

# Empirical Disability Legal Studies

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## Keywords

disability, law and society, law and political economy, social movements, quantitative methodologies, qualitative methodologies

## Abstract

Disability studies is an interdisciplinary field investigating the nature of disability as a social and cultural phenomenon. Since the mid-2000s, legal scholars have been employing a disability studies lens to explore legal doctrine and the treatment of people with disabilities under the law. This article identifies a nascent scholarly movement I call empirical disability legal studies: utilizing both a disability studies lens and empirical methods associated with the social sciences to study disability law. Legal scholars have used empirical methods, involving an analysis of quantitative or qualitative data, to explore three main themes: the experiences of disabled individuals within the formal legal system, the negotiations of disability rights in everyday life outside of formal legal institutions, and the construction of disability in legal texts. This article calls for more scholars to do work in the empirical disability legal studies tradition and puts forward new unexplored paths to expand such inquiry into the legal treatment of disability.

## INTRODUCTION

Disability studies is a relatively new academic field that focuses on human difference, perceptions of “normalcy,” and the ways disability has been constructed and perceived by society at large. In the mid-2000s, legal scholars started to use a disability studies lens to explore legal doctrine and the treatment of people with disabilities under the law. This approach has been termed disability legal studies.

This article discusses works that explore disability law critically via a disability studies lens as well as through the use of empirical tools, whether quantitative, qualitative, or mixed methods—a strand of scholarship I call empirical disability legal studies. This article also explores how different traditions of conducting research in disability studies influenced legal scholarship, whether through a theoretical-humanities tradition or through an empirical approach. Then, it identifies three strands of existing empirical disability legal studies research: disabled individuals’ experiences with formal legal institutions like courts or administrative agencies, their experiences negotiating disability rights in everyday situations outside of formal institutions, and the construction of disability in legal documents such as court decisions or protocols. The article concludes with a look to the future and recommendations for conducting further empirical research informed by disability studies.

## CULTURES OF DISABILITY STUDIES: BETWEEN THE HUMANITIES AND THE SOCIAL SCIENCES

Disability studies emerged as an academic field contemporaneously with the social movements of the 1970s that exposed the social marginalization of people with disabilities (Goodley 2017, Linton 2005, Meekosha 2004). Disability studies aims to approach disability as a social, cultural, and political phenomenon. This approach falls outside the traditional ways of thinking about disability, which treat it solely as a health issue and relegate it to an area of inquiry exclusive to the fields of medicine and rehabilitation.

In the early 1970s, the disability social movement began almost simultaneously in two parts of the Western world: the United States and the United Kingdom (Belt & Dorfman 2019). In London, a group of disabled activists led by Paul Hunt and Vic Finkelstein started the Union of the Physically Impaired Against Segregation (UPIAS) (Oliver 1995). In Berkeley, California, Ed Roberts—alongside a group of activists known as the “Rolling Quads”—established the first Center for Independent Living, which paved the way for the independent living movement (Shapiro 1993) and later the disability rights movement together with Judith Heumann (Heumann & Joiner 2020). These social movements highlighted the public marginalization of people with disabilities and how eugenic ideas deemed this population “socially inadequate” and a burden on society, relegating it to widespread practices of sterilization, institutionalization, and life in poverty. These movements’ main goals were fighting for the recognition of disability as a civil/human rights issue and liberating disabled people from discrimination and exclusion from daily life.

The underlying ideologies of these disability social movements penetrated what Meekosha (2004) calls the “cultures of disability studies,” meaning the different approaches and methodologies of studying disability. Meekosha, working in Australia but originally from the United Kingdom, noticed these differences from her perspective as a foreign scholar working on disability. Similar to Meekosha, I have noticed these differences as an Israeli academic working in the United States. I feel that adapting to another scholarly tradition has proven to be challenging yet enriching.

The UK disability social movement was based on Marxist ideology and the politics of the welfare state, showcasing how capitalist development and the move toward industrialization led

to the socioeconomic exclusion of people with disabilities from the labor market, education, and community living (Goodley 2013). In academic terms, the UK movement aligns with the fields of social policy and sociology, two areas that connect theory with practice. Similar to the United Kingdom, the Scandinavian scholarly tradition connects disability studies with social policy studies (specifically, the principles of the welfare state) and the use of social science methodologies (Traustadóttir et al. 2013).

The US disability social movement drew inspiration from the women's rights and civil rights movements. In terms of scholarly focus, the US approach concerns itself more with the lived experiences of minoritized individuals and their participation in social and economic markets, while applying social constructive theories associated with the humanities (Meekosha 2004). This is not to say that there cannot be examples of social science disability work in the United States and humanities-oriented work in the United Kingdom or in Europe; rather, these are simply trends across the pond.

In the early-to-mid-1980s, British scholar Michael Oliver, a sociologist by training, translated UPIAS's ideas into academic writing, introducing the social model of disability. This concept—namely, that structural barriers, like the lack of wheelchair ramps or the failure to provide sign-language interpretation, hinder disabled people's inclusion into society, rather than their impairments—has been revolutionary in the struggle for disability equality. Oliver (1986, p. 16) employed socialist ideas and discussed how “capitalist values surrounding the notion of work” and the idea of productivity are behind disabled people's segregation from the labor market and from society. Leading voices in UK disability studies, like Colin Barnes and Geof Mercer, both from sociology departments, worked with Oliver and continued to explore the social model. Fellow British scholar Tom Shakespeare, a sociologist and bioethicist, has done incredible work critiquing the social model and developing it to understand that the relationship between societal barriers and impairment is not as rigid as originally conceived. In his work, Shakespeare (2014) highlighted ethical dilemmas with prenatal testing, selective abortion, and physician-assisted suicide as they pertain to the disability community. At least earlier in their careers, the intended audience for the scholarship by Oliver and other British disability scholars was social workers and social policy scholars and not necessarily scholars in the humanities.

