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BOOK REVIEW

UNDER THE EMPIRICAL RADAR: AN INITIAL EXPRESSIVE LAW ANALYSIS OF THE ADA

*Michael Ashley Stein**

Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities. By David M. Engel & Frank W. Munger. Chicago: The University of Chicago Press. 2003.

INTRODUCTION

WHILE enacting the Americans with Disabilities Act (“ADA”),¹ Senators Harkin and Kennedy each proclaimed its passage as an “emancipation proclamation” for people with disabilities.² Fourteen years later,³ one wonders just how much (if at all) the disabled have been emancipated.⁴

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¹ 42 U.S.C. §§ 12101–12213 (2000). The focus of this Review is the employment subchapter (Title I) of the ADA. 42 U.S.C. §§ 12111–12117.

² 136 Cong. Rec. 17,369 (1990) (statement of Sen. Harkin); 135 Cong. Rec. 19,888 (1989) (statement of Sen. Kennedy).

³ Twelve years later, if one counts from the time the statute’s equal employment provisions became operative on July 26, 1992. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 108, 104 Stat. 327, 337 (1990). The provisions have applied to certain employers for only ten years. See *id.* § 101(5)(A), 104 Stat. at 330 (providing that Title I apply to employers of more than twenty-five workers until July 26, 1994, thence to workplaces with more than fifteen employees).

⁴ I ventured a preliminary consideration of the question of disability employment as a measure of the ADA’s efficacy seven years ago in Michael Ashley Stein, *Employing People with Disabilities: Some Cautionary Thoughts for a Second Generation Civil Rights Statute*, Speech at the University of Iowa (1997), *in* *Employment, Disability, and the Americans with Disabilities Act: Issues in Law, Public Policy, and Research* 51 (Peter David Blanck ed., 2000).

One way to gauge whether social and economic empowerment has increased for people with disabilities after the ADA's passage is to examine their employment experiences.⁵ To date, empirical studies of post-ADA disabled employees' labor market participation are less than encouraging.⁶ Notably, two well-publicized empirical studies of the relative post-ADA employment effects on workers with disabilities found an overall reduction in the employment rate, concurrent with a neutral effect on wages.⁷ These studies have sparked a growing debate among scholars who either

⁵ As stated eloquently by Professor Vicki Schultz:

Our historical conception of citizenship, our sense of community, and our sense that we are of value to the world all depend importantly on the work we do for a living and how it is organized and understood by the larger society. In everyday language, we are what we do for a living.

Vicki Schultz, *Life's Work*, 100 *Colum. L. Rev.* 1881, 1884 (2000). For additional, complementary views on the connection between work, citizenship, and self-worth see Judith N. Shklar, *American Citizenship: The Quest for Inclusion* 63–101 (1991) (exploring the connection between work and citizenship in a democracy); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *Geo. L.J.* 1, 2–4 (2000) (arguing for the workplace as a “vehicle of civic engagement”); Gregory S. Kavka, *Disability and the Right to Work*, 9 *Soc. Phil. & Pol'y* 262, 263–64 (1992) (arguing for a moral and legal right to work for disabled citizens).

⁶ One commentator has characterized the “statute’s impact,” with tongue firmly in cheek, as being “anything but radical.” See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 *Wm. & Mary L. Rev.* 921, 923 (2003).

⁷ See Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 *J. Pol. Econ.* 915, 929–33 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 *J. Hum. Resources* 691, 700–08 (2000). Professor DeLeire utilized data panels of men aged eighteen to sixty-four from the Survey of Income and Program Participation (SIPP) from 1986–1993. *Id.* at 697–98. He concluded that after the ADA's passage, the average employment level of men with disabilities decreased 7.2% relative to that of men without disabilities. *Id.* at 705. Over the same period, DeLeire did not discern a change in disabled workers' relative earnings. *Id.* Professors Acemoglu and Angrist culled their results from the 1988–1997 Current Population Survey (CPS) data for both men and women age twenty-one to fifty-eight. Acemoglu & Angrist, *supra*, at 916–17. These results generally corroborate DeLeire's findings, but in greater detail. Acemoglu and Angrist found that, for the twenty-one to thirty-nine age group, the relative employment level of disabled workers declined by ten to fifteen percent with respect to the number of weekly hours worked. *Id.* at 930–32. Across the forty to fifty-eight age group, Acemoglu and Angrist did not discover a relative effect upon women with disabilities. *Id.* The employment level for men with disabilities, however, did decrease significantly. *Id.* The overall relative wage level of workers with disabilities was unchanged. *Id.*

support⁸ or challenge⁹ their findings. Nonetheless, even those economists seeking to explain the available data within the context of broader economic effects¹⁰ concede that post-ADA disability-related employment (broadly defined) has not dramatically improved.¹¹ At the same time, plaintiffs asserting ADA Title I employment discrimination claims in the federal courts have a lower win-loss rate than any other group excepting prisoner-rights litigants.¹² Specifically, an American Bar Association report found that employers prevailed in about ninety-two percent of Title I cases between 1992 and 1997.¹³ Although a number of factors may

⁸ For example, Professor Christine Jolls identifies the circumstances under which accommodation mandates are likely to reduce a given group's employment level or wages. See Christine Jolls, *Accommodation Mandates*, 53 *Stan. L. Rev.* 223 (2000). She posits that in the case of workers with disabilities, restrictions on employment differentials are unlikely to be binding, while restrictions on wage differentials are likely to be binding. *Id.* at 274–75. Consequently, Jolls's model predicts that the relative post-ADA wages of disabled workers will increase or remain unchanged, while the employment rate will continue to decrease. *Id.* at 275.

⁹ See, e.g., Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 *Berkeley J. Emp. & Lab. L.* 271, 293–312 (2000) (presenting detailed econometric objections to the two post-ADA employment studies). For an updated version of their critique, see Susan Schwochau & Peter Blanck, *Does the ADA Disable the Disabled?—More Comments*, 42 *Indus. Rel.* 67 (2003).

¹⁰ For the most current detailed treatments of this subject, see *The Decline in Employment of People with Disabilities: A Policy Puzzle* (David C. Stapleton & Richard V. Burkhauser eds., 2003); *Symposium, Disability and Employment*, 42 *Indus. Rel.* 1 (2003).

¹¹ See, e.g., Richard V. Burkhauser & David C. Stapleton, *A Review of the Evidence and Its Implications for Policy Change*, in *The Decline in Employment of People with Disabilities: A Policy Puzzle*, supra note 10, at 369, 373 (reporting that all the authors agree that “[t]he employment rate for working-aged adults with disabilities, broadly defined, has declined during the 1990s, both absolutely and relative to the rate for those without disabilities”).

¹² See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 *Geo. L.J.* 1567, 1578 (1989) (setting forth data establishing the low success rate of prisoner plaintiffs in civil rights litigation).

¹³ *Am. Bar Ass'n, Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 *Mental & Physical Disability L. Rep.* 403, 403 (1998). A subsequent study found that employers won at a rate of approximately ninety-three percent. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 *Harv. C.R.-C.L. L. Rev.* 99, 108–09 (1999). Professor Colker argues that plaintiffs frequently lose under the ADA because “[c]ourts are abusing the summary judgment device” by “refusing to send normative factual questions” to juries. *Id.* at 101.

contribute to this phenomenon,¹⁴ the overall impression is dire. Thus, from a purely quantitative perspective, empirical analysis indicates that the ADA is not fulfilling its promise of empowering workers with disabilities.

By contrast, Professors David Engel and Frank Munger's thoughtful book, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities*,¹⁵ applies a noneconomic metric to the question of whether the ADA is "working," and in so doing provides an alternative appraisal of the statute's efficacy.¹⁶ Utilizing qualitative analysis, Engel and Munger interviewed workers with disabilities who had never asserted disability-related employment discrimination claims.¹⁷ They conclude that the ADA's mere presence has changed disabled persons' identities by creating a vision of work-capable people who can be successful and vibrant employees if given the opportunity, including proper accommodations, to demonstrate these abilities. At the same time, Engel and Munger argue that the putative employment rights embodied in the ADA can only be

¹⁴ These can include: technical misuse of pretrial motions in favor of defendants; judicial opposition to the statute or indifference towards people with disabilities; claimants not falling within the statute's purview; plaintiffs feeling strongly enough to pursue nonwinning claims or having negative expectation value of settlement; informational asymmetry clouding the litigation decisionmaking process; poor lawyering; or mediocre expert testimony. See Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 *Duke L.J.* 79, 86, 90–96 (2003).

¹⁵ David M. Engel & Frank W. Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (2003).

¹⁶ This point has been previously noted: "Exploring alternative measures by which to gauge Title I's success can also enhance our understanding of the post-ADA employment experiences of workers with disabilities." Michael Ashley Stein, *Empirical Implications of Title I*, 85 *Iowa L. Rev.* 1671, 1687 (2000).

¹⁷ An initial note on methodology is warranted. The authors conducted 180 preliminary telephone interviews from which they selected sixty for full follow-up interviews. From that group, eight people were chosen for "repeat interviews," an unusual technique in which the subjects were allowed to review what had been written about them and amend any errors. Six elected to do so. See Engel & Munger, *supra* note 15, at 7–9. A scholar given to empirical research could criticize the authors' methodology as being vulnerable to selection bias, meaning that they invited back people who could provide them with information they desired (just as a scholar using qualitative research might argue that the empirical method is subject to bias in developing its underlying assumptions). What is, however, somewhat troubling is that the initial cohort, while divided between individuals with physical disabilities (wheelchair users) and those with various learning disabilities, was culled from a narrow geographic region (western New York) and thus might have a somewhat limited perspective due to hegemonic cultural input. *Id.* at 7–8.

brought to fruition if people with disabilities understand and embrace the statute's normative aspirations.¹⁸ Their assessment of the ADA as well as their subsequent proposal for a "new theory" of rights that can properly encompass the dynamics of disability identity formation are therefore both internal and contextual to those individuals whose life stories are presented in *Rights of Inclusion*.

This Review seeks to bridge the inquiries made by the two normally exclusive disciplines of economics (the external, quantitative empirical radar) and sociology (the internal, qualitative assessment of rights discourse),¹⁹ by presenting a third path: an initial expressive law analysis of the ADA (examining the phenomena that exist beneath the empirical radar).²⁰ That approach considers how the external (law) can influence the internal (individual behavior) by altering broader social norms, an aspect of rights theory and change that is not addressed in *Rights of Inclusion*.²¹ In considering those precepts, I am particularly interested in building on the expressive law gloss presented in Professor Alex Geisinger's "belief change" theory, which identifies and models a process through which regulations can affect norms and preferences.²²

¹⁸ *Id.* at 251.

¹⁹ The metaphor of bridge building in this context, as well as the characterization that the disciplines exist at opposite poles, is drawn from the whimsical Ian Ayres, *Never Confuse Efficiency with a Liver Complaint*, 1997 *Wis. L. Rev.* 503, 506–07 (noting that among "those economists that do from time-to-time engage sociology, there are those who are Bridge-builders/Appeasers and those who are Openly Hostile"). With the exception of technical phrases and words of art, I have attempted throughout this Review to "translate" discipline-specific language into more readily accessible terms.

²⁰ My hope is that, as the first publication on this topic, this Review will be construed as an invitation to a continuing dialogue.

