

THE NEED TO REIMAGINE DISABILITY RIGHTS LAW BECAUSE THE MEDICAL MODEL OF DISABILITY FAILS US ALL

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All human beings are born free and equal in dignity and rights.

—Universal Declaration of Human Rights, Article 1¹

Disability is not a personal problem, but rather a social reaction to natural human variation and susceptibility to life circumstances. Current disability antidiscrimination law has been ineffective in overcoming this misleading understanding. The COVID-19 pandemic has highlighted that, in particular, disability antidiscrimination law lies within the paradigm known as the “medical model of disability.” The medical model treats disabilities as defects in need of treatment. In doing so, it reinforces the able body as the norm and perpetuates stigma and discrimination against people with disabilities. After experiencing a pandemic in modern times, many of those recovering from COVID-19 have experienced, and will continue to experience, long-term health effects resulting in various disabilities. As young Americans without underlying conditions suffer from this virus, the pandemic has brought this reality to the forefront. Thus, as more and more Americans need to access its protection, disability antidiscrimination law is under greater scrutiny. For the first time on a massive scale, Americans experienced working from home and the reality that anyone—regardless of age, race, class, or gender—could be susceptible to the virus and might require workplace accommodations going forward. Vulnerability is universal and constant. Unfortunately, people of

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1. G.A. Res. 217 (III) A, art. I, Universal Declaration of Human Rights (Dec. 10, 1948).

color are at a higher risk of contracting, experiencing complications, and dying from COVID-19. Therefore, this Essay uses a Disability Studies and Critical Race Theory (DisCrit) lens to shed light on the structural issues that perpetuate these disparities. Through this lens, the Essay explains the medical model's failings embedded in disability antidiscrimination law and the need to instead use the social model of disability in the law so that it recognizes society's role in constructing disability. The root of the problem is that the medical model essentializes disability and perpetuates "othering," affecting us all but even further impacting people of color.

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INTRODUCTION

The wake of the COVID-19 pandemic amplified the need to examine disability antidiscrimination law. What if there is a future outbreak of the coronavirus or measles, potentially leaving many individuals with permanent disabilities? What if another unknown and highly contagious virus were to appear in the future and workplace accommodations were required for the masses to save lives and ensure the economy would not suffer? This reality is now at the forefront of American life.

During the early months of the COVID-19 pandemic, some individuals with preexisting health conditions risked their lives by going grocery shopping. Although not to the same extent, these people experienced stigma—similar to the experience of those positive for the Human Immunodeficiency Virus (HIV) in the early stages of the Acquired Immunodeficiency Syndrome (AIDS) pandemic. Like the COVID-19 concerns in 2020, society did not know how HIV spread in the late 1970s and early 1980s.² AIDS was stereotypically associated with being a gay

2. See Paul M. Sharp & Beatrice H. Hahn, *Origins of HIV and the AIDS Pandemic*, COLD SPRING HARBOR PERSPS. MED., Sept. 2011, at 1, 1–2. In 1981, HIV, which causes AIDS, was recognized as a new disease. *Id.* at 1. HIV/AIDS was a pandemic because it spread throughout the world. See *id.* According to the Centers for Disease Control and Prevention (CDC), HIV is now considered an epidemic in the United States. See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUM. SERVS., CDC FACT SHEET: TODAY'S HIV/AIDS EPIDEMIC (2016).

man.³ People stayed away if a person showed lesions or looked sickly. Similarly, before some officials mandated wearing a mask, people in grocery stores stayed away from someone wearing a face mask or coughing because it indicated that they were perhaps infected with the coronavirus and were trying to prevent its spread.⁴ COVID-19 was also initially blamed on a targeted group, the Chinese.⁵

Young Americans in their twenties and thirties without underlying conditions are dying from this virus.⁶ People of color are at a higher risk of contracting the virus and dying from it because they are more likely to live in crowded housing conditions, work in essential fields,⁷ have inconsistent access to health care, suffer from chronic health conditions, and experience higher levels of stress due to income inequality and institutionalized racism, which in turn compromises their immune systems.⁸ The pandemic's racial and ethnic disparities are all the more

3. Rachel Nall, *The History of HIV and AIDS in the United States*, HEALTHLINE (Apr. 24, 2020), <https://www.healthline.com/health/hiv-aids/history> [https://perma.cc/3H39-WTYX].

4. See Laura Geggel, *Everyone Should Wear Face 'Masks' in Public, CDC Now Recommends*, LIVE SCI. (Apr. 3, 2020), <https://www.livescience.com/cdc-recommends-face-masks-coronavirus.html> [https://perma.cc/PX9Y-A2XM] (noting that, previously, the CDC was only recommending those with symptoms to wear masks).

5. Donald Moynihan & Gregory Porumbescu, *Trump's 'Chinese Virus' Slur Makes Some People Blame Chinese Americans. But Others Blame Trump.*, WASH. POST (Sept. 16, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/09/16/trumps-chinese-virus-slur-makes-some-people-blame-chinese-americans-others-blame-trump/> [https://perma.cc/2Z97-86SF].

6. Chris Mooney, Brady Dennis & Sarah Kaplan, *Hundreds of Young Americans Have Now Been Killed by the Coronavirus, Data Shows*, WASH. POST (Apr. 8, 2020), <https://www.washingtonpost.com/health/2020/04/08/young-people-coronavirus-deaths/> [https://perma.cc/PYW2-MY3V] (“[T]he vast majority of young people who contract the disease fare well and recover. But for a minority, it appears to cause a unique change in the blood’s oxygen-carrying hemoglobin cells. ‘Young people who are otherwise fit can tolerate this longer, but at the expense of their heart and their pulmonary functions’”). See also *Demographic Trends of COVID-19 Cases and Deaths in the US Reported to CDC*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#demographics> [https://perma.cc/N6PZ-ZVV5] (last visited Feb. 27, 2021) [hereinafter *Demographic Trends of COVID-19*].

7. For more information on who is considered an essential worker, see Memorandum from Christopher C. Krebs, Cybersecurity & Infrastructure Sec. Agency Dir., U.S. Dep’t of Homeland Sec. (Mar. 28, 2020), https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_1.pdf [https://perma.cc/A9B9-BCHY].

8. Danae Bixler et al., *SARS-CoV-2–Associated Deaths Among Persons Aged <21 Years—United States, February 12–July 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1324, 1325–27 (2020) (“Among infants, children, and adolescents hospitalized with laboratory-confirmed COVID-19 . . . and cases of MIS-C . . . persons from racial and ethnic minority groups are overrepresented. These racial/ethnic groups are also disproportionately represented among essential workers unable to work from their homes . . . resulting in higher risk for exposure to SARS-CoV-2 with potential secondary transmission among household members In addition, disparities in social determinants

reason for our laws to consider intersectionality⁹ and begin addressing the law using the tenets found in Disability Studies and Critical Race Theory (DisCrit) moving forward.¹⁰

Even among those who recover from COVID-19, some people sustain long-lasting adverse health effects; as a cardiologist at Yale University said, “[i]t can affect the heart, the liver, the kidneys, the brain, the endocrine system and the blood system.”¹¹ Lasting neurological changes impacting memory and cognitive function are among the most insidious effects on the brain; some of these lasting effects include myalgic

of health, such as crowded living conditions, food and housing insecurity, wealth and educational gaps, and racial discrimination, likely contribute to racial and ethnic disparities in COVID-19 and MIS-C incidence and outcomes”); *see also Coronavirus in African Americans and Other People of Color*, JOHNS HOPKINS MED. (Apr. 20, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid19-racial-disparities> [<https://perma.cc/GHX2-LA8G>]; *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/K6DG-JDF4>] (“[R]acial and ethnic minority groups [are] at [an] increased risk of getting sick and dying from COVID-19.”).

