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## Disabling Language: Why Legal Terminology Should Comport with a Social Model of Disability

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# DISABLING LANGUAGE: WHY LEGAL TERMINOLOGY SHOULD COMPORT WITH A SOCIAL MODEL OF DISABILITY

**Abstract:** The disability terminology used in the law has evolved significantly over time. This evolution has mirrored various models for treating and perceiving disability in society, from the moral model of disability as a sin to the medical model of disability as a defect to be cured. After witnessing the success of the Civil Rights Movement, disability rights activists began to push for a social model of disability that reframed disability as a condition created by physical and cultural barriers to inclusion rather than as an individual impairment. This activism led to federal legislation mandating both inclusion and inclusive language, but there is still work to do. Lawyers, as members of society with a special responsibility for promoting justice, should implement the social model in their practice of law by utilizing respectful language and confronting their own underlying assumptions about disability. State legislatures should make sure the social model is reflected in their laws by updating disability terminology to reflect the preferred language of the disability community. And the Supreme Court should bring the social model into the courtroom by interpreting the definition of disability more broadly to protect a wide range of people and better align with congressional intent.

## INTRODUCTION

Feeble-minded, moron, mentally deficient, retarded, handicapped—these are words that have been used in society and the law to describe people with disabilities.<sup>1</sup> These are also all words that contribute to feelings of stigmatization and discrimination against people with disabilities.<sup>2</sup> In the words of John Franklin Stephens, a Special Olympics athlete:

So what's wrong with "retard"? I can only tell you what it means to me and people like me when we hear it. It means that the rest of you are excluding us from your group. We are something that is not like you and something that none of you would ever want to be. We are

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<sup>1</sup> John Simpson, *What's in a Name? The Language of Intellectual Disability*, in SUPPORTING INDIVIDUALS WITH INTELLECTUAL DISABILITIES & MENTAL ILLNESS 10, 11–13 (Sherri Melrose et al. eds., 2015); Patrick J. Devlieger, *From Handicap to Disability: Language Use and Cultural Meaning in the United States*, 21 DISABILITY & REHABILITATION 346, 351 (1999).

<sup>2</sup> See S. REP. NO. 111-244, at 2 (2010) (discussing how each of the terms used throughout history has described people with disabilities in a negative way); Simpson, *supra* note 1, at 11–13 (highlighting how a number of the terms used to describe people with disabilities have been transformed into everyday insults).

something outside the “in” group. We are someone that is not your kind. I want you to know that it hurts to be left out here, alone.<sup>3</sup>

As Stephens describes, stigmatizing language like the word “retard” contributes to the marginalization of people with disabilities.<sup>4</sup> Through statutes and court cases that utilized—and sometimes directly addressed—this language, the law has played a powerful role in the perpetuation of different models of perceiving and treating disability.<sup>5</sup> The evolution of disability language can be traced from statutes that made it a crime to be “deformed,” to the Supreme Court condoning the medical sterilization of those deemed to be “feeble-minded,” to the first laws mandating the provision of services to the “handicapped” that emerged out of concern for rehabilitating wounded veterans.<sup>6</sup> After observing the success of the Civil Rights Movement, disability rights activists began a strong push for more inclusive language in legislation that reflected a model of disability in which it is the environment, not the person or their individual condition, that is disabling.<sup>7</sup>

In response to this pressure, Congress passed the Americans with Disabilities Act (ADA) in 1990, a comprehensive civil rights bill for people with disabilities.<sup>8</sup> Notably, the ADA used the phrase “individuals with disabilities,” which is an example of person-first language that promotes inclusion and equality by emphasizing individuals as people first rather than defining them by their disability.<sup>9</sup> This person-first language is in line with the modern social model of disability that views disability as a condition created by the physical

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<sup>3</sup> John Franklin Stephens, Opinion, *Using the Word “Retard” to Describe Me Hurts*, DENVER POST (Aug. 31, 2008), <https://www.denverpost.com/2008/08/31/using-the-word-retard-to-describe-me-hurts/> [<https://perma.cc/J6E9-CRN9>].

<sup>4</sup> Lindsey T. Back et al., *How We Label Students with Disabilities: A Framework of Language Use in an Urban School District in the United States*, 36 DISABILITY STUD. Q., Fall 2016, <https://dsq-sds.org/article/view/4387/4481#top> [<https://perma.cc/FCP4-Q2Y2>].

<sup>5</sup> See Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1344 (1993) (highlighting how the law has historically treated individuals with disabilities as “intrinsically sub-standard”).

<sup>6</sup> Vocational Rehabilitation Act Amendments of 1943, Pub. L. No. 78-113, 57 Stat. 374; *Buck v. Bell*, 274 U.S. 200, 207 (1926); SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC 1* (2009).

<sup>7</sup> Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 428–29 (2000); Dana S. Dunn & Erin E. Andrews, *Person-First and Identity-First Language: Developing Psychologists’ Cultural Competence Using Disability Language*, 70 AM. PSYCHOLOGIST 255, 258 (2015); Vlad Perju, *Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States*, 44 CORNELL INT’L L.J. 279, 294 (2011).

<sup>8</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2018)); FRED PELKA, *WHAT WE HAVE DONE* 28–29 (2012); Kathryn L. Reed, *History of Federal Legislation for Persons with Disabilities*, 46 AM. J. OCCUPATIONAL THERAPY 397, 404 (1992).

<sup>9</sup> 42 U.S.C. § 12112; Dunn & Andrews, *supra* note 7, at 256; Back et al., *supra* note 4, at 4–5.

and cultural barriers of society rather than an individual trait.<sup>10</sup> Utilizing person-first language in the ADA was a deliberate effort by Congress to respect the preferences of people with disabilities and avoid stereotypes or stigmatizing labels.<sup>11</sup> Subsequently, in 2010, President Barack Obama signed Rosa's Law, which mandated that "mental retardation" be replaced with person-first language in numerous federal laws.<sup>12</sup>

As exemplified by this history of disability terminology, the way language is utilized in the law can have powerful implications.<sup>13</sup> Terminology and labels attach connotations and perceptions to the people they describe, and the imposition of a label is an exercise of authority that determines who is outside the norm.<sup>14</sup> The law is built upon spoken and written word and has the ability to institutionalize language and the norms that it connotes.<sup>15</sup> Disability terminology as used in the law can influence the way people with disabilities are viewed and view themselves, and can lead to marginalization and exclusion when associated with negative connotations.<sup>16</sup> Furthermore, defining certain legal terminology can have drastic implications for who may qualify for services and protections provided under laws like the ADA.<sup>17</sup> When the Supreme Court interpreted the ADA in 1999, it took a formalist approach—a strict adherence to precedent and legal terminology—and significantly narrowed the

<sup>10</sup> See Bagenstos, *supra* note 7, at 428–29 (describing how the social model treats disability as arising from society and the environment rather than from an individual's mental or physical condition); Dunn & Andrews, *supra* note 7, at 258 (discussing how language that emphasizes the person over their condition is more in line with a social model of disability that also shifts the "problem" of disability from the person to society).

<sup>11</sup> H.R. REP. NO. 101-485, pt. 2, at 332–33 (1990) (addressing the change in terminology from "handicap" to "disability" and explaining the reasons behind it, including the fact that "the choice of terms to apply to a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations").

<sup>12</sup> Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643, 2643 (2010) (codified as amended in scattered sections of the U.S.C.); Marty Ford et al., *Beyond Terminology: The Policy Impact of a Grass-roots Movement*, 51 INTELL. & DEVELOPMENTAL DISABILITIES 108, 109 (2013).

<sup>13</sup> WILLIAM J. CHAMBLISS & ROBERT B. SEIDMAN, LAW, ORDER, AND POWER 8 (1971); Tom Shakespeare, *Disability, Identity, and Difference*, in EXPLORING THE DIVIDE 94, 105 (Colin Barnes & Geoff Mercer eds., 1996); Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 433 (2011); Rose Galvin, *The Making of the Disabled Identity: A Linguistic Analysis of Marginalisation*, 23 DISABILITY STUD. Q., No. 2, 2003, <https://dsq-sds.org/article/view/421/589> [<https://perma.cc/H9GS-PT7T>].

<sup>14</sup> Wendy Atkins-Sayre, *Naming Women: The Emergence of "Ms." as a Liberatory Title*, 28 WOMEN & LANGUAGE 8, 9 (2005); Devlieger, *supra* note 1, at 346; Irving Kenneth Zola, *Self, Identity, and the Naming Question: Reflections on the Language of Disability*, 36 SOC. SCI. & MED. 167, 167 (1993); Galvin, *supra* note 13.

<sup>15</sup> CHAMBLISS & SEIDMAN, *supra* note 13, at 8; Kanter, *supra* note 13, at 433–34.

<sup>16</sup> Shakespeare, *supra* note 13, at 105; Zola, *supra* note 14, at 169; see CHAMBLISS & SEIDMAN, *supra* note 13, at 13 (describing the role-defining power of the law).

<sup>17</sup> See, e.g., 42 U.S.C. § 12112(a) (forbidding discrimination against an individual based on disability); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481 (1999) (deciding whether plaintiffs qualify as individuals with disabilities under the Americans with Disabilities Act (ADA)).

definition of disability, thereby excluding a number of individuals from protection under the law.<sup>18</sup> In order to align itself with the disability rights movement and the preferences of disability advocates, the social model of disability should be reflected in the terminology used by legal practitioners, in state statutes, and by the Supreme Court.<sup>19</sup>

Part I of this Note traces the history of disability terminology and the role of the law in its evolution.<sup>20</sup> Part II discusses the intricate relationship between language, disability, law, and power.<sup>21</sup> This Part also explains the most recent iterations of disability terminology.<sup>22</sup> Because of the important role social, legislative, and judicial application of disability terminology and definitions have played throughout history, Part III recommends that the social model of disability be reflected in three different legal spaces: the individual practice of the law, state legislation, and the Supreme Court's judicial interpretation of the definition of disability under the ADA.<sup>23</sup>

## I. TRACING THE HISTORY OF THE LANGUAGE OF DISABILITY

The stigmatizing language used to label and describe individuals with disabilities has historically emphasized inferiority and otherness.<sup>24</sup> In the United States, the law has played a prominent role in determining how society both talks about and treats individuals with disabilities.<sup>25</sup> Section A of this Part discusses the variety of ways individuals with disabilities were excluded from society during the nineteenth and twentieth century and traces the rise of medi-

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<sup>18</sup> CHRISTOPHER HUTTON, LANGUAGE, MEANING, AND THE LAW 10 (2009); Perju, *supra* note 7, at 313–15 (addressing the Supreme Court's interpretation of "disability" to exclude individuals for whom corrective measures minimize the impact of their disability, those who cannot show that their disability impacts a "major life activity," and others).

<sup>19</sup> See 42 U.S.C. § 12102(4)(A) (instructing courts to interpret the definition of "disability" broadly in order to extend protection to those that have been excluded from society because of institutional and societal barriers); S. REP. NO. 111-244, at 3 (in the context of Rosa's Law, discussing the importance of legislative language reflecting a view of people with disabilities as deserving of equality and inclusion in society); Kanter, *supra* note 13, at 468–69 (discussing the critical need for lawyers to understand how to represent clients with disabilities respectfully and effectively).

<sup>20</sup> See *infra* notes 24–152 and accompanying text.

<sup>21</sup> See *infra* notes 154–209 and accompanying text.

<sup>22</sup> See *infra* notes 210–221 and accompanying text.

<sup>23</sup> See *infra* notes 222–279 and accompanying text.

<sup>24</sup> Devlieger, *supra* note 1, at 351. Using the term "idiots" to refer to people with intellectual disabilities and mark them as inferior dates as far back as ancient Greece. David Ferleger, *Disabilities and the Law: The Evolution of Independence*, FED. LAW., Sept. 2010, at 26, 27. Similar language use throughout history has emphasized marginalization and dehumanization, and individuals with disabilities have been treated as second-class citizens. Drimmer, *supra* note 5, at 1342–43; Back et al., *supra* note 4, at 3.

<sup>25</sup> See Drimmer, *supra* note 5, at 1342–44 (noting that the law and society have treated individuals with disabilities as second-class citizens). Even laws that were designed to create more rights for people with disabilities tend to describe the people as flawed. *Id.* at 1344.

cal and moral models of disability.<sup>26</sup> Section B documents how the return of injured World War I veterans led to a focus on rehabilitation, as well as the persistence of the medical model and the creation of the clinical term “retarded.”<sup>27</sup> Section C chronicles how the rise of the Civil Rights Movement and the concurrent disability rights movement led to a push for inclusive legislation and language, culminating in the passage of the ADA.<sup>28</sup> Section D discusses the Supreme Court’s interpretation of the ADA and Congress’s response to the judicial narrowing of the definition of disability.<sup>29</sup>

A. “*We Didn’t Have No Freedom, We Didn’t Have No Rights at All*”:  
*The Societal Exclusion of Individuals with Disabilities  
 and the Rise of the Moral and Medical Models*<sup>30</sup>

Starting in the late 1800s, major cities across the country passed laws that made it illegal for any person who had a physical disability to appear in public.<sup>31</sup> These laws were often referred to as “ugly laws” because of the offensive language they used to describe people with disabilities as less than human, such as persons “in any way deformed so as to be an unsightly or disgusting object.”<sup>32</sup> The ugly laws reflected the push at the time to keep individuals with disabilities segregated from larger society, often through forced institutionalization in separate facilities.<sup>33</sup> The language used in ugly laws—“diseased, maimed, mutilated”—highlights the dehumanizing view of people with disabilities prevalent at the time.<sup>34</sup> Although the ugly laws refer to “any person,”

<sup>26</sup> See *infra* notes 31–60 and accompanying text.

<sup>27</sup> See *infra* notes 62–81 and accompanying text.

<sup>28</sup> See *infra* notes 83–129 and accompanying text.

<sup>29</sup> See *infra* notes 131–152 and accompanying text.

<sup>30</sup> This Note argues in large part that the voices of individuals with disabilities need to be heard in society, in the courts, and in their legal representation. See *infra* notes 222–279 and accompanying text. To that end, many of the headings include quotes from individuals with disabilities who lived through the history being chronicled throughout this Note. These quotes are pulled from Fred Pelka’s *What We Have Done: An Oral History of the Disability Rights Movement*, which aims to tell the story of the disability rights movement “in the words of those who drew up that agenda, engaged that environment, and forever transformed our society.” PELKA, *supra* note 8, at 29. This first quote comes from Terry Schwartz, who describes his time at the Fairview Training Center in Oregon. *Institutions, Part 1*, in WHAT WE HAVE DONE, *supra* note 8, at 48, 57–58.

<sup>31</sup> SCHWEIK, *supra* note 6, at 1; Ferleger, *supra* note 24, at 28.

<sup>32</sup> SCHWEIK, *supra* note 6, at 4; Ferleger, *supra* note 24, at 28. Many states had “ugly laws” in place until the 1970s. Bagenstos, *supra* note 7, at 441; Ferleger, *supra* note 24, at 28.

<sup>33</sup> See Ferleger, *supra* note 24, at 28 (stating that the “ugly laws” were further evidence of an “out of sight, out of mind” approach to treating people with disabilities). Institutionalization was also a result of the belief that individuals with disabilities should not interact with people without disabilities. S. REP. NO. 111-244, at 2.