²¹ See *infra* Section II.A. Ironically, inquiries into the effect that law can have on molding social norms and behavior were formally the intellectual province of law and society scholars, including the authors of *Rights of Inclusion*. See, e.g., Frank Munger, *Miners and lawyers: law practice and class conflict in Appalachia, 1872–1920*, in *Lawyers in a postmodern world: translation and transgression* 185 (Maureen Cain & Christine B. Harrington eds., 1994); David M. Engel, *The Oven Bird's Song: Insiders, Outsiders and Personal Injuries in an American Community*, 18 *Law & Soc'y Rev.* 551 (1984). At the same time, it bears noting that neither *Rights of Inclusion* nor expressive law scholarship (including, for the most part, this Review) adequately account for exogenous factors (for example, public transportation and health care) that have a powerful effect on the efficacy of antidiscrimination norms.

²² Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 *Iowa L. Rev.* 35 (2002). This Review owes a large debt both to Geisinger's work and to his friendship. For an adumbration of his belief change theory, see *infra* Section II.B.

Part I will set forth the disability life stories chronicled by Engel and Munger and the conclusions they draw from those experiences about the nature of identity and rights theory. Next, Part II will describe the general goals of expressive law scholarship and will outline Geisinger's "belief change" theory. Part III will depict existing socio-legal norms on the disabled, as seen in recent United States Supreme Court decisions, and the aspirations contained in the ADA. Part IV will then set forth a preliminary expressive law analysis of the ADA. The Review will conclude by reinterpreting, from an expressive law perspective, some of the disability life stories portrayed in *Rights of Inclusion*.

I. A QUALITATIVE ANALYSIS: DISABILITY LIFE STORIES

The central thesis of *Rights of Inclusion* is that disability-related rights become active in formal (that is, legal) and informal (meaning nonlegal) settings. Focusing on informal mechanisms, Engel and Munger conclude that the rights granted to persons with disabilities through the ADA had a powerful effect on many of the interviewees by fostering their self-image as capable and potentially successful employees. At the same time, the authors maintain that for the ADA to be effective, disabled employees must be aware of the nature and scope of their rights and understand that a violation of those rights has occurred. In consequence, *Rights of Inclusion* advocates a rights theory that can appropriately account for the recursive and internal nature of disability identity that arises through ADA-inspired rights formation. This Part sets forth Engel and Munger's conclusions—as presented in the context of their subjects' life stories—about the impact on rights formation of disability identity²³ and extra-disability factors and their proposal for a new rights theory.

A. Disability Identity Formation and its Impact on Rights

Engel and Munger assert that, for the ADA to be effective, disabled employees must be aware of the existence of their rights, and

²³ For a similar approach, see Peter Blanck, *Justice for All?: Stories about Americans with Disabilities and Their Civil Rights*, 8 J. Gender Race & Just. (forthcoming 2004).

of a subsequent rights violation.²⁴ Such awareness is dependent on an individual's identity, the formation of which results from his or her interactive process with society at large.²⁵ Because persons with disabilities are vulnerable to societal prejudice, they explain, the group as a whole is at high risk of internalizing generally held negative misperceptions.²⁶ As a result, societal pressure can prevent persons with disabilities from having a sense of entitlement to equal treatment in the workforce and in society as a whole.²⁷ To illustrate this point, *Rights of Inclusion* examines the lives of both physically and learning disabled individuals and contrasts their experiences both within and across disability categories.

According to Engel and Munger, physical limitations are viewed as disabilities because of a cultural construct that arbitrarily compares limitations against an arbitrary norm.²⁸ If persons with dis-

²⁴ Thus, they argue that "the sense of self determines the perceptions of fairness and unfairness that precede any consideration of rights." Engel & Munger, *supra* note 15, at 16.

²⁵ As the authors put it: "The interactive process of identity formation shapes a sense of self that is consistent with either inclusion or exclusion in mainstream society." *Id.* at 44. The authors also turn to the philosopher Habermas for the proposition that identity is a result of an interactive and intersubjective process between self and society over time. Accordingly, "the basis for the assertion of one's own identity is not really self-identification, but intersubjectively recognized self-identification." *Id.* at 43-44.

²⁶ *Id.* at 67-69.

²⁷ *Id.* at 68-69.

²⁸ The contention that disability is a social construct and thus the byproduct of exogenous environmental factors is a mainstay of the Disability Studies Movement. See, e.g., Claire H. Liachowitz, *Disability as a Social Construct: Legislative Roots* (1988) (tracing the legal, limiting classification of disability); Richard K. Scotch, *Making Change: The ADA as an Instrument of Social Reform*, in *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions* 275, 275 (Leslie Pickering Francis & Anita Silvers eds., 2000) (approving of "a social model of disability that conceptualizes disability as a social construction that is the result of interaction between physical or mental impairment and the social environment"); Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* 35 (1996) (noting the difficulty in marking "the distinction between the biological reality of a disability and the social construction of a disability"); Ron Amundson, *Disability, Handicap, and the Environment*, 23 *J. Soc. Phil.* 105, 110 (1992) (stating that "[a] handicap results from the interaction between a disability and an environment"). For a review of this literature and its application to ADA-based rights, see Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 *U. Pa. L. Rev.* (forthcoming December 2004). For a broader treatment of the meaning of difference in categorizing people and their rights, see Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990).

abilities succumb to this vision, their identity is “spoiled,”²⁹ and they view themselves as “disabled” in the sense of feeling powerless.³⁰ To illustrate this contention, *Rights of Inclusion* contrasts the life experiences of two wheelchair users, Sara Lane and Rick Evans.

Sara Lane is a personally and professionally successful adult because, in large measure, she was able to tell a different story from the one which society would have imposed on her. Sara sees herself as a part of the mainstream and therefore views her disability as one part of her identity and social experience.³¹ She explains that “because my disability was so integrated into our family as a community . . . because I was treated as an equal, as a peer, when I went to get a career, [when] I went to college, those barriers didn’t exist in my mind.”³²

By comparison, Rick Evans is an example of identity spoiling as a result of having conflated his self-worth and his disability. Unlike Sara, Rick has always been separated out from the mainstream.³³ During his primary and secondary schooling, his social interactions throughout life, and his professional experiences, he has lived what the authors term a “marginalized identity.”³⁴ Rick blames his lack of personal and professional success on his disability and the failure of the ADA. He therefore feels powerless to be anything other than a victim of prejudice and circumstance.³⁵

Unlike a majority of physical disabilities, many learning disabilities are neither readily visible nor well recognized,³⁶ and so their va-

²⁹ The term references the seminal work by Erving Goffman. Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963).

³⁰ Engel & Munger, *supra* note 15, at 46.

³¹ *Id.* at 54.

³² *Id.* at 22.

³³ *Id.* at 56.

³⁴ *Id.* at 42.

³⁵ *Id.* at 56–57.

³⁶ This raises an interesting, but parenthetical issue. Pursuant to Title I, employers cannot, with certain exceptions, inquire into the history, existence, or extent of a person’s disability. 42 U.S.C. § 12112(d)(4)(A) (2000); see Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View From the Inside*, 64 Temp. L. Rev. 521, 531 (1991) (analyzing the medical examinations and inquiries section of the employment title of the ADA using legislative history). Conversely, when a person has a disability that is not readily ascertainable and does not disclose to her employer the existence of her disability, she will not be protected under the ADA’s auspices. *Id.* Similarly, under Title VII of the Civil Rights Act of 1964,

lidity is often questioned.³⁷ Consequently, Engel and Munger maintain there is a strong temptation to “pass” as a person without a disability to avoid social stigma and subordination.³⁸ Vicki Kennedy, for example, has never been formally diagnosed with a learning disability and resists diagnosis. The absence of physical symptoms makes her question the reality of her disability.³⁹ Thus, Vicki does not consider asserting her disability-based rights, including

if a person’s religious convictions prevent her from performing her employment, she is not protected unless she had previously disclosed that limitation. See, e.g., *Johnson v. Angelica Unif. Group*, 762 F.2d 671, 673 (8th Cir. 1985) (denying recourse to an employee who was terminated for missing work on religious holidays because she had not informed her employer of the holidays). Thus, for purposes of attempting to enculturate within a firm and avoid prejudice, when should a person with a nonvisible disability disclose that disability? This is an especially pertinent question if the disability in question is a cognitive disability that is likely, as demonstrated by the sources cited in note 37, *infra*, to encounter strong prejudice. *Rights of Inclusion* briefly touches on this issue by presenting the life story of Jim Vargas, a physical therapist with a learning disability. See Engel & Munger, *supra* note 15, at 126–30. Jim’s impairment affects his job performance in that he has great difficulty keeping up with the paper work, though he stays late and works through lunch. Frustrated, he changes jobs often. *Id.* at 126–27. Jim’s dilemma is whether to conceal or reveal his learning disability to employers at interviews. He has resolved to take an ad hoc approach, as revealing his disability can either hurt him (in that he might be met “with disbelief rather than understanding”) or help him (in that he becomes legally eligible for accommodation and so employers cannot misinterpret the effects of his disability on job performance). *Id.* at 127.

³⁷ This point is made by a number of commentators, most notably Susan Stefan. For her perspective on external stigma and subordination, see Susan Stefan, *Hollow Promises: Employment Discrimination Against People with Mental Disabilities* xiv–xv (2002); Susan Stefan, *Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act* (2001). For her thoughts on the issue of stigma and identification within the disability community, see Susan Stefan, “Discredited” and “Discreditable”: The Search for Political Identity by People with Psychiatric Diagnoses, 44 *Wm. & Mary L. Rev.* 1341 (2003).

³⁸ Traditionally, the term “passing” has referred to people of color who subsume their racial identities in order to live among the mainstream as majority members. See, e.g., Brooke Kroeger, *Passing: When People Can’t Be Who They Are* (2003); James M. O’Toole, *Passing for White: Race, Religion, and the Healy Family, 1820–1920* (2002). At times the phenomenon of passing can also be involuntary, resulting from an individual’s lack of knowledge regarding his family history. See, e.g., Gregory Howard Williams, *Life on the Color Line: The True Story of a White Boy Who Discovered He Was Black* (1995) (recounting the experiences of a former law school dean). Recently, the notion of passing has been applied to other groups. See, e.g., *Passing: Identity and Interpretation in Sexuality, Race, and Religion* (María Carla Sánchez & Linda Schlossberg eds., 2001).

³⁹ Engel & Munger, *supra* note 15, at 61–62.

those contained in the ADA.⁴⁰ Similarly, William Heinz was formally diagnosed as dyslexic and had a terrible experience in the special education system. Because he believes that his diagnosis focused societal prejudices and misconceptions against him more strongly, William hides his learning disability from others.⁴¹ Like Vicki, William does not consider asserting rights related to his disability under the ADA.⁴²

Conversely, Jill Golding's diagnosis with a learning disability as an adult was a powerfully transformative experience that allowed her to claim a place in the mainstream as a successful nurse. From a childhood when she and others viewed her as stupid, lazy, and undeserving of the mainstream, she has been able to access her abilities and talents and transform her sense of self in the process. This was because, after her diagnosis, Jill was able to forge a new identity, one in which she is capable, successful, and deserving of the mainstream.⁴³ Knowing that she has legal rights under the ADA has allowed Jill to find the strength to assert those rights informally, to personal and professional advantage.⁴⁴

B. Extra-Disability Factors Affecting Rights

Engel and Munger identify social class, family, race, and gender⁴⁵ as extra-disability factors affecting the development of disability identity and its interplay with ADA rights.⁴⁶ How an individual with a disability conceives of her opportunities and rights under the ADA, if she conceives of them at all, is linked to these contextual factors. Crucial to the overall ability of disabled employees to work, according to *Rights of Inclusion*, are the resources available

⁴⁰ Id. at 66.

