disputes between neighbors in a rural California community.)

⁴I draw here on Festinger’s concept of cognitive dissonance. See Leon Festinger, *A THEORY OF COGNITIVE DISSONANCE* (1957).

dissonance creation, and efforts to reduce dissonance, social norms come to function like preferences,⁵ and can usefully be viewed as preferences in connection with attempts to understand or predict attitudes, behavior, judgment, and choice.

Of course, formal law and informal social norms are not mutually independent. Social norms both shape and are shaped by formal law. They are, in this sense, “inter-endogenous.”⁶ In most situations, formal laws, such as those prohibiting murder or theft, reflect and are designed to enforce consensus social norms. In these contexts, a law-maker’s primary task is to translate nuanced, amorphous, often context-dependent informal norms into clear, precise legal rules that can be applied consistently across diverse contexts.⁷ Although this task can be challenging and may be executed more or less artfully, formal law and informal social norms that closely mirror each other are apt to be mutually reinforcing. In such situations, formal law is likely to be viewed as legitimate by most influential social actors, and is unlikely to be met with widespread attempts at evasion, subversion or outright rollback.⁸ For ease of expression, I will refer to formal legal rules of this type – that is, those that

⁵For a discussion of the relationship between norms and preferences, *see, e.g.* Cass R. Sunstein, *Social Norms and Social Roles*, *supra* note 3, at 913.

⁶I borrow the idea that law is endogenous from sociologist Lauren Edelman. *See, e.g.*, Lauren B. Edelman, Christopher Uggen, & Howard Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AMER. J. SOCIOLOGY 406 (1999) (defining the concept of legal endogeneity as reflecting the idea that the specific content and meaning of law are shaped within and by the organizational field the law was intended to regulate).

⁷In connection with this process, *see* Paul Bohannon, *The Differing Realms of the Law*, 67 AMERICAN ANTHROPOLOGIST, 33, 35-36 (elaborating a theory of “double institutionalization” of social norms when incorporated into formal legal rules).

⁸*See generally* Tom Tyler, WHY PEOPLE OBEY THE LAW (1990) (exploring the sources and role of perceived legitimacy in compliance with formal law).

reflect and seek to enforce informal consensus norms – as “normal law.”

However, formal laws are sometimes enacted by constituencies wishing to displace entrenched social norms. Laws of this sort, which I will refer to as “transformative law,” emerge from a variety of socio-political contexts.⁹ Most relevant to our present inquiry is transformative law that emerges from normatively diverse societies, in which some interest group or coalition succeeds in enacting reformist laws aimed at changing social norms which it perceives to be unjust or otherwise undesirable. Civil rights laws in general, and the Americans with Disabilities Act in particular, can be understood in this way, as one among many species of transformative law.

Just as formal legal initiatives can be more or less consistent with established social norms, they can be more or less congruent with established institutions. I use the term “institution” here in a specific sense – not as a synonym for “organization,” but as the term is used in the new institutionalism in sociology and organization theory. An “institution” in this sense comprises a web of interrelated norms, social meanings, implicit expectancies, and other “taken-for-granted” aspects of reality, which operate as largely invisible background rules in social interaction and construal.¹⁰

⁹Transformative law may emerge from colonial conditions, where the colonizing society imposes laws and/or legal procedures expressing norms congenial to the colonizers but remote from the indigenous culture. It can also emerge from federal political arrangements, in which majoritarian social norms differ among the constituent states. In these situations, federal law may from time to time express norms congenial to a majority of the federated states, but inconsistent with traditional social norms in one or more states in the minority. *See generally* Linda Hamilton Krieger, *supra* n. 2, at 90.

¹⁰This definition is not drawn from any particular source, but synthesizes definitions and descriptions of the concept of “institution” reflected in various places. *See, e.g.*, Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Science*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19 (Mary C. Brinton & Victor Nee eds., 1998) (Mary C. Brinton & Victor Nee, Eds., describing institutions as “webs of interrelated rules and norms that govern social relationships and set formal and informal constraints on actors’ ‘choice sets’); Howard Garfinkel,

For example, a stop sign is an “institution,” as well as an object, in that it symbolizes and evokes an entire set of norms, expectancies, and social meanings.¹¹ These include rules about what actually constitutes a “stop,” (consider in this regard the “California stop” – arguably an institution unto itself), or rules about who has the right of way when cars on perpendicular trajectories stop at about the same time. The institution “stop sign” also includes a whole set of expectancies -- “scripts” about what may happen to drivers who violate “stop sign rules” in particular contexts. “Stop sign” carries with it a set of social meanings reflected, for example, in the spontaneous judgments made about drivers who run stop signs, or the different judgments made about drivers who slow but do not quite stop (the “California stop,” again). The norms constituting the institution are likely to include various rules of exemption, imparting social meanings that would not be obvious to an “institutional outsider.” Consider in this regard the quite different attributions made when an ambulance or fire engine runs a stop sign, as opposed to a car full of teenage boys.

While the stop sign might seem a trivial example of an “institution,” it effectively illustrates an important point. Social interaction is mediated by taken-for-granted background rules which structure social perception, communication, and interpretation, and create an impression – even if false – of shared meaning and experience. As we will see, any formal law designed to alter patterns of social

STUDIES IN ETHNOMETHODOLOGY 76 (1967) (describing institutions as background rules that function as the “socially-sanctioned-facts-of-life-in-society-that-any-bona-fide-member-of-society-knows”); Peter L. Berger & Thomas Luckmann, *THE SOCIAL CONSTRUCTION OF REALITY* 44, 54 (1967) (characterizing institutions as taken-for-granted patterns of action that transmute subjective meanings into apparently objective “facticities”).

¹¹Other “institutions,” in the new institutionalist sense of the word, might include marriage, seniority, race, the civil service examination, or even disability.

action must contend with institutions and with their constitutive patterns of action and interpretation.

The promoters of any formal legal regime that fails to take such institutions into account are apt to find themselves swimming perpetually upstream against a powerful alignment of normative, interpretive, and attitudinal currents.

This conceptual foundation set, we can return to the project of categorizing formal law in terms of its relationship to underlying norms and institutionalized practices. Just as a simple instance of transformative law may be devised to displace a discrete social norm, a more comprehensive legal regime may be deployed in an effort to destabilize, subvert, and reconstitute a entire set of interrelated institutions. Various devices can be brought to bear in pursuit of this end.

First, transformative law may challenge preexisting consensus definitions of particular categories or concepts, and by statute, regulation, or judicial decision attempt to redefine, or “re-institutionalize” it with a different set of constituent social meanings, values, and normative principles. The Americans with Disabilities Act uses this device, for example, when it defines a person with a disability not only as a “person with an impairment” – which is how most people would reflexively define the disabled state – but also as a person who has a *record* of an impairment, or who is *perceived* as having an impairment.¹² Through this definition, the ADA constitutes the disabled state not only in terms of the internal attributes of the arguably disabled individual, but also in terms of external attributes of the attitudinal environment in which that person must function.¹³ “Disability,” under this conception, resides

¹²ADA § 3(2), 42 U.S.C. §12102(2).

¹³This approach represents a dramatic shift in the legal construction of disability, as various scholars comparing the definition of disability under the Social Security Act with its counterpart under the Rehabilitation Act §504 Regulations and the ADA have observed. In this regard, *see generally*

as much in the attitudes of society as in the characteristics of the disabled individual.

In similar fashion, the ADA seeks to reinstitutionalize the concept of employment qualification. It defines the term “qualified” person with a disability not merely in terms of a person’s ability to perform the functions of a particular job *as she finds it*, but in terms of her ability to perform the job’s *essential functions with or without reasonable accommodation*.¹⁴ In this way, the ADA rejects the notion that a disabled person is “unqualified” if she can not function effectively in the “world-as-it-is.” Rather, she can legitimately be classified as unqualified only if she would be unable to function effectively in the “world-as-it-could-be,” after reasonable environmental adaptation.¹⁵

In recasting the concept of qualification in this way, the drafters of the ADA sought to transform the institution of disability by locating responsibility for disablement not only in a disabled person’s impairment, but also in an employer’s “disabling” physical or structural environment.¹⁶ Under such a

Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, [insert cite from this volume]; Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 U.C.L.A. L. Rev. 1341 (1993). Richard K. Scotch & Kay Schriener, *Disability, Civil Rights, and Public Policy: The Politics of Implementation*, 22 J. POLICY STUD. 170 (1994).

¹⁴Section 101(8) of the ADA provides in relevant part, “The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires.” 42 U.S.C. § 12111(8).

¹⁵The term “reasonable environmental adaptation,” of course is Harlan Hahn’s. See H. Hahn, *Reasonable Accommodation and the ADA*, *supra* p. [insert first page # of Hahn here], [insert pin cite to term].

¹⁶To be sure, this transformative process began not with the drafting of the ADA, but rather with the drafting of the regulations implementing §504 of the Rehabilitation Act of 1974. For a discussion of this process, see discussion *infra* in text accompanying notes 40-42. However, because the ADA covered private as well as public employment, its reconstruction of the disability category had

construction, the concept of disability takes on new social meaning. It is not merely a container holding tragedy, or occasion for pity, charity, or exemption from the ordinary obligations attending membership in society. The concept of disability now also, or to a certain extent instead, contains rights to and societal responsibility for making enabling environmental adaptations. The ADA was in this way crafted to replace the old “impairment” model of disability with a socio-political approach.

Just as transformative law may be designed to subvert and reconstruct relevant institutionalized categories, it may also be deployed to displace institutionalized patterns of inference and action. In the most extreme cases, a transformative legal regime may even strive to displace patterns of inference and action which, at least among certain constituencies, are taken so for granted as to seem not only permissible, but normative – deriving from common sense, and responding to the natural order of things.

In this regard, reconsider the direct threat defense, set out in ADA Section 103.¹⁷ Under Section 103, an employer who wishes for safety reasons to exclude a person with a disability from a particular job must satisfy a much more exacting standard than most employers would apply on their own. The substance of that standard is spelled out in administrative regulations issued by the Equal Employment Opportunity Commission, pursuant to a Congressional delegation of interpretive authority contained in ADA Section 106.¹⁸ The E.E.O.C. direct threat regulations, provide:

Direct Threat means a significant risk of substantial harm to the health

a far broader impact, and provoked a much stronger response, than did §504.

¹⁷42 U.S.C. § 12113(b).

¹⁸42 U.S.C. § 12116.

or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be made on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on a *reasonable medical judgment* that relies on the *most current medical knowledge* and/or on the *best available objective evidence*. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.¹⁹

Consider for a moment the many norms and institutions implicated by the ADA’s direct threat standard. First, there are norms of prudential risk management, conveyed by aphorisms like, “Better safe than sorry,” and “A stitch in time saves nine.” Over time, these norms have been institutionalized into the legal constructs of “foreseeable risk” and “the reasonable man,” (now, the more inclusive “reasonable person”). However objectively small a particular risk might be, if it actually materializes and causes harm it is apt to be viewed after the fact as having been “foreseeable.”²⁰ One who fails *ex ante* to recognize and take steps to avoid a foreseeable risk is not likely to be viewed *ex post* as having

¹⁹29 C.F.R. § 1630.2(r) (emphasis added).

²⁰This tendency is generally referred to as “hindsight bias.” The seminal paper describing the bias is Baruch Fischhoff, *Hindsight [not =] Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXP. PSYCH. 288 (1975). For more recent treatments, see generally, Jay J.J. Christensen-Szalanski & Cynthia Fobian Willham, *The Hindsight Bias: A Meta-Analysis*, 48 ORG. BEH. & HUMAN DECISION PROCESSES 147 (reviewing relevant research). For an application of hindsight bias theory to legal adjudication processes, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (arguing that jurors’ hindsight bias in effect converts negligence-based liability regimes into systems of strict liability).

acted with reasonable care.

We can expect hindsight bias of this sort to operate even more powerfully where a specific type of risk is associated in popular myth or stereotype with members of a stigmatized group.²¹ So, for example, if mental illness is associated with violence, a person with a mental illness is apt to be viewed as posing an elevated risk of future violence. If that person later does behave violently, his behavior will probably be viewed as having been more foreseeable than it would have been absent the mental illness. The non-discrimination and direct threat provisions of the ADA prohibit precisely this type of “risk management by heuristic,” creating a powerful tension between compliance with the statute on the one hand and popular (read, “irrational”) approaches to risk on the other.²²

The nature of the tension between direct threat analysis and heuristic approaches to risk management becomes even more evident when one considers the “reasonably prudent person” of tort law. The reasonably prudent person is not really reasonably prudent at all. She is perfect -- vigilant, prescient, swift to neutralize every conceivable risk. Through this lense, an employer who hires or retains an employee who, because of mental illness, is irrationally assumed to be dangerous will likely not be viewed as having been reasonably prudent. If the ADA is seen as dictating such a person’s hiring or retention, it will be viewed as violating “common sense,” as this cartoon, which appeared in the

²¹For a helpful overview of cognitive biases influencing risk perception, see Paul Slovic, Baruch Fischhoff, & Sarah Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 465 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982).

²²On this subject, see generally Vicki A. Laden & Gregory Schwartz, *Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account*, [insert cite from this volume]

*Richmond Times*²³ shortly after publication of the E.E.O.C. Guidance on Psychiatric Disabilities and the ADA, so vividly reflects:



As this cartoon reveals, a formal legal rule that requires a scientific approach to risk assessment in situations where people are not accustomed to seeing it applied may conflict rather sharply with popular conceptions of “common sense.” Unfortunately, as those who work in public health, risk management, and environmental policy can attest, scientific and popular approaches to risk perception often wildly diverge.

In requiring a less stereotype-driven and more scientific approach to risk analysis, the ADA’s direct threat provisions challenge a number of interconnected institutions bearing on risk assessment and

²³© Brookins, RICHMOND TIMES, January 1997.

management. The company doctor, for example, long accorded broad discretion in determining who can safely be employed in particular jobs, can be delegitimated under the ADA if his or her judgment is not based on “the most current medical knowledge.”²⁴ The Act directly prohibits pre-offer fitness for duty exams and the use of blanket “medical standards,” lists of medical conditions used to exclude affected applicants from particular jobs without any individualized inquiry.²⁵ The company doctor, the eligibility physical, and medical standards are easily recognizable institutions with long histories of application across diverse organizational fields.²⁶ The Americans with Disabilities Act was designed by its drafters to destabilize and reconstitute these institutions, along with other taken for granted aspects of reality bound up in popular assumptions about the relationship between disability and risk. In this respect, the ADA provides an almost perfect example of transformative law.

Of course, the formal displacement of an entrenched network of social norms and institutions by a transformative legal regime does not guarantee that network’s immediate, or even eventual, *de facto* displacement.²⁷ Through a variety of mechanisms, established norms and institutions can be expected

²⁴ 29 C.F.R. § 1630.2(r).