<sup>34</sup> SCHWEIK, *supra* note 6, at 85, 89, 94.

they utilize terms of disgust that immutably tie that person to an identity of being diseased, maimed, mutilated, or deformed.<sup>35</sup>

The description of disability as a defect or deformity led to the rise of the medical model in the nineteenth century that considered disability a medical problem to be cured.<sup>36</sup> The medical model regarded disability as a problem that is inherent in the individual and that should be fixed through medical treatment.<sup>37</sup> “Feeble-minded” became the first widely used term arising out of the medical model for individuals with intellectual disabilities in the United States, and was used to refer to individuals collectively (“the feeble-minded”).<sup>38</sup> “Imbecile” and “idiot” were also used as further clinical classifications of “feeble-mindedness.”<sup>39</sup>

Religious doctrines led to the concurrent moral model of disability that emphasized inferiority and pity, resulting in derogatory terms that portrayed disability as the result of sin or requiring charity.<sup>40</sup> Individuals characterized as “feeble-minded” were associated with a group considered to be the root cause of societal evils, including crime, sexual deviancy, and poverty.<sup>41</sup>

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<sup>35</sup> *Id.* at 85, 94. By describing individuals with disabilities as persons “who are” rather than persons “with,” the language of the laws further binds the person to these characteristics deemed unpleasant and disgusting. *Id.* at 85.

<sup>36</sup> Dunn & Andrews, *supra* note 7, at 258.

<sup>37</sup> Laura Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1048 (2004). Under the medical model, being able-bodied is seen as the norm, and a failure to cure disability is seen as a failure of medicine and science. PELKA, *supra* note 8, at 8.

<sup>38</sup> Simpson, *supra* note 1, at 11; see Dunn & Andrews, *supra* note 7, at 258 (describing that the medical model refers to people by and as their conditions, such as when a doctor asks if someone has treated “the spinal cord injury in room 330”).

<sup>39</sup> Simpson, *supra* note 1, at 11.

<sup>40</sup> Dunn & Andrews, *supra* note 7, at 258. The moral model has roots in many religious traditions, including Judaism and Christianity. Marno Retief & Rantoa Letšosa, *Models of Disability: A Brief Overview*, 74 HTC THEOLOGICAL STUD. 1, 2 (2018). In these doctrines, disability was sometimes seen as a blessing worthy of protection of the gods, but more often, disability was viewed as a punishment from god or a possession by demons, and therefore was equated with sin. PELKA, *supra* note 8, at 5; Retief & Letšosa, *supra*, at 2. Often the ability to cure disability was seen as an expression of spiritual power. PELKA, *supra* note 8, at 5. This idea that disability or illness is the result of individual sin has been taken to its extreme throughout history, including a once-common notion that masturbation caused blindness or that AIDS was a punishment for homosexuality and drug use. *Id.* at 6. In fact, Congressman Tony Coelho, one of the key legislators to push for the ADA in 1989, spoke at committee hearings for the ADA about his own experience with disability and religion. JONATHAN M. YOUNG, *EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 87–88* (2d ed. 2010). Congressman Coelho was diagnosed with epilepsy when he was in college, and because of a belief that epilepsy was evidence of a demonic possession he was forbidden from the Catholic priesthood he was pursuing and exiled from his family. *Id.* at 87. He subsequently began a career in government and as a Democratic representative was at the forefront of pushing for inclusive legislation for people with disabilities. *Id.* at 39, 88.

<sup>41</sup> Mark Jackson, *‘It Begins with the Goose and Ends with the Goose’: Medical, Legal, and Lay Understandings of Imbecility in Ingram v. Wyatt, 1824–1832*, 11 SOC. HIST. MED. 361, 364 (1998).

The eugenics movement reflected this societal fear that “normal” individuals would eventually become outnumbered by this “deviant” group.<sup>42</sup> In 1926, the Supreme Court in *Buck v. Bell* upheld the constitutionality of state-mandated sterilization of individuals deemed “feeble-minded” in order to eradicate the perceived dangers posed by this group.<sup>43</sup> The lawyers on both sides of *Buck* are suspected to have brought the case specifically to uphold the sterilization laws.<sup>44</sup> In his majority opinion, Justice Oliver Wendall Holmes utilized language like “socially inadequate” and “defective offspring” that emphasized a perception of individuals with disabilities as inferior and a threat to society to legitimize the Court’s holding that stripped them of their right to reproduce.<sup>45</sup>

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<sup>42</sup> Kanter, *supra* note 13, at 437. The pervasive belief at this time was that conditions such as mental illness were passed down from generation to generation. ROBERT HENLEY WOODY, LEGAL ASPECTS OF MENTAL RETARDATION: A SEARCH FOR RELIABILITY 68 (1974) (citing Elyce Zenoff Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591 (1966)). Therefore, preventing the inheritance of these traits was considered the only way to protect society from being inundated by those considered defective. *Id.*

<sup>43</sup> 274 U.S. at 207; Jackson, *supra* note 41, at 364. The case challenged the involuntary sterilization of eighteen-year-old Carrie Buck in Virginia, described as “a feeble-minded white woman,” who lived with her mother and illegitimate child in a Virginia institution. *Buck*, 274 U.S. at 205. Carrie became pregnant after being raped while in foster care. PELKA, *supra* note 8, at 2. Carrie’s mother had been taken to the Virginia Colony for Epileptics and Feeble-minded (“the Colony”) when she was forty-eight years old after being diagnosed with “mental deficiency.” PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES 106 (2008). She had been arrested for prostitution, showed evidence of illicit drug use, and was described as lacking “moral sense and responsibility,” but she did not demonstrate any actual signs of a mental disability. *Id.* After her pregnancy, Carrie’s foster parents had her placed at the Colony with her birth mother. *Id.* at 103.

<sup>44</sup> *Verdict of History: The Forgotten Years: 1870–1940*, MICH. B.J., Jan. 2009, at 12. There was little evidence that Carrie’s family met the clinical definition of “feeble-minded.” *Id.* Her foster parents described her as “peculiar,” subject to hallucinations, and prone to temper tantrums, but otherwise as in good health and well-behaved. LOMBARDO, *supra* note 43, at 103. She had an I.Q. of 56. *Id.* at 105. Dr. Albert S. Priddy, director of the Colony and a strong proponent of the eugenics movement, reported finding that Carrie showed no evidence of psychosis but described her as “a moral delinquent.” *Id.* at 60, 107. After Dr. Priddy presented evidence that both Carrie and her mother demonstrated the same deviant characteristics, the Colony Board voted to sterilize Carrie to promote societal welfare. *Id.* at 107. To uphold this vote, the Board was required to appoint an attorney to represent Carrie against the Colony’s lawyer, Aubrey Strode. *Id.* The lawyer the Colony appointed was Irving Whitehead, a friend of both Priddy and Strode, a former director of the Colony, and an advocate for the eugenics movement. *Id.* At the initial trial, Strode introduced testimony of Carrie’s teachers, social workers, neighbors, and nurses who testified negatively about the “peculiarity” of various members of the Buck family while offering very little evidence about Carrie herself. *Id.* at 113–16. Whitehead let inaccurate statements about the Buck family go undisputed, raised no strong challenges to any of this evidence, and did not cross-examine many of the witnesses. *Id.* at 138–39. Strode introduced into evidence the deposition testimony of a prominent eugenics expert stating that the “social and economic inadequacy” and record of “immorality, prostitution, and untruthfulness” of Carrie and her family presented a risk to society, and that sterilization offered a solution to “prevent race degeneracy.” *Id.* at 134–35. Whitehead made one objection—that the deposition be struck from the trial record—but was overruled, and he offered no witnesses or evidence in opposition to Carrie’s sterilization. *Id.* at 135.

<sup>45</sup> See *Buck*, 274 U.S. at 205–07 (using terms such as “feeble-minded,” “mental defectives,” and “imbecility” to describe people with disabilities). The language used in the opinion also perpetuated an idea that individuals with disabilities were not viewed as fully human and therefore should be erad-

The language of the case mirrored the pervasive societal fear that gave rise to the eugenics movement in the United States.<sup>46</sup> After *Buck*, over sixty thousand individuals were involuntarily sterilized across the country.<sup>47</sup>

Towards the middle of the twentieth century, the medical field began to use “mental deficiency” and “mental defectiveness” due to negative connotations that were associated with the term “feeble-minded.”<sup>48</sup> Although it appeared that the medical terminology was evolving, the term “moron” arose out of the eugenics movement and persisted in colloquial use.<sup>49</sup> This kind of language reflected a belief that individuals with disabilities were lacking or damaged and could not be cured, and therefore still relegated them to the margins of society.<sup>50</sup> The Supreme Court used the terms “mentally defective” and “moron” in cases from the 1940s through the 1960s and issued decisions that largely reflected a perception of individuals with disabilities as deficient.<sup>51</sup> The laws in question in these cases were often as ostracizing to people with disabilities as the language used within them, including the Immigration Act of 1917, which prohibited people who were deemed to be “mentally defective” from being admitted to the United States.<sup>52</sup>

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icated from society. *See id.* at 207 (describing people with disabilities as “degenerates” who should not be allowed to reproduce because their offspring will most likely starve or be executed for committing a crime).

<sup>46</sup> *See Verdict of History: The Forgotten Years: 1870–1940*, *supra* note 44, at 10, 12 (describing the impact of legal decisions upholding sterilization laws to stop the perpetuation of a “low and degenerate race”).

<sup>47</sup> *Id.* at 12. Twenty states passed sterilization laws that largely mirrored the Virginia Law upheld in *Buck*. MENTALLY DISABLED AND THE LAW: THE REPORT OF THE AMERICAN BAR FOUNDATION ON THE RIGHTS OF THE MENTALLY ILL 184 (Frank T. Lindman & Donald M. McIntyre eds., 1961). Many offered little to no procedural protections to patients, and only two states statutorily required the consent of the patient. *Id.* at 184–85.

<sup>48</sup> Simpson, *supra* note 1, at 12.

<sup>49</sup> Dan Berry, *Giving a Name, and Dignity, to a Disability*, N.Y. TIMES (May 7, 2016), <https://www.nytimes.com/2016/05/08/sunday-review/giving-a-name-and-dignity-to-a-disability.html> [<https://perma.cc/V83D-PJXF>]. A leading eugenicist, Henry H. Goddard, came up with the term by using the Greek word for “dull.” *Id.*

<sup>50</sup> *See Dunn & Andrews*, *supra* note 7, at 258 (stating that terms like “moron” perpetuated an idea that individuals with disabilities were inferior to the rest of society). An American Bar Association report from 1961 highlights that the generally agreed-upon view of the time was that mental deficiency was a condition that could not be cured. MENTALLY DISABLED AND THE LAW, *supra* note 47, at 186.

<sup>51</sup> *See Culombe v. Connecticut*, 367 U.S. 568, 620, 635 (1961) (overturning the conviction of plaintiff, a “thirty-three-year-old mental defective of the moron class,” because given his disability, his confession could not be said to be a willing admission of guilt); *United States ex. rel. Johnson v. Shaughnessy*, 336 U.S. 806, 808, 815 (1949) (remanding a decision by the Immigration and Nationalization Service denying petitioner admission to the United States because there was inadequate evidence to find her “mentally defective” rather than “normal”).

<sup>52</sup> *See Shaughnessy*, 336 U.S. at 808 (interpreting the Immigration Act to determine whether denying admission to the plaintiff was inappropriate because of her status as “mentally defective”). A connection could be drawn between the prevalent xenophobia of the late nineteenth and early twenti-

This view that people with disabilities were not capable of living among larger society or making decisions led to the rise of institutionalization across the country.<sup>53</sup> While some in the 1800s believed that individuals with disabilities could grow and develop if provided with education and accommodations, a growing perception of people with disabilities as dangerous shifted the goals of institutions away from education and toward simply custodial care.<sup>54</sup> These institutions were referred to as asylums and their purpose was to maintain social order by segregating people with disabilities rather than providing them with any sort of meaningful services.<sup>55</sup> Despite growing public unrest with the dehumanizing conditions of asylums across the country, the legal profession remained largely unconcerned with addressing these problems.<sup>56</sup> Individuals who were institutionalized and then released often returned to public life only to find that they had lost a number of their civil rights, including property and custody rights.<sup>57</sup>

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eth centuries and the rise of the eugenics movement, as individuals outside the norm were seen as a threat to larger society. PELKA, *supra* note 8, at 9.

<sup>53</sup> Megan Testa & Sara G. West, *Civil Commitment in the United States*, PSYCHIATRY, Oct. 2010, at 30, 32 (2010). The first four asylums in the United States were founded in Connecticut, Massachusetts, New York, and Pennsylvania in the early 1800s. *Id.* These original institutions were privately funded, but soon there was a network of public, state-funded mental institutions across the country. *Id.* In 1953, an all-time high of 559,000 people were living in institutions in the United States. *Id.*

<sup>54</sup> Ferleger, *supra* note 24, at 27–28. Examples of custodial care included restraining patients or sedating them with medicine or experimental drugs, including opium. Testa & West, *supra* note 53, at 32. While care of this type was the norm in the nineteenth century, a few individuals were ahead of their time in pushing for proper education for children with disabilities. Hilary Rodham Clinton & Chelsea Clinton, *Margaret Bancroft*, in THE BOOK OF GUTSY WOMEN 58, 59 (2019). Margaret Bancroft was one of the earliest disability advocates, and quit her job as a teacher to found the Had-donfield Training School in 1883. *Id.* The school provided holistic education and care to its students, with a focus on “nutrition, exercise, and sensory and artistic instruction.” *Id.* While most people held the belief that individuals with disabilities should be hidden away from larger society, Bancroft took her students on field trips and taught them important life and job skills. *Id.* She trained teachers to take these practices to other parts of the country and encouraged the medical field to be more inclusive and individualized when it came to treating individuals with disabilities. *Id.* at 60. Bancroft also actively pushed to end the use of derogatory terms like “idiot” and “imbecile.” *Id.* Her school, reincorporated as the Bancroft Training School in 1898, is now a large nonprofit that continues to provide services to children and adults with disabilities across Delaware, New Jersey, and Pennsylvania. *Id.*; *History*, BANCROFT, <https://www.bancroft.org/about/history/> [<https://perma.cc/Z68X-F9RL>].

<sup>55</sup> Testa & West, *supra* note 53, at 32.

<sup>56</sup> David Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L.J. 595, 595–96 (1983). From 1950 to 1955, no more than twenty-eight law journal articles discussed intellectual disabilities in a given year, reflecting the lack of attention from the legal profession to the issue of disability and institutionalization. *Id.* at 596 n.4.

<sup>57</sup> Testa & West, *supra* note 53, at 32. Elizabeth Packard is one example of how institutionalization was accompanied by a loss of countless other civil rights. *Id.* Elizabeth was institutionalized in 1860 because her husband, a clergyman, wanted to punish her for “having an unclean spirit.” *Id.* At the time, all that was required to involuntarily institutionalize someone was a mental illness diagnosis of some kind and a recommendation for treatment; this was based on the idea that it was the government’s obligation to treat such individuals, even against their will. *Id.* Elizabeth was officially labeled as having “moral insanity” and spent three years in an institution. *Id.* When she was released, she

It was not until the twentieth century that the public's condemnation of the abuses of institutionalization manifested as actual improvements to the system.<sup>58</sup> States implemented legal protections for individuals being considered for commitment to an institutionalization.<sup>59</sup> These protections included the right to a trial and legal representation prior to commitment, and the judiciary undertook responsibility for the decision of whether to commit someone, largely removing that power from the medical profession.<sup>60</sup>

*B. "If It's Rehab, Surely at Some Point You're Rehabilitated!": The Push for Rehabilitation, the Introduction of "Retardation," and the Persistence of the Medical Model"*<sup>61</sup>

The rehabilitative model evolved from the medical model and positioned disability as a condition that can be mitigated or even cured by the provision of therapies or accommodations.<sup>62</sup> Support for providing vocational trainings and services to people with physical disabilities arose out of a desire to help veterans returning home after World War I.<sup>63</sup> The rehabilitative model, like the medical model, focused on "fixing" the individual, often with the goal of getting that person back to work.<sup>64</sup> In the early twentieth century, many states implemented workers' compensation schemes to provide income to employees who became disabled after workplace accidents.<sup>65</sup> Proof of disability was required to be eligible for workers' compensation, but doctors made such determinations based on a value judgment of who they felt was deserving of such compensation rather than on objective medical standards.<sup>66</sup>

In 1918, Congress passed the Soldiers (Veterans) Rehabilitation Act to provide vocational services to veterans; it later extended the same provisions to civilians with physical disabilities with the passage of the Smith-Fess Act in 1920.<sup>67</sup> In 1943, Congress amended the Smith-Fess Act to expand the defini-

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found that she had legally lost custody of her children and had lost her property rights. *Id.* She subsequently filed and won a lawsuit for wrongful confinement. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Institutions, Part 2, in WHAT WE HAVE DONE*, *supra* note 8, at 77, 86. Lucy Gwin describes her time in a rehabilitative facility after she suffered a traumatic brain injury in a car accident. *Id.* at 82–83.