⁴¹ Id. at 62–65.

⁴² Id. at 66.

⁴³ In this respect, Jill's circumstance is a rarity. The authors note that few of the learning disabled people they interviewed "viewed their situation through such a rights-tinged lens. Jill's perspective is distinctive because it equates learning disabilities with physical disabilities . . . and with the issue of racial discrimination." Id. at 34.

⁴⁴ Id. at 30–36.

⁴⁵ The authors, and hence this Review, use the term "gender" to refer to assigned social roles that cut across people's "sex," meaning their biological difference. Id. at 214.

⁴⁶ Id. at 18–19.

to them at the point their careers first intersect with their disabilities.⁴⁷

The authors contend that social class affects identity formation in that the options a person believes are available, as well as the future he perceives as possible, are frequently dictated by social strata. As the child of uneducated Polish immigrants, Rosemary Sauter was expected to enter the workforce rather than attend college and did so.⁴⁸ There was no conception of learning disabilities in Rosemary's world, and she was thought by her family, teachers, and peers to be slothful and unintelligent.⁴⁹ By contrast, Barry Swygert was raised in a supportive and middle-class home environment, and it was assumed that he would continue to be professionally successful after the onset of his disability at the age of thirty. He and his social circle are aware of his rights and he has utilized government programs geared at helping persons with disabilities to participate in the workplace.⁵⁰

One's family situation, according to Engel and Munger, also affects identity formation. No one in Louise Dobbs's alcoholic, abusive, and dysfunctional family, including Louise, ever saw a future for her beyond manual labor and poverty. She has no notion of legal empowerment or assistance of any kind and believes that the paralysis she sustained following a stroke prevents her from ever returning to her old job in a chicken factory.⁵¹ Until dyslexic William Thomas was transferred into a stable and supportive foster home, he did very poorly in school, despite receiving special education services.⁵² His strong mentoring relationship with a local locksmith with whom he apprenticed taught William "how to be a man, how to carry [him]self, how to carry adversity."⁵³

Nevertheless, William's status as an impoverished African-American has limited his ambition. Although he will attend a junior college, he has no conception that the ADA and the rights he holds under it could expand his career options beyond becoming a

⁴⁷ See generally *id.* at 168–238.

⁴⁸ Rosemary worked as a dance teacher originally, but she now works as an operating room nurse. *Id.* at 172, 175.

⁴⁹ *Id.* at 168–74.

⁵⁰ *Id.* at 100–03.

⁵¹ *Id.* at 180–83.

⁵² *Id.* at 184–86.

⁵³ *Id.* at 186.

locksmith.⁵⁴ Contrast William with Evelyn Gardner, the child of an upwardly mobile working-class African family who was sent to study in the United States in the fifth grade. While her diagnosis as dyslexic while attending community college transformed her perspective and her career plans, for Evelyn, race is associated with cultural differences and her immigrant status, rather than with injustice.⁵⁵

For Engel and Munger, gender has perhaps the most nuanced effect among extra-disability factors, in that it can impact how rights become active in four general ways. They found that gender: (1) affects the perceptions individuals have about “themselves as employees”; (2) influences the willingness a person has to assert his or her rights; (3) negatively interplays with disability so that rights consciousness is absent from some personal narratives; and (4) positively interplays with the ADA to help persons with disabilities reconstruct their gender identities.⁵⁶

As an initial premise, Engel and Munger found (as do almost all feminist legal scholars) that gender roles influence career choices. While Rosemary Sauter was discouraged from math and mechanical drawing, and was instead expected to marry and raise children,⁵⁷ Mary Williams found success in the mainstream, in spite of her severe and undiagnosed learning disability, by finding a way to conform to traditional gender roles via cosmetology.⁵⁸ Dick Seaton was steered toward manual labor as a result of his learning disability and became a housepainter. Later, as a diagnosed adult, Dick considered returning to school to pursue medicine. He never considered nursing, though, because he perceived of it as womens’ work.⁵⁹

⁵⁴ Id. at 187. Specifically, he does not believe in the reasonable accommodations provision in the ADA and thinks that employers have the right not to hire learning disabled employees or provide them with accommodations. As William related in his interview: “You shouldn’t discriminate nobody. But if it requires reading and you don’t know how to do it, you just can’t take the job. . . . Or shouldn’t even apply for the job if you know it’s reading.” Id. He does not use the discourse of racial justice in telling his story and does not analogize his learning disability to race. Id. at 189.

⁵⁵ Id. at 190–94.

⁵⁶ Id. at 236–37. Contrast, for instance, the interplay of racial identity and disability for Evelyn: “The discourse of racial justice appears to have little to do with the way she thinks and talks about her options.” Id. at 193.

⁵⁷ Id. at 171–73.

⁵⁸ Id. at 221–25.

⁵⁹ Id. at 219–20.

Engel and Munger also recount instances of workers with disabilities who exploited their respective gender roles, rather than utilized their legal rights, to enter the mainstream. Beth Devon's approach to accommodation issues (albeit pre-ADA) was determined in large part by gender roles and expectations. Instead of demanding accommodations from her employer, she cajoled him into providing them. Beth's gender modified her self-reliant attitude in that she took positive advantage of socially expected gender roles, transforming herself into a "girl Friday" to establish herself in the workplace.⁶⁰ Similarly, Sid Tegler approached the question of accommodation by becoming "one of the guys." Through stereotypical masculine behavior such as drunken antics in school and the development of a very "manly" demeanor, Sid believes he secured his position as an accountant in the mainstream by emulating his fellow workmen.⁶¹

At the opposite end of the spectrum are those who use their disability-grounded rights to reconstruct shattered gender identities. Jill Golding believes that her employer has a duty under the ADA to care for her in the same manner that she, as a nurse, cares for their mutual patients. Jill's legal rights have "positively reinforce[d] her perception of herself as a nurse and a woman."⁶² In the same vein, before his disabling injury, Al Vincenzo had asserted his male identity by playing hockey. Now, as a disabled person cognizant of the ADA, Al asserts his masculinity by prosecuting his legal rights.⁶³

The authors of *Rights of Inclusion* conclude that the essential element in the success of disabled employees participating in the workplace is the extent of the resources that could be accessed at the locus of rights and developing disability identities. They assert that the timing of both disability and the passage of the ADA in an individual's life cycle impact that individual's identity formation. To illustrate, after developing a disability at age thirty due to a spi-

⁶⁰ Id. at 228. Along these lines, Beth believes that personal appearance is crucial when looking for (and working at) a job. She believes that persons using wheelchairs should keep them clean and comments that "a lot of men don't clean their chairs," while she spends "hours at a time cleaning hers until all the lines [are] sleek" because "[y]our chair is part of you, just like your shoes." Id. at 210.

⁶¹ Id. at 227-29.

⁶² Id. at 232.

⁶³ Id. at 234-35.

nal tumor, Barry Swygert views his post-ADA disability as an important element of his identity, but in a way that is empowering rather than debilitating.⁶⁴ Sara Lane, who describes herself as a “type A polio victim,” was brought up at a time when people were “taught to respond to childhood polio with resilience and to pursue lofty career goals with high expectations.”⁶⁵ Because she was taught to be self-reliant, Sara is reluctant to formally activate her ADA rights, although she does feel that the passage of the ADA influenced her identity as one entitled to the mainstream.⁶⁶ Having also contracted polio as a child, Beth Devon similarly did not feel stigmatized by her disability or “marked as ‘different.’”⁶⁷ Nevertheless, because Beth’s work experience as an accountant preceded passage of the ADA, she could not rely on its accommodation provisions and had to persuade her employer to make workplace modifications on her behalf.⁶⁸

C. A New Rights Theory

As the result of their findings, Engel and Munger proffer a new rights theory, one they believe is conducive to the ADA’s aspirations and influence. In their view, traditional rights theories fail to adequately interrelate with disability rights.⁶⁹ Moreover, although the ADA is rarely invoked in a formal manner, it does profoundly affect individual identity.⁷⁰ Thus, the true measure of the effectiveness of the ADA lies not in how often persons with disabilities assert their legal rights (or prevail in litigation), but in how those people identify themselves in relation to others.⁷¹

Under “classical rights” theory, rights exist to mitigate the barriers that prevent people from achieving specific purposes and identities—for example, working as a means of being a full citizen.⁷² As the authors put it:

⁶⁴ Id. at 100–03.

⁶⁵ Id. at 196.

⁶⁶ Id. at 197.

⁶⁷ Id. at 206.

⁶⁸ Id. at 207–09.

⁶⁹ This is because “the challenges of identity formation differ for persons with physical and learning disabilities.” Id. at 16.

⁷⁰ Id. at 80.

⁷¹ Id. at 40.

⁷² See id. at 80–82.

In the classic conception, rights do not merely entitle an individual to *do something*—vote, attend an integrated school, receive due process, worship, or marry. They also entitle each individual to *be someone*—to be recognized by others as a citizen, as a member of society, as an autonomous individual within the American democracy.⁷³

Because barriers exist to the implementation of rights and their identity-altering effects, the goal of classical rights theory scholars and legislators is to identify and mitigate these barriers.⁷⁴ Nevertheless, although classical rights theory has mythic significance in the minds of the interviewees, *Rights of Inclusion* asserts that it has little practical import because none of those individuals had formally invoked their rights through suit.⁷⁵

According to the “rights versus relationship” model, as individual identity is distributed amongst social relationships, the formal assertion of rights can damage the relationships that constitute individual identity.⁷⁶ This is because identity is “‘distributed’ within social relationships,” and thus, “the theorized opposition of rights and relationships implies significant limitations for the constitutive effects of the ADA.”⁷⁷ Examining rights from this perspective implies that the ADA may increase the exclusion of people with disabilities from the mainstream and harm the identity of people with disabilities by destroying the personal relationships from which identity stems.⁷⁸ Moreover, as none of the interviewees formally invoked her rights, and so none jeopardized her relationship in the way that Engel and Munger’s theory hypothesizes, the “rights ver-

⁷³ Id. at 83.

⁷⁴ Id.

⁷⁵ Id. at 96–97.

⁷⁶ Id. at 84–85.

⁷⁷ Id. at 84.

⁷⁸ Id. at 85–86. According to the authors, this is because the continuum of mechanisms regulating social interactions spans from the formal to the informal. Id. at 84. Legal rights are the far end of the formal portion of this continuum and have little impact on the informal end. Id. Where relationships are strong, legal rights play an insignificant role. Where relationships are weak, legal rights play a strong role. Id.

sus relationship” model is inapposite to their examination of ADA rights.⁷⁹

“Critical rights theory” posits that formally granted rights are illusions and tools of oppression. Because of the presence of legal “rights,” oppressed people do not view themselves as being subordinated.⁸⁰ Yet, *Rights of Inclusion* asserts that the constitutive effects of legal rights depend on context. Rights are not harmful for those who do not have a mistaken belief that the mere possession of legal rights is indicative of the possession of social equality.⁸¹ Furthermore, at a minimum, interviewees were not “fooled” into a false consciousness of rights. Hence, critical rights theory fails to account for the ambiguity most interviewees felt about their rights.⁸²

In contrast, Engel and Munger aver that the ADA challenges the historical view that disability means unemployability and reaffirms historical attitudes about disability, in the sense that it requires a differentiation of persons with disabilities from persons without disabilities in a potentially stigmatizing way.⁸³ This recursive effect, both positive and negative, of the ADA on rights and identity can be seen in Engel and Munger’s comparison of Barry Swygert’s experiences with those of Raymond Militello. Although Barry never formally invoked the ADA after the onset of his paralysis, the statute transformed his self-perception and enabled him to “reconstitute his identity” and retain his “ambitious” career plans.⁸⁴ He became rights-conscious through “cultural and discursive” shifts that were engendered as a result of the legislation itself, and he became an active participant in rights-identity through “its context-creating effects.”⁸⁵

⁷⁹ Id. at 97. At the same time, the authors generally subscribe both to classical rights theory and the rights versus relationship model in that they see legal rights as having both positive and negative effects on identity. Id. at 86.