²⁵ See 42 U.S.C. § 12112(d) (prohibition on pre-employment medical examinations and inquiries).

²⁶ I use the term “organizational field” to indicate “a collection of organizations that, in the aggregate, constitute a recognized area of institutional life.” Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, in Walter W. Powell & Paul J. DiMaggio, *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 65 (1991). So, for example, civil service employment in many different states and localities might constitute an organizational field, as would employment in related skilled trades, or specific industries.

²⁷ The same is also true with respect to the contest between entrenched social norms and institutions and an emerging transformative normative/institutional framework. For an interesting

to resist displacement by new formal legal rules. To the extent that these resistance efforts succeed, transformative law becomes “captured law.”

Consider, first in general terms, the many threats posed by traditional norms and institutions to the effective enforcement of laws designed to uplift historically subordinated groups.²⁸ In the case of criminal laws, or civil laws as to which there exists no effective private right of action, law enforcement officials, whose loyalties often lie with the traditional normative system, may be unwilling to enforce the new formal legal rules. Where a victim’s complaint is required to initiate formal legal proceedings, social pressures, expressed as either subtle or blatant social boycotts and reprisals, may make resort to the new legal protections too costly. Similar social pressures may constrain the willingness of witnesses to cooperate with the new legal order, resulting in the suppression of evidence needed for successful prosecution of a theoretically viable claim.

Effective implementation of transformative law may be further constrained by resource imbalances between those who seek to mobilize or enforce the new legal rules and those who seek to avoid liability under them. In the context of “normal” criminal law, where the state acts to enforce dominant social norms, prosecutors are likely to occupy positions of greater power and are apt to possess greater resources than the strata of defendants they prosecute. On the other hand, where

analysis of norm competition within unstable normative systems, *see generally*, Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225 (1997) (examining norm competition and attempting to specify conditions under which one norm will displace another).

²⁸For a more detailed discussion of these forces and processes, *see* Linda Hamilton Krieger, *supra* n. 2, at 90-91, 98 (describing processes of socio-legal capture in connection with Indian government efforts to eradicate the institution of dowry).

transformative law challenges or contradicts traditional social norms, the opposite situation often obtains. Transformative law is often mobilized by social “outsiders” against social “insiders.” When challenged under a transformative legal regime, these social insiders are often better able than their outsider opponents to exploit the law’s soft spots. They are therefore often able to restrict the law’s application, both to them individually and more broadly, as a function of judicial precedent.

The operation of subtle cognitive and motivational biases which distort social perception and judgment may further constrain the implementation of transformative law. The mechanisms through which social stereotypes and other institutionalized expectancies, social group allegiances, and subjective conceptions of fairness bias the evaluation of evidence are all well-documented in the relevant social science literature.²⁹

Other subtle processes can foil the displacement of entrenched social norms and institutions as well. Law does not exercise a direct effect on individuals. The space between formal legal constraints and individual action is occupied by organizational structures and social relationships, and by the many social norms and institutions produced and monitored by those structures and relationships. As formal law is filtered through these mediating norms and institutions, it is interpreted, constituted, and re-enacted in ways that tend to reflect and reify them.

²⁹For examples, *see, e.g.*, Tom R. Tyler, Robert J. Boeckmann, Heather J. Smith & Yuen J. Ho, SOCIAL JUSTICE IN A DIVERSE SOCIETY, 53-54 (1997) (effect of subjective perceptions of justice on evaluation of social information); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1327-1329 (effects of attribution bias on civil rights adjudications); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (effect of social stereotypes on jury decision making); Albert Moore, *Trial By Schema: Cognitive Filters in the Courtroom*, 37 U.C.L.A. L. REV. 273 (1989) (sources of cognitive bias, broadly conceived, in jury decision making).

For example, legal sociologist Lauren Edelman and her colleagues have shown that over time, Title VII's civil rights protections have tended to be interpreted by organizational complaint handlers as generalized rules of fairness, bearing increasingly less resemblance to the anti-racist, anti-sexist political ideologies from which they emerged.³⁰ As Edelman observes, formal law is initially ambiguous, and acquires specific meaning only after professional and organizational communities have constructed definitions of violation and compliance.³¹

Not surprisingly, this interpretive process is powerfully influenced by the taken-for-granted background rules represented by norms, institutionalized practices, and related social meaning systems. Sometimes, these interpretive processes work from the top down, as organizational actors interpret and voluntarily comply with the indeterminate legal standards contained in legislation, regulations, or lawyer advice. Other construal processes, through which norms, institutions and social meaning systems influence law, operate from the bottom-up. Complex statutory regimes contain many ambiguous provisions requiring judicial and/or administrative construction. Judges and administrative officials, whose conscious or unconscious allegiance often lies with traditional rather than transformative normative and institutional systems, may powerfully constrain the new law's full implementation by way of statutory interpretation and implementation.

Judges and administrative officials can, of course, deliberately exploit loopholes or ambiguities in the law, thereby systematically limiting its sphere of application or attenuating its requirements. But

³⁰Lauren Edelman, John Lande, & Howard Erlanger, *Employers' Handling of Discrimination Complaints: The Transformation of Rights in the Workplace*, 27 LAW & SOC. REV. 497 (1993).

³¹*Id.*

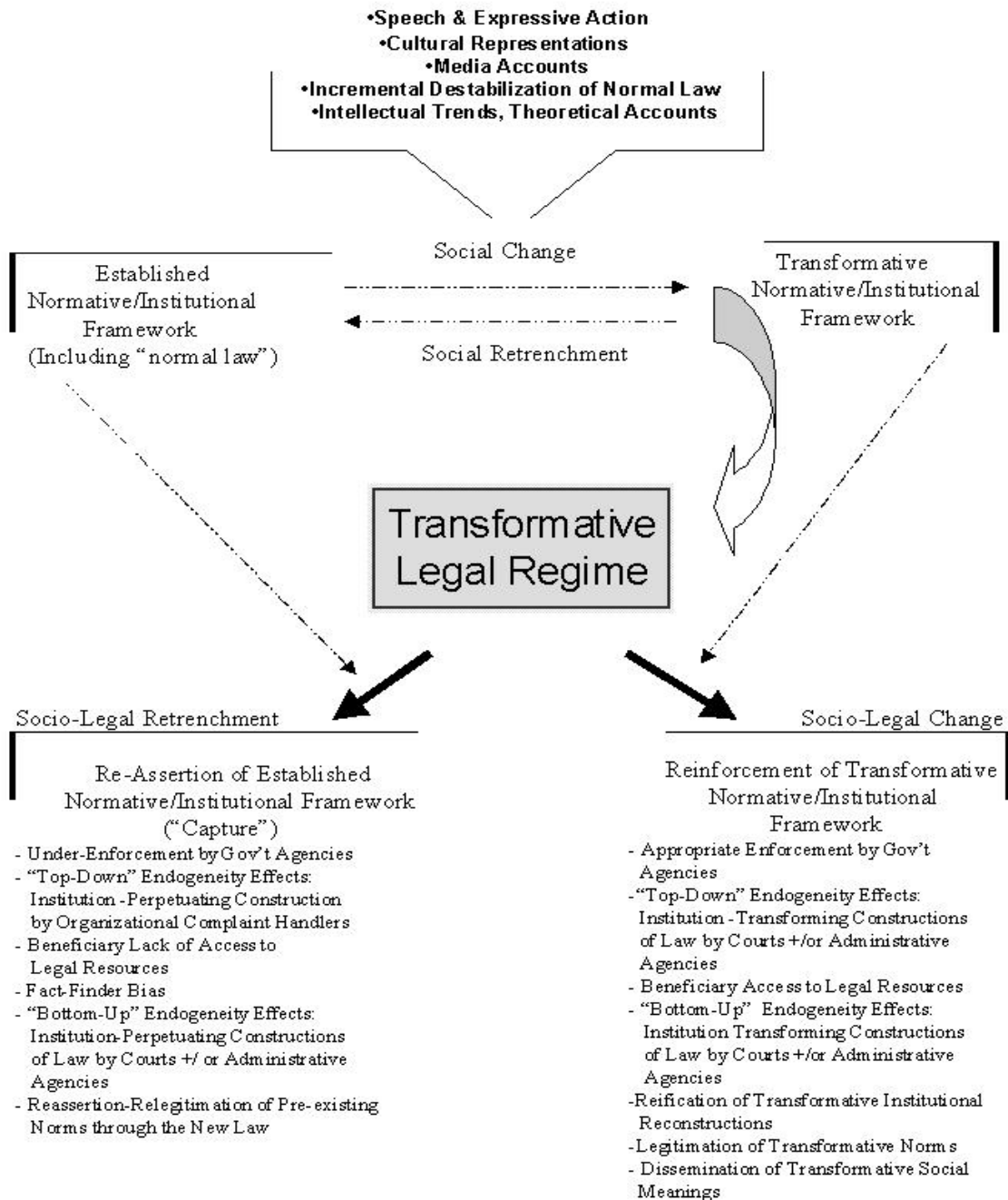
this process of capture through construal need not be animated by deliberate efforts to undermine a transformative law's effectiveness. Biased judicial or administrative construal can result from far more subtle mechanisms through which traditional entrenched norms and institutionalized practices, taken for granted by judicial and administrative decision makers, systematically skew the interpretations of transformative legal rules so that those rules increasingly resemble the normative and institutional systems they were intended to displace. Eventually, if these interpretive biases operate unconstrained, the new transformative law may provide a vehicle for the reassertion and relegitimation of the very norms and institutions it was designed to transform. Lauren Edelman and her collaborators have referred to this phenomenon as reflecting the "endogeneity" of law.³² Wendy Parmet, earlier in this volume, described it as an inevitable consequence of the new textualism.³³

Before bringing backlash into this analysis, let me organize the ideas explored thus far by describing them and their relationship to each other in graphic form. Figure 1 depicts a model of socio-legal change and retrenchment that incorporates the concepts of normal law, transformative law, and captured law, and explicates what I earlier referred to as the "inter-endogeneity" of formal law and the socio-cultural environment in which it functions and evolves.

³²L. B. Edelman, C. Uggen, & H. S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedure as Rational Myth*, *supra* note 5, at 407; Lauren B. Edelman, *Constructed Legalities: Socio-Legal Fields and the Endogeneity of Law*, in *BENDING THE BARS OF THE IRON CAGE: INSTITUTIONAL DYNAMICS AND PROCESSES* (Walter W. Powell & Daniel L. Jones eds., in press).

³³Wendy Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, *supra* p. [insert first page of Parmet].

Figure 1: Processes of Socio-Legal Change and Retrenchment



At the upper left-hand corner of Figure 1, we begin with an established normative and institutional framework. This framework corresponds with and in a sense includes the system of formal legal rules and procedures referred to earlier as normal law.

Moving across the top of Figure 1 from left to right, we find the established normative and institutional system destabilized by a variety of social, political, and cultural forces that press for normative and institutional change. These forces include political speech and expressive action, formal political initiatives, artistic representations, media accounts, and critical accounts by academics and other intellectuals. Through these and other devices, participants in socio-political movements attempt to transform – and to a greater or lesser extent may succeed in transforming – entrenched social norms, social meaning systems, and institutionalized practices. As the traditional normative and institutional system is destabilized, one may also observe incremental changes in normal law, or the proliferation of dissenting views among influential legal decision makers.

Three aspects of this process require consideration at this juncture. First, even if forces militating for social change succeed in enacting a transformative legal regime, traditional norms and institutions are unlikely to vanish overnight. As earlier described, transformative law often emerges out of normatively heterogeneous societies. In such societies, no one normative or institutional system exercises exclusive sway. In most situations in which social change efforts are underway, pressures for social retrenchment continue for some time to vie with emerging pressures for social change. In short, norm competition does not end with the enactment of a transformative legal regime.

The second point is closely related to the first. Transformative legal regimes can emerge at earlier or later stages of a social justice struggle. In this regard, it is useful to contrast the Civil Rights

Act of 1964 with both Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

The Civil Rights Act of 1964 was passed after many years of well-publicized struggle for racial justice. The Montgomery Bus Boycott began in the Spring of 1955.³⁴ The Little Rock 9 entered Central High School in the Fall of 1957, following Arkansas Governor Orval Eugene Faubus' infamous threat that blood would run in the streets if black students attempted to enter the school. It was February 1960 when four young black students from North Carolina A & T sat down at a white's only lunch counter at the Woolworth's in Greensboro, North Carolina. 1960 also saw the beginning of the Freedom Rides, which continued into 1961. In 1963, pictures of Bull Connor's police dogs ripping at the pants legs of demonstrators and of members of the Birmingham Fire Department turning fire hoses on children found their way onto the front pages of newspapers around the world. 1963 also produced Martin Luther King's, "Letter from the Birmingham Jail," the March on Washington, and King's "I Have a Dream" speech. In short, by the time the Civil Rights Act finally passed, it was supported by a powerful and well-publicized movement for social change, whose major tenets and aspirations had already garnered widespread socio-cultural support.³⁵

Disability rights legislation sits at the opposite end of a continuum in this regard. Although there was certainly a disability rights movement in the United States during the 1970's and 1980's, it was

³⁴Historical references to the civil rights movement of the 1950's and 1960's are taken from David J. Carrow, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* (1988).

³⁵For a comprehensive discussion of this point, *see generally* Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7 (1994).

neither as broad-based nor as well-disseminated into popular consciousness as the black civil rights movement of the 1950's and '60's, or the women's movement of the 1970's. As a result, neither Section 504 of the Rehabilitation Act of 1973 nor the Americans with Disabilities Act was supported by a broad-based popular understanding of the injustices faced by people with disabilities, the nature of their continuing struggle for inclusion and equality, or the particular theory of equality which informed the statute's many ambiguous provisions.

As Symposium contributor Richard Scotch has documented,³⁶ Section 504 of the Rehabilitation Act of 1973, which prohibits disability discrimination by federal agencies, federal contractors and recipients of federal funding, was not enacted in response to a broad social movement for disability rights, or even through the efforts of particular disability rights lobbyists or activists. Rather, the section was included in the Rehabilitation Act based on the spontaneous impulse of a small group of Congressional staffers who were familiar with Title IX, which prohibits sex discrimination in education, but who had virtually no experience with or knowledge of disability issues.³⁷ No hearings were held on Section 504, and Congressional staffers could not even remember exactly who among them had suggested adding the non-discrimination section to the overall bill.³⁸ According to Scotch, members of Congress who voted on the Rehabilitation Act were either unaware of the Section's existence or interpreted it simply as "little more than a platitude."³⁹ As economist Edward Berkowitz characterized

³⁶RICHARD SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS (1984).

³⁷*See id.* at 139-141.

³⁸*Id.* at 51-52, 54.