9. *See* Kimberle W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245–51 (1991). Kimberlé Crenshaw originally coined “structural intersectionality” to explain how non-white women experience domestic violence and rape differently than white women, taking into account other social structures such as race, class, and citizenship. *See id.*

10. *See* DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY 19 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016) [hereinafter DISCRIT] (“DisCrit focuses on ways that the forces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy[,] . . . values multidimensional identities and troubles singular notions of identity such as race *or* dis/ability *or* class *or* gender *or* sexuality, and so on[,] . . . emphasizes the social constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms[,] . . . privileges voices of marginalized populations, traditionally not acknowledged within research[,] . . . considers legal and historical aspects of dis/ability and race and how both have been used separately and together to deny the rights of some citizens[,] . . . recognizes Whiteness and Ability as Property and that gains for people labeled with dis/abilities have largely been made as the result of interest convergence of White, middle-class citizens. . . . [and] requires activism and supports all forms of resistance.”). *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) [hereinafter CRITICAL RACE THEORY].

11. Melissa Healy, *Coronavirus Infection May Cause Lasting Damage Throughout the Body, Doctors Fear*, L.A. TIMES (Apr. 10, 2020, 3:03 PM), <https://www.latimes.com/science/story/2020-04-10/coronavirus-infection-can-do-lasting-damage-to-the-heart-liver> [<https://perma.cc/VN4T-9GUB>]; *see also* Julie Steenhuisen, *Scientists Just Beginning to Understand the Many Health Problems Caused by COVID-19*, REUTERS (June 26, 2020, 5:12 AM), <https://www.reuters.com/article/us-health-coronavirus-effects/scientists-just-beginning-to-understand-the-many-health-problems-caused-by-covid-19-idUSKBN23X1BZ> [<https://perma.cc/2NZY-UEX4>].

encephalomyelitis/chronic fatigue syndrome and Guillain-Barré syndrome, possibly caused by a viral infection of the brain tissue.¹²

Additionally, a virus may lay dormant for years, only to wreak havoc in the future.¹³ Congenital disabilities resulting from previous epidemics, as was the case with the Zika virus, increased the number of people with disabilities.¹⁴ In one day, an individual's health and abilities can change, compelling many to reevaluate their abilities and vulnerabilities.¹⁵ Acknowledging that vulnerability is universal and inherent to the human condition fosters a more egalitarian society.¹⁶ Relatedly, anyone with a disability could be vulnerable to potential civil rights violations, as seen in Alabama and Pennsylvania, where individuals with disabilities were placed at the end of the waiting list to receive ventilators.¹⁷ For the first time on a massive scale, Americans transitioned to working from home and experienced the reality that anyone—regardless of age, race, class, or

12. Natalie C. Tronson, *How COVID-19 Might Increase Risk of Memory Loss and Cognitive Decline*, THE CONVERSATION (Aug. 7, 2020, 8:37 AM), <https://theconversation.com/how-covid-19-might-increase-risk-of-memory-loss-and-cognitive-decline-141940> [<https://perma.cc/4L5A-SNVL>].

13. *See id.*

14. *Microcephaly & Other Birth Defects*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/zika/healtheffects/birth_defects.html [<https://perma.cc/5MPP-4LQG>] (last revised May 14, 2019) (noting that a Zika virus infection during pregnancy can cause birth defects leading to lifelong disabilities).

15. Brenda Fitzgerald, Coleen Boyle & Margaret A. Honein, *Birth Defects Potentially Related to Zika Virus Infection During Pregnancy in the United States*, 319 JAMA 1195, 1195 (2018).

16. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1–2 (2008).

17. *See* Andrew Stevens, *HHS OCR Announces Resolution of First COVID-19 Civil Rights Investigation*, JD SUPRA (Apr. 28, 2020), <https://www.jdsupra.com/legalnews/hhs-ocr-announces-resolution-of-first-78648/> [<https://perma.cc/58CD-XV8Q>]. States were discriminating against people with disabilities in their triage protocols, which compelled the HHS OCR to take swift action. *Id.* During the COVID-19 pandemic, state officials viewed the lives of people with disabilities as less valuable. The Alabama Department of Public Health's website posted a state policy prioritizing who should receive the ventilators; people with disabilities were not a priority. *Id.*; *see also* Liz Essley Whyte, *State Policies May Send People with Disabilities to the Back of the Line for Ventilators*, CTRS. FOR PUB. INTEGRITY (Apr. 8, 2020), <https://publicintegrity.org/health/coronavirus-and-inequality/state-policies-may-send-people-with-disabilities-to-the-back-of-the-line-for-ventilators/> [<https://perma.cc/X2ZU-JXJX>]. The mother of Matthew Foster, a thirty-seven-year-old with Down Syndrome, said, "I am outraged and still am that any decision-maker or policy-maker in our state would think so little of people with intellectual disabilities that they would actually say an IQ score determines whether you live or die." *Id.* Alabama is not the only state with such policies. *See* Daniel Moran & Anita Chabria, *Coronavirus Frays the Safety Net for People with Severe Disabilities, Leaving Many at Risk*, L.A. TIMES (Apr. 5, 2020, 7:00 AM), <https://www.latimes.com/california/story/2020-04-05/coronavirus-services-disabled-families-california> [<https://perma.cc/69M6-3USG>]. To settle the investigations, Alabama and Pennsylvania had to update their COVID-19 triage protocols for ventilator use. *Id.*

gender—is susceptible to the virus and might require workplace accommodations as a result.

Those seeking the protection of disability antidiscrimination law, such as Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA), are in for a rude awakening. Disability antidiscrimination law¹⁸ in the United States is poorly suited to address the pandemic’s emerging concerns. The current paradigm uses the medical model of disability, which treats disabilities as defects in need of treatment. This model reinforces the able body¹⁹ as the norm, perpetuating stigma and discrimination against people with disabilities by “othering” and limiting an individual’s value to “reasonable accommodations.” Today, those with or recovering from COVID-19 become othered, an experience all too familiar for people with disabilities. The medical model has also informed disability antidiscrimination law’s narrow focus on providing accessibility for public accommodations and has failed to meaningfully advance employment opportunities for people with disabilities.²⁰ Achieving equity for people with disabilities requires disability law to adopt the social model of disability as informed by DisCrit, which recognizes the role society plays in constructing disability.²¹

Current disability antidiscrimination law has been ineffective in overcoming the misleading understanding of human variation. Disability is not a personal problem, but rather a social reaction to natural human variation and the susceptibility to life circumstances. People can either be born with a disability or acquire one during their lifetime, be it a permanent or temporary disability. This is evidenced by the many who are recovering from COVID-19 and left with long-term health effects, such as shortness of breath, chest pain, and heart palpitations.²²

18. In this Essay, “disability law” refers to Section 504 of the Rehabilitation Act 1973, 29 U.S.C. § 764, and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213.

19. Throughout the Essay, the terms “able body” or “able-bodied” include both the physical and mental attributes of the body.

20. See RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 69–70* (2005) (noting that the ADA did not significantly increase the number of people with disabilities in the workforce); SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 1* (2009).

21. Dimitris Anastasiou & James M. Kauffman, *The Social Model of Disability: Dichotomy Between Impairment and Disability*, 38 J. MED. & PHIL. 441, 442 (2013).

22. *Long-Term Effects of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html> [<https://perma.cc/TS7N-7QBU>]. See also George Citroner, *What We Know About the Long-Term Effects of COVID-19*, HEALTHLINE (Apr. 21, 2020), <https://www.healthline.com/health-news/what-we-know-about-the-long-term-effects-of-covid-19> [<https://perma.cc/2ZAT-NG4T>].

This Essay embraces poetic legal writing, meant to leave the reader to speculate as to the use and location of concepts and meaning. As such, it has somewhat of an atypical, scattered flow—but still retains a more formal structure. Part I lists the core tenets of Disability Studies and Critical Race Theory (DisCrit). Part II defines disability models with a mini-critique of the medical model, citing the disability studies field literature. Part III exposes the “othering” effect of disability antidiscrimination law by explaining the legal treatment of people with disabilities under the medical model of disability.