⁸⁰ See id. at 87.

⁸¹ See id.

⁸² Id. at 97.

⁸³ Id. at 116–22.

⁸⁴ Id. at 102.

⁸⁵ Id; cf. Peter Blanck, *Civil War Pensions and Disability*, 62 Ohio St. L.J. 109 (2001) (identifying historical, political, and social forces behind the conceptions of disability); Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 Ala. L. Rev. 1 (2000) (same).

Thus, Barry believes that the importance of the ADA is not in its formal invocation, but in the way its very existence transforms society, people, and their relationships.⁸⁶ In contrast, Raymond Militello, who has a learning disability, sees himself as abnormal and thus he sees the ADA as wrongfully preferring abnormality to normalcy.⁸⁷ While he appreciates the more positive accommodations he has received in college, Raymond hesitates to view himself as a “rights-bearer,” instead envisioning himself as a wily person taking advantage of any means to get in the “back door” and gain advantage over his peers.⁸⁸ Moreover, Raymond explicitly (and ironically) opposes the ADA as an unnecessary governmental intrusion into the private sphere. He questions whether all those who make use of the ADA, including himself, really need it.⁸⁹

Accordingly, *Rights of Inclusion* asserts that because current rights theory in its three major iterations fails to fully account for the effects of the ADA on persons with disabilities, a new, more appropriate rights theory is necessary. This paradigm would take into account the facts that rights (1) become active in informal, extralegal ways; (2) are active when they transform the self-perception of the rights-holder; (3) produce cultural and discursive shifts that impact the way that rights-holders view themselves and how others view them; and (4) create new contexts that alter the identities of rights-holders.⁹⁰ As well, the impact of rights must be viewed over time since temporal depth is necessary for a meaningful analysis of the effect that rights engender.⁹¹

The most crucial elements of Engel and Munger’s framework are a recognition of the centrality of work to adult identity and the manner in which employment confers moral citizenship.⁹² Unemployed people are marginalized and viewed as less than working adults, resulting in a lessening of self-respect. Since, historically, “disability” is a term associated with an inability to work, persons with disabilities that hinder employment are threatened with a

⁸⁶ Engel & Munger, *supra* note 15, at 103.

⁸⁷ *Id.* at 75.

⁸⁸ *Id.* at 74–77.

⁸⁹ *Id.* at 75–77.

⁹⁰ *Id.* at 94–96.

⁹¹ See *id.* at 98–104.

⁹² *Id.* at 116.

lessening of self-respect, self-sufficiency, and self-reliance.⁹³ Consequently, for people with disabilities, work is the ability “to achieve recognition as independent and worthy participants in society.”⁹⁴

The assertion of the necessity for a new rights theory is demonstrated by Engel and Munger’s description of three common discourses of rights⁹⁵ they found among interviewees: the market,⁹⁶ religion,⁹⁷ and racial justice.⁹⁸ Because dialectic impacts the way in which disability, rights, and identity interact, Engel and Munger maintain that providing a new rights theory framework creates a method to understand and evaluate experience.⁹⁹ Sid Tegler’s experience, for example, demonstrates the marketplace discourse.¹⁰⁰ Sid uses a cost-benefit approach to rights under the ADA to distance himself from his disability and the social stigma inherent in it because he needs to view himself as being as capable an employee as anyone else. Thus, he cannot support accommodation provisions under the ADA without compromising his identity.¹⁰¹ The dis-

⁹³ *Id.*

⁹⁴ *Id.* at 117; see also *id.* at 116–22.

⁹⁵ They describe the term “discourse” as being,

by definition, interactive and intersubjective. It is the communicative medium through which the self interacts with and comes to be distributed among others, thereby establishing a sense of identity. Further, because a discourse is a way of thinking and talking about experiences, narrations of the self continually draw on available discourses to create and recreate identity.

Id. at 143. These various “discourses,” as the authors term them, fundamentally affected how the interviewees responded to and interacted with the ADA: “If potential rights holders cannot articulate a disparity between the treatment expected and the treatment actually received, they may come to accept as natural and appropriate what might otherwise be considered exclusion or discrimination. They can perceive no space within which ADA rights could become active.” *Id.* at 144.

⁹⁶ This discourse ties into how persons with disabilities construct their identities as employees, specifically in relation to notions of cost-benefit and reasonableness. *Id.* at 152–53.

⁹⁷ By which the authors mean “a resource that enables [the interviewees] to understand and express their concepts of self, disability, employment, and the law.” *Id.* at 159.

⁹⁸ This term describes “the use of concepts and language that are widely shared in our society as Americans talk—and sometimes heatedly disagree—about fairness and justice for racial minorities.” *Id.* at 144–45.

⁹⁹ Interestingly, they found all three discourses present and effective amongst the interviewees. *Id.* at 165–67.

¹⁰⁰ *Id.* at 153–56; see also *id.* at 106–32.

¹⁰¹ *Id.* at 153–55. Additionally, the authors note that when confronted with discrimination, “Sid’s approach . . . was to express his disdain and move on.” *Id.* at 109. Sid

course of the market, then, protects his identity as a capable worker.¹⁰²

The discourse of faith can be seen in the life story of Georgia Steeb, who is conflicted between her Christian duty to forgive rights-violators and her role as a rights-bearer. In theory, Georgia believes she should assert her rights when they are violated, but she also believes that her Christian faith requires that she turn the other cheek. As a result, Georgia can pursue only the most egregious violations, in accordance with her faith.¹⁰³

The discourse of racial justice can be seen in the circumstance of Ron Zander, who equates the ADA's reasonable accommodations provisions with affirmative action. In so doing, he distinguishes, somewhat hazily, between "discrimination" that he considers to be legally allowable, refusal of preferential treatment (specifically, a refusal to extend more time to dyslexics to deal with job-related paperwork), and "prejudice" that is not legally allowable (for instance, refusing to hire someone like himself due to dyslexia). The more closely analogous to race-based discrimination an employer's action is, the more Ron thinks it should be illegal.¹⁰⁴

II. EXPRESSIVE LAW SCHOLARSHIP

Expressive law scholarship examines the impact that the external (the legal system) can have on the internal (individual behavior) by altering social norms. This is an aspect of rights transformation not addressed in *Rights of Inclusion*. Alex Geisinger's "belief change" theory offers a gloss on expressive law scholarship that explains how those changes can be positive and predictive.

eventually became self-employed. *Id.* at 110. Speaking of employers, customers, and clients, Sid believes them to be indifferent, rather than hostile, to people with disabilities, and thinks that they will not care about disabilities when they are convinced that working with someone is in their financial interest. *Id.* at 112–13.

¹⁰² *Id.* at 153–56.

¹⁰³ *Id.* at 159–63.

¹⁰⁴ *Id.* at 149–51; cf. Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 *Va. L. Rev.* 825, 833–37 (2003) (arguing that discrimination against the disabled is as morally reprehensible as racial discrimination).

A. The Goals of Expressive Law Scholarship

Traditional law and economics literature operates from the premise that people act rationally to maximize their own utility when choosing among alternatively available courses of conduct.¹⁰⁵ Under this framework, known as rational choice theory, law operates by varying the cost to an individual of satisfying her exogenous preferences through the use of sanctions.¹⁰⁶ For any given activity, increasing the associated cost will decrease that individual's desire to choose that opportunity; conversely, a decrease in cost will encourage the individual to satisfy her desire by choosing that opportunity.¹⁰⁷ In other words, manipulating the opportunity set available to a given actor will alter her subsequent choices.

This standard economic account has proved a useful baseline method for modeling human behavior and thereby predicting the effects of particular policies.¹⁰⁸ Scholars who have challenged the traditional model have done so primarily on two grounds.¹⁰⁹ Those exter-

¹⁰⁵ See William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* 99–103 (8th ed. 1999); Mark Perleman & Charles R. McCann, Jr., *The Pillars of Economic Understanding: Factors and Markets* 301 (2000) (describing the market as a “model of allocative efficiency”).

¹⁰⁶ “In the vision of law that dominates economics-influenced legal theory, law imposes sanctions to solve problems . . .” Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 Va. L. Rev. 1649, 1650 (2000). Professor McAdams uses this axiom as a departure point for his version of expressive law theory.

¹⁰⁷ For a discussion of this point made in the context of criminal activity, see Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 Duke L.J. 1.

¹⁰⁸ Two Nobel laureates unabashedly defend this model from the perspective that preferences are relatively static and that studying variable taste is a futile endeavor. See George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, *Am. Econ. Rev.*, Mar. 1977, at 76.

¹⁰⁹ Two other challenges that do not originate from questioning the rationality of behavioral constraints are nonetheless worth mentioning. The first is feminist law and economics, notably the work of Professor Hadfield. See, e.g., Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 *Geo. L.J.* 89, 89–90 (1993) (challenging the circular reasoning used by those law and economics scholars who explain gender wage differentials by reference to the historical household structure without also questioning the existence of this arrangement); Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 *Harv. L. Rev.* 479, 502–03 (1992) (reviewing Richard A. Posner, *Sex and Reason* (1992)). The second is environmental law and economics. See generally Daniel H. Cole, *Environmental Protection and Economic Growth: Lessons from Socialist Europe*, in *Law and Economics: New and Critical Perspectives* 295 (Robin Paul Malloy & Christopher K. Braun eds., 1995) (tracing the comparative failure of envi-

nal to the discipline of law and economics have faulted it on the basis that the framework assumes rational behavior and is therefore either methodologically deficient¹¹⁰ or morally wanting.¹¹¹

By contrast, commentators generally satisfied with the law and economic schema, but wishing to extend and add greater nuance to its reach, have advocated for greater exploration into how law shapes choices beyond the use of traditional sanctions. Typically this is achieved either by changing the social meaning of a behavior, and thus the likelihood of being socially sanctioned for undertaking that behavior, or by altering individual preference so that people no longer desire to satisfy a particular taste.¹¹² Both emendations result in individuals choosing a previously secondary course of conduct. This scholarly agenda, which generally may be referred to as the field

ronmental protection in socialist Europe); Jeff L. Lewin, *Toward a New Ecological Law & Economics*, in *Law and Economics: New and Critical Perspectives*, supra, at 249, 250 (suggesting “the emergence of a new ‘ecological law & economics’ that will address such issues as ecological scarcity and environmental equity from a perspective that overcomes the limitations of the neoclassical approach”).