³⁹*Id.* at 54.

the situation, “It would not be an overstatement to say that Section 504 was enacted into law with no public comment or debate.”⁴⁰

The same can not be said however about the process leading up to final adoption of the Section 504 implementing regulations. Those regulations were drafted by a small group of Senate aides, Department of Health, Education and Welfare staffers, and disability rights advocates. The proposed regulations, both in their definition of disability and in their incorporation of a reasonable accommodation duty, and were based on a social or civil rights model of disability rather than on the older impairment model that informed the disability provisions of the Social Security Act.⁴¹ After their publication for comment, the proposed regulations drew a great deal of fire. The Ford administration left office in 1976 without adopting them,⁴² and after assuming his position in the new Carter administration, H.E.W. Secretary Joseph Califano was similarly negatively inclined.⁴³

The best-publicized episode of disability rights activism emerged from the struggle to implement the Section 504 regulations. On April 5, 1977, disability activists staged sit-ins and demonstrations in nine H.E.W offices around the country. While most dissipated within 24 hours, the occupation of HEW’s regional office in San Francisco lasted twenty-five days and received a good deal of national

⁴⁰EDWARD D. BERKOWITZ, *DISABLED POLICY: AMERICA’S PROGRAMS FOR THE HANDICAPPED* 212 (1987).

⁴¹*See* SCOTCH, *supra* note 30, at 143-145.

⁴²*Id.* at 112; *see also* JOSEPH CALIFANO, *GOVERNING AMERICA* 259 (1982).

⁴³*See* SCOTCH, *supra* note 30, at 145.

media attention.⁴⁴ It ended on April 28, 1977, when four years after the law's passage, Secretary Califano signed the regulations.⁴⁵

As Joseph Shapiro observes, disability rights activism in the 1970's centered primarily in the San Francisco Bay Area.⁴⁶ In the years between adoption of the Section 504 regulations in 1977 and passage of the ADA in 1990, relatively few well-publicized actions took place outside of the Bay Area or Washington D.C.⁴⁷ One salient exception, a widely-publicized action protesting inaccessible public transit in Detroit, Michigan, ended in public relations disaster, when at the last minute invited participant Rosa Parks withdrew from the event and issued a scathing, open letter chastising the action's organizers for their aggressive tactics.⁴⁸

A final burst of well-publicized disability rights activism took place as the ADA was being marked up in the House Energy and Commerce Committee in March of 1990. Early in that month, demonstrators organized by American Disabled for Accessible Public Transit (ADAPT) converged on Washington, D.C. for an action that came to be known as the Wheels of Justice March. The event

⁴⁴*See id.* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT, 66-69 (1993) (hereinafter, NO PITY).

⁴⁵*Id.* at 69.

⁴⁶*Id.* at 70 (stating, after describing the sit in at HEW's San Francisco office, "What existed in the San Francisco area simply did not exist elsewhere.").

⁴⁷I do not mean to imply that disability rights activism was not occurring in other locations. Such a claim would be patently incorrect. For example, American Disabled for Accessible Public Transit (ADAPT), founded in 1983, conducted numerous civil disobedience actions around the country during the 1980's and '90's, agitating for accessible public transit facilities. For a description of ADAPT's efforts in this regard, *see, e.g.* SHAPIRO, *supra* note 38, at 128-129.

⁴⁸*Id.* at 128.

began with a rally at the White House, during which the crowd was addressed by White House Counsel C. Boydon Gray, an enthusiastic supporter of the Americans with Disabilities Act. After the rally, demonstrators marched to the Capitol building. There, as ADAPT's Mike Auberger spoke from his wheelchair about the grim symbolism of the inaccessible Capitol building, three dozen ADAPT activists cast themselves out of their wheelchairs and commenced a "crawl-up," during which they dragged themselves hand over hand up the eighty three marble steps leading to the Capitol's front entrance. The action concluded the next day, with a noisy occupation of the Capitol rotunda.⁴⁹

Despite this and other efforts to educate the public about the physical and attitudinal obstacles confronting people with disabilities, by the time the ADA was passed the following summer, few people understood what the law provided, why it was important, or what core values and ideals should guide its implementation. Indeed, a nationwide poll conducted in 1991 by Harris Associates revealed that only 18 percent of those questioned were even aware of the law's existence.⁵⁰ Sixteen percent of respondents – just two percent fewer than knew about the ADA – reported feeling anger because "people with disabilities are an inconvenience."⁵¹

In short, by the time the ADA was passed, very little popular consciousness-raising had occurred. Few Americans outside a relatively small circle were familiar with the notion that the obstacles confronting persons with disabilities stemmed as much from attitudinal and physical barriers as

⁴⁹For a description of the Wheels of Justice action, *see id.* at 130-136.

⁵⁰*Public Attitudes Toward People with Disabilities*, conducted for the National Organization on Disability by Louis Harris and Associates, Inc. (1991), cited in SHAPIRO, *supra* note 44, at 328-329.

⁵¹*Id.*

from impairment *per se*. Most people simply did not understand the values, social meaning systems, and core principles on which the disability rights movement, the Section 504 regulations, and the ADA were based.

A transformative normative and institutional framework developed as part of a social justice movement rarely represents a complete break with the traditional normative and institutional system from which it emerged. In fact, social justice movements often draw upon a core subset of deeply rooted values, myths, and symbols and attempt to link the movement's agenda to the aspirations these values, myths and symbols express. These aspirational constructs, which we might refer to as "legacy values," serve in sense as transitional objects, linking the new normative framework to valued elements of the larger society's socio-political self-conception. The ultimate success of a social justice movement depends in large measure on its ability to integrate legacy values into the new transformative normative and institutional framework it proposes, and to keep the close relationship between the two salient.

In summary, transformative law often emerges when a reformist group or coalition seeks to harness the power of law to advance its program of normative and institutional change. Transformative law may take the form of a major statutory initiative, like Title VII of the Civil Rights Act of 1964, or it may emerge through judicial action in response to a major constitutional crisis, as in *Brown v. Board of Education*.⁵² In other situations, it may emerge from common law developments alone, as occurred for example in the landmark cases establishing a cause of action for strict liability for manufacturing

⁵²347 U.S. 483 (1954).

defects.⁵³ Indeed, one might define “judicial activism” as the manifest willingness of appellate court judges to participate in the production of transformative law.

But as Figure 1 above suggests, the enactment of a new statutory regime or the issuance of a major judicial decision is not a socio-legal *telos*; it is merely one part of a larger process. The influence of social and cultural forces on formal legal rules does not end with the passage of legislation or the judicial pronouncement of a new legal rule. On the contrary, as Figure 1 indicates, both the entrenched/traditional and the emerging/transformative normative and institutional frameworks exert pressure on the interpretation and elaboration of formal law, as it is re-enacted in its application to concrete situations. To the extent that reformist influences (represented by the dotted arrow moving from upper right to lower left on the right-hand side of Figure 1) predominate in the implementation process, transformative law will be elaborated and applied in ways that reinforce corresponding transformative norms and institutional reconstructions.⁵⁴ In these situations, one can begin to see

⁵³See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (holding both manufacturer of a defective automobile and the dealer who sold it liable for product defect on strict liability theory); *Heaton v. Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967) (same). See generally Keeton, *Product Liability – Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966) (describing judicial development of doctrine of strict liability in tort for defective products).

⁵⁴A thorough discussion of the role played by formal law in the transformation of social norms is beyond the scope of this paper. A large literature is available to readers wishing to pursue. See, e.g. Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1227-1228 (1997) (describing the function of law in “norm seeding”); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (discussing how changes in law may lead to what Sunstein refers to as “norm bandwagons” or “norm cascades”); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (same); Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 69, 76 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

manifestations of socio-legal change, enumerated as bullet points on the lower right hand side of Figure 1.

However, as the dotted arrow appearing on the upper left side of Figure 1 indicates, the traditional normative/institutional framework does not simply disappear. Rather, it continues to shape the legal environment as the transformative legal regime is interpreted, elaborated, and applied. To the extent that socio-legal actors continue to be influenced by traditional norms, social meaning systems, and institutionalized practices, the construal, elaboration, and “re-enactment” of transformative law will move progressively in the direction of socio-legal capture. Capture, then, can usefully be understood as the subtle re-assertion of pre-existing norms, social meanings, and institutionalized practices into a formal legal regime intended by its promoters to displace them.

II. SOCIO-LEGAL BACKLASH

As we have seen, the process of socio-legal capture is accretive. It can occur even if legal actors do not consciously or deliberately set out to undermine the reformist norms embedded in a transformative legal regime. Indeed, capture can occur even if a large majority of influential socio-legal actors embrace key aspects of the transformative normative framework. In backlash, however, opponents of the new legal regime explicitly reject key elements of the new legal regime, and ground that rejection in open assertions of the *normative superiority* of the pre-existing socio-legal framework.

Because in the case of backlash efforts to subvert or delegitimize the new legal regime are overt and are based on explicitly normative grounds, a number of additional features, which I will refer to as

“backlash effects,” begin to emerge. These include the following phenomena, not ordinarily present in mere capture contexts:

- Explicit attacks on the moral desert of the new regime’s beneficiaries; often accompanied by
- Attempts to limit the class benefitted by the new legal regime, based explicitly on asserted differences in the desert status of different beneficiary sub-groups;
- Parades of horrors – claims, often supported by vivid anecdotes, that application of the new legal rules is systematically resulting in unfair, absurd, or otherwise normatively undesirable outcomes;
- Rhetorical attacks on and other attempts to delegitimize law enforcement agents and agencies; often accompanied by
- Derisive humor leveled at the law and at those who mobilize and seek to enforce it;
- Opinion cascades: sudden, large scale shifts in manifest willingness to publicly express support for or opposition to a particular law, policy, group, activity, or principle;
- Calls for, or concrete efforts directed at achieving, outright rollback of transformative legal norms; and
- Other assertions of the normative superiority of the pre-existing social, legal, and institutional framework.

It might be helpful at this juncture to consider two cases illustrating the admittedly fuzzy but still discernible line between capture and backlash. The contrast I propose is between the transformative legal framework represented by Title VII of the Civil Rights Act of 1964 and the network of norms and institutions represented by preferential forms of affirmative action.

The disparate treatment aspects of Title VII have not been subjected to backlash as I am defining that concept here. Since the mid-1960's, few influential social actors have expressed normative opposition to the anti-discrimination principle. Even when Title VII plaintiffs lose their cases,

their motives or moral desert are rarely attacked in either judicial opinions or mainstream media commentaries. It is virtually impossible to find cartoons lampooning Title VII in major newspapers or news magazines. Even those who oppose Title VII on economic efficiency grounds⁵⁵ profess support for its central normative principles and goals; they simply contend that regulation is not the best way to achieve them. Few influential social actors advocate, or I would suggest even secretly wish for, a return to the pre-Title VII patterns of race, sex, and national origin discrimination.

Finally, it would also be hard to argue with the proposition that, at least in substantial measure, Title VII has had significant transformative effects. Official, separate job classifications, union locals, and lines of progression for whites and non-whites . . . separate pay and benefits scales for men and women . . . sex-specific help-wanted ads in newspapers -- these were all commonplace in 1963 and are all virtually unheard of today.

On the other hand, Title VII has undeniably been subject to socio-legal capture, at least in certain significant respects. Over the course of the 1980's and 1990's, courts progressively heightened standards of proof for plaintiffs asserting Title VII claims.⁵⁶ The class action standards contained in

⁵⁵See generally RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (opposing anti-discrimination regulation on economic efficiency grounds).

⁵⁶Between 1973, when the Supreme Court decided *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, and 1981, when it decided *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, courts divided on whether it was a burden of proof, or merely a burden of producing evidence of a legitimate, non-discriminatory reason, that shifted to the defendant after the plaintiff established the elements of a prima facie case. In *Burdine*, the Court decided that issue in defendants' favor, but stated that the plaintiff could carry her ultimate burden of proving that the defendant's proffered reason was pretextual either directly, by showing that discrimination more likely motivated its action, or indirectly, by establishing that its proffered reason was "unworthy of proof." 450 U.S. 248, 255 n. 10. As a practical matter, that standard was further narrowed in *St. Mary's Honor*

Rule 23 of the Federal Rules of Civil Procedure have been interpreted and applied in ways that have made it increasingly difficult to certify employment discrimination class actions. This in turn has made hiring and promotion discrimination harder to redress in a systematic way.⁵⁷ Over time, courts have interposed a variety of other substantive, procedural, and evidentiary obstacles, making successful prosecution of individual and class-based discrimination cases more difficult.⁵⁸

Institutionalized practices like word-of-mouth recruitment and non-posting of job openings, once routinely invalidated as discriminatory, have been upheld with increasing frequency, treated by federal judges not as part of the problem, but simply as part of “the common nature of things.”⁵⁹

Center v. Hicks, 509 U.S. 502 (1993), in which the Supreme Court held that establishing pretext did not, as a matter of law, entitle the plaintiff to judgment.

⁵⁷*See, e.g.*, *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977) (questioning “across-the-board” approach to class actions previously permitted in Title VII cases); *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982) (rejecting “across-the-board” approach outright).

⁵⁸Although a systematic discussion of these various devices is beyond the scope of this article, one example is the “same actor inference,” now an accepted feature of Title VII disparate treatment doctrine in most federal circuit. For an analysis of the same actor inference, *see* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1310, 1314 (1998).

⁵⁹*Compare* *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1435-36 (9th Cir. 1975) (finding word-of-mouth hiring discriminatory because of its tendency to perpetuate the all-white composition of the employer’s work force) *and* *NAACP v. Evergreen*, 693 F.2d 1367, 1369 (11th Cir. 1982) (same) *with* *Equal Employment Opportunity Comm’n v. Consol. Serv. Sys.* 989 F.2d 233, 235-36 (7th Cir. 1993) (holding word-of-mouth recruitment does not violate Title VII on either a disparate treatment or disparate impact theory; it was the most cost-effective method of recruitment and there was no evidence of invidious bias against any under-represented group) *and* *Equal Employment Opportunity Commission v. Chicago Miniature Lamp Works*, 947 F.2d 292, 298-99 (7th Cir. 1991) (refusing to apply disparate impact theory in case challenging word of mouth recruitment practices).

Although disparate impact theory, first endorsed by the Supreme Court in 1971,⁶⁰ seemed poised to displace a broad range of employment-related institutions, in subsequent years the requirements attending its successful mobilization were increasingly tightened and its sphere of permissible application progressively constricted, sharply circumscribing its transformative effect.⁶¹

These and other restrictive developments, however, have progressed against a backdrop of proclaimed allegiance to non-discrimination norms. Even during the Reagan administration, as E.E.O.C. officials all but shut down the Commission's systemic discrimination enforcement operations and issued new policies prohibiting Commission attorneys from invoking the statute's most powerful remedies, they continued to express firm commitment to anti-discrimination principles and vigorous law enforcement.⁶² As Lauren Edelman has demonstrated, even as business organizations found ways to insulate their established practices from Title VII's transformative effects, they systematically constructed and displayed symbolic indicia of compliance, thus signaling their support for the statute's

⁶⁰Griggs v. Duke Power Company, 401 U.S. 424 (1971).

