

## ARTICLES

### PROCESSING DISABILITY

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*This Article argues that the practice of holding so many adjudicative proceedings related to disability in private settings (e.g., guardianship, special education due process, civil commitment, and social security) relative to our strong normative presumption of public access to adjudication may cultivate and perpetuate stigma in contravention of the goals of inclusion and enhanced agency set forth in antidiscrimination laws. Descriptively, the law has a complicated history with disability—initially rendering disability invisible; later, underwriting particular narratives of disability synonymous with incapacity; and, in recent history, promoting the full socio-economic visibility of people with disabilities. The Americans with Disabilities Act (ADA), the marquee civil rights legislation for people with disabilities (about to enter its twenty-fifth year), expresses a national approach to disability that recognizes the role of society in its construction, maintenance, and potential remedy. However, the ADA’s mission is incomplete. It has not generated the types of interactions between people with disabilities and nondisabled people empirically shown to deconstruct deeply entrenched social stigma.*

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*Prescriptively, procedural design can act as an “antistigma agent” to resist and mitigate disability stigma. This Article focuses on one element of institutional design—public access to adjudication—as a potential tool to construct and disseminate counter-narratives of disability. The unique substantive focus in disability adjudication on questions of agency provides a potential public space for the negotiation of nuanced definitions of disability and capacity more reflective of the human condition.*

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## INTRODUCTION

The current scholarly concerns regarding shifts towards greater privacy in and privatization of adjudication as counter-normative—particularly in the civil rights context—omit a key historical exception to presumptions of public adjudication.<sup>1</sup> Disability adjudication has unfolded almost exclusively in private settings as an untested norm in the *parens patriae* tradition of the state as “protector” of vulnerable populations. In fact, while such a move has generated much debate and controversy in areas such as national security, immigration,<sup>2</sup> tort, and business litigation, presumptions of closed, less formal adjudicative proceedings in the disability context remain unexplored by legal scholars. Even political philosopher Jeremy Bentham, who fervently advanced the “publicity” values of open adjudicative proceedings as fundamental to liberal democracies, carved out exceptions for disability on the basis of its presumed vulnerability and stigma.<sup>3</sup>

What is the relationship between privacy (or publicity) and disability stigma? How do we reconcile antidiscrimination laws such as the Americans with Disabilities Act (ADA) that seek to maximize the agency and dignity of people with disabilities<sup>4</sup> as full socio-economic participants with presumptions of disability as a private, stigmatizing matter and, thus, in need of protection from disclosure?<sup>5</sup> What is the role of law in the creation and remedy of disability stigma?

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1. See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1802 (2014) [hereinafter Resnik, *Privatization of Process*] (emphasizing the demise of public values of adjudication with the shift to less formal adjudication); see also Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 1, 4–5 (2011) [hereinafter Resnik, *Bring Back Bentham*] (arguing that privatization of judicial claims has removed the visibility of human rights claims from public oversight).

2. See, e.g., Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Proceedings*, 40 CAL. W. L. REV. 265, 265–66, 268 (2004) (discussing closed proceedings in the immigration context as violative of the First Amendment right of public access to adjudication).

3. See PHILIP SCHOFIELD, *UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM* 256–57 (2006) (chronicling popular discourse of Jeremy Bentham).

4. Note that this Article uses “people first” language consistent with the view within the U.S. disability rights movement that disabilities and medical diagnoses are not persons and do not define individuals.

5. This Article focuses on the relationship between private adjudication and disability stigma. In a later project, I will examine the normative implications of the history of closed proceedings in the disability context and what lessons it offers to proceduralists more broadly who think about the “privatization of process.”

This Article argues that the more law treats disability as a private matter, the more disability (and social stigma) it may construct.<sup>6</sup> Historically, laws have shifted pendulously from explicit *protection of the public from looking at and interacting with people with disabilities*—for example, public vagrancy laws<sup>7</sup>—to laws designed to *protect disability from public disclosure*—for example, laws protecting medical and health information<sup>8</sup>—with the same outcome of hindering the circulation of information about and experiences with disability. Current normative conceptions of disability suffer from a certain informational poverty—that is, the public has had limited access to diverse, disaggregated narratives of disability obtained through social contact and the media. Consequently, selective narratives of disability (all with fundamental questions of agency at their core)—the heroic person who achieves success and happiness *in spite of* disability, the dangerous criminal with a mental disability, the pitiable invalid—dominate public discourse.

The ADA, now approaching its twenty-fifth anniversary, sought to address discrimination through greater integration of people with disabilities into society, in part, by increasing their visibility in public spaces. Congress identified stigma, “prejudice, [and] antiquated attitudes” as the primary impediments to full inclusion driving the

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6. SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 40 (1996); see also MATTHEW W. BRAULT, U.S. CENSUS BUREAU, *AMERICANS WITH DISABILITIES: 2010 4* (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf> (stating that approximately one in five of the civilian non-institutionalized population, or 56.7 million people, has a disability). This Article refers to “disability” in its singular form to reflect a theory or philosophy of the construction. However, part of the goal of this Article is to surface the tension between laws’ categorical and essentialist nature and function and the plurality of lived experiences that fall within an umbrella concept such as “disability.” Disabilities vary in the age of onset, visibility, and/or whether the disability is progressive (e.g., muscular dystrophy). These factors interact to determine a person’s conception of disability as part of identity and her social identity and lived experience as a person with a disability. See MICHELLE FINE & ADRIENNE ASCH, *WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS 1* (1988) (discussing intersectionality of disability with gender, race, ethnicity, and class).

7. See, e.g., SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC 3–5* (2009) (discussing municipal public conduct codes structured to protect the public from the visible impact of disability and difference: “[d]isability disturbs” (internal quotation marks omitted)); see also *infra* Part I.A (describing the historical concealment of disability through so called “ugly laws,” or ordinances which prohibited people with disabilities from appearing in public and labeled disability a public nuisance).

8. See, e.g., Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 10491, 110 Stat. 1936 (codified as amended in scattered sections of 18, 29, 42 U.S.C.).

promulgation of the ADA.<sup>9</sup> However, while the ADA relatively increased the visibility of people with disabilities in society through greater access to public accommodations and protections against employment discrimination (primarily for those who were already in the formal employment sector), structural discrimination persists. The ADA has not generated the type of social interaction and public discourse necessary to shape and disseminate counter-narratives of disability and deconstruct stigma according to social science stigma research. People with disabilities continue to be un- and underemployed<sup>10</sup> and under-educated<sup>11</sup> on the basis of false conceptions of their agency and humanity. The persistence of social stigmas of disability warrants a deeper exploration of the role of law in its construction, perpetuation, and potential remedial landscape.

Critical analysis of institutional designs in disability adjudication offers unexplored opportunities to reduce self- and public stigmas of disability. While shortcomings may exist within the classic adversarial process in either a court or administrative proceeding, such fora allow for public confrontation with state actors.<sup>12</sup> As such, adjudicative proceedings can be performative sites of liberal democracies where civil societies engage in public discourse about events and issues of extraordinary importance in their ordinary lives.<sup>13</sup> This Article focuses on one element of institutional design—

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9. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

10. See, e.g., Table A. *Employment Status of the Civilian Population by Sex, Age, and Disability Status, Not Seasonally Adjusted*, U.S. BUREAU LAB. STAT., <http://data.bls.gov/cgi-bin/print.pl/news.release/empsit.t06.htm> (last updated Jan. 9, 2015) (publishing the December 2014 rate of job market participation for people with disabilities at 20.3%, compared to approximately 70% of the nondisabled population, and the unemployment rate decreasing at approximately 11% for people with disabilities and at approximately 5.1% for nondisabled people, half the rate for people with disabilities).

11. See, e.g., MARIE C. STETSER & ROBERT STILLWELL, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., PUBLIC HIGH SCHOOL FOUR-YEAR ON-TIME GRADUATION RATES AND EVENT DROPOUT RATES: SCHOOL YEARS 2010–11 AND 2011–12 4, 9–10 tbl.2 (2014) (finding that while national graduation rates average 80% for nondisabled students, the national average for students with disabilities was only 61% in the 2011–2012 school year with significant disparities across individual states ranging from 24% to 81%).

12. See Resnik, *Bring Back Bentham*, *supra* note 1, at 6 (“Through public processes, one learns whether individuals of all kinds—including ‘suspected terrorists’—are understood to be persons equally entitled to the forms of procedure offered to others, so as to mark their dignity and to accord them the respect and fairness due to all persons.”).

13. See JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 4–5 (Thomas Burger & Frederick Lawrence trans. 1989) (recounting historical and theoretical

public access to adjudication—while recognizing the potential for other procedural designs—e.g., access to counsel, evidentiary rules—to advance agency of disputants with disabilities.

Disability law is unique in the existence of adjudicative proceedings that directly implicate the agency and dignity of people with disabilities. These proceedings interpret and apply the integrative goals of disability laws to the everyday lives of people with disabilities at critical moments when questions arise about their ability to live and work in the most inclusive socio-economic settings. I advance novel descriptive and evaluative claims. To begin with, a startling number of hearings related to disability occur in nonpublic settings counter to broader historical presumptions of open courts—e.g., guardianship and civil commitment hearings. These procedural designs—intentionally or by default—may cultivate and perpetuate stigma unnecessarily in contravention of the goals of inclusion, individual dignity, and enhanced agency set forth in the ADA. I argue that a more critical, nuanced analysis of disability proceedings can create opportunities to challenge the roots of disability stigma—namely, categorical presumptions of disability as incapacity—in at least two ways. First, it allows for greater participation by some people with disabilities in the adjudicatory process itself. Second, it reframes concepts of both disability and agency as flexible, social constructions that exist on a continuum rather than rigid, medical diagnoses.<sup>14</sup>

Accordingly, this Article brings together scholarly discussions in at least three areas—civil rights, procedure, and disability—to move beyond antidiscrimination laws as the sole prescription for social

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underpinnings behind the development and significance of a public sphere of discourse); see also Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109, 109–11 (Craig Calhoun ed., 1992) (expanding Jürgen Habermas's notion of “public sphere” to account for feminist political theories).

14. This view of disability as “a natural part of the human condition” first appeared in a 1985 report from the U.S. Commission on Civil Rights. Scholars since that time have drawn upon this concept in disability and feminist legal theory to construct a mutual “vulnerability” that defines the human experience. See, e.g., Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 19–20 (2008) (urging a paradigmatic shift in conceptualizing the power of the state to empower those who are vulnerable); Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 523 (2008) (agreeing with Fineman's theory of vulnerability and arguing that society has a discriminatory vulnerability towards people with disabilities).

inequality.<sup>15</sup> Civil rights scholars wrestle with the limitations of classic antidiscrimination paradigms to address implicit bias.<sup>16</sup> Proceduralists think about the identification and implementation of underlying values of procedure—including agency and dignity—through the construction and manipulation of adjudicative rules and standards.<sup>17</sup> Finally, and perhaps most directly, I join the current discussion among disability scholars seeking new interpretive and remedial frameworks for disability discrimination within existing civil rights laws and jurisprudence.<sup>18</sup> Sam Bagenstos, for example, argues persuasively that the “future of disability law” lies not in antidiscrimination efforts per se but, rather, in a return to social welfare laws to provide economic supports—such as funding for assistive technology—that will make integration possible.<sup>19</sup> Most

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15. It also adds to the scholarly discussion among behavioral change theorists regarding the role of the law more broadly in changing social norms by positioning stigma reduction front and center as an explicit indicator of normative change. See Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 39 (2002) (pointing to rules against smoking in public places as an example of placing norms front and center in legal requirements to effectuate a change in stigma); Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 644–45 (2000) (concluding that lawmakers are reluctant to force changes in social norms through legislation and enforcement); Lawrence Lessig, *Social Meanings and Social Norms*, 144 U. PA. L. REV. 2181, 2186 (1996) (acknowledging a cost or price valuation in normative behaviors and hinting at the effect of shifting such economic factors when changing norms and meanings through the law). This Article, however, leaves open questions of precise empirical measurement of stigma reduction, which social scientists continue to shape and explore. See, e.g., Patrick J. Michaels et al., *Changing Stigma Through a Consumer-Based Stigma Reduction Program*, 50 COMMUNITY MENTAL HEALTH J. 395, 395, 399 (2014) (measuring stigma reduction efforts in the mental health context).

16. See, e.g., Lisa C. Ikemoto, *Racial Disparities in Health Care and Cultural Competency*, 48 ST. LOUIS U. L.J. 75, 75–76 (2003) (highlighting language inaccessibility as a form of implicit bias and the need to expand antidiscrimination remedies to address bias in health disparities); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 804 (2004) (considering the limits of antidiscrimination paradigms to address implicit biases and stigma).

17. See ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE* 2–7 (1979) (discussing underlying values of procedure); see also Resnik, *Privatization of Process*, *supra* note 1, at 1802 (arguing that the promotion of alternative dispute resolution enhances first-hand knowledge of the claims made and provides opportunities to bring claims affordably).

18. The move beyond antidiscrimination is not unique to disability law scholars. See, e.g., MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 261 (2000) (explaining the concept of “therapeutic jurisprudence”); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747–48 (2011) (framing the shift beyond equality jurisprudence as a product of greater “pluralism anxiety”).

19. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 54–56 (2004).

recently, Elizabeth Emens proposes informational “[f]raming rules” as a way to shift public attitudes of disability at key moments when nondisabled people personally encounter a decision that implicates a future relationship with disability.<sup>20</sup> Her thesis, much like the present thesis, turns on the provision of information to nondisabled people about the lived experiences of people with disabilities to shift the stereotypical views of disability that dominate mainstream society. This Article, however, is the first to examine the potential of procedural mechanisms to mitigate stigmas of disability by focusing on *the performance of disability* and its dissemination of counter-narratives in public adjudicative spaces.

I proceed in four parts following this introduction. Part I advances the claim that as a historical matter, the law rendered disability invisible. I contend that the history of systematic concealment of disability as an identity (irrespective of malicious or benevolent motives) generated three narrow and deleterious narratives of disability—deviance, incapacity, and separate but unequal—that persist today as common heuristics to understand people with disabilities. I offer three examples—respectively, public vagrancy laws, institutionalization, and segregated education—to illustrate the foundations of these narratives. Exploring their origins, evolution, and authorship sheds light on appropriate prescriptions.

Part II spotlights the Americans with Disabilities Act, Congress’s remedial response to the socio-economic invisibility set forth in Part I. I discuss congressional intent and design and submit a distinct assessment of the ADA’s success in responding to the history of invisibility.<sup>21</sup> The ADA, while expressive of important ideological shifts from “disability” as individual deficits to a national recognition of its social constructions, has not engendered the visibility and contact necessary to challenge deeply entrenched disability stigma. I argue that, although Congress recognized the importance of addressing social stigma, the remedial design of the ADA could not reach the root of disability stigma—that is, the cognitive-affective associations of disability with incapacity and inhumanity. I draw upon social science to explain why stigma is so formidable and ubiquitous and call for well-designed interventions to reduce its effects. If we understand stigmatization as a process of

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20. Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1410–34 (2012) [hereinafter Emens, *Framing Disability*].

21. Most evaluative projects concern the economic impact of the ADA. *See infra* Part II.A–B (asserting that the ADA has not been as successful as intended in increasing the socio-economic visibility of people with disabilities).



mismanaging social differences (perceived or actual), then reframing stigma in process terms respects its social constructions and can help reverse engineer its formation to reduce stigma.

Part III advances the role of procedural law in mitigating disability stigma. Whereas the prior Parts concern the law's historical role in rendering disability invisible and shaping social stigma, this Part asks whether the law can instead be a means to promote visibility and to circulate counter-narratives of disability in public places. We may miss significant opportunities to destigmatize disability (and may, in fact, be exacerbating it) by ignoring the functional and expressive values underlying adjudicative procedures and rules. Attention to institutional design—specifically, what I call “antistigma agency”—can enter and navigate spaces that antidiscrimination laws cannot and, consequently, can open the discursive space to shape a broader disability consciousness.<sup>22</sup> I focus on public access to adjudication as a space traditionally recognized for its ability to ignite public awareness. Finally, Part IV confronts potential objections to openness as one possible procedural remedy to advance antistigma agency.

#### I. VESTIGES OF INVISIBILITY

Despite advances in the visibility of people with disabilities in public spaces generated by the Americans with Disabilities Act, remnants of the early socio-legal invisibility—specifically, the historical constructs and narratives of disability as categorical incapacity and shame—remain.<sup>23</sup> This section addresses the law's production of what Linda Hamilton Krieger calls “core stories” about disability “with commonly recognized plots, symbols, themes, and characters.”<sup>24</sup> The dominant stories of

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22. This paper serves as the conceptual scaffolding for future (related) projects that will explore the ways in which disability proceedings can be redesigned to maximize the agency and dignity of the disputants.

23. This critique recognizes the complexity of invisibility with respect to parents or families of people with disabilities who at times were advised to institutionalize their children in their best interests. We see this history through a different lens today. The point is to show that this history, irrespective of assignment of fault, had serious consequences for the public consciousness of disability and identity of people with disabilities.

24. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1166 (1995). My concern here is not with the complex interplay between law and social norms because a robust body of scholarship already exists. See, e.g., Scott Burris, *Disease Stigma in U.S. Public Health Law*, 30 J.L. MED. & ETHICS 179, 183–85 (2002) (discussing the relationship between law and social norms in the health context); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1396–1410

disability that evolved reflect some form of incapacity.<sup>25</sup> Without the ready circulation of diverse narratives of disability demonstrative of agency, early images and messages expressed by these laws became accepted definitions and heuristics for processing disability. As a result, the exclusion of people with disabilities from socio-economic environments is more likely understood today as a benign, “natural” consequence of different needs rather than discriminatory conduct.

#### A. *Deviance*

Perhaps the most overt form of the law’s historical concealment of disability, municipal ordinances—known collectively as “ugly laws”<sup>26</sup>—prohibited people with disabilities from appearing in public places. These laws appeared as early as 1867 in San Francisco, California and have served as grounds for a civil citation as recently as 1974 in Omaha, Nebraska.<sup>27</sup> The tradition of concealing disability dates back even further to Elizabethan poor laws.<sup>28</sup> Marketed as an aggressive attack on public panhandling and vagrancy, these ordinances fall squarely within the group of public conduct rules designed to police normative deviance and shield the nondisabled public from discomfort, disgust, ambivalence, or

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(2000) (discussing the interaction between judicial review, social norms, and political discourse in the sexual orientation context); Lessig, *supra* note 15, at 2182–83 (theorizing law’s relationship to normative change); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 923 (1996) (arguing a similar point that law can strengthen the norms it reflects and weaken those it censures); cf. Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1375–76 (2000) (critiquing expressive law theories and calling for increased empirical analyses).

25. See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 95 (2000) (“The sine qua non of disability was *inability to function* in society. Hence, individuals with disabilities were to be pitied, excluded, and/or cared for outside the mainstream of society.”). Feldblum notes that society has distinguished between “disabled” and “sick” people, with the former perceived as unable to function and, thus, excluded from society, and the latter having fewer if any limitations and assumed to be participating members of society. *Id.* (internal quotation marks omitted).

26. See generally Marcia Pearce Burgdorf & Robert Burgdorf Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a “Suspect Class” Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 863 (1975) (referring to these ordinances, for the first time, collectively as “ugly laws”).

27. Most cities repealed ugly laws by 1915, but in many places, such as Omaha, the statutes and ordinances remained on the books and, though infrequent, were the basis for causes of action as recently as 1974.

28. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161–62 (1972) (discussing the history and purposes of poor laws).

contagion of ideas or disease.<sup>29</sup> They reflect the foundations of modern narratives of socio-economic dependency,<sup>30</sup> incapacity, and dangerousness. The following account, written at the turn of the twentieth century, illustrates the deep “existential anxiety,”<sup>31</sup> misinformation, and fear about disability that motivated enactment of these laws:

In sociable intercourse the epileptic is an object of dread, and no one who has witnessed the person in a convulsion can quite escape from the haunting memory of the spectacle and entirely free his mind from terror or disgust. Hence there cannot be that free, unconstrained, and natural converse which gives pleasure to society.<sup>32</sup>

These laws collectively labeled disability a “public nuisance,” punishable by fine or jail. A New York appellate court, for example, held that the sight of a ten-year old boy with a disability who was “unable to stand, and obliged to move on his hands and legs” rose to a level of speech that violated the local vagrancy ordinance prohibiting “begging.”<sup>33</sup>

Charitable organizations played an integral role in shaping public discourse on disability during the mid- to late-nineteenth century. The dominant narratives of disability trace their roots to the early moral reform efforts designed to convert a select number of deserving poor from their morally flawed lives to socially and economically productive ones. Consider the following petition to the Mayor and City Council of New York in 1854:

Those shameful exhibitions of beggary . . . maimed, deformed and sickly mendicants, making the most revolting display of their misfortunes or infirmities, to excite sympathy; . . . no plea of morality or humanity will justify these public parades of deformity or distress. . . . Whatever the facts, they are vagrants under the description of the statute, and law, humanity and public decency,

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29. Public vagrancy laws historically have policed socially undesirable groups. See, e.g., *People v. Hale*, 168 N.E.2d 518, 519 (N.Y. 1960) (applying vagrancy law to “loitering pimps and prostitutes . . . [and] loitering homosexuals”).

30. See Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 821–23 (1966) (discussing the origins of the connection between disability and socio-economic dependence in social discourse).

31. Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 43–44 (1988).