I. DISABILITY STUDIES AND CRITICAL RACE THEORY (DISCRIT)

Critical Race Theory marked a much-needed departure from the dominant ideology found in legal academia. This framework exposed, and continues to expose, how “[l]egal decisions reflect the balance of racial power and any anxiety that exists in the larger social order.”²³ The foundational writings of Derrick Bell, Alan Freeman, and Richard Delgado paved the way for the critical legal scholarship that acknowledged the importance of “how race is understood, a narrative that can legitimate racial power by representing it as neutral and objective.”²⁴ Similarly, DisCrit challenges the notion of ability tied to an able body standard as the norm.²⁵ Ability-consciousness is just as important as race-consciousness—even more so when the social construct of ableness is being used as an additional apparatus to oppress people of color.²⁶ Acknowledging the multiple intersectionality layers tied to race and ability is necessary to critically view disability antidiscrimination law to further expose institutionalized forms of oppression. Legal scholarship can no longer ignore the need to acknowledge these structural levels of oppression and must adopt a DisCrit lens that recognizes their existence.

DisCrit has seven tenets.²⁷ These tenets can serve as guides for viewing or designing laws that have the potential to start dismantling the multiple layers of oppression embedded in our legal system that affect those who have been historically marginalized.²⁸ DisCrit’s tenets are 1) acknowledge that racism and ableism uphold notions of normalcy; 2) value multidimensional identities; 3) acknowledge that whiteness and ableness are socially constructed; 4) privilege voices of the marginalized; 5) acknowledge the legal and historical aspects of disability and race; 6) see whiteness and ableness as property; and 7) support activism and forms

23. CRITICAL RACE THEORY, *supra* note 10, at 2.

24. *Id.* at 3.

25. *Id.* at xiii.

26. *See id.*

27. DISCRIT, *supra* note 10.

28. *See id.*

of resistance.²⁹ To view the trajectory of laws that affect people with disabilities under the DisCrit lens using these tenets helps prevent oppressive social mechanisms. Conversely, to view the law under just a disability studies lens would ignore how people of color are disproportionately affected in this country given its history related to health, economics, and social participation.³⁰

II. DISABILITY MODELS

Fundamental to this Essay is a discussion of the models of disability and the definition of disability terms. The term “disability” may not evoke a positive reaction from the public, given the stigma surrounding disabilities. However, the term “Disability” with a capital “D” is an umbrella term encompassing all who have a disability, also known as a pan-disability identity.³¹ It empowers and unites the Disability community by embracing the distinct difference between the illness and the social treatment.³² The term “disability” with a lower case “d” embodies the social treatment³³ that disables individuals.³⁴ The disability is separate from the illness or impairment, and the social treatment is the source of the differences that preserve the social oppression of people with disabilities.³⁵ Acknowledging the social construction of disability does not

29. See Subini Ancy Annamma, David Connor & Beth Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 11 (2013); DISCRIT, *supra* note 10.

30. See *Demographic Trends of COVID-19*, *supra* note 6 (explaining how the COVID-19 pandemic has disproportionately impacted people of color).

31. See SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 11–12 (1998) (describing the difference between definitions of “disability”: its medical definition, which has a negative connotation, and its definition as a social/political category, which relates to the identity of “a group bound by common social and political experience”); BAGENSTOS, *supra* note 20, at 50 (explaining the importance of a pan-disability identity when unifying a group for a political movement). See generally Andrew Jenks, *Crip Theory and the Disabled Identity: Why Disability Politics Needs Impairment*, 34 DISABILITY & SOC’Y 449 (2019) (illustrating how a disabled identity is a complicated identity).

32. See BAGENSTOS, *supra* note 20, at 50.

33. See Mairian Corker, *Disability Discourse in a Postmodern World*, in THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES 221, 225–31 (Tom Shakespeare ed., 1998). The concept of uppercase “D” and lowercase “d” arose from the distinction made in the deaf community where uppercase “D” is meant to signify an identity. See Harlan Lane, *Ethnicity, Ethics, and the Deaf-World*, 10 J. DEAF STUD. & DEAF EDUC. 291, 291 (2005). In contrast, the lowercase d signifies an impairment. See *id.*

34. See Lane, *supra* note 33; Deborah Marks, *Models of Disability*, 19 DISABILITY & REHAB. 85, 87–89 (1997).

35. See Harlan Hahn, *The Politics of Physical Difference: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 41 (1988) (“Minority groups have been subjected to various forms of exploitation and oppression, and the sources of their treatment may be traced to pervasive social values of the dominant majority.”).

negate the pain or suffering of an impairment or illness that may need treatment.

A. Medical Model

Disability models influence the framework used to construct disability antidiscrimination law. The medical model is cemented in the medical field, as doctors determine whether an individual has an impairment or loss of function to qualify for disability benefits.³⁶ Unfortunately, this practice has not stayed confined to the medical profession—where it belongs—as the medical model has seeped into individuals’ general psyche, resulting in the view that people with disabilities are impaired. It makes no difference that “[t]he medical profession takes the position that impairment is a purely medical phenomenon, while disability is a medical-administrative-legal phenomenon.”³⁷ Creating a disability guide to assist doctors in this distinction, the American Medical Association understood that the “medical judgment of impairment is separa[te] from the more subjective and value-laden judgment of disability[.]”³⁸ Unfortunately, the general public remains unaware of the difference between impairment and disability.³⁹ Instead, social treatment of an individual with an illness or an impairment is the general definition of disability.⁴⁰

Notably, if disability antidiscrimination law was constructed under a social model of disability, the administrative scheme in disability antidiscrimination law would not require this distinction that reinforces the ability/disability binary. However, under the present legislative scheme, in order for an individual to be covered under disability antidiscrimination law, an individual must have a bona fide impairment,⁴¹ leaving those who are not able enough, yet not disabled enough, out in the cold. To qualify

36. See DEBORAH A. STONE, *THE DISABLED STATE* 108 (1984); BAGENSTOS, *supra* note 20, at 4 (“Some activists come close to seeking an end to the disability welfare state that is the locus of much paternalism, while others seek expanded disability welfare benefits under a system that gives people with disabilities more choice and control.”).

37. STONE, *supra* note 36, at 108.

38. *Id.* at 110.

39. See Hahn, *supra* note 35, at 39 (“Although a ‘minority-group’ model has emerged to challenge the traditional dominance of the ‘functional-limitations’ paradigm for the study of disability, research on attitudes toward disabled people has not produced a theoretical orientation that reflects these developments.”).

40. See LINTON, *supra* note 31, at 12.

41. Rehabilitation Act of 1973 (Rehab Act) § 7, 29 U.S.C. § 705(20)(A); Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(1). The three-pronged disability definition is the same for the Rehab Act and the ADA: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment[.]” *Id.*

as an impairment and be protected under a disability standard, the disability must be “a physical or mental impairment that substantially limits one or more major life activities of such individual.”⁴² Therefore, under this medical model structure, the law requires drawing a distinction. Thus, if society is ever to begin embracing the human variation concept, Americans cannot regard people with disabilities as anything other than “in need of assistance” when everyone, to some degree, is in need or will be in need of such assistance. Not embracing this variation creates “othering,” which then becomes cemented not only in the public’s mind at large, but also in the minds of the individuals with disabilities themselves.⁴³

The medical model also lends itself to considering disabilities a “personal tragedy, which suggests that a disability is some terrible chance event that occurs at random to unfortunate individuals.”⁴⁴ Accordingly, this model fixates the “problem” within the individual while simultaneously absolving society from any further consideration. It also ultimately perpetuates stereotypes, perceiving people with disabilities as incomplete or damaged and needing fixing to accomplish any task at hand.⁴⁵ This model also views the individual with pity, as defective, or as having an impairment that must be eliminated, treated, or cured.⁴⁶ This framing diminishes the hidden gifts and intrinsic value people with disabilities provide by existing. Therefore,

Society, in agreeing to assign medical meaning to *disability*, colludes to keep the issue within the purview of the medical establishment, to keep it a personal matter and “treat” the condition and the person with the condition rather than

42. 42 U.S.C. § 12102(1)(A).