¹¹⁰ For two early criticisms, see Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. Cal. L. Rev. 669 (1979) and Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 Stan. L. Rev. 387 (1981). As an aside, the traditional law and economics academy acknowledges that not all behavior is rational and, therefore, accountable by the traditional model. See, e.g., *The Law and Economics of Irrational Behavior* (Francesco Parisi & Vernon Smith eds., forthcoming 2004) (exploring models of irrational behavior and the implications for the design of legal rules and institutions); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 Va. L. Rev. 1603 (2000) (noting some of the limitations).

¹¹¹ See, e.g., Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, in *Cost-Benefit Analysis: Legal, Economic, and Philosophical Perspectives* 135 (Matthew D. Adler & Eric A. Posner eds., 2001) (questioning the validity of the entire rational economic model); Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. Legal Stud. 1005, 1007–08 (2000).

¹¹² Lawrence Lessig describes this schism as one between the “Old Chicago School,” whose adherents believe that norms act independently of law, and the “New Chicago School,” whose adherents consider what impact laws have upon norms. Lawrence Lessig, *The New Chicago School*, 27 J. Legal Stud. 661, 673–80 (1998). For stalwarts of the Old Chicago School—for example, Judge Richard Posner—law and social norms scholarship enriches traditional law and economic work, but does not supercede it. Specifically, Judge Posner believes that social meaning is “something that comes ready-made in the sound or gesture or practice,” but is not itself instilled into an act by law. See Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. Legal Stud. 553, 563 (1998).

of law and social norms,¹¹³ has inspired an outpouring of behavioral economic scholarship¹¹⁴ examining the effect of law and norms on a range of individual behavior beyond the traditional effect of sanctions.¹¹⁵

¹¹³ Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991), is considered by many to be the determining work in the general field of law and social norms and therefore the wellspring of much of what followed. See, e.g., Richard H. McAdams, *Signaling Discount Rates: Laws, Norms, and Economic Methodology*, 110 *Yale L.J.* 625, 626 (2001) (reviewing Eric A. Posner, *Law and Social Norms* (2000)) (opining that “[t]he seminal work in the law-and-economics camp is unquestionably Robert Ellickson’s”). According to McAdams, Posner’s 2000 work “represents the first book-length treatment of this subject by a law professor since Ellickson.” *Id.* Several symposia have been convened on the subject. For example, see Symposium, *Law, Economics, & Norms*, 144 *U. Pa. L. Rev.* 1643 (1996); Symposium, *The Legal Construction of Norms*, 86 *Va. L. Rev.* 1577 (2000); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 *J. Legal Stud.* 537 (1998). A cogent overview of this scholarship is provided by Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, in *Social Norms* 35 (Michael Hechter & Karl-Dieter Opp eds., 2001).

¹¹⁴ See generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471 (1998) (envisioning how law and economics analysis may be improved by attention to insight about actual human behavior); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 *Vand. L. Rev.* 1583, 1584–88 (1998) (analyzing the impact on contract negotiations of negotiator biases for the status quo and inaction, as well as expressive law and economics (which examines how legal norms can alter social norms)). Referring to themselves as “the radical middle,” these last scholars are represented by their own section in the American Association of Law Schools and contribute to the publication of the *Journal of Socio-Economics*.

¹¹⁵ See, e.g., Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. Legal Stud.* 115 (1992) (diamond merchants); Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 *Law & Contemp. Probs.* 73 (1997) (punitive damages); Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 *Int’l Rev. L. & Econ.* 215 (1994) (commercial law); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 *Colum. L. Rev.* 1253 (1999) (corporate law); Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 *S. Cal. L. Rev.* 1 (1999) (torts); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. Chi. L. Rev.* 591 (1996) (criminal punishment); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *Harv. L. Rev.* 1003 (1995) (antidiscrimination law); Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 *U. Pa. L. Rev.* 2237 (1996) (blackmail); Eric A. Posner, *Family Law and Social Norms*, in *The Fall and Rise of Freedom of Contract* 256 (F. H. Buckley ed., 1999) (family law); Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 *Va. L. Rev.* 1781 (2000) (tax); Eric A. Posner, *The Legal Regulation of Religious Groups*, 2 *Legal Theory* 33 (1996) (religion); Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, in *The Fall and Rise of Freedom of Contract*, *supra*, at 201 (marriage); Michelle J. White, *Why It Pays to File*

A recent branch of law and social norms scholarship is the related area of expressive law, which seeks to understand law's potential for proscribing or changing the social significance of particular behavior to individuals, thereby altering their behavior.¹¹⁶ This is because the new law either carries a symbolic social meaning, or because it affects the way individuals mediate that symbolic social meaning.¹¹⁷ What is crucial to this analysis is the nexus between law, norms, and social meaning. When designed appropriately, law can cause individuals to alter their own behavior because either the law induces them to change their tastes (internalization), or creates a fear of bearing social sanctions (second order sanctions), or because of pressure brought to bear upon them through societal sanction (third order sanctions).¹¹⁸

An example commonly used in the literature to illustrate the effect of norm changes on behavior is regulations prohibiting public smoking.¹¹⁹ Suppose a society exists in which most people smoke regularly,

for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change, 65 U. Chi. L. Rev. 685 (1998) (bankruptcy).

¹¹⁶ See, e.g., Robert Cooter, Expressive Law and Economics, 27 J. Legal Stud. 585 (1998) (describing the role of law in the development of social norms, and socioeconomic law and economics, which seeks to inject psychological and social factors related to wealth and race into otherwise "neutral" economic analyses); Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943 (1995) (examining the social construction of orthodoxy and its place in the law); McAdams, *supra* note 106 (suggesting that law may be alternatively conceptualized for its expressive, as well as its traditionally acknowledged, enforcement functions); Richard H. McAdams, An Attitudinal Theory of Expressive Law, 79 Or. L. Rev. 339 (2000) (highlighting the power of the approval or disapproval of law in shaping behavior); Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021 (1996) (considering how legal statements might be designed to change social norms).

¹¹⁷ Lessig, *supra* note 112, at 681–83.

¹¹⁸ This account is, naturally enough for an emerging field, a synthesis of several views rather than a univocal proposition. For example, Robert Cooter describes law as having two very different functions: enacting new obligations from the top down (as in the case of regulatory law), or growing from the bottom up (through social norm enforcement). See Robert Cooter, Normative Failure Theory of Law, 82 Cornell L. Rev. 947, 947–49 (1997). I conflate Cooter's two functions in this Review because I see them as complementary rather than as dichotomous. For a comprehensive literature review of the development of the field and the nuances contained therein, see Geisinger, *supra* note 22.

¹¹⁹ See, e.g., Geisinger, *supra* note 22, at 44–48; McAdams, *supra* note 106, at 1718–21; Sunstein, *supra* note 116, at 2032–34; Richard H. McAdams & Janice Nadler, A Third Model of Legal Compliance: Testing for Expressive Effects in a Hawk/Dove Game,

either because they consider it pleasurable or it is otherwise in keeping with regular social mores. Having learned that smoking engenders both health care costs (cancer and emphysema, to name two examples) and environmental costs (poor air quality), the legislature passes a law that prohibits public smoking and fines violators.¹²⁰ The effect of this statute on Marlboro Man, an exuberant smoker, can be threefold. Passage of the anti-smoking ordinance can (1) educate Marlboro Man that smoking really is a bad activity in which to engage, not only for himself, but also for fellow citizens within reach of second-hand smoke and for animals who may choke on cigarette butts, and so change his desire to smoke; or (2) have no effect at all on Marlboro Man's personal desire to smoke, but result in fear of social condemnation from others who witness his public smoking causing him either to curb his addiction or to practice it in private; and/or, in combination with either or both of the previous two possibilities, (3) cause other members of Marlboro Man's society to bear social pressure and condemnation upon him until he abstains from public smoking.¹²¹

B. Alex Geisinger's "Belief Change" Theory

Some law and economics scholars have criticized the account of law's effect upon norm change contained in expressive law as being descriptive and lacking predictive effect.¹²² There are also scholars who have raised questions about whether law itself can even have an expressive effect in internalizing normative value choices.¹²³

The John M. Olin Center for Studies in Law, Economics, and Public Policy Working Paper Series, Working Paper No. 285, at <http://lsr.nellco.org/yale/lepp/papers/285>.

¹²⁰ The role of the legislature in signaling preferences and endorsing certain outcomes is part of Richard McAdams's continuing and intrepid scholarship on expressive law. See, e.g., McAdams & Nadler, *supra* note 119; Dhammika Dharmapala & Richard H. McAdams, The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law, 5 *Am. L. & Econ. Rev.* 1 (2003).

¹²¹ For examples in the literature, see Dan M. Kahan & Eric A. Posner, *Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 *J.L. & Econ.* 365, 366 (1999) (criminal shaming) and Lessig, *supra* note 116, at 971 (dueling).

¹²² See, e.g., Scott, *supra* note 110, at 1606-07; Stigler & Becker, *supra* note 108, at 81-83.

¹²³ See, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 *U. Pa. L. Rev.* 1363 (2000); Matthew D. Adler, *Linguistic Meaning, Nonlinguistic "Expression," and the Multiple Variants of Expressivism: A Reply to Professors Anderson*

In response to these valid criticisms, Alex Geisinger has proffered a “belief change” theory of expressive law that seeks to model and predict behavior in the context of social norm change.¹²⁴ Drawing on studies by social psychologists, he points out that two factors mainly influence individual decisions as to whether to engage in particular behavior: the individual’s attitude towards the behavior, and the individual’s belief about how society at large views that behavior.¹²⁵ Combined, these two factors help determine how an individual will act in a given circumstance; in other words, a person’s attitude (or belief certainty) about the consequences of satisfying a particular preference will govern whether she will satisfy that preference.¹²⁶

According to Geisinger, law impacts an individual’s certainty regarding the consequences of her actions either by providing additional information about that action (for instance, informing Marlboro Man that smoking causes lung cancer), or through its influence on an individual’s “inferential reasoning process” (for example, that despite lobbying by the tobacco industry, which funds many of the representatives’ election campaigns, the legislature nonetheless bans public smoking).¹²⁷ This change in belief may occur because people were ambivalent about particular conduct, and the law’s passage has now “tipped” those fence-sitters towards an equilibrium (Marlboro Man had heard that smoking was unhealthy, but was as yet unconvinced), or because individuals with little information regarding an activity have now updated their knowledge and beliefs subsequent to the law’s passage (that is, all of Marlboro Man’s friends smoked, and none had cancer, but a larger empirical data set has now been provided).¹²⁸

Similarly, passage of a law will provide information to Marlboro Man on the likelihood of being socially sanctioned. Marlboro Man

and Pildes, 148 U. Pa. L. Rev. 1577 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503 (2000).

¹²⁴ See Geisinger, *supra* note 22.

¹²⁵ *Id.* at 55-56; see also Martin Fishbein & Icek Ajzen, *Belief, Attitude, Intention and Behavior: An Introduction to Theory and Research* 13-18 (1975) (outlining a conceptual framework that suggests that the performance or nonperformance of a specific behavior is determined by the person’s intention to perform that behavior).

¹²⁶ Geisinger, *supra* note 22, at 56, 62-63; see also Russell Veitch & Daniel Arkkelin, *Environmental Psychology: An Interdisciplinary Perspective* 109 (1995) (discussing the Fishbein-Ajzen “Reasoned Action Model” of behavior).

¹²⁷ Geisinger, *supra* note 22, at 63-65.

