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## COMMENTARY

### DISABILITY IDEOLOGY AND THE LAW SCHOOL CURRICULUM

ALLAN H. MACURDY\*

More than ten years of studies, conferences, and law review articles have been devoted to the twin goals of diversity and inclusion in the training of lawyers. From this self-examination the legal academy has confirmed much of what many of us suspected about the role of class, white supremacy, and patriarchy in the structure of American law. As legal educators we have also observed that silence can marginalize more powerfully than oppressive legal rules. The absence of excluded groups maintains our confidence in the justice of our legal system by eliminating from our awareness the knowledge that some are not treated justly. One significant conclusion that has emerged from this effort is that the failures of the law school curriculum are revealed more by asking ourselves what is missing than by examining what gets taught.

The role of disability ideology in the legal system has been less studied, though people with disabilities<sup>1</sup> have experienced the brutal edge of law in

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<sup>1</sup> A note about disability terminology. There has been a great deal of debate over the years regarding the acceptable way to refer to both individuals with disabilities and the aggregate population of people with disabilities. While this debate has often deteriorated into absurdity, and distracted people with disabilities from combating more palpable sources of oppression, we have learned that in a world of hierarchy and marginalization, words do matter. Newborns labeled as "defective" receive substandard care, adults marked as "incompetent" lose all autonomy, and "special needs" can mean social death. As Robert Cover so clearly saw, law uses words as instruments of violence and legal words carry power that can delegitimize an individual. See Robert Cover,

nearly every legal category. As advocates, we deal every day with the ways in which legal power is used against individuals with disabilities, so the idea that disability bias is embedded in the structure of law is built into how we do our jobs. We see how rigid conceptions of competency are manipulated to deny people with disabilities control over their property, their living arrangements, and their bodies. We have learned that core values of individual autonomy, equality, and due process are left behind by "treatment" models and paternalism. We no longer question, though we each might express the point differently, that the law proceeds as if there were an identifiable standard of "able-ness" that describes most of us, and justifies different treatment of everyone else, and that such a standard is myth.

In questioning how law comes to perpetuate hierarchies that devalue people with disabilities, we at the Pike Institute were led to examine what aspiring lawyers are taught about disability. We had been contacted regarding the possibility of developing teaching materials that would expose law students to disability issues in the core courses taken by all aspiring lawyers, rather than through disability law courses with limited enrollments. The timing was fortuitous as I had just begun reading critiques of the law school curriculum for class, sex and race bias in an attempt to develop methods to evaluate the curriculum in terms of disability.<sup>2</sup> The proposed project seemed the ideal vehicle

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*Violence and the Word*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1992). To the extent that word choice reveals values and value hierarchies, the terms employed are a function of the speaker's starting point, his or her beliefs about disability and human worth. See Felix Cohen, *The Reconstruction of Hidden Value Choices: Word Choices as Value Indicators*, in SYMBOLS AND VALUES 545-61 (Lyman Bryson ed. 1954). Our practice at the Pike Institute is to emphasize the person rather than the label. Hence, individuals with disabilities, or persons with mentally retardation, is preferred over the disabled or the mentally retarded; or individual with mental retardation or person with a spinal cord injury is more acceptable than retardate or quadriplegic.

<sup>2</sup> See, e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Christine Boyle, *Teaching Law as if Women Mattered, or What About the Washrooms?* 2 CANADIAN J. WOMEN & L. 96 (1986); Mary Irene Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988); Nancy S. Erickson, *Legal Education: The Last Bastion of Sex Bias?* 10 NOVA L. REV. 457 (1986); Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101 (1988); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Catharine W. Hantzis, *Kingsfield & Kennedy: Reappraising the Male Model of Law School Teaching*, 38 J. LEGAL EDUC. 155 (1988); Deborah L. Rhode, *Gender and Jurisprudence: An Agenda for Research*, 56 U. CIN. L. REV. 521 (1987); Ann Shalleck, *Report of the Women and the Law Project: Gender Bias and the Law School Curriculum*, 38 J. LEGAL EDUC. 97 (1988); Judith T. Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U. L. REV. 211 (1973); see also DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE

for a broader critique of disability ideology in the curriculum, providing both the empirical evidence to support the critique and concrete proposals for change in the form of classroom materials. With that in mind, and armed with a three year grant,<sup>3</sup> we formulated ambitious project goals which reflected the perspective of those earlier studies. Our first goal was to develop a methodology for examining and critiquing various curricula and texts. Next we would examine and critique such materials for: (1) discriminatory language, ideas, and doctrine; (2) omission of issues of importance to individuals with disabilities; (3) failure to consider the perspective of individuals with disabilities; and (4) signs of "disability consciousness," that is, an ideology of subordination of individuals with disabilities. From that examination, we would then develop supplementary materials to remedy such defects and omissions. The ultimate product, we hoped, would be teaching materials that served the purpose of integration while remaining relevant to their respective subject areas.

We started with the perception that outside of our disability rights seminars, law students were presented with few disability issues and even fewer legal actors with disabilities in three years of study. We expected to find that the few encounters with such issues would generally involve oppressive doctrines employed unashamedly to deny rights and dignity. Recognizing that society and culture teach us lessons of value and hierarchy through tacit understandings conveyed to us in actions, symbols, and metaphors, as well as conscious instruction, we also knew that the search for disability ideology in the curriculum would require attention to underlying assumptions.<sup>4</sup> Finally, we anticipated that the degree to which individuals with disabilities were marginalized by society might be reflected in a limited presence of people with disabilities in the casebooks.

The purpose of this article is to explain how we carried out the project, to identify problems that arose in our methods and preconceptions, and to draw some preliminary conclusions about disability ideology in the curriculum. In the next section, we will describe our general approach and present difficulties we encountered that were common to all subject areas. The lessons we learned during the project about method, and more importantly, about the nature of the law school curriculum will be presented. In the final section we present an example of how embedded "disablist" thinking can be in judicial decisionmaking through a discussion of a wrongful birth case. This discussion illustrates the value and necessity of analyzing cases not simply for legal doctrine, but to reveal the ingrained assumptions about human value that give these decisions symbolic meaning.

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SYSTEM (1983).

<sup>3</sup> NIDRR Grant No. H133G00130, with subcontract to Trustees of Boston University from Washington Business Group on Health and Berkeley Planning Associates.

<sup>4</sup> Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

## I. METHODOLOGY

For each subject area we began by determining what was being taught through an examination of a widely used casebook.<sup>5</sup> Admittedly, such an approach cannot provide an exhaustive study of variations in teaching techniques or differences among casebooks, nor did we have the time to pursue an in-depth deconstruction of each text as did Mary Joe Frug in her *Re-Reading Contracts* study of gender in a contracts casebook.<sup>6</sup> We hope that our approach will, however, yield at least a fledgling, preliminary understanding of the role of disability bias in law teaching, as well as new teaching materials in several subjects that can be tested and evaluated by instructors. A fully developed critique of the law school canon, grounded in and supporting a critical theory of disability, will have to wait.<sup>7</sup>

Each casebook was evaluated on four levels reflecting the goals of the project. We read in search of: (1) discriminatory language, ideas and doctrine; (2) omitted issues of importance to individuals with disabilities; (3) casebook presentation of the perspectives of individuals with disabilities; and (4) signs of "disability consciousness," that is, an ideology of subordination of individuals with disabilities. These four levels of analysis, however, quickly revealed their inadequacy, and we learned of the dangers of entering a research project with too heavy an ideological ax to grind.