32. SCHWEIK, *supra* note 7, at 89 (internal quotation marks omitted).

33. *In re Haller*, 3 Abb. N. Cas. 65, 66 (N.Y. 1877).

not only require their immediate removal [from public spaces], but the absolute prohibition of all similar exhibitions in future.<sup>34</sup>

Most interesting is the identity of the petitioning organization above: the Association for Improving the Conditions of the Poor. This organization administered charitable assistance through a process of moral sorting. The level of deservedness depended on the volitional attributions imposed on the individual and his capacity for productive employment.<sup>35</sup> The moral hierarchy also shaped the provision of public welfare benefits<sup>36</sup> at the time that offered children, veterans, and accident victims medical and rehabilitative support with the goal of (re)integration into the workforce.<sup>37</sup> These interest groups—lead by nondisabled people—dominated the public’s understanding of disability. They shaped and circulated narratives of incapacity.<sup>38</sup> These organizations focused on a disaggregated view of disability of particular diseases or impairments that could (and should) be eradicated through research and development.<sup>39</sup>

The relics of state-sponsored segregation—driven by social views of disability as a “spoiled identity”<sup>40</sup>—continue to manifest in surprisingly similar ways. The U.S. Court of Appeals for the Ninth Circuit, for example, recently struck down a modern version of the “ugly laws” that the City of Los Angeles used to police homeless people living in their cars.<sup>41</sup> The ordinance represents an increasing move by states to criminalize public homelessness and “force the homeless out of sight and out of mind.”<sup>42</sup> While perhaps motivated by some legitimate health and safety concerns, Los Angeles has disproportionately applied the ordinance to homeless people with disabilities.<sup>43</sup> One in three homeless adults in Los Angeles has a known physical, mental, or psychosocial disability.<sup>44</sup> Thus, enforcement of this ordinance has had a disparate impact on this group and contributes to removal of people with disabilities from the public sphere today.

### *B. Incapacity*

The rise of involuntary institutionalization of people with intellectual and developmental disabilities began in the late nineteenth century and was influenced by the growing eugenics movement in the United States.<sup>45</sup> Close to 200,000 people lived in

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34. *Street-Begging and Vagrancy*, N.Y. DAILY TIMES, Feb. 24, 1854, at 3 (providing the text of a Public Petition by the Association for Improving the Conditions of the Poor to the City Council and Mayor of New York City in support of greater enforcement of municipal vagrancy laws).

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35. *The Poor*, BALT. SUN, Nov. 28, 1850, at 1 (advocating on behalf of the Association for Improving Conditions for the Poor for greater enforcement of public vagrancy laws as a part of broader anti-poverty efforts); *see also The Suffering Poor*, N.Y. DAILY TIMES, Feb. 18, 1854, at 4 (indicating that the Association ensures that applicants truly need support before receiving it).

36. Growth of disability-specific organizations such as the National Spinal Cord Injury Association, Muscular Dystrophy Association, United Cerebral Palsy, developed in the first half of the 20th Century to respond to a need for research into “cures” and interventions to support rehabilitation. Over time, these organizations controlled the narratives of specific disabilities and the overall public discourse regarding disability as a medical diagnosis in need of a cure.

37. Robert Funk, *Disability Rights: From Caste to Class in the Context of Civil Rights*, in IMAGES OF THE DISABLED, DISABLING IMAGES 7, 10 (Alan Gartner & Tom Joe eds., 1987).

38. *See* MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 28 (2003) (explaining the normative association of disability and pity).

39. *See* Lloyd Burton, Jr., *Federal Assistance for Disabled Persons: Law and Policy in Uncertain Transition*, 15 CLEARINGHOUSE REV. 753, 754 (1982). National disability rights organizations have protested fundraisers such as the annual Jerry Lewis Muscular Dystrophy Association Telethon because they infantilize people with disabilities and advance the medical model of disability as the foundation of their fundraising efforts. *See, e.g.*, Evan Kemp Jr., *Aiding the Disabled: No Pity, Please*, N.Y. TIMES, Sept. 3, 1981, at A19 (arguing that the telethon’s “pity approach to fundraising” perpetuates the stereotypes that people with disabilities are “childlike, helpless, hopeless, nonfunctioning and noncontributing members of society”); *see also* Ben Mattlin, *Personal Perspective: An Open Letter to Jerry Lewis: The Disabled Need Dignity, Not Pity*, L.A. TIMES (Sept. 1, 1991), [http://articles.latimes.com/print/1991-09-1/opinion/op-2249\\_1\\_dear-jerry-lewis](http://articles.latimes.com/print/1991-09-1/opinion/op-2249_1_dear-jerry-lewis) (arguing that annual charitable telethons seeking financial support for people with disabilities reinforce stigmas about people with disabilities).

40. *See infra* note 139 (providing Erving Goffman’s definition of stigma); *see also* *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (declaring Virginia’s ban on interracial marriage unconstitutional); Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1315 (2009) [hereinafter Emens, *Intimate Discrimination*] (discussing how U.S. law “required rather than prohibited discrimination in the intimate realm” by regulating marriage, procreation, and other sexual relations).

41. *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1157–58 (9th Cir. 2014).

42. The number of cities that ban sleeping in cars, for example, has increased from thirty-seven in 2011 to eighty-one in 2014. Editorial, *Shunting the Homeless from Sight*, N.Y. TIMES, July 17, 2014, at A.24, *available at* [http://www.nytimes.com/2014/07/17/opinion/Shunting-the-Homeless-From-Sight.html?\\_r=0](http://www.nytimes.com/2014/07/17/opinion/Shunting-the-Homeless-From-Sight.html?_r=0).

43. *Desertrain*, 754 F.3d at 1149 n.1 (noting that four of the named plaintiffs were homeless people with disabilities).

44. *See* L.A. HOMELESSNESS SERVS. AUTH., 2013 GREATER LOS ANGELES HOMELESS COUNT: OVERALL RESULTS FOR LOS ANGELES COUNTY AND LOS ANGELES CONTINUUM OF CARE 36 (2014) (reporting that people with mental or psychosocial disabilities comprised 30.2% of the Los Angeles homeless population in 2013).

state-operated institutions in the 1960s, the peak of institutionalization of people with intellectual and developmental disabilities.<sup>46</sup> Justice Marshall in *City of Cleburne v. Cleburne Living Center, Inc.*<sup>47</sup> documented the systematic segregation experienced by people with intellectual and developmental disabilities:

A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and “nearly extinguish their race.” Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. . . . *But most important, lengthy and continuing isolation . . . has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them.*<sup>48</sup>

By the mid-1950s, about half a million people (more than twice the number of people with intellectual disabilities) resided in public psychiatric hospitals.<sup>49</sup> The deinstitutionalization movement expanded by the 1970s in response to increased incidences of abuse and neglect in settings of weak accountability mechanisms.<sup>50</sup> The number of

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45. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461–64 (1985) (Marshall, J., concurring in part and dissenting in part) (chronicling the history of institutionalization for people with mental and psychosocial disabilities in the United States); see also U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 18–20 (1983) (discussing the history of shame and exclusion of people with disabilities).

46. See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 7–8 (2012) (acknowledging a decline in the rate of institutionalization since its peak in 1967).

47. 473 U.S. 432 (1985).

48. *Id.* at 462–64 (Marshall, J., concurring in part and dissenting in part) (emphasis added); see also WILLIE V. BRYAN, IN SEARCH OF FREEDOM: HOW PERSONS WITH DISABILITIES HAVE BEEN DISENFRANCHISED FROM THE MAINSTREAM OF AMERICAN SOCIETY 7 (1996) (“[S]ome families with members who had a disability considered the most appropriate action was to send them to an institution and keep them away from the public.”); David Ferleger, *The Constitutional Right to Community Services*, 26 GA. ST. U. L. REV. 763, 766 (2010) (arguing that “involuntary institutionalization of people with intellectual disabilities is unconstitutional on due process and equal protection grounds”); Arlene S. Kanter, *There’s No Place Like Home: The Right to Live in the Community for People with Disabilities, Under International Law and the Domestic Laws of the United States and Israel*, 45 ISR. L. REV. 181, 197–98 (2012) (discussing the history of the “right to live” movement in the United States).

49. Bagenstos, *supra* note 46, at 7–9.

50. See, e.g., ANN BRADEN JOHNSON, OUT OF BEDLAM: THE TRUTH ABOUT DEINSTITUTIONALIZATION 3–4 (1990) (explaining that deinstitutionalization began

people committed to psychiatric hospitals (as well as the number of hospitals themselves) drastically decreased over time.<sup>51</sup> The lack of supportive services, however—such as housing, employment opportunities, and supplemental economic assistance—has significantly undermined the deinstitutionalization process by substituting jails and prisons with few or no social services for former psychiatric institutions.<sup>52</sup>

The persistent denial of meaningful opportunities for self-determination has foiled efforts for greater inclusion of people with disabilities. This was particularly true in institutional settings. For example, in *Wyatt v. Stickney*,<sup>53</sup> an institutional reform case in Alabama, an expert witness for the Department of Justice testified about this very phenomenon:

[I]f you walk through [Alabama's largest institution for people with intellectual disabilities] . . . you can see the *effect*—the people who

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once technology and a deeper understanding of psychiatric treatment led to a change in how society perceived disabled individuals); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 295 (1971) (discussing history of the deinstitutionalization movement); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, HRD652, *RETURNING THE MENTALLY DISABLED TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE 1* (1977) (calling on Congress to invest additional resources and clarify responsibilities of federal agencies to promote community-based living). *But see, e.g.*, E. FULLER TORREY, *THE INSANITY OFFENSE: HOW AMERICA'S FAILURE TO TREAT THE SERIOUSLY MENTALLY ILL ENDANGERS ITS CITIZENS* 1–2 (2008) (arguing to the contrary that the deinstitutionalization movement was a failure and resulted in significant public risk because psychiatric patients were removed from mental hospitals and placed in the community, often without adequate community-based services). For a more nuanced review of the arguments, *see* Bagenstos, *supra* note 46, at 5–6. While the aggregate percentage of institutionalized persons has decreased nationally, the aggregate numbers show that somewhere between one and two thousand people with intellectual disabilities in each state continue to reside in state-run institutions. *Id.* at 8–9.

51. *See* Bagenstos, *supra* note 46, at 9 (noting that by 2003, the number of people in psychiatric facilities decreased to around 50,000 people and that the number of public psychiatric hospitals decreased from 310 in 1970 to 220 in 2000).

52. Letter from Preet Bharara, U.S. Attorney for the S. Dist. of N.Y. et al., to Hon. Bill de Blasio, Mayor of N.Y.C. et al. (Aug. 4, 2014) (on file with author) (describing the rampant abuse of adolescent inmates in Riker's Island jail and noting that one in two adolescent inmates has one or more diagnosed mental or psychosocial disabilities and that seventy-five percent of all adolescent inmates in punitive segregation have a known mental or psychosocial disability); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES* 3 (2006) (noting, nationally, that fifty-six percent of state prisoners, forty-five percent of federal prisoners, and sixty-four percent of local jail inmates have a known mental disability).

53. 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

begin to become involved in eccentric mannerisms, the rocking back and forth, peculiar behavior mechanisms, the people who sit in a semi-stupor in a place, without any activity, the people who slowly deteriorate and turn to the simple elements of human behavior. . . . I can assure you that this kind of behavior is due to neglect and is not an outcome of [intellectual disability] itself. . . . [W]e have ample documentation in this country that individuals who come to institutions and can . . . talk will stop talking, who come to institutions and can feed themselves will stop feeding themselves; in other words, in many other ways, *a steady process of deterioration*.<sup>54</sup>

State-sponsored denials of citizenship to people with disabilities based on presumptions of incapacity took other forms in addition to systematic segregation in institutions. Forced sterilizations, for example, in line with the predominant eugenics ideology in the first half of the twentieth century, denied people with disabilities their autonomous right to procreation.<sup>55</sup> Other examples include prohibitions or limitations on marriage,<sup>56</sup> custody,<sup>57</sup> adoption,<sup>58</sup> voting,<sup>59</sup> and jury service.<sup>60</sup>

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54. Stanley S. Herr, Rights and Advocacy for Retarded People 108 n.7 (1883) (fourth and fifth alterations in original) (emphasis added) (quoting Record at 24, Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)).

55. See, e.g., Buck v. Bell, 274 U.S. 200, 207 (1927) (arguing in defense of sanctioning the forced sterilization of people with intellectual disabilities that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough”); see also Emens, *Intimate Discrimination*, *supra* note 40, at 1390 (“[P]eople with disabilities have been treated as if outside the sexual realm altogether.”).

56. See, e.g., State v. Wyman, 173 A. 155, 156 (Conn. 1934) (explaining that the purpose of a statute prohibiting marriage to people with intellectual disabilities was to “check the increase of mental defectives and abnormal persons in the community which results by inheritance from defective parents”); Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 397–424 (1997) (cataloguing state statutes discussing the ability of people with mental disabilities to consent to sex and the statutes’ relationships to rape laws).

57. See, e.g., Ella Callow et al., *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J. C.L. & C.R. 9, 10 (2011) (“Children from families with parental disability are unnecessarily removed from the custody of their parents at alarming rates.”).

58. See, e.g., Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 550–51 (2014) (discussing an adoption challenge in California concerning the Equal Protection Clause).

59. See, e.g., Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV. 353, 357–59 (2003) (providing a



*C. Separate but Unequal*

Presumed by society as ineducable, students with disabilities have (and continue to) receive segregated education. States and school districts, by design, excluded children with disabilities from public education prior to the promulgation of the Education for All Handicapped Children Act of 1975.<sup>61</sup> Children with disabilities, both physical and mental, received little or qualitatively inferior education based on assumptions of incapacity that produced low expectations for their achievement.<sup>62</sup> As recently as 1965, for example, one year after the promulgation of the Civil Rights Act, North Carolina attached criminal penalties to aggressive parental challenges to state determinations that their children were ineducable.<sup>63</sup>

Today, the lack of financial support for public schools has produced de facto segregation of students with disabilities, often resulting in placement of these students in private (“nonpublic”)

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comprehensive discussion of key legal issues in and the history of voting rights of people with disabilities).

60. Early cases noted the categorical prohibitions against people with perceived or known mental and psychosocial disabilities serving on juries irrespective of their capacities. *See, e.g.,* *People v. Ross*, 24 P. 789, 789 (Cal. 1890) (“All the authorities admit that when any juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and whether the mental inability be produced by sickness, fatigue, or incurable prejudice, the result must be the same.” (internal quotation marks omitted)).

61. Pub. L. No. 9442, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482 (2012)). The Education for the Handicapped Act (EHA), which preceded the EAHCA in 1974, aimed to extend Title VI to the Elementary and Secondary Education Act of 1965. 20 U.S.C. § 1400(c)(2); *see also* *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (holding that the exclusion of children with disabilities from public school programs violated due process); *Pa. Ass’n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1258–59 (E.D. Pa. 1971) (concluding that the denial of educational services to children with intellectual disabilities violated the Equal Protection Clause of the Fourteenth Amendment).

62. *See, e.g.,* *Watson v. City of Cambridge*, 32 N.E. 864, 864–65 (Mass. 1893) (upholding the expulsion of a student who was “weak in mind” (internal quotation marks omitted)); *see also* H.R. REP. NO. 9432, at 11 (1975) (discussing the need for supportive, integrated education for children with disabilities); Jeffrey J. Zettel & Joseph Ballard, *The Education for All Handicapped Children Act of 1975 (P.L. 9442): Its History, Origins, and Concepts*, 12 in *SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS* 11, 12 (Joseph Ballard et al. eds., 1982) (examining state school systems’ policies prior to 1973, many of which “excluded children who were blind, deaf, ‘feebleminded,’ or seriously emotionally disturbed on the grounds that there were no educational programs to meet their needs”).

63. *See* 1965 N.C. Sess. Laws 641, 643–44 (amending N.C. GEN. STAT. § 11565 (1955), which, in 1961, was amended to substitute “director” for “superintendent”).

schools designed to serve students with disabilities exclusively.<sup>64</sup> School districts place students who are unable to achieve “some educational benefit”<sup>65</sup> despite education support or who require greater behavioral interventions into increasingly restrictive (or less integrated) settings.<sup>66</sup> They range from specialized classrooms within a school, to alternative education settings within the public school system, to private placements at the public’s expense. Integrated education requires sufficient resources (e.g., aides, sign language interpreters, and assistive technology) to make meaningful access a viable choice for students with disabilities.<sup>67</sup> This is not to say that the costs of integration (financial or otherwise) should surpass the costs of private education.<sup>68</sup> In fact, recent studies suggest that, when accounting for the costs of litigation, the costs associated with private, specialized education may exceed those associated with the support services and architectural and curricular adjustments necessary for integrated education.<sup>69</sup> While the Individuals with Disabilities

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64. See Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 821–23 (2006) (analyzing court decisions allowing public school districts to use cost as a factor in considering whether to provide integrated programs for students with disabilities).

65. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982) (“[T]he requirement [is] that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child.” (emphasis added)). This is not to suggest that parents or advocates should not pursue private placements for individual clients. Rather, I want to draw attention to the current tug of war (quite evident in the District of Columbia) between the need for large scale systemic reform to increase the capacity of public schools to provide integrated education where appropriate and the needs of individual students who are not receiving needed (and statutorily protected) special education services.

66. See *Diatta v. District of Columbia*, 319 F. Supp. 2d 57, 66–67 (D.D.C. 2004) (reviewing a case of an autistic child who had not received adequate educational opportunities in a public school district and holding that the school district was required to tailor appropriate education to fit the child’s needs). Schools are increasingly placing children into more restrictive settings. See, e.g., *T.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 254 (2d Cir. 2009) (per curiam) (concluding that an individualized education program satisfies substantive requirements when it produces “progress” not “regression”).

67. See *Rowley*, 458 U.S. at 200 (explaining that Congress implicitly requires disabled students to receive “some educational benefit” as part of their entitlement to a free public education).

68. See *Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991) (per curiam) (“Congress intended the states to balance the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions.”).

69. See, e.g., Samuel L. Odom et al., *The Costs of Inclusive and Traditional Special Education Preschool Services*, 14 J. SPECIAL EDUC. LEADERSHIP 33, 38 (2001) (reporting

Education Act (IDEA)<sup>70</sup> has successfully established a system of due process protections for students with disabilities, it has been less successful in its primary goal of eliminating barriers between general and special education, making inclusive education less than a reality.<sup>71</sup>

## II. THE AMERICANS WITH DISABILITIES ACT AND STIGMA

Popular narratives of the ADA reflect its success as the “greatest victory of the modern disability rights movement,”<sup>72</sup> an “emancipation proclamation” for people with disabilities,<sup>73</sup> and a “landmark” moment akin to the collapse of the Berlin Wall.<sup>74</sup> The ADA (at least rhetorically) challenged the dominant philosophy of fundamental differences that historically justified the exclusion of people with disabilities.<sup>75</sup> Yet there is broad consensus among

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on empirical data suggesting that the cost of instructional services in integrated educational settings is generally less than or comparable to the cost of specialized, private placement). For two interesting perspectives on the inclusion debate, see Colker, *supra* note 64, at 796 (challenging through empirical data the presumption of integrated education as violative of the Individuals with Disabilities Education Act (IDEA) for certain disabled children); Mark C. Weber, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. PENNUMBRA 174, 174–75 (2007) (arguing that the presumption of integration has continued utility as a standard and can be challenged accordingly).

70. See Pub. L. No. 101-476, 104 Stat. 1103 (1990). IDEA is the successor legislation to the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 88 Stat. 773.

71. See Lisa J. Walker, *Procedural Rights in the Wrong System: Special Education is Not Enough*, in *IMAGES OF THE DISABLED*, *supra* note 37, at 97, 108 (“[W]ithout adjusting the organization of services within schools, changing attitudes toward disability, altering the substantial state and local funding streams that make it difficult to treat disabled students as part of the mainstream, nor collapsing the categorical definitions that define the population as being different [special education laws] may have served to reinforce a hybrid structure—one with elaborate protections to assure the rights of disabled students, but carried out by a separate delivery system of special education services . . . outside the normal scope of school business.”).

72. Rogers M. Smith, *Foreword*, in *VOICES FROM THE EDGE: NARRATIVES ABOUT THE AMERICANS WITH DISABILITIES ACT*, v, viii (Ruth O’Brien ed., 2004).

73. 135 CONG. REC. 19,888 (1989) (statement of Sen. Kennedy); see also 136 CONG. REC. 17,369 (1990) (statement of Sen. Harkin).

74. President George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), available at [http://www.eeoc.gov/eeoc/history/35th/videos/ada\\_signing\\_text.html](http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html).

75. See, e.g., Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 398–99 (2001) (“No matter how court decisions chip away at its reach, and no matter how poorly federal agencies enforce its provisions, the [ADA] provides a tangible assertion that the federal government believes in the moral equality and worth of people with

scholars across disciplines that the ADA has not lived up to its initial hype.<sup>76</sup> Scholars nonetheless diverge with respect to the ADA's degree of success, empirical questions of causation and correlation, and the appropriate evaluative measures (e.g., an economic matrix,<sup>77</sup> economic plus matrix,<sup>78</sup> rights-consciousness matrix,<sup>79</sup> expressive law

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disabilities and believes that people can benefit from, and contribute to, the common life of the society.”); Burris, *supra* note 24, at 185 (describing the “[h]egemony” of stigma that can be challenged through expressive laws and shift the uncontested hegemony to an “ideology” that does not reflect normative views (internal quotation marks omitted)).

76. See, e.g., SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009) (offering a slightly different critique of the ADA by attributing the ADA's limited success to the plurality of the disability rights movement itself); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 99–100 (1999) (offering empirical data to support the practical effect of limited judicial interpretation, including that “defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level” (footnote omitted)); Linda Hamilton Krieger, *Introduction*, in *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 1, 5–11 (Linda Hamilton Krieger ed., 2003) (discussing the limited judicial interpretation of the protected class based on the ADA's facially vague gateway definitions); see also RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 480–94 (1992) (arguing that misperceptions of costs of accommodations as well as the costs of mandating accommodations rather than allowing for market-based cost-shifting has limited the success of Title I of the ADA); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 275 (2000) [hereinafter Jolls, *Accommodation Mandates*] (same).

77. See, e.g., Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 917 (2001) (suggesting that employment of people with disabilities declined in small and medium firms in part because of ADA exemptions); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RES. 693, 694, 711 (2000) (arguing that the employment of people with disabilities has declined since and because of the ADA); see also Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 923 (2003) (characterizing the ADA's success as “anything but radical” in this area).

78. See Jolls, *Accommodation Mandates*, *supra* note 76, at 275 (predicting that the relative post-ADA wages of disabled workers will increase or remain unchanged while the employment rate will continue to decrease). Jolls re-positions the economic analyses of accommodation mandates (Lawrence Summers's theory of mandates directed to workers) to account for the interaction with antidiscrimination laws, i.e., successful implementation and enforcement depends on the allocation of costs and liability between the employer and employee. *Id.* at 225 & n.2, 232.