<sup>62</sup> Dunn & Andrews, *supra* note 7, at 258.

<sup>63</sup> Reed, *supra* note 8, at 398; Rovner, *supra* note 37, at 1048.

<sup>64</sup> Dunn & Andrews, *supra* note 7, at 258; Rovner, *supra* note 37, at 1049.

<sup>65</sup> PELKA, *supra* note 8, at 12. Workers' compensation became a necessity as industrialization led to an increasing number of employees becoming disabled because of injuries at work. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Reed, *supra* note 8, at 398–99; see Smith-Fess Act, ch. 219, Pub. L. No. 66-236, 41 Stat. 735 (1920) (providing vocational services to individuals "disabled in industry"); Vocational Rehabilitation

tion of “vocational services,” and for the first time medical, educational, and vocational services for both physical and intellectual disability, as well as blindness and psychiatric illness, were covered under the law.<sup>68</sup> These laws continued to fixate on work-related skills and education, and therefore still reflected dominant stereotypes about disability as an inferior status that leads to negative economic effects for the entire nation.<sup>69</sup>

The 1943 Vocational Rehabilitation Act Amendments also introduced the term “handicap” to the law.<sup>70</sup> The word originated in nineteenth century sports as a method to equalize the playing field by imposing an advantage or disadvantage, and it was later used to describe an encumbrance or impediment.<sup>71</sup> Throughout the twentieth century, it became one of the most common words used in both society and the law to refer to mental or physical disability both as an identifying status and as an obstacle that creates difficulty.<sup>72</sup>

In 1961, what was then known as the American Association on Mental Deficiency issued guidelines proposing use of the terms “mild, moderate, severe, and profound mental retardation” to classify individuals with intellectual disabilities.<sup>73</sup> The term “mental retardation” was clinically defined as a condi-

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Act of 1918, ch. 107, § 2, 40 Stat. 617 (providing vocational services and compensation to individuals disabled after discharge from the military).

<sup>68</sup> Vocational Rehabilitation Act Amendments of 1943, Pub. L. No. 78-113, 57 Stat. 374; Reed, *supra* note 8, at 400.

<sup>69</sup> Drimmer, *supra* note 5, at 1371. The goals of rehabilitation were to cure the aspects of individuals with disabilities that made them inferior, including their perceived inability to contribute economically to the country. *Id.* These policies did not help to reduce stigma or discrimination against individuals with disabilities, as the only employment opportunities for people with disabilities were often in segregated, sheltered workshops. *Id.* at 1369, 1371. President Franklin Delano Roosevelt was one example during this time of the negative stigma that attached to disability. PELKA, *supra* note 8, at 17–18. A polio survivor, Roosevelt went to extreme lengths to hide the fact that he used a wheelchair and had ramps installed at the White House because he feared his disability would hinder his chances of being reelected. *Id.* at 18.

<sup>70</sup> Vocational Rehabilitation Act Amendments of 1943 at 379.

<sup>71</sup> *Handicap*, OXFORD ENGLISH DICTIONARY (3d ed. 2013), <https://www-oed-com.proxy.bc.edu/view/Entry/83859?rskey=AnvwGl&result=1&isAdvanced=false> [<https://perma.cc/34XW-PJUX>].

<sup>72</sup> *See id.* (showing that the word “handicap” was used in 1888 to describe the “handicap of deafness” and continued to be used in this way throughout the next century); *see, e.g.*, Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 121, 123 (1970) (providing free public education for children who are physically or mentally “handicapped” and require special education); Vocational Rehabilitation Act Amendments of 1943 at 376, 378 (using “handicap” in phrases like “handicapped individuals” as well as mentioning a physical condition that may create “substantial handicap to employment”).

<sup>73</sup> Simpson, *supra* note 1, at 12. The American Association on Mental Deficiency is now known as the American Association on Intellectual and Developmental Disabilities. Marc J. Tassé & Matthew Grover, *American Association on Intellectual and Developmental Disabilities*, in *ENCYCLOPEDIA OF AUTISM SPECTRUM DISORDERS* 122, 124 (F. R. Volkmar ed. 2013). As a professional organization dedicated to research and support for people with intellectual disabilities, the name of the Association has acted as an indicator of public perception of attitudes towards people with intellectual disabilities. *Id.* at 123. The Association changed from The American Association for the Study of the

tion with diminished cognitive capacity and functioning, though critics argued that the term was too ambiguous and lacked a consistent definition.<sup>74</sup> The term came about at the same time as the law recognized a more comprehensive view of rehabilitation for people with disabilities that went beyond just job placement and included improvement in day-to-day life.<sup>75</sup> The Vocational Rehabilitation Act was amended again in 1965 to further expand the provision and increase the quality of services and facilities for the “mentally retarded.”<sup>76</sup>

Although it originated as a neutral clinical term, “mental retardation” quickly developed a broader social meaning that classified individuals with intellectual disabilities as outside of the norm.<sup>77</sup> It also became a commonly used slur for a person with or without a disability considered to be stupid or dumb, which reinforced negative stereotypes of people with disabilities.<sup>78</sup> The pejorative use of the word first appeared in 1954 in the novel *The Courts of Memory* when one of the main characters stated, “you’ve got an I.Q. about equal to a squirrel’s. You’re retarded, do you hear me?”<sup>79</sup> Similarly negative uses of the term, and the suffix “-tard,” became and remained popular in the

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Feeble-minded to the American Association on Mental Deficiency in 1933, and in 1987 changed its name to The American Association on Mental Retardation. *Id.* at 123–24.

<sup>74</sup> S. REP. NO. 111-244, at 2; WOODY, *supra* note 42, at 14. In 1968, the American Psychiatric Association defined mental retardation as “subnormal general intellectual functioning” that an individual is born with and that leads to difficulty with learning, social skills, and development. WOODY, *supra* note 42, at 13. This definition focused both on intellectual functioning as well as behavioral manifestations of people with mental retardation. *Id.* at 13–14. Under this clinical perspective, mental retardation was a diagnosis made by medical professionals after testing with standardized measures. Steven Taylor, *Before It Had a Name: Exploring the Historical Roots of Disability Studies in Education*, in VITAL QUESTIONS FACING DISABILITY STUDIES IN EDUCATION, at xiii, xiv–xv (Scot Danforth & Susan L. Gabel eds., 2d ed. 2016). The ambiguity in the definition of—and diagnostic criteria for—mental retardation, however, often frustrated medical professionals and could have drastic implications for the individuals being diagnosed. WOODY, *supra* note 42, at 15–16.

<sup>75</sup> Reed, *supra* note 8, at 401. Improving the social rehabilitation of people with disabilities would decrease the need for institutional care. *Id.*

<sup>76</sup> Vocational Rehabilitation Act of 1965, Pub. L. No. 89-333, 79 Stat. 1282 (repealed 1973); Reed, *supra* note 8, at 401. Being diagnosed as “mentally retarded” granted access to treatment but could also have negative legal consequences, such as the loss of the right to enter into contracts. WOODY, *supra* note 42, at 58, 67. The loss of the right to enter into contracts meant that people diagnosed as mentally retarded often could not get married, and some states passed laws specifically forbidding it. *Id.* at 67.

<sup>77</sup> Taylor, *supra* note 74, at xv; see Simpson, *supra* note 1, at 12 (stating that to a large extent, the idea of “mental retardation” is the result of socially constructed ideas about what constitutes normal or acceptable intellectual functioning).

<sup>78</sup> S. REP. NO. 111-244, at 2; Simpson, *supra* note 1, at 12.

<sup>79</sup> Mark Peters, *The R-Word and the Challenging History of Words for Dummies*, BOS. GLOBE (Mar. 6, 2017), <https://www.bostonglobe.com/ideas/2017/03/06/the-word-and-challenging-history-words-for-dummies/6heGdgEkMRaUw4MPYVF6yN/story.html> [https://perma.cc/6B3C-RW3N].

public lexicon.<sup>80</sup> Despite its negative connotations, “retardation” remained the most commonly used term for an intellectual disability for decades.<sup>81</sup>

*C. “Basically, We Were a Galvanizing Force, Working to Get People at the Grassroots Level Involved”: The Rise of the Social Model of Disability and the Push for Inclusion*<sup>82</sup>

As the Civil Rights Movement gained traction in the latter half of the twentieth century, a concurrent disability rights movement was born.<sup>83</sup> The disability rights movement pushed back against the medical model of disability, which focused on treatment, charity, and public assistance as ways to mitigate the “problem” of disability.<sup>84</sup> It instead promoted a social model of disability, which shifted the focus from the individual and his or her specific conditions to the social barriers preventing those with disabilities from full inclusion in society.<sup>85</sup> Scholars under the social rights model argue that although people with disabilities have vastly different conditions and experiences, they make

<sup>80</sup> *Id.*

<sup>81</sup> See *id.* (positing that part of the reason why the word “retarded” gained such a negative connotation is because its clinical use and lay use overlapped for so long).

<sup>82</sup> *Activists and Organizers, Part 1, in WHAT WE HAVE DONE, supra* note 8, at 151, 159. Gary Olsen is a Deaf man who in the 1960s worked with the National Association of the Deaf to engage other young people in the push for inclusion. *Id.* at 157.

<sup>83</sup> See Drimmer, *supra* note 5, at 1375 (emphasizing that the push for racial and gender equality led to a growing belief that people with disabilities similarly had a right to the equal access to society that they had been denied throughout history); Perju, *supra* note 7, at 291 (discussing how the disability advocacy movement emerged in the 1960s). Discrimination against people with disabilities often occurs concurrently with discrimination against other minority groups because similar ideas of deficiency and deviancy have been applied to women, racial minorities, and immigrants. PELKA, *supra* note 8, at 10. John W. Davis, one of the attorneys arguing on behalf of the Board of Education of Topeka, Kansas in the landmark 1954 civil rights case *Brown v. Board of Education*, made an argument before the Supreme Court that if states stop classifying people on the basis of race, then they will also have to stop doing so on the basis of sex, age, or “mental capacity.” *Id.* at 1; see *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that “separate but equal” facilities for educating black and white students violate the Fourteenth Amendment’s guarantee of equal protection of the law). This argument showed the marginalized status held by people with disabilities, as Davis tried to scare the Court with the idea that “idiots” or “imbeciles” would be educated alongside all other students if segregation is deemed unconstitutional. PELKA, *supra* note 8, at 2. Thurgood Marshall, arguing on behalf of black students, responded by contending that all the individual rights of minorities, including individuals with disabilities, are to be tested by the legal standards determined by the Court. *Id.* at 3. Many advocates for civil rights argued vehemently that racial minorities or women do not have any of the flaws associated with people with disabilities, further solidifying the idea that at the very least, it is acceptable for society to discriminate against the individuals who do. *Id.* at 10.

<sup>84</sup> Bagenstos, *supra* note 7, at 427.

<sup>85</sup> *Id.* at 428–29. The social model shifts focus away from disability as a moral failure to be pitied or a medical impairment to be cured, and deems society, not the person or their condition, the main obstacle to inclusion. *Id.* at 429–30; Dunn & Andrews, *supra* note 7, at 258. A similar model, the socio-political model of disability, views disability as the interaction between both the innate physical or mental condition of the individual and the social environment in which they exist. Rovner, *supra* note 37, at 1051–52.

up an identifiable group who share the defining characteristics of societal exclusion, systematic disadvantage, and lack of opportunity.<sup>86</sup> Under this view, disability is not the “unfortunate result of a defective body” but rather the result of an environment created without a range of abilities in mind.<sup>87</sup> This can include physical barriers to access inherent in infrastructure as well as prejudice, discrimination, and fear towards people with disabilities.<sup>88</sup> The social model thus changed the role of people with disabilities in society from passive recipients of sympathy and rehabilitation to active rights holders entitled to, and empowered to demand, access to society.<sup>89</sup> With the passage of progressive legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, people with disabilities saw potential for full inclusion into society.<sup>90</sup>

In 1971, the United Nations issued a “Declaration on the Rights of Mentally Retarded Persons” that laid out seven rights for people with disabilities and explicitly affirmed that they are entitled to the same rights enjoyed by all other members of society.<sup>91</sup> A mental retardation diagnosis was also key to eligibility for services increasingly available under state and federal legislation that focused on removing barriers to basic human rights.<sup>92</sup> The Architectural

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<sup>86</sup> Bagenstos, *supra* note 7, at 401.

<sup>87</sup> Rovner, *supra* note 37, at 1052.

<sup>88</sup> Dunn & Andrews, *supra* note 7, at 258. Societal barriers against people with disabilities can take many forms, including both outright animus as well as over-generalizations that cause people to make assumptions about what an individual can or cannot do. Bagenstos, *supra* note 7, at 422–24. Some highlighted examples presented to Congress during debate on the ADA included a New Jersey zoo that refused to admit children with Down Syndrome because it thought they would upset the chimpanzees, and a woman who was removed from an auction event after staff decided she was “distasteful to look at.” *Id.* Furthermore, the history of isolation and segregation of people with disabilities for most of American history means that American society was built without them in mind. *Id.* at 439–40. This is evident in every facet of the infrastructure and architecture of the United States: for example, the existence of telephones assumes that everyone can speak and hear, streets lack curb cuts for people who use wheelchairs, and public transit systems without ramps or elevators are completely inaccessible to anyone but the able-bodied. PELKA, *supra* note 8, at 17; Bagenstos, *supra* note 7, at 440.

<sup>89</sup> Perju, *supra* note 7, at 284.

<sup>90</sup> Drimmer, *supra* note 5, at 1376. The disability rights movement adopted the strategies and tactics of the Civil Rights movement in its fight for greater inclusion. PELKA, *supra* note 8, at 26. The disability rights movement began on college campuses in the 1960s, as students with disabilities who were finally given access to education pushed for accommodations on their campuses. Perju, *supra* note 7, at 291.

<sup>91</sup> WOODY, *supra* note 42, at 46. This declaration included the right to medical care, education, economic security, satisfactory standards of living, and due process of the law. *Id.* It also stated that to the greatest extent possible, “the mentally retarded person” should live with family or relatives and has a right to a qualified guardian. *Id.* Finally, the declaration stated that should the rights of people with disabilities need to be restricted, proper procedural and legal safeguards must be utilized. *Id.* at 47. The declaration motivated legal actions seeking to uphold a number of these rights. *Id.*

<sup>92</sup> Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTEL. & DEVELOPMENTAL DISABILITIES 116, 120 (2007). The term was also used to determine citizenship as well as in civil and criminal justice, education, employment, health care, housing, and more. *Id.*

Barriers Act of 1968 was the first legislative push to remove the societal barriers to inclusion and required that buildings be made universally accessible, although its language used “physically handicapped persons.”<sup>93</sup> The term “developmental disability” was used for the first time in 1970 in the Developmental Disabilities Services and Facilities Construction Amendments.<sup>94</sup> This new term specifically included expanded protection to conditions that had not previously been named in legislation, such as cerebral palsy, autism, and epilepsy.<sup>95</sup>

After a failed push to include disability as a protected class in the Civil Rights Act of 1964, Congress enacted Section 504 of the Rehabilitation Act of 1973 (Section 504) and directly outlawed discrimination on the basis of disability, including “mental retardation,” for the first time.<sup>96</sup> The Rehabilitation Act’s use of the more inclusive term, “equal opportunity,” as opposed to the potentially discriminatory term, “equal treatment,” was key to advancing the push for accommodations that ensured equal access to employment and services.<sup>97</sup>

The enactment of Section 504 utilized the language “handicapped,” but its definition reflected a shift from a medical model to a social one: a “handicapped individual” under Section 504 is “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having

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<sup>93</sup> Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718, 719 (codified as amended at 42 U.S.C. §§ 4151–4157); Drimmer, *supra* note 5, at 1377. While the Architectural Barriers Act did not directly address societal discrimination, its enactment was a statutory recognition that in constructing buildings, society had completely ignored people with disabilities. Drimmer, *supra* note 5, at 1378.