⁶¹See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1989) (requiring showing of disparate impact to be based on statistics limited to qualified persons in the relevant labor market); Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works, *supra* note 53, at 298-99 (refusing to apply disparate impact theory in case challenging word of mouth recruitment practices); Pegues v. Mississippi State Employment Serv., 699 F.2d 760, 766-67 (5th Cir. 1983), *cert. denied*, 464 U.S. 991 (1983) (imposing strict requirement regarding proof of causation in disparate impact cases); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 189 (5th Cir. 1983) (refusing to apply disparate impact theory to challenge a test that was only one of many factors considered in making hiring decisions);

⁶²Two informative treatments of Title VII enforcement by the E.E.O.C. during the Reagan years addressing these and other issues include David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121 (1989), and Eleanor Holmes Norton, *Equal Employment Law: Crisis in Interpretation – Survival Against the Odds*, 62 TULANE L. REV. 681 (1988).

basic normative principles.⁶³ The anti-racist, anti-sexist ideology undergirding Title VII was not explicitly denounced by organizational actors. Rather, it was gradually transmuted into basic principles of procedural fairness, which were familiar and relatively non-threatening to high level managers and human resources professionals.⁶⁴ In these and other ways, processes of socio-legal capture functioned covertly, as the transformative strength of the non-discrimination principle was increasingly diluted and its dictates recast to harmonize with rather than destabilize entrenched institutions and social meaning systems.

Responses to affirmative action, on the other hand, represents a paradigmatic case of socio-legal backlash. Opposition to affirmative action is often based explicitly on assertions that “colorblind” or “merit-based” allocation regimes are normatively superior to selection systems incorporating affirmative action elements.⁶⁵ Both popular and scholarly accounts, often supported by vivid anecdotes, assert that affirmative action programs privilege the unworthy at the expense of the worthy, undermine important values and traditions, and systematically result in unfair, perverse, and otherwise

⁶³See Lauren Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Law*, 97 AMER. J. SOCIOLOG. 1531 (1992) (discussing the organizational construction of symbolic indicia of compliance with anti-discrimination laws).

⁶⁴See Lauren Edelman et al., *Employers’ Handling of Discrimination Complaints: The Transformation of Rights in the Workplace*, 27 LAW & SOC. REV. 497 (1993).

⁶⁵See, e.g., SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* (1990); SHELBY STEELE, *A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA* (1998); V. Dion Haynes, *Called “Blasphemy,” Spot Won’t Run: King Speech in GOP Ad Sparks Furor*, CHI. TRIB., October 25, 1996 (describing argument advanced by Ward Connerly to the effect that merit-based decision making systems are needed to “bring the races together”).

undesirable outcomes.⁶⁶ Candidates for public office who support affirmative action policies have been subjected to blistering rhetorical attacks. These are perhaps best exemplified by the derisive labeling of Lani Guinier as a “quota queen” by those opposing her nomination to head the Civil Rights Division of the Justice Department in 1993.⁶⁷ Eventually, affirmative action programs were targeted for outright

⁶⁶See, e.g., Dee Ann Durbin, *Debaters Take Their Shots on Prop. 209: U.C. Regent, Attorney Vie Over Affirmative Action*, SAN DIEGO UNION-TRIB., October 9, 1996 (describing anecdote regarding a white male student denied admission to U.C. San Diego Medical School, used in debate by U.C. Regent Ward Connerly); Jeff Howard & Ray Hammond, *Rumors of Inferiority: The Hidden Obstacles to Black Success*, NEW REPUBLIC 17 (Sep. 1985) (positing that affirmative action creates a sense of self-doubt in beneficiaries).

⁶⁷The “quota queen” label originated with a piece in the Wall Street Journal bearing the headline “Clinton’s Quota Queens.” The piece was authored by Clint Bolick, a former Justice Department attorney and aide to William Bradford Reynolds, Chief of the Civil Rights Division during the Reagan administration. See Linda Feldman, *Failure to Combat Labels Sunk Justice Nominee*, CHRISTIAN SCI. MONITOR, June 7, 1993, at 4. (stating that, “[I]t was Mr. Bolick who fired the first salvo - a column in the Wall Street Journal titled ‘Clinton’s Quota Queens’ - after Ms. Guinier’s nomination was announced April 29”).

Both print and broadcast media coverage of the Guinier nomination regularly repeated the slur, to the point that it became emblematic of the Guinier affair. As one article noted, “[T]he fatal error, Guinier’s supporters say, was the White House’s failure to counter the ‘quota queen’ epithet, which worked its way into other media and into the Zeitgeist.” See *id.* For examples of the label’s use in the broadcast media, see, e.g., *All Things Considered*, National Public Radio Broadcast June 2, 1993; see also Catherine Crier & Bernard Shaw, *Controversial Guinier Nomination Hits Senate*, (CNN Broadcast of *Inside Politics*, June 2, 1993, transcript 345).

President Clinton withdrew the Guinier nomination on June 3, 1993. See *Clinton Drops Guinier as Choice for Civil Rights Post; Avoids a Fight Over Writings on Race*, FACTS ON FILE WORLD NEWS DIGEST, June 10, 1993, at 422, A2.

rollback in the courts,⁶⁸ in Congress,⁶⁹ and in legislative initiatives and/or public referenda in a number of states.⁷⁰ Many of these efforts were successful, the most notable being the passage of Proposition 209 by the California electorate in 1996, and the issuance of the Fifth Circuit's decision in *Hopwood v. Texas*.⁷¹

Although a thorough exposition of the case is beyond the scope of this article, one further example of socio-legal change and attempted retrenchment will advance our inquiry. In 1993, the Santa Cruz City Council approved on the first of two required votes an ordinance that banned, among other things, discrimination based on personal appearance.⁷² Outside of Santa Cruz, reactions to the ordinance were scathingly negative, reflecting many of the backlash effects described earlier. Media coverage was blistering, characterized by derisive humor aimed at the law, its promoters, and its presumed beneficiaries.

Examples of this coverage are far too numerous to catalog. The following treatment by

⁶⁸See, e.g., *Piscataway Township Board of Ed. v. Taxman*, 91 F.3d 1547 (3rd Cir. 1996) (en banc), *cert. granted*, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997); *Hopwood v. Texas*, 84 F.3d 720, *cert. denied*, 518 U.S. 1033 (1996); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

⁶⁹See, e.g., Civil Rights Restoration Act of 1997, S. 46 105th Cong. (1997); Civil Rights Act of 1997, H.R. 1909, 105th Cong. (1997); Racial and Gender Preference Reform Act, H.R. 2079, 105th Cong. (1997).

⁷⁰For a discussion of various such initiatives contemporaneous with California's Proposition 209, see Linda Hamilton Krieger, *Civil Rights Perestroika*, *supra* note 52, at 1255, n. 10.

⁷¹84 F.3d 720 (1996) (invalidating the University of Texas' affirmative action admissions program on equal protection grounds).

⁷²SANTA CRUZ, CAL., ORDINANCE 92-11 (Apr. 28, 1992).

the *Washington Times*, however, was typical:

Out in Santa Cruz, Calif., the weirdos are on the march double time. The City Council is considering enacting a law that would forbid discrimination on the basis of personal appearance. As a result, every geek in the country seems to be flying, flapping, crawling or hopping into town to squeak and gibber in support of the measure. If it passes next month, the city's population may soon resemble nothing so much as the cast of a 1950's drive-in horror movie . . . One "victim" of "lookism" . . . is 22 year old Cooper Hazen. His contribution to funny-lookingness is his insistence upon wearing a half-inch post in his tongue. His employer at a local psychiatric hospital gave him the heave-ho when he recently discovered this practice. . . . "Thith ith wha gah me thired," [sic] confirmed Mr. Hazen to an Associated Press reporter, protruding his tongue with its attachments.⁷³

What is perhaps most interesting about this and similar coverage is that the ordinance actually allowed employers to enforce dress codes and grooming rules. Mr. Hazen did not even work in Santa Cruz, and if he had, his termination would not have been prohibited by the ordinance.⁷⁴

Media coverage also reflected the familiar "parades of horrors," offering vivid examples of the absurd outcomes the law would supposedly compel. One particularly interesting example of this effect appeared in the *Los Angeles Times*:

Here's a little common-sense test:

- - Imagine you run a small Jewish deli and you have an opening for a checkout cashier. In walks an applicant with a swastika tattooed prominently on his arm. Do you hire him?

⁷³*Santa Cruz Weirdocracy*, WASH. TIMES, January 21, 1992, at 2.

⁷⁴*See Overlook Looks, City May Order Employers*, ST. PETERSBURG TIMES, February 8, 1993, at 5A (quoting ordinance sponsor and Santa Cruz City Council Member Neal Coonerty).

- - Pretend you own a fast-food restaurant in a predominantly black neighborhood and you need a short-order cook. The most technically qualified person seeking the job is a skinhead fond of wearing a T-shirt emblazoned with the words “White Power.” Does he get the job?
- - Now let’s say you’re a newspaper editor looking for someone to cover the police beat. An experienced professional journalist wants the job, but he shows up for the interview wearing a dress. Does he get a chance to be our ace crime reporter?

If you live and work in the California cities of Santa Cruz or San Francisco, the answer to all three of these questions had better be yes or you could be in for serious trouble...⁷⁵

Although a number of interesting things can be said about the Santa Cruz ordinance, three observations are particularly significant for our purposes here. First, despite the fact that the ordinance, its promoters, its beneficiaries, and the town of Santa Cruz itself were subjected to widespread, withering ridicule from as far away as Malaysia,⁷⁶ the law has apparently never been targeted for repeal. Furthermore, at least as of 1995, it appeared to be operating precisely as its promoters intended,⁷⁷ providing a formal claim to non-discriminatory treatment in employment, housing, and public

⁷⁵Joseph Farah, *Job Bias Law Takes a Walk in Purple Zone; Some Cities May Prohibit Discrimination in Hiring on the Basis of Appearance*, L. A. TIMES, February 7, 1993, at 5.

⁷⁶See Shukor Rahman, *Looks Still Count*, NEW STRAITS TIMES (Malaysia), Sep. 12, 1997, at 8. The New Straits Times’ article, for example, described the ordinance as follows: “In 1992, Santa Cruz, a coastal town about 120 km south of San Francisco, imposed an unprecedented ban on discrimination in employment and housing based on a person’s looks. The law, believed to be the most far-reaching ‘anti-lookism’ statute in the US, protects not only ‘ugly’ people but also the fat, skinny, short, toothless and anyone else with abnormal physical traits.”

⁷⁷Finding serious reportage describing the aims of the new law’s promoters is no easy task. One reasonably informative treatment can be found amidst the mockery in Richard C. Paddock, *California Album: Santa Cruz Grants Anti-Bias Protection to the Ugly*, L.A. TIMES, May 25, 1992, at 3. Paddock’s article includes remarks by Santa Cruz City Councilman Neal Coonerty, the law’s sponsor, who explains that it grew out of *Cassista v. Community Foods*, a case involving a

accommodations for persons stigmatized by their weight, sexual orientation, gender, or physical attributes.⁷⁸

The second point may help account for the first. The ordinance was first proposed and successfully passed through one of two required City Council votes in January 1992. The second vote, which had been scheduled for the following February 11th, was postponed in response to the firestorm of negative media coverage and opposition to the ordinance from the Santa Cruz business community. Between the first vote and the second, which was eventually held on May 28th, the law was redrafted to narrow the particular aspects of self-presentation it would protect. These revisions eliminated protection for most purposeful changes in personal appearance, such as tatoos and body piercings.

The final provisions of the 1992 ordinance are now codified as part of the Santa Cruz Municipal Code.⁷⁹ Section 9.83.010 of the Code prohibits discrimination based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight or *physical characteristic*, as opposed to physical appearance. “Physical characteristic” is

Santa Cruz natural foods store that refused to hire a female applicant who weighed over 300 pounds. Cassista lost her case at trial, but the judgment was overturned on appeal to the California Court of Appeals for the Sixth Appellate District. Eventually, the California Supreme Court held that the California Fair Employment and Housing Act did not prohibit discrimination based on weight, and that discrimination based on weight was, in most circumstances, not covered by the Act’s disability discrimination provisions. *See Cassista v. Community Foods*, 5 Cal. 4th 1050 (1993).

⁷⁸So, for example, in 1995, the Body Image Task Force used the Santa Cruz ordinance to negotiate an agreement with theater companies United Artists and the Harris Group to install a certain number of extra-wide seats in newly constructed theaters so as to accommodate fat movie-goers. *See Large Moviegoers Demand Large Seats*, NEWS & RECORD (Greensboro, NC), February 17, 1995, at W2; Leah Garchik, *Room With a View*, S.F. CHRONICLE, February 8, 1995, at F8.

⁷⁹ SANTA CRUZ, CAL., CODE § 9.83 (“Prohibitions Against Discriminating”).

defined in the following way:

“Physical characteristic” shall mean a bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person including individual physical mannerisms. Physical characteristic shall not relate to those situations where a bodily condition or characteristic will present a danger to the health, welfare or safety of any individual.⁸⁰

These changes circumscribed the class of people who would be able to invoke the law’s protection, but did not by any means exclude all classes of individuals whose inclusion had subjected the ordinance to ridicule. “Out” were people with objectionable body piercings, tattoos, or wild hairstyles. Still “in” were fat people, transsexuals, people who had physical disfigurements or were simply considered “ugly,” effeminate men, and others with mannerisms that could be characterized as “outside their control.”⁸¹

One final feature of the Santa Cruz ordinance merits consideration. Under Municipal Code Section 9.83.120, a person claiming to be aggrieved under the law must file a complaint with a city official, who then selects three mediators from a predetermined list. Each party strikes one of the three

⁸⁰SANTA CRUZ, CAL., CODE § 9.83.020(13). Discrimination based on “personal appearance” is prohibited only in housing. Section 21.01.010 of the Code provides:

It shall be unlawful for any person having the right to rent or lease any housing accommodation to discriminate against any person on the basis of race, color, creed, religion, national origin, ancestry, disability, marital status, sex, sexual orientation, personal appearance, pregnancy or tenancy of a minor child except as provided for by state law.

Physical appearance is not defined.