¹²⁸ *Id.* at 68-69.

may believe that he is more likely to be sanctioned for smoking because people have a general belief that laws should be followed. In addition, as Professors Richard McAdams and Robert Scott have each pointed out, the fact that a legislature has passed the anti-smoking ordinance provides information to individuals (especially in light of the costs to legislators personally) that the majority of the electorate believes the rule is just.¹²⁹ Thus, a belief change theory rests on the mechanisms through which a law's passage will influence an individual's behavior beyond the traditional notion of sanction.¹³⁰

Moreover, Geisinger explains that a belief change theory clarifies the process of internalization, and its attendant effect upon subjective norms, in a more complete manner than previous scholarship. This is because internalization comes about as the result of law impacting attitude, rather than stimulating the subjective norm.¹³¹ Returning once more to the hypothetical Marlboro Man, he is initially surprised by the passage of the anti-smoking law because he knows that the legislators are either smokers or are heavily supported by tobacco-based campaign funds. Ultimately, however, he infers from passage of the law that smoking must indeed be a hazardous activity and changes his attitude regarding smoking in public. Henceforth, not only does Marlboro Man refrain from public smoking, but he also castigates fellow smokers when he catches them lighting up in public. This circumstance arises because Marlboro Man has internalized his preference change due to passage of the anti-smoking ordinance. Should he feel compelled to smoke in public due to a nicotine addiction, he

¹²⁹ McAdams, *An Attitudinal Theory of Expressive Law*, supra note 116, at 362–63; Scott, supra note 110, at 1624–25. Geisinger asserts that, while basically correct, neither of these explanations is as fully satisfactory as his belief change theory, since majoritarian compliance is “only one form of inferential belief change regarding the subjective norm.” Geisinger, supra note 22, at 70.

¹³⁰ This is because:

Passage of a law will likely affect attitudes toward the behavior by increasing or decreasing the certainty with which beliefs regarding a behavior are held. Passage of a law may also affect an individual's belief about the subjective norm, thus increasing or decreasing the likelihood that the individual will undertake the behavior. Furthermore, the effects on belief certainty about a particular behavior or the subjective norm are measurable and can be combined in a meaningful way to predict the outcome of such changes on an individual's intent to undertake a behavior. The belief change theory, therefore, provides a comprehensive and predictable means of analyzing the non-sanctioning effects of a law.

Geisinger, supra note 22, at 65.

¹³¹ *Id.* at 66–67.

would feel guilty about doing so even if no one was around to observe him.¹³²

Nor is this phenomenon, according to Geisinger's model, merely an instance of a belief change occurring while a preference remains the same (that is, that Marlboro Man now recognizes the dangers of smoking but only acts as he does in order to avoid second and third order sanctions). This is because Marlboro Man now derives greater utility from not smoking, or from stopping others from smoking, than he does from smoking or by remaining silent. As such, law may not only provide greater information about given activities, it may also act to change individuals' internal beliefs about the consequences of those activities.¹³³ Consequently, Geisinger's belief change theory "accounts for changes in social meaning by suggesting that, at a particular point, law increases the certainty of particular beliefs about an activity while decreasing other beliefs about it."¹³⁴

III. DISABILITY RIGHTS: NORMS AND ASPIRATIONS

Extant socio-legal norms on disability rights view people with disabilities as being inherently less capable than non-disabled people. In consequence, society views disability-related rights as "special" rights. These notions can be seen in recent Supreme Court decisions. By contrast, the ADA seeks to eliminate artificial barriers to disabled participation and recognizes the equality of the disabled. This Part contrasts social and legal conventions regarding people with disabilities to the aspirations set forth in the ADA.

A. Existing Socio-Legal Norms on Disability Rights

Social convention equates disabled people's biological atypicality with inherent lesser ability. In consequence, prevailing socio-legal norms view disability rights as special rights. These views, which combine to exclude people with disabilities from equal social participation, can be seen in recent Supreme Court opinions.

¹³² This hypothetical parallels the example provided initially by Scott, *supra* note 110, at 1608, and elaborated on by Geisinger, *supra* note 22, at 51, which uses devoted dog lovers.

¹³³ Geisinger, *supra* note 22, at 68–70.

¹³⁴ *Id.* at 72.

1. *Inherent Lesser Ability*

A primary social convention regarding people with disabilities is one that equates their biological atypicality with inherent lesser ability. Perhaps the most damaging aspect of this concept, expressed in sociological terms, is the belief that people with disabilities are “inauthentic workers.”¹³⁵

Set against the backdrop of public policies that presume people with disabilities can and should receive public assistance rather than engage in employment,¹³⁶ this perception justifies the disadvantaged socioeconomic position of workers with disabilities who are employed in lower paying or less demanding positions.¹³⁷ This is a perception that the Court has implicitly endorsed. In *Cleveland v. Policy Management System Corp.*,¹³⁸ plaintiff Cleveland was deemed to have ADA protection in retaining employment, even though she had exercised a statutory entitlement to Social Security Disability Insurance (“SSDI”) benefits. The burden shifted to her, however, to show that with reasonable accommodation she could overcome the crucial aspects of the employment-related dysfunction on which her SSDI application was based.¹³⁹ Thus, the Court preserved the principle that an assignment to the disability classification carries a presumption of inability, and continued to expect individuals so classified to prove themselves exceptions to this presumption in

¹³⁵ The phrase is drawn from Schultz, *supra* note 5, at 1892.

¹³⁶ Defining someone as disabled under the Social Security system “incorporates common expectations and shared values about what infirmities a person *ought* not to have to bear and keep working.” Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 *Harv. L. Rev.* 833, 853 (1976). See generally Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 *Berkeley J. Emp. & Lab. L.* 166, 183–85 (2000) (characterizing the development of Social Security Insurance (“SSI”) and SSDI under the Nixon administration as one intended to keep disabled people out of the workplace); Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 *U. Mich. J.L. Reform* 81, 124–25 (2002) (referencing “welfarist” policies that presume people with disabilities will not engage in employment opportunity).

¹³⁷ In describing the parallel position of women, Schultz points out the odd position taken by Professor Becker, who maintains that women are occupationally disadvantaged because of their “comparative advantage” at child care and housework. See Schultz, *supra* note 5, at 1893–98.

¹³⁸ 526 U.S. 795 (1999).

¹³⁹ *Id.* at 798.

order to gain access to the normal opportunity range, including employment.¹⁴⁰

2. *Special Rights*

Because socio-legal norms operate from the premise that disabled workers are less capable than their non-disabled peers, an attendant social convention is that disability rights are special rights.¹⁴¹ As a result, provisions that integrate people with disabilities into the workplace are perceived of as raising those individuals above an equality equilibrium, rather than leveling an uneven playing field.¹⁴²

This perspective is aptly demonstrated by the Supreme Court's opinion in *Board of Trustees of the University of Alabama v. Garrett*.¹⁴³ Patricia Garrett sued the University after being demoted from her nursing supervisor position because she had undergone breast cancer treatment.¹⁴⁴ The Court did not reach the merits of her claim, ruling that as a state actor the defendant was immune from Garrett's private ADA suit for monetary damages.¹⁴⁵ Nonetheless, Chief Justice Rehnquist's majority opinion upheld as constitutional state workplace practices discriminating against people with disabilities for inherent economic reasons.¹⁴⁶ This is because "it would be entirely rational" for state employers "to conserve scarce financial resources by hiring employees who are able to use existing facilities" rather than comply with ADA requests.¹⁴⁷ Ac-

¹⁴⁰ Id.; cf. *Barnhart v. Thomas*, 124 S. Ct. 376 (2003) (holding that people are not disabled for social security purposes if they are functionally capable of some type of employment, even if the position they once held is either terminated or no longer exists in the national economy).

¹⁴¹ See Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 Mich. L. Rev. 564, 565 (1998) (noting that categorizing rights as special rights "conflate[s] antidiscrimination laws that essentially mirror the Constitution's own command with affirmative action provisions whose constitutionality can be determined under current law only after they have been subjected to searching judicial scrutiny").

¹⁴² I address this perspective, which has become canonical in the legal literature, in Stein, *supra* note 28.

¹⁴³ 531 U.S. 356 (2001).

¹⁴⁴ Id. at 362.

¹⁴⁵ Id. at 360.

¹⁴⁶ Id. at 369–72.

¹⁴⁷ Id. at 372.

cordingly, state actors “could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled.”¹⁴⁸ Although Garrett did not request any form of accommodation, the Chief Justice characterized her ADA claims as being for “special accommodations.”¹⁴⁹ Justice Kennedy concurred in the judgment, noting that the adjudication of ADA claims was not an equality issue.¹⁵⁰ Rather, that determination necessitated an internal battle between “our own human instincts” which cause us to shun disabled people, and “the better angels of our nature” that sympathize for “those disadvantaged by mental or physical impairments.”¹⁵¹ Hence, according to the Court’s ruling, ADA rights involve something more than equality, and are motivated by humanitarian concerns rather than a belief in the equality of the disabled.¹⁵²

B. ADA Disability Rights Aspirations

Among the ADA’s normative aspirations were the elimination of artificial barriers to disabled persons’ equal participation in society and a concurrent social recognition of their civil rights.¹⁵³

¹⁴⁸ *Id.* at 367–68.

¹⁴⁹ *Id.* at 368.

¹⁵⁰ Justice Kennedy was joined by Justice O’Connor. *Id.* at 374–75. (Kennedy, J., concurring).

¹⁵¹ *Id.* at 375–76.

¹⁵² In contrast to the majority, Justice Breyer dissented on the ground that “Congress compiled a vast legislative record” which documented extensive and “powerful evidence of discriminatory treatment” of the disabled that both “implicate[d] state governments” and supported the rights-based theory evoked by the plaintiffs. *Id.* at 377–78 (Breyer, J., dissenting).

¹⁵³ The qualification reflects the fact that numerous interpretations are possible. For example, Professor Samuel Bagenstos has offered four distinct analyses of the principles that either underlie or ought to motivate ADA jurisprudence. First, the ADA could be seen as by and large extending protection only to those individuals subject to stigma and systematic disadvantage. See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 *Va. L. Rev.* 397, 401 (2000). Second, the statute can be viewed through the lens of risk regulation. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation,* 101 *Colum. L. Rev.* 1479 (2001). Third, the ADA was “sold” to Congress on the notion of making disabled people independent of public assistance. See Bagenstos, *supra* note 6, at 953–75. Fourth, the legislation was intended, by means of moral imperative, to remedy discrimination. See Bagenstos, *supra* note 104, at 837–46. For a diverse treatment of the issue of disability identity formation, see Symposium, *Disability & Identity,* 44 *Wm. & Mary L. Rev.* 907 (2003).

1. Eliminating Artificial Barriers

During hearings on the ADA, Congress was presented with a catalog of evidence on the historical exclusion of people with disabilities from American society.¹⁵⁴ Among the more dramatic evidence presented were results of an independent nationwide poll of one thousand Americans with disabilities¹⁵⁵ that found that two-thirds of working-age people with disabilities were unemployed,¹⁵⁶ and that two-thirds of those individuals wanted to work but could not do so because of employer attitudes.¹⁵⁷ The study also found that during the year prior to the ADA hearings nearly two-thirds of individuals with disabilities did not attend movies;¹⁵⁸ three-fourths of the disabled population did not see live theatrical or musical performances;¹⁵⁹ two-thirds of disabled people had not attended sporting events;¹⁶⁰ seventeen percent did not eat in restaurants;¹⁶¹ and thirteen percent had not shopped in grocery stores.¹⁶²

¹⁵⁴ Congress summarized its conclusions as to this evidence in the ADA's Findings section. 42 U.S.C. § 12101 (2000); Moreover, "[h]istorically, society has tended to isolate and segregate handicapped people. Despite some improvements . . . discrimination against handicapped persons continues to be a serious and pervasive social problem." U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 159 (1983).