By contrast, the humanities-centered approach of the US tradition becomes clear in the description of the field of disability studies by American pioneer scholar Simi Linton. For Linton (2005, p. 518), the field aims

to expose the ways that disability has been made exceptional and to work to naturalize disabled people—remake us as full citizens whose rights and privileges are intact, whose history and contributions are recorded, and whose often-distorted representations in art, literature, film, theater, and other forms of artistic expression are fully analyzed.

Indeed, many leading American disability studies scholars conduct research mostly on the representation of disability in literary pieces, art, and cultural products or on the social histories of disabled people (see, e.g., Bell 2012, Davis 2002, Kafer 2013, Kleege 1999, McRuer 2006, Price 2011, Samuels 2014, Schalk 2018, Schweik 2009, Siebers 2010). Other leading scholars, who teach in education or political science departments, employ a critical theoretical lens to their work instead of what is considered empirical methodology that involves analysis of quantitative or qualitative data (see, e.g., Ben Moshe 2020, Connor et al. 2015, Gill 2015). It is no wonder that the first American anthology of essays on methods in disability studies, *Crip Authorship: Disability as Method*, mainly includes scholars working in the humanities tradition (Mills & Sanchez 2023). Important work in US disability studies has also been done in the field of history (see, e.g., Baynton 2001, 2016; Longmore 2003, 2016; Nielsen 2012, 2020). Although some notable

American scholars working in social science departments have had similar ideas about the production of disability to those of Oliver (see, e.g., Albrecht 1992; Hahn 1985, 1988; Scotch 2001; Stone 1984; Zola 1972, 1993), overall, “critical social sciences have not been so much in evidence from North American scholars” (Meekosha 2004, p. 727).

Ultimately, disability studies as an interdisciplinary and transnational field has been occupied with understanding what disability is and exploring the reasons, consequences, and lessons that can be learned from the historical marginalization of people with disabilities. The different methods and approaches to explore these issues have led to a rich body of literature. In my view, combining insights from theoretical-humanities-focused inquiries with social science and social policy literature creates a well-rounded and deep exploration into the role disability plays in social life and the broader lessons it teaches us.

## WHAT’S LAW GOT TO DO WITH IT? ENTER DISABILITY LEGAL STUDIES

In 2006, Israeli legal scholar Mor (2006) introduced the new field of disability legal studies. This new field seeks to incorporate insights from disability studies into legal scholarship by examining the role of legal norms, actors, and institutions in constructing disability, and therefore to move beyond traditional doctrinal analysis of disability law. Mor, who pursued her doctorate at New York University, chose to write her dissertation on a topic traditionally associated with the UK strand of disability studies: hierarchies of disability within the Israeli welfare and social benefits system, where a certain group of disabled individuals (veterans) are deemed worthy and receive preferential treatment compared to other groups of disabled individuals (disabled workers, those born disabled, or those injured in an accident unrelated to work). Nevertheless, she associated her analysis with the American critical legal studies movement that largely did not explore disability [with the exception of Minow’s (1990) fundamental writing and Kelman & Lester’s (1997) controversial book *Jumping the Queue*]. Fittingly, the article that first introduced disability legal studies, adapted from Mor’s dissertation, was published in the *Yale Journal of Law and the Humanities*.

Five years later, Kanter (2011) wrote an expansive article on why disability legal studies should be recognized as part of the critical legal studies canon alongside feminist legal studies and critical race theory. She notes not only that disability intersects with other protected categories in American law, such as race, gender, sexual orientation, and immigration status, but also that disability helps shed light on the values, histories, and intentions behind statutes and court decisions, and thus teaches us about the legal system in general (Belt & Dorfman 2019, Kanter 2011). Kanter (2011, p. 462) wrote,

Disability Studies provides a vehicle with which to explore questions about the rights and responsibilities of citizens and the general role of the government in promoting and protecting the welfare of all citizens. Just as discussions of gender and race have had an impact well beyond women and people of color, so too can disability force the legal academy to reconsider the economic, social, political, cultural, religious, legal, philosophical, artistic, moral, creative and medical aspects of almost everything “we have taken for granted.”

Alongside the formal introduction of disability studies into American legal scholarship, the social movement for disability equality began to evolve. In 2016, a group of disabled artists known as Sins Invalid, which was mostly composed of people of color and members of the LGBTQ community, produced a manifesto for a new movement called disability justice. The disability justice movement was developed in response to criticism of the 1970s disability rights movement that failed to recognize the complexity and nuance of intersectional identities within the disability community, specifically the historical employment of disability stereotypes toward racial minorities to exacerbate their marginalization (Morgan 2023). The 1970s disability rights

movement was also focused almost entirely on a limited civil rights/antidiscrimination approach. The disability justice movement, often referred to as the second wave of the disability rights movement, is a more radical approach that incorporates Marxist ideology and aims to push back against capitalist notions of productivity as a means to value a person's worth (Sins Invalid 2019). Conceptually, disability justice resembles the roots of the UK disability movement, which, as previously mentioned, was embedded in class politics. Alongside the disability justice movement, writers/activists outside of the formal academy produced scholarship that builds on the disability justice framework and grounds itself in critical theory and the humanities tradition (see, e.g., Adler-Bolton & Vierkant 2022a; Mingus 2017; Piepzna-Samarasinha 2018; Wong 2020, 2024).