79. The rights-consciousness matrix measures the extent to which people with disabilities see themselves and are perceived as rights holders. See, e.g., DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* 10 (2003) (arguing that study of life stories

matrix,<sup>80</sup> jurisprudential matrix,<sup>81</sup> and attitudinal matrix,<sup>82</sup> among others). These matrices intersect; for example, they all address greater public visibility and reduced stigmatization at some level. Varied frameworks offer distinct angles—each with a unique focal point—to assess the socio-economic impact of the ADA. Still, none of the available analytical lenses quite addresses the question of historical invisibility at sufficient depth to understand the role of the ADA in the perpetuation of existing or creation of new forms of invisibility or stigma.

#### A. *Intent and Design*

Despite the more radical articulation of the ADA's mission and goals espoused in public discourse, most accounts of Congress's legislative intent<sup>83</sup> for the ADA reflect a much more modest yet still celebratory goal at its outset: to extend the employment protections afforded people with disabilities under the 1973 Rehabilitation Act in private employment and fill in the gaps in protection from existing employment discrimination laws. For example, the ADA sought to extend section 504 protections to private employers and eliminate the requirement of disability as the "sole[]" basis of discrimination.<sup>84</sup>

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of people with disabilities over time reveals the ways in which rights, such as those under the ADA, become active or remain dormant).

80. Michael Ashley Stein, Book Review, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1155 (2004) (citations omitted) (reviewing ENGEL & MUNGER, *supra* note 79, through an expressive law analysis of the ADA as well as "examining the phenomena that exist beneath the empirical radar").

81. See, e.g., Colker, *supra* note 76, at 100 & n.9, 108 (reporting on empirical data showing that, under Title I of the ADA, defendants prevailed in ninety-three percent of cases at the federal district court level and in eighty-four percent of cases in which losing plaintiffs appealed their judgments); see also RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* 83–85 (2005) (noting that, as a relative matter, plaintiffs seeking relief under Title I of the ADA have fared worse than those under Title VII of the Civil Rights Act); cf. Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 306–07 (2008) (offering data from Equal Employment Opportunity Commission (EEOC) resolutions, settlement statistics, and etcetera to support employers' responsiveness to disability discrimination claims).

82. See Emens, *Framing Disability*, *supra* note 20, at 1410–34 (suggesting, with examples, three ways that framing could change attitudes toward disabilities).

83. Feldblum, *supra* note 25, at 126–28 (discussing the political and legislative history surrounding the drafting and passage of the ADA, including several versions of the ADA penned by advocates and congressional staff).

84. SUSAN STEFAN, *HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES: THE LAW AND PUBLIC POLICY* 23 (2002) (internal quotation marks omitted); see also 42 U.S.C. § 12111 (2012) (defining "covered

Legislative history and accounts by former legislative staff indicate that Congress adopted, almost verbatim, the definition of disability<sup>85</sup> from then-existing section 504 regulations.<sup>86</sup> The design of section 504 itself mirrors that of the antidiscrimination provisions in Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.<sup>87</sup> Robert Scotch explains that this progressive incorporation omitted a critical analysis or broad-based discussion about the appropriateness of applying existing antidiscrimination frameworks to disability.<sup>88</sup> This might explain some of the current challenges to implementation and evolution of social movements around a shared (and clearly defined) experience of discrimination on the basis of disability.

The ADA aspired to transform the daily lives of people with disabilities by increasing visibility in employment and public spaces. In fact, Congress explicitly documented the historic invisibility discussed in Part I (though not the law's contribution in rendering it so) as evidence of the need for the remedial provisions of the ADA.<sup>89</sup>

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entity" and "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day . . ." (internal quotation marks omitted)); § 12112(a) (limiting applicability of the ADA to "covered entit[ies]"). More broadly, the ADA only applies to individuals with statutorily defined "disabilities": "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." § 12102.

85. Section 504 of the Rehabilitation Act of 1973 used the term "handicapped." Pub. L. No. 9312, § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 701). In contrast, Congress chose to use "disability" when it enacted the ADA in 1990. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3, 104 Stat. 327, 329 (codified as amended at 42 U.S.C. § 12102). The provisions are nearly identical with the exception of the change in language. Section 504 has been amended to reflect the term "disability." *Id.*

86. In fact, Chai Feldblum, credited as among the legislative staffers responsible for versions of the ADA, notes that Robert Silverstein, at the time a staffer for Senator Tom Harkin, intentionally tracked the language of section 504's regulatory definition of disability with its tested track record instead of the former definition offered in an earlier draft penned by Robert Burgdorf, formerly with the National Council on the Handicapped. Feldblum, *supra* note 25, at 126-27; *see also* Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 248 (2008) (chronicling the experience).

87. Feldblum, *supra* note 25, at 98-99 (citations omitted).

88. *Id.*

89. Congress provided that

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; . . .

Congress sought to address the history of invisibility primarily by bringing people with disabilities into the employment sector in greater numbers.<sup>90</sup> Ideologically, this reflects shared cultural norms about employment as a primary locus of identity formation and agency enhancement.<sup>91</sup> More specifically, Congress sought to expand employment opportunities for people with disabilities who wished to work (and could do so) but were precluded from doing so because of misperceptions and social stigmas about their functional limitations.<sup>92</sup> Accordingly, Congress designed the ADA to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”<sup>93</sup>

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(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities . . .

42 U.S.C. § 12101(a)(2), (5).

90. Bagenstos, *supra* note 77, at 957–75 (noting congressional intent that the ADA would improve the employment status of people with disabilities); *see also* H.R. Rep. No. 10185, pt. 2, at 22–23 (1990) (adding that the ADA employment provisions incorporate the standards in the regulations promulgating section 504 of the Rehabilitation Act of 1973).

91. The ADA expressed Congress’s intent to change social norms of disability through employment, a purpose that is in line with our Western liberal focus on the connection of work to our identity. *See* Vicki Schultz, Essay, *Life’s Work*, 100 COLUM. L. REV. 1881, 1884 (2000) (“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.”).

92. *See* 42 U.S.C. § 12101(a)–(b)(1) (detailing some of Congress’s findings and purpose for the ADA).

93. *Id.* § 12101(a)(7). Specifically, the purpose of the Americans with Disabilities Act of 1990 was

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

*Id.* § 12101(b).

*B. Assessing the ADA's Record of Visibility and Integration*

The ADA sought to remedy the legacy of segregation experienced by people with disabilities primarily in two areas: public spaces and employment. However, while the ADA has generated greater integration of people with disabilities (and as a positive byproduct, greater social visibility) in some respects, it has not generated greater opportunities for people with disabilities to meaningfully interact with nondisabled people in public settings so as to challenge existing stigma.

Title II of the ADA, for example, requires that state and local governments provide an equal opportunity to people with disabilities to benefit from all state and local government programs and services such as public education, employment, and transportation.<sup>94</sup> Notably, plaintiffs have successfully used Title II to challenge prohibitions on marriage,<sup>95</sup> segregated community residential placements<sup>96</sup> through exclusionary zoning ordinances,<sup>97</sup> and denials of rights and responsibilities of citizenship, including jury service.<sup>98</sup> Furthermore, Title III of the ADA has produced greater visibility of people with disabilities in public spaces through its affirmative accessibility requirements in public accommodations such as public transportation and, more well-known, parking spaces, restrooms, and

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94. *Id.* § 12132 (“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

95. *E.g.*, *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993) (invalidating a state law that voided marriage by people with AIDS).

96. *E.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587, 607 (1999) (holding that Title II of the ADA requires states “to provide community-based treatment for persons with mental disabilities when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities”).

97. *E.g.*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 (1995) (concluding that the federal statute prohibiting discrimination in housing based on disability should be interpreted to allow a challenge to a city zoning provision that limited the number of unrelated occupants allowed in a dwelling because the provision failed to reasonably accommodate a group home for recovering addicts).

98. *E.g.*, *Galloway v. Superior Court*, 816 F. Supp. 12, 20 (D.D.C. 1993) (holding that the blanket exclusion of blind people from jury pool violates the ADA); *see also* Laura E. Walvoord, Comment, *A Critique of Torcasio v. Murray and the Use of the Clear Statement Rule to Interpret the Americans with Disabilities Act*, 80 MINN. L. REV. 1183, 1188 nn.26–30 (1996) (providing additional examples of plaintiffs’ successes in challenging policies geared towards marriage, social services, zoning, jury selection, and licensing under Title II).



architectural redesigns such as the addition of entrance ramps.<sup>99</sup> Yet the ADA's remedial structure in many ways creates "rights without remedies" with respect to public entities by denying plaintiffs monetary damages.<sup>100</sup> Weak enforcement of Title II and the lack of a threat of damages beyond cases of "intentional discrimination,"<sup>101</sup> coupled with Title III's sole remedy of injunctive relief,<sup>102</sup> continue to limit the ADA's deterrent value and promise of integration.<sup>103</sup> Title I of the ADA has been even less successful in increasing the visibility of disability in employment to the degree predicted.<sup>104</sup> Congress anticipated that increased contact and interaction among people with disabilities and the nondisabled would decrease prejudice, generate new social narratives, and, accordingly, reduce social stigma. However, this did not happen for at least three reasons, discussed below.

1. *The absence of new market entrants and implicit bias*

First, existing analyses of the impact of the ADA largely measure the degree of increased participation of people with disabilities in the formal economy, which, empirically, has shown little growth over

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99. Significant accessibility issues still exist in areas of transportation such as sidewalks and curb cuts, air travel, and taxi service. See, e.g., Plaintiffs' Original Complaint and Request for Preliminary and Permanent Injunctive Relief at 4–5, *Ramos v. Uber Techs., Inc.*, No. 14CV00502 (W.D. Tex. June 2, 2014) (alleging Title III violations against Uber and Lyft for failing to accommodate people with mobility impairments).

100. See Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 626 (1985) (critiquing the notion of a "right without a remedy" as counter to "ordinary usage and in traditional rights discourse" because rights are "functional," not "metaphysical").

101. Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1824 (2005).

102. See, e.g., Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 381 (2000) (explaining that under ADA Title III, private parties are only entitled to injunctive relief); Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 833 (2005) (analyzing the ineffectiveness of the Title III injunctive relief remedy).

103. See Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 315 (2009) (reviewing the backlash effect that employers and the public have expressed towards the ADA).

104. The design of employment protections as a means to greater integration turns on a well-established social psychology and behavioral economics reliance on contact theory. See, e.g., GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 41–42, 44, 46 (1954) (suggesting that increased contact between in-group and out-group members can improve attitudes of in-group members towards those in the out-group).

time and at the moment is in decline.<sup>105</sup> Labor market participation rates for people with disabilities ages sixteen and older steadily declined over the last four years, from 22.4% in 2009 (compared to a nondisabled rate of 70.9%), to 20.3% in 2013 (compared to a nondisabled rate of 68.9%).<sup>106</sup> The unemployment rate for people with disabilities continues to rise and is significantly higher than that of nondisabled persons.<sup>107</sup> Understandably, there are other variables at work, such as increased life expectancy<sup>108</sup> and severity of the disability. Disaggregation of the data, however, paints an even bleaker picture. By excluding the population with disabilities over age sixty-five, the unemployment rate for the working age population with disabilities<sup>109</sup> *doubles* compared to those without a disability.<sup>110</sup>

While it is difficult to sufficiently isolate the host of variables necessary to establish causation, the ADA's legislative design offers some insight into why the ADA has not affirmatively produced a greater number of new market entrants. According to Christine Jolls, the ADA's cost distribution of compliance with the ADA's "accommodation[s] mandate," for example, produced a net disincentive for employers to increase the number of employees with

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105. See, e.g., THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE 4–5, 9 (David C. Stapleton & Richard V. Burkhauser eds., 2003) (showing an overall decline in employment rates for disabled persons in the 1990s when employment rates for those without disabilities were increasing); Acemoglu & Angrist, *supra* note 77, at 929–32 (concluding that the ADA resulted in the decline of employment rates for workers with disabilities and an increase in litigation because many employers concluded that it was less expensive to litigate than to comply with ADA regulations); DeLeire, *supra* note 77, at 705–08 (providing empirical data that showed the ADA did not improve wages for disabled men and led to a decline in employment rates for disabled workers in manual labor and managerial occupations); Stein, *supra* note 80, at 1154 (“[F]rom a purely quantitative perspective, empirical analysis indicates that the ADA is not fulfilling its promise of empowering workers with disabilities.”).

106. These statistics were downloaded from the U.S. Department of Labor (DOL) website and are on file with the author.

107. See Jeffrey Sparshott, *People with Disabilities Face 13.4% Unemployment Rate*, WALL ST. J. (June 12, 2013, 3:38 PM), available at <http://blogs.wsj.com/economics/2013/06/12/people-with-disabilities-face-13-4-unemployment-rate> (“About 8 in 10 persons with disabilities weren’t in the labor force in 2012, compared with about 3 in 10 persons with no disability . . .”).

108. *Id.* (showing that people with disabilities over the age of 65 may be retirees who are seeking to reenter the market).

109. *Id.*; see BRAULT, *supra* note 6, at 10 & n.22 (measuring employment among those ages twenty-one through sixty-four).

110. See Sparshott, *supra* note 107 (confirming that 14.6% of those of working age who have disabilities are unemployed, compared to 7.9% of those without disabilities).

disabilities.<sup>111</sup> Jolls posits that an employer's inability to shift the costs of accommodations (or perceived costs) to the employee through such methods as decreased wages because of antidiscrimination laws, combined with the low probability of enforcement of ADA prohibitions on hiring discrimination, had two notable effects on the market. First, she suggests that it offered greater protections and benefits for existing employees (those already in the job market) and, second, little incentives for employers to affirmatively seek applicants with disabilities as part of broader diversity efforts.<sup>112</sup> Furthermore, actual or perceived costs associated with accommodations may interact with existing explicit or implicit biases<sup>113</sup> about diminished capacity or productivity of an applicant with a disability to remove the candidate from consideration at an initial résumé review stage.<sup>114</sup>

The ADA does not capture the operation of implicit (or explicit) bias at the early stages of the hiring process. The employer may be unaware of the implicit biases guiding her often split-second decisions and, even if self-aware, her failure to interview produces evidentiary challenges (failure to interview is not the same as failure to hire). Commencement of litigation requires a plaintiff who interprets the failure to receive an interview or an offer as discrimination rather than a personal issue of credentials or qualifications. Also, this potential plaintiff would have to come forward with the necessary resources to adjudicate her rights under the ADA. Empirical data, however, shows a striking imbalance between cases brought under the ADA for failure to accommodate or improper termination compared to failure to hire.<sup>115</sup> Thus, the ADA

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111. Jolls, *Accommodation Mandates*, *supra* note 76, at 274–76; *cf.* Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1674–77 (2000) (arguing that most requested accommodations are inexpensive).

112. *See id.*, *Accommodation Mandates*, *supra* note 76, at 275 (explaining that the difficulty in proving discrimination at the hiring stage may account for fewer cases initiated by potential plaintiffs under Title I).

113. Implicit bias manifests in discriminatory behavior. Perhaps most important for legal scholars are the findings that what people ordinarily may associate with “controllable behaviors” may actually be prone to implicit biases primarily under three conditions: (1) “inattentiveness to task”; (2) “time pressure or other cognitive [over]load”; and (3) “ambiguity,” or the existence of multiple biased and non-biased explanations. Marianne Bertrand et al., *New Approaches to Discrimination: Implicit Discrimination*, 95 AM. ECON. REV. 94, 95 (2005).

114. *See id.* at 94–95 (reviewing the potential for implicit discrimination against job applicants based on the information provided in résumés).

115. *See Jolls, Accommodation Mandates*, *supra* note 76, at 275 (examining the challenges faced by workers with disabilities in proving discrimination in an employer's hiring practices).

likely increased protections for existing employees but has not generated litigation and other disincentives against hiring discrimination to usher in new entrants to the job market. Irrespective of the lack of consensus about causation or correlation of the ADA to the market as an empirical matter,<sup>116</sup> the number of people with disabilities in the workforce did not increase—and, in fact, may have declined—counter to the goals of the ADA.<sup>117</sup> Also, the ADA, by design, did not reach collateral requirements for market participation, such as improved opportunities for a quality education or vocational training or access to health care and affordable housing, that make it possible for people with disabilities to compete on an equal footing with nondisabled persons.

2. *The face of disability in the workplace*

*Second*, the focus on existing employees limits the visibility of diverse disabilities in the workplace, and as some suggest, may generate additional animus towards people with known or visible disabilities. The ADA's definition of disability, although amended in 2008 to account for several flaws,<sup>118</sup> limited protection to those with "qualified" disabilities under a three-part functional limitations test. Protection under the ADA extended to an individual with functional limitations (disabled enough) and, yet, who was still able to perform the essential functions of a position.<sup>119</sup> As a result, disability in the workplace looks more like diabetes than quadriplegia. This limited exposure to diverse disabilities leads to two consequences with respect to narratives of disability: it does little to diversify and challenge stigma attached to historically less visible disabilities such as

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116. See Samuel R. Bagenstos, Review Essay, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities? The Decline in Employment of People with Disabilities: A Policy Puzzle*, 25 BERKELEY J. EMP. & LAB. L. 527, 537 n.63 (2004) (citing the ratio of discharge to hiring cases as ten to one, which is substantially higher than for Title VII cases).

117. Scholars have a more optimistic view that the early information and implementation costs of compliance—in particular, the costs of accommodations—may decrease over time. This trend, combined with greater improvements in education for young people with disabilities and ADA Title II and Title III enforcement, may produce a long-term gain. *Id.* at 558–63.

118. See ADA Amendments Act of 2008, Pub. L. No. 11025, §§ 2(a)(3), 2(b)(3)–(4), 4(a), 122 Stat. 3553–55 (codified at 42 U.S.C. §§ 12101–12102 (2012)) (overturning *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and its companion cases).

119. Compare *id.* (providing coverage without consideration of mitigating measures such as eyeglasses), with Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3, 104 Stat. 327, 329–30 (providing coverage without mitigation).

intellectual, developmental, mental, or psychosocial disabilities, and the narratives of disability generated may reflect greater resentment among nondisabled coworkers.

In the context of intellectual, developmental, mental, and psychosocial disabilities, for example, the ADA has more bark than bite. The expressive value of defining “disability” as “physical *or* mental impairment”<sup>120</sup> cannot be overstated.<sup>121</sup> Congress explicitly proclaimed that “[t]he underlying premise of [T]itle [I of the ADA] is that persons with [mental and physical] disabilities should not be excluded from job opportunities unless they are actually unable to do the job.”<sup>122</sup> Yet the ubiquity of disability stigma attached to “mental impairment”—defined as “[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities”<sup>123</sup>—continues to undermine the power of this proclamation. One empirical study determined that the primary barrier to workplace success for people with mental or psychosocial disabilities is the employer’s maintenance of the stigma of incapacity.<sup>124</sup> Individuals with intellectual, developmental, mental, or psychosocial disabilities are “twice stigmatized” and subject to categorical labels as “unpredictable, dangerous, irrational, slow, stupid, and unreliable,”<sup>125</sup> perhaps the antithesis of an “ideal” worker. These stereotypes guide an employer’s use of and reliance on affirmative defenses built into the ADA such as her ability to exclude employees or potential employees if they pose a safety risk—“direct threat”<sup>126</sup>—to others in

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120. 42 U.S.C. § 12102(1) (emphasis added) (internal quotation marks omitted).

121. H.R. REP. NO. 10185, pt. 3, at 31 (1990). Former Executive Director of the Bazelon Center for Mental Health Law, Leonard S. Rubinstein, described the ADA as carrying “a lot of freight for people with psychiatric disabilities, seeking nothing less than to transform a world that is not quite ready for it.” Teresa L. Scheid, *Stigma as a Barrier to Employment: Mental Disability and the Americans with Disabilities Act*, 28 INT’L J.L. & PSYCHIATRY 670, 671 (2005) (internal quotation marks omitted).

122. H.R. REP. NO. 10185, at 31.

123. 28 C.F.R. § 35.104 (2014); *see also* Americans with Disabilities Act of 1990 § 3(2) (including “mental impairment[s] that substantially limit[] one or more . . . major life activities” within the definition of “disability”).

124. Scheid, *supra* note 121, at 672–74.

125. *Id.* at 673.

126. Americans with Disabilities Act of 1990 § 101 (internal quotation marks omitted).

the workplace or to deny a request for an accommodation as “[un]reasonable”<sup>127</sup> and burdensome in the mental disability context.

Similarly, indiscriminate views about capacity, competence, and productivity affect judicial interpretations of the ADA.<sup>128</sup> For example, one court held that a person with a mental disability was “unqualified” for a job because his behavior (speaking “too loudly”) did not conform to social norms of his workplace, a grocery store.<sup>129</sup> “Judges cannot understand that an individual can be simultaneously employed and have a major psychiatric diagnosis because few employed people with major psychiatric diagnoses have ever felt safe letting the world know who they are.”<sup>130</sup>

In addition, nondisabled people may perceive accommodations as a form of affirmative action or subsidies in the workplace and resent people with actual or perceived disabilities for what seems like an imposition of greater responsibilities (and workloads) on them. Consider, for example, your friend John in the office down the hall (who, like you, has worked for the company for fifteen years). John tells you one day over lunch that human resources approved his request for flextime, with fewer hours, based on his disability. You respond that you did not know he was disabled, to which John, who wants to downplay his psychosocial disability because of the associated stigma, replies, “I’m not really, just sometimes.” In your experience, John does not fit the description or image of a person with a disability, so you process his accommodation as unnecessary, undeserved, and exploitative of the system.<sup>131</sup> These views strain not

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127. See 42 U.S.C. §§ 12111–12112 (2012) (defining “reasonable[ness]” of accommodation and whether it imposes “undue hardship” on the employer (internal quotation marks omitted)).

128. See SUSAN STEFAN, *HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES* 5 (2002) (“Paradoxically, as social science research and individual accounts teach us more about the nature of discrimination against people with psychiatric disabilities, the law is being developed and interpreted in a way that is contrary to those teachings—a way that ultimately provides little or no protection against discrimination.”).

129. *Taylor v. Food World, Inc.*, 946 F. Supp. 937, 942 (N.D. Ala. 1996), *rev’d*, 133 F.3d 1419 (11th Cir. 1998).