43. See Marks, *supra* note 34, at 87.

44. See Angelica Guevara, *Ableness as Property*, 98 DENV. L. REV. F. 1, 10 (2020),

https://static1.squarespace.com/static/5cb79f7efd6793296c0eb738/t/5ee2821c4697a938378535fa/1591902753122/Ableness+as+Property_Guevara_Final.pdf

[<https://perma.cc/EM2V-F8M5>]; Arlene S. Kanter, *The Law: What’s Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 409 (2011).

45. See MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 4–6 (1990).

46. See *id.*; STONE, *supra* note 36, at 107–17 (discussing the medical evaluation of impairment); DAN GOODLEY, *DIS/ABILITY STUDIES: THEORISING DISABLISM AND ABLEISM* 16 (2014) (“Disability is established in the *World Report* as a problematic dynamic phenomenon requiring the immediate response of nations states, their governments and their citizens.”).

“treating” the social processes and policies that constrict disabled people’s lives.⁴⁷

DisCrit’s third tenet, which acknowledges that whiteness and ableness are socially constructed, highlights the social construction of ability and disability,⁴⁸ and its sixth, which sees whiteness and ableness as property, acknowledges the property interest in ableness.⁴⁹ Consequently, they both provide insight into how and why gatekeepers manufacture disability, using the discretion afforded to them by current disability laws to do so.⁵⁰ Using the medical model violates tenets three and six by embracing categories and bolstering and further constructing the normalization of the historically privileged able body. This then nullifies tenet one—acknowledging that racism and ableism uphold notions of normalcy—and tenet two—valuing multidimensional identities—making it all the more challenging for the activism and resistance central to tenet seven to flourish and create meaningful change for people with disabilities as a whole, further impacting people of color with disabilities disproportionately. Categories of disabled or not disabled enable the manufacturing of a disability.⁵¹ When gatekeepers make arbitrary decisions as to which disabilities will be provided reasonable accommodations or which disabilities pose an undue burden on those providing the accommodation, this signals to the masses which disabilities will be considered credible and, therefore, a true disability.⁵² With every instance of manufacturing, stigma is not eradicated but perpetuated and solidified in the masses’ minds.

47. See LINTON, *supra* note 31, at 11.

48. See OLIVER, *supra* note 45, at 4; STONE, *supra* note 36, at 107–17; GOODLEY, *supra* note 46, at 16–17. For example, Alan Turing, a pioneer in computer science who undoubtedly was responsible for modern computing systems that paved the way for artificial intelligence theories, was a homosexual at a time when homosexuality was considered a disability per a psychiatric disorder. See Chris Christensen, *Review of Biographies of Alan Turing*, 37 CRYPTOLOGIA 356, 361–62 (2013); Dalya Alberge, *Letters Reveal Alan Turing’s Battle with His Sexuality*, GUARDIAN (Aug. 22, 2015), <https://www.theguardian.com/science/2015/aug/23/alan-turing-letters-reveal-battle-sexuality> [<https://perma.cc/7P8X-6JDB>]; Patricia Fancher, *Embodying Turing’s Machine: Queer, Embodied Rhetorics in the History of Digital Computation*, 37 RHETORIC REV. 90 (2018); Jack Drescher, *The Removal of Homosexuality from the DSM: Its Impact on Today’s Marriage Equality Debate*, 16 J. GAY & LESBIAN MENTAL HEALTH 124, 124 (2012).

49. See Guevara, *supra* note 44, at 32.

50. See *id.* at 33–34.

51. See *id.*

52. See *id.* at 32–37.

B. Social Model

Alternatively, the most important model that empowers people with disabilities is the social model of disability. Unlike the medical model, it puts forth the idea that society disabled individuals.⁵³ In other words, our society's structures create disabilities⁵⁴ when, really, there is nothing deficient or wrong with an individual with a disability. Rather, there are diverse ways of existing in the world.⁵⁵ Michael Oliver developed the social theory of disability in *The Politics of Disablement*, in which he brings that consciousness, already present in the disability community, to academia.⁵⁶ Again, this consciousness reflects the understanding that society causes disability. Physicians define impairment as "lacking part of or all of a limb, or having a defective limb, organism or mechanism of the body."⁵⁷ Put another way, "[i]mpairment is, in fact, nothing less than a description of the physical body."⁵⁸ Compare this to disability—"the disadvantage or restriction of activity caused by a contemporary social organism which takes no or little account of people who have physical [or mental] impairments and thus excludes them from the mainstream of social activities"⁵⁹—and the social model crystallizes further. By extension, this model means the society into which individuals are born makes all the difference in how people experience and view disability.

Applying the social model of disability would allow society to see how it disables people.⁶⁰ Following this model, society would maximize

53. *Id.* at 10.

54. *See id.* at 32–37; Anne Louise Chappell, *Still Out in the Cold: People with Learning Difficulties and the Social Model of Disability*, in *THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES* 211, 214–19 (Tom Shakespeare ed., 1998); TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS REVISITED* 106 (2d ed. 2014) ("What divides disabled from non-disabled people, in [the social model] formulation, is the imposition of social oppression and social exclusion.").

55. *See, e.g.*, Tom Shakespeare, *Disability, Identity, and Difference*, in *EXPLORING THE DIVIDE: ILLNESS AND DISABILITY* 94, 94–113 (Colin Barnes & Geoff Mercer eds., 1996); Chappell, *supra* note 54, at 214–19; SHAKESPEARE, *supra* note 54, at 101–06.

56. *See generally* OLIVER, *supra* note 45.

57. *Id.* at 11.

58. MICHAEL OLIVER, *UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE* 35 (1995).

59. *See* OLIVER, *supra* note 45, at 11.

60. *See* Mike Oliver, *The Politics of Disability*, 4 *CRITICAL SOC. POL'Y* 21, 22–23 (1984); Marks, *supra* note 34, at 85–86 (discussing the difficulty of defining disability due to the constantly changing nature of qualifying factors). *See generally* SHAKESPEARE, *supra* note 54, at 106 (proposing that the social model may cause disabled individuals to define themselves in comparison or contrast with non-disabled individuals); JANE CAMPBELL & MIKE OLIVER, *DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE* 19–20 (1996) (describing the shift to the social model and subsequent positive change in the political mobility of organizations founded by disabled individuals).

an individual's potential because it challenges the view of normalcy and forces an individual to examine any subconscious bias and assumptions about any given disability, embracing universalism.⁶¹ In doing so, decisions regarding and attitudes toward people with disabilities would change. Instead of having a ramp to bypass stairs, a building would not have stairs in the first place—if elevators stopped working in a building, anyone could use a ramp.

Using this social model of disability prompts an individual to think inclusively about Universal Design (UD).⁶² For example, Ronald Mace thought inclusively by designing products that could be used to the greatest extent possible by all people, not just people with disabilities.⁶³ For instance, the dropped-curb assists people in wheelchairs, people with strollers, and bicycle users.⁶⁴ Later, Selwyn Goldsmith adopted this concept, changing the paradigm to *Designing for the Disabled*.⁶⁵ This concept is now widely applied in social and physical structures.⁶⁶ Universal Design's greater inclusion allows social participation for all, providing for unforeseen beneficiaries whether they have a disability or not. For a contemporary example, many non-disabled individuals benefitted from the handicap push-button that automatically opens doors without having to touch a door during the coronavirus outbreak—a universal benefit indeed. Furthermore, when contextualized in any social instructional settings, “universal design is best understood through intentional verbs . . . applied in various ways—for example, ‘permit,’ ‘listen,’ ‘update,’ ‘guide,’ ‘clarify,’ ‘review,’ and ‘allow.’”⁶⁷ More broadly, universal design represents a worldview where environments are not tailored to marginal groups, but rather to a “form of hope, a manner of

61. See Jerome E. Bickenbach, Somnath Chatterji, E.M. Bradley & T.B. Üstün, *Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps*, 48 SOC. SCI. & MED. 1173, 1173–84 (1999).