In the last few years, scholars in the law and political economy movement, viewed by many as the new incarnation of critical legal studies, began to show interest in the question of how class politics and critiques of capitalism produce disability (Belt et al. 2022). The themes associated with the British disability movement thus started to penetrate legal scholarship. For example, members of the law and political economy movement found new interest in the late-1990s writings of American activist Russell, who employed critiques of how an individual's value is associated solely with their level of workplace productivity or employability (Adler-Bolton & Vierkant 2022b, Tani 2022). Still, Russell's (1998) important book *Beyond Ramps*, which predated the law and political economy movement's interest in disability, "has undoubtedly been better received in Britain and other countries than in the United States in part because [Michael] Oliver's materialist conception of disablement has wider currency" in the United Kingdom and Europe (Malhotra 2019).

The conceptual shift in both American disability studies and disability legal studies has thus pushed the two fields closer to the British tradition in terms of concepts and themes of structural inequality. This shift has been less pronounced regarding methodology, meaning adopting social science approaches and using some systematic analysis of qualitative or quantitative data.

Nevertheless, some disability law scholars found a home within the law and society tradition that is based on examining sociolegal phenomena through empirical tools (Heyer & Mor 2019). This article's goal is to showcase some nascent empirical work in disability legal studies that adopts a social science approach informed by, and incorporating, disability studies concepts. It is therefore a call to encourage more empirical disability legal studies scholarship.

In the rest of the article, I present three strands of research within empirical disability legal studies: exploring the experiences of disabled individuals and their representatives within formal legal institutions, documenting how individuals with disabilities negotiate their rights in everyday life outside of formal institutions, and reading how disability is construed in court decisions and other legal documents.

## **EXERCISING DISABILITY RIGHTS WITHIN FORMAL INSTITUTIONS**

One strand of work within empirical disability legal studies investigates encounters between people with disabilities and the formal legal system. These encounters include situations in which disabled individuals are parties to a legal proceeding, whether a court trial or the administrative procedure of obtaining social security benefits. Mor (2017) discussed access to courts and other legal proceedings as the narrowest formulation of the bigger access to justice theory. She also drew connections between access to justice and the concept of access in the disability context. This strand of work in disability legal studies is arguably the one most associated with the study of procedural justice (Blader & Tyler 2003, Lind & Tyler 1988), where the focus is on the individuals' experiences of the process, their perceptions of fairness, and strategies of navigating the legal system.

This focus on personal experience aligns itself with qualitative empirical methods. The main reason to choose a qualitative research strategy is the desire to provide a "thick description"—the

famous term associated with American anthropologist Geertz (Ponterotto 2006)—of a program, life experience, or decision-making process. Such rich account relies primarily on interview data obtained through semi-structured, nonstandardized interviews. Semi-structured interviews are done through loosely drafted protocols of questions that seek to aid the interviewee in recounting information but are not rigorously followed by the interviewer. The goal of semi-structured interviews is to center the lived experience of the interviewee. In that sense, this research methodology fits well with the goal of disability studies in centering the voices of people with disabilities, which have long been absent from the academic scholarship in general and legal scholarship in particular.

An important example of empirical work investigating disability rights litigation is “Disability Cause Lawyers” by Waterstone et al. (2012). This article uses original data from interviews with leading American disability rights lawyers to help shed light on the development of legal doctrine in the field, why the doctrine is structured the way it is, and the lacunas within the field. The authors’ analyses of the original interview data not only elucidate the ways in which lawyers interact with the disability rights movement but also connect the literature on cause lawyering with disability law, thus opening up discussions at the intersection of two disparate strands of scholarship.

Waterstone and coauthors demonstrate that, unlike in other civil rights movements, little progress in advancing the rights of people with disabilities was achieved through carefully crafted united-front impact litigation or powerful lobbyists. Instead, legal action was brought through sporadic initiatives by individuals who were unassociated with disability rights organizations and did not consider themselves part of the social movement. This important point not only explains the losing strikes of many employment discrimination cases in the early days of the Americans with Disabilities Act (ADA) but also speaks to the remaining tension between different strands within the disability community on impact litigation issues regarding accessibility and deinstitutionalization. Another important insight from this work is that many disability cause lawyers found it important to achieve justice for their clients, and the community, outside the category of impact litigation before the US Supreme Court. Disability cause lawyers are therefore committed to “relentless pragmatism” for their clients (Waterstone et al. 2012, p. 1358) and avoid the often-criticized hyperfocus of cause lawyers on impact litigation.

Eleven years after this important work, in 2023, disability law scholar Weber (2023) was inspired to conduct his own interview-based study on a never-before-researched subset of disability cause lawyers: special education lawyers. Weber found that special education lawyers, like the disability cause lawyers interviewed in Waterstone et al.’s (2012) article, are engaged with the social movement, are committed to bettering the lives of their clients, and are not solely committed to “paper victories” in the Supreme Court. Common themes between the two studies of cause lawyering for people with disabilities were the ways in which counsels carefully steered their clients into settlements that would create “industry precedents” in practice (as opposed to legal precedents through court decisions) and their work toward legislative advocacy outside the court room.