130. STEFAN, *supra* note 128, at xiv. See generally ELYN R. SAKS, *THE CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS* (2007) (chronicling Professor Saks’s struggles to balance schizophrenia with her career and personal ambitions).

131. The media exacerbates the perception of people exploiting ADA protections like it does in the context of social security benefits, reinforcing a fear of “gaming” and “undeserving” people who extort the system for personal gain. See, e.g., Nate Rott, *Under Calif. Law with Teeth, Big-Time Lawsuits Hit Small Businesses*, NAT’L PUB. RADIO (Apr. 23, 2014, 4:01 PM), <http://www.npr.org/2014/04/23/306238454/>

only your personal but also your work relationship with John. Other forms of documented backlash to the ADA include that of judges who interpreted the ADA during its first eighteen years in a more restrictive manner than Congress intended—a reflection, according to some legal scholars, of attitudes about disability and the capacity of people with disabilities (particularly those with mental disabilities).<sup>132</sup>

3. *Disability as private medical information versus a celebrated component of identity*

Third, the ADA advances conflicting theories of disability. Although congressional findings rhetorically challenged the medical model of disability as generative of disability itself, other ADA provisions have undercut this important conceptual move. Antidiscrimination law focuses on preventing and policing discriminatory behavior, which may require, when possible, the suppression and nondisclosure of potentially stigmatizing information. However, this tactic of suppression and nondisclosure of information conflicts with an antistigma agenda that depends on the production and dissemination of information as the means to shift social norms. While professing the need for a social model<sup>133</sup> of disability, the ADA

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under-calif-law-with-teeth-big-time-lawsuits-hit-small-businesses (“Some California lawyers and litigants have created a cottage industry around the Americans with Disabilities Act. Some plaintiffs file hundreds of complaints a year, collecting a living off small businesses that aren’t compliant with the ADA. Small business advocates and community leaders say they focus on minority businesses because they make for easier targets.”).

132. See, e.g., Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 22 (2000) (discussing “judicial backlash” against the ADA prior to the ADA amendments in 2008).

133. See, e.g., MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 11 (1990) (suggesting a social theory of disability must follow from “the experience of disabled people themselves and their attempts . . . to construct a political movement amongst themselves”); MICHAEL OLIVER, *UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE* 30–31 (1996) (explaining the “social model” and contrasting it with the historical construction of the “medical model” of disability); Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 426–36 (2000) (noting that most disability rights activists have embraced “the “social-relations approach” to difference, which “treats human differences as constructed by, and residing in, social relationships” (internal quotation marks omitted)); Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3, 8–9 (1988) (describing a “common” assumption that disability is solely a function of biology as leading to disability’s acceptance uncritically “as an independent variable”); Harlan Hahn, *Civil Rights for Disabled Americans: The Foundations of a Political Agenda*, in *IMAGES OF THE DISABLED*, *supra* note 37, at 181, 183–84 (developing a case for the “sociopolitical

also reinforces the association of disability with medical information in need of protection from disclosure. For example, the ADA prohibits an employer from inquiring about a person's disability with few exceptions<sup>134</sup> at the interview stage, the offer stage, or while employed.<sup>135</sup> Consider Valerie, an employee with epilepsy, who works at a company as a data analyst. At no point during her ten-year tenure with the company did she reveal her disability to human resources or anyone else for fear of stigma. There were, over the years, a few times that Valerie took one to two weeks off to respond to periods of crisis but she always labeled these "vacation days." Lately, the number of seizures she has experienced has increased and may be affecting her job performance (she took several days off and cannot enter data as quickly because of the side effects of a new medication). She receives a memo to all employees about the opportunities for accommodations and the process of requesting them. Valerie notices that she must only reveal her disability and provide proof (a doctor's letter and medical records) to a designated human resources coordinator. The fact that her disability is generally invisible means that, assuming human resources complies with the privacy requirements under the ADA and the federal Health Insurance Portability and Accountability Act (HIPAA), none of her coworkers will ever know she identifies as a person with a disability. Furthermore, the memo indicates that "privacy is of the utmost importance to protect potentially embarrassing medical information" from public consumption. This may, in fact, be a good thing given the backlash discussed earlier. However, privacy can also perpetuate

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understanding of disability" and demonstrating the advantages of this approach); *see also* PAUL K. LONGMORE, *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 10 (2003) (collecting essays as part of a search for a "usable past" for the disability rights movement); *cf.* Tom Shakespeare & Nicholas Watson, *The Social Model of Disability: An Outdated Ideology?*, 2 *RES. SOC. SCI. & DISABILITY* 9, 18 (2002) (critiquing the social model of disability as being too subjective and not functionally useful).

134. Functional inquiries during the pre-offer stage are permissible if related to the essential functions of a position—e.g., for a position at a warehouse that would require heavy lifting, asking a job applicant if she has any limitations on her ability to lift is allowed. *See* 42 § U.S.C. 12112(d)(2)(B) (2012).

135. Furthermore, the "reasonableness" of a particular request for workplace accommodations under Title I turns on the degree to which the person with a disability can adapt to existing workplace designs and not whether the workplace designs can adjust expectations and designs to respond to differences. *Id.* § 12112(b)(5)(A) (utilizing an "undue hardship" test). As such, the ADA actually advances an individual deficit model here as opposed to its professed adherence to a social model of disability.



the notion of disability as disease—something that must be hidden for fear of shame and stigma.<sup>136</sup> As a practical matter, privacy requires Valerie to assimilate and adjust to existing norms and, without disclosure, encourages her to “cover” her disability rather than redesign existing norms to allow for and encourage her broader disclosure.<sup>137</sup>

### C. *The ADA’s Achilles Heel: Stigma*

Congress designed the ADA to remedy the history of invisibility, achieving significant expressive victories. Yet stigma is the ADA’s greatest vulnerability. Is this a function of the ADA’s limited reach or, more broadly, an inability of law to reach social stigma? Perhaps it is a function of both. Social science reveals that stigma is unlikely to decrease “naturally” without structured, well-designed interventions, suggesting a role for legal rules and procedures. Social science explanations for stigma can deepen our understanding of the role of law in stigma’s formation and potential deconstruction.

#### 1. *Social science explanations*

Stigma arises during a social interaction when an individual’s actual social identity—the attributes he or she actually possesses—conflicts with society’s normative expectations<sup>138</sup> of the attributes the individual should possess—referred to as his or her “virtual social

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136. See, e.g., Burris, *supra* note 24, at 183 (“[L]egal measures that protect people from the enactment of stigma are often designed to facilitate concealment, or have the effect of facilitating concealment and accommodation rather than supporting and promoting resistance. Privacy is good, but it is also the source of chronic hidden distress at the individual level and maintenance of shame and stigma socially.”).

137. Here, disabilities in the workplace (less visible ones) resemble the trajectory of sexual orientation. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 819 (2002) (framing covering as a form of discrimination and “coming out” as resistance (internal quotation marks omitted)).

138. Attitudes towards disability range from overt hatred (particularly of people with mental or psychosocial disabilities) to paternalism. This normative spectrum has room for many more affective responses in between; perhaps the most notable is ambivalence, a discomfort and distaste for disability offset by a deep sense of guilt. Harlan Hahn has argued that social ambivalence is perhaps most clearly exemplified by the ways in which people describe the historical segregation of people with disabilities: inaccessible public accommodations are “architectural barriers rather than instruments of segregation”; students with disabilities are “mainstream[ed] rather than integrat[ed] or desegregat[ed]”; and releasing disabled persons from restrictive confinement is “deinstitutionalization” or “independent living.” Harlan Hahn, *Civil Rights for Disabled Americans: The Foundation of a Political Agenda*, in IMAGES OF THE DISABLED, *supra* note 37, at 181, 195 (internal quotation marks omitted).

identity.”<sup>139</sup> The individual in possession of the stigmatized attribute, known in social psychology as the “target” of stigma, is socially, physically, and morally either “discredited” (if the mark is visible, such as facial disfigurement) or “discreditable” (if the mark is less visible, such as a psychosocial disability) on the basis of that disfavored attribute.<sup>140</sup> The stigmatizer (or “perceiver” in social psychology) equates the presence of the mark with the target’s inability to fulfill the “role requirements of social interaction.”<sup>141</sup> The target’s social identity becomes “spoiled” in the eyes of the perceiver. Consequently, the perceiver discounts the target’s identity as a person and relegates him to a different social status (“us” versus “them,” or “in group” versus “out group”). Stigma, in turn, can manifest implicitly as unconscious heuristics that shape everyday decisions or, in the extreme, explicitly as overt discrimination. Thus, its danger lies in its ability to discretely integrate into social structures and, over time, to inconspicuously morph into accepted normative positions.<sup>142</sup> Stigma is not only about affirmative exclusion but also about unabashed neglect or failure to consider people with disabilities in the design of public institutions. The final (but perhaps most critical) element in the process of stigmatization is the existence of power inequities between the perceiver and the target, without which stigma loses its functionality (i.e., social control).<sup>143</sup> This carries particular salience in the disability context, where people with

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139. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 2 (1963). Erving Goffman, a renowned sociologist, constructed the best-known (and perhaps most widely cited) theory of stigma in 1963. Stigma, according to Goffman, is the “relationship between [an] attribute and stereotype [about others possessing that attribute]” that is deeply “discrediting” and reduces a person in the minds of others “from a whole and usual person to a tainted, discounted one.” *Id.* at 2–4.

140. *Id.* at 4. Stigma takes shape at both the personal and public levels based on the interaction of several variables that inform the social exchange between the target and perceiver in the public arena. Three central variables in the context of disability are visibility, threat, and responsibility. The interaction of these factors determines both the target’s and the perceiver’s level of awareness of the mark, its relevance, and the extent to which the perceiver will treat the target as deviant on the basis of the mark. *Id.*

141. Robert Kurzban & Mark R. Leary, *Evolutionary Origins of Stigmatization: The Functions of Social Exclusion*, 127 *PSYCHOL. BULL.* 187, 187 (2001).

142. Scott Burris, *Stigma and the Law*, 367 *LANCET* 529, 530 (2006) (“Structural discrimination and self-stigmatisation are extremely powerful forces, not covered by law.”).

143. Bruce G. Link & Jo C. Phelan, *On Stigma and Its Public Health Implications*, NAT’L INSTS. HEALTH, <http://www.stigmaconference.nih.gov/FinalLinkPaper.html> (last visited Mar. 30, 2015).

disabilities are among the most disenfranchised, poor, and highly disaggregated sociopolitical groups.

I focus here on two models of stigma advanced by social scientists: individual stigma (self-stigma) and public stigma.<sup>144</sup> The public model, discussed above, includes cognitive identification and labeling of human differences (e.g., “that man is talking to himself and pacing; he might be mentally ill”); the connection of marked individuals to socially undesirable characteristics rooted in shared cultural stereotypes of an “in group” (e.g., “he is unstable and perhaps dangerous”); and eventual categorization and separation of the labeled person into an “out group,” resulting in loss of social status, exclusion, and discrimination (e.g., “I need to cross the street to avoid him”).<sup>145</sup>

At the individual level, stigmatization begins with self-identification of differences relative to culturally accepted norms, such as beauty, intelligence, or functioning. Medical diagnoses can also trigger the stigmatization process for the individual who now has a socially recognized label for a discredited difference. The individual then (consciously or unconsciously) accepts or rejects the stigma attached to the attribute.<sup>146</sup> “[B]oth perceived- and self-stigma result in losses of self-esteem and self-efficacy,” thus limiting life opportunities (employment, relationships, health care, and treatment) and

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144. Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 366–67 (2001).

145. *Id.* at 367 (“Thus, we apply the term stigma when elements of labeling, stereotyping, separation, status loss, and discrimination co-occur in a power situation that allows the components of stigma to unfold.”). Recent empirical studies based on Implicit Association Tests of disability suggest certain correlations among negative implicit biases about disability and an individual’s beliefs about the controllability of her future, sensitivity to the concept of disease, and degree of contact with individuals with disabilities. In the context of physical disabilities, people who reported prior experiences of integrated education exhibited relatively less implicit bias than those with less notable prior contact with people with disabilities, those with less fate control manifested heightened existential fears about physical disabilities when exposed to a mark of physical disability (such as a wheelchair or facial disfigurement), and, overall, people expressed clear preferences for nondisabled people. Michelle Clare Wilson & Katrina Scior, *Attitudes Towards Individuals with Disabilities as Measured by the Implicit Association Test: A Literature Review*, 35 RES. DEVELOPMENTAL DISABILITIES 294, 314–15 (2014) (citations omitted).

146. See, e.g., Jennifer Crocker & Brenda Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 PSYCHOL. REV. 608, 610 (1989) (discussing “reflected appraisals” in the development of self-concept (internal quotation marks omitted)); Brenda Major & Laurie T. O’Brien, *The Social Psychology of Stigma*, 56 ANN. REV. PSYCHOL. 393, 396 (2005) (discussing expectancy confirmation processes, or “self-fulfilling prophecies”).

opportunities for recovery.<sup>147</sup> The target faces the possibility of discrimination or exclusion in any social interaction and uncertainty about whether the outcomes of social interactions reflect “personal deservingness or . . . social prejudices” (known as “attributional ambiguity”).<sup>148</sup> Acceptance of stigmas based on less visible marks can lead to social concealment of disability, self-exclusion, self-discrimination, and social avoidance to protect one’s ability to “pass” or “cover” disability.<sup>149</sup> Targets can use disclosure, on the other hand, as a form of stigma resistance. Empirically (and, to some, counter-intuitively), social science reveals the significant health, economic, and social benefits of disclosure, as compared to the concealment of a stigmatized identity.<sup>150</sup>

## 2. *The relationship between law and stigma*

The ability of the ADA, post-2008 amendments, to serve as a prophylaxis or remedy for stigma that manifests in overt violence or discrimination remains an open question, the answer to which will take shape in emerging jurisprudence. Historically, disability laws have largely constructed or perpetuated the stigma of disability.<sup>151</sup> Socio-economic distance, as a practical matter, has prevented people with disabilities from challenging social stigmas through integrated contact, the accumulation of wealth, and standing as a major political interest group. In addition, the expressive value of the laws of invisibility placed state stamps of legitimacy (and legality) on concealment, separation, and social distance as acceptable (and justifiable) social responses to disability. William Eskridge, in the context of sexual orientation, argues that the law itself—through constructing legal definitions of what it means to be gay—helped to create and perpetuate

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147. Patrick W. Corrigan et al., *The Stigma of Mental Illness: Explanatory Models and Methods for Change*, 11 APPLIED & PREVENTIVE PSYCHOL. 179, 180 (2005).

148. Brenda Major et al., *Antecedents and Consequences of Attributions to Discrimination: Theoretical and Empirical Advances*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 251, 258 (2002).

149. Burris, *supra* note 24, at 181.

150. See, e.g., Patrick Corrigan & Alicia K. Matthews, *Stigma and Disclosure: Implications for Coming Out of the Closet*, 12 J. MENTAL HEALTH 235, 235 (2003) (discussing how members of the general public’s contact with people with mental illness correlates with their diminished prejudicial attitudes and discriminating behaviors).

151. See Burris, *supra* note 142, at 530 (noting the law’s role in constructing stigma in the HIV/AIDS context through prohibitions on service in the armed forces and, in the context of epilepsy, through prohibitions on obtaining a driver’s license). Burris also discusses (and questions) the intentional use of “good stigma” in public health to regulate and deter poor health decisions, such as smoking in public places. *Id.*

stigmas of homosexuality precisely through atomistic reduction of gays to a singular social identity—that of sexual orientation.<sup>152</sup> Arguably, the act of constructing a legal definition of disability may itself perpetuate the salience of the mark even where, as in the ADA, such categorization intends to remedy discrimination. The expressive value of the category signifies that the mark, at least in some contexts, remains salient, useful, and legitimate, undercutting efforts to produce normative change.<sup>153</sup>

The target of disability stigma can also internalize social norms expressed in laws as legitimate statements of public perceptions and social valuation. Harm to identity and self-esteem are hardly benign when they can shape one's interpretation of interactions as self-failures or discriminatory acts and one's willingness, in the case of discrimination, to seek remedies. It is in this space where rights consciousness meets the development and evolution of legal claims and legal narratives to advance those claims.<sup>154</sup>

Broad consensus exists among scholars of antidiscrimination law (primarily in the race and sex arenas) that existing legal frameworks are ill-suited to redress implicit bias and stigma that operate largely outside of the consciousness,<sup>155</sup> as opposed to conduct and

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152. See Eskridge, *supra* note 24, at 1334–35 (analogizing the law's role in stigmatizing race with the role of the “law's stigma [in helping] create homosexuality as a totalizing and naturalized identity trait”).

153. See Burris, *supra* note 24, at 183 (explaining how “legal measures that protect people from the enactment of stigma” often “have the effect of facilitating concealment and accommodation rather than supporting and promoting resistance”). For example, social welfare legislation has historically played that role by defining disability in terms of medical diagnoses or functional limitations while categorically excluding those without such legal classifications from receiving assistance. See 42 U.S.C. § 423(d)(1) (2012) (“[D]isability’ means—(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . .”).

154. See Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 251 (discussing the initial interview with a lawyer or advocate as an example of a key moment in narrative evolution where the client, in the disability context, must claim the label of disability).

155. See generally Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 22 (2006) (suggesting that although some courts have scrutinized whether an employer's subjective employment practices contain “sufficient procedural safeguards to limit the possibility of bias,” the judicial system for the most part has reluctantly scrutinized workplace structures that impede equality); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 753 (2001) (discussing not only disparate

intentional acts of discrimination that produced the Civil Rights Act and cases such as *Washington v. Davis*.<sup>156</sup> Implicit bias manifests in unconscious behavior, an unsettling proposition for proponents of the law as a means to regulate and promote rational (i.e., conscious) behavior.<sup>157</sup> Although scholars agree that the remedy does not fit the

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treatment and disparate impact, but also other forms of bias that have not been theorized in law and are often unintentional and unconscious); Christine Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, in 3 NYU SELECTED ESSAYS ON LABOR AND EMPLOYMENT LAW: BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION 69, 86 (Mitu Gulati & Michael J. Yelnosky eds., 2007) (describing the gap between advances in social science in the area of implicit bias and antidiscrimination law's lack of response as a "highly dangerous" combination); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161 (1995) (disputing the argument under existing models that biased employment decisions result from discrimination and suggesting instead that they arise from "judgment errors"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("[T]he Court thinks of facially neutral actions as either intentionally and unconstitutionally or unintentionally and constitutionally discriminatory . . . . [T]his is a false dichotomy."); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 803 (2004) (arguing that racial stigma, rather than intentional discrimination as suggested by Fourteenth Amendment jurisprudence, causes racial injury in the U.S.); Ann C. McGinley, *Viva la Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 415 (2000) (suggesting that the legal community should focus on more than the "intent" to discriminate in assessing whether someone has violated an employment discrimination law); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1139 (1997) (positing that courts now use the "discriminatory purpose" doctrine outlined in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), to "justify a decision to uphold facially neutral state action that has a disparate impact on protected classes"); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) ("Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality.").

156. 426 U.S. 229, 239 (1976) (holding that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is [not] unconstitutional solely because it has a racially disproportionate impact").

157. See, e.g., Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1551 (1998) (supporting rational choice economics, which is broadly defined as choosing "the means that achieves . . . the greatest margin of benefit over cost"); see also Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1956 (2009) (questioning empirical data that purports to upset the law's deterrent effect); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 1004-05 (2008) (challenging the importance of implicit bias theories because of their use of, and reliance on, weak causal connections to explain discriminatory behavior). But see Samuel R. Bagenstos, *Implicit Bias, "Science," and*

harm, they disagree as to the appropriate legal interventions.<sup>158</sup> Despite their concerns, scholars recognize the continued utility of antidiscrimination laws in addressing conscious, overt acts of discrimination but not social stigma directly.<sup>159</sup>

### III. OPEN PROCEEDINGS AS ANTISTIGMA AGENTS

Procedural design offers agency-enhancing possibilities to bring disability out of the shadows. Adjudication mirrors and gives meaning to our public values<sup>160</sup> and rights through a facilitated, contextualized conversation with litigants and the public about both localized and national cultural norms.<sup>161</sup> Transparency,<sup>162</sup>

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*Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479–80 (2007) (defending the utility of the implicit bias theory in antidiscrimination law despite its causal limitations expressed by naysayers).

158. Antidiscrimination scholarship diverges with respect to proposed solutions. See Lawrence, *supra* note 155, at 324–25 (advancing a “cultural meaning” test of an alleged discriminatory act by which judges can determine whether implicit biases are at work and thereby apply strict scrutiny (internal quotation marks omitted)). However, scholars commonly focus on either substantive reforms of antidiscrimination laws or particular methods of (or frameworks for) judicial interpretation in equal protection and/or antidiscrimination statutes. The particular points of divergence are beyond the scope of this Article. I argue here that antidiscrimination scholars have not focused on the normative potential of procedure to remedy implicit biases and stigma. My theory of antistigma agency complements these existing proposals.

159. Cf. EPSTEIN, *supra* note 76, at 493 (noting that like other discrimination laws, the employment “antidiscrimination rules are highly beneficial to some members of the protected class, but not to all”).

160. See Owen M. Fiss, *The Supreme Court, 1978 Term: Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (“Adjudication is the social process by which judges give meaning to our public values.”).

161. Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 306 (1996) (discussing the value of early court-based procedure to “enacting rights” (internal quotation marks omitted)).

162. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring) (“Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one’s private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.”).

“accuracy,”<sup>163</sup> accountability, publicity,<sup>164</sup> effectuation,<sup>165</sup> finality, economy, democratic, and legal institutional legitimacy<sup>166</sup> sit atop the list of values of procedure. For example, Tom Tyler’s empirical work reveals the importance of procedural fairness in dispute resolution and in assessments of democratic legitimacy.<sup>167</sup> Tyler’s research suggests that disputants focus on at least three underlying values of procedure in shaping their perceptions of fairness: the opportunity to participate, treatment with dignity, and litigants’ trust in the adjudicator.<sup>168</sup>

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163. See, e.g., E. Allan Lind & Tom R. Tyler, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 130–32 (1988) (discussing Leventhal’s theory of procedural justice’s “six general procedural justice rules”: consistency, bias suppression, accuracy of information, correctability, representativeness, and ethicality); see also Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS FOR THERAPEUTIC JURISPRUDENCE* 3, 7 (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter Tyler, *Psychological Consequences*] (“[P]eople are affected by the way in which decisions are made, irrespective of what those decisions are.”).