⁸¹*See id.*

and is then required to work informally with the remaining mediator to resolve the dispute. As the ordinance provides, “[t]he objective of the mediation process shall be to achieve resolution of the complaint of discrimination by way of an understanding and mutual agreement between the parties. It shall not be to assign liability or fault.”⁸² If mediation fails, the complainant can file a civil action in any court of competent jurisdiction. As of the writing of this article, however, there were no published decisions interpreting, applying, or even mentioning the law.⁸³

Three aspects of this case suggest conditions under which socio-legal retrenchment is more or less likely to occur. First, the ordinance applied only to the City of Santa Cruz -- a relatively small and insular jurisdiction. As a result, it does not much matter what opinion-makers or other influential actors in St. Petersburg, Florida, Washington, D.C., Los Angeles, or Malaysia think of the Ordinance. Similarly, it does not much matter whether people outside of the law’s relatively homogenous compliance community understand, let alone embrace, the norms and values that underlie it. *The community from which the ordinance emerged co-extends with the community empowered to interpret and apply it.*

This contrasts sharply with the Americans with Disabilities Act and the Rehabilitation Act Section 504 Regulations on which the ADA was modeled. As earlier described, both were drafted by a relatively insular group of disability activists, joined in the case of the ADA by a small sympathetic group of legislative and administrative officials who understood the social model of disability and sought

⁸² *See id.* § 9.83.120.

⁸³This was the case as of a LEXIS search performed October 30, 1999.

to reify it through federal legislative and regulatory power.⁸⁴ But, as the symposium offerings of Matthew Diller,⁸⁵ Chai Feldblum,⁸⁶ and Wendy Parmet⁸⁷ so vividly reflect, few people outside of this relatively small circle, including the federal judges empowered to interpret the ADA, understood the social model of disability or adhered to the norms, values, and interpretive perspectives it was designed to advance. This situation, I suggest, dramatically increased the ADA's vulnerability to capture and backlash effects.

In contrast to the ADA, a second feature of the Santa Cruz ordinance may have protected it from socio-legal retrenchment. As earlier described,⁸⁸ the Santa Cruz law is apparently being enforced primarily through mediation rather than through litigation. As a consequence, disputants and their advocates, rather than judges or other professional legal decision makers, are the agents empowered to "re-enact" the law, that is, to infuse it with meaning and apply it to a particular dispute. Mediation, much more than litigation I suggest, encourages disputants to develop an inter-subjective understanding of the norms and values implicated by their dispute, and of the relationship of those norms and values to

⁸⁴See text accompanying notes ___ - ___, *supra*.

⁸⁵Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, *supra* p. [insert first page of article here].

⁸⁶Chai Feldblum, *The Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, *supra* p. [insert first page of article here].

⁸⁷Wendy Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, *supra* p. [insert first page of article here].

⁸⁸See text accompanying notes ___ - ___, *supra*.

their specific situation.⁸⁹ Because they are required to listen to one another, participants in mediation will at least be exposed to each other's normative perspective and to the social meanings each ascribes to the law's technical terms. Consequently, mediated outcomes are less likely than litigated outcomes to turn on technicalities or fine parsings of statutory language. This reduces the influence of many of the mechanisms of socio-legal retrenchment which have so powerfully limited the transformative potential of the ADA.

Finally, in contrast to the Rehabilitation Act and the ADA, the Santa Cruz ordinance was fully debated, and the major normative objections generated by its earlier versions thoroughly aired, before the law was passed.⁹⁰ By eliminating from protection people who had purposefully changed their appearance by, for example, tattooing or body piercing, and by clarifying the right of employers to enforce consensus norms of dress, grooming, and personal hygiene, the law's promoters accomplished a number of things. The first is obvious: they reduced the ability of opponents to discredit the ordinance with plausible "parades of horrors" or with humorous depictions of the "absurd" results a literal application of the ordinance might effect.

But in addition, by subjecting the ordinance to intense public scrutiny, debate, and eventual

⁸⁹I do not intend this statement as a broad endorsement of mediation as the preferred procedure for the elaboration and enforcement of civil rights protections. There is an ongoing and exceedingly complex debate now underway on this issue. My speculations here may bear on that debate over this issue, but they are meant to do no more.

⁹⁰It is not my intention to imply that this sort of debate and statutory tailoring was completely absent from the process leading up to the enactment of the Act. ADA Section 508, now codified at 42 U.S.C. § 12209, for example, explicitly excludes transvestitism from the definition of disability. Section 511 explicitly exempts other controversial conditions as well. 42 U.S.C. § 12211. However, the inclusion of mental disabilities, and the broad, flexible definition of disability set out in ADA Section 3, left ample room for normative ambiguity and dissension.

modification, its promoters achieved something far more significant. They uncovered a set of core normative principles underlying the new law, connected those principles to key legacy values, and re-crafted the statute to ensure that the norms and values the statute was *asserted* to advance were in fact the norms and values that the ordinance would advance *in practice*.

The legacy value most clearly reflected by the modified ordinance can be captured in a familiar aphorism: “You can’t (and by implication, should not) judge a book by its cover.” Many people stigmatize and discriminate against fat people, people with cosmetic disfigurements, and those simply considered “ugly.” But most, if pressed, would admit that they should not. The Santa Cruz ordinance then, despite its non-conventionality, is actually anchored in a deeply entrenched traditional norm that most of us learned as young children. What makes the ordinance transformative, of course, is that it extends the canopy of that norm over traditionally unsheltered groups, like effeminate men, whose “covers” were traditionally, and in most parts of the country are still, seen as revealing something defective about “the book.”

In sum, certain features characterizing the Santa Cruz ordinance, absent in connection with the ADA, may have helped protect it from socio-legal retrenchment. First, the community out of which the ordinance emerged co-extends with the community empowered to re-enact it through interpretation and application. Second, before the law was passed, its normative underpinnings were clarified and its connection with legacy and other consensus values strengthened. Finally, the law’s enforcement mechanisms limit opportunities for construction and application by technically-oriented legal decision makers and encourage lay disputants to develop mutually acceptable interpretations of the law through dialogue about norms, values, and subjective social meanings. In this way, informal consciousness

raising becomes an integral element of the law's enforcement; ongoing socio-cultural change and the law's re-enactment through interpretation and application stay closely linked.

Questions remain, of course, as to whether one can soundly generalize these features to other situations, or indeed whether they had causal efficacy in the Santa Cruz context at all. It is the causes of socio-legal backlash, both in general and in the context of the ADA, that our attention now turns.

III.

RETRENCHMENT, BACKLASH, AND THE AMERICANS WITH DISABILITIES ACT

Specifying the causal antecedents of even a simple social phenomenon is an ambitious and essentially empirical endeavor, so let me say at the outset that my effort here to posit a causal model of socio-legal backlash is necessarily both tentative and conjectural. That point conceded, I offer the following general principles as a framework for understanding why, as a general matter, backlash effects emerge, and why they have emerged in response to the Americans with Disabilities Act.

At its core, backlash is about the relationship between a transformative legal regime and the traditional social norms and institutionalized practices it implicates. Specifically, backlash can be expected to occur when the application of a transformative legal regime generates outcomes that conflict with norms and institutions to which influential segments of the relevant populace retain strong conscious allegiance. Vulnerability to backlash increases, I suggest, if a transformative legal regime is normatively ambiguous or opaque. Normative ambiguity obtains when a law's moral underpinnings are ill-defined or internally contradictory, or if the law's practical effects diverge from the moral principles on which it was rhetorically premised. Normative opacity results when a transformative law represents the social and moral vision of an insular sub-group that managed to enact the law, but has failed to

disseminate that vision more broadly through the compliance community and, at the same time, has lost control over the law's "re-enactment" through processes of interpretation and application.

In the discussion that follows, I excavate these ideas in more depth and relate them to the ADA. Section A explores ways in which, given a broad definition of disability, the ADA effects outcomes which conflict with powerful social norms bearing on subjective perceptions of distributive justice. Section B examines the claim that the ADA is in certain key respects normatively ambiguous and opaque, as those terms were earlier defined.

A. Reasonable Accommodation, Disability Status, and the Social Psychology of Distributive Justice

In Part I,⁹¹ I described the tension between the direct threat provisions of the Americans with Disabilities Act and a set of entrenched norms and institutionalized practices relating to the management of certain types of perceived workplace risk. The relationship between that tension and the emergence of anti-ADA backlash effects is vividly illustrated by the *Richmond Times* cartoon depicted in Part I⁹² and is more systematically explored in Symposium contributions by Cary LaCheen⁹³ and by Vicki Laden and Greg Schwartz.⁹⁴ Their contributions highlight a salient example of the type of dissonance between a transformative legal regime and an entrenched set of norms and institutions that generates

⁹¹See TAN __, *supra*

⁹²See *supra* note 19 and accompanying text.

⁹³Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung, and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television*, *supra* p. [insert first page of article here].

⁹⁴V. Laden & G. Schwartz, *Psychiatric Disabilities, The Americans with Disabilities Act, and the New Workplace Violence Account*, *supra* p. [insert first page of article here].

socio-legal retrenchment and accompanying backlash effects. In this section, I explore a second example by examining how the ADA, under the broad and flexible definition of disability advocated by its proponents, effects outcomes that conflict with a powerful system of entrenched social norms relating to distributive justice.

At the outset, I should explain why in examining the Americans with Disabilities Act I should be discussing distributive justice at all. Harlan Hahn has forcefully argued,⁹⁵ and later in this volume argues reasserts⁹⁶ that the ADA is not about distributive justice; it is about corrective justice. The non-disabled majority simply has trouble understanding this, he points out, because its members are so enured to the prejudice against the disabled manifested in the built physical environment.⁹⁷

Professor Hahn's point is extremely well-taken, especially in relation to certain disabilities and corresponding accommodations. Admittedly, a legal mandate compelling a private or public entity to make its buildings physically accessible to persons with mobility impairments has distributive implications. There is only so much money to spend. But such a mandate also provides an easily-

⁹⁵See, e.g., Harlan Hahn, *Civil Rights for Disabled Americans: The Foundations of a Political Agenda*, in IMAGES OF THE DISABLED/DISABLING IMAGES 281 (A. Gartner & T. Joe eds., 1987); Harlan Hahn, *Toward a Politics of Disability: Definition, Disciplines, and Politics*, in 22 SOC. SCI. J. 87 (1985); Harlan Hahn, *Reconceptualizing Disability: A Political Science Perspective*, 48 REHABILITATION LITERATURE 362 (1984) (positing a civil rights model of disability premised on corrective justice principles).

⁹⁶Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, *supra* p. [insert first page of article here].

⁹⁷For an exploration of the tensions inherent in a distributive versus corrective justice approach to the ADA, see John M. Vande Walle, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 Chi.-Kent L. Rev. 897 (1998).

recognizable correction to an earlier decision by that entity, whether conscious or simply uncaring, to minimize costs at a stigmatized group's expense.

However, it is harder to argue persuasively that accommodation lacks distributive justice implications where the disability category is broad or contested. For example, requiring an employer to allocate a private office to a relatively new, not particularly productive employee diagnosed with Attention Deficit Disorder instead of to a high seniority, very productive employee who is simply fed up with noise and a lack of privacy has little intuitive connection with corrective justice principles. Its distributive fairness implications, on the other hand, are viscerally clear.

The extent to which the ADA will be seen as having distributive as opposed to corrective justice implications will vary, I suggest, with a set of identifiable factors. These include:

- The nature of the disability in question (prototypic or non-prototypic);
- The nature of the discrimination involved (disparate treatment or failure to accommodate);
- The nature of the accommodation, if any, at issue (available to everyone, like a curb cut, or "zero-sum," like a shift assignment; and
- The conceptual frame through which disability policy issues are viewed (impairment/social welfarist frame or social/civil rights frame).

More to the point, whether justified or not, people evidently *view* the ADA as distributing benefits to persons permitted to invoke its protection. This perspective is clearly reflected in newspaper commentary responsive to the Supreme Court's 1999 definition-of-disability cases.⁹⁸

⁹⁸These include *Sutton v. United Airlines*, ___ U.S. ___, 119 S.Ct. 2139 (1999)(corrective lenses and myopia), *Murphy v. United Parcel Service, Inc.*, ___ U.S. ___, 119 S.Ct. 2133 (1999)(hypertension controlled by medication), and *Albertsons, Inc. v. Kirkenberg*, ___ U.S. ___, 119

While the following excerpts represent but a tiny fraction of similar expressions of opinion, they amply illustrate my point.

Consider first a statement by former National Public Radio reporter John Hockenberry, now a syndicated columnist and lecturer on disability issues:

Rather than fixing a specific problem with a specific set of changes, the proponents of the Americans with Disabilities Act have decided to induce change through a series of lawsuits, encouraging people to think of disability as *a non-specific cache of misery redeemable for a compensatory benefit*.⁹⁹

The notion that the ADA is primarily about the allocation of material benefits and privileged treatment can be seen in the following excerpts as well:

The professionally disabled . . . have consistently promoted the expansion of the definition of who is to be included among the disabled and entitled to its protection and benefits. They ignore that *many people want to be seen as disabled when there is a material reward for being defined in this way* . . . These spokespersons forget that when they demand that everyone be entitled to protection under the ADA, no one will be protected. Worse, those with severe disabilities will be pushed out of the way by those people with minimal or non-existent disabilities who are often in a stronger position physically and financially *to sustain a fight for privilege*.¹⁰⁰

[I]f some disabilities were not easily and largely correctable, they conceivably could be used as *legal tickets to employment* even if they

S.Ct. 2162 (1999)(monocular vision).

⁹⁹John Hockenberry, *Disability Games*, N.Y. TIMES, June 29, 1999, at 19 (emphasis added).

¹⁰⁰Bill Bolt, *Commentary: Ruling is a Blow to the Disabled But It's Also an Opportunity*, L.A. TIMES, June 27, 1999, at 5 (emphasis added).

entailed some unacceptable risk to others.¹⁰¹

The notion that disability status is contested because it has distributive implications is of course nothing new. Exploring the definition of disability under the Social Security Act, Deborah Stone in *The Disabled State*,¹⁰² argued that the disability category is controversial precisely because it is used to resolve issues of distributive justice.

As Stone observes, virtually all societies have two parallel distribution systems – a primary or default system, and a secondary system based on need. In most modern contexts, the primary or default distribution system is based on work. Outputs, or distributions to an individual, correspond with inputs from that individual -- that is, from work.¹⁰³

In the modern welfare state, Stone maintains, disability status entails political privilege as well as social stigma. It entails privilege because it functions as an administrative status, permitting those who hold it to be excused from participation in the work-based system and to enter the need-based one. Disability status may also provide exemption from other burdens and obligations generally viewed as undesirable, such as military service, debt, even potential criminal liability. As Stone concludes, “[d]isability programs are political precisely because they allocate these privileges . . . the fight is about

¹⁰¹*Wise Ruling on Disability Law*, DENVER ROCKY MOUNTAIN NEWS, June 25, 1999, at 52A.

¹⁰²DEBORAH STONE, *THE DISABLED STATE* (1983).