First, the process of evaluating judicial opinions for evidence of bias, much of which is in the form of underlying assumptions or tacit understanding, requires more than Justice Potter Stewart's obscenity test of "I know it when I see it."<sup>8</sup> What is required is a heightened sense of context—an ability to detect and, if not detectable, to envision the real people, the story behind the opinion. The question whether a description, idea, or body of legal rules is biased or discriminatory cannot be considered in a vacuum. Rather, it must be scrutinized in context.

Second, looking for issues that have been omitted—and, contrary to the

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<sup>5</sup> We evaluated a leading text in each subject area: JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* (2d ed. 1985); JOHN J. COUND ET AL., *CIVIL PROCEDURE* (3d ed. 1980); ARCHIBALD COX ET AL., *CASES AND MATERIALS ON LABOR LAW* (10th ed. 1986); JOHN P. DAWSON ET AL., *CASES AND COMMENT ON CONTRACTS* (5th ed. 1988); ERIC D. GREEN & CHARLES R. NESSON, *PROBLEMS, CASES, AND MATERIALS ON EVIDENCE* (1st ed. 1983); GERALD GUNTHER, *CONSTITUTIONAL LAW* (12th ed. 1991); SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* (4th ed. 1983); RICHARD A. POSNER, *TORT LAW: CASES AND ECONOMIC ANALYSIS* (1st ed. 1982).

<sup>6</sup> Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); see also Mary Irene Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Text*, 38 J. LEGAL EDUC. 117 (1988).

<sup>7</sup> For a tentative attempt to venture in that direction, see Allan H. Macurdy, *Toward a Critical Theory of Disability* (unpublished manuscript, on file with the author).

<sup>8</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

seeming illogic of the quest, contextual and sensitive reading can detect omitted issues—is less a matter of treasure hunts than application of our experience as disability rights lawyers regarding legal issues we know are out there but law students do not get to see.

Third, themes such as the presence of “disability consciousness,” or a fully developed ideology that would oppress persons with disabilities, are often an obstacle to contextual analysis. Such themes are important, and deserving of serious consideration, but we found that we could not search for them. We always had “suspicions of ideology” in our heads, and our findings were continuously laid against those suspicions. As you will see, support for the presence of an “ablist” ideology is readily drawn from the project, but is more effectively revealed through other analyses than deliberate pursuit.

Lastly, all four levels of discriminatory evils are somewhat arbitrary categories imposed on the phenomenon studied. Reality is never quite so easily categorized, and we were required to synthesize these levels in order to adequately explain our findings.

When searching for language, ideas and doctrine that were clearly discriminatory in relation to persons with disabilities, our success was mixed. Stigmatizing language was clearly present in labels and descriptions employed by courts. “Idiots,” “mental defectives,” and “cripples” were much in evidence, a supporting cast of vulnerable (or dangerous) people toward whom courts needed to be solicitous (or not). There were examples of discriminatory ideas in every subject area, from paternalistic discussions of contract capacity to tragic portrayals of individuals’ quality of life in discussions of the measure of damages in tort. However, such examples were a small proportion of the materials presented.<sup>9</sup>

Enmeshed within the evaluation of language and ideas is the question of how the perspectives of individuals with disabilities are presented? This examination can be broken down into a number of questions. Can the reader identify in the text legal actors who have disabilities? If so, do we learn about their interests in the legal dispute or the results they would prefer? Do the texts give any indication that the way individuals with disabilities are treated differs from the way those without are treated? Is there any attempt to place particular decisions within a history of exclusion and oppression of individuals with disabilities? Here, at least, we found our suspicions about the curriculum to have been validated. We expected that individuals with disabilities would be nearly invisible in casebooks, but they were even less visible than we had imagined. A reader can only identify legal actors with disabilities in a tiny number of instances across nine subjects. Admittedly, part of the inability to identify individuals with disabilities is methodological: persons with disabilities cannot be recognized by the names held by the various legal actors. Unlike

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<sup>9</sup> See JOHN P. DAWSON ET AL., *CASES AND COMMENT ON CONTRACTS* (5th ed. 1988) (cases and text on capacity to contract); RICHARD A. POSNER, *TORT LAW: CASES AND ECONOMIC ANALYSIS* (1st ed. 1982) (cases on negligence discussing the measure of damages).