Powell et al. (2020a) also drew conclusions about direct experiences with the legal system from interviewing parents with psychiatric disabilities who received legal counsel from the Family Law Project, a Massachusetts-based legal aid organization. Powell and coauthors demonstrated that the ongoing needs of mentally disabled parents who are involved in custody or visitation disputes go beyond litigation. Explaining the process to the parents, helping coordinate with third parties on behalf of the parents, and referring the parent to other services are often as important as the representation in the court proceedings. Based on qualitative data, the authors then provided practical advice to members of the legal profession who come in contact with parents with psychiatric disabilities, making this rich account useful for training lawyers, judges, and students who are partaking in law school clinics.

Another example of work dealing with the experiences of disabled individuals within a legal system that is not the courts is my work on the Social Security Administration's Disability Determination Process (DDP), which examines the relationship between self-identity and the perceived fairness of legal procedures (Dorfman 2015, 2017). This work aims to bring a disability studies perspective to the study of the American Social Security disability benefits system, a topic Stone (1984) famously explored four decades ago in her groundbreaking book *The Disabled State*. The disability studies angle is immediately apparent in the title of the article "Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process" (Dorfman 2017), a tribute to Linton's (1998) classic book *Claiming Disability: Knowledge and Identity*, which helped establish disability studies as a field in the United States.

The DDP is a five-step, quasi-judicial procedure to determine a person's disability and thus eligibility for Social Security disability benefits (either Social Security Disability Insurance or Supplemental Security Income). Although the Social Security Administration is a federal agency, this procedure is administered by state agencies, known as Disability Determination Services, and is considered a partnership between the states and the federal government. In my work, I claim that perhaps even more intriguing than the claim for disability benefits, however, is how the DDP validates claimants' identities in a formal way by the administration. It does so by establishing a binary classification of disabled versus nondisabled.

Using in-depth interviews, I explored the procedural justice experiences of Social Security disability benefits claimants and how these encounters with the DDP influence their ideas about equal citizenship and disability identity. This work exposes how disabled claimants perform their disability to be eligible for the benefits. Interviewees pointed out that, as part of the eligibility assessment, they are asked counterintuitive questions about everyday tasks. Such questions encourage the disabled claimant to prove their worth and "put on their best face" (Dorfman 2017, p. 218). However, to be deemed disabled according to the Social Security Act, claimants need to show the exact opposite, that they are unable to work. The current policy requires disabled individuals to perform dependency, weakness, and need for substantial assistance. Because getting into this mindset is difficult, claimants use a strategy I termed as the "worst day approach," as one interviewee explained:

As you go about the rest of your life with a disability, you know, there's times when you have to prove yourself or prove you can do things. People don't realize, if they don't have advocates helping them, that if they'll go to Social Security with that attitude, they will not be eligible. . . . There is this saying that advocates for Social Security use. . . .that you have to think about your worst day. You have to talk to them about how hard it is to live with a disability, how much it limits you, how much trouble it is, how bad you feel, how often you're sick. You have to talk that way. Because you have to impress [pause] you have to present an image of being pathetic and helpless. (Dorfman 2017, p. 218)

This clash between a proud disability identity, informed by the disability rights movement, and the image promoted by social insurance law, as highlighted by the interviewees, can be viewed in other legal proceedings. In the torts system, the way in which the plaintiff needs to present disability negatively as a harm and damage, such as in wrongful birth and wrongful life cases, stands in stark contrast to contemporary, nuanced views of disability held by people with lived experiences (Mor 2014, Robbennolt & Hans 2016).

## THE EVERYDAY LIFE OF DISABILITY RIGHTS

Seminal work by sociolegal scholars, specifically in the 1990s and early 2000s, focused on analyzing the beliefs and experiences various social group members hold relative to the law and their motivations to mobilize under the law and to obey it. This study of legal consciousness, legality, and the law in everyday life draws on sociological and anthropological traditions (Ewick &

Silbey 1998, Harding 2006, Sarat 1990, Silbey 2005, Young 2014). It is the study of the “common-sense understanding” of how the law works (Nielsen 2004, p. 7) and of the “constitutive nature of law in everyday life,” that is, the way the law produces cultural meanings in daily life outside the courthouse (Merry 1995, Sarat & Kearns 1993).

Among early work on the way lay individuals with disabilities perceive and use the ADA, incorporating their experiences of living with disability using in-depth interviews, is Engel & Munger’s (2003) book *Rights of Inclusion*. Although groundbreaking in its theme and “participatory research methodology,” and being “the first book-length treatment of disability consciousness from a sociolegal perspective” (Heyer 2007, pp. 280, 263), the book has been critiqued for failing to engage with disability studies literature, insights from disability theory on the models of disability, the complex relationship between the body and social construction, or the relationship of those concepts to the development of disability identity (Heyer 2007). Over the years, however, disability law scholars have done empirical work that explores disability law in everyday life and engages not only with the sociolegal approach but also with theories from disability studies.

An illustrative example of work on the role disability law plays in everyday life is Emens’s (2021) interview-based article “Disability Admin: The Invisible Cost of Being Disabled.” An extension to her work on “life admin,” “the office-type work involved in running a life” (Emens 2014, 2019), this article actualizes and breathes life into the labor of exercising disability law. A world that was not designed with individuals with disabilities in mind extorts time and mental resources from them as they face numerous forms, red tape, and the constant need to explain their needs to strangers. Emens divides this labor into three categories: medical, benefit, and antidiscrimination admin. The navigation of referrals and appointments is a practice that disproportionately impacts disabled individuals, who must constantly prove their eligibility to receive reasonable accommodations or social benefits through a growing pile of documentation (Macfarlane 2021). As one interviewee put it, “a lot of it is bureaucracy, not really disability” (Emens 2021, p. 2340). In addition, many interviewees experienced “advocacy fatigue” from consistent self-advocacy and community organizing.