62. See MARGARET PRICE, MAD AT SCHOOL: RHETORICS OF MENTAL DISABILITY AND ACADEMIC LIFE 88 (2011); JAY TIMOTHY DOLMAGE, ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUCATION 86 (2017) (explaining how the curb cuts to accommodate wheelchair users benefit others); see *Ronald L. Mace Papers 1974–1998*, NC STATE UNIV. LIBRS., <https://www.lib.ncsu.edu/findaids/mc00260/> [<https://perma.cc/YRN5-9XVE>] (last visited Mar. 2, 2021) (describing how Mace contracted polio as a child and quickly realized the challenges people with disabilities face, leading him to pioneer the concept of universal design and creating aesthetically pleasing buildings with an inclusive design that most people could use regardless of ability).

63. See *Ronald L. Mace Papers 1974–1998*, *supra* note 62.

64. See DOLMAGE, *supra* note 62, at 86.

65. See generally SELWYN GOLDSMITH, *DESIGNING FOR THE DISABLED: THE NEW PARADIGM* (1997).

66. Peter Blanck, *The Coming Importance of Universal Design*, PROGRESSIVE AE (Jan. 19, 2016), <https://www.progressiveae.com/importance-universal-design/> [<https://perma.cc/WN6T-6YB3>].

67. See PRICE, *supra* note 62, at 88.

trying.”⁶⁸ Therefore, a person with a disability is “limited more by social attitudes and environmental barriers than any inherent ‘defect’ or ‘deficiency’ within the person that must be remedied.”⁶⁹

DisCrit’s seventh tenet embraces activism and resistance that would counter these social and environmental barriers.⁷⁰ Considering human variation means acknowledging that there is no such thing as a standard way of being and that “the presence or absence of a disability [does not] predict [the] quality of life” of any individual.⁷¹ The focus of any institution that seeks to address disability then becomes fixing the systems to become accessible instead of “‘fixing’ the individual so that he or she can better fit into existing systems.”⁷² Had individuals historically valued the utility of human variation, perhaps the able body would not be the standard way of being today.⁷³ Tenet five of DisCrit acknowledges the importance of this history.⁷⁴

Human variation is common but is still perceived as a rare phenomenon in the United States because people with differences are not often visible in public given the limitations of public accommodations and negative social reactions to those who are perceived as not aesthetically pleasing.⁷⁵ Additionally, many individuals have non-apparent disabilities and, more often than not, do not disclose them because of potential stigma.⁷⁶ On the 2010 Census, about nineteen percent of Americans

68. *Id.*

69. *See* Kanter, *supra* note 44, at 409.

70. *See supra* note 29 and accompanying text.

71. *See* Kanter, *supra* note 44, at 414 (citing Harriet McBryde Johnson, *Unspeakable Conversations*, N.Y. TIMES (Feb. 16, 2003), <https://www.nytimes.com/2003/02/16/magazine/unspeakable-conversations.html> [<https://perma.cc/YE4V-JDN9>]). *See also* HARRIET MCBRYDE JOHNSON, TOO LATE TO DIE YOUNG: NEARLY TRUE TALES FROM A LIFE 7–8, 47–75 (2005). In this memoir, Johnson stated that the Jerry Lewis muscular dystrophy telethon sent her the message, for the first time, that her neuromuscular disease would eventually kill her. *Id.* Johnson opposed the “pity-based tactics” of the annual Lewis muscular dystrophy telethon. Dennis Heyesi, *Harriet Johnson, 50, Activist for Disabled, Is Dead*, N.Y. TIMES (June 7, 2008), <https://www.nytimes.com/2008/06/07/us/07johnson.html>.

72. *See* Kanter, *supra* note 44, at 410.

73. *See, e.g.*, Louis Ariotti, *Social Construction of Anangu Disability*, 7 AUSTRAL. J. RURAL HEALTH 216, 216 (1999); George S. Gotto IV, *Persons and Nonpersons: Intellectual Disability, Personhood, and Social Capital Among the Mixes of Southern Mexico*, in 1 DISABILITIES: INSIGHTS FROM ACROSS FIELDS AND AROUND THE WORLD 193, 193–207 (Catherine A. Marshall, Elizabeth Kendall, Martha E. Banks & Reva Mariah S. Gover eds., 2009).

74. Tenet five acknowledges the legal and historical aspects of disability and race in DisCrit Theory. *See supra* note 29 and accompanying text.

75. *See generally* Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895 (2019).

76. *See* Pooja Jain-Link & Julia Taylor Kennedy, *Why People Hide Their Disabilities at Work*, HARV. BUS. REV. (June 3, 2019), <https://hbr.org/2019/06/why-people-hide-their-disabilities-at-work> [<https://perma.cc/Q6XL-VSRC>]; Derrick Kranke, Sarah E.

disclosed a disability.⁷⁷ Currently, after the 2020 Census, the Centers for Disease Control (CDC) is reporting twenty-six percent of Americans are living with some type of disability, with the highest numbers reported in the South.⁷⁸ Clearly, the percentages are growing and may be even higher, given that there are people with temporary disabilities and some people with non-apparent disabilities who have not yet accepted their disability to then feel comfortable to disclose it.⁷⁹

Moreover, the percentage of people with disabilities may increase in the aftermath of the COVID-19 pandemic. Those recovering from moderate to severe symptoms of COVID-19 continue to sustain long-term health effects, rendering some temporarily or permanently disabled.⁸⁰ Others may struggle with a multitude of mental health issues,⁸¹ such as post-traumatic stress disorder (PTSD), depression, and anxiety, due to

Jackson, Debbie A. Taylor, Eileen Anderson-Fye, & Jerry Floersch, *College Student Disclosure of Non-Apparent Disabilities to Receive Classroom Accommodations*, 26 J. POSTSECONDARY EDUC. & DISABILITY 35 (2013).

77. *Nearly 1 in 5 People Have a Disability in the U.S.*, Census Bureau Reports, U.S. CENSUS BUREAU (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html#:~:text=About%2056.7%20million%20people%20%E2%80%94%2019,by%20the%20U.S.%20Census%20Bureau> [https://perma.cc/9EJJ-VY9P].

78. *Disability Impacts Us All*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> [https://perma.cc/6F2G-YFQJ] (last updated Sept. 16, 2020).

79. *Why We Ask: Disability*, U.S. CENSUS BUREAU, <https://www2.census.gov/programs-surveys/acs/about/qbyqfact/Disability.pdf> [https://perma.cc/52K5-35A6] (last visited Mar. 2, 2021). The Census primarily takes into account disabilities related to vision, hearing, mobility, and cognitive function. *Id.* See also *How Disability Data Are Collected from the American Community Survey*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/health/disability/guidance/data-collection-acs.html> [https://perma.cc/JR9S-SNPL] (last revised Feb. 23, 2021) (noting that before 2010, the American Community Survey “focused on the presence of specific conditions, rather than the impact those conditions might have on basic functioning”).