¹⁰³Of course, this is not always the case. Principles other than work at times function as the applicable distribution rule. Veteran status, for example, or seniority, or in the case of preferential affirmative action programs, racial, ethnic, or gender characteristics, may also function as distribution rules. In any event, when need will be permitted to trump any other applicable distribution rules is a critical question in virtually any society, whatever its default distribution system might be.

privilege rather than handicap or stigma.”¹⁰⁴

In certain situations, being classified as “disabled” within the meaning of the Americans with Disabilities Act can be seen as functioning in a similar way. Such classification removes an individual from an employer’s default system of obligation and entitlement and places her in a parallel system, which in certain circumstances is reasonably viewed as more desirable. For example, absent a disability designation, an employee has no right to force her employer to engage in a good faith, interactive process to resolve disputes over job duties, shift assignments, or other aspects of work organization. The ADA imposes such an obligation on employers in relation to requests for accommodation by disabled employees.

Consider a second example: absent a formal learning disability diagnosis, a person who simply works slowly or has difficulty concentrating will not be entitled to extra time on otherwise time-limited educational or licencing examinations.¹⁰⁵ As Mark Kelman and Gillian Lester point out, under current disability discrimination laws, some, but not all students whose performance fails to meet their or others’ expectations receive beneficial entitlements that other students do not receive, but from which they too might benefit.¹⁰⁶ It is hard to argue with the proposition that such a system has significant distributive justice implications.

¹⁰⁴STONE, *supra* note 98, at 28.

¹⁰⁵For a thorough and sharply critical analysis of the distributive justice implications of disability discrimination laws in the educational context, *see* MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1997).

¹⁰⁶*See id.* at ____

We know a good deal about the factors mediating people's perceptions of distributive justice, and about the rules people apply in assessing the fairness of distributive allocations.¹⁰⁷ The earliest and most widely studied of these rules is the equity principle, which posits that outcomes, or distributions, should be proportional to inputs, or contributions.

Within social psychology, equity theory was first developed to explain workers' reactions to wages and promotions,¹⁰⁸ and was later extended in an attempt to explain perceptions of fairness in such far-flung contexts as intimate social relationships,¹⁰⁹ affirmative action,¹¹⁰ and the division of household chores.¹¹¹ By the late 1970's, equity theory had developed into a general psychological theory of justice, broadly used to explain subjective perceptions of distributive fairness across a wide

¹⁰⁷For a comprehensive review of research on subjective perceptions of distributive justice, see TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 45-74 (1997). It should be noted that virtually all of this research was conducted in the United States. Because conceptions of justice are socially constructed, the study's findings should not be generalized to other countries or cultures.

¹⁰⁸For examples of this early work, see J. S. Adams & W. B. Rosenbaum, *The Relationship of Worker Productivity to Cognitive Dissonance About Wage Inequities*, 46 *J. OF APPLIED PSYCHOL.* 161 (1962); J. S. Adams, *Inequity in Social Exchange*, in 2 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 267 (Leonard Berkowitz ed., 1965).

¹⁰⁹See, e.g., E. Hatfield & J. Traupmann, *Intimate Relationships: A Perspective From Equity Theory*, in *PERSONAL RELATIONSHIPS* ____] (S. Duck & R. Gilmour eds., 1981); E. Hatfield, M. Utne, & J. Traupmann, *Equity Theory and Intimate Relationships*, in *SOCIAL EXCHANGE IN DEVELOPING RELATIONSHIPS* ____] (R. L. Burgess & T. I. Huston eds., 1979).

¹¹⁰See, e.g., Rupert Barnes Nacoste, *Sources of Stigma: Analyzing the Psychology of Affirmative Action*, 12 *LAW AND POLICY* 175 (1990) (exploring implications of equity theory for the affirmative action debate).

¹¹¹J. M. Steil & B. A. Turetsky, *Is Equal Better? The Relationship Between Marital Equality and Psychological Symptomatology*, in *FAMILY PROCESSES AND PROBLEMS: SOCIAL PSYCHOLOGICAL ASPECTS* ____ (S. Oskamp ed., 1987).

variety of interaction contexts.¹¹²

Problems associated with this broad, cross-contextual extension quickly emerged as studies yielded results contradicting the theory's predictions. These findings lent empirical support to a theoretical model posited by Morton Deutsch, who suggested that people apply different distributive justice rules in different contexts, depending in part on interaction goals. These distribution rules, according to Deutsch, include the principles of equitable allocation (distributions proportional to relative contributions), equal allocation (equal distributions regardless of contribution), and allocation based on need.¹¹³

Subsequent research supported both Deutsch's insight that people prefer different distribution rules in different social contexts and his claim that this choice has something to do with interaction goals.¹¹⁴ This literature reveals certain consistent patterns. In the context of economic relations, including those in the workplace, people tend to apply equity principles,¹¹⁵ particularly where

¹¹²The classic statement of this view can be found in E. WALSTER, G. W. WALSTER, & E. BERSCHIED, *EQUITY: THEORY AND RESEARCH* (1978).

¹¹³MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE* (1975).

¹¹⁴*See generally* T. R. TYLER ET AL., *supra* note 102, 56-60; *see also* Elizabeth A. Mannix, Margaret A. Neale, & Gregory B. Northcraft, *Equity, Equality, or Need? The Effects of Organizational Culture on the Allocation of Benefits and Burdens*, 63 *ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES* 276 (1995) (business managers base allocations on equity when productivity goals are salient and on equality when pursuing interpersonal harmony within the workplace); GERALD MIKULA, *JUSTICE AND SOCIAL INTERACTION* (1980) 177-79, 187-88 (discussing the interaction goals furthered by differing distributive allocation rules).

¹¹⁵*See, e.g.*, Jerald Greenberg, *Equity and Workplace Status: A Field Experiment*, 73 *J. OF APPLIED PSYCHOL.* 606 (1988) (demonstrating, in an employment rather than a lab setting, that subjects adjust outputs to match distributions as predicted by equity theory). *See generally* T. R. TYLER ET AL., *supra* note 102, at 57, 59 (reviewing research).

productivity goals are salient.¹¹⁶ Where civil rights are implicated, or in other situations where the most important goal is the fostering of harmonious social relationships, people tend to perceive equal distributions as being most fair.¹¹⁷ Need-based distributions are rarely favored outside a narrow band of contexts, including situations involving close personal relationships, such as those existing within the family, situations where humanitarian social norms have been activated, or where the primary goal being pursued is the fostering of individual development or welfare.¹¹⁸

Additional factors appear to influence whether or not people view the application of a particular allocation rule as fair. Edna and Uriel Foa suggest that the nature of the resource being allocated also

¹¹⁶See Edith Barrett-Howard & Tom R. Tyler, *Procedural Justice as a Criterion in Allocations Decisions*, 50 J. PERSONALITY AND SOC. PSYCHOL. 296 (1986) (people who view productivity as a goal are more likely to use equity as a justice standard.); E. A. Mannix *et al.*, *supra* note 109 (showing association between productivity versus social harmony goal orientation and choice of distribution rule).

¹¹⁷See, e.g., Tom R. Tyler, *Justice in the Political Arena*, in THE SENSE OF INJUSTICE: SOC. PSYCHOL. PERSPECTIVES, 187, 192-93, 194-97 (Robert Folger ed., 1984) (reviewing research indicating that people prefer allocation according to the principle of equality in the context of political rights); Tom R. Tyler & Eugene Griffin, *The Influence of Decision Makers Goals on Their Concerns About Procedural Justice*, 21 J. OF APPLIED SOC. PSYCHOL. 1629 (1991) (demonstrating difference in allocation preferences depending on whether decision makers were more concerned about promoting positive interpersonal relations or enhancing productivity); E. Barrett-Howard & T. R. Tyler, *supra* note 111, at ___ (illustrating that those who view social harmony as a goal are more likely to choose equality as applicable distribution rule); E. A. Mannix *et al.*, *supra* note 109, at ____ (same).

¹¹⁸DEUTSCH, *supra* note 108, at 146-7; MIKULA, *supra* note 110 at 187-88; Lerner, Miller, & Holmes 1976 (Need is likely to be the operative distribution principle within the family, where the legitimate needs of the various members tend to determine distribution, regardless of the members' relative contributions); Prentice & Crosby 1987 (In work settings, judgments of deservingness are governed by equity principles, but at home, deservingness is judged according to need.)

influences the choice of distribution rule.¹¹⁹ Preferences for particular rules may vary, for example, according to whether the resource being allocated is perceived as scarce or easily subject to depletion.¹²⁰ Other research indicates that the nature of the relationship between the people involved exerts a powerful effect on the choice of an allocation rule.¹²¹ In general, this research shows that closer relationships, such as those existing within the family, are associated with equality or need-based allocations, more distant relationships with equity-based distribution. Other research demonstrates an ideology effect, with conservatives generally supporting equity-based allocations, and liberals generally

¹¹⁹Edna. B. Foa & Uriel G. Foa, *Resource Theory of Social Exchange*, in CONTEMPORARY TOPICS IN SOCIAL PSYCHOLOGY ____ (John W. Thibaut et al. eds., 1976) (early explication of resource theory). For a more comprehensive discussion of resource theory, see RESOURCE THEORY: EXPLORATIONS AND APPLICATIONS (Uriel G. Foa et al. eds., 1993) (reviewing theory and research)

¹²⁰See T. R. TYLER ET. AL., *supra* note 102, at 61.

¹²¹See A. P. Fiske, *The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations*, 99 PSYCHOL. REV. 689 (1992) (differentiating between allocation rules applied in four types of relationships, including communal sharing, authority ranking, equality matching, and market pricing); G. Mikula et al., *What People Regard as Unjust: Types and Structures of Everyday Experiences of Injustice*, 22 EUROPEAN J. OF SOC. PSYCHOL. 133 (1990) (arguing that relationship type matters more than interaction goal); E. Barrett-Howard & T. R. Tyler, *supra* note 111, at 206 (1986) (showing that the nature of relationship influences both the interaction goals pursued and the allocation rules preferred); Morton Deutsch, *Interdependence and Psychological Orientation*, in COOPERATION & HELPING BEHAVIOR ____ [need pin cite] (V. J. Delilega & J. Grzelak eds., 1982) (arguing that the extent of interdependence between participants to the interaction influences choice of distribution rule); H. Lamm & E. Keyser, *The Allocation of Monetary Gain and Loss Following Dyadic Performance: The Weight Given to Effort and Ability Under Conditions of Low and High Intra-Dyadic Attraction*, 8 EUROPEAN J. OF SOC. PSYCHOL. 275 (1978) (illustrating that the nature of relationship influences choice of equity versus need as applicable distribution rule).

preferring allocations based on the principle of equality.¹²²

Allocation rules can usefully be understood as a species of social norm. They are acquired, and they function, in much the same way.¹²³ Just as people care when important social norms are violated, they care when resource allocation decisions violate the contextually appropriate distribution rule. If we want to understand why many people see the reasonable accommodation provisions of the Americans with Disabilities Act and other disability rights statutes as unfair, it makes sense at least to consider the situation from a distributive justice perspective.

ADA Title I may be viewed as unfair because it requires the selective application of a need-based allocation principle in the workplace – a context in which most people, whether liberal or conservative, do not expect it to apply. Because it is a need-based allocation rule, the ADA's reasonable accommodation provisions conflict with both the equity principle, which conservatives and those most concerned with productivity are likely to favor, and the principle of equal allocations, which liberals and those most concerned with fostering harmonious social relationships are apt to support.

In the workplace, both productivity and the fostering of harmonious social relationships represent centrally important, highly salient social interaction goals. And while it perhaps would not be

¹²²See L. J. Skitka & P. E. Tetlock, *Allocation of Scarce Resources: A Contingency Model of Distributive Justice*, 28 J. OF EXPERIMENTAL & SOCIAL PSYCHOL. 491 (1992); K. Rasinski, *What's Fair Is Fair...Or Is It? Value Differences Underlying Public Views About Social Justice*, 53 J. PERSON. & SOC. PSYCHOL. 201 (1987).

¹²³For a discussion of the development of context-dependent allocation rule awareness in young children, see C. Sigelman & K. Waitzman, *The Development of Distributive Justice Orientations: Contextual Influences on Children's Resource Allocations*, 62 CHILD DEVELOPMENT 1367 (1991) (discussing children's developing awareness of the socially sanctioned allocation rules applicable in differing social contexts).

so in a truly good world, the promotion of workers' individual, personal welfare is not generally treated as a significant workplace priority. Accordingly, it is not surprising that most people expect workplace distributions to be governed by some combination of equity and equality principles, rather than in accordance with need. Furthermore, if workplace allocations *are* to be based on need, it is hard to justify a system that considers only certain types of need at the expense of others that might reasonably be viewed as equally pressing.

The problem here described is exacerbated, I suggest, by the civil rights model of disability itself. Claiming a *right* to a *needs-based allocation* generates powerful normative dissonance because where political rights are implicated, people expect allocations to be based on the principle of equality, under which everyone is treated the same.¹²⁴ Because need-based allocation is viewed as the “wrong” distribution rule to apply in a civil or political rights context, a demand for accommodation, couched in the rhetoric of rights, is viewed by many as “attempting to have it both ways.” This viewpoint is vividly illustrated in the following example of news commentary responsive to the Court’s definition of disability decisions mentioned earlier in this section:

Many advocates [for the disabled] . . . see little conflict between demanding that the disabled be treated like everyone else, while insisting that more physical and mental problems be labeled disabilities, *entitling people to special treatment*.¹²⁵

The problem is harder still in situations involving “invisible” impairments, or conditions that are

¹²⁴For a review of research supporting this proposition, see Tom R. Tyler, *Justice in the Political Arena*, in *THE SENSE OF INJUSTICE: SOCIAL PSYCHOLOGICAL PERSPECTIVES*, 187, 192-93, 194-97 (Robert Folger ed., 1984).

¹²⁵Robert J. Samuelson, *Dilemmas of Disability*, *WASH. POST*, June 30, 1999, at A3.

not viewed as “disabilities” within popular understandings of the disability category. As earlier described, need-based allocation regimes tend to be viewed as fair in only a narrow band of contexts. In addition to degree of social closeness and interaction goals, three factors can be expected to influence whether people view needs-based distribution as just. These include the nature and extent of the need, the need’s distinctiveness, and the causes to which the need is attributed.

An expansive definition of disability can be expected to generate problems on each of these three dimensions. Consider first the problem of “invisible” disabilities, such as cancer, lupus, or many forms of mental illness. Under the medical privacy provisions of the ADA,¹²⁶ employers are generally prohibited from disclosing medical information about an employee to his or her peers. As a result, co-workers may know (or suspect) that a particular employee is receiving an accommodation, and may know that he would not be receiving this benefit under equity or equality-based distribution principles, but they might not be permitted to know why the employee is being accorded this special treatment. In such situations, co-workers will be unable to evaluate either the nature or extent of the need, and will thus be less likely to view a needs-based distribution as fair.

The broad and indeterminate nature of the ADA’s definition of disability creates problems on the dimension of distinctiveness as well. Under ADA Section 3, a “person with a disability” is defined in the following way:

Disability. – The term “disability” means, with respect to an individual –

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

¹²⁶42 U.S.C. §12112(d)(3)(B).

- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment¹²⁷

Consider first the definition under subsection (A). Whether a particular individual is deemed a “person with a disability” will depend on how the relevant legal decision maker answers three questions: 1) what qualifies as an impairment? 2) what constitutes a major life activity; and 3) at what point does a limitation become substantial? Application of this highly technical and indeterminate definition of disability will not necessarily generate outcomes matching popular conceptions of what disability means, or of whether a particular claimant would be properly included in the disability category.

“Persons with disabilities” can usefully be viewed as a “fuzzy set,” that is, a category with no clear boundaries separating members from non-members. Fuzzy set theory, initially posited Berkeley computer scientist Lofti Zadeh,¹²⁸ reflects Wittgenstein’s earlier observation that, unlike formal theoretical categories, natural categories are indeterminate, in that not all objects viewed as members of a category will possess all of the attributes associated with category membership.¹²⁹ The concept of the fuzzy set can usefully be applied in attempting to understand the nature of socially constructed categories, like “the disabled.”

Cognitive psychologists Nancy Cantor and Walter Mischel were among the first to apply fuzzy

¹²⁷42 U.S.C. § 12102(2).

¹²⁸ Lofti Zadeh’s seminal paper on the subject of “fuzzy sets” is *Fuzzy Sets*, 8 INFORMATION AND CONTROL 338 (1965). For additional overviews of fuzzy set theory and its applications, see generally Lofti A. Zadeh, *FUZZY SETS AND THEIR APPLICATIONS TO COGNITIVE AND DECISION PROCESSES* (King-Sun Fu eds., 1975); Lofti A. Zadeh, *FUZZY SETS AND APPLICATIONS: SELECTED PAPERS* (R. R. Yager ed., 1987).

¹²⁹Ludwig Wittgenstein, *PHILOSOPHICAL INVESTIGATIONS*, (G.E.M. Anscombe, trans., 1953).

set theory social categories,¹³⁰ and to connect it to the work of Berkeley psychologist Eleanor Rosch. Rosch suggests that natural categories are organized around prototypical category exemplars, which provide the “best” examples of the category, with less prototypical members forming a surrounding network or continuum.¹³¹ This model, especially when considered in conjunction with Zadeh and Wittgenstein’s insights, suggests that judgments of category membership will have a probabilistic quality. The more a candidate for category membership diverges from the category’s prototypical exemplars, the lower the probability that it will be viewed as a member of the category.

It is reasonable to assume that people view “disability” as distinctive. But the farther a particular condition diverges from prototypical exemplars of the disability category, the less likely it is that the condition will coded as a “disability.” If the claimant’s condition does not code as a disability, people are less likely to view the resulting need as distinctive. If the claimant’s condition is not viewed as distinctive, people are less likely to view it as justifying needs-based allocation, especially at others’ expense. This analysis suggests that once ADA coverage extends beyond a relatively distinct set of prototypic disabilities associated with an accompanying set of “accommodation schemas,”¹³² the law is

¹³⁰Nancy Cantor & Walter Mischel, *Prototypes in Person Perception*, in 12 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOL.* 3, 8-13 (Leonard Berkowitz ed., 1979).

¹³¹Eleanor Rosch et al., *Basic Objects in Natural Categories*, 8 *COGNITIVE PSYCHOL.* 382 (1976); Eleanor Rosch, *Cognitive Reference Points*, 1 *COGNITIVE PSYCHOL.* 532 (1975).

¹³²I use the phrase “accommodation schema” in the sense that disabled parking spaces, curb cuts, and larger bathroom stalls in public restrooms have become readily recognized, or “scripted” accommodations for paraplegia or other mobility disorders. Allowing guide dogs (but not other dogs) in public accommodations, for example, is a prototypic accommodation for the corresponding prototypic disability of blindness. One way at looking at the question of “prototypic” versus “non-prototypic” accommodations is to recognize that certain accommodations are becoming “institutionalized,” as that concept was defined in Part __, above.

placed at greater risk of violating established norms governing distributive allocations.

Finally, a substantial body of research indicates that patterns of causal attribution powerfully affect both people's willingness to help a stigmatized other¹³³ and their support for needs-based distributions in general.¹³⁴ This research shows that people are generally less willing to help and less supportive of needs-based distributions if they view stigmatized claimants as responsible for their own predicament. This effect is accentuated by conditions of perceived resource scarcity,¹³⁵ the nature of

¹³³Much of the empirical work in this area has been conducted by Bernard Weiner and his colleagues. See, e.g., Bernard Weiner, *Perceiving the Other as Responsible*, in NEBRASKA SYMPOSIUM ON MOTIVATION 165 (Richard Dienstbier et. al. eds., 1990) (discussing importance of attribution-based perceived controllability on reactions to stigmas and willingness to help); Bernard Weiner & Raymond P. Perry, *An Attributional Analysis of Reactions to Stigma*, 55 J. PERSONALITY AND SOC. PSYCHOL.738 (1988) (examining perceived controllability and stability of physically vs. mentally-based stigmas and assessing effect of controllability/stability judgments on pity, anger, and willingness to help). Other treatments include Verena H. Menec & Raymond P. Perry, *Reactions to Stigmas Among Canadian Students: Testing the Attribution-Affect-Help Judgment Model*, 138 J. SOC. PSYCHOL.443 (1998) (illustrating that perceived controllability is linked to greater anger and less pity, and in turn linked to willingness to help); Miriam Rodin et al., *Derogation, Exclusion, and Unfair Treatment of Persons with Social Flaws: Controllability of Stigma and the Attribution of Prejudice*, 1989 PERSONALITY AND SOC. PSYCHOL. J. 439 (1989) (demonstrating effect of perceived controllability of stigmatizing condition on subjects' reactions to derogation, exclusion, or unfair treatment of targets with stigmatizing physical appearance or patterns of speech); Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION AND RACISM 6170 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (revealing that where need is attributed by white subjects to lack of effort on the part of black confederates, subjects show significantly less willingness to provide help).

¹³⁴See Linda J. Skitka & Philip E. Tetlock, *Allocating Scarce Resources: A Contingency Model of Distributive Justice*, 28 J. OF EXPERIMENTAL SOCIAL PSYCHOLOGY 491 (1992) (demonstrating effect of attribution of need, political ideology, and perceived resource scarcity of on reactions to need-based distribution); Bernard Weiner & Raymond P. Perry, *supra* note 128, at ____

¹³⁵See *id.*

the stigma,¹³⁶ and the political orientation of the person making the fairness judgment.¹³⁷

This research help us understand the negative reactions to the ADA described by many Symposium contributors. It helps explain, for example the media’s seeming obsession with ADA cases involving “undeserving” conditions, as obesity, alcoholism, drug addiction, or mental illness, discussed by Cary LaCheen.¹³⁸ It renders intelligible the inability or unwillingness of the Eighth Circuit, explored by Vicki Laden and Gregory Schwartz earlier in this volume,¹³⁹ to recognize as a manifestation of prejudice rather than as a reasonable reaction to a realistically perceived threat the abusive treatment inflicted upon the clinically depressed plaintiff in *Cody v. Signa Healthcare*.¹⁴⁰

Finally, this research can help us make sense of the attacks leveled at the ADA and the Equal

¹³⁶For example, people are generally less willing to help targets with stigmatizing mental impairments than stigmatizing physical impairments. The effect appears to be mediated by people’s beliefs about the controllability and stability of mental/behavioral versus physical conditions.

¹³⁷See Linda J. Skitka & Philip E. Tetlock, *Providing Public Assistance: Cognitive and Motivational Processes Underlying Liberal and Conservative Policy Preferences*, 65 J. PERSONALITY & SOC. PSYCHOL. 1205 (1993) (demonstrating mediating effect of ideology on attribution of need and reactions to need-based resource allocation under conditions of perceived scarcity and non-scarcity).

¹³⁸Cary LaCheen, *Achy Breaky Pelvis* [etc.], *supra* note [insert first page # here].

¹³⁹Vicki Laden & Greg Schwartz, *Psychiatric Disabilities, The Americans with Disabilities Act, and the New Workplace Violence Account*, *infra* p. [insert first page # of Laden/Schwartz article here]. Consider also in this regard the work of Miriam Rodin and her colleagues, who demonstrated that subjects who observe experimental confederates derogating, excluding, or harshly treating stigmatized targets are less likely to interpret the confederates’ behavior as a manifestation of “prejudice” if they blame the target for his social flaws. Miriam Rodin et al., *Derogation, Exclusion, and Unfair Treatment of Persons with Social Flaws: Controllability of Stigma and the Attribution of Prejudice*, 1989 PERSONALITY AND SOC. PSYCHOL. J. 439 (1989).

¹⁴⁰139 F.3d 595 (8th Cir. 1998).

Employment Opportunity Commission surrounding promulgation of the Commission's *Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* in March of 1997.¹⁴¹ As E.E.O.C. Commissioner Paul Miller described in oral remarks during the Symposium,¹⁴² issuance of the *Guidance* unleashed a firestorm of hostility directed at the E.E.O.C. by media commentators incensed by the very notion that the Commission might "interpret" the Act as protecting persons with mental illnesses. These commentators seemed strangely unaware that protection for people with psychiatric disabilities was not invented by the E.E.O.C., but was written into the plain language of the statute.¹⁴³

Some months before the *Guidance* was issued, conservative columnist George Will complained that the mental disability provisions of the ADA create a "right to be a colossally obnoxious jerk on the job."¹⁴⁴ Will went on to opine that people exhibiting traits of mental illness should be held "morally responsible" for them, rather than be coddled by statutes like the ADA.¹⁴⁵ Clearly, the uproar in the media and the business community following publication of the E.E.O.C. *Guidance* reflects both the strong stigma associated with mental illness and deeply-entrenched popular notions about the

¹⁴¹United States Equal Employment Opportunity Commission, *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (March 25, 1997).

¹⁴²See Paul Steven Miller, *Reclaiming the Vision: Beating Back the Backlash Against Workers with Mental Disabilities*, March 13, 1999 (unpublished paper on file with the Berkeley Journal of Employment and Labor Law).

¹⁴³42 U.S.C. Section 12102 provides, in pertinent part, "The term 'disability' means, with respect to an individual – (A) a physical *or mental* impairment that substantially limits one or more of the major life activities on such individual."(emphasis added).

¹⁴⁴George Will, *Protection for the Personality Impaired*, WASH. POST, Apr. 4, 1996, at A31.

¹⁴⁵*Id.*

causes and controllability of its behavioral manifestations.

Taken as a whole, the research reviewed above suggests that people would respond more positively to the reasonable accommodation provisions of the ADA if the class being benefitted and the resources being allocated satisfied certain criteria. To maximize public acceptance, the protected class would be narrowly defined. It would, in the language of ADA Section 2, comprise “*a discrete and insular minority*,”¹⁴⁶ whose need for accommodation was both clear and distinctive. Under this approach, both the term “impairment” and the phrase “substantially limit one or more major life activities” would be narrowly construed.

Viewed from a public acceptance perspective, the “best” ADA protected class definition would include only those persons with prototypic disabilities, whose social inclusion could be effected through the use of prototypic accommodations that could readily become institutionalized. It would exclude persons popularly viewed as “responsible for their own predicament.” The ADA’s drafters must have recognized the rhetorical power of this issue, as the Act’s findings and purposes section characterizes individuals with disabilities as having being subordinated “based on characteristics that are beyond

¹⁴⁶A.D.A. Section 2(a)(7) provides:

[I]ndividuals with disabilities are 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.

42 U.S.C. §12101(a)(7).

[their] control.”¹⁴⁷

Disability activists can not solve these public acceptance problems, however, by simply acceding to the narrow definition of disability presently characterizing judicial interpretations of the ADA. For as the following discussion will demonstrate, defining disability in this narrow way frustrates other disability policy goals that the Act’s drafters sought to achieve and violates central tenets of the social model of disability upon which the Act was premised. In short, concessions that might facilitate public acceptance of one set of disability policy goals would substantially frustrate the achievement of others.

B. Normative Ambiguity, Normative Opacity, and the Americans with Disabilities Act

In transcribed remarks published earlier in this volume, Mike Wald observes that the ADA incorporates two separate, and in some ways inconsistent, models of equality.¹⁴⁸ I take Professor Wald’s point, but would characterize the situation in a slightly different way. Under this characterization, one might say that the ADA was designed to advance two distinct equality projects – projects which those within the disability rights movement view as thoroughly consistent and compatible, but which those outside of the movement tend to see as contradictory.

The first of these two projects, which we might refer to as the ADA’s “anti-disparate treatment project” is unambiguously corrective in nature. It prohibits covered entities from discriminating against

¹⁴⁷*Id.*

¹⁴⁸Wald, *Comments, supra* p. [insert first page # of Wald’s Commentary here].

persons with disabilities in much that same way that the Age Discrimination in Employment Act¹⁴⁹ prohibits discrimination against those over forty. The ADA's "anti-disparate treatment project" strongly resembles other similar contemporary "anti-disparate treatment projects," such as those undertaken in Title VII, or the Reconstruction Era Civil Rights Acts. As compared to equivalent provisions in those statutes, the anti-disparate treatment provisions of the ADA forbid similar types of conduct, are grounded in similar norms and values, and share common theoretical and doctrinal frameworks.

In earlier work, Symposium contributor Richard Scotch referred to the ADA's anti-disparate treatment project as requiring the removal of "attitudinal barriers" to the full participation of disabled individuals in social, economic, political, and cultural life.¹⁵⁰ These attitudinal barriers include the following sorts of things:

- Social discomfort generated by being in the presence of a person with a stigmatizing physical or mental condition, leading to a desire for social and/or physical distance;
- Myths and stereotypes about the attributes, abilities or other characteristics of people with various kinds of stigmatizing physical or mental conditions;
- Fears, realistic or irrational, but often inflated, about the risks associated with allowing persons with disabilities to perform certain job functions or to be present in the employment context at all; and
- Concerns, realistic or unrealistic, that persons with certain physical or mental conditions or having a record of certain physical or mental conditions are at greater risk of future injury or incapacitation, or will be more expensive to insure under medical or other benefit plans, in comparison with other employees not so affected.

¹⁴⁹29 U.S.C. §621, et. seq.

¹⁵⁰SCOTCH, *supra* note 30, at ___

It is important to note at this point that the social ills targeted by the ADA's anti-disparate treatment project do not depend on the target either having an actual impairment or being mistakenly regarded as having an impairment. Rather, they depend only on the target having a stigmatized physical or mental condition. If one narrowly interprets the ADA's definition of disability narrowly, as courts have thus far done, conditions which result in impairment only because of the attitudes of others remain unprotected. This is not what the Act's drafters intended.