<sup>94</sup> Developmental Disabilities Services and Facilities Construction Amendments of 1970, Pub. L. No. 91-517, § 130, 84 Stat. 1316, 1316 (codified as amended in scattered sections of 42 U.S.C. §§ 2661–2696); Reed, *supra* note 8, at 403. The purpose of the law was to provide services to people with developmental disabilities, including technical assistance, accessible facilities, and training. Developmental Disabilities Services and Facilities Construction Amendments of 1970 at 1316–17.

<sup>95</sup> Reed, *supra* note 8, at 403.

<sup>96</sup> 29 U.S.C. § 794 (2018); Perju, *supra* note 7, at 293. Section 504 directly outlawed discrimination against people with disabilities when it comes to accessibility as well as outright societal discrimination. Reed, *supra* note 8, at 404. Section 504 has been referred to as “anticipatory politics” and “legislative afterthought” in that it was enacted not due to a substantial outside push by disability advocates, but rather due to individuals in the government who saw people with disabilities as a minority group that demanded recognition, like those of the civil rights and women’s movements. Perju, *supra* note 7, at 293; Rovner, *supra* note 37, at 1050. Disability rights scholars have been unable to pinpoint exactly where the impetus came from to enact civil rights legislation specifically to protect people with disabilities. Rovner, *supra* note 37, at 1050. Section 504 has therefore been characterized as “a law that preceded the movement” because it was passed without much input of or participation by the disability rights movement itself and with little debate in Congress. SUSAN GLUCK MEZEY, *DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT* 13 (2005).

<sup>97</sup> Reed, *supra* note 8, at 404. Equal treatment, for example, would be giving someone in a wheelchair and someone not in a wheelchair access to stairs, while equal opportunity means creating accommodations that give the person in the wheelchair the same access to all floors in the building as someone who can use the stairs. *Id.*

such an impairment.”<sup>98</sup> The inclusion of the “regarded as” and “record” prongs of the definition reflect the social model by recognizing that social perceptions and structures are as disabling as a diagnosed biological condition.<sup>99</sup>

In 1987, the Supreme Court in *School Board of Nassau County v. Arline* utilized a broad statutory definition of disability to hold that a woman with tuberculosis was a “handicapped individual” under Section 504.<sup>100</sup> In doing so, the Court described how Congress included Section 504 in the 1975 amendments to the Rehabilitation Act to address broader issues of societal discrimination.<sup>101</sup> The definition of “handicap,” the Court went on, reflected this concern with discrimination by protecting individuals with a record of or regarded as having an impairment, even if they do not outwardly present as such.<sup>102</sup> This expansion of the definition of “disability” combats the negative effects of prevalent societal misconceptions about the “handicapped.”<sup>103</sup> The Court therefore concluded that to allow discrimination based on an assumption that a person with tuberculosis is contagious would be inconsistent with the policy of Section 504 to protect people from exactly this type of prejudice and ignorance.<sup>104</sup>

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<sup>98</sup> Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111, 88 Stat. 1617, 1619 (codified as amended in scattered sections of 29 U.S.C.); Perju, *supra* note 7, at 293–94.

<sup>99</sup> Bagenstos, *supra* note 7, at 433; Perju, *supra* note 7, at 294. Section 504 also introduced a host of new concepts for both society and the law to interpret, including what legally constitutes “discrimination,” what is a sufficient “reasonable accommodation” for a person with disabilities, and when the provision of such accommodation can be excused because it is an “undue burden.” PELKA, *supra* note 8, at 28.

<sup>100</sup> *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 289 (1987). Plaintiff Gene Arline was fired from her job as an elementary school teacher after experiencing three relapses of tuberculosis over two years. *Id.* at 276. The Court ultimately held that although a person with tuberculosis is a “handicapped person” under Section 504, whether she was “otherwise qualified” for her position as a teacher would turn on whether she was at risk of infecting others. *Id.* at 287–89. The case was remanded for further findings of fact. *Id.* The District Court for the Middle District of Florida subsequently examined medical evidence regarding the communicability of Arline’s tuberculosis and found that there was no threat of her passing the disease on to her students. *Arline v. Sch. Bd. of Nassau Cty.*, 692 F. Supp. 1286, 1292 (M.D. Fla. 1988). She therefore was “otherwise qualified” for her job as a teacher and qualified for protection under Section 504 as an individual with a disability. *Id.* The court concluded that Arline was fired because of unwarranted fears about her disease and that she was eligible for full back pay for the four years she was out of work. *Id.*

<sup>101</sup> *Sch. Bd. of Nassau Cty.*, 480 U.S. at 277–79.

<sup>102</sup> *Id.* at 279.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 284. The Court pushed back against condoning discrimination based on generalization, stating that the fact that some persons who have contagious diseases may pose a health threat to others does not justify excluding from the coverage of the statute all persons with actual or perceived contagious diseases. *Id.* at 285. The Supreme Court had previously been less willing to provide constitutional protections to people with intellectual disabilities, however. SUSAN STEFAN, *UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 74* (2001). In 1985, in *City of Cleburne v. Cleburne Living Center*, the Supreme Court held that a zoning ordinance prohibiting the creation of a “group home for the mentally retarded” violated the Equal Protection Clause. 473 U.S. 432, 435, 448 (1985). In doing so, however, the Court held that people with disabilities were not a group entitled to a heightened level of scrutiny when it

The term “handicap,” featured prominently in Section 504, followed a similar trajectory as the term “retarded” and began to fall out of favor with the disability community in the mid-1980s because of its association with negative stereotypes.<sup>105</sup> The word was replaced with “disability,” and while the two words have been and continue to be used interchangeably, they have distinct definitions.<sup>106</sup> A “disability” is a condition of an individual, while a “handicap” is a restriction or disadvantage, often the result of society, that hinders one’s ability to function.<sup>107</sup> “Handicapped” was no longer an acceptable label for people with disabilities, but it was still used sparingly in professional literature to describe barriers to access.<sup>108</sup>

The shortcomings of Section 504 went beyond language, as it proved to be insufficient to address the pervasive societal discrimination against people with disabilities.<sup>109</sup> Disability rights groups began to exert outside pressure on Congress for more comprehensive legislation because Section 504 applied only to federally-funded entities.<sup>110</sup> As a result, Congress passed the ADA in 1990, the most comprehensive civil rights legislation for people with disabilities.<sup>111</sup> The ADA became a “watershed” piece of legislation that reflected the legislative adoption of the social model of disability.<sup>112</sup> The law included in its findings and purpose the history of unequal treatment of and discrimination against people with disabilities.<sup>113</sup> The ADA took into consideration the expe-

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comes to discriminatory actions. *Id.* at 442; STEFAN, *supra*, at 74. The Court reasoned that people with disabilities are unable to function in society and therefore different and unequal treatment under the law is justified. *City of Cleburne*, 473 U.S. at 442–43; STEFAN, *supra*, at 74. At the same time, the Court denied that society is still prejudiced against people with disabilities, citing the increase in legislative action to protect them from discrimination. *City of Cleburne*, 473 U.S. at 443; STEFAN, *supra*, at 74. In doing so, the Court substantially weakened the very laws it cited as designated to protect individuals with disabilities from discrimination. STEFAN, *supra*, at 74.

<sup>105</sup> See Simpson, *supra* note 1, at 12 (describing the roots of the word “handicap” as connoting literal caps in hand, as people with disabilities were commonly forced to beg on the street in order to survive); Devlieger, *supra* note 1, at 347 (describing the shift from “handicap” to “disability” that occurred in the 1980s); Ford et al., *supra* note 12, at 108 (describing how the negative connotations acquired by the term “retard” led to a push against its usage in favor of more inclusive language).

<sup>106</sup> Jerome E. Bickenbach et al., *Models of Disablement, Universalism, and the International Classification of Impairments, Disabilities, and Handicaps*, 48 SOC. SCI. & MED. 1173, 1175 (1999); Devlieger, *supra* note 1, at 347–48.

<sup>107</sup> Bickenbach et al., *supra* note 106, at 1175.

<sup>108</sup> Devlieger, *supra* note 1, at 347. Despite the fact that it is infrequently used in professional literature, the term “handicapped” continues to remain prominent in public life, such as on parking signs. *Id.* at 348.

<sup>109</sup> Perju, *supra* note 7, at 294–95.

<sup>110</sup> *Id.* at 294–96.

<sup>111</sup> 42 U.S.C. §§ 12101–12213; Perju, *supra* note 7, at 296; Reed, *supra* note 8, at 404.

<sup>112</sup> Rovner, *supra* note 37, at 1044.

<sup>113</sup> 42 U.S.C. § 12101. The legislative findings of the ADA addressed exclusion resulting from discrimination in many forms, including outright animus-based prejudice, generalizing stereotypes, and physical barriers inherent in the country’s infrastructure. *Id.* § 12101(a)(5); Bagenstos, *supra* note 7, at 423, 425.

riences of people with disabilities and addressed five major areas of law: employment discrimination, discrimination by public and government entities, public accommodations, telecommunications accommodations, and miscellaneous provisions.<sup>114</sup> For the first time, individuals seeking redress for disability-based discrimination in both public and private institutions had a cause of action in federal courts.<sup>115</sup>

The ADA utilized the term “individuals with disabilities” rather than “handicap” to modernize the legal language with currently accepted terminology.<sup>116</sup> Congress recognized that language can convey stereotypes and other condescending connotations and therefore ensured that the language in the ADA restored dignity to Americans with disabilities.<sup>117</sup> Congress also deliberately included “Americans” in the title of the law to reflect that people with disabilities are part of the fabric of American society and have equal rights to access as all other individuals in the country.<sup>118</sup> Despite this positive change in terminology, the ADA retained word-for-word the definition of disability from Section 504.<sup>119</sup>

The ADA was unlike other major civil rights laws in that it was passed well before public perception had shifted rather than as a response to outside pressure.<sup>120</sup> As the ADA increased access to society for people with disabilities, disability advocates were still pushing for more inclusive and less stigma-

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<sup>114</sup> 42 U.S.C. §§ 12101–12213; STEFAN, *supra* note 104, at 88–89. Congress accepted submissions of hundreds of written accounts to learn about the experiences of people with disabilities. STEFAN, *supra* note 104, at 88. These so-called diaries described the discrimination people with disabilities face every day. *Id.* The diaries served the dual purpose of providing evidence to Congress as well as mobilizing individuals with disabilities to confront disability discrimination, recognize its causes, and become a part of the grassroots fight to end it. YOUNG, *supra* note 39, at 62. Justin Dart, vice-chairperson of the National Council on Disability, who used a wheelchair after experiencing polio as a child, traveled around the country collecting the stories of the disability community. *Id.* at 41. Dart presented a box of the diaries to the Committee on Labor and Human Resources as part of Senate hearings on the ADA in 1989. *Id.* at 86, 88.

<sup>115</sup> Perju, *supra* note 7, at 295.

<sup>116</sup> H.R. REP. NO. 101-485, at 323–24. The Education of Handicapped Children Act was similarly renamed the Individuals with Disabilities Education Act (IDEA) as part of a series of 1990 amendments to reflect this push for more inclusive education and language. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1142 (codified as amended at 20 U.S.C §§ 1400–1445 (2018)); U.S. OFFICE OF SPECIAL EDUC. PROGRAMS, HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 3 (2007). Senator Paul Simon, in comments on the Senate floor, approved the removal of the term “handicap” in favor of person-first terminology. 136 CONG. REC. 26,929, 27,033 (1990). The new language reflected the guiding force behind the IDEA: that educational services should be individualized and designed to meet the needs of each unique student. *Id.*

<sup>117</sup> H.R. REP. NO. 101-485, at 323–24.

<sup>118</sup> *Id.*

<sup>119</sup> 42 U.S.C. § 12102(2); Rehabilitation Act Amendments of 1974 at 1619; Perju, *supra* note 7, at 296. Despite proposals calling for more a detailed definition, Congress decided to leave the definition of disability unchanged because the courts were already familiar with it. *Id.* at 297.

<sup>120</sup> Rovner, *supra* note 37, at 1060.

tizing language to talk about disability throughout society and the law.<sup>121</sup> Much of the motivation for the change in language came from grassroots organization and advocacy by people with disabilities and their families, who argued that the continued use of terms like “mental retardation” became offensive to many people with disabilities.<sup>122</sup> Agencies and programs began to change their names to remove the stigmatizing “r-word” from their names.<sup>123</sup>

In 2010, President Obama signed Rosa’s Law, the first major legislation to directly address the stigma associated with labels given to people with disabilities.<sup>124</sup> The law was the result of a campaign by Rosa Marcellino, a young girl with Down Syndrome, and her family to end the use of the “r-word” in state and federal law.<sup>125</sup> In the words of Rosa’s mother:

So, when my daughter’s IEP [individualized education program] coding was changed to “Mentally Retarded,” I wondered how a society that had become so empathetic regarding the language it used to describe so many of its members, had not recognized the offensive language still used to describe one of its most vulnerable populations.<sup>126</sup>

The purpose of Rosa’s Law was to ensure that statutory language mirrors the policy underlying laws like the ADA that people with disabilities should be given equal opportunity and access to society.<sup>127</sup> The law mandated that the term “mental retardation” be replaced with “intellectual disability” in numer-

<sup>121</sup> Ford et al., *supra* note 12, at 108.

<sup>122</sup> *Id.*

<sup>123</sup> Tassé & Grover, *supra* note 73, at 123–24; Ford et al., *supra* note 12, at 108–09. The American Association on Mental Retardation (formerly the American Association on Mental Deficiency) changed its name in 2007 to the American Association on Intellectual and Developmental Disabilities. Tassé & Grover, *supra* note 73, at 124.

<sup>124</sup> Rosa’s Law at 2643; Ford et al., *supra* note 12, at 109.

<sup>125</sup> Ford et al., *supra* note 12, at 109; Luke Cyphers, *Meet the Little Girl Who Wiped Out Government Use of the R-Word*, ESPNW (July 22, 2015), [https://www.espn.com/espnw/news-commentary/story/\\_/id/13287823/meet-little-girl-wiped-government-use-r-word](https://www.espn.com/espnw/news-commentary/story/_/id/13287823/meet-little-girl-wiped-government-use-r-word) [<https://perma.cc/ERZ3-6NBP>]. Rosa and her family began a campaign in their home state of Maryland to remove the word “mentally retarded” from state laws because it became abhorrent to Rosa and those who knew and loved her. Ford et al., *supra* note 12, at 109. After Rosa’s Law was passed in Maryland in 2009, the campaign gained national momentum. *Id.* It was championed in Congress by Senator Barbara Mikulski, endorsed by forty-four national disability organizations, and passed by unanimous vote. *Id.*

<sup>126</sup> Ford et al., *supra* note 12, at 109.