80. See Healy, *supra* note 11; see also Citroner, *supra* note 22.

81. See *New Poll: COVID-19 Impacting Mental Well-Being: Americans Feeling Anxious, Especially for Loved Ones; Older Adults Are Less Anxious*, AM. PSYCHIATRIC ASS’N (Mar. 25, 2020), <https://www.psychiatry.org/newsroom/news-releases/new-poll-covid-19-impacting-mental-well-being-americans-feeling-anxious-especially-for-loved-ones-older-adults-are-less-anxious> [https://perma.cc/LHX2-3A94]. At the time this poll was taken, 48% of Americans were anxious of getting the coronavirus, 40% were anxious about becoming seriously ill or dying from the virus, and 62% percent were anxious that a loved one might contract the virus. *Id.* 57% of Americans were concerned about the negative impact on their finances. *Id.* See also Neil Greenberg, Mary Docherty, & Simon Wessely, *Managing Mental Health Challenges Faced by Healthcare Workers During COVID-19 Pandemic*, 368 BRITISH MED. J. 1211, 1211 (2020); *Coping with Stress*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Jan. 22, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html> [https://perma.cc/LPT7-RTWD] (noting outbreaks cause stress).

losing a loved one, a job,⁸² a business, or a home. These mental issues may have resulted from the fallout of the virus, as many were unable to earn money given the stay-at-home orders that some governors implemented across different states to reduce the spread of COVID-19.⁸³

The general pandemic's impact compels more attempts to access protections under disability antidiscrimination laws. Racial and ethnic minorities, as well as those recovering from COVID-19, have been stigmatized and discriminated against during the pandemic, even though "[n]o single person or group of people are more likely than others to spread COVID-19."⁸⁴ Thus, those attempting to access the protections under disability antidiscrimination laws are quickly discovering the harsh reality that disability cases are frequently unsuccessful in federal courts.⁸⁵ Most litigation is spent establishing whether someone has a disability or not, regardless of whether those judges—here acting as gatekeepers⁸⁶—consciously recognize the inherent property interest at stake in their ableness determination.

82. Heather Long, *U.S. Now Has 22 Million Unemployed, Wiping Out a Decade of Job Gains*, WASH. POST (Apr. 16, 2020, 6:16 PM), <https://www.washingtonpost.com/business/2020/04/16/unemployment-claims-coronavirus/> [<https://perma.cc/S5NY-MQ28>].

83. Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents To Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<https://perma.cc/CS4B-Q34N>].

84. *Reducing Stigma*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/reducing-stigma.html> [<https://perma.cc/7J4X-6FQ9>] (last updated June 11, 2020).

85. See Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L. REFORM 305, 361 (2001–02) (describing that disability cases are frequently unsuccessful).

86. See Guevara, *supra* note 44, at 1–2, 3 n.9 (“[T]he term ‘gatekeeper’ refers primarily to either the academic institutions or the courts, [who] in deciding disability cases . . . determine which students are included or excluded in the space of higher learning. They are gatekeepers because they have the authority to include or exclude individuals from spaces of social status. They sit at the ‘gates of access’ to the privileged spaces otherwise afforded to the able-bodied student. The property interest in ableness is promulgated on two fronts by the gatekeepers. First, the majority of gatekeepers are able-bodied[,] dictating who is included or excluded reaffirming the social position and status of the able. Secondly, gatekeepers manufacture disabilities, dictating what disability becomes the norm in elite spaces where the images and therefore models of disability seep into the larger society by perpetuating what body is acceptable to be deemed disabled or able.”).

III. DISABILITY ANTIDISCRIMINATION LAW UNDER THE MEDICAL MODEL

The ideology underlying disability antidiscrimination law views people with disabilities as the “other.” The sentiment toward people with disabilities is most telling in the Fair Labor Standards Act of 1938 (FLSA), a U.S. labor law known for its mandate of minimum wage⁸⁷ and payment of “time-and-a-half” for any individual working over forty hours a week.⁸⁸ It references individuals with disabilities in Section 14(c), which authorizes employers to pay less than the federal minimum wage to workers who have disabilities.⁸⁹ The FLSA relied on the medical model of disability by seeing people with disabilities as impaired, or less than an able-bodied person, to justify paying them less.

The passing of Section 504 of the Rehabilitation Act of 1973 gave the courts, educational institutions, and employers increased discretion as to which individuals and what disability to accommodate to enter these social spaces.⁹⁰ A reasonable accommodation under Section 504 is any “change, adaptation or modification to a policy, program, service, . . . or workplace which will allow a qualified person with a disability to participate fully in

87. 29 U.S.C. § 206.

88. 29 U.S.C. § 207(a).

89. 29 U.S.C. § 214(c)(1). After receiving a certification from the Wage and Hour Division (WHD), an employer may pay a person with a disability less than minimum wage. *Subminimum Wage Employment for Workers with Disabilities*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/workers-with-disabilities/overview> [<https://perma.cc/XXY8-SQ3K>] (last visited Mar. 2, 2021). In 2014, President Barack Obama signed Executive Order 13,658, which raised the minimum wage to \$10.10 for contractors, including people with disabilities. *Id.*; Establishing a Minimum Wage for Contractors, 79 Fed. Reg. 9851 (Feb. 12, 2014) (codified at 48 C.F.R. § 52.222-55(b) (2019)). The President also signed the Workforce Innovation and Opportunity Act (WIOA), increasing access to the workforce for people with disabilities. 29 U.S.C. §§ 3101–3361. *See also Workforce Innovation and Opportunity Act: About*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/eta/wioa/about> [<https://perma.cc/RRL6-78TQ>] (last visited Mar. 2, 2021).

90. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794. Violations of Section 794 are determined under the Americans with Disabilities Act of 1990 (ADA). 42 U.S.C. § 12112(a) (“No [gatekeeper] shall discriminate against a qualified individual on the basis of disability”); § 12111(8) (“The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position”); 42 U.S.C. § 12112(b)(5)(A) (2018) (“[N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” constitutes discrimination “unless [the gatekeeper] can demonstrate that the accommodation would impose an undue hardship”).

a program, take advantage of a service, . . . or perform a job.”⁹¹ The law was supposed to prohibit discrimination against people with disabilities in institutions that received federal funding.⁹² But, by applying subjective standards for what is considered a qualified individual⁹³ with a disability, a reasonable accommodation,⁹⁴ and an undue hardship,⁹⁵ the law circumvents this protection by continually moving the mark.⁹⁶

The goal behind Section 504 and the Americans with Disabilities Act that followed was, in part, to seek reasonable accommodations to help people enter the employment sector and places of public accommodation.⁹⁷ In practice, however, the law has done little to improve access to places of public accommodations⁹⁸ or improve the employment rate of people with disabilities.⁹⁹ This lack of improvement is due to the “inherent limitations of antidiscrimination laws in eliminating deep-rooted structural barriers to work,”¹⁰⁰ as well as in eliminating barriers to having an independent livelihood and also seeing those deemed “severely disabled” as able to make the necessary adjustments to maximize their human potential. The language in Section 504 inadvertently created

91. *Reasonable Accommodations and Modifications*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications [<https://perma.cc/DNK4-L72V>] (last visited Mar. 2, 2021).

92. Donald Jay Olenick, Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 172–76 (1980).

93. 42 U.S.C. § 12111(8) (“The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer’s judgement as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”); *see also* RUTH COLKER & PAUL D. GROSSMAN, *THE LAW OF DISABILITY DISCRIMINATION FOR HIGHER EDUCATION PROFESSIONALS* 77–78 (2014).

94. § 12111(9); *see also* COLKER & GROSSMAN, *supra* note 93, at 77–78.

95. § 12111(10); *see also* COLKER & GROSSMAN, *supra* note 93, at 77–78.

96. §§ 12111(9)–(10) (allowing the employer to determine what is considered a reasonable accommodation or an undue hardship allows the employer to continually move the mark and protect the profit margin).

97. John E. Rumel, *Federal Disability Discrimination Law and the Toxic Workplace: A Critique of ADA and Section 504 Case Law Addressing Impairments Caused or Exacerbated by the Work Environment*, 51 SANTA CLARA L. REV. 515, 519 (2011).