In true disability legal studies tradition, Emens’s notion of disability admin enriches the understanding of both concepts in disability studies as well as within legal doctrine. Disability admin connects to the social model of disability because the labor individuals with disabilities must perform helps to explain how the impairment interacts with the social environment. Simultaneously, Emens persuasively argues that the examination of the “reasonableness” of a requested disability accommodation, whether in the workplace, in a place of public accommodation, or in educational settings, should consider the disability admin the claimant had to invest in pursuing the accommodation.

In 2023, the disability community held its breath as the Supreme Court considered a case that had significant implications on ensuring accessibility of everyday places of public accommodation, such as hotels, restaurants, and theaters, under Title III of the ADA. In *Acheson Hotels LLC v. Laufer* (2023), the plaintiff-respondent Deborah Laufer sued hundreds of hotels for failing to state whether they have accessible rooms available on their websites. By the sheer number of lawsuits she filed, more than 600, the court determined that she did not intend to stay in those hotels, which raised the question of whether she had standing to sue under the ADA.

Through the years, scholars have described how disability law is an area that is designed mostly to be left to private enforcement through litigation by members of society, specifically with regard to accessibility standards under the ADA regulations that implement Title III (Bagenstos 2006, Colker 2020, Dorfman & Yabo 2020, Waterstone 2007). Despite this feature of the law, plaintiffs who work to enforce the ADA, referred to as “testers,” are often stigmatized as scammers manipulating and abusing the system for profit. The Laufer case, many feared, could bring an end to



the practice of enforcing accessibility through private litigation, with devastating consequences for the everyday life of people with disabilities. They feared the case would eliminate incentives of business owners to ensure compliance with legal accessibility standards, thus undercutting the spirit of the ADA to ensure disability access and inclusion in all areas of life.

In December 2023, the Supreme Court declared the case moot after Laufer herself voluntarily dismissed her pending suits with prejudice, following concerns that her attorney's disciplinary violations would distract the court and that the case would fuel negative attitudes about ADA testers. The court was not convinced that Laufer's dismissal was an effort to evade the court's review and left the issue as a circuit split, despite a troubling dissent by Justice Thomas framing the issue not as discrimination under the ADA but as an unguaranteed "right for information" on websites, which is not legally protected.

While disability advocates sighed in relief due to the dismissal, disability law scholars used empirical tools to help show potential harm to disabled individuals if standing from ADA testers was deemed illegal. Popham, Emens, and Harris used an observational survey to record the experiences of disabled individuals failing to get information regarding hotel accessibility online. Using these data, Popham et al. (2023, p. 17) persuasively argued that the recorded stories not only show the inconvenience of traveling while having a disability but also demonstrate the harm to the "autonomy, security, and dignity of the disabled person." One respondent, for example, said she passed on a professional opportunity because she was not sure she could get an accessible hotel room: "They said an accessible room would be requested but not guaranteed. . . . I chose not to attend the conference, so I missed it" (p. 22). Another survey respondent highlighted safety concerns because of the lack of accessible fire alarms with light signalers:

Older hotels/motels often have fire alarms in the hallways, which doesn't help me in my room when I am sleeping. Newer or remodeled hotels often have it in the room. I do not know ahead of time when booking. . . . All of this results in me being stressed, not sleeping well, and being in a dangerous situation if an emergency were to happen. (pp. 23–24)

Another respondent said he could not shower during his three-day hotel stay because of the lack of an accessible shower, "instead, trying to make do with a washcloth which is not the same thing at all" (p. 26). These data illustrate the everyday concerns of disabled people and help nondisabled people better understand the dangers and harms in not providing advanced accessibility information. This documentation through empirical methods is highly important as the right of testers to file accessibility lawsuits under the ADA remains a live issue after *Acheson Hotels v. Laufer* and will likely be presented again before the Supreme Court in the future.

Disability scholars from both social science and humanities traditions have theorized how cultural meanings and stereotypes manifest themselves in daily, mundane encounters between disabled and nondisabled individuals. Sociologist Goffman [2009 (1963)] famously explored the concept of stigma, a social symbolic act of disgracing that is a "special kind of a relationship between attribute and stereotype" produced through social encounters in everyday life, for example, on the streets, on public transportation, at work, or at school (p. 4). A stigmatized person, Goffman argues, is reduced "from a whole and usual person to a tainted, discounted one" (p. 3) and is viewed as someone "not quite human" who is unfit and unworthy of acceptance (p. 5). Social interactions with others cause the stigmatized person to suffer from emotional distress and discomfort that arise from social rejection, leading to a self-construct Goffman calls a "spoiled identity." Goffman was a pioneer in applying the concept of stigma to the everyday experiences of individuals with disabilities. Later, disability studies scholars associated with the humanities built upon this work and continued to explore how stigma and stereotypes apply in the everyday life of disabled individuals. Garland-Thomson (2009) theorized on the phenomenon of staring and

how it can be a form of exerting dominance over and assigning stigma to people with disabilities. Healey & Titchkosky (2022, p. 245) used self-narratives to explore how people with less-apparent disabilities maintain a sense of normalcy and belonging by mimicking a stereotypical representation of disability in everyday situations. In their work, they examined how people with visual impairments fit themselves into the common social view of the ways a blind person moves: closing their eyes and “moving in a zombie-esque fashion, hands stretched out groping.” Healey & Titchkosky then discussed how such a strategy comes at the price of “sacrificing the legitimacy of the disability experience” (p. 248). Using the same method of self-narrative, Israeli disability studies scholar Broyer (2020, p. 1489) showed how public restrooms served as a place of refuge for her and other disabled individuals, where they could “escape the eyes of others.” Broyer then explored how accessibility regulations on the physical positioning of a bathroom mirror, often hung too high or at an angle that does not fit with the disabled body, contribute to feelings of marginality and stigmatization of disabled individuals.