164. See, e.g., JEREMY BENTHAM, *THE COLLECTED WORKS OF JEREMY BENTHAM: FIRST PRINCIPLES PREPARATORY TO CONSTITUTIONAL CODE* 56 (Philip Schofield ed., 1989) (explaining that publicizing a tribunal’s decision and underlying rationale are a counterforce to official power); see also 6 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 355 (John Bowring ed., 1843) (“Without publicity, all other checks are insufficient: in comparison with publicity, all other checks are of small account.”).

165. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part I*, 1973 *DUKE L.J.* 1153, 1173 (“Effectuation values see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs.”).

166. See JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* 289 (2011) (“Because the public processes of adjudication undermined status hierarchies . . . adjudication served as one paradigm for responsible, popularly responsive, and hence democratic governance.”).

167. See, e.g., Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 *ANN. REV. PSYCHOL.* 375, 376 (2006) (discussing “legitimacy—the belief that authorities, institutions, and social arrangements are appropriate, proper, and just”); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *LAW & SOC’Y REV.* 103, 115 (1988) (expanding the focus of procedural fairness tests to include, in addition to formal trials, citizen contact with police and other nondisputes); see also JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 67–68 (1975) (noting that both disputants and members of the public sitting in a gallery are often concerned with the fairness of the processes as much as the outcomes themselves); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 758 (1984) (advocating for the use of a “problem-solving” model of negotiation over the traditional adversarial model).

168. Tyler, *Psychological Consequences*, *supra* note 162, at 7.



While federal and state court jurisprudence tend to focus more on utilitarian values,<sup>169</sup> procedural justice scholars routinely assert—in addition to and not as a replacement for—underlying values of individual dignity and voice, autonomy, participation,<sup>170</sup> and the cathartic interests<sup>171</sup> of disputants. Most pertinent to this discussion, autonomy—the vesting of decision making authority in individual disputants—is a distinct value from opportunities for persuasion, memorialized by the Supreme Court in *Goldberg v. Kelly*<sup>172</sup> as an “opportunity to be heard.”<sup>173</sup> In this respect, due process values extend beyond the individual to the public more broadly.<sup>174</sup>

#### A. *A Primer on Open Proceedings*

Twenty-five years later, therefore, institutional designers may benefit from a different interpretive and evaluative lens, one specifically designed to address a central but unfulfilled goal of the

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169. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (privileging efficacy values, i.e., risk of an erroneous result, over others in the balance of interests). *But see* *Goldberg v. Kelly*, 397 U.S. 254, 264–66 (1970) (discussing the potential psychological harms to welfare recipients’ dignity and self-esteem as a result of a failure to provide a pre-deprivation hearing); cf. Tyler, *Psychological Consequences*, *supra* note 162, at 3 (noting that literature evaluating the adequacy of judicial hearings and procedures “typically focuses on issues such as bias, honesty, and expertise,” which are “regarded as important because they are believed to influence the ability of a procedure to reach an objectively correct outcome”).

170. See Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–50 (1976) (“State coercion must be legitimized, not only by acceptable substantive policies, but also by political processes that respond to a democratic morality’s demand for participation in decisions affecting individual and group interests.”).

171. See Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL., PUB. POLY, & L. 184, 185 (1997) (“Therapeutic jurisprudence proposes the exploration of ways in which, consistent with principles of justice . . . , the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law.”).

172. 397 U.S. 254 (1970).

173. *Id.* at 267 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

174. Bankruptcy proceedings demonstrate the use of open proceedings as an affirmative tool for combating stigmatization. Public examination had been regarded as one of the most important aspects of the bankruptcy process because it was intended to serve public policy by permitting the public to gather as much information as possible about the debtor and his affairs. See, e.g., *Sexton v. Dreyfus*, 219 U.S. 339, 344–46 (1911) (tracing the roots of American bankruptcy law to English law in 1869); see also *In re Astri Inv., Mgmt. & Sec. Corp.*, 88 B.R. 730, 737 (D. Md. 1988) (describing the American importation of the procedural tradition of openness to allow creditors to publicly examine debtors).

ADA: *antistigma agency*, or the law's ability to support the agency and dignity of people with disabilities. Public adjudication is a well-established element of procedural design that is historically understood to promote the underlying values of individual autonomy and public accountability. Arguments advancing open access to adjudication most focused on the work of political philosopher Jeremy Bentham emphasize the "publicity" values of open access—that is, public education about the judicial process and government functionality.<sup>175</sup> Bentham identified disability as an area where blanket public access may not advance underlying procedural values; however, he applied an indiscriminate categorical exclusion of disability from our normative tradition of openness without due consideration.

This Article contends that a more nuanced evaluation of disability proceedings may yield significant gains for advancing agency by opening the discursive space, in some cases, to the creation and dissemination of information about disability. Most scholars use Bentham's highly utilitarian values of open proceedings as a point of reference for analysis. Judith Resnik, for example, argues that even if Bentham overstates the educative value of proceedings, public adjudication can be norm generative. Over time, and through interactions among adjudicators, disputants, and the public, "the polity develops, learns about, and changes the norms that govern disputes."<sup>176</sup>

Federal and state jurisprudence, more generally, supports presumptive open proceedings on the basis of the long and tested history<sup>177</sup> of public access to adjudication rooted in English common law<sup>178</sup> and, implicitly, in constitutional law.<sup>179</sup> The Supreme Court of

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175. See *supra* note 164 (discussing the works of Jeremy Bentham); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 597 (1980) (Brennan, J., concurring) ("Popular attendance at trials, in sum, substantially furthers the particular public purposes of that critical judicial proceeding. In that sense, public access is an indispensable element of the trial process itself." (footnote omitted)).

176. Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 417 (1987).

177. *But see id.* at 410–11 (questioning the Supreme Court's untested empirical claim that history proves the existence of open courts).

178. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 526–27 (2012) ("The main features of the Anglo-American civil trial developed in the practice of the English common law courts . . . as a consequence of the jury system . . ." (footnote omitted)).

179. The Supreme Court has explicitly determined that the public and press hold First and Fourteenth Amendment rights of access to criminal proceedings (including grand jury and evidentiary hearings) in furtherance of the public accountability, transparency, cathartic, and education goals. See, e.g., *Richmond Newspapers, Inc.*, 448 U.S. at 591 (Brennan, J., concurring) ("This Court too has persistently defended the

the United States has not directly addressed the question of the public's constitutional right of access to civil proceedings.<sup>180</sup> The strong presumption of openness requires a showing that “closure is essential to preserve *higher values* and is narrowly tailored to serve that interest.”<sup>181</sup> Such higher values tend to focus on the privacy interests of the parties—for example, national security, disability, divorce, child protection, and trade secrets. While such a presumption does not exist in the administrative arena, the more “trial-like” an agency proceeding, the more willing courts are to hold that a right of public access exists.<sup>182</sup>

The question here is not whether the public has a right (constitutional or otherwise) to attend any or all disability proceedings; in fact, given the association between disability and privacy and the history of disability adjudication as presumptively closed, it is unlikely that courts doctrinally would find the “logic” or “experience” necessary to grant public access without greater disability consciousness of the type advanced in this Article.<sup>183</sup>

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public character of the trial process.”). English law did not distinguish between criminal and civil trials; instead, “all causes [were] heard . . . openly in the kings courts.” 1 EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 103 (1797).

180. *See, e.g.*, *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 351 n.13, 358–59 (Cal. 1999) (noting that the U.S. Supreme Court has held that the public has a First Amendment right of access in criminal proceedings, but the Court has suggested that the right is not only limited to criminal proceedings and has not reviewed any lower court cases that do find a right of access to civil proceedings).

181. *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984) (emphasis added).

182. *See, e.g.*, *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 518 (3d Cir. 2013) (extending the First Amendment right of public access to adjudication to arbitration proceedings “conducted before active judges in a courthouse, because they result in a binding order of the Chancery Court, and because they allow only a limited right of appeal”), *cert. denied*, 134 S. Ct. 1551 (2014); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 290 (2d Cir. 2011) (extending the First Amendment right of public access to adjudication to state administrative proceedings because “access . . . does not depend on which branch of government houses that proceeding”).

183. *See, e.g.*, *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8–9 (1986) (establishing a two part “experience and logic” analysis to determine the public's right of access: (1) “experience,” whether “the place and process have historically been open to the press and general public,” and (2) logic, whether “public access plays a significant positive role in the functioning of the particular process in question”); *see also* Resnik, *Privatization of Process*, *supra* note 1, at 1816 (“Because [the experience and logic] test is contingent rather than rights-based, ‘experience’ can change the ‘logic’ of what needs to be open. As the Federal Rules

Rather, I undertake a broader conceptual project here: that of constructing and advancing antistigma agency as an unexplored, transcontextual value of open proceedings. This Article posits that institutional designers *should* consider the value of antistigma agency in the disability context—particularly, open proceedings as antistigma agents—not that open proceedings in the disability context *are* constitutionally required per se or should be open without qualification.

### B. *Theory of Antistigma Agency*

I propose new interpretive and prescriptive considerations—what I call “antistigma agents”—to focus institutional designers on the advancement of agency, autonomy, and dignity values. An *antistigma agent* is a process, rule, standard, or procedure that creates an opportunity for normative transformation of stigma by structuring the public performance of marked social identities.<sup>184</sup> The process or instrument can mitigate stigma by offering the structures to facilitate a demonstration, dissemination, or communication of the dignity and agency of a person or group in possession of a stigmatized mark. Antistigma agency implicates process autonomy for both the target and perceiver. That is, having control of the process of dispute resolution (or being perceived as such) both enables and reflects agency and capacity.<sup>185</sup> Much of the social science literature on prejudice and discrimination focuses on the perceiver as the actor

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and ADR reshape ‘experiences,’ they alter the ‘logic’ of what courts are about and when openness is therefore protected.”).

184. Because my focus here is on marks of disability, I do not consider the intersectionality of marked identities—e.g., a black female with a psychosocial disorder—that complicates the processes of identity performance as well as management/mitigation of the marks. For discussions regarding the challenges of intersectionality to identity politics in critical race theory, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (dissecting black women’s experiences in employment “to contrast the multidimensionality of [b]lack women’s experience with the single-axis analysis that distorts these experiences”); Addrain S. Conyers, *Manifold Deviants: Labeling and Identity Management Among Persons Possessing Multiple Spoiled Identities* (June 29, 2007) (unpublished Ph.D. dissertation, Southern Illinois University Carbondale) (focusing on individuals’ multiple “spoiled entities” to expand the current research, which is often limited to one spoiled entity).

185. Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in *SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH* 27, 43, 45 (Kenneth J. Gergen et al. eds., 1980) (distinguishing between process and decisional control).

and the target as a passive recipient. An antistigma agency analysis, in contrast, positions the target at the center of the inquiry as well as the remedial focal point. The person with a disability accomplishes this by participating in a process that increases the salience of the stigmatized mark but changes its valence, if not more broadly, at least to the individual. The net effect potentially mitigates self-stigma and can generate information about disability in a public setting.

Prescriptively, institutional and legislative designers seeking to advance underlying values of agency and dignity may consider, for example, (1) the expressed goals of the process or adjudicative proceeding and how the goals of the process or procedure relate to the agency and/or dignity of the person in possession of a stigmatized mark; (2) other underlying values driving or potentially driving the goals that exist for the designers, the public, and the disputants; (3) the substantive laws and legal elements governing outcomes that may advance or suppress the agency and dignity of the person with a stigmatized mark; (4) the social identities of the legal actors that may be in possession of known or expected<sup>186</sup> stigmatized marks; (5) the public's interests in the process or proceeding; (6) the extent to which existing procedures have the potential to enhance or reduce agency and dignity of the person with a stigmatized social identity; and (7) the weight and balance of procedural goals at stake to institutional designers and their considerations and possibilities. This analysis can be incorporated into any due process design, but the weight given to agency and autonomy may vary depending on the answers to the previously listed considerations. For those matters where the potential antistigma agency is high (i.e., when the substantive law explicitly addresses the stigmatized mark) procedural designers may choose to advance autonomy and dignity over other competing interests such as, perhaps, process efficacy or costs.

Antistigma agency operates through procedural participation and the creation of diverse narratives of disability. Stigma turns on shared cultural knowledge and information about differences. Procedures offer structured opportunities to solve the collective information problem that perpetuates the negative stereotypes that underlie stigma. For example, under an attitudinal theory of expressive law,

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186. For example, people of color who possess what Goffman calls "tribal stigma" are disproportionately affected by social welfare laws, and, thus, any process related to their substantive entitlements will likely disproportionately implicate and affect them. See GOFFMAN, *supra* note 139, at 4–5 (describing three types of expected stigmas, including tribal stigmas of race, nation, and religion).

people are motivated by societal approval either for its own sake or for another purpose.<sup>187</sup> But individuals have imperfect information about social norms and often carry and share misinformation.<sup>188</sup> According to Richard McAdams, because people innately seek social approval, “individuals are . . . sensitive to new sources of information.”<sup>189</sup> Procedural rules can shape the creation and quality of information about people with disabilities. The process generates or facilitates the production of disconfirming evidence about the mark.<sup>190</sup> The fundamental belief driving the formation and persistence of social stigma is that the stigmatized mark makes the person in possession less than human. These opportunities to enhance agency can also produce alternative narratives about the dignity and autonomy of people with disabilities.

The use and effectiveness of open proceedings to mitigate disability stigma requires attention to context. I argue here that blanket presumptions of closure as well as de facto practices of closure mask the gradations of agency and competency of people more broadly and apply, more specifically, to people with disabilities precisely because of the historic invisibility of disability. A presumption of openness in disability adjudication, from a design perspective, can be a default position aligned with broader

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187. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340–41 (2000).

188. *Id.* at 340.

189. *Id.* McAdams advances a third component of attitudinal theory where he suggests that laws provide information to people about societal expectations and can cause people to update prior views based on the absence of data or misinformation. *Id.* Under this theory, the ADA’s expressive law effect may continue to unfold. *See, e.g.*, Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1154–55, 1191 (2004) (reviewing DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003)).

190. *See* Eva Jonas et al., *Confirmation Bias in Sequential Information Search After Preliminary Decisions: An Expansion of Dissonance Theoretical Research on Selective Exposure to Information*, 80 J. PERSONALITY & SOC. PSYCHOL. 557, 557 (2001) (referring to “confirmation bias” as information and processes that lead a person to search for information to confirm rather than to challenge his or her existing beliefs). Social scientists have identified a number of variables in managing confirmation biases and cognitive dissonance, including the sequence of presenting the information, the stated focus of the information inquiry, and/or the sharing process. *Id.* at 569–70. For example, focusing decision makers on the source and persuasiveness of the information rather than on the ultimate question can mitigate confirmation biases. *Id.* at 570.

adjudicative norms (at least historically). With this as a starting point, the degree of openness can potentially exist on a continuum.

*C. Contextualizing Public Access to Disability Adjudication*

I situate my thesis in the current debate regarding the values of open proceedings and the “new private process”—that is, the increasing reliance on alternative public and private dispute resolution mechanisms.<sup>191</sup> I recognize this discussion about open proceedings comes at a critical moment regarding the future of public adjudication and may seem to push against the evolving norm in this area. It is precisely because we are moving at increasing speed towards less public and less structured forms of adjudication that I wish to stop and consider the effects of this movement in particular on people with disabilities and the evolution of a public disability consciousness. This shift from court-based, adversarial<sup>192</sup> adjudication in public spaces to less formal, private dispute resolution has never existed in the disability law context. From its onset, disability adjudication has occurred in presumptively or effectively private spaces,<sup>193</sup> cloaked in a protective cape by the state and marked as an “exception” to the well-established norm of public adjudication. This choice of design, combined with a history of invisibility, created a void in public consciousness about disability more generally but also about the appropriate procedural values to guide disability adjudication. Without greater public participation in disability adjudication and opportunities to observe the administration of justice, there is a normative baseline for public debate to drive substantive or procedural reforms.

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191. See Resnik, *Privatization of Process*, *supra* note 1, at 1802–14 (detailing the historical development towards the various forms of alternative dispute resolution that constitute the “[n]ew [p]rivate [p]rocess”).

192. Courts have discussed the difference between an “adversarial” proceeding and, by exclusion, a non-adversarial one. See, e.g., *Pardo v. Gen. Hosp. Corp.*, No. 98174, 2001 Mass. Super. LEXIS 377, at \*13–14 (Mass. Super. Ct. July 30, 2001) (noting that evaluating procedural elements associated with non-adversarial proceedings such as “the closed nature of the proceeding, its focus on education and improvement as opposed to punishment, and the insistence on confidentiality” may suggest whether the proceeding is adversarial), *aff'd*, 841 N.E.2d 692 (Mass. 2006).

193. Exceptions include cases brought under the Rehabilitation Act, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act, all of which typically take place in open court.

*D. Civil Proceedings in State Courts*

Guardianship and civil commitment present two of the strongest cases for consideration of antistigma agency, as they directly implicate the liberty and dignity interests of the respondents. Although these proceedings tend to focus on people with intellectual, developmental, mental, or psychosocial disabilities (particularly in civil commitment), guardianship proceedings touch people with a broad range of disabilities, including epilepsy, dementia, mobility impairments, blindness, and deafness. States have selected primarily more traditional adjudicatory fora to hear arguments regarding these grave liberty deprivations—state courts before state court judges. Adjudicative proceedings in state courts have a significant presumption of openness to overcome, particularly given the public's interest in the treatment of its citizens when questions of agency arise. However, with few exceptions, privacy considerations have *de jure* or *de facto* subsumed the public's interests in accessing these proceedings and the respondents' interests in visibility and autonomy.<sup>194</sup>

*1. Adult guardianship*

Approximately twenty percent of states have statutorily closed adult guardianship proceedings.<sup>195</sup> These proceedings take place in otherwise publicly accessible state courthouses among presumptively

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194. The Supreme Court of the United States has not directly addressed the question of the public's constitutional right of access to civil proceedings, but having a First Amendment right to access in civil proceedings may be implied. *See, e.g., NBC Subsidiary (KNBC-TV), Inc., v. Superior Court*, 980 P.2d 337, 351 n.13, 358–59 (Cal. 1999) (noting that the Supreme Court of the United States has held that the public has a First Amendment right of access in criminal proceedings, but the Court has suggested that the right is not limited to criminal proceedings and has not reviewed any lower court cases that do find a right of access to civil proceedings). The strong presumption of openness requires a showing that “closure is essential to preserve *higher values* and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984) (emphasis added). Such higher values tend to focus on the privacy interests of the parties—for example, national security, disability, divorce, child protection, and trade secrets.

195. A majority of states appear to presumptively close minor guardianship proceedings. I conducted a fifty state review of guardianship states (authority over the adult as opposed to conservatorship or minor guardianship proceedings). A clear presumption of closure exists in the following states: Wisconsin, Alaska, West Virginia, New Mexico, Washington, New Hampshire, and Alabama. *See generally* JASMINE E. HARRIS, STATE-BY-STATE GUARDIANSHIP HEARING INFORMATION (2014) (on file with author).



open proceedings.<sup>196</sup> For example, Wisconsin presumptively closes guardianship proceedings, yet the public has a presumptive right to access both the records and hearings regarding a contested will irrespective of the personal and perhaps even salacious details about historically protected persons.<sup>197</sup>

Although a slight majority of states have a textual presumption of open guardianship proceedings,<sup>198</sup> a disaggregated analysis highlights the existence of additional procedures, rules, or practices that de facto undermine the public's access and the respondents' autonomy. For example, while some states rest the decision to grant public access with the respondent, there are no procedures or rules structuring the type and extent of information provided, method of delivery (e.g., written or oral), or support offered to the respondent in making this decision to open or close a proceeding.<sup>199</sup> Other qualifiers extend the decision to the respondent's counsel or guardian ad litem based on a "best interests" standard.<sup>200</sup> By placing the decision in the hands of the respondent, absent meaningful opportunities to exercise that decision, as a practical matter, the decision to open the proceeding may become a question of convenience for counsel or one of legal strategy rather than a central value of institutional design and due process. Other state statutes do not specify closure but place the decision in the hands of the judge

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196. See, e.g., UNIF. PROBATE CODE § 3-405 (amended 2010) ("If a petition in a testacy proceeding is unopposed, the court may . . . conduct a *hearing in open court* and require proof of the matters necessary to support the order sought." (emphasis added)). Almost half of all states have adopted the Uniform Probate Code or language substantially similar to it. *UPC Enactment Chart*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Shared/Docs/Probate%20Code/UPC%20Chart.pdf> (last visited Mar. 30, 2015).

197. Compare WIS. STAT. ANN. § 54.44(5) (West 2014) ("Every hearing under this chapter shall be closed . . ."), with *In re Estates of Zimmer*, 442 N.W.2d 578, 581–85 (Wis. Ct. App. 1989) (holding that Wisconsin gives the public the right to access records of any court of law, including probate courts, even if the underlying information concerns a minor).

198. Approximately twenty-eight states either do not specify an open or closed proceeding, but their statutes can be read to set a presumption of openness as the default in the absence of contrary language.

199. See, e.g., ALASKA STAT. § 13.26.113(a) (2012) ("[R]espondent has the right to . . . have the hearing open or closed to the public as the respondent elects . . ."); MO. REV. STAT. § 475.075(8) (2006) ("[R]espondent shall have . . . [t]he right to have the hearing opened or closed to the public as he elects . . .").