<sup>127</sup> S. REP. NO. 111-244, at 3.

ous federal health, education, and labor laws.<sup>128</sup> Following its implementation, many states banned the use of the term in their laws and regulations.<sup>129</sup>

*D. "That Doesn't Mean There Aren't Huge Challenges Ahead, and Much Yet to Be Done": Defining Disability Under the ADA*<sup>130</sup>

There are two major competing schools of thought that have drastically different views of the use of language in laws and in judicial decision making.<sup>131</sup> Formalism is the view that legal decisions must strictly follow precedent, while realism asserts that the legal decision making should consider and be informed by economic, social, and ethical implications.<sup>132</sup> Formalist decisions often focus on legal terminology, with the inquiry turning on whether the facts or parties fit a predetermined definition.<sup>133</sup> Legal realism critiques this divorcing of legal terminology and social reality and instead promotes language as a conceptual jumping-off point rather than a self-contained legal solution.<sup>134</sup>

These schools of thought become relevant because to bring a case under the ADA, plaintiffs first must prove that they meet the definition of disability under the law, and then that they experienced discrimination because of their disability.<sup>135</sup> The Supreme Court did not comment on the ADA until its 1997

<sup>128</sup> Ford et al., *supra* note 12, at 109. This included critical laws like the Individuals with Disabilities Education Act, which mandates a free and appropriate public education to students with disabilities. 20 U.S.C. § 1400(d)(1)(A); Ford et al., *supra* note 12, at 109. Rosa's Law did not apply to the Social Security Act due to congressional jurisdictional issues. Ford et al., *supra* note 12, at 109.

<sup>129</sup> Ford et al., *supra* note 12, at 109; Back et al., *supra* note 4, at 4. A similar grassroots campaign known as "Spread the Word to End the Word" was established in 2009 to end the use of the word "retarded" as a colloquial slur. *About Spread the Word*, SPREAD THE WORD, <https://www.spreadtheword.global/about> [<https://perma.cc/HJH5-4CY5>]. The campaign was created by youth with and without intellectual disabilities and includes an annual day of awareness, a pledge to stop using the so-called "r-word," and resources for schools and students across the country to join the movement. *Take Action*, SPREAD THE WORD, <https://www.spreadtheword.global/take-action/> [<https://perma.cc/NH9M-8BEZ>]. As education has moved away from secluding students with disabilities in separate classrooms and toward inclusion with their peers, the importance of the terminology used by educators and students has increased. Back et al., *supra* note 4, at 4. Students with disabilities often already struggle with self-esteem and peer acceptance, and the language used both in the classroom and the hallways can further impact the way they are perceived and the way they perceive themselves. *Id.*

<sup>130</sup> *Aftermath*, in *WHAT WE HAVE DONE*, *supra* note 8, at 548, 554. Mary Lou Breslin, who contracted polio when she was eleven, describes the accomplishment of passing the ADA as "embed[ding] in the national psyche" the idea that individuals with disabilities deserve access to and inclusion in society. *Id.* at 65, 554. That said, she notes "we may lose ground on some court cases," but she is hopeful "there isn't going to be a return to the ways of forty or fifty years ago." *Id.* at 555.

<sup>131</sup> HUTTON, *supra* note 18, at 11–13.

<sup>132</sup> *Id.* at 10–11.

<sup>133</sup> *Id.* at 12. Textualism in constitutional jurisprudence is a product of the formalist school of legal theory and promotes application of the law that strictly adheres to the language of the Constitution at the time of its creation. *Id.* at 13; Stephen M. Durden, *Plain Language Textualism: Some Personal Predilections Are More Equal Than Others*, 26 QUINNIPIAC L. REV. 337, 341 (2008).

<sup>134</sup> HUTTON, *supra* note 18, at 11–12.

<sup>135</sup> *Sutton*, 527 U.S. at 477–78.

and 1998 terms when it decided a series of eight ADA cases.<sup>136</sup> Four of these turned on the Supreme Court's interpretation of the definition of disability.<sup>137</sup> The holdings in these cases utilized a formalist method of judicial inquiry that substantially limited the scope of individuals protected by the ADA.<sup>138</sup> The Supreme Court honed in on the "substantially limits" prong of the definition of disability under the ADA.<sup>139</sup> For example, in *Sutton v. United Air Lines, Inc.*, the Court held that two twin sisters with severe vision impairments did not qualify as "disabled" because their use of corrective measures like contact lenses and glasses meant they did not experience any substantial limitation.<sup>140</sup> The Court noted the use of the present indicative verb "limits" and concluded that the test needs to be whether the facts of the case show that a person is *presently* limited in some way.<sup>141</sup> The Court similarly rejected arguments that the plaintiffs met the "regarded as" prong of the definition because although their employer decided poor vision precluded them from holding the position they applied for, this did not qualify as being perceived as having a "*substantially limiting* impairment" in their ability to work.<sup>142</sup> By deciding the case based on the definition of disability, the Court never reached the question of whether the plaintiffs experienced disability-based discrimination.<sup>143</sup>

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<sup>136</sup> Bagenstos, *supra* note 7, at 398.

<sup>137</sup> *Id.* In the years after the passage of the ADA, qualifying as an individual with a disability was incredibly burdensome for plaintiffs, and between 1995 and 1996, only one plaintiff in six met the statutory definition of disability. Perju, *supra* note 7, at 314.

<sup>138</sup> Perju, *supra* note 7, at 315; see *Sutton*, 527 U.S. at 482 (holding that courts should take corrective measures into account when determining whether an individual meets the statutory definition of disability); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999) (applying *Sutton* to find that plaintiff did not qualify as an individual with a disability because medication mitigated the effects of his high blood pressure); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 559, 565–66 (1999) (holding that a truck driver who was blind in one eye was not an individual with a disability because his brain's own mitigating measures meant he was not substantially limited by his monocular vision).

<sup>139</sup> See 42 U.S.C. § 12102(2)(A) (defining a disability as an impairment that substantially limits an individual in a major life activity); *Sutton*, 527 U.S. at 482 (holding that individuals are not disabled if mitigating measures mean that they are not substantially limited in any major life activity).

<sup>140</sup> *Sutton*, 527 U.S. at 481. The plaintiffs in *Sutton* applied to be airline pilots but were rejected because they failed to meet the employer's vision requirement, which was an uncorrected vision level of at least 20/100. *Id.* at 475–76. The plaintiffs' uncorrected vision in each eye was 20/200 and 20/400 or worse, but each had 20/20 vision when wearing corrective lenses and met all other requirements for the pilot position. *Id.*

<sup>141</sup> *Id.* at 482 (emphasis added); Perju, *supra* note 7, at 313.

<sup>142</sup> *Sutton*, 527 U.S. at 492–93.

<sup>143</sup> Perju, *supra* note 7, at 314. The Court further limited the class of people who qualified as having a disability in a 2002 case, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*. 534 U.S. 184, 196–97 (2002). The plaintiff was fired from her job because she was unable to perform automobile assembly line tasks due to carpal tunnel syndrome and tendonitis. *Id.* at 187, 190. The Court narrowed the definition of "substantially limited" to having an impairment that prevents or seriously limits someone from doing activities that are crucial to daily life, and held that not being able to perform the tasks of automobile assembly did not meet this requirement. *Id.* at 197–98, 201. The Court specifically stated its intent in this case was to maintain a high standard to meet the definition of disability under the ADA. *Id.* at 197.

The Supreme Court applied *Sutton* to a subsequent case, *Albertson's, Inc. v. Kirkingburg*, in 1999.<sup>144</sup> The plaintiff, Hallie Kirkingburg, was hired as a truckdriver but was fired soon after when he could not meet the Department of Transportation's vision standards because he was blind in his left eye.<sup>145</sup> The Court, despite stating that it could resolve the case without determining whether the plaintiff was an individual with a disability, went on to resolve that very issue.<sup>146</sup> The Court described how Kirkingburg's brain was able to compensate for his blindness such that he could adequately see out of one eye.<sup>147</sup> It went on to conclude that because Kirkingburg's brain was able to mitigate for his blindness the same way medications or corrective devices might for a different condition, he was not substantially limited in any way and therefore did not qualify for protection under the ADA.<sup>148</sup>

Congress amended the ADA in 2008 in response to the narrowed definition of the Supreme Court.<sup>149</sup> The ADA Amendments Act (ADAAA) explicitly rejected the Supreme Court's holding in *Sutton* and subsequent cases as inappropriately limiting the class of people afforded protection under the ADA.<sup>150</sup> Although the ADAAA did not alter the statutory definition of disability in any way, Congress instructed courts to apply a broad interpretation of the definition

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<sup>144</sup> *Albertson's, Inc.*, 527 U.S. at 565–66.

<sup>145</sup> *Id.* at 559–60. The plaintiff had over ten years of experience as a driver and passed the road test required for the job. *Id.* at 558. He was hired by and drove for the defendant company, a grocery store, for a year because his doctor mistakenly certified that he met the vision requirements. *Id.* at 558–59. After taking a leave of absence for an injury, he was examined by another doctor who realized that he did not meet the standards and would need a waiver to continue driving for the defendant. *Id.* at 559–60.

<sup>146</sup> *Id.* at 562.

<sup>147</sup> *Id.* at 564.

<sup>148</sup> *Id.* at 565–66. Similarly, in 2000, in *Bartlett v. New York State Board of Bar Examiners*, the Second Circuit held that the fact that a law student had figured out ways to compensate for—and be successful in law school despite—her reading disability did not remove her from protection as an individual with a disability under the ADA. 156 F.3d 321, 324 (2d Cir. 1998). Marilyn Bartlett sued for disability discrimination after the New York State Board of Law Examiners refused to provide her with any accommodations for the bar examination. *Id.* at 324–25. The court held that any self-accommodations that Bartlett employed to mitigate for her disability should not be considered when determining whether she is “disabled” under the ADA. *Id.* at 329. The court subsequently ordered the Board to provide her with reasonable accommodations for the bar examination. *Id.* The Board appealed to the Supreme Court, who remanded *Bartlett* for reconsideration in light of their decision in *Albertson's, Inc.* that self-accommodations should be considered when determining whether an individual has a disability. *N.Y. State Bd. of Law Exam'rs v. Bartlett*, 527 U.S. 1031, 1031 (1999). The case was ultimately remanded to the District Court, which held that even with her self-accommodations Bartlett was substantially limited in her ability to read and therefore still qualified for protection under the ADA. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 CIV. 4986(SS), 2001 WL 930792, at \*3 (S.D.N.Y. 2001).

<sup>149</sup> 42 U.S.C. § 12102(4)(A); Perju, *supra* note 7, at 316.

<sup>150</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3554 (codified as amended at 42 U.S.C. §§ 12101–12102). The ADAAA explicitly rejected *Sutton's* consideration of mitigating measures and narrowing of the “regarded as” prong of the definition as well as the strict standards for “substantially limits” established by *Toyota Motor Manufacturing, Inc.* *Id.*

of disability.<sup>151</sup> The ADAAA reinforced that the purpose of the ADA was to tackle the widespread discrimination against people with disabilities and asserted that the primary focus of ADA inquiries should be on whether employers have met their obligation to reasonably accommodate employees with disabilities.<sup>152</sup>

## II. “THERE WAS LIKE A UNISON OF PEOPLE WHO SAID, ‘WE HATE THAT NAME! WE HATE THAT!’”: THE IMPLICATIONS OF NAMING AND DEFINING DISABILITY<sup>153</sup>

Tracing the history of disability highlights that both language and the law have the ability to create norms in society.<sup>154</sup> When it comes to disability, legal and social terminology and definitions have important implications for how individuals with disabilities are perceived and treated.<sup>155</sup> Section A of this Part describes the ways language can both shape and be shaped by societal perceptions and the implications this can have from a social science perspective.<sup>156</sup> Section B describes the impact language can have on how people with disabili-

<sup>151</sup> 42 U.S.C. § 12102(4)(A). The ADAAA allowed for the consideration of eyeglasses or contact lenses but instructed that courts not consider other mitigating measures such as medication or assistive technology. *Id.* § 12102(4)(E)(i)–(ii).

<sup>152</sup> *See id.* § 12102(4)(A) (mandating that the definition of disability should be interpreted broadly to afford broad coverage to individuals with disabilities); Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 206 (2012) (describing how the passage of the ADAAA was an attempt to restore the original goals of the ADA); Perju, *supra* note 7, at 297 (asserting how important the ADAAA was in maintaining a broad interpretation of disability). Many lower courts have subsequently followed the mandate to interpret the definition of disability more broadly. Jana K. Terry, *The ADA Amendments Act Three Years After Passage: The EEOC’s Regulations and the First Court Decisions Emerge at Last*, 58 FED. LAW. 49, 51 (2011); *see* Fleck v. Wilmac Corp., No. 10-05562, 2011 WL 1899198, at \*5 (E.D. Pa. 2011) (applying the less restrictive standards of the ADAAA and finding that plaintiff with a chronic ankle injury that prevented her from standing or walking for long periods of time was an individual with a disability); Gil v. Vortex, LLC, 697 F. Supp. 2d 234, 236, 240 (D. Mass. 2010) (holding that plaintiff, despite not precisely pleading how limited he was by monocular vision, met the relaxed definition of disability under the ADAAA). Other courts, however, have continued to cite precedent from before the ADAAA and have held that plaintiffs did not meet the definition of disability. *See* Rumbin v. Ass’n of Am. Med. Colls., 803 F. Supp. 2d 83, 93 (D. Conn. 2011) (citing pre-ADAAA cases, including *Sutton*, to support finding that plaintiff with convergence insufficiency, a condition limiting the ability to focus on nearby objects, was not substantially limited in seeing, reading, or writing and therefore was not an individual with a disability).

<sup>153</sup> *Self-Advocates*, in *WHAT WE HAVE DONE*, *supra* note 8, at 324, 328. Dennis Heath, a social worker, got this response when he asked a group of residents at the Fairview Training Center in Oregon what they thought of the name “retarded.” *Id.*

<sup>154</sup> *See* Rovner, *supra* note 37, at 1056 (discussing how the able-bodied majority of society created and therefore benefited from the law and policy throughout history at the expense of individuals with disabilities); Galvin, *supra* note 13 (discussing how labeling disability contributes to the sense of disability as the “other” and how disability terminology has become attached to stereotypical images).

<sup>155</sup> *See* Kanter, *supra* note 13, at 433 (discussing the relationship between disability language, law, and power structures); Perju, *supra* note 7, at 297 (describing how changing the definition of disability could have major implications for perception of people with disabilities).

<sup>156</sup> *See infra* notes 160–170 and accompanying text.

ties are perceived and treated in society.<sup>157</sup> Section C discusses how the law has the power to institutionalize norms, and how disability is one area where the law can either legitimize or reject discriminatory terminology.<sup>158</sup> Section D discusses the push and pull between the most recent developments in the language of disability, known as person-first language and identity-first language, and the beliefs underlying the two concepts.<sup>159</sup>

### A. *The Power of Language*

Social scientists assert that language has powerful implications for shaping perception and social attitudes.<sup>160</sup> The terminology we use imputes meaning and attaches connotations and associations to people that may or may not align with the way society perceives and treats that group.<sup>161</sup> Dominant groups in society have often exerted power over other groups to maintain the status quo by imposing a name or label that defines what is “normal” and what is not.<sup>162</sup> For example, the push during the Civil Rights Movement for the term “Black” to replace derogatory terms was a deliberate attempt to move away from language imposed by the dominant white society that implied inferiority.<sup>163</sup> The pervasive use of language and labels by these dominant groups solidifies stereotypical beliefs in the fabric of society that confine people to socially mandated roles.<sup>164</sup>

This type of linguistic categorization can also lead to generalization, because individuality is devalued when a wide variety of experiences are characterized by a single term or phrase.<sup>165</sup> Because a label tends to direct attention to a particular characteristic, it distracts from any other elements of the object or individual.<sup>166</sup> Furthermore, language and labels impact not only the way others

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<sup>157</sup> See *infra* notes 171–186 and accompanying text.