98. *See, e.g.*, Anne Quito, *Poorly Designed Public Toilets Aren’t Just Annoying, They’re Dehumanizing*, QUARTZ (Aug. 13, 2017), <https://qz.com/1048117/bathroom-design-and-disability-rights-poorly-designed-public-toilets-arent-just-annoying-theyre-dehumanizing/> [<https://perma.cc/H7S5-ETJL>]; *see also* U.S. DEP’T OF JUST., *ACCESS FOR ALL: FIVE YEARS OF PROGRESS* 22–26 (2006).

99. *See* COLKER, *supra* note 20 (noting the ADA did not significantly increase the number of people with disabilities in the workforce); *see also* BAGENSTOS, *supra* note 20.

100. *See* BAGENSTOS, *supra* note 20, at 2.

numerous loopholes with words such as “reasonable accommodations” and “undue hardship,”¹⁰¹ giving discretion to the entity providing the accommodations and defining undue burden. This conflict of interest inevitably trickled into disability antidiscrimination law.¹⁰² This vague language has been used time and time again in disability law, reinforcing the medical model of disability’s “othering” language. Thus, this language has become rooted in assisting individuals with disabilities to fit into existing systems rather than in fixing the systems that disable and use an able body standard.

IV. THE AMERICANS WITH DISABILITIES ACT (ADA) AND ITS AMENDMENT ARE INSUFFICIENT

Recognizing that Section 504 was insufficient because it only protects people with disabilities in federally funded spaces, Congress passed the Americans with Disabilities Act (ADA) in 1990.¹⁰³ The ADA is intended to protect individuals in all public spaces, as the scope is no longer limited to federally funded institutions.¹⁰⁴ Significantly, it banned disability-based discrimination in employment, education, transportation, and places that are open to the public.¹⁰⁵ However, despite this reform,

101. *See id.* at 71 (concluding no accommodation will be required no matter how reasonable). “Disability Rights Law” referred to in this article comprises the Rehabilitation Act of 1973 Section 504, The Americans with Disabilities Act of 1990 and its 2008 Amendment, and Individuals with Disabilities Education Act (IDEA).

102. 42 U.S.C. § 12111(8). *See also id.* (“The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer’s judgement as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”); §§ 12111(10)(A)–(B)(ii) (“(A) In general. The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B). (B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—(i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility[.]”); COLKER & GROSSMAN, *supra* note 93, at 76–78.

103. Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1089 (1995).

104. *Id.*

105. §§ 12112(a), 12132.

several years after the passage of the ADA, employment numbers have not significantly improved.¹⁰⁶

Since the language used in Section 504 was the foundation for the ADA, it renders the same effects of discrimination through “othering.”¹⁰⁷ Both laws define individuals with disabilities using essentially the same definition: “a physical or mental impairment” that “substantially limits one or more major life activities” or “results in a substantial impediment to employment.”¹⁰⁸ Unfortunately, by building upon the language used in Section 504, the ADA continued to view people with disabilities under the medical model of disability.¹⁰⁹

The 2008 ADA Amendment broadened the definition of “disability,” protecting those who mitigate their disability by, for example, taking medication or using prosthetics, and regards them as having a bona fide disability under the law.¹¹⁰ This Amendment abrogated the Court’s earlier decisions in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*¹¹¹

106. See COLKER, *supra* note 20, at 69 (noting the ADA was intended to increase the number of people with disabilities in the workforce).

107. The ADA defined disability as “a physical or mental impairment that substantially limits one or more major life activities” or as “being regarded as having such an impairment.” 42 U.S.C. § 12102(1)(A), (C). See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 5 (1963).

108. § 12102(1); Rehabilitation Act of 1973, §7(9), 29 U.S.C. § 705(9).

109. See LINTON, *supra* note 31, at 11.

110. *Id.* § 12102(4)(E)(i) (“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . .”).

111. 534 U.S. 184 (2002). In this case, Ella Williams was terminated due to her poor attendance record, as she was suffering from carpal tunnel syndrome due to performing her assembly line duties for Toyota. *Id.* at 187–90. She filed suit under the ADA, alleging she was not given reasonable accommodations for her carpal tunnel. *Id.* at 190. Toyota then filed a motion for summary judgment, declaring no genuine issue to be tried since her carpal tunnel syndrome was not considered a disability under the ADA. *See id.* at 190–91. It did not substantially limit any of William’s major life activities, for she continued to perform manual tasks (e.g., eating, bathing, etc.). *See id.* The Sixth Circuit Court of Appeals ruled in favor of Williams, finding that the carpal tunnel syndrome was a disability because it was substantially limiting her ability to perform her work. *Id.* at 191–92. The Supreme Court determined that the Court of Appeals did not use the proper standard in determining what is a disability under the ADA. *See id.* at 192–93. Thus, the Court of Appeals was wrong in only examining whether Williams could perform her work, limiting the class of manual tasks to those she would perform at work instead of determining whether her daily life activities outside of work were impacted. *Id.* at 199–203. The Court went on to say that, under the ADA, a disability had to be permanent or long-term. *Id.* at 196, 198. As such, *Toyota* established a narrow standard for determining whom the ADA covered, leaving people with mental or physical disabilities that “substantially limited a major life activity” mainly covered by Section 504. As a result, disabilities such as cancer, diabetes, HIV/AIDS, intellectual disabilities, amputations, epilepsy, and multiple sclerosis were not readily protected. *See* Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL’Y J. 5, 11 (2013). After the 2008 ADA amendment, the condition no longer had to meet such a demanding standard requiring the disability to be permanent or long-term. *See* 42 U.S.C. § 12102(4)(D).

and *Sutton v. United Air Lines, Inc.*¹¹² The Amendment had a significant impact in broadening the definition of disability, covering more people with disabilities and giving people with disabilities more legal recourse and protection—or so one thought. Although it covered more people, there is no getting around the inadequate subjective language such as “reasonable accommodations” and “undue hardship” that is largely dependent on the awareness of those in positions of power making these determinations.¹¹³

Even with this Amendment, the law still falls short of providing equity for people with disabilities because these loopholes allow institutions to not provide accommodations under reasonable accommodation and undue hardship standards.¹¹⁴ The effects are otherwise limited because the base of disability antidiscrimination law originally intended to provide people with disabilities opportunities in the social spaces like the workforce, rather than equity in our society.¹¹⁵ The root of the issue is distinguishing people with and without disabilities in the first place.¹¹⁶

The medical model is the origin of this distinction and the basis of disability antidiscrimination laws impacting people with disabilities, creating a binary—someone either has a disability or not. The law only protects those deemed disabled, trying to find ways to protect them rather than addressing how society is disabling them through its categorization.¹¹⁷ The unintended consequence of highlighting a person’s

112. 527 U.S. 471 (1999). In this case, identical twins with myopia brought a lawsuit against United Airlines under the ADA when the airline did not hire them as commercial pilots. Their uncorrected vision did not meet the minimum requirements to have visual acuity of twenty/one hundred or better. *Id.* at 475–76. The Court held the twins were not disabled under the ADA because they could correct their eyesight with eyeglasses or contact lenses. They were not regarded as disabled, arguing that the airline’s allegation that they were unable to satisfy a job’s requirements was not enough to qualify the twins as being regarded as persons with a disability. *Id.* at 481–94 (citing 42 U.S.C. § 12102). In the end, the Court in *Sutton* held that people who could mitigate their impairments (such as wearing eyeglasses to correct poor vision) were not “disabled.” *Sutton*, 527 U.S. at 475–76. Therefore, under *Sutton*, anyone mitigating their disability with medication or prosthetics is not considered disabled.

113. See §§ 12111(9)–(10).

114. See *id.*; Discrimination against a “qualified individual” includes “not making reasonable accommodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . .” § 12112(b)(5)(A); COLKER & GROSSMAN, *supra* note 93, at 81; see also GOFFMAN, *supra* note 107.