My own mixed-methods empirical work on “fear of the disability con” also deals with an oft-ignored barrier for exercising disability rights in everyday life, the common perception that people pretend to be disabled to exploit disability rights, which I refer to as the disability con stereotype.

Disability rights and accommodations intended to allow people with disabilities to take an active part in civic life have become ubiquitous. But a close examination of the ways these legal standards are implemented—the gap between the law on the books and law in action (Macaulay et al. 2007)—uncover an invisible barrier to the law’s promise of inclusion. People who park in disabled parking spots, use service dogs, use workplace accommodations, move to the front of lines, receive Social Security disability benefits, or request academic accommodations are often viewed as faking disabilities and taking (unfair) advantage of the law.

The first article in the series on this topic, “Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse” (Dorfman 2019), demonstrates how the disability con stereotype undermines the legitimacy of disability law and affects the lives of disabled individuals, raising concerns about diminished compliance with the law by the public. I first juxtaposed case law from the 1990s and early 2000s, when a judicial backlash against the ADA occurred (Hamilton Krieger 2003), with everyday responses from laypeople questioning the deservingness of disabled claimants. I then combined statistical analysis on original observational survey data with qualitative interview data to show that (a) the same disability con stereotype cuts across a broad range of legal regimes from education to public benefits; (b) nearly 60% of disabled people feel that others question their disabilities; (c) the result is a chilling effect, preventing people with disabilities from using accommodations such as parking placards because of the fear of being harassed; and (d) interestingly, suspicion of disability con is strongest among nondisabled individuals with a disabled friend or family member and among disabled people who were themselves suspected by others of committing disability con. This last finding might suggest that the disability con stereotype is internalized by individuals with disabilities:

Those who were falsely suspected seem to think to themselves “others may have been wrong about me ‘faking my disability’ but they must be right that many others are ‘abusing the system,’ and so I should be more alert to this phenomenon.” (Dorfman 2019, p. 1078)

The finding that nondisabled people personally connected to a disabled individual are more suspicious of disability con when compared to nondisabled people with no such relationship complicates conventional notions about “contact theory.” Originally developed by psychologist Allport [1979 (1954)], contact theory discusses the ability of interpersonal contact to reduce stigma around disability. The fact that nondisabled individuals with a disabled friend or family member are more cognizant of the use of accommodations by their loved one (compared to the nondisabled with no

such relationships) could explain this finding. These nondisabled individuals may therefore try to protect their disabled loved one from others who may fake disability and take away their resources and thus hold higher levels of suspicion.

In the second article, “[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights” (Dorfman 2020), I sought to identify the sources of the disability con stereotype using a series of online experiments addressing the experiences of disabled individuals in parking lots and in line at Disney parks (the latter are spaces that hold a special place for people with disabilities, as they historically have been very accessible). The findings demonstrate that the suspicion of disability con is a matter of perceived fairness, justice, and ethics, and that distrust is not fueled by the suspicious person’s rational pursuit of self-interest. I tested the effect of two independent variables on the level of suspicion: deservingness (measured through the proxy of the visibility of disability) and scarcity of resources. My hypothesis was that the level of suspicion of disability con would be higher when resources are scarce (a full parking lot/an hour-long wait) compared with a situation with no scarcity (empty parking lot/a few-minute or no wait time). Counterintuitively, however, the level of scarcity of public resources had no effect on levels of suspicion. The sense of deservingness (or lack thereof) was found to drive mistrust: Participants were always much more suspicious of a person with a less-apparent disability. This empirical study helps advance the theoretical work on visibility/invisibility of disability and how the law reflects an imagined hierarchy between those impairments (Harris 2019, Siebers 2008, Wendell 2001). Whereas the quantitative analysis demonstrates an “outside view of disability” by nondisabled individuals, it is accompanied by qualitative interview data showcasing an “inside view” into the experiences of disabled individuals claiming rights (Dunn 2014, Emens 2012).

The third article, “Suspicious Species” (Dorfman 2021a), investigates the reciprocal relationship between legal rule-making and extralegal norms using regulation of assistance animals as a case study. I discuss how people with disabilities using service dogs signal their protected status using accessories that indicate legality (such as vests) and dog breeds traditionally associated with service (like Labradors or Golden Retrievers). None of these indications originally appeared in black-letter law. However, as renowned law and society scholar Edelman (1992) showed in her work on employment discrimination litigation, ambiguous and complex laws with relatively weak enforcement mechanisms create a process of constructing signs of compliance and legitimacy that do not formally appear in federal law. Following a moral panic around the abuse of disability law by misrepresenting pets as service animals, states adopted the extralegal norms into legislation.