<sup>158</sup> See *infra* notes 187–209 and accompanying text.

<sup>159</sup> See *infra* notes 210–221 and accompanying text.

<sup>160</sup> Devlieger, *supra* note 1, at 346.

<sup>161</sup> *Id.* at 347; Zola, *supra* note 14, at 167. The generally accepted view is that language shapes an individual’s thoughts and perceptions, but some social scientists push back on the idea that language shapes reality. Atkins-Sayre, *supra* note 14, at 9–10.

<sup>162</sup> Atkins-Sayre, *supra* note 14, at 9–10; Galvin, *supra* note 13.

<sup>163</sup> Angelica Mucchi-Faina, *Visible or Influential? Language Reforms and Gender (In)equality*, 44 SOC. SCI. INFO. 189, 191 (2005).

<sup>164</sup> Atkins-Sayre, *supra* note 14, at 8; Zola, *supra* note 14, at 167; Galvin, *supra* note 13. For example, the gender equality movement included a push for non-sexist and non-gendered language. Back et al., *supra* note 4, at 16. Naming can also serve a positive function by creating importance and understanding where there was none. Atkins-Sayre, *supra* note 14, at 9. For example, the creation of the term “sexual harassment” gave a name to a terrible but common occurrence that previously had gone unaddressed. *Id.*

<sup>165</sup> Zola, *supra* note 14, at 169. The practice of using one single characteristic to describe an entire concept or individual is called metonymy. Back et al., *supra* note 4, at 16.

<sup>166</sup> Atkins-Sayre, *supra* note 14, at 9. The function of language to filter perception and direct attention is sometimes referred to as the “terministic screen.” *Id.*

view the people being described, but also how those people view themselves.<sup>167</sup> A label can restrict an individual's identity by reducing it to a single descriptive word.<sup>168</sup> Being classified as a member of a certain group connects an individual's identity or sense of self with society's definition of that group.<sup>169</sup> When such a label is attached to negative stereotypes or connotations, it may have damaging effects on an individual's sense of self-worth.<sup>170</sup>

### B. Language and Disability

The power of language is particularly visceral in the disability context, as language has and continues to directly relate to the way society perceives, interacts with, and excludes individuals with disabilities.<sup>171</sup> The words a society uses to describe people with disabilities reveal that society's values and perceptions.<sup>172</sup> Terms like "handicap" and "retard" are attached to specific socially created images and concepts, and referring to individuals as such projects those images onto them.<sup>173</sup> As outlined in Part I of this Note, the history of the treatment of people with disabilities has created associations between these words and images of helplessness, deformity, fear, inferiority, and weakness.<sup>174</sup> These associations then directly contributed to social and legal structures that not only marginalized people with disabilities, but also equated them with evil and sin to be eradicated from society.<sup>175</sup> Utilizing such terms represents an acceptance of discrimination and oppression that can range from failing to provide proper accommodations to segregating individuals in institutions.<sup>176</sup> Furthermore, language can influence the way people with disabilities perceive themselves; when an individual constantly hears language that tells them they are inferior, sick, or unproductive, they may ultimately internalize that message.<sup>177</sup>

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<sup>167</sup> Zola, *supra* note 14, at 169.

<sup>168</sup> *Id.*

<sup>169</sup> Galvin, *supra* note 13.

<sup>170</sup> See Zola, *supra* note 14, at 169 (stating the labels used to describe people with disabilities can influence the way they view themselves and the way others view them even more than whether they use sign language or sit in a wheelchair); Back et al., *supra* note 4, at 4 (discussing how language used in the school environment can negatively impact both students' self-esteem as well as the way they are perceived by others).

<sup>171</sup> Back et al., *supra* note 4, at 2.

<sup>172</sup> Kanter, *supra* note 13, at 433.

<sup>173</sup> Galvin, *supra* note 13.

<sup>174</sup> See *id.* (describing how the language of disability has attached to concepts of deformity and inferiority, resulting in feelings of negativity towards the people such language describes); *supra* notes 24–152 and accompanying text.

<sup>175</sup> Rovner, *supra* note 37, at 1054; *Verdict of History: The Forgotten Years: 1870–1940*, *supra* note 44, at 10; see *Buck v. Bell*, 274 U.S. 200, 207 (1927) (justifying the upholding of mandatory sterilization laws by equating the "feeble-minded" with crime and other social ills).

<sup>176</sup> See Zola, *supra* note 14, at 167–68 (describing how once an individual is labeled sick or crazy, their behavior is easily dismissed, and society can explain away anything they say or ask for).

<sup>177</sup> Shakespeare, *supra* note 13, at 105.

The negative effects of language are clearly evidenced by the constant evolution of terminology, as each new word used to describe disability eventually became so embedded with negative connotations that it was unusable.<sup>178</sup> Each subsequent adaptation—such as Rosa’s Law’s sweeping mandate that “mentally retarded” be replaced by “people with disabilities” in federal legislation—is an attempt to align the social and legal language with the context of the time.<sup>179</sup> Changes in language reflect a recognition that people with disabilities are just as deserving of respect and inclusion as anyone else and should be described as such.<sup>180</sup>

The consequences of disability language go beyond the labels; even grammar and parts of speech impact the perceptions of the people described.<sup>181</sup> The medical model resulted in the use of language like “suffering from” or “afflicted with,” perpetuating an idea of disability as a medical infirmity and associating the person described with helplessness and dependence.<sup>182</sup> Furthermore, the idea that someone is “suffering” is a societally imposed belief of what it means to have a disability rather than an accurate representation of an individual’s real experience.<sup>183</sup> The use of adjectives as nouns, such as “the mentally retarded,” generalizes an entire group and focuses attention on only one facet of an individual’s identity.<sup>184</sup> Active and passive language invoke specific relationships between the subject and the verb; there is a noticeable difference of perception between “a person confined to a wheelchair” and “a person using a wheelchair.”<sup>185</sup> The verb “is” versus “has” has similar effects: “is” equates something in meaning (“he is disabled”) whereas “has” connotes a relationship in which the person retains identity and control (“he has epilepsy”).<sup>186</sup>

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<sup>178</sup> Ford et al., *supra* note 12, at 108. The linguist Steven Pinker coined the term “euphemism treadmill” to refer to this phenomenon: often, when a word is deemed offensive and replaced with a new term, the negative connotations eventually become imputed onto the new word until it, too, is considered offensive. Steven Pinker, *The Game of the Name*, N.Y. TIMES (Apr. 5, 1994), <https://nyti.ms/2vczhKg> [<https://perma.cc/B5GX-4QT9>].

<sup>179</sup> See Ford et al., *supra* note 12, at 108, 109 (describing the shift from the term “retard” and its negative connotations to more inclusive language).

<sup>180</sup> Kanter, *supra* note 13, at 434.

<sup>181</sup> Galvin, *supra* note 13.

<sup>182</sup> Zola, *supra* note 14, at 168; Galvin, *supra* note 13. An added consequence of the medical model is the equating of disability with illness: once a person’s entire life is defined by an illness it allows society to discount the validity of anything they have said or done. Zola, *supra* note 14, at 168.

<sup>183</sup> Zola, *supra* note 14, at 170.

<sup>184</sup> *Id.* at 169; Galvin, *supra* note 13. Because the presence of a disability is often the most visible characteristic of a person, using that description as a collective noun to refer to them obliterates the rest of their identity. Galvin, *supra* note 13.

<sup>185</sup> Zola, *supra* note 14, at 170.

<sup>186</sup> *Id.*

### C. The Law, Language, and Power

Legal labels and terminology similarly have the power to shape identities and perceptions.<sup>187</sup> Because the law exists to maintain social order, it has the formidable ability to institutionalize and formalize societally accepted norms.<sup>188</sup> Law is often referred to as a form of social engineering that defines the roles for individuals in society, how one must conform to that role, and the consequences for failing to do so.<sup>189</sup> In effect, the law has the ability to both create and maintain the status quo.<sup>190</sup> Often, this relates to determining what is “normal” in society and how to respond to any differences.<sup>191</sup> The legislature decides what norms are to be implemented and incorporated into society through its law-making function, with such laws typically reflective of the interests of the groups already in power in society.<sup>192</sup> When courts then resolve discrepancies or ambiguities in the laws, they ultimately create new norms.<sup>193</sup> These processes can create and maintain systems of privilege and exclusion.<sup>194</sup> Throughout history, the able-bodied majority created public policy and therefore conferred benefits on themselves while imposing disadvantages on people with disabilities.<sup>195</sup>

The law is an institution created by and perpetuated through the spoken and written word: it is used to present arguments, negotiate, deliver opinions, and pass laws.<sup>196</sup> When the legislature or courts utilize language in the law that has a stigmatizing or discriminatory effect, that stigma becomes a sanctioned part of the normative system.<sup>197</sup> For example, as described in Part I, legislation mandating the sterilization of the “feeble-minded” and subsequent endorsement by the Supreme Court of the practice legitimized the norm that people

<sup>187</sup> Kaaryn Gustafson, Symposium, *Disability, Fluidity, and Measuring Without Baselines*, 75 MISS. L.J. 1007, 1025–26 (2006); Kanter, *supra* note 13, at 439.

<sup>188</sup> CHAMBLISS & SEIDMAN, *supra* note 13, at 8.

<sup>189</sup> *Id.*

<sup>190</sup> Kanter, *supra* note 13, at 439–41.

<sup>191</sup> *Id.* at 446.

<sup>192</sup> CHAMBLISS & SEIDMAN, *supra* note 13, at 65.

<sup>193</sup> *Id.* at 35. Chambliss and Seidman describe how courts originated as dispute-resolution to punish those who broke societal norms, but have since become norm-enforcing institutions in cases where the law is unclear. *Id.*

<sup>194</sup> Gustafson, *supra* note 187, at 1026–27.

<sup>195</sup> Rovner, *supra* note 37, at 1056. Robert Henley Woody describes how social systems in the United States were built to accommodate the needs of the majority and therefore have trouble accommodating people with complex physical or mental needs. WOODY, *supra* note 42, at 3. The legal system has trouble determining how to address the needs of people with disabilities, specifically when it comes to assessing the legal ramifications of having a disability as well as how to uphold the rights of people with disabilities. *Id.* at 4.

<sup>196</sup> Kanter, *supra* note 13, at 432.

<sup>197</sup> See CHAMBLISS & SEIDMAN, *supra* note 13, at 10 (describing how the law is a tool that defines both role and role performance in society); *supra* notes 36–47 and accompanying text.

with disabilities were inferior and posed a threat to society.<sup>198</sup> The law can also directly result in stigmatizing language appearing throughout society, such as “handicapped parking” signs resulting from the ADA or inclusion of “mentally retarded” as a disability category on a student’s education plan in school.<sup>199</sup> It can also mandate its disappearance: Rosa’s Law, for example, is a direct legislative rejection of certain language and the offensive connotations attached to it, thus supporting a new norm of ensuring people with disabilities have the same access and opportunities as those without.<sup>200</sup> Laws such as the ADA that give people a new set of rights and utilize inclusive language can change perceptions by imposing a legal duty on society at large to develop a better understanding of people with disabilities and actively work to facilitate their inclusion.<sup>201</sup> These laws also impact individuals’ sense of self-worth and agency by giving them a legal avenue to challenge discrimination.<sup>202</sup>

It is not only the terminology utilized in the law that is significant, but also how that terminology is defined.<sup>203</sup> Disability is at once a social construct and a legal construct, with definitions of each that may or may not be congruent.<sup>204</sup> While laws create different groups, judges get to decide who falls into

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<sup>198</sup> See *Buck*, 274 U.S. at 207 (upholding Virginia’s mandatory sterilization law for individuals deemed “feeble-minded”); *Verdict of History: The Forgotten Years: 1870–1940*, *supra* note 44, at 12 (stating that the case was likely brought with lawyers on both sides hoping that the sterilization laws would be upheld by the Court).

<sup>199</sup> See Devlieger, *supra* note 1, at 347 (highlighting the introduction of signs indicating accessibility for people with disabilities and other accommodations as a direct result of the passage of the ADA); Ford et al., *supra* note 12, at 109 (describing how jarring it was for a mother to see her daughter labeled “mentally retarded” by her Individualized Education Plan when that language was no longer socially acceptable).

<sup>200</sup> Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643, 2643 (2010) (codified as amended in scattered sections of the U.S.C.); see S. REP. NO. 111-244, at 2–3 (2010) (stating that the law should mirror the societal departure from the term “mentally retarded” in favor of language that better reflects the current perception of people with disabilities as equal members of society).

<sup>201</sup> Emens, *supra* note 152, at 220–21.

<sup>202</sup> See Gustafson, *supra* note 187, at 1017–18 (stating that the ADA reminds people with disabilities that accommodation and nondiscrimination should be the new normal, and gives them an avenue to challenge instances where that is not the case).

<sup>203</sup> See Atkins-Sayre, *supra* note 14, at 9 (describing how defining what constituted sexual harassment generated notice and understanding of a pervasive yet previously unaddressed phenomenon); Perju, *supra* note 7, at 306 (describing the judicial power of defining a term like disability to change the social, political, and legal environment to the push for equal access).

<sup>204</sup> Gustafson, *supra* note 187, at 1032. When “mentally retarded” was the preferred term for people with intellectual disabilities, legal definitions often grouped together people with mental retardation and people with mental illness under the definition of “mentally defective persons,” leading to unreliable and inconsistent legal treatment of people with a wide variety of conditions. WOODY, *supra* note 42, at 17–18. Creating a legal definition for disability can be incredibly difficult because of the wide array of conditions and experiences it encompasses. Bagenstos, *supra* note 7, at 405–06. Defining the term remains crucially important, however, to establishing a claim of disability discrimination. *Id.*

those legal categories.<sup>205</sup> Whether individuals can meet the legal definition of disability has drastic implications for the kinds of services and protections they are entitled to under the law, regardless of the social perceptions at the time.<sup>206</sup> Legal categorizations have led to tension throughout history, as individuals with disabilities pushed back against legal language that was stigmatizing, but that otherwise granted them access to countless services and protections.<sup>207</sup> Whether judges subscribe to a more formalist or realist view of legal terminology can have drastic implications for the individuals that disability laws are meant to protect.<sup>208</sup> The Supreme Court's formalist approach to defining disability has had the effect of substantially narrowing the class of people protected by the ADA, contrary to Congress's objectives in enacting the law.<sup>209</sup>

#### D. Person-First and Identity-First Language

The most recent push for more inclusive language regarding disability, reflected in the ADA, is commonly referred to as “person-” or “people-first language.”<sup>210</sup> This language reflects the social model of disability by emphasizing the person rather than defining individuals by their disabilities.<sup>211</sup> Advocates for person-first language posit that individuals are much more than just their

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<sup>205</sup> Gustafson, *supra* note 187, at 1026–27. Robert Cover describes legal interpretation as “the imposition of violence upon others” because of the drastic effects judicial rulings can have—the loss of a child, property, freedom, or life. Kanter, *supra* note 13, at 433 (quoting Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986)).

<sup>206</sup> See WOODY, *supra* note 42, at 18 (describing how the failure to develop a consistent legal definition for “mentally retarded” led to unreliable and inconsistent treatment of such individuals under the law); *see, e.g.*, 42 U.S.C. § 12112(a) (2018) (forbidding employers from discriminating against “a qualified individual with a disability,” therefore requiring a person to be categorized as such before guaranteeing her any protection).

<sup>207</sup> See PELKA, *supra* note 8, at 12 (describing how being found by a doctor to have a disability was crucial to being eligible for workers' compensation in the early twentieth century); Schalock et al., *supra* note 92, at 120 (describing how a diagnosis of mental retardation was crucial to being found eligible under federal law in areas such as immigration, education, social security, Medicaid, and employment).