gender, in most cases, and ethnicity, in some cases, having a disability determines neither one's given name nor one's surname. Still, one might have expected to find more persons with disabilities in the cases simply through context. But isn't their invisibility sometimes a good thing in cases where their disability is irrelevant to the issue being litigated? In the ideal world, disability may be irrelevant in many settings, just as gender and race so often are. The problem is one of perceptions of persons with disabilities. The reader need not conclude that disability is irrelevant. The conclusion that individuals with disabilities are never significant legal actors is, at least, equally plausible.

Where individuals with disabilities were detected, the reader never learns how the person with disability might view the desired legal result, rarely is presented with that person's interests, and does not hear his or her side of the story. For example, cases about contract capacity first attach a label of incompetency, then consider transactions in terms of "objective behavioral evidence," rather than ever asking, or even wondering, what that person was trying to accomplish through an agreement, and whether that might be rational.<sup>10</sup> In torts, the "reasonable person" standard never takes into account the differences in perspective between an individual with a disability and an individual without a disability. What would a reasonably prudent blind man be expected to do to avoid harm? Family law cases regard incompetency as an all-encompassing label, permitting bias to take the place of a functional assessment of the individual's actual incompetency or her ability to make this specific decision. In the world of law school texts, these perspectives hardly exist. Individuals with disabilities are not ever visible unless a non-disabled person is involved to act on their behalf, prosecute them, victimize them, or relieve them of responsibility.

Our second level of analysis involved identifying issues of importance to individuals with disabilities that have been omitted from the various texts. Omission, we felt, could take different forms. One way in which such issues might be left out is through failure to address whole categories of doctrine. For example, constitutional law texts had left out civil commitment cases that had been decided under the Due Process Clause<sup>11</sup>; and labor law casebooks had omitted disability-based discrimination from discussions of statutes

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<sup>10</sup> As the Supreme Court noted in 1872:

The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract that will have any efficacy as such.

Dexter v. Hall, 82 U.S. (15 Wall.) 9, 20 (1872).

<sup>11</sup> See PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (2d ed. 1983); GERALD GUNTHER, CONSTITUTIONAL LAW (12th ed. 1991). Both texts lack discussion of *Addington v. Texas*, 441 U.S. 418 (1979), *Parham v. J.R.*, 422 U.S. 584 (1979), or *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

prohibiting discrimination in employment.<sup>12</sup> There were a few instances across the nine subject areas where entire sections could have been added.

More common were omissions of cases and sub-issues which could advance the development of topics already addressed in the text. In fact, nearly all of the issues that might have been added as whole categories could as easily have been absorbed as additions to covered topics. In some ways, this second form of omission better served the goals of the project. If we were truly endeavoring to demonstrate to students that disability issues were relevant to mainstream courses, then using disability materials that also taught the more typical subject matter of the course was essential. In constitutional law, for example, due process issues related to standards of proof are easily explored by discussing these standards in civil commitment or guardianship cases. In family law, issues of parental fitness and termination of parental rights are often placed in stark relief in cases where parents have disabilities. In property law, cases exist which challenge discriminatory land use devices that exclude community residences. These cases help to develop an understanding of how various devices<sup>13</sup> operate and can be placed alongside race-based restrictive covenants to demonstrate the limits to the free alienation of property.<sup>14</sup> Those materials that support the standard doctrinal objectives of a given text are easily conceived by matching disability-related cases to those objectives. As these cases are in large measure already known to us, they have been easily obtained. Thus, the bulk of our materials fall into this category.

## II. LESSONS LEARNED

Our examination has succeeded in peeling back a very small part of the facade to reveal the more obvious forms of prejudice in language and stereotyped portrayals. We have also addressed a number of issues of importance to individuals with disabilities. What is obviously more difficult to describe is the role disability ideology plays in our legal system and legal education, including law textbooks. Our conclusions, therefore, are very preliminary and are offered with the hope that they might start an ongoing dialogue.