200. See N.H. REV. STAT. ANN. § 464-A:8(VII) (2004) ("The issue as to whether a guardian should be appointed . . . shall be determined by the court at a closed hearing unless the proposed ward or counsel for the proposed ward otherwise requests.").

acting *sua sponte* in the “best interests” of the respondent or in the respondent’s (or counsel’s) hands.<sup>201</sup> A number of states with presumptively open proceedings do not provide information to the respondent to make an informed decision on whether to open or close a hearing.<sup>202</sup>

In fact, most guardianship hearings proceed uncontested, with the majority of guardians appointed without the respondent present.<sup>203</sup> Consider the case of Jerry Chenoweth in Colorado.<sup>204</sup> Chenoweth, a person with psychosocial disabilities and HIV, expressed his wish to leave his current residence in a nursing home for a more independent setting. Staff at the home recognized Chenoweth’s capacity to live in a less restrictive setting and the absence of any impairment to competent decision making, but his doctors, who had very little contact with him, disagreed and refused to authorize his release. Chenoweth ultimately left the nursing home against medical advice. Adult Protective Services (APS) petitioned for guardianship over Mr. Chenoweth. APS described him as a danger to himself and others, evidence of which was his departure from the nursing home against medical advice. Although guardianship proceedings are statutorily open in Colorado, and hence, could potentially offer counter-narratives of disability, the judge granted APS’s petition

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201. Kansas, although providing for a trial, places procedural designs completely within the hands of the judge without enumerated guidance. See KAN. STAT. ANN. § 59067(d) (2005) (“The trial shall be conducted in as informal a manner as may be consistent with orderly procedure.”).

202. As a practical matter, a petitioner files for guardianship with the court, and most jurisdictions have some form of notice requirements to the respondent, but nothing in the petitions or notice provides information to the respondents or counsel of the rights to open or close proceedings or information that could help the person make an informed decision. See RICHARD VAN DUIZEND & BRENDA K. UEKERT, NAT’L COLL. OF PROBATE JUDGES, NATIONAL PROBATE COURT STANDARDS 3.3.1C–D, 3.37 (2013) (listing the standard requirements for a petition and notice of guardianship proceedings).

203. See Daniel A. Krauss & Bruce D. Sales, *Guardianship and the Elderly*, in HANDBOOK OF NEUROPSYCHOLOGY AND AGING 528, 530–31 (Paul David Nussbaum ed., 1997) (listing various issues with traditional guardianship adjudications that caused most guardianship hearings to be uncontested). There is an open empirical question regarding the perception of lawyers representing respondents regarding any ethical duty to counsel their clients about this right and whether lawyers perceive this as an affirmative due process protection or a benefit.

204. See Laura Hershey, *Adult Protective Services vs. Jerry Chenoweth*, RAGGED EDGE ONLINE, <http://www.raggededgemagazine.com/0701/0701feat1.htm> (last updated Aug. 2001) (discussing the ability of Victor Montoya, an adult protective services worker, to obtain a court order that granted him and the county emergency temporary guardianship of Chenoweth despite the lack of input from Chenoweth).

without Mr. Chenoweth present.<sup>205</sup> A procedural rule requiring the respondent's presence absent emergent circumstances may have produced a different result if the judge had an opportunity to see and hear Mr. Chenoweth in person.<sup>206</sup>

Although substantial differences exist among states with respect to the specific design of due process procedures and protections afforded respondents in guardianship proceedings, several common procedural elements exist across jurisdictions—namely, the requirements of (1) the filing of a formal petition seeking guardianship; (2) notice to the respondent of petition and hearing; (3) the appointment, recommendation for, or availability of counsel for respondent;<sup>207</sup> (4) a court-appointed independent guardian ad litem and medical evaluator to assess the individual's capacity and make recommendations to the court; (5) a hearing and opportunity to present testimony; (6) the right to cross-examine adverse witnesses; (7) findings of fact and conclusions of law by the judge resulting in appointment of a plenary or limited guardian or dismissal of the case; and (8) the right to appeal.<sup>208</sup>

The history of guardianship offers a window into the choices of its institutional designers. Guardianship proceedings are the modern day remnants of the English legal tradition *parens patriae*—i.e., the king or the state acting as the parent of the country and fiduciary of the property of its citizens who were *non compos mentis* (not of sound mind/incompetent).<sup>209</sup> English common law and its American

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205. See Hershey, *supra* note 204 (examining court documents, including statements by officials that stated that Chenoweth was “being ill-advised by an advocacy group,” and then concluding that Chenoweth “should remain in the supervised, structured setting he is currently in until an appropriate care plan can be implemented” (internal quotation marks omitted)).

206. Interestingly, the Chenoweth case unfolded less than two years after the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). The Court in *Olmstead* considered whether Georgia's refusal to offer services to people with mental disabilities in community settings (as opposed to institutions such as hospitals) violated the ADA's integration mandate. The Court held that “[u]njustified isolation . . . is properly regarded as discrimination based on disability.” *Id.* at 597.

207. See, e.g., Anne K. Pecora, *The Constitutional Right to Court-Appointed Adversary Counsel for Defendants in Guardianship Proceedings*, 43 ARK. L. REV. 345, 347–48, 361 (1990) (arguing that due process should accord the appointment of counsel in every guardianship proceeding).

208. LAUREN BARRITT LISI ET AL., CENTER FOR SOCIAL GERONTOLOGY, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDINGS AND RECOMMENDATIONS 648 (1994).

209. Sallyanne Payton, *The Concept of the Person in the Parens Patriae Jurisdiction over Previously Competent Persons*, 17 J. MED. & PHIL. 605, 625–26 (1992) (recounting the

counterpart<sup>210</sup> distinguished between the competency and capacity of persons referred to as “idiots” (those with intellectual or developmental disabilities) and “lunatics” (those with mental or psychosocial disabilities). The distinction focused the determination of capacity on the onset and nature of the medical diagnoses. Medical experts distinguished between intellectual and developmental disabilities as congenital and permanent and mental and psychosocial disabilities as diseases with intermittent periods of lucidity.<sup>211</sup> These medically-based, categorical definitions of capacity became different standards of proof for constitutional deprivations of liberty (i.e., commitment standards).<sup>212</sup>

Early guardianship procedures were largely informational and ministerial except in the case of wealthier respondents who could both pay for a more formal process and, in the eyes of the law,

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feudal structure and the sovereign powers of *parens patrie* over proclaimed lunatics and mad individuals).

210. After the American Revolution, state legislatures stepped into the role of *parens patriae* on behalf of vulnerable populations. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1208 (1974); see *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890) (“This prerogative of *parens patriae* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the Legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.”).

211. 1 WILLIAM BLACKSTONE, COMMENTARIES \*302, \*304; see *Heller v. Doe*, 509 U.S. 312, 326–28 (1993) (noting that English common law distinguished between “idiots” and “lunatics” (internal quotation marks omitted)).

212. One example of how the presumptions of incapacity for people with intellectual or developmental disabilities and the limited capacity of people with mental or psychosocial disabilities has continued in American jurisprudence is the difference between the civil commitment standard for people with intellectual disabilities and the civil commitment standard for people with mental or psychosocial disabilities—clear and convincing and beyond a reasonable doubt, respectively. See *Heller*, 509 U.S. at 314–15, 322 (examining different standards of review based on the belief that there is a greater risk of error in diagnosing mental disability than intellectual disability). The Supreme Court has upheld such distinctions based on a medical model of disability that purports to determine intellectual functioning based on precise intelligence quotient assessments whereas no such “objective” standard exists for people with mental or psychosocial disabilities requiring a higher evidentiary standard for the denial of liberties. *But see Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (expressing agreement with medical experts that there is an existence of a range, or standard error of measurement, in determining intellectual disability).

warranted additional formality and protections because of the property at stake. Accordingly, these early proceedings developed out of the conservatorship side of probate, directly related to the allocation of property rights and protections. The King and, later, the state, viewed guardianship over the person as a private matter best addressed by the incapacitated person's "committee" or designated family and friends.<sup>213</sup> The Lord Chancellor's determination of incapacity ("*non compos*") triggered *parens patriae* authority of the state.<sup>214</sup> The issuance of a writ *de lunatico inquirendo*—granting the state conservatorship over his property and friends and family guardianship over the person—or a writ *de idiota inquirendo*—appointing family or friends as guardians over the person and his property—followed a jury's fact determination of "idiocy" or "lunacy."<sup>215</sup> The jury made its determination, however, based solely on their subjective experiences with the respondents and without instruction from the Lord Chancellor or the common law.

Guardianship proceedings developed in the United States in line with the Lord Chancellor's concern for management of the property of a person believed to be legally incompetent; the family had jurisdiction over anyone without a property interest.<sup>216</sup> Very early on, states recognized that the collateral consequences of an adjudicated label of "incompetence," such as the loss of liberty and property, warranted adequate due process protections. But states offered few guidelines with respect to the degree and nature of due process requirements. For example, by the turn of the twentieth century in Maryland, courts recognized that to deprive a person of such fundamental liberties without a jury trial "under the general principles of American law, without notice, or opportunity to be heard, was shocking to one's sense of justice and unity. No such general rule of procedure can be recognized by the American

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213. 1 BLACKSTONE, *supra* note 211, at \*305.

214. *Id.*

215. *Id.* at \*303–05.

216. See Joan L. O'Sullivan & Diane E. Hoffmann, *The Guardianship Puzzle: Whatever Happened to Due Process?*, 7 MD. J. CONTEMP. LEGAL ISSUES 11, 16 (1996) ("Those who lacked both family and wealth, and who were too old or sick to work, were left to wander the countryside begging for their sustenance, for the state had little apparent interest in providing for their persons.").

courts.”<sup>217</sup> Yet such proclamations did not produce formal rules or jurisprudential standards until the mid-twentieth century.<sup>218</sup>

Most states had a formal statute in place by the 1950s with procedural guidelines for the appointment of a conservator of the property of an “incapacitated person” (defined as a person of advanced age or a person with an intellectual limitation unable to care for his property). State or surrogate jurisdiction over the person, what we now know as “guardianship,” however, applied to minors but not to people with disabilities, who were still understood to be wards of their families.<sup>219</sup> A state court judge most often adjudicated these proceedings. Thereafter, a majority of states merged the statutory definitions and processes for people with intellectual and mental disabilities and shifted resources to account for plenary guardianship over people regardless of the property interest.<sup>220</sup> The introduction of the Uniform Probate Code in 1969 also paved the way for more formal procedural protections and guidelines.<sup>221</sup> The deinstitutionalization of people with disabilities in the 1970s and 1980s (promoted in part by media exposure of rampant abuse and neglect) also created opportunities for society to think more critically about conceptions of agency, dignity, and competence of people with disabilities.<sup>222</sup>

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217. *Id.* at 17 (quoting Supreme Council of Royal Arcanum v. Nicholson, 65 A. 320, 322 (Md. 1906)).

218. See A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-first Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 34–35, 37–38, 46, 60 (1997) (detailing the various changes in law through the promulgation of the Uniform Probate Code (UPC) in 1969, where Article V discusses guardianship for minors and adults; the enactment of California’s three guardianship laws in the 1970s; the production of the Uniform Guardianship and Protective Proceedings Act (UGPPA) in 1982; and the production of the 1993 National Probate Court Standards on Guardianship and Conservatorship).

219. See, e.g., O’Sullivan & Hoffmann, *supra* note 216, at 19.

220. Johns, *supra* note 218, at 35.

221. The National Conference of Commissioners on Uniform and State Laws and the American Bar Association introduced the UPC in 1969 and revised it in 1990. 15 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 85.13[c] (Michael Allan Wolf ed., 2014).

222. See Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System Part II: Many Elderly Never Get Their Day in Court*, ASSOCIATED PRESS (Sept. 20, 1987, 11:50 PM), <http://www.apnewsarchive.com/1987/Guardians-of-the-Elderly-An-Ailing-System-Part-II-Many-Elderly-Never-Get-Their-Day-In-Court/id-8ea94c1c992fd97e7eea7fe72a924f73> (reporting on the results of an Associated Press investigation into the vague laws of guardianship that found that senior citizens that face guardianship are often denied their day in court, many senior citizens are not represented by

Today, the Uniform Guardianship and Protective Proceedings Act (UGPPA) seeks to unify state guardianship procedures, streamline questions of jurisdiction and reciprocity, and promote economic efficiency in state courts.<sup>223</sup> The UGPPA calls for open proceedings across jurisdictions.<sup>224</sup> Interestingly, states have adopted model uniform jurisdictional procedures (where a key question concerns jurisdiction over property interests across state lines) much more readily than uniform procedural due process protections.<sup>225</sup>

Open guardianship proceedings present significant opportunities for an antistigma agency for three primary reasons. First, questions of capacity and competence dominate the legal inquiry. Adjudicators must decide whether a respondent lacks the capacity to make decisions about her life and care for herself. If she is found lacking in such capacity, the adjudicator can grant a petitioner plenary or limited guardianship to execute daily decisions about her finances, health, and/or daily living in her “best interest.”<sup>226</sup> In order to make more than a subjective judgment on capacity, adjudicators could delve into the mechanics of decision making, the normative procedure for making decisions, and the elements of a qualitatively “good” decision. However, this takes time and resources, two elements in short supply at the state court level.<sup>227</sup>

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attorneys, and many of the senior citizens’ own attorneys were determining that they were incompetent without supporting medical evidence).

223. See UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT prefatory note (1997).

224. *Id.* § 308(a) (“The hearing may be held in a location convenient to the respondent and may be closed upon the request of the respondent and a showing of good cause.”).

225. A majority of states (forty) and the District of Columbia and Puerto Rico have enacted the Adult Guardianship and Protective Proceedings Jurisdiction Act. *Legislative Fact Sheet—Adult Guardianship and Protective Proceedings Jurisdiction Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act> (last visited Mar. 30, 2015). However, only five states (Alabama, Colorado, Hawaii, Massachusetts, and Minnesota) and the District of Columbia and the U.S. Virgin Islands have enacted the UGPPA. *Legislative Fact Sheet—Guardianship and Protective Proceedings Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Guardianship%20and%20Protective%20Proceedings%20Act> (last visited Mar. 30, 2015).

226. Pressure by advocates today seeks to move legislators and courts to an “expressed desires” standard rather than the paternalistic “best interest” standard that is still operating today as prescribed by statute or, less formally, in practice. See Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491, 1497–532 (2012).

227. See, e.g., *Preliminary COSCA Budget Survey: Summary*, A.B.A. (May 2011), [http://www.americanbar.org/content/dam/aba/administrative/task\\_force/cosca\\_b](http://www.americanbar.org/content/dam/aba/administrative/task_force/cosca_b)

Second, and relatedly, the respondent (and her lawyer) can play a critical role in expanding the normative benchmark of decision making that currently centers on beliefs about autonomy and individual agency. Most recently, a twenty-nine year old woman with Down syndrome, Jenny Hatch, won an iconic victory in Virginia in a guardianship proceeding.<sup>228</sup> Hatch's parents petitioned for plenary guardianship alleging that, among other concerns, she made poor decisions about her health, safety, and choice of living arrangements and that these decisions necessitated more formal intervention.<sup>229</sup> Hatch disagreed with her parents' decision to place her in a group home after she had lived and worked on her own. The judge, after a six-day bench trial, ultimately determined that Ms. Hatch would benefit from court-appointed guardians of her choice for a limited duration and with a very narrow scope of authority.<sup>230</sup> This order has tremendous expressive and functional value.<sup>231</sup> It is the first judicial order to explicitly direct the parties to implement what is known as "supported decision making."<sup>232</sup> In this new paradigm of equitable

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dgtsrvy\_maysummaryv3.authcheckdam.pdf (discussing significant state court budget shortfalls and the impact of decreasing resources on the administration of justice).

228. See Order at 5–6, *Ross v. Hatch*, No. CWF120000426P3 (Va. Cir. Ct. Aug. 2, 2013) (limiting the scope of a guardianship order to a "supportive decision making" role with a limited term of one year).

229. See Petition for Appointment of Guardians at 3, *Ross v. Hatch*, No. CFW120000426-DP (Va. Cir. Ct. Aug. 8, 2012) ("Recent incidents have demonstrated decisions and behaviors that are contrary to those that a competent person would make regarding their own health and safety.").

230. The guardianship order approaches termination. Ms. Hatch will then have to decide how to proceed and the level and formality of support she would like—e.g., powers of attorney for particular matters such as health or finance, limited guardianship, or no legal structure. See Order, *supra* note 228, at 5–6.

231. *Id.* at 4–6 (internal quotation marks omitted). Interestingly, the judge garnered Ms. Hatch's opinion from counsel, other witnesses, and the pleadings in the case; Ms. Hatch did not take the stand during trial. *Id.* at 3–4. Perhaps a strategic litigation choice, one wonders about the expressive (and perhaps even functional) value lost by not putting Ms. Hatch on the stand.

232. Disability rights advocates tout supported decision making as a viable alternative to guardianship that respects and maintains the agency and dignity of the person with a disability. See Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1154–55, 1157 (2013) (discussing the goal of supported decision making to improve an individual's well-being and promote his dignity and how this model may possibly be a viable alternative to guardianship); Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 279, 306–07, 312–13 (2011) (exploring the characteristics of supported decision making and how it would be a significant alternative to guardianship as evidenced by other governments that have adopted legislation offering supported decision making as an



relief, the individual with a disability benefits from the advice and assistance of people—in Ms. Hatch’s case, two existing friends—who assist the individual in decision making processes but do not substitute their *own* judgment for the individual with a disability.<sup>233</sup>

Third, open proceedings have tremendous social marketing value. They can generate and publicize alternative narratives of disability that reflect greater agency and that challenge existing stereotypes of incapacity and incompetence that underwrite disability stigma. Virginia’s guardianship statute and regulations do not explicitly establish a presumption of openness.<sup>234</sup> Nevertheless, the public gallery in Ms. Hatch’s case overflowed each day with media, advocates, legal monitors, and members of the public.<sup>235</sup> Not all guardianship cases will produce the counter-normative narratives of Jenny Hatch—that is, the highly functioning person with a developmental disability—though advocates contend that Ms. Hatch’s case is hardly an exception.<sup>236</sup> Rather, the circulation of more diverse narratives that reflect a continuum of capacity for both nondisabled people and people with disabilities begins to chip away at the blanket presumption of incapacity that underlies disability stigma. The active participation of mainstream media sources, including the Washington Post and People Magazine, widely circulated Ms. Hatch’s story and its position within the ongoing disability rights movement.<sup>237</sup> The Hatch victory also resonates more broadly as a common rally point and mirror of the lived experiences of many other people with disabilities who are subject to the same

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alternative). Functionally, the judge’s order reflects Jenny’s expressed interests regarding who she wanted as a guardian and the scope of decisions for which she will require some assistance.

233. See Order, *supra* note 228, at 5–6.

234. See VA. CODE ANN. § 64.2007 (Supp. 2014).

235. Telephone Interview with Jonathan Martinis, Counsel of Record for Jenny Hatch, Quality Trust for Individuals with Disabilities (Aug. 15, 2014) (on file with author).

236. *Id.*

237. See, e.g., Cathy Free & Nicole Weisensee Egan, *Woman with Down Syndrome Fights for Her Freedom—and Wins*, PEOPLE MAG. (Mar. 7, 2014, 3:15 PM), <http://www.people.com/people/article/0,,20794070,00.html> (praising the outcome of the case because it will inspire people with disabilities to choose the future they want for themselves); Theresa Vargas, *Virginia Woman with Down Syndrome Becomes Hero to the Disabled*, WASH. POST (Aug. 17, 2013), [http://www.washingtonpost.com/local/virginia-woman-with-down-syndrome-becomes-hero-to-the-disabled/2013/08/17/0da21766-062e-11e3-a07f-49ddc7417125\\_story.html](http://www.washingtonpost.com/local/virginia-woman-with-down-syndrome-becomes-hero-to-the-disabled/2013/08/17/0da21766-062e-11e3-a07f-49ddc7417125_story.html) (emphasizing how Jenny Hatch has become a symbol of strength and hope by inspiring other people with disabilities and changing the view on how society treats people with disabilities).

presumptions of incompetence and incapacity.<sup>238</sup> Since the judicial order, Ms. Hatch has traveled the country for speaking engagements and conferences to expand the collective disability rights' consciousness.

## 2. *Civil commitment*

Although public access to involuntary civil commitment proceedings varies by jurisdiction, more than a third of all states maintain a statutory presumption of closure with the right to open by motion.<sup>239</sup> A third of the states have no presumption either way and place the decision to open or close a particular hearing in the hands of the respondent or her counsel, which, like guardianship, often results in de facto closed proceedings.<sup>240</sup> The remaining states are split among three permutations: (1) explicit statutory presumptions of openness with the right of closure granted to respondents or their counsel; (2) explicit statutory presumptions of openness and broad judicial discretion to close proceedings in the best interest of the respondent; and (3) silent statutes implying open proceedings from descriptions of other procedural protections read in conjunction with public access language in state constitutions.<sup>241</sup> Several states appear

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238. *Jenny Hatch: Disabled Young Woman Helps Others Gain Independence* (CBS News television broadcast Nov. 30, 2013), available at <http://www.cbsnews.com/videos/jenny-hatch-disabled-young-woman-helps-others-gain-independence> (discussing Jenny Hatch's case and how she identifies as a person with a disability).

239. HARRIS, *supra* note 195. *But see* 50 PA. STAT. ANN. § 7304(e)(4) (West 2001) (stating that the hearing is presumptively public unless it is requested to be private); *Kirk v. Commonwealth*, 944 N.E.2d 135, 139 (Mass. 2011) ("Once removed from traditional physical settings normally associated with courts, participants in many hearings may be tempted to conduct themselves in a manner [that] is not fully consistent with the elements of procedural due process" (alteration in original) (quoting DISTRICT COURT STANDARDS OF JUDICIAL PRACTICE: CIVIL COMMITMENT 2.00 cmt. (Admin. Office of Dist. Court 1979) (amended 2011))); *In re Det. of D.F.F.*, 256 P.3d 357, 363 (Wash. 2011) (en banc) (holding that a lower court's procedural rule that presumptively closed civil commitment proceedings violated the presumption of openness in the state constitution and common law).

240. JASMINE E. HARRIS, STATE-BY-STATE CIVIL COMMITMENT HEARING INFORMATION (2014) (on file with author) (noting statutory language, for example, in Alaska, where "respondent has the right . . . to have the hearing open or closed to the public as [s/he] elects").