The ADA's second project, which we might refer to as its "structural equality project," differs from the first in significant respects. It was enacted to require, at least under certain conditions, the removal of "hard" and "soft" structural barriers¹⁵¹ to the inclusion of people who *do* have impairments and are disabled not only by attitudes but also by designed features of the built environment. This second project, which we might call the ADA's "structural equality project" can be interpreted through a corrective lense, but it often has significant redistributive implications.

It is important to recognize that in attempting to address both attitudinal and structural barriers,

¹⁵¹Structural barriers, include:

- "Hard" structural barriers, such as inaccessible buildings, transportation facilities, bathrooms, computers, signs, telecommunications and other electronic appliances, or failures to provide translation services or other assistive technologies for persons with sensory, mobility, or other physical or mental impairments; and
- "Soft" structural barriers, including such things as entrance or employment requirements that disproportionately screen out persons with disabilities, rules, procedures, or other methods of administration with which people with disabilities are unable, because of their disability, to comply and which lack sufficient justification, and the provision of benefits in a form that people with disabilities can not utilize.

the ADA targets two quite separate types of disadvantage. It is also important to note that if we examine these two projects closely, we find that they generate considerably different problems that call for inconsistent solutions.

Consider first the definition of the class protected by the ADA, as well as the relationship of that definition to the specific behavior the statute prohibits or requires and to the norms and values inspiring those provisions. If, as is plainly the case, the statute's drafters intended the ADA to prohibit disparate treatment based on derogating myths and stereotypes, social discomfort effects, or statistical discrimination,¹⁵² directed at persons with stigmatizing physical or mental conditions, the definition of disability should be designed to track patterns of social stigma, irrespective of the presence or absence of an actual impairment. It makes little sense to define a disparate treatment class according to the presence or absence of impairment, because people who are not impaired but nonetheless have stigmatizing mental or physical conditions are equally likely to be subjected to the wrong targeted by the statute's disparate treatment provisions. Anyone who, absent statutorily sufficient justification, is subjected to disparate treatment on the basis of a past, present, or imagined mental or physical condition should be entitled to protection. Accordingly, achievement of the ADA's anti-disparate treatment project requires a broad definition of disability, geared as much to patterns of stigma and derogation as to the actual presence or absence of impairment.

Precisely the opposite approach to the definition of disability, however, would advance the

¹⁵²“Statistical discrimination” is the kind of discrimination that results from the use of group status as a proxy for decision-relevant traits. So, for example, the exclusion of all individuals with a history of a particular medical condition, on the rational ground that they present an elevated risk of future injury or incapacitation, is a form of statistical discrimination.

ADA's structural equality project. The ADA's reasonable accommodation provisions have distributive implications. As we saw in Section A, above, people's reactions to needs-based distribution regimes turn in large measure on perceived characteristics of class benefitting from the redistribution. Claimants' needs must be clear, distinctive, stable, and attributable to causes outside their control. In short, to maximize public acceptance of the ADA's reasonable accommodation and disparate impact provisions, the protected class would be limited to those having severe, visible impairments that clearly distinguish them from the general population.

This results in normative incoherence. The class definition that would best cohere with the normative impulses underlying the ADA's structural equality project would frustrate its anti-disparate treatment agenda. Conversely, the class definition that would best advance the Act's anti-disparate treatment project renders its structural equality project unpalatable to large segments of the American public.

To make matters worse, I suggest, large segments of the public, including many judges and media programmers, completely fail to understand the ADA's anti-disparate treatment agenda. Rather, they confuse the ADA's disparate treatment agenda with agendas of social welfare benefits programs like the social security disability system, which seeks to provide a safety net for the non-working disabled.

One consequence of this confusion is that people tend to assume that the ADA should protect from discrimination only those with the most severe disabilities. The view that the ADA should benefit only those with severe impairments is clearly reflected in a post-*Sutton* editorial in the *Chicago Tribune*, which asserted:

The ADA was meant to protect people with disabilities—not everyone with a physical ailment or flaw . . . This distinction is akin to welfare programs that offer financial aid to people in actual poverty but not people who are also in need but slightly above the poverty line.¹⁵³

This excerpt, and many others reflecting a similar perspective, support Matthew Diller’s claim that the ADA’s definition of disability has come under such powerful narrowing pressure because people do not understand that the ADA is an *anti-discrimination statute* rather than an entitlement program.¹⁵⁴ Indeed, as if attempting to prove Professor Diller’s point, media commentary following the Supreme Court’s definition of disability cases revealed a shocking lack of understanding that the plaintiffs in those cases were seeking not entitlement benefits under the ADA, but rather freedom from *unjustified disparate treatment*. Such claims might be lost on the merits, but the plaintiffs in those cases were simply never permitted to litigate them.

One editorial reflected on *Sutton v. United Air Lines*¹⁵⁵ in the following terms: “Had the justices ruled the other way, it would have made it impossible for employers to set reasonable physical standards for certain jobs.”¹⁵⁶ This is just wrong. Even if the *Sutton* plaintiffs, whose myopic vision was corrected with glasses, had been found to be “persons with disabilities” within the meaning of the ADA, United might well have justified their exclusion under the Act’s direct threat defense. Putting the

¹⁵³CHI. TRIB., June 24, 1999, at 28.

¹⁵⁴Diller, *Judicial Backlash*: [at cite-checking, insert full title], *supra* p. [insert first page # of Diller’s article here].

¹⁵⁵527 U.S. ___, 119 S. Ct. 2139 (1999) (holding that corrected myopia does not constitute a disability within the meaning of the ADA).

¹⁵⁶ *Defining Disability*, INDIANAPOLIS STAR, June 25, 1999, at A18.

policy to that test would have meant confronting the key *normative* issue presented by the case -- was United's exclusionary rule a product of irrational myths and stereotypes about corrected myopia, a condition obviously stigmatized within the airline piloting field, or was the policy justified under a reasoned analysis of the risks involved? By deciding the cases on the issue of statutory coverage, the *Sutton* Court simply dodged the important normative questions it presented.

It makes sense to exclude persons with corrected impairments from redistributive entitlement programs, like the Social Security Disability System. One might even make a creditable argument that persons without present impairments should be excluded from the reasonable accommodation provisions of the ADA. But excluding people with mental or physical defects that do not result in present impairment from protection against disparate treatment ignores the pernicious effects of stigma.

For some combination of reasons, many of which are explored by Harlan Hahn's article earlier in this volume,¹⁵⁷ media pundits and federal judges alike have had difficulty understanding the concept of stigma, let alone grasping how it should inform interpretation of the ADA. From a media standpoint, perhaps the clearest example of this can be found in an editorial in *The Plain Dealer*, lauding the Supreme Court's Summer 1999 decisions in *Sutton*,¹⁵⁸ *Kirkenberg*,¹⁵⁹ and *Murphy*¹⁶⁰:

¹⁵⁷Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, *supra* p. [insert first page of Hahn piece here].

¹⁵⁸119 S. Ct. 2139 (1999).

¹⁵⁹*Albertsons v. Kirkenburg*, 527 U.S. ___, 119 S. Ct. 2162 (1999) (holding that monocular vision not a disability within the meaning of the ADA).

¹⁶⁰*Murphy v. United Parcel Service*, 527 U.S. ___, 119 S. Ct. 2133 (1999) (holding that hypertension controlled with medication not a disability within the meaning of the ADA).

The broad reading of the ADA demanded by the near-sighted, *one-eyed*, and hypertensive plaintiffs in the cases that went before the court would have made a mess of litigation. Worse, it would make a mockery of the statute's intent: to prohibit discrimination against the 43 million Americans whose disabilities "substantially limit one or more ..major life activities" but do not affect their ability to do a particular job.¹⁶¹

The very fact that the editorialist would derisively refer to plaintiff Kirkenberg as "one-eyed" and then contrast him with those who are "able to do a particular job" proves the point plaintiff Kirkenberg made but ultimately lost: people with mitigated physical defects may be stigmatized and discriminated against even if their defect does not result in actual impairment. Accordingly, it makes little sense to limit ADA protection against disparate treatment to those with actual, present or past impairments or with conditions regarded by defendants as impairments.

With the welcome exception of the Supreme Court's decision in *Olmstead v. L.C.*,¹⁶² federal judges interpreting the ADA appear curiously oblivious to the problem of stigma or to the role the ADA's drafters expected it to play in the Act's implementation. The best example of this phenomenon appears in the Seventh Circuit's opinion in *Vande Zande v. State of Wisconsin*,¹⁶³ one of the cases

¹⁶¹*Blowing Away a Legislative Fog: High Court Injects A Welcome Dose of Common Sense into the Americans with Disabilities Act*, THE PLAIN DEALER, June 25, 1999, at 8B (emphasis added).

¹⁶²527 U.S. ___, 119 S. Ct. 2176 (1999) (ADA Title II held to require states, under certain circumstances, to provide persons with mental disabilities with community-based treatment rather than placement in an institution.)

¹⁶³44 F.3d 538 (7th Cir. 1995).

explored by Professor Lennard Davis earlier in this volume.¹⁶⁴ Plaintiff Lori Vande Zande, a paraplegic who used a wheelchair, argued that the sink in the employee lounge should have been lowered, at a cost of around \$200, so that she could reach it from her wheelchair. The defendant argued that this would not be a *reasonable* accommodation: Vande Zande could simply use the sink in the bathroom. Vande Zande opposed this solution on the ground that requiring her to use a bathroom sink when non-disabled employees could use the sink in the kitchenette stigmatized her as different and inferior. Stated Judge Poser in response:

We do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity of working conditions between disabled and non-disabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions “stigmatizing.” *That is just an epithet.*¹⁶⁵

Whatever one may think about the ultimate merits of the *Vande Zande* case, stigma is *not* just an epithet. That a federal circuit court judge could characterize the concept in this way gives substance to Professor Hahn’s claim that the ADA’s crabbed interpretation derives in substantial part from judges’ failure to understand the connection between stigma, structural exclusion, and discrimination in the disability rights context.

A second stark example of this “stigma disconnect” can be found in another Seventh Circuit case, *Christian v. St. Anthony Medical Center*,¹⁶⁶ in which Judge Posner opined:

¹⁶⁴Lennard P. Davis, *Bending Over Backwards*, *supra* p. [insert first page of Davis’ piece here].

¹⁶⁵44 F.3d at 545.

¹⁶⁶117 F.3d 1051 (7th Cir. 1997), *cert. denied* 523 U.S. 1022 (1998).

Suppose that the plaintiff had a skin disease that was unsightly and also very expensive to treat, but neither the disease itself nor the treatment for it would interfere with her work. And suppose her employer fired her nevertheless, either because he was revolted by her disfigured appearance or because the welfare plan that he had set up for his employees was unfunded and he didn't want to incur the expense of the treatment that she required. *Either way he would not be guilty of disability discrimination.*¹⁶⁷

The court justifies this result on the ground that, although the hypothetical plaintiff's disfigurement was a physical condition, it was not an impairment, and therefore not a "disability" within the meaning of the ADA because it did not, in fact, disable her. She was, after all, able to work.

One can reach this conclusion only by ignoring the role played by attitudinal barriers -- stigma - in *creating disability*. Judge Posner's hypothetical plaintiff is indeed disabled, but it is not her condition that disables her. She is disabled by the attitudes of others in her social environment. As Professor Hahn suggests, cases like *Christian v. St. Anthony Medial Center* indeed reflect a startling incomprehension of the social model of disability on which the ADA and other disability rights statutes were based.

As I have suggested throughout this article, and as numerous Symposium contributors have argued in others, the norms, values, and ideals that underpin the Americans with Disabilities Act have not diffused into popular or judicial legal consciousness. Those norms are somehow "opaque" to those who are empowered to re-enact the ADA through statutory interpretation and application to particular disputes.

The success of any law designed to transform social norms and institutionalized practices that

¹⁶⁷*Id.* at 1053.

disadvantage members of subordinated groups turns at least in part on how that law performs of the following dimensions:

1. Can the behavior the law prohibits or requires be described with sufficient precision to avoid creating conditions of severe normative ambiguity?
2. Is the connection between the conduct prohibited or required by the law and the norms and values the law is designed to further clear and strong? Are those norms and values understood and shared by a large enough segment of the affected community to give the new law “normative legs?”
3. Is the protected class defined in a way that makes clear to its beneficiary and compliance communities precisely who is entitled to the law’s protection? and
4. Do the contours of the protected class bear a clear and rational relationship to: a) the specific conduct the law prohibits or requires; and (b) the normative goals and values the law was enacted to further?

The negative reception the ADA is receiving, described in the preceding articles, stems at least in part from problems the Act it has encountered along these four dimensions. The ADA is an extremely complex statute, incorporating many vague standards requiring the case-by-case balancing of under-specified factors. This complexity and under-specification, I suggest, has created a legal field characterized by intense normative ambiguity, which has in turn engendered hostility directed at the Act, its enforcers, and its beneficiaries.

As I have suggested throughout this Forward, and as numerous Symposium contributors observe earlier in this volume, the norms, values, and ideals that underpin the Americans with Disabilities Act have not been disseminated into popular or judicial legal consciousness. Too many

influential socio-legal actors simply do not understand the social and moral vision that animates the Act, and the Act itself is too complex, its standards too ambiguous and under-specified, as to be normatively self-enforcing. For many in the relevant compliance community, the ADA is normatively ambiguous and opaque.

CONCLUSION

The success of any law designed to transform social norms and institutionalized practices that disadvantage members of subordinated groups turns at least in part on how well the law performs on three critical dimensions. First, one must ask, can the behavior the law prohibits or requires be described with sufficient precision so that people understand what it requires of them. Second, is the connection between the conduct prohibited or required by the law and the norms and values the law is designed to further clear and strong? And third, are those norms and values understood and shared by a large enough segment of the affected community to give the new law “normative legs?”

One of the hazards of social justice advocacy is that we can begin to confuse the question, “How do we think people *should* react to a particular argument, case, or claim” with the question, “How can we realistically *expect* people to react to that argument, case, or claim.” No matter how frustrating, careful attention to the second question is critical to the success of any social justice initiative.

When law is used as a tool for effecting social change, its architects and promoters must ask and satisfactorily answer a series of critically important questions: What norms and institutions does the new law seek to displace or transform? Has the process of norm change proceeded to the point that the new law will receive adequate support, or has it “overspun” itself in this regard? What other norms

and institutions not actually targeted will the new law necessarily implicate or infringe upon? Are people – not just the ill-meaning or thoughtless, but the well-meaning and thoughtful as well – likely to resist interference with these “collateral” norms and values? And finally, how can the new law be structured and implemented so as to adhere to the greatest extent possible with broadly accepted, if yet unrealized, aspirations, values and ideals. Any transformative legal regime that fails to reckon successfully with these questions is unlikely to fulfill its architects’ expectations. Misunderstood, misconstrued, or directly perceived as illegitimate, it will eventually yield to the mechanisms socio-legal retrenchment, of which backlash is simply the most conspicuous type.