The most significant impression left from this study is the degree of invisibility faced by individuals with disabilities in the legal system. People with disabilities, if judged by the casebooks we use to educate young lawyers, play no role, have no legal interests, engender little substantive law, and need to be locked away as dangerous or vulnerable. The legal system, to be sure, reflects the society at large. Invisibility is a hallmark of the disability experience in America, from retail settings to restaurant tables to street encounters. Why

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<sup>12</sup> ARCHIBALD COX ET AL., *CASES AND MATERIALS ON LABOR LAW* (10th ed. 1986) has no discussion of the Americans with Disabilities Act ("ADA") despite the ADA's applicability to employer-employee relations.

<sup>13</sup> Devices of exclusion can include zoning rules including special permitting, occupancy requirements, or facility licensing procedures.

<sup>14</sup> See *Shelley v. Kraemer*, 334 U.S. 1 (1948).



should it be surprising that interactions with individuals with disabilities in legal settings are stilted, awkward, or non-existent? When others recoil from acknowledging you or simply assume you are incapable of participation, no one hears your perspective, and societal norms and value hierarchies go unexamined and unchallenged. The absence of conversation between us is unremarkable because the lives of individuals with disabilities have been "marginalized," rendered irrelevant by adherence to the idea that there are ideally able persons (us) and an irrelevant minority who aren't (them). When living out the ideology of "ableness," members of the society "are simply no longer able to see certain facts,"<sup>16</sup> understand certain points of view, or hear certain voices. The society is unable to see value in lives with disability because of differences between mainstream society and the disability experience. As Milner Ball has put it: "Blindness to people may be of a piece with their oppression."<sup>16</sup>

An observer may be made uncomfortable in the presence of an individual with a disability not simply because that person looks "different," but also because of an aversion to thinking about that person's life as if it were the observer's own life.<sup>17</sup> In other words, because the observer wants to avoid thinking about what to him is a terrible life situation, his fear requires that he avoid—or not see—individuals with disabilities. This perception of tragedy, as expressed in comments such as "I'd rather be dead than live like that," can be seen as outward manifestations of the observer's psychological process of fear-avoidance. Not only is there fear of disability, fueled by stereotype, but there is also a fear of acknowledging another's pain, of recognizing someone else's courage, and of comprehending the injustices others endure as people of feeling who are marginalized and devalued. We are afraid of feeling, of needing and care, and of change because they all require the risk of admitting our

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<sup>16</sup> KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 36 (1936). As Milner Ball has noted, blindness to certain facts in conflict with one's world view is a general problem across disciplines. See MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* (1985) (discussing conceptual metaphors); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 157 (1983) (discussing intellectual villages); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (discussing observational blindness in paradigms); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980); Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990); Robert M. Cover, *The Supreme Court 1982 Term - Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing *nomoi*); Martha Minow, *The Supreme Court 1986 Term - Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (discussing similarity-difference).

<sup>16</sup> Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855, 1856 (1990).

<sup>17</sup> This discussion owes much to Harlan Hahn, a sociologist who has examined societal perceptions of disability, and has coined the term "existential anxiety" to describe the phenomenon. Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39 (1988).

vulnerability, our interdependence, and our need to reject the presence of emotion in legal decisionmaking.

The second conclusion we have drawn is that all distinctions that are made by the legal system, and then advanced to justify treating individuals with disabilities differently, are assumed to be natural ones, and, therefore, unquestionable. Law attaches meaning to disability and legal discourse, by invoking the tragic differences nature visits upon individuals with disabilities, which validates disability hierarchy as "natural" and "neutral." As we discuss in the final section, through a description of a "wrongful birth" tort suit, courts assume all parents will experience "emotional anguish" caused by the "apparent" complete tragedy of living with a child with a disability. The assumptions that individuals with disabilities are complete victims, incapable of protecting themselves from criminal or commercial harm, is in large part never questioned, or even considered, by judges. Such hidden ideological structures often lead to "put-down" remedies, or interventions that deal with the immediate issue, but that reinforce stereotypes of the disabled person as an individual to be feared or pitied and certainly to be avoided.