In this work, I use a variety of empirical methods. A survey experiment showed how two visible signs of compliance, the use of a vest and the breed of the dog, affect public perceptions of deservingness (though the impact of the vest condition on deservingness was larger than the impact of the dog’s breed condition). A 50-state survey of laws prohibiting service-dog disability con showed how some adopted visible signs of compliance (like vests or harnesses for service dogs) became part of black-letter state law. Lastly, my qualitative interviews with service dog handlers showcased their strategies for navigating the world with service dogs. This research also showed the way suspicion of smaller dogs disproportionately affects people with less-apparent disabilities, who typically use smaller dogs as service animals (like people with mental illness or chronic conditions like diabetes, fibromyalgia, lupus, or multiple sclerosis).

## **INTERPRETING DISABILITY IN LEGAL TEXTS**

Using systematic content analysis, legal scholars have investigated how disability is constructed by legal decision makers such as courts, hearing officers, and hospital protocols. Content analysis offers a window into decision makers’ processes, values, and interests. The careful analysis of

rhetoric, reasoning, and outcomes shows how the law contributes to the social construction and understanding of disability.

In two fascinating studies, Mor and colleagues analyzed how disability is thought of in tort litigation in Israeli courts (Mor & Pikkell 2019, Mor et al. 2024). The first study deals with the intersection of disability and sexuality, an area that has been studied by both disability studies and legal scholars in the past, though most did not use empirical methods (Chin 2018, Gill 2015, Harris 2018, Perlin & Lynch 2016, Shakespeare 2000). One notable exception is Canadian sociologist Santinele Martino's terrific work in the area, which is based on in-depth interviews with individuals with intellectual disabilities and their caregivers about sexuality and intimacy in group homes and other residential settings (Santinele Martino 2022, Santinele Martino & Perreault-Laird 2019). Mor et al. highlight trends in court damage awards for loss of sexual enjoyment to plaintiffs in personal injury cases. While analyzing the rhetoric of such decisions, they expose how the court's language conforms to the medical and individual models of disability that reflect "a bias against disabled persons' life as life of misery and despair" (Mor & Pikkell 2019, p. 1035). Opinions by medical experts central to those decisions presented what the authors viewed as a "narrow medical understanding of sexuality" that ignores "all nonanatomical aspects of sexuality and pleasure" (p. 1036). The study shows how Israeli courts have been slow to adopt a disability rights framework when analyzing torts cases, similar to the discussion about the experiences of disabled claimants in formal institutions, specifically in the Social Security context (Dorfman 2015, 2017). As Mor & Pikkell (2019, p. 1045) conclude, "prevalent understanding of tort law does not view it as disability law, let alone the law of disablement; moreover, the nature of the judicial texts in compensation law is instrumental, thin, and narrowly focused on the injuries and the related needs of the plaintiffs."

In a later study, Mor, Pikkell, and Lankry expanded the scope of court decisions they analyzed: personal injury court decisions in Israel between 1998 and 2008, the first two decades following the enactment of the Israeli counterpart to the ADA, the Equal Rights of Persons of Disability Law (Mor et al. 2024). This study again shows how courts are slow to implement disability rights language and approaches in tort cases. Yet, interestingly, it finds that when the court does "infuse disability rights orientation" (p. 709) into cases, it does not replace attitudes connected to medical-individual models of disability but rather adds the contemporary approach alongside the older ones. The authors created a "progressive index" to look at the prevalence of a disability rights approach over the years, finding that the new statute did affect the rhetoric courts used over the years, including the use of concepts like accommodations and person-first terminology (which is preferred in Hebrew though not necessarily in English).<sup>1</sup> Courts even started to gradually mention "integration" and "society" in their decisions, reflecting the "gradual, though limited, diffusion of a progressive disability discourse into personal injury court decisions" and the effect of disability rights on adjacent areas of law (p. 732).

Powell et al. (2020b) systematically coded and analyzed US appellate court decisions discussing the possible termination of parental rights of parents with various disabilities. The study shows that an astonishing 93% of the cases analyzed ended in the termination of parental rights. Although

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<sup>1</sup>With greater societal awareness of disability rights and disability justice, discussions about terminology and how to talk about disability communities have proliferated. The main issue revolved around semantical choices between person-first language (i.e., people with disabilities) and identity-first language (i.e., disabled people). Many individuals prefer the use of identity-first language, like people in the neurodiversity movement who refer to themselves as autistic self-advocates or those who refer to themselves as amputees (Andrews et al. 2022, Ladau 2021). I use person-first language and identity-first language interchangeably to acknowledge the diversity of opinions on this issue within disability communities.

the maternal disability itself did not predict loss of parental rights, other factors like lower income (earning below 200% of the federal poverty line), history of substance abuse, and prior history with the child welfare system increased the likelihood of such a result. Another crucial factor found to be significant in predicting the determination was the expert testimony in the case. Positive expert testimony on the mother's parental abilities decreased the odds of termination of her parental rights, whereas negative expert testimony increased the likelihood of termination. This study thus shows the complexity and intersection of disability status with other characteristics like class. It also emphasizes the role disability professionals from the health care and rehabilitation industries play in drastically affecting the life course of people with disabilities, as Albrecht (1992) famously described in the early 1990s.