<sup>208</sup> See HUTTON, *supra* note 18, at 11–13 (highlighting that a legal formalist will look only at legal language itself while a legal realist will consider the sociological implications when applying such language to each case); Perju, *supra* note 7, at 313, 314–15 (outlining the implications of the judicial narrowing of the statutory definition of “individual with a disability” under the ADA).

<sup>209</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (codified as amended at 42 U.S.C. §§ 12101–12102); Perju, *supra* note 7, at 315; *see, e.g.*, Sutton v. United Air Lines, Inc. 527 U.S. 471, 482 (1999) (holding that mitigating measures—such as corrective lenses or a prosthetic limb—must be considered when deciding whether a person is an “individual with a disability” under the ADA). The Supreme Court's approach removed individuals with conditions such as breast cancer, multiple sclerosis, lymphoma, brain tumors, epilepsy, and depression from protection under the ADA. Perju, *supra* note 7, at 315.

<sup>210</sup> Simpson, *supra* note 1, at 14; Back et al., *supra* note 4, at 4–5; *see, e.g.*, 42 U.S.C. § 12101 (utilizing the term “individuals with disabilities,” an example of person-first language).

<sup>211</sup> Dunn & Andrews, *supra* note 7, at 258.

disability.<sup>212</sup> This approach eliminates the use of stigmatizing and generalized labels like “disabled” or “the epileptic” as nouns that describe an individual or group and refers to them instead as “people with disabilities” or “people with epilepsy.”<sup>213</sup> Those who prefer this language believe that putting people first will counter negative stereotypes and promote inclusion of and equal opportunity for individuals with disabilities.<sup>214</sup> From a grammatical perspective, the use of the preposition “with” slows the response of the writer or speaker and can lead them to reflect on the language they are using and the impact it can have.<sup>215</sup> Although the majority of legislation now employs person-first language, some judicial decisions continue to use stigmatizing collective language.<sup>216</sup>

Despite this preference for person-first language, there has been a recent push from some in the disability rights community to return to the use of “identity-first language” to give the individual or group a way to proudly reclaim disability and alter its connotation from one of shame to one of pride.<sup>217</sup> Advocates for identity-first language argue that dissociating the person from the disability reinforces the idea that there is something undesirable about having a disability.<sup>218</sup> Asserting disability, on the other hand, promotes autonomy and indicates a decision to reclaim control over one’s disability identity.<sup>219</sup> Imputing a previously negative word with positive and liberating meanings empowers individuals to resist the word’s negative use in society.<sup>220</sup> The ongoing debate between person-first and identity-first language further highlights the critical impact language can have on identity and perception.<sup>221</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> Simpson, *supra* note 1, at 14.

<sup>214</sup> Dunn & Andrews, *supra* note 7, at 258; Back et al., *supra* note 4, at 4–5. The American Psychological Association endorsed person-first language as an effective way to shift public perception of people with disabilities towards acceptance and respect. Dunn & Andrews, *supra* note 7, at 256.

<sup>215</sup> Dunn & Andrews, *supra* note 7, at 258.

<sup>216</sup> See, e.g., *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (interpreting what constitutes a free and appropriate public education for a “disabled child”). The Court in *Endrew F.* held that a free and appropriate public education under the Individuals with Disabilities Act is one that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 999. This means that schools should identify and work towards appropriately challenging objectives for every student with disabilities to ensure that these students benefit from their education. *Id.* at 992. What constitutes effective progress for students will vary depending on their particular levels of ability. *Id.*

<sup>217</sup> Dunn & Andrews, *supra* note 7, at 256.

<sup>218</sup> *Id.* at 256–57.

<sup>219</sup> *Id.* at 257. The National Federation for the Blind is one national organization that has decided to use identity-first language, rejecting person-first language as “overly defensive.” *Id.*

<sup>220</sup> Galvin, *supra* note 13.

<sup>221</sup> See Kanter, *supra* note 13, at 432–34 (highlighting the importance of language as promoting certain damaging ideas about disability and showcasing the ongoing debate between person-first and identity-first language).

### III. RECOMMENDATIONS FOR LEGAL PRACTITIONERS, STATE LEGISLATURES, AND THE SUPREME COURT REGARDING DISABILITY TERMINOLOGY

Because the law can have important legal and social implications for people with disabilities, the terminology utilized by practitioners, legislative bodies, and courts should be consistent with modern views of disability.<sup>222</sup> Section A of this Part recommends that lawyers utilize respectful disability terminology as well as confront their own underlying assumptions about disability.<sup>223</sup> Section B recommends that state legislatures that have not modernized their legal terminology pass comprehensive legislation to rid their laws of stigmatizing language, and that states that have already done so ensure that the legislation is effectively enforced.<sup>224</sup> Section C argues that the Supreme Court should broaden its interpretation of the definition of disability to better align with congressional intent under the ADAAA and societal perceptions of disability.<sup>225</sup>

#### *A. Recommendations for Lawyers in Practice*

While federal legislation largely reflects person-first language and a social model of disability, it is much more difficult to measure whether the public perception of disability also reflects a social model.<sup>226</sup> As described in Part II of this Note, the law can be a source of social exclusion, but it can also be a source of social change that is propelled by the enactment of progressive laws, inclusive judicial interpretation, and zealous attorney advocacy.<sup>227</sup> Lawyers are often told that the law exists apart from moral, social, and cultural considerations, but it can be incredibly powerful to examine the role that the law and lawyers have played in the societal marginalization of people with disabilities.<sup>228</sup> A lawyer holds a special role in society as both a “member of the legal profession . . . and a public citizen having special responsibility for the quality of justice” as dictated by the Model Rules of Professional Responsibility.<sup>229</sup> As

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<sup>222</sup> See *id.* at 432 (discussing the legal profession’s heavy reliance on oral and written advocacy that therefore leads the language in the law to have powerful consequences).

<sup>223</sup> See *infra* notes 226–245 and accompanying text.

<sup>224</sup> See *infra* notes 246–259 and accompanying text.

<sup>225</sup> See *infra* notes 260–279 and accompanying text.

<sup>226</sup> See Gustafson, *supra* note 187, at 1015 (describing that although it is easy to document the way the laws have changed and been utilized, it is more difficult to measure how the public’s perception of and resistance to disability rights have evolved).

<sup>227</sup> Kanter, *supra* note 13, at 446; see *supra* notes 154–221 and accompanying text.

<sup>228</sup> Kanter, *supra* note 13, at 446–48. For example, there is evidence that lawyers on both sides of *Buck v. Bell* participated in the case with the goal of upholding the sterilization laws. *Verdict of History: The Forgotten Years: 1870–1940*, *supra* note 44, at 12; see *Buck v. Bell*, 274 U.S. 200, 205 (1927) (challenging the sterilization of a “feeble-minded” woman under Virginia’s mandatory sterilization laws).

<sup>229</sup> MODEL RULES OF PROF’L CONDUCT pmb1., para. 1 (AM. BAR ASS’N 2016).

private citizens, lawyers will either experience disability directly at some point in their lifetime or know someone with a disability.<sup>230</sup> There is the same risk for lawyers as there is for the rest of society that their biases and assumptions reflect the prejudices or misapprehensions about disability outlined in Part I and Part II of this Note.<sup>231</sup> As members of the legal profession, lawyers come face-to-face with disability in countless areas of the law, including: guardianship, insanity defenses in criminal law, insurance law, competency determinations, custody decisions, education law, employment discrimination, constitutional considerations of equal protection and sovereign immunity, family law, and more.<sup>232</sup> As representatives, most lawyers will have a client with a disability at some point during their career.<sup>233</sup>

It is therefore critically important for lawyers to examine their own biases and learn best practices for representing clients with disabilities in order to be agents for social change.<sup>234</sup> Lawyers must challenge their underlying assumptions about people with disabilities in order to provide the best representation possible.<sup>235</sup> If a lawyer has internalized an equation of disability with incompe-

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<sup>230</sup> Kanter, *supra* note 13, at 449. When the ADA was passed in 1990, the statement of findings and purposes stated that upwards of forty-three million Americans have one or more disabilities, and that this number will only increase as the population gets older. 42 U.S.C. § 12101(a) (2018). Disability is often considered the largest minority in the country. Dunn & Andrews, *supra* note 7, at 259.

<sup>231</sup> See Kanter, *supra* note 13, at 468 (discussing how lawyers might possess damaging biases towards people with disabilities); *supra* notes 24–152, 171–186 and accompanying text.

<sup>232</sup> Kanter, *supra* note 13, at 461–68. Lawyers have a special responsibility to be informed about the legal ramifications of disability to ensure that people with disabilities receive proper treatment under the law. WOODY, *supra* note 42, at 4. They are assisted in this role by individuals in other professions who also interact with the law, including social workers, educators, and law enforcement. *Id.*

<sup>233</sup> Kanter, *supra* note 13, at 469.

<sup>234</sup> *Id.* at 468–69. It is not only clients with disabilities who suffer from damaging stereotypes about disabilities, but also lawyers with disabilities. Donald H. Stone, *The Disabled Lawyers Have Arrived; Have They Been Welcomed with Open Arms into the Profession? An Empirical Study of the Disabled Lawyer*, 27 LAW & INEQ. 93, 99 (2009). Studies by the National Association of Law Placement found that there are great disparities both in hiring rates and pay scales between lawyers with disabilities and those without. *Id.* at 95. A California poll found that lawyers with disabilities reported experiencing skepticism about their professional capabilities, derogatory comments from judges, employer refusals to provide accommodation, physical and communication barriers, and various other forms of discrimination. *Id.* at 98–99.

<sup>235</sup> Kanter, *supra* note 13, at 468. Kanter recommends exposure to clients with disabilities and the field of disability studies during law school as one way to ensure that lawyers are properly trained in representing clients with disabilities respectfully and effectively. *Id.* at 466–77. First year courses such as Torts, Criminal Law, Property, and Constitutional Law often touch on issues related to disability, but disability should be explicitly addressed and discussed as part of the curriculum. *Id.* at 466. Students will be exposed to disability by discussing, for example, what it means to be a reasonable person with a disability, considering modifications required by the ADA for places of public accommodation, and toying with complex areas of constitutional law such as equal protection that have been brought up by cases related to disability. *Id.* Disability pervades upper level courses as well, including Evidence and issues of testimony, Estate Tax and estate planning for parents of children with disabilities, Employment Law and providing accommodations for employees with disabilities, and more. *Id.* at 467. Furthermore, Kanter recommends schools provide disability-related clinics to help students de-

tence, it may lead them to substitute their own expertise for the express wishes of their client, contrary to their professional duty.<sup>236</sup> Lawyers also must understand the complex ways disability is treated by the law and have the ability to separate the legal construction from the social construction of disability.<sup>237</sup> For example, a client who has been deemed incompetent in court may still be fully competent to make her own decisions relating to her representation.<sup>238</sup>

Lawyers are charged with improving the law and legal profession and working to ensure equal access to the legal system for all.<sup>239</sup> Utilizing the preferred language of clients with disabilities is one relatively simple way a lawyer can respect the autonomy and identity of their clients.<sup>240</sup> A lawyer is a representative, advocate, and voice of their client.<sup>241</sup> Lawyers should ask their clients what language choices they prefer and respect those wishes whenever referring to their client's disability is appropriate, including in interviews, briefs, and arguments in court.<sup>242</sup> The language a lawyer uses in briefs and arguments could ultimately be memorialized in a judicial opinion, which in turn can influence the

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velop the professional skills necessary to work with clients with disabilities. *Id.* at 474. These opportunities will present law students with an opportunity to confront their own assumptions about and biases towards people with disabilities. *Id.* Doing so will not only make them better communicators and advocates for all their future clients, but also give them an opportunity to confront the way society, and the law, is often inaccessible to people with disabilities. *Id.* at 475–77. Able-bodied law students often represent society's view of what is "normal," and working with individuals who are different from themselves can help them understand that what constitutes the norm is often a social construct. *Id.* at 476. It will also expose them to the fact that people with disabilities are a heterogeneous group and that every client comes with their own unique characteristics, of which disability may just be one. *Id.*

<sup>236</sup> *Id.* at 468; see MODEL RULES OF PROF'L CONDUCT r. 1.2 (mandating that a lawyer will follow a client's wishes when it comes to the objectives of their representation, and stating that although lawyers have control over the procedure, they should consult with the client as to the methods they will use). Even though clients are meant to control the objectives of their legal representation, the reality is that lawyers often make these decisions, and that risk is particularly prevalent when working with clients with disabilities. See SUSAN M. OLSON, CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS 140 (1984) (discussing how the line between a lawyer *suggesting* a course of action and choosing to pursue it is often blurred).

<sup>237</sup> Kanter, *supra* note 13, at 468–69.

<sup>238</sup> *Id.* There are several factors that can influence how successful the lawyer-client relationship is in the disability context, including demographics, psychology, and economics. OLSON, *supra* note 236, at 131–32. Lawyers should consciously make sure their clients feel empowered to make their own decisions. *Id.* at 137.

<sup>239</sup> MODEL RULES OF PROF'L CONDUCT pmbi., para. 6.

<sup>240</sup> *Cf.* Dunn & Andrews, *supra* note 7, at 261 (suggesting that professionals like psychologists should ask people how they prefer to be referred to and should explore the social, political, and cultural reasons for different language preferences to gain a deeper understanding of their clients).

<sup>241</sup> MODEL RULES OF PROF'L CONDUCT pmbi., para. 2.

<sup>242</sup> *Cf.* Dunn & Andrews, *supra* note 7, at 262 (advising psychologists to understand and become comfortable both with person-first and identity-first language to best respect the wishes of their clients).

future of both the law and societal perception.<sup>243</sup> The American Bar Association has a disability rights section of its website that addresses issues of accessibility, but a language guide that articulates best practices for lawyers who work with clients with disabilities would also be beneficial for lawyers to reference.<sup>244</sup> Such resources will assist lawyers in promoting a social model of disability simply by being careful and intentional about the disability language they use.<sup>245</sup>

### *B. Recommendations for State Legislatures*

Rosa's Law was a direct federal legislative condemnation of the use of demeaning language and a mandate to replace it with language that connotes equality and inclusion.<sup>246</sup> In the years following its passage, many states passed similar statutes modernizing the terminology used in their laws to refer to people with disabilities.<sup>247</sup> The statute passed in Nevada, for example, specifically orders the Legislative Counsel to use respectful language and sentence structures that refer to the person first, then the disability.<sup>248</sup> Colorado passed a session law in 2018 mandating the removal of the outdated term "mental retardation" from all state laws.<sup>249</sup> In 2019, Wisconsin's governor signed a bill removing the term from the state's administrative code.<sup>250</sup>

<sup>243</sup> See CHAMBLISS & SEIDMAN, *supra* note 13, at 35 (describing the power of the judiciary as a norm-enforcing institution).

<sup>244</sup> See *Commission on Disability Rights*, AM. BAR ASS'N, <https://www.americanbar.org/groups/diversity/disabilityrights/> [<https://perma.cc/UL2T-J7LA>] (containing links to numerous accessibility resources but not including a language guide for lawyers).

<sup>245</sup> See Kanter, *supra* note 13, at 432 (discussing how language is an important tool for the practice of law and asserting that lawyers therefore need to understand the power of the words they use, particularly when it comes to disability).

<sup>246</sup> See Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643, 2643 (2010) (codified as amended in scattered sections of the U.S.C.) (mandating the use of person-first language throughout federal law); S. REP. NO. 111-244, at 3 (2009) (finding that language needs to reflect the goals of equality and inclusion of individuals with disabilities throughout society).

<sup>247</sup> Ford et al., *supra* note 12, at 111; see, e.g., CONN. GEN. STAT. § 17a-210d (2019) (mandating the replacement of "the mentally retarded" with "persons with intellectual disability" and other similar changes in Connecticut statutes).