241. *Id.*; *see also* ALA. CODE § 222(4) (2006) ("All hearings shall be heard by the probate judge without a jury and shall be open to the public unless the respondent or his attorney requests in writing that the hearings be closed to the public."); S.C. CODE ANN. § 44770 (2002) ("The court may exclude all persons not necessary for the conduct of the proceedings."); *see also* OR. CONST. art. I, § 10 ("No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay . . .").

to be trending in the direction of presumptive openness. Most recently, for example, state supreme courts in Washington and Massachusetts struck down statutory presumptions of closed proceedings as violative of liberty, accountability, and transparency interests of the respondent and the public.<sup>242</sup>

Civil commitment laws<sup>243</sup> track two separate sources of state power:<sup>244</sup> *parens patriae* (acting in the best interest of a person found incapable of providing for her own well-being) or police powers (acting in the best interest of the state to protect public safety).<sup>245</sup> In early colonial times, the states used both their police powers and *parens patriae* in exercising their discretion to involuntarily detain people with disabilities (primarily mental, although also inclusive of

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242. See *supra* note 239 and accompanying text. But see *People v. Dixon*, 56 Cal. Rptr. 3d 33, 40–41, 43–45 (Ct. App. 2007) (applying the *Press-Enterprise II* test and holding that the public does not have a presumptive right of access to civil commitment proceedings because of the treatment focus and discussion of medical information but that the legislature could decide differently and provide for precautions to release confidential information).

243. I limit my discussion here to inpatient civil commitment proceedings. Most states have a form of less restrictive, supervised outpatient civil commitment, also called “assisted outpatient treatment” (AOT) or “outpatient commitment.” See, e.g., ALASKA STAT. § 47.30.735(d) (2012) (providing that a court may order a respondent to outpatient treatment for a maximum of thirty days if it is a less restrictive alternative to the inpatient treatment that the respondent qualifies for and the respondent refused the voluntary treatment through the alternative); KAN. STAT. ANN. § 59967(a) (Supp. 2005) (asserting that the court may order outpatient treatment if inpatient treatment would have also been allowed, if the patient will likely comply with the outpatient treatment order, and if the patient will not be a danger to the community). Five states (Connecticut, Maryland, Massachusetts, New Mexico, and Tennessee) do not provide for AOT.

244. See 18 U.S.C. § 4248 (2012) (detailing the process and considerations for the civil commitment of a sexually dangerous person and the different actions to take to ensure the person is not sexually dangerous to others); see also *United States v. Comstock*, 560 U.S. 126, 129 (2010) (stating that 18 U.S.C. § 4248, a federal civil-commitment provision, authorizes the federal government “to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released”).

245. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (explaining how the state has an interest in providing care to those that cannot care for themselves because they are emotionally disabled and how the state has authority to protect the public from the mentally ill that may be dangerous); see also MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 79 (2000) (establishing that the history of civil commitment shows that there is a “dual policy” basis of police power commitments and *parens patriae* commitments); Stuart A. Anfang & Paul S. Appelbaum, *Civil Commitment—The American Experience*, 43 *ISR. J. PSYCHIATRY & RELATED SCI.* 209, 210–11 (2006) (addressing the history of the development of involuntary civil commitment statutes, rules, and due process protections from a medical perspective).

intellectual and developmental disabilities). Over time, states developed a hybrid, near uniform standard of “dangerous to self or others” for involuntary civil commitment.<sup>246</sup> A rather loose customary standard—generally, whether a person with a disability could provide self-care irrespective of whether she threatened public order—gave law enforcement officials and medical doctors significant discretion to make civil commitment decisions with no oversight.<sup>247</sup> Given the paucity of hospitals<sup>248</sup> and space at almshouses, historically, people with mental disabilities frequently were committed to jails.<sup>249</sup>

The creation of asylums, the first public institutions for the “moral treatment” of people with disabilities, operated without much oversight until after the Civil War and in many ways institutionalized the informal practices of earlier years.<sup>250</sup> Some states in the post-Civil

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246. The primary procedural distinction in civil commitment law between people with mental and psychosocial disabilities and those with intellectual or developmental disabilities turns on the evidentiary standard: beyond a reasonable doubt and clear and convincing evidence, respectively. See *Heller v. Doe*, 509 U.S. 312, 324–27 (1993); *Addington*, 441 U.S. at 423–24 (explaining the function of a standard of proof to allocate the risk of error and the importance of the final decision). This difference flows, according to the Supreme Court, from the nature of the disabilities (congenital versus non-congenital), the degree of invasiveness of the treatments, the connection to dangerousness and public safety, and the liberty deprivations faced by the respondent. See *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (“A finding of ‘mental illness’ alone cannot justify a State’s locking a person up against his will and keeping him indefinitely in simple custodial confinement.”); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (balancing out various judgments for confinement because “[civil commitment] is . . . a massive curtailment of liberty”).

247. See Paul S. Appelbaum, *Civil Mental Health Law: Its History and Its Future*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 599, 599 (1996) (discussing the history of civil commitment of people with mental illness and how they may be involuntarily detained even if they posed no danger to public order); see also *Jackson v. Indiana*, 406 U.S. 715, 736 (1972) (noting the broad power afforded states to commit those who are mentally ill). The “in need of care or treatment” standard pre-dated the move toward dangerous to self/others.

248. Few hospitals existed before the nineteenth century, but “[i]f hospital care was available, as it was in a handful of major cities, families and physicians generally decided whether patients should be admitted and when they might be discharged.” Appelbaum, *supra* note 247, at 599.

249. See, e.g., Michael Winerip & Michael Schwartz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. TIMES (July 14, 2014), <http://nyti.ms/W2jVRi> (“Rikers now has about as many people with mental illnesses—roughly 4,000 of the 11,000 inmates—as all [twenty-four] psychiatric hospitals in New York State combined. They make up nearly [forty] percent of the jail population, up from about [twenty] percent eight years ago” while nationally, studies show that “correctional facilities now hold [ninety-five] percent of all institutionalized people with mental illnesses.”).

250. Appelbaum, *supra* note 247, at 599 (internal quotation marks omitted).

War years adopted procedural due process protections, such as the right to an attorney and trial by jury, in response to allegations of abuse and neglect within asylums.<sup>251</sup> The allocation of procedural safeguards shifted over time to reflect public understanding of mental disability as a treatable illness that may manifest as behavioral deviance.<sup>252</sup> For example, as recently as 1960, a number of states based civil commitment solely on a person's need for care or treatment with no connection to public safety concerns. Greater association with medical and rehabilitative treatment generated fewer due process protections for respondents.<sup>253</sup> Much of civil commitment jurisprudence today interpreting "dangerousness" focuses on a person's "danger to self" even when framed as "danger to others."<sup>254</sup>

The Supreme Court's decisions in *In re Gault*<sup>255</sup> and *Parham v. J.R.*<sup>256</sup> bridged the procedural requirements in criminal cases with quasi-criminal proceedings such as civil commitment.<sup>257</sup> The Court in *In re Gault* held that the non-punitive, rehabilitative nature of juvenile delinquency proceedings—like civil commitment proceedings—did not demand the same constitutional due process safeguards afforded criminal defendants subject to the police power of the state.<sup>258</sup> A decade later, in *Parham*, the Court affirmed its position in *In re Gault*

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251. *Id.*; see also Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 PSYCHIATRY 30, 32 (2010) (explaining why the state removed decision making power from people who abused civil commitment, such as medical professionals, and placed such authority in the judges' hands).

252. Appelbaum, *supra* note 247, at 599 (explaining how "eras of therapeutic optimism tended to correspond with relaxed procedures, while more fatalistic periods witnessed a rise in procedural protections").

253. PERLIN, *supra* note 245, at 79 (indicating that only five states based civil commitment on the dangerousness of the individual).

254. Michael Perlin has written extensively on the ambiguity and elusiveness of the question of doctrinal interpretation of the "dangerousness" standard, including the problems created by state court splits and inconsistencies regarding the predicate of an "overt act" of dangerousness. *Id.* at 80–83 (internal quotation marks omitted); see also *The National Center for State Courts' Guidelines for Involuntary Civil Commitment*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 409, 415 (1986) (referencing the growth of civil commitment standards at the state level).

255. 387 U.S. 1 (1967).

256. 442 U.S. 584 (1979).

257. See *id.* at 607–13 (rationalizing that requiring a formalized hearing for commitment of a minor child is unnecessary because it would not necessarily reduce the risks of error and it may be too intrusive); *In re Gault*, 387 U.S. at 56–57 (determining that issuance of an order of commitment in a juvenile proceeding requires sworn testimony and an opportunity for cross-examination).

258. *In re Gault*, 387 U.S. at 15–16 (explaining the early reformers' views that a child should be rehabilitated and not subject to punishment).

that the Constitution did not require formal procedures in the context of juveniles involuntarily committed to state psychiatric facilities.<sup>259</sup>

Some states have a separate involuntary civil commitment or admission process for people with intellectual and developmental disabilities. For example, the District of Columbia passed the Mentally Retarded Citizens Constitutional Rights and Dignity Act in 1978.<sup>260</sup> The Act established standards and procedures for voluntary and involuntary commitments to residential facilities (including group homes) and outpatient nonresidential habilitation for people with intellectual and developmental disabilities.<sup>261</sup> It provided specific due process protections for commitments and mandated a review of voluntariness and competency of individuals to consent to admissions.<sup>262</sup> Section § 7-1304.08 of the Code of the District of Columbia establishes a presumption of closed proceedings surmountable only by motion of the respondent or her attorney. As a practical matter, these proceedings—in an otherwise publicly available state court—remain presumptively closed to the public.<sup>263</sup> Whereas guardianship proceedings concern the curtailment of a respondent's decision making autonomy with generally no physical deprivation of liberty (although the Chenoweth case implicated his residency in the nursing home),<sup>264</sup> civil commitment by definition addresses the physical liberty of the respondent. Benthamite publicity concerns and quasi-criminal liberty interests support the use of open proceedings in the civil commitment context.

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259. The Court stated,

Due process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer. . . . A state is free to require such a hearing, but due process is not violated by use of informal, traditional medical investigative techniques. . . . What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made. Not every determination by state officers can be made most effectively by use of the procedural tools of judicial or administrative decisionmaking.

*Parham*, 442 U.S. at 607–08 (citations omitted) (internal quotation marks omitted).

260. See D.C. CODE § 7301.02(A)(5) (2001) (indicating that one of the purposes of the Act was to “[m]aximize the assimilation of persons with mental retardation into the ordinary life of the community in which they live”).

261. *Id.* § 7303.01–.14.

262. See *id.* § 7304.01–.13 (discussing procedures and safeguards).

263. I have served as a panel attorney for the District Superior Court's Mental Health and Habilitation Branch and have been appointed by the court as counsel or guardian ad litem in these cases.

264. See *supra* Part III.B (advancing a new framework—antistigma agency—to address social stigma).

With respect to institutional design, reliance on testimony and recommendations of the treating psychiatrist may have influenced designers to adopt a setting that looks more like medical reviews than formal legal hearings on the deprivation of liberty. A medical review is more akin to a private meeting in a conference room (where these hearings are often held), in which the reviewer defers to a medical doctor's expertise, than to a more formal hearing in court, where the law and its adjudicators are experts in resolving questions of public significance. Civil commitment statutes, even in the case of presumptive openness, call for informality or flexibility of location and form for the convenience of the respondent.<sup>265</sup> The "convenience" caveat allows for hearings in psychiatric hospitals, which lack the visibility, convenience, and public notice to generate public awareness or attendance, though they are not formally closed to the public.

One argument against open proceedings in the civil commitment context is the strength and pervasiveness of the stigma of mental and psychosocial disability. Stigma, according to this argument, demands privacy as a means to protect respondents from further stigmatization. However, this argument suffers from circularity and may reflect a certain degree of shortsightedness. The argument that "mental disability is so stigmatized that we need to conceal it" lacks sophistication and persuasiveness. Social scientists, for example, offer empirical evidence to the contrary, namely that disclosure of mental and psychosocial disabilities can be therapeutic and destigmatizing for the individual and the public.<sup>266</sup>

#### *E. Administrative Agency Adjudication*

Administrative agency proceedings reflect a growing alternative to court-based adjudication to the dismay of many proceduralists.<sup>267</sup>

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265. See, e.g., KAN. STAT. ANN. § 59965(C) (2005) ("All persons not necessary for the conduct of the proceedings may be excluded. The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the welfare of the proposed patient.").

266. See, e.g., Corrigan & Matthews, *supra* note 150, at 244 (comparing "coming out" for the LGBT community with public disclosure for people with psychiatric disorders as it relates to stigma and finding that each process is beneficial for both individuals and communities).

267. See, e.g., Resnik, *Privatization of Process*, *supra* note 1, at 1802 (describing "the devolution of adjudication to administrative agencies" as a function, at least partly, of judicially-driven amendments to the federal rules of civil procedure). The Supreme Court has not addressed whether the public's constitutional right of access extends to administrative proceedings. Judge Guido Calabresi, however, writing for the U.S.

The scholarship reflects an existential struggle with increasing administrative agency-based adjudication. Some scholars caution against over relying on less visible forms of adjudication (agency hearings, arbitration, and mediation), arguing that such proceedings develop information “in the shadow of constitutional obligations”<sup>268</sup> rather than negotiating such information in and with the public. Other scholars argue that the actual or perceived illegitimacy of courts may outweigh any procedural or substantive advantages.

Yet disability occupies an interesting position in the broader debate about administrative adjudication. Disability adjudication regarding education, economic support (e.g., social security and veterans’ benefits), and employment discrimination (at least in the first instance) takes place in conference rooms in agency buildings behind presumptively or effectively closed doors. Furthermore, with respect to stigma, the current design of certain disability laws makes it difficult to receive the necessary services (in the case of special education) or economic support (in the case of social security) unless the person with a disability meets very restrictive guidelines.

Thus, constructing and advancing a viable legal theory often requires emphasis on limitations and impairments rather than framing the inquiry on the support services necessary for the person to receive an education, live, or work in the most inclusive environment. My goal in reframing the legal inquiry through the lens of antistigma agency is to illustrate the potential for redesigning the guiding legislation as much as the adjudicative procedures. The remainder of this section focuses on social security and special education hearings that adjudicate questions of agency and

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Court of Appeals for the Second Circuit, recently extended the presumption of open proceedings to an administrative process before the New York City Transit Authority (NYCTA). NYCTA denied the New York Civil Liberties Union access to an administrative hearing on the basis of procedural rules requiring affirmative consent from the respondent but also established concurrent jurisdiction for state criminal courts and NYCTA to adjudicate a traffic violation. *N.Y. Civ. Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 293 (2d Cir. 2011). Judge Calabresi, though leaving open the question of broader applicability to other administrative proceedings, emphasized that “[t]he public’s right of access to an adjudicatory proceeding does not depend on which branch of government houses that proceeding” but, rather, on a balance of the interests at stake. *Id.* at 290. The Second Circuit did not address the question of whether the public’s First Amendment right to presumptive, qualified access extends to administrative proceedings as a general matter.

268. Resnik, *Privatization of Process*, *supra* note 1, at 1821.



integration, albeit through a slightly different lens, to examine the root of design choices and their relationship with disability stigma.<sup>269</sup>

### 1. *Social Security*

Social security appeals hearings involving disability claims are presumptively closed to the public.<sup>270</sup> Procedural design choices reflect public sentiments regarding the nature of the proceeding. In this context, social security disability appeals take place in small conference rooms where, as a practical matter, there is little room for a gallery. Furthermore, the Social Security Administration's (SSA) focus on increasing efficiency (perhaps at the expense of other underlying procedural values) has produced hearings via "videoconference" and telephonic cross-examinations of witnesses,<sup>271</sup> allowing administrative law judges (ALJs) to hear cases in one location and permitting the appellant, her attorney, and witnesses (including the SSA's vocational expert) to appear in different locations from the ALJ, and even from each other.<sup>272</sup>

Yet the Social Security Act provides a disability claimant with the right to a "full and fair hearing."<sup>273</sup> The ALJ conducts these hearings in an inquisitorial fashion with the appellant, the ALJ, and any witnesses present. The inherent informality of the social security appeals process congressional design positions the ALJ as neither advocate nor adversary.<sup>274</sup>

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269. Specific redesign proposals fall outside of the scope of this Article.

270. See 20 C.F.R. § 405.320(a) (2014) ("A hearing is open only to you [social security claimant] and to other persons the administrative law judge considers necessary and proper."). *But see id.* § 498.215(d) (providing that in civil penalty cases for social security fraud, "[t]he hearing will be open to the public unless otherwise ordered by the ALJ for good cause").

271. *Hepp v. Astrue*, 511 F.3d 798, 805–06 (8th Cir. 2008) (holding that the disability claimant's cross-examination of the witness by telephone afforded him sufficient due process).

272. 20 CFR § 405.350(a) ("[A] right to appear before the administrative law judge, either in person or, when the administrative law judge determines . . . by video teleconferencing, to present evidence and to state your position.").

273. See *Northcutt v. Califano*, 581 F.2d 164, 167 (8th Cir. 1978) (internal quotation marks omitted); *see also Richardson v. Perales*, 402 U.S. 389, 401–02 (1971) (holding that procedural due process requires full and fair hearings for disability claimants challenging agency decision).

274. See, e.g., *Richardson*, 402 U.S. at 403 ("We bear in mind that the agency operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary. This is the congressional plan.").

In 1935, Congress created the SSA to provide benefits in a manner that is efficient and effective to the “deserving disabled.”<sup>275</sup> Specifically, the Social Security Act covers old age, survivors, and disability insurance under Title II.<sup>276</sup> A decade later, Congress, responding to the exponential growth of the administrative state, enacted the Administrative Procedure Act (APA) to provide uniformity and fairness in the administrative process within the federal government.<sup>277</sup> The SSA previously held that the agency was not subject to the APA hearing requirement; however, the SSA commissioner, in an attempt to clarify the due process responsibilities of the agency, released a written statement that reinforced the applicability of the APA to Social Security Act adjudications.<sup>278</sup> The SSA appears to be in substance and form, an “agency” under § 2(a) of the APA.<sup>279</sup> For example, the SSA appeals hearings reflect statutory elements of “adjudication” under section 2(a) of the APA such as examination and cross-examination of witnesses, independence of adjudicators, and written findings of fact and conclusions of law.<sup>280</sup>

Congress has a substantial interest in providing a check on the SSA’s power, particularly given that the number of adjudicative hearings held each year outpaces those held in federal courts. Between September 2013 and September 2014, social security ALJs conducted over 614,500 individual hearings.<sup>281</sup> Claimants on average

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275. See Kelly Huntley, *Issues in the Third Circuit: “To Review or Not To Review?”—That Is the Question: Interpreting New Evidence in Social Security Disability Claims in the Third Circuit*, 47 VILL. L. REV. 1089, 1091 (2002) (stating that Congress passed the Social Security Amendments of 1980 to strengthen federal management of state disability determinations and to make the disability insurance program more organized).

276. See Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. OF NATIONAL ASS’N OF ADMIN. L. JUDGES 267, 269–70 (2003) (“The Social Security Administration . . . sets and implements the policy standards for entitlement to Social Security Act Title II old age, survivors and disability insurance program benefits . . .”).

277. *Id.* at 319 (including uniform standards for conducting adjudicatory proceedings).

278. *Id.* (arguing that selective applicability threatens claimants’ due process rights).

279. See 5 U.S.C. § 551(1) (2012) (internal quotation marks omitted) (defining “agency” to mean an authority of the U.S., “whether or not it is within or subject to review by another agency” (internal quotation marks omitted)).

280. *Id.* § 551(7); see also Arzt, *supra* note 276, at 320 (emphasizing the importance that social security hearings are also APA adjudications because 5 U.S.C. § 3105 requires ALJs to preside over the hearings); G. M. Buechlein, *What Constitutes “Adversary Adjudication” by Administrative Agency Entitling Prevailing Party to Award of Attorneys’ Fees Under Equal Access to Justice Act (5 USCS § 504)*, 96 A.L.R. FED. 336, 346–48 (1990) (discussing the variation in treatment of social security proceedings on remand).

281. *Hearings Held In-Person or Via Video Conferencing Report FY 2014 (For Reporting Purposes: 09/28/2013 Through 09/26/2014)*, SOC. SECURITY ADMIN., available at

waited one year between when they filed the appeal and appeared before an ALJ and often without receiving income supports and Medicaid or Medicare benefits that may be linked to social security eligibility.<sup>282</sup>

Furthermore, plaintiffs filed approximately 20,000 new social security federal district court appeals (denials of supplemental security income and disability insurance) in 2013—representing upwards of seven percent of the total civil cases commenced and a substantial number of new civil cases entering the system.<sup>283</sup> Although situated in presumptively open federal district courts, federal district or magistrate judges review these cases on the briefs and the existing factual record to determine whether the ALJ's decision was supported by “substantial evidence” without a gallery present.<sup>284</sup>

Even if the public packed the gallery at the agency or federal court levels, would an open hearing exacerbate or mediate stigma based on the Social Security Act's definition of disability as severely limited and inability to participate in the workforce? For example, a federal magistrate judge upon reviewing the SSA hearing record concluded that a plaintiff was not “disabled” under the Social Security Act and thus ineligible to receive benefits because she “successfully completed high school, worked for eleven years, described herself as literate on a disability report, and was able to read well enough to take and pass a written driver's license test.”<sup>285</sup> A showing of capacity translates into a denial of eligibility for income supports. This may suggest that the narratives of disability created in these proceedings would undermine agency and dignity. However, greater publicity of the legal standards for receipt of assistance can also highlight their counter-effectiveness to the goals of integrated employment.

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[http://www.ssa.gov/appeals/DataSets/archive/archive\\_data\\_reports.html#a1=5&ht=1](http://www.ssa.gov/appeals/DataSets/archive/archive_data_reports.html#a1=5&ht=1) (last visited Mar. 30, 2015).

282. *Average Wait Time Until Hearing Held Report (For the Month of December 2014)*, SOC. SECURITY ADMIN., available at [http://www.ssa.gov/appeals/DataSets/01\\_NetStat\\_Report.html](http://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html) (last visited Mar. 30, 2015).

283. See U.S. District Courts—Social Security Cases Commenced During the 12-Month Period Ending September 30, 2013, U.S. CTS., <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C10Sep13.pdf> (last visited Mar. 30, 2015). Courts of appeals and district court rules favoring mediation and case settlement discussions categorically exclude social security. See LAURAL HOOPER ET AL., FED. JUD. CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURT OF APPEALS 16 (2d ed. 2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/caseman2.pdf/\\$file/caseman2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/caseman2.pdf/$file/caseman2.pdf).

284. 42 U.S.C. § 405(g).