115. See 29 U.S.C. § 794(a).

116. See BAGENSTOS, *supra* note 20, at 35.

117. See 29 U.S.C. § 701(b) (“The purposes of this chapter are (1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through (A) statewide workforce development systems . . . that include, as integral components, comprehensive and coordinated state-of-the-art programs of vocational rehabilitation[.]”).

disability when having to determine who cannot qualify for services leads to “othering.”¹¹⁸ Martha Minow calls attention to “the dilemma of difference,” describing how “[t]he stigma of difference may be recreated by both ignoring and by focusing on [the disability].”¹¹⁹ To receive services or benefits and obtain the necessary accommodations to thrive and succeed, the disability is highlighted, while the claimant is simultaneously yearning for equal treatment and attempting to avoid feeling like the “other.”¹²⁰

Eradicating the stigma and reimagining other alternatives to reduce discrimination start by shifting the focus away from an individual’s abilities and focusing instead on how society disables—that is, by using the social model of disability while also embracing temporary disabilities and human variation. Shifting this intent begins to address stigma and discrimination against people with disabilities in a more holistic way, something the current law fails to do.¹²¹ Acknowledging ableness’s property interest is essential to this shift, as accounting for possible resistance toward any future change may alter society’s approach and tactics.¹²²

The focus should shift to maximizing everyone’s human potential without room for exclusion, rather than wasting the judicial resources¹²³ to

118. See GOFFMAN, *supra* note 107.

119. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990).

120. See GOFFMAN, *supra* note 107.

121. See S. Rep. No. 93-1297, 93rd Cong., 2nd Sess. at 37 (“It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term ‘handicapped individual’ in those sections was not to be narrowly limited to employment (in the case of section 504), nor to the individual’s potential benefit from vocational rehabilitation services under titles I and III (in the case of both section 503 and 504) of the Act.”); see also Aldon D. Morris, *A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks*, 25 ANN. REV. SOCIO. 517, 517, 527 (1999) (explaining that the civil rights movement created a “paradigmatic shift” in antidiscrimination law necessary to dismantle group-based subordination); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 579–80 (2004).

122. See OLIVER, *supra* note 45, at 4–6 (noting the social model of disability puts forth the idea that society disables and, thus, the structures of our society create disabilities); Guevara, *supra* note 44, at 1. Property interest in ableness is a concept first described in *Ableness as Property* as the idea that there is inherent social influence exercised by gatekeepers—who have limited exposure to disability—when they make decisions that tend to manufacture disability. *Id.*; see also LINTON, *supra* note 25, at 39 (describing the power dynamics of the “dominant group” as “non-disabled people determin[ing] what resources, if any, will be made available to disabled people”).

123. See Gordon Good, Comment, *The Americans with Disabilities Act: Short-Term Disabilities, Exceptions, and the Meaning of Minor*, 37 U. DAYTON L. REV. 99, 104 (2011) (noting the “actual” and “regarded as” prongs account for the clear majority of disability cases, so a large portion of litigation involving disability deals with determining whether a plaintiff has a disability).

determine whether a person has a disability, whether an accommodation is reasonable or not, or whether such an accommodation is an undue hardship.¹²⁴ To provide an accommodation to one individual and not another signals that the individual receiving the accommodation is worth more and worthy of investment. The statutes start with language in their purpose section that resembles the social model of disability, aiming for the full participation of people with disabilities in every facet of our society.¹²⁵ But, the purpose quickly shifts to embracing a medical model of disability with “othering effect” brought on by using a “reasonable accommodation” standard to justify providing for a person with a disability but not another.¹²⁶ This “othering” loophole is also evident under the undue hardship defense¹²⁷ for entities that are unwilling to provide the accommodations. This categorization creates insiders and outsiders¹²⁸ in social spaces, leaving room for discrimination.

Instead, maximizing all human potential can shift the value placed on all human life in the public and private spheres, especially for those currently viewed as a social burden.¹²⁹ The value of life and work product of anyone who is considered different would change since everyone would partake in the benefits and resources; this could possibly eliminate the prevalent rational discrimination against people with disabilities.¹³⁰ If the framework of disability law were changed, society would intentionally invest in people’s differences for the collective long-term good of all, rather than the short-term benefit of the individual. Society would begin to view people with disabilities as part of human variation with no prescribed standard way of being. If the adage is true that necessity is the mother of invention,¹³¹ then inventions to maximize all human potential that benefit us all will launch society into new technological waves and

124. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213; Rehabilitation Act, 29 U.S.C. §§ 701–797. Undue hardship and undue burden are used interchangeably. Undue hardship is a defense to a reasonable accommodation claim used by an employer. *See also* 42 U.S.C. §§ 12111(10), 12112(b)(5)(A).

125. § 12101(b) (“The purpose of this chapter (1) is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;”); 29 U.S.C. § 701(b) (“The purposes of this chapter are (1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, . . .”).

126. 42 U.S.C. § 12111(9) (defining reasonable accommodation).

127. § 12111(10) (defining undue hardship).

128. *See* GOFFMAN, *supra* note 107.

129. *See, e.g.,* Whyte, *supra* note 17.

130. *See* Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 848–49 (2003) (“The prohibition of rational discrimination is the central component of antidiscrimination doctrine.”).

131. PLATO, *THE REPUBLIC OF PLATO* 49 (Benjamin Jowett, trans., 2017) (“[T]he true creator is necessity, who is the mother of our invention.”).

create new markets. Universal design would no longer be a theory, but a reality.¹³²

CONCLUSION

The cost of not moving away from the medical model reduces our humanity to production and makes justice fall short—it becomes another slippery slope toward genocide, killing off those who are deemed undeserving based on this idea of what is “ability,” embracing a utilitarian view. The pandemic served to introduce the populace to the need to use DisCrit, as historical forms of oppression are still pervasive. To invest in the untapped human potential that is often suppressed in a medical model environment is a wise investment because there would be no waste of priceless knowledge found in the lived experiences of those who deviate from the status quo.

Some normative solutions for long-term change would entail implementing the social model of disability courses to shift ideology in our primary school systems that receive federal funding. By the time students enter the workforce, they would create, design, lead, and teach with a non-“othering” mentality creating spaces of belonging for people with disabilities. Maximizing the human potential and capitalizing on the most effective ways to do so moves our society forward because doing so values all human dignity. Some projects in the works are taking humanity to the next frontier, all because some companies have decided to provide access to people with disabilities, while simultaneously impacting the lives of people with or without disabilities alike.¹³³ Systems and structures should be designed for individuals instead of having individuals fit into existing systems. It is time our laws reflected this belief and started reimagining disability rights law because the medical model fails us all.

132. See *Ronald L. Mace Papers 1974–1998*, *supra* note 62. Universal design, associated with the barrier-free concept, is a concept of making buildings, products, and environments accessible to all. See generally GOLDSMITH, *supra* note 65.

133. Some projects already in the works by companies for people with disabilities include (1) the Kenguru Electric Car, which allows someone with a wheelchair to roll into the car from a back door into the driver’s seat; (2) the iBot Stair-Climbing Wheelchair, which can climb around any obstacle placed in its path like a monster truck; (3) the Smart Belt, which can detect the onset of a seizure; (4) the Braille Smartphone and Braille Edge 40 Display, which have keys in braille; (5) the handsfree Lucy 4 Keyboard; (6) the Deka Bionic Arm; (7) the ReVoice Glove that can interpret sign language; (8) the DynaVox EyeMax, a speech-generating device which one uses the eyes to control speech; (9) the EyeBorg, which helps individuals who are blind, color blind, or can only see in black and white to perceive color through sound waves; and (10) iPhone and iRobot Home Robot. Matt Petronzio, *Ten Ingenious Inventions for People with Disabilities*, MASHABLE (Sept. 12, 2013), <https://mashable.com/2013/09/12/assistive-technology> [<https://perma.cc/43XB-5LCJ>].