In his work on reverse mainstreaming in schools, situations where general education students are sent to special education classrooms for certain activities, Covo (2023) employed systematic content analysis of decisions by hearing officers in charge of reviewing school districts' compliance with the Individuals with Disabilities Education Act's (IDEA's) integration mandate. This novel use of content analysis helped to get a fuller picture of the reverse mainstreaming phenomenon. For example, Covo found that nearly half of the decisions studied involved autistic students, who consist of only 11% of all students served under the IDEA. He also showed how reverse mainstreaming is more prevalent in wealthier neighborhoods (although this might be attributed to higher litigation costs, making the cases with litigants from higher socioeconomic backgrounds more prevalent in published decisions). In terms of parent-school dynamics, in most of the cases analyzed, the schools were the initiators of the reverse discrimination practice, whereas parents supported the practice in only a minority of the cases. Covo's exploratory study is a prime example of how empirical methods can uncover underexplored sociolegal phenomena. Having some data to help explain how reverse mainstreaming works in practice allows for further theorization of the concept, its benefits for both disabled and nondisabled students, and disability as a unique cultural identity.

Lastly, work by Ne'eman et al. (2021) used content analysis of hospitals' crisis standard of care triage protocols during the COVID-19 pandemic to examine how the institutions treated patients with disabilities with regard to the allocation of scarce lifesaving equipment, mainly ventilators. Controversy over these policies by disability advocates and scholars erupted during early stages of the pandemic. The critique centered around the way the crisis standard of care protocols pushed patients with disabilities to the back of the line in the allocation of lifesaving medical treatment in the event of scarcity. The protocols explicitly placed disabled patients at the bottom of the triage priority in some states. Other states applied facially neutral criteria (like long-term life expectancy) that disproportionately deprioritized disabled patients, thus creating a disparate impact against them (Bagenstos 2020, Dorfman 2021b, Guidry-Grimes et al. 2020, Hellman & Nicholson 2021). Disability rights advocates campaigned to change the crisis standard of care protocols and started working with the Health and Human Services's Office for Civil Rights on the issue. In their research, Ne'eman and coauthors (2021) coded crisis standard of care protocols from 35 states across time to see whether the campaigns and advocacy by disability advocates could actually affect the policy. They found that most states that revised their protocols during the pandemic did so in alignment with the disability rights agenda, for example, by eliminating categorical exclusions from receiving critical care based on patients' diagnosis and functional impairment, and by removing patients' long-term survival as a criterion for care prioritization. Although this article does not infer causation between the advocacy efforts and the protocol changes, the direction of these changes and the overall context suggest some hopeful prospects for civil society's ability to create change in health law and policy. The article therefore contributes to the vast law and society literature on the relationship between law and social change, and also shows how

seizing momentum and public attention during a public health emergency can benefit long-term goals of social movements. The expressive value of the changes made to the crisis standards of care on clinicians' views of the value and quality of life of disabled patients is a topic for future research.

## THE FUTURE OF EMPIRICAL DISABILITY LEGAL STUDIES

Exploration of the social, cultural, and legal construction of disability using empirical tools is still nascent, especially in the United States, where the disability studies tradition has been more situated in the humanities and less so in the social sciences. Nevertheless, as this article aims to show, there is great potential in conducting empirical research—quantitative, qualitative, or mixed methods—into the sociolegal aspects of disability.

As the field of empirical disability legal studies evolves, it would be beneficial to expand some of the methodologies to offer causal inferences. Most of the research presented, excepting survey experiments on fear of the disability con (Dorfman 2020, 2021a), consisted of observational studies. These studies record the phenomenon by identifying and coding certain characteristics in legal documents, surveys, or interview data. In recent years, a group of scholars has begun investigating legal doctrines, concepts, and language using controlled experiments. This approach, inspired by the related fields of social psychology and experimental philosophy, has been called experimental jurisprudence (Sommers 2021, Tobia 2022). I therefore encourage more disability law scholars to use these experimental methods in their studies (Dorfman 2024). The use of experiments to better understand how stereotypes and biases regarding disability are reflected in legal decision-making could help not only to inspire interventions to reduce those stereotypes and biases but also to bring attention to disability law issues with broader audiences interested in such an approach.

Another avenue for empirical disability legal studies to explore is the use of more sophisticated ways to conduct content analyses using machine learning. Such methodology would enable researchers to go through higher volumes of legal documents more rigorously and efficiently. A barrier for the use of such programs is that they require high proficiency in programming and quantitative methods, when most American disability studies and disability law scholars are more embedded in the humanities tradition. A possible solution could be cross-disciplinary collaboration, like Ne'eman et al.'s (2021) study involving legal and public health scholars.

A mixed-methods approach that combines both quantitative and qualitative methods should also be a goal for future work. Qualitative interviews, for example, could foreground the voices of individuals with disabilities, offering an inside view of disability, whereas quantitative methods of analyzing public opinion, court decisions, or other data could shed light on the outside view of disability, meaning how nondisabled individuals view it (Dorfman 2019, 2020, 2021a). It would thus help provide a fuller picture of the sociolegal treatment of disability.

In terms of subject matter, an area that has been empirically underexplored is the intersection between disability and criminal law. Alongside excellent theoretical work by scholars like Morgan (2021, 2022a) on encounters between disabled individuals and the police and by Schlanger and Belt on issues of disabled prisoners (Belt 2022, Bialek & Schlanger 2023, Morgan 2022b, Schlanger 2017), employing empirical tools to investigate these issues is promising, specifically as empirical research is prominent in criminal law, and such methods could inspire research on disability in this context.

I hope that this article inspires other disability law scholars to start employing empirical methods in their research and serves as a call for empirical researchers to be interested in disability. Aligning data on how disability law functions in practice with the vast theorization around disability could move us toward a more inclusive, accessible world.

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