<sup>248</sup> NEV. REV. STAT. § 220.125(1) (2019). The Nevada statute goes on to state that person-first language is preferred for use throughout Nevada laws and that "handicapped," "mentally retarded," and other similar words are no longer preferred. *Id.* § 220.125(2)–(3).

<sup>249</sup> See 2018 Colo. Legis. Serv. ch. 44 (S.B. 18-096) (West) (mandating the modernization of "the outdated use of the terms 'mental retardation' and 'mentally retarded'" in Colorado laws). This law does not go far enough, however: the legislation did not remove the terms but rather added in an additional alternate label. See, e.g., COLO. REV. STAT. § 18-1.3-1102(1) (2019) ("Any defendant may file a motion with the trial court in which the defendant may allege that such defendant is a mentally retarded defendant or a defendant with an intellectual and developmental disability.") (emphasis added).

<sup>250</sup> Riley Vetterkind, *Tony Evers' First Bill-Signing Removes 'R-Word' from Administrative Code*, WIS. ST. J. (May 2, 2019), [https://madison.com/wsj/news/local/govt-and-politics/tony-evers-first-bill-signing-removes-r-word-from-administrative/article\\_a5f3d1ae-3e47-5268-99ca-f0ab969445dd.html](https://madison.com/wsj/news/local/govt-and-politics/tony-evers-first-bill-signing-removes-r-word-from-administrative/article_a5f3d1ae-3e47-5268-99ca-f0ab969445dd.html) [<https://perma.cc/C73T-L3BC>]; see S.B. 19, 104th Legis. Sess. (Wis. 2019) (re-

Not every state followed suit, however.<sup>251</sup> State legislatures that have not introduced such bills or have had bills fail before being enacted should renew efforts to pass such a law.<sup>252</sup> All states should also conduct a comprehensive examination to remove all stigmatizing language regarding disability in bills that have already been passed.<sup>253</sup> As discussed in Part II of this Note, public policy and law can either maintain the status quo, often at the expense of minority groups, or can actively combat damaging social attitudes and discrimination; changing language is one seemingly simple, yet impactful, way to do so.<sup>254</sup> Federal and state laws and regulations should utilize consistent terminology to ensure coherence and uniformity.<sup>255</sup>

One of the consistent problems with disability terminology throughout history is that it often was not chosen by the individuals it is meant to describe, but rather was imposed onto them by others.<sup>256</sup> As a result, such language does not reflect their personal identities or the way they wish to be viewed by society.<sup>257</sup> One simple way a legislature can institutionalize respect for people with disabilities is to make sure their preferred language is always utilized in state laws.<sup>258</sup> Especially given the growing preference for identity-first language,

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placing the term “mental retardation” with “intellectual disabilities” in Wisconsin’s administrative code).

<sup>251</sup> See, e.g., OKLA. STAT. tit. 56 § 530.6 (2019) (granting the Oklahoma Department of Human Services the authority to investigate homes that care for “mentally retarded” or “developmentally disabled” adults).

<sup>252</sup> See Ford et al., *supra* note 12, at 111 (discussing how all states should strive to rid their laws of stigmatizing language and replace it with more inclusive terminology); Marie Szaniszlo, *Bill to Strike the ‘R Word’ from Bay State Laws Languishes in Committee*, BOS. HERALD (Nov. 21, 2019), <https://www.bostonherald.com/2019/11/21/bill-to-strike-the-r-word-from-bay-state-laws-languishes-in-committee/> [<https://perma.cc/FY4H-7YNF>] (discussing how a bill filed in Massachusetts in 2011—and every year since—proposing the removal of “retarded” from the general laws has not been able to make it out of committee). Patricia Jehlen, the state senator who proposed the Massachusetts bill, posited that the reason it has not moved forward is “that there’s no giant movement behind it.” Szaniszlo, *supra*.

<sup>253</sup> See Ford et al., *supra* note 12, at 111 (emphasizing how important consistency is across state laws).

<sup>254</sup> See S. REP. NO. 111-244, at 3 (2010) (stating that the law should mirror the societal departure from the term “mentally retarded” in favor of language that better reflects the current perception of people with disabilities as equal members of society); CHAMBLISS & SEIDMAN, *supra* note 13, at 35 (describing how law and policy have the power to define the norms of society); Kanter, *supra* note 13, at 432, 446 (discussing the importance of language in the law and how the law can both promote exclusion and foster inclusion depending on how it is utilized); *supra* notes 160–209 and accompanying text.

<sup>255</sup> See Ford et al., *supra* note 12, at 108 (emphasizing that federal and state laws and programs should consistently reflect the shift to more inclusive language).

<sup>256</sup> Galvin, *supra* note 13. Fred Pelka states that even this idea—that individuals with disabilities could determine for themselves their own identity—is revolutionary given the fact that such an identity has been imposed upon them by other forces in society for all of history. PELKA, *supra* note 8, at 4.

<sup>257</sup> Galvin, *supra* note 13.

<sup>258</sup> See Dunn & Andrews, *supra* note 7, at 261 (explaining that the best way for psychologists to resolve the tension around disability terminology is to simply ask the individuals they work with what

particularly among the Deaf, blind, and autistic communities, state legislatures should consult with disability rights groups in their jurisdiction when updating legislative language.<sup>259</sup>

### C. Broadening the Definition of Disability Under the ADA

Once the legislature changes its language and policies to reflect a social model of disability and inclusion, courts are tasked with interpreting and applying that terminology.<sup>260</sup> As described in Part II of this Note, these interpretations can have drastic implications for individual and group rights.<sup>261</sup> While the ADA was seen as a groundbreaking piece of legislation that targeted both physical barriers and social stigma, it did not provide sufficient guidance to courts on how to navigate the social model and its emphasis on remedying societal discrimination.<sup>262</sup> Disability is a class that individuals can move in and out of as well as experience in vastly different ways depending on their particular condition, so developing clear definitions can be difficult.<sup>263</sup> The Supreme Court in *Sutton v. United Air Lines, Inc.* and subsequent cases therefore utilized a formalist interpretation of “disability” that mirrored the medical model’s focus on the individual’s condition in order to determine who is eligible for protection under the ADA.<sup>264</sup> This interpretation, however, is contrary to the purpose and legislative history of the definition of disability and the law

terminology they prefer); Ford et al., *supra* note 12, at 111 (discussing how all states should strive for consistent use of respectful statutory language).

<sup>259</sup> See Dunn & Andrews, *supra* note 7, at 257, 262 (discussing how the National Federation of the Blind has elected to use identity-first language, and that many Deaf and autistic individuals similarly prefer identity-first language); Back et al., *supra* note 4, at 5 (describing that individuals who prefer identity-first language feel that disability is a crucial part of who they are rather than a medical flaw).

<sup>260</sup> Gustafson, *supra* note 187, at 1026–27.

<sup>261</sup> See Perju, *supra* note 7, at 315 (describing the judicial narrowing of the statutory definition of “individual with a disability” under the ADA and its implications for eligibility under the law); *supra* notes 160–209 and accompanying text.

<sup>262</sup> Perju, *supra* note 7, at 323.

<sup>263</sup> Bagenstos, *supra* note 7, at 405–06; Gustafson, *supra* note 187, at 1022–23. Sometimes disability is referred to as an “open minority,” because injury, illness, or even age can lead someone to become disabled at any point in their life. PELKA, *supra* note 8, at 25–26. There is also such a wide variety of disabilities that affect people from all walks of life that individuals who are part of the disability community may see themselves as having little in common with others in the same community. *Id.*

<sup>264</sup> Perju, *supra* note 7, at 320, 332; see *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481 (1999) (holding that plaintiffs with severe vision impairments did not meet the definition of disability because the fact that they wore corrective lenses prevented them from qualifying under the “substantially limited in any major life activity” prong). This response has been described as the judiciary’s negative reaction to the social model of the ADA, which was enacted before the public had fully embraced the goal of inclusion of individuals with disabilities codified in the law. Perju, *supra* note 7, at 323. Judges are also often uncomfortable with an idea of positive discrimination or affirmative action through which certain individuals are granted accommodations and services that others are not. *Id.*

itself.<sup>265</sup> It is also incongruous with the fact that often, the main unifying experience individuals with disabilities share is that they are societally perceived as having a disability, whether or not they actually identify as such.<sup>266</sup>

The Supreme Court's interpretation means that individuals who view themselves and are viewed by society as having a disability, such as someone who is completely blind in one eye, may be told by a judge that they do not legally qualify as "disabled."<sup>267</sup> Plaintiffs carry a heavy and uncomfortable burden of proving that they are "substantially limited" even though the ADA is meant to legitimize the idea that people with disabilities can be autonomous and self-sufficient when provided with proper accommodations and services.<sup>268</sup> It also means that the court often does not eventually address the question of discrimination that the ADA is meant to target.<sup>269</sup> This resets the status quo by excluding individuals from the public and private institutions the ADA intended to make available for all.<sup>270</sup> Although such exclusion may be more easily justified by the Court when it comes to individuals with vision problems who cannot be airline pilots or truck drivers, it is much harder to stomach when it prevents those same plaintiffs from bringing a case when they experience outright discrimination or animosity as a result of their disability.<sup>271</sup>

The ADA was ahead of its time in promoting a social model of disability, and the view of disability has only evolved in society and popular culture since then; the Supreme Court's interpretation of disability should better align with

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<sup>265</sup> Perju, *supra* note 7, at 320.

<sup>266</sup> See Kanter, *supra* note 13, at 435 (discussing how disability encompasses individuals with a wide variety of experiences and perspectives whose one unifying feature is that society has deemed them as outside the norm).

<sup>267</sup> See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999) (holding that the brain's accounting for a loss of vision in one eye disqualifies plaintiff from protection under the ADA because he is not "substantially limited" in any way); Gustafson, *supra* note 187, at 1013 (describing how the definition of disability is incongruous between public perception, the ADA, and the Supreme Court).

<sup>268</sup> Emens, *supra* note 152, at 216–17; see Perju, *supra* note 7, at 315 (describing how difficult the Supreme Court has made it for plaintiffs to get over the hurdle of qualifying as an individual with a disability). Emens describes how it is both difficult and uncomfortable for a plaintiff to prove that they are "substantially limited" yet "otherwise qualified" as an employee. Emens, *supra* note 152, at 216–17.

<sup>269</sup> See Perju, *supra* note 7, at 316 (describing how judicial attention on the definition of disability has prevented courts from addressing and answering questions of disability-based discrimination).

<sup>270</sup> Gustafson, *supra* note 187, at 1026.

<sup>271</sup> See *Sutton*, 527 U.S. at 481 (rejecting plaintiffs' contention that being denied positions as airline pilots because of a vision requirement was disability-based discrimination because they were not individuals with a disability); *Albertson's, Inc.*, 527 U.S. at 565–66 (holding that plaintiff who was blind in one eye could not sue for discrimination after being denied a position as a truck driver because he could not show that he experienced a substantial limitation due to his brain's ability to mitigate for his monocular vision); Gustafson, *supra* note 187, at 1028 (describing the Supreme Court's narrowing of the definition of disability as preventing individuals who have minor impairments but experience substantial disability-based discrimination and animus from any recovery under the ADA).

this progression.<sup>272</sup> The Supreme Court's formalist interpretation is described as a straightforward creation of standards that are easy to apply to a variety of scenarios and takes the morality of a realist interpretation out of the inquiry.<sup>273</sup> Deciding who qualifies as an individual with a disability, however, is essentially a judgment based on subjective values.<sup>274</sup> The Supreme Court's interpretation sends a message that despite what the ADA says, disability comes from an individual, not society.<sup>275</sup> One way to better comport with the goals of inclusion is to follow Congress's directive in the Amendments to the ADA to interpret the definition of disability broadly and ascribe to a more realist view of people with disability as those who experience exclusion due to physical and societal barriers.<sup>276</sup> This interpretation would shift the bulk of ADA inquiry to the question of discrimination.<sup>277</sup> The outcome of cases like *Sutton* may still be the same, but at the very least there would be more consistency between the social, legislative, and judicial interpretations of what it means to have a disability.<sup>278</sup> This would not only judicially affirm the social model of disability, but it may also lead to further improvement in societal perception by bringing more people into the workplace and giving society more exposure to people with a wide range of disabilities and accommodations.<sup>279</sup>

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<sup>272</sup> See Emens, *supra* note 152, at 206–07 (describing how the ADA was enacted before society had fully accepted people with disabilities, and how that led judges to narrow its application to comport with their own views of disability).

<sup>273</sup> Perju, *supra* note 7, at 283. Courts are often concerned with creating clear and rational lines of inquiry without regard for the political or social consequences. *Id.* at 343–44.

<sup>274</sup> Bagenstos, *supra* note 7, at 412–13.

<sup>275</sup> See Perju, *supra* note 7, at 344 (describing how the courts reverted to a medical model of disability either due to a misunderstanding of or an outright rejection of the purpose of the ADA to target societal barriers to inclusion). The Court focused on the nature, severity, duration, and impact of the plaintiff's "impairment" but never the social effects or exclusion the plaintiff experienced. *Id.* at 316.

<sup>276</sup> Bagenstos, *supra* note 7, at 445–46; see Emens, *supra* note 152, at 207 (expressing doubts that the Supreme Court will be willing to embrace a social model of disability and broaden the definition).

<sup>277</sup> Perju, *supra* note 7, at 316; see 42 U.S.C. § 12102(4) (instructing courts to interpret the definition of disability broadly in order to cover a greater number of individuals); *Sutton*, 527 U.S. at 494 (dismissing plaintiff's claim without addressing the question of whether a vision requirement constitutes discrimination under the ADA).

<sup>278</sup> See Gustafson, *supra* note 187, at 1013 (highlighting the discrepancies between definitions of disability across different institutions); see, e.g., *Raytheon Co. v. Hernandez*, 540 U.S. 44, 46 (2003) (highlighting that in order to qualify for relief under the ADA, a plaintiff must show that they were discriminated against because of that disability).

<sup>279</sup> See DISABILITY IN AMERICA: TOWARD A NATIONAL AGENDA FOR PREVENTION 36 (Andrew M. Pope & Alvin R. Tarlov eds., 1991) (discussing how a complete understanding of disability must include consideration of the limiting effect of the environment and public attitudes); Bagenstos, *supra* note 7, at 444 (postulating that disability is a socially defined status that views certain individuals as outside the "norm"); Emens, *supra* note 152, at 209 (stating that a broadened interpretation under the ADAAA could have a circular effect by positively impacting attitudes about disability as more people are brought into the workforce).

## CONCLUSION

The terminology used to discuss disability has changed significantly throughout history. These changes often mirrored the way society's perceptions of disability have evolved: from "feeble-minded" and the medical model of disability as a problem to be cured, to person-first language and the social model that considers societal discrimination to be at the very core of what it means to have a disability. The law has played an underlying role in every one of these changes, sometimes codifying damaging labels and perceptions while at other times leading the charge for more inclusive terminology and treatment. The law as an institution has the power to normalize damaging stereotypes and maintain oppressive power structures, or it can actively combat discrimination. Because language is a powerful tool used in every area of the institution of law, it is important to understand the history and impacts of the words we choose to use. To align with the disability rights movement and the preferences of disability advocates, the terminology used by legal practitioners, state statutes, and the Supreme Court should reflect the social model of disability. Lawyers should do their part as public citizens with the special duty of promoting justice by respecting the wishes of their clients when it comes to what terminology they prefer. State legislatures should survey their laws and ensure that no stigmatizing statutory language remains. Finally, the Supreme Court should pursue the policy of the ADA to combat discrimination and follow the congressional mandate in the ADAAA by employing a broad definition of disability that considers societal perceptions and treatment of individuals with disabilities, thus giving the Court an opportunity to address the discrimination the ADA was intended to combat.

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