¹⁵⁵ Louis Harris & Associates, Inc., *The International Center for the Disabled Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986) [hereinafter *Harris/ICD Survey*]. These results were summarized to Congress by the President of that organization during hearings on the ADA. See *Guaranteed Job Opportunity Act of 1987: Joint Hearing on S. 777 Before the Subcomm. on Employment and Productivity and Subcomm. on the Handicapped of the Sen. Comm. on Labor and Human Resources, 100th Cong., at 9 (1987)* (statement of Humphrey Taylor, President, Louis Harris & Associates, Inc.) (cited in S. Rep. No. 101-116, at 8 (1989)). For a thorough overview of the ADA by one of its drafters, see Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 *Harv. C.R.-C.L. L. Rev.* 413, 441-58 (1991). For a good journalistic account, see Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 105-41 (1993).

¹⁵⁶ *Harris/ICD Survey*, supra note 155, at 47.

¹⁵⁷ *Id.* at 50-51.

¹⁵⁸ *Id.* at 37, 39.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 40.

¹⁶² *Id.* at 39.

These findings were corroborated both with more empirically rigorous evidence¹⁶³ and with anecdotal evidence.¹⁶⁴

As a result of those hearings, Congress was persuaded that the overall status of disabled people in America was a dismal one, concluding that disabled Americans have historically been “relegated to a position of political powerlessness in our society,”¹⁶⁵ and “continually encounter various forms of discrimination.”¹⁶⁶ Consequently, the legislators found that people with disabilities have been denied equal opportunities in society, including employment, education, transportation, access to public services, and voting.¹⁶⁷ Congress, moreover, identified the source of this exclusion as an artificial one, sustained by the “continuing existence of unfair and unnecessary discrimination and prejudice.”¹⁶⁸ Among the forms of unnecessary exclusion encountered by people with disabilities on a daily basis, Congress noted “the discriminatory effects of architectural, transportation, and communication barriers.”¹⁶⁹

Accordingly, Congress premised the ADA on the belief that the repercussions of having a disability are often mutable and can be relieved when the social environment accommodates physical and

¹⁶³ For example, census data indicated at that time that more than twenty percent of working age individuals with disabilities were below the poverty level. National Council on the Handicapped, *Toward Independence* 5 (1986). Previous testimony before the Senate had concluded that “by almost any definition . . . disabled Americans are uniquely underprivileged and disadvantaged. They are much poorer, much less well educated and, having much less social life, enjoy fewer amenities and have a lower level of life satisfaction than other Americans.” *Guaranteed Job Opportunity Act of 1987: Joint Hearing on S. 777*, *supra* note 155, at 9.

¹⁶⁴ The more compelling anecdotal evidence included the following: testimony by a wheelchair-using future undersecretary of the Department of Education who was removed from an auction house for being deemed “disgusting to look at”; testimony about individuals with Down Syndrome who were banned from a zoo because of the keeper’s fear they would frighten the chimpanzees; testimony that an academically competitive and nondisruptive child was barred from attending public school because of a teacher’s allegation that his physical appearance “produced a nauseating effect” upon classmates; and testimony about a competent arthritic woman who was denied a job by a college because of its trustees’ belief that “normal students shouldn’t see her.” *S. Rep. No. 101-116*, at 6–8 (1989).

¹⁶⁵ 42 U.S.C. § 12101(a)(7) (2000).

¹⁶⁶ *Id.* § 12101(a)(5).

¹⁶⁷ *Id.* § 12101(a)(3).

¹⁶⁸ *Id.* § 12101(a)(9).

¹⁶⁹ *Id.* § 12101(a)(5).

cognitive difference instead of excluding it.¹⁷⁰ By recognizing that many disadvantages associated with disability are the result of social construct rather than biological destiny, the ADA seeks to eliminate an environment that is artificially hostile to those impairments.¹⁷¹

2. *Recognizing Equality*

Policymakers considering how to rectify historical inequities, whether motivated by reasons of equality or by a desire to redistribute social resources, are normally faced with choosing between the options of regulation (for example, antidiscrimination legislation) and tax-and-spend (also called subsidy) programs.¹⁷² Indeed, several commentators have advocated for subsidies in lieu of the ADA's mandates as a way of providing employers with incentives to accommodate and retain workers with disabilities.¹⁷³

¹⁷⁰ See Silvers & Stein, *supra* note 136, at 89–98.

¹⁷¹ As such, it is fair to say that the ADA comports with the social model of disability that is asserted by most Disability Studies commentators. See Liachowitz, *supra* note 28; Scotch, *supra* note 28; Wendell, *supra* note 28; Amundson, *supra* note 28.

¹⁷² See generally Mark Kelman, *Strategy or Principle? The Choice between Regulation and Taxation 81–94* (1999) (exploring the relationship between regulation and cost-bearing burdens); Robert Howse, *Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State*, *in Regulation, Economics and the Law 259, 259–96* (Anthony I. Ogus ed., 2001) (exploring the alternatives of regulation and incentives); Cass R. Sunstein, *The Functions of Regulatory Statutes*, *in Regulation, Economics and the Law*, *supra*, at 3, 3–34 (exploring the nature and uses of regulatory statutes). The general economic efficiency and prudential propriety of both regulation and tax-and-spend programs form part of an old debate within the field of public finance. See generally Robert Howse, *supra* (asserting that government can bring about social change without returning to command-and-control approaches or relying on economically self-interested market behavior).

¹⁷³ See, e.g., Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws 480–94* (1992) (criticizing the ADA as economically inefficient); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 *Wm. & Mary L. Rev.* 1197, 1276–83 (2003) (arguing for an extension of the ADA by allowing disabled employees to pay for their extra-reasonable accommodations); Sue A. Krenk, Note, *Beyond Reasonable Accommodation*, 72 *Tex. L. Rev.* 1969, 2009–13 (1994) (proposing to effectuate accommodations through a public-private partnership wherein private employers pay for permanent improvements to their physical plants and the federal government pays for the rest); Scott A. Moss & Daniel A. Malin, Note, *Public Funding For Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 *Harv. C.R.-C.L. L. Rev.* 197, 219–31 (1998) (arguing for a grant system to federally fund reasonable disability accommodation in the workplace).

By conceiving of ADA accommodation costs as antidiscrimination rather than by characterizing it as a subsidy program, however, Congress sent a clear message that the ADA's remedies are intended to correct past injustice rather than acting as a charitable handout. Congress declared that the statute's main purpose was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"¹⁷⁴ by promulgating "clear, strong, consistent, [and] enforceable standards addressing" both individual and systematic forms of discrimination.¹⁷⁵

This language indicates that Congress, through passage of the ADA, wanted to bring about sweeping changes in social policy. Hence, Congress's overt intention in promulgating the statute was to raise the level at which social exclusions of the disabled would be examined by courts in the future.¹⁷⁶ Moreover, in its legislative findings Congress used language culled from Supreme Court decisions approving equal protection classifications.¹⁷⁷ The use of this specific language in the ADA, responding to what the Supreme Court required for heightened constitutional scrutiny circa 1990, demonstrates that Congress was consciously attempting to frame ADA remedies as part of an antisubordination agenda, which is a classic goal of civil rights law.¹⁷⁸

IV. AN INITIAL EXPRESSIVE LAW ANALYSIS OF THE ADA

An initial expressive law analysis of the ADA indicates that the statute has the potential to legislate a belief change regarding individuals with disabilities by educating mainstream individuals about

¹⁷⁴ 42 U.S.C. § 12101(b)(1) (1994).

¹⁷⁵ *Id.* § 12101(b)(2).

¹⁷⁶ *Id.* § 12101; see also *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 613 (1999) (Kennedy, J., concurring) ("The congressional findings . . . serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned."); *Sutton v. United Air Lines*, 527 U.S. 471, 494 (1999) (Ginsburg, J., concurring) (opining that the findings section affords "[t]he strongest clues to Congress' perception of the domain of the Americans with Disabilities Act").

¹⁷⁷ See Burgdorf, *supra* note 155, at 436; Silvers & Stein, *supra* note 136, at 88–96.

¹⁷⁸ See Bagenstos, *supra* note 104, at 833–35; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003, 1007–10 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Aff.* 107, 154–55 (1976); Kenneth L. Karst, *Why Equality Matters*, 17 *Ga. L. Rev.* 245, 247–49 (1983).

people with disabilities, and by creating tri-order sanctions against discrimination. Moreover, during the period in which this belief change is effectuated, the ADA imposes a financial sanction for discrimination.

A. Information: The Disability Rights Chronology

Unlike other minority groups, disabled Americans were empowered by civil rights legislation prior to a general elevation of social consciousness about their circumstances and capabilities.¹⁷⁹ Before marshalling support for the ADA's passage, the disability rights movement encompassed hundreds of individual groups, each of which represented and advocated on behalf of a different constituency.¹⁸⁰

To take one example, the protest by deaf and hearing impaired students demanding appointment of a deaf president at Gallaudet University¹⁸¹ was unconnected to People First's advocacy on behalf of developmentally disabled individuals.¹⁸² The campaign for the ADA's passage unified these previously fractured advocates.¹⁸³ De-

¹⁷⁹ See generally Shapiro, *supra* note 155, at 184–210 (discussing the rise and importance of self-advocacy); David Pfeiffer, Overview of the Disability Movement: History, Legislative Record, and Political Implications, 21 *Pol'y Stud. J.* 724, 724–32 (1993) (discussing the history and legislative record of the disability movement).

¹⁸⁰ Shapiro, *supra* note 155, at 61–63.

¹⁸¹ See generally Jack R. Gannon, *The Week The World Heard Gallaudet* (1989) (explaining the importance of the student protest to the civil rights movement for deaf and hearing impaired people); Mary Elena Fernandez, *Gallaudet Recaptures Spirit of Historic '88 March; On Anniversary, Protesters Use Same Route to Press New Concerns for the Deaf*, *Wash. Post*, Mar. 12, 1998, at B3 (explaining that “students shut down their school to demand the appointment of a deaf president”).

¹⁸² For a description of the People First movement, see Charles K. Curtis, *The Changing Role of the People First Advisor*, *Am. Rehabilitation*, Apr.-May-June 1984, at 6 (describing the development of a People First chapter); see also Dirk Johnson, *Tight Labor Supply Creates Jobs for the Mentally Disabled*, *N.Y. Times*, Nov. 15, 1999, at A1 (mentioning a People First protest of an employer's hiring practices). See generally *Independent Living for Physically Disabled People: Developing, Implementing, and Evaluating Self-Help Rehabilitation Programs* (Nancy M. Crewe & Irving Kenneth Zola eds., 1983) (arguing that disabled people, including the mentally disabled, can and should live independently).