285. *Pelfrey v. Comm'r*, No. 1:08CV605, 2010 WL 909134, at \*3 (S.D. Ohio Mar. 10, 2010).

Privacy concerns certainly exist—specifically the abundance of medical information required to prove disability under the statute and the potentially disempowering narratives about functional limitations required to meet the statutory definitions of severity. One could imagine the social security context as not ideal for the construction and dissemination of agency enhancing narratives. However, this is due, at least in part, to the legislative design and, with greater access, could produce a more informed national conversation on the role of social supports in the disability context.

At least one social security administrative law judge, president of the Association of Administrative Law Judges, has called for more public participation in agency-level appeals hearings (albeit for different reasons). The ALJ advocates for greater adversarial structures in appeals hearings to reflect the large dockets, interests at stake, and to give the public a window into what he describes as a current imbalance of power.<sup>286</sup>

## 2. *Special education*

Special education due process hearings, much like social security appeals, have a split adjudicative personality between formal and informal. They are presumptively closed, but the IDEA and supporting regulations require states to give parents<sup>287</sup> the right to open the proceeding to the public.<sup>288</sup> States designed these due process hearings to be informal, non-adversarial settings for dispute resolution. For example, hearings are held in small conference rooms at the local educational agency or state administrative hearings offices, hearing officers are employees of the local or state educational agencies (with minimal insulation to protect the adjudicator's independence), the rules of evidence do not strictly apply, and there is no right to appointed counsel. However, these hearings also reflect elements of more formal court-based adjudication: opportunities for discovery (albeit limited) and disclosure; motion practice; strict statutes of limitations on liability and damages; the frequent use of expert witnesses; a somewhat

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286. See D. Randall Frye, *Fixing Disability Courts*, N.Y. TIMES (Jan. 19, 2014), <http://www.nytimes.com/2014/01/20/opinion/fixing-disability-courts.html> (noting the recent push by ALJs to bring technology and greater accessibility into the SSA court room and, thereby, to encourage greater advocacy in a more adversarial process).

287. Or surrogate. I use “parent” as a proxy for “educational rights holder.”

288. 34 C.F.R. § 300.512(c)(2) (2014) (“Parents involved in hearings must be given the right to . . . [o]pen the hearing to the public . . .”). This explicit grant of authority is not enumerated in the IDEA.

bifurcated presentation of evidence on liability and damages (also heavily dependent on expert testimony); statutory provision for the availability of attorneys' fees; and multitier appellate review<sup>289</sup> with choice of state or federal court upon exhaustion of remedies.

Congress designed special education due process hearings to protect the special education rights holder<sup>290</sup> from arbitrary state action denying the student with a disability<sup>291</sup> a right to a "free [and] appropriate public education" (FAPE)<sup>292</sup> in the "least restrictive [educational] environment" (LRE)" (or most inclusive setting).<sup>293</sup> The IDEA established clear procedural due process protections, including prior written notice of schools' decisions to change the individualized education program, the location of educational services, and school placement.<sup>294</sup>

The antistigma values of special education due process hearings are complicated by potentially conflicting interests of the educational rights holder (usually the parent) and the student who receives special education services. The demonstrative value of the proceedings may be less for the parent than the student, although, social science suggests that "courtesy stigma"—the stigma experienced by family and friends of a person with a disability—can undermine efforts towards broader societal destigmatization. Alternatively, a student may wish to conceal a hidden disability as a means of managing self and public stigma while the parent—the

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289. See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 860–66 (1984) (providing a useful procedural framework to conceptualize underlying values of procedure—e.g., levels of appellate review and values of finality or accuracy—and the trade-offs at work).

290. 20 U.S.C. § 1415(b)(2)(A) (2012) (stating that the court may appoint educational surrogates); *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (recognizing a parent's constitutional rights and requiring "clear and convincing evidence" to terminate those rights); *Ashland Sch. Dist. v. Parents of Student R.J.*, 585 F. Supp. 2d 1208, 1211 n.1 (D. Or. 2008) ("[T]he attorney in an IDEA action usually represents the parents [as educational decisionmakers] . . .").

291. 34 C.F.R. § 300.7(c)(1), (3)–(6), (8)–(9), (11)–(13) (2003) (explaining that receipt of special education services requires proof of a qualifying disability that "adversely affects" education).

292. 20 U.S.C. § 1401(9) (internal quotation marks omitted); see *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 361 (1985) (indicating that 20 U.S.C. § 1415(a) requires the "provision of free appropriate public education" (internal quotation marks omitted)).

293. 20 U.S.C. § 1412(a)(5).

294. See *id.* § 1400 (setting forth the policy objectives of the IDEA and noting the many deficiencies that existed prior to its passage); see also *id.* § 1415(d) (establishing that school districts have an affirmative duty to provide procedural safeguards to parents and educational decision makers).

educational rights holder by statute—may wish to invite members of the public and press to publicize, educate, or mobilize other families around a common recurring or widespread harm.

#### IV. A RESPONSE TO POTENTIAL OBJECTIONS

Understandably, the proposition of presumptively open proceedings as antistigma agents may raise some concerns. This project seeks to surface longstanding assumptions about privacy and disability and propose antistigma agency as a new interpretive and prescriptive lens for disability adjudication to shift social norms of disability. Accordingly, this Article opens the doors of the proceedings but recognizes the need for procedural redesign once inside those doors to generate agency-enhancing experiences and narratives for people with disabilities and the public.

With that in mind, the prescription may still raise concerns about the proper balance between privacy and confidentiality as well as the power of disclosure and discussion as affirmative opportunities to reduce stigma. These questions reflect tensions between short-term and long-term prescriptions, individual and collective choices, and limited resource allocation.

I briefly address four potential objections followed by a discussion of the movement towards greater public access in the context of another historically private and stigmatized area: family law. While many of the potential objections to open proceedings apply equally in those settings, nevertheless, institutional designers have shifted in favor of greater sunlight for a number of reasons such as greater transparency and public accountability.

##### *A. Tension with Existing Privacy Laws*

Open proceedings do not necessarily conflict with privacy either in the health law context (e.g., HIPAA), or in the educational context (e.g., the Family Educational Rights and Privacy Act (FERPA)). Institutional designers are well-acquainted with the construction of procedural rules that address medical or other “sensitive” information with varying levels of protection. For example, certain rules provide for filing specific documents under seal, protective orders, limited redaction of documents, or truncating parts of

otherwise open proceedings to present certain arguments and accompanying evidence *in camera*.<sup>295</sup>

### B. Exacerbating Stigma

A concern may arise regarding the potential for openness and publicity to exacerbate stigma based on the often-precarious positions of the people with disabilities in these proceedings. In this sense, perhaps, privacy may operate to protect further dissemination of negative stereotypes and self-stigmatization. Jeffrey Rosen advanced a similar argument about privacy more broadly in his book, *The Unwanted Gaze*. He emphasized the importance of maintaining “private spaces” to protect people against being judged unfairly out of context and “mistaking information for knowledge in a culture of exposure.”<sup>296</sup> Rosen raises a valid concern as to whether, if we unlock the courthouse door or conference room, the types of narratives produced will reduce or exacerbate disability stigma.

If we opened guardianship hearings tomorrow, for example, would they produce the desired narratives demonstrative of capacity rather than demonstrative incapacity that may reinforce existing stigma? Jerry Chenoweth’s guardianship proceedings were open, yet they did not generate the narratives of agency that would be useful in reducing stigma—partly because the court proceeded without Chenoweth present, thus undermining opportunities for his own destigmatization process (defending his case), and because the media and potential public observers who could reproduce his narrative were absent from the gallery.

In isolation, without more, open proceedings cannot be expected to produce the quality of information required to challenge existing biases. However, this is not a reason to neglect the potential benefits of open proceedings in combination with broader procedural reforms. Jenny Hatch’s case supports this point. But what other factors were at play? Open proceedings offered a public space for Hatch’s and the public’s destigmatization of disability. Hatch, her lawyers, and the media created a perfect storm to shift the public

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295. *E.g.*, 28 U.S.C. § 2635(b)(2)–(c) (allowing for a court to review confidential evidence *in camera*); FED. R. CIV. P. 5.2(a)(1)–(4), (d)–(f), (h). This raises a question about the fiscal, human, and other costs associated with opening adjudication in the disability context, which will be discussed in a later project.

296. JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 223 (2001). Erving Goffman expressed a similar view of privacy as a means of resisting and managing public stigma. GOFFMAN, *supra* note 139, at 91–95 (discussing methods of information control and its relationship to personal identity).

consciousness and advance Hatch's own connection to broader collective action. Hatch's case also presented great facts to make a point about presumptions of incapacity.

While Jenny Hatch's case may present a high degree of antistigma agency such that it falls closer to the end of the continuum of open proceedings without qualification, there may be others for whom openness at that level would, on balance, exacerbate existing stigma and/or do little to enhance the person's overall agency. However, questions of openness should not turn on the quality of the narratives such that only narratives similar to Jenny Hatch's circulate in public spaces.

Social science reveals that, given society's high degree of cognitive dissonance, the selective presentation of disconfirming evidence that runs opposed to a stereotype may be cognitively discounted by the public.<sup>297</sup> Furthermore, with respect to confirmation bias, empirical studies indicate that the best chance of disconfirming bias is in the production of moderately disconfirming information.<sup>298</sup> Disability adjudication may generate a mixture of narratives on a spectrum between maximum functional capacity and severe functional limitations. Social science supports the potential of the grey zone to avoid cognitive discounting.<sup>299</sup>

A related question might ask whether procedural design is the best vehicle for reducing stigma. As discussed previously, empirical contact between the nondisabled and people with disabilities appears to offer the most potential for stigma reduction. However, legislated forms of contact—employment (ADA) and education (IDEA), for example—have not produced the anticipated opportunities for integration. While resources must continue to fuel expanded opportunities for integrated employment and inclusive education, the ubiquity of stigma requires additional public responses. Adjudication reflects a hybrid remedy supported by empirical data: education plus contact. The structures of rules and procedures—when well designed to reflect underlying values of agency and dignity—become social marketing platforms for disability.

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297. Christina Schwind et al., *Preference-Inconsistent Recommendations: An Effective Approach for Reducing Confirmation Bias and Stimulating Divergent Thinking?*, 58 *COMPUTERS & EDUC.* 787, 788 (2012).

298. *Id.* at 787–88 (“Since preference consistent information appears convincing by itself, individuals do not feel any need for justification. In contrast, preference inconsistent information appears less valid, and this leads to a deliberate search for further information to refute dissenting arguments.” (citations omitted)).

299. *Id.* at 794–95.



### C. *The Burden of Disclosure*

Does this place a greater burden on people with disabilities to disclose when they already have so little privacy? This objection raises a familiar tension in social justice movements between the interests of the individual versus the collective good.<sup>300</sup> This tension is particularly salient in the context of people with disabilities whose lives are highly regulated by the state. Disability advocates have increasingly called for greater visibility as a resistance strategy and direct response to a history of forced invisibility. In fact, disability studies scholars have identified open discussions about disability by and with people with disabilities as a central requirement of collective action.<sup>301</sup> Much like in the case of second wave feminists, the disability rights community has recognized the “personal is political,” which challenges the historical dichotomy between “public” and “private” spaces.<sup>302</sup>

### D. *Populating the Galleries*

The success of open proceedings as antistigma agents does not depend solely on the public populating the galleries at these proceedings. Open proceedings operate as antistigma agents on several levels. First, flipping the presumption in disability adjudication has a significant expressive value. It sends a powerful social message that disability is not shameful or in need of protection. This is the beginning step in determining what type of procedures might best enhance agency while being consistent with the substantive laws. Second, open proceedings offer the target opportunities to resist the effects of stigma through active participation in the creation and dissemination of her lived

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300. See, e.g., Elizabeth F. Emens, *Shape Stops Story*, 15 NARRATIVE 124, 129–30 (2007) (discussing the tension from a lawyering perspective of resisting the state’s overly burdensome requests for the details of the lives of marginalized people in litigation versus the strategic use of those spaces to expand the power of narratives).

301. See, e.g., Corbett Joan O’Toole, *Disclosing Our Relationships to Disabilities: An Invitation for Disability Studies Scholars*, 33 DISABILITY STUD. Q. (2013) (“I want to talk about why we . . . don’t talk about our relationships to disabilities. . . . [W]e skirt around it. We whisper the information to each other over coffee. But there are no standardized signifiers of our relationships to disabilities, no universal expectation of public disclosure, no support when people ask for public disclosure. In fact, it’s just the opposite.”).

302. SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 111 (1989) (internal quotation marks omitted); see Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN’S STUD. 97, 114 (1994) (“This type of analysis [(the personal is the political)] can be applied to the study of disability almost without modification.”).

experience. Even if her story is told through counsel, rules of ethics (particularly Model Rule of Professional Conduct 1.14)<sup>303</sup> call for her control over the content of the narrative conveyed. Third, the design choice of open court proceedings includes access to the records in those cases. Public access can create a body of jurisprudence in this area to guide the behavior and expectations of legal actors. It can also provide opportunities for data collection and analysis by researchers such as the National Center for State Courts.

#### *E. Unveiling Family Law*

Other areas of family law previously closed to the public, for many of the same reasons driving closure in the disability arena (e.g., the “best interests” of the child) have flipped former presumptions in favor of qualified openness. States have articulated a variety of legal sources regarding public access, including state constitutions, statutes, regulations, court rules, case law, or some combination thereof. For example, Oregon’s constitution explicitly states that “[n]o court shall be secret, but justice shall be administered, openly and without purchase . . . .”<sup>304</sup> In contrast, North Carolina has no formally articulated procedural directive and, instead, has relied on judicial discretion and practice to treat these proceedings as presumptively open with judicial discretion to close.<sup>305</sup>

Much of the resistance to public access to these proceedings is a function of attitudes about the shame and fears that drive people to closet issues in the name of privacy, convenience, and

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303. See MODEL RULES OF PROF’L CONDUCT R. 1.14(a) (2014) (“[T]he lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”); see also *id.* R. 1.14 cmt. 1 (“The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.”).

304. OR. CONST. art. I, § 10.

305. BARTON CHILD LAW & POLICY CLINIC, EMORY UNIV. SCH. OF LAW, OPEN OR CLOSED: AN OVERVIEW OF THE CURRENT OPINIONS AND REALITIES OF OPENING JUVENILE COURT DEPRIVATION PROCEEDINGS 7 (3rd ed. 2006), available at [http://bartoncenter.net/uploads/fall2011updates/policy\\_general/OpenCourtsMemo.pdf](http://bartoncenter.net/uploads/fall2011updates/policy_general/OpenCourtsMemo.pdf) [hereinafter BARTON CENTER REPORT]; see N.C. GEN. STAT. § 7B-801 (2011) (providing judicial discretion to close parts of proceedings in juvenile cases). The General Statutes of North Carolina suggest that judges assess the following factors when determining whether to close parts of a hearing in the child welfare context: an examination of the nature of the allegations against the parent or guardian, the age and maturity level of the young person, the benefits of confidentiality and openness to the young person, and the potential harm to the young person’s confidentiality over time if opened now. N.C. GEN. STAT. § 7B-801(a).

protection.<sup>306</sup> The National Council of Juvenile and Family Court Judges, a group of adjudicators in family and juvenile matters including judges, referees, and masters, passed a resolution in support of opening (with judicial discretion to close) all juvenile proceedings, including delinquency, abuse, and neglect.<sup>307</sup> The resolution explained the need to open proceedings to advance institutional accountability, efficacy, public education, and confidence.<sup>308</sup>

Even in child welfare proceedings, where the interest in protecting the child's privacy is significant, states increasingly are moving to open access to promote transparency and public accountability. Congress has expressly clarified that no federal grant requirement prevents states from opening proceedings to the extent that they do not endanger the safety and wellbeing of the young person.<sup>309</sup> Accordingly, about one-third of states have moved to presumptively open child protection proceedings.<sup>310</sup>

The movement in this area began in the 1990s with a handful of state pilot projects to test the impact of public access on a child's psychological state. The central concern was that public access and dissemination of the child's story—through the media or by word of mouth—would lead to repeat trauma for the young person.<sup>311</sup>

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306. See, e.g., BARTON CENTER REPORT, *supra* note 305, at 2 (“The majority of arguments advanced on either side are not legal arguments *per se*, rather they are predominately the opinions of care givers, court personnel and child advocates on how the system works or can be mended.”).

307. See Resolution No. 9: *Resolution in Support of Presumptively Open Hearings with Discretion of Courts to Close*, NAT'L COUNCIL JUV. & FAM. CT. JUDGES (July 20, 2005), available at <http://www.ncjfcj.org/sites/default/files/resolution%2520no.%25209%2520open%2520hearings.pdf> (resolving that the public has an interest the legal holdings of the family courts in dealing with complicated issues of juvenile justice and child protection).

308. *Id.* (lacking procedural recommendations on how to close proceedings (e.g., by motion) or the applicable evidentiary standard (e.g., compelling government interest)).

309. See 42 U.S.C. § 5106a (2012) (proclaiming that federal grants to state child protection services shall not preclude a state's discretion on how it procedurally conducts family court adjudications).

310. BARTON CENTER REPORT, *supra* note 305, at 6 n.21 (“The states with presumably open proceedings and judicial discretion to close are Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Texas, Utah and Washington.”). Oregon does not specify a presumption of openness in juvenile proceedings because its constitution provides a presumption of openness in all courts. See OR. CONST. art. I, § 10; *State ex rel. Oregonian Publ'g Co. v. Deiz*, 613 P.2d 23, 23, 27 (Or. 1980) (holding that a judge's order barring a newspaper publisher and reporter from the hearings of a juvenile court was invalid under Article I, § 10 of the Oregon Constitution).

311. William Wesley Patton, *Bringing Facts into Fiction: The First “Data-Based” Accountability Analysis of the Differences Between Presumptively Open, Discretionarily Open,*

Minnesota, Arizona, and Connecticut created pilot projects to test the benefits and risks of open dependency proceedings.<sup>312</sup> State assessments reported success in greater public and media engagement and have discovered ways to mitigate many of the potential harms by sealing particularly sensitive records and restricting the conditions of access where the privacy interests are particularly significant, such as in the case of rape and incest. Minnesota has revised its procedures to provide a clear directive that juvenile protection hearings are presumed open to the public with discretion of the courts to close.<sup>313</sup> As of 2004, about a quarter of states had advanced the presumption of openness through statutes, and a handful of states in which hearings were presumptively closed had initiated pilot projects to study the impact of openness.<sup>314</sup>

#### CONCLUSION

New York Governor Andrew Cuomo signed a bill, the first of its kind, in July 2014 requiring the replacement of the “handicapped” sign with a more active image of a wheelchair user in motion.<sup>315</sup> Cuomo, in response to objections regarding significant costs for what opponents characterized as aesthetic adjustments, argued that the

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*and Closed Child-Dependency-Court Systems*, 44 U. MEM. L. REV. 831, 832–33 (2014) (summarizing the results of an empirical study on the psychological health of youth who are subject to open proceedings).

312. See JUVENILE ACCESS PILOT PROGRAM ADVISORY BD., REPORT TO THE CONNECTICUT GENERAL ASSEMBLY 4 (2010) (reporting on the implementation of a state pilot program to increase access to juvenile court proceedings); see also Heidi S. Schellhas, *Open Child Protection Proceedings in Minnesota*, 26 WM. MITCHELL L. REV. 631, 657–66 (2000) (discussing the history of Minnesota’s open juvenile protection proceedings pilot project, its initially hostile reception, and the need for continued openness). *But cf.* Patton, *supra* note 311, at 867–68 (concluding and reporting that, empirically, children were more psychologically healthy if they participated in closed proceedings than in open proceedings).

313. MINN. R. JUV. PROT. P. 8.02 (2009) (enumerating pilot jurisdictions for open proceedings).

314. Memorandum from Michele Garcia and Charisa Smith to Judge Michael Mack 1 (Nov. 8, 2004), available at <http://www.ctvoices.org/sites/default/files/welf04courtmemo11.pdf>.

315. See H.R. A09934A, 2014 Gen. Assemb., Reg. Sess. (N.Y. 2014) (“AN ACT to amend the executive law and the vehicle and traffic law, in relation to certain signs relating to accessibility and related rules and regulations . . .”).

“bill is an important step toward correcting society’s understanding of accessibility and eliminating a stigma.”<sup>316</sup>

Similarly, this Article seeks to shift the images and narratives of disability. The law has a complicated history with disability—rendering disability invisible at one time, allowing for selective visibility at another, and moving towards full socio-economic visibility at the present. The ADA has opened the closet of disability but has been less effective in addressing the barriers associated with disability stigma that prevent people with disabilities from fully coming out.<sup>317</sup> In other words, integration means not only visibility but active engagement in socio-economic life.

Critical analysis of institutional designs reveals the ways in which procedures may have perpetuated invisibility and stigma. For example, the presumptions of private adjudication in the disability context (either by design or in practice) continue to propagate the notion of disability as special, personal, and shameful. Procedural design also reveals untapped potential for mitigating both individual and societal stigmas of disability—most fundamentally through open dialogic spaces for the construction and dissemination of counter-normative narratives of disability.

The twenty-fifth anniversary of the ADA offers an occasion to reflect. Scholars and institutional designers have an opportunity to pivot from a retrospective analysis of disability law to a prospective one in which procedural design adopts a more active, mitigating role in the antistigma process. Perhaps New York, once again a trendsetter, provides a useful image of the next iteration of disability consciousness—active, progressive, and worth every penny.

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316. Press Release, Governor’s Press Office, Governor Cuomo Signs Legislation Updating New York’s Accessibility Signage and Logos (July 25, 2014), *available at* <http://www.governor.ny.gov/press/07252014-accessibility-signage-and-logos>.

317. The “closet” metaphor taken literally and true to its origins in the gay rights context would suggest its limits to the experience of those with less visible or “hidden” disabilities—i.e., those with an actual choice of whether to disclose, “cover,” or “pass.” Yet social scientists have recently expanded this concept through research in the context of obesity, a visible and highly stigmatizing mark. “Coming out” in this context reflects the target’s acceptance and “flaunting” of a particularly disfavored body image. *See, e.g.*, Abigail C. Saguy & Anna Ward, *Coming Out as Fat: Rethinking Stigma*, 74 *SOC. PSYCHOL. Q.* 53, 54, 57 (2011).