¹⁸³ As noted by ADA lobbyist Liz Savage: “People with epilepsy now will be advocates for the same piece of legislation as people who are deaf That has never happened before.” Shapiro, *supra* note 155, at 126–27. See generally Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 *Mil-*

spite this temporary phenomenon, people with disabilities remain largely uncoordinated, without either an acknowledged figurehead (paralleling, for example, Jesse Jackson), or a central political vision (such as that expressed by NOW or NAACP) through which to voice their concerns and desires.¹⁸⁴

Because people with disabilities were empowered with civil rights absent the necessary political tools and organization for inducing a general elevation of social consciousness, it falls to the ADA to educate mainstream society about this previously unknown group. The statute does so in two ways. First, by providing information through its legislative findings regarding the relative position of people with disabilities in society.¹⁸⁵ This is especially true in its statements about artificial exclusion as the cause of social participation, as opposed to inherent necessity.¹⁸⁶ Second, by requiring places of public accommodation be made readily accessible, Title III¹⁸⁷ affords people with disabilities a greater opportunity to participate in social function. Together, these features lessen the identity of the disabled as “other” and increase non-disableds’ general familiarity with people with disabilities.

Hence, following the ADA’s promulgation, an employer who reads the statute (or consults with a lawyer as to its effects), is presented with a different vision of disability identity than that previously held. If she had lacked information regarding the role of disabled workers in society, the ADA has now updated her knowledge and beliefs. If she had been ambivalent about excluding disabled workers, the ADA’s passage has now “tipped” her from being a fence-sitter towards an inclusive equilibrium. Further, when an employer encounters people with disabilities in other areas of social activity, say at a baseball game or when riding on public transportation, she becomes acclimated to the presence of persons from whom she was previously sheltered. This effect, in combination

bank Q. 380, 389–90 (1989) (describing the then-emerging pan-disability rights movement).

¹⁸⁴ The formation and continuing development of the American Association of People with Disabilities, with its focus on securing accessible voting and political participation, is a welcome and promising change. The website can be found at <http://www.aapd.com>.

¹⁸⁵ See *supra* Section III.B.

¹⁸⁶ See *supra* Section III.B.

¹⁸⁷ 42 U.S.C. §§ 12181–12189 (2000).

with the educational information contained in the ADA, will influence an employer to embrace the notion that people with disabilities belong in the mainstream, including the workplace. This is true particularly because the general impetus to exclude disabled people arises from paternalism rather than from animus.¹⁸⁸

B. Tri-Order Sanctions: The Moral Cost of Discrimination

Recall that Congress framed the ADA as a civil rights remedy, rather than as a subsidy program.¹⁸⁹ In doing so, the legislature articulated a group-based antisubordination theory that was to eviscerate practices of systemic subordination.¹⁹⁰ As such, the ADA's goal is to alter employer behavior that contributes to unacceptable systemic patterns of social and economic subordination.¹⁹¹ This is because of the premise that "employers who have a choice between participating in a subordinating system and working (at reasonable cost) against such a system have a moral obligation to respond in a way that reduces subordination."¹⁹²

Framed as an antidiscrimination device, the ADA contains three levels of sanctions that can change social norms towards people with disabilities. First order sanctions cause individuals to alter their own behavior because the law induces them to change their tastes. Second order sanctions operate by creating a fear of individuals bearing social sanction. Third order sanctions pressure individuals through societal sanction.

¹⁸⁸ See *supra* Section III.B.

¹⁸⁹ See *supra* Section III.B.2.

¹⁹⁰ For two recent and thoughtful variations on this theme, see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 Cal. L. Rev. 1, 9, 17 (2000) (arguing that the rationale underlying current antidiscrimination law seeks to liberate individuals from the thrall of socially held stereotypes, when in reality law itself can do no more than reshape the nature and content of those conventions); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, *Issues in Legal Scholarship*, *The Origins and Fate of Antisubordination Theory*, at <http://www.bepress.com/ils/iss2/art11> (averring that the normative goals of anticlassification and antisubordination, usually considered in opposition to each other, "are better understood as regulating overlapping groups of practices and that their application shifts over time, in response to social contestation and social struggle").

¹⁹¹ See Bagenstos, *supra* note 104, at 837–38.

¹⁹² *Id.* at 838.

As a first order sanction, the fact that Congress promulgated the ADA as an antidiscrimination measure signals to individuals that the majority of the electorate believes that discriminating against the disabled is morally wrong. According to the belief change theory, and also extrapolating the points that Professor Robert Cooter has made in a more general context,¹⁹³ disability law can also influence the process of belief change in two ways. First, in formulating a law regarding the disabled, and thus creating a legal duty on behalf of employers, Congress can increase an individual employer's willingness to embrace that duty as part of her larger duties of citizenship. Second, individuals who believe they are required to obey the ADA's precepts will alter their preferences in order to behave in a manner in accord with that mandate. These two processes "tip" an individual's behavior towards a new equilibrium of behavior.

Even if the ADA does not convince individual employers who would prefer to continue to exclude disabled workers,¹⁹⁴ however, the framing of disability-based exclusion as a moral wrong can convince those individual employers not to exercise that preference in fear of social condemnation. This is true whether the censure arises through formal or informal channels.

Moreover, in combination with either or both of the previous two orders of sanction, the ADA can cause other members of an employer's society to bear social pressure and condemnation upon them until they abstain from excluding disabled workers. Again, this is true especially due to the exclusion of employees with disabilities not motivated by animus.¹⁹⁵

C. Financial Sanctions: Increasing the Utility Cost of Discrimination

Finally, the ADA has a belief change effect for the traditional ("Old Chicago") reason that it creates monetary sanctions for discriminating against individuals with disabilities in the workplace.¹⁹⁶

¹⁹³ See generally Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 Va. L. Rev. 1577, 1600 (2000) (arguing that "[f]or citizens who intrinsically value obeying the law . . . the enactment of the law increases their willingness to do their duty").

¹⁹⁴ This argument works regardless of whether the underlying reason is motivated by overt prejudice, benign paternalism, or ignorance of true cost.

¹⁹⁵ See *supra* Section III.B.

¹⁹⁶ 42 U.S.C. §§ 2000e-5(g), 12117 (2000).

Modeled after Title VII of the Civil Rights Act of 1964,¹⁹⁷ the ADA consciously tracks many of its provisions and offers several means for prosecuting claims.¹⁹⁸ These include the requirement that employers engage in an “interactive process” with disabled workers requesting those workplace alterations,¹⁹⁹ the formal filing of a disability discrimination complaint with a local Equal Employment Opportunities Commission (“EEOC”) office,²⁰⁰ the request for mediation,²⁰¹ and lawsuits brought against those employers either by aggrieved individuals or by the EEOC or Department of Justice suing on their behalf.²⁰² Each of these measures in turn carries increasingly heavy transaction costs for employers. Thus, regardless of whether employers continue to ultimately prove victorious in defending federal court suits,²⁰³ the ADA has added a transaction cost that reduces the overall utility to individual employers of exercising a preference for excluding disabled workers. Accordingly, by providing sanctions, the ADA motivates individual employers to reconsider acting on preferences that exclude disabled individuals from employment.

CONCLUSION

By utilizing a qualitative metric, *Rights of Inclusion* makes a valuable contribution to the literature examining the post-ADA effects on workers and others with disabilities. As noted above, the currently utilized gauge directly links the ADA’s efficacy to agree-

¹⁹⁷ Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000(e)-2(a) (2000) (prohibiting employment practices that result in disparate treatment as well as those causing disparate impact).

¹⁹⁸ See S. Rep. No. 101-116, at 43 (1989); H.R. Rep. No. 101-485, pt. 2, at 82–83 (1990).

¹⁹⁹ 29 C.F.R. §§ 1630.2(o)(3), 1630.9 (2003). See generally Amy Renee Brown, Note, Mental Disabilities Under the ADA: The Role of Employees and Employers in the Interactive Process, 8 Wash. U. J.L. & Pol’y 341, 352–68 (2002) (describing judicial interpretations of the interactive process); Comment, Determining Reasonable Accommodations Under the ADA: Why Courts Should Require Employers to Participate in an “Interactive Process,” 30 Loy. U. Chi. L.J. 513, 542–45 (1999) (describing components for an “optimal interactive process”).

²⁰⁰ 42 U.S.C. § 2000(e)(5) (2000); 29 C.F.R. §§ 1601.6–.8 (2003) (establishing the guidelines for this process).

²⁰¹ 42 U.S.C. § 12212 (2000).

²⁰² Id. § 12117.

²⁰³ See *supra* Introduction.

gate employment rate levels.²⁰⁴ This provides a serviceable understanding of post-ADA effects, and raises disquieting and worthwhile questions,²⁰⁵ but only from an external, and essentially anonymous, perspective. By emphasizing the recursive nature of rights identity formation, Engel and Munger lend insight and nuance into how the ADA affects the lives of the individuals it was meant to assist. For disability rights advocates, this is a useful point of view, especially at a time when the ADA is considered besieged.²⁰⁶

Nevertheless, because the authors' thesis is heavily dependent on internal and conceptualized notions of self-empowerment, *Rights of Inclusion* tends to downplay the external stimuli that also generate rights identity.²⁰⁷ This absence is noteworthy for three reasons. First, it is counter-factual to several of the disability life stories portrayed in the book. The respective employers of both Bill Meier²⁰⁸ and Sara Lane,²⁰⁹ for instance, each provided accommodations *sua sponte* after the passage of the ADA.

Second, by focusing on the internal nature of recursive rights identity formation to the exclusion of external generation, *Rights of Inclusion* falls prey to the theoretical flaw that it asserts exists in

²⁰⁴ See *supra* Introduction.

²⁰⁵ See Stein, *supra* note 16, at 1684–90.

²⁰⁶ For instance, the assertion of a backlash against disability rights was explored from a number of different angles in Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 *Berkeley J. Emp. & Lab. L.* 335, 336 (2000) (averring “that the backlash to the ADA has been prompted by capitalist opposition”). Russell asserts that this “capitalist opposition” has “promoted the backlash among groups of workers who have become fearful that their own interests are in jeopardy as a result of the Act’s enforcement powers.” *Id.* Professor Stephen Percy has noted that critics of the ADA have characterized the Act as an unacceptable “instance of expansive regulatory mandates on the private sector.” Stephen L. Percy, *Administrative Remedies and Legal Disputes: Evidence on Key Controversies Underlying Implementation of the Americans With Disabilities Act*, 21 *Berkeley J. Emp. & Lab. L.* 413, 433 (2000).

²⁰⁷ The authors *do* acknowledge the influence of exogenous factors such as employers acting on their own initiative, but do not adequately develop this theory in *Rights of Inclusion* on those actions. They do, however, elaborate this notion in an earlier work. See David M. Engel & Frank W. Munger, *Re-Interpreting the Effect of Rights: Career Narratives and the Americans with Disabilities Act*, 62 *Ohio St. L.J.* 285, 329 (2001).

²⁰⁸ Bill was allowed to more-or-less self-create a job at which he is very successful. Engel & Munger, *supra* note 15, at 200–01.

²⁰⁹ Sara was provided with a closed-off workspace. *Id.* at 26–27.

critical rights jurisprudence.²¹⁰ Namely, that if disabled workers (and, to make the point stronger, their employers) believe that the ADA is a powerful tool when it really is not, then those ADA rights are deceptive and ultimately illusory.

Third, and this factor is crucial to an expressive law analysis, although the identity formation of rights bearers is an important factor (and Engel and Munger are to be praised for so staunchly advocating this perspective), so is the change in general social norms. Because these are measured from the perspective of the belief change engendered in the actions of potential discriminators, it is best seen from not only an internal view, but from an external expressive law perspective as well.

²¹⁰ See *supra* Section I.C.