To begin to understand how law supports the subordination of individuals with disabilities, we need first to acknowledge the social construction of disability. For example, a job applicant who uses a wheelchair is not hired because of a false perception that she has cognitive or communicative limitations; prospective parents with disabilities are told that for them to have children would be unfair to those children; children with disabilities are excluded from play groups, or are taught not to expect—through actions as well as words—a future of careers, relationships and purpose.

Why are these examples "constructions?" First, because each is an inaccurate representation of the realities of specific disabilities or of what the lives of individuals with disabilities are like. Further, these experiences create and are created by a myth which expresses an ideal of "ableness" that is hopelessly utopian. If we believe that most people can be perfectly able—they look like us, they can do whatever we can, and they can't do whatever we can't—we have come to see the world as if it were that ideal. Once the world is defined in such ideal terms, anyone who appears to deviate is defined as being out of the world or, more precisely, is positioned below those who appear to embody the ideal. Adherence to this ideal perpetuates an unequal value allocation. That is, those in a subordinate position are less important, less legitimate and less valuable. This is hierarchy, constructed around a reified norm of the ideally able-bodied and able-minded individual, and it requires that we obscure "our" own deviations from the norm itself. As in race and sex oppression, the hierarchies of human value that subordinate individuals with disabilities are the result of an ideology of "difference" or "otherness."<sup>18</sup>

Because most observers assume that differences between those with disabili-

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<sup>18</sup> Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (Spring, 1988).

ties and those without are obvious, these categories may be harder to deconstruct and discredit. We can see that Bob walks and Alice doesn't, so that to demonstrate that characteristics attached to "not walking" are social "constructs" runs counter to what we believe our eyes to perceive. Prejudice, however, is not an optic function. Prejudice occurs in the mind by associating images with attitudes in ideological ways. In this respect, disability as a social phenomenon closely resembles distinctions associated with gender. In other words, there is a core characteristic—Alice can't walk or Bob can't bear children—upon which numerous pervasive stereotypes are grafted.<sup>19</sup>

Mary Joe Frug addressed the intransigence of inequalities based upon "particular differences [that] can seem quite deeply embedded within the sexes."<sup>20</sup> Her observations about gender resonate with our experiences with disability ideology. As she stated, "[w]hen applied to differences that seem especially entrenched—differences such as masculine aggression or feminine compassion, or differences related to the erotic and reproductive aspects of women's lives, social construction seems like a cliched, improbable, and unconvincing account of experience, an explanation for sex differences that undervalues 'reality.'"<sup>21</sup> The seeming obviousness of disability to the utopian world view causes legal ideology to operate in a similar way, discrediting the notion of social construction, or at least "radically stunt[ing its] liberatory potential."<sup>22</sup>

### III. "WRONGFUL BIRTH" AND VALUE HIERARCHY

Judges, in applying legal rules to specific situations, attach meaning to disability. Consider an example from a common species of medical malpractice claim—wrongful birth or life. Esther and Paul Berman (on their own behalf and as guardians-ad-litem on behalf of their daughter, Sharon) brought suit against Esther's obstetricians for failing to inform them of the risk that their child might be born with Down's Syndrome, and for not advising them that amniocentesis could safely and accurately determine whether the fetus had the condition early enough in the pregnancy to terminate safely.<sup>23</sup> After Sharon was born with Down's Syndrome, her parents sought damages for the "emotional anguish which they have experienced and will continue to experience on account of Sharon's birth defect, and the medical and other costs which they will incur in order to properly raise, educate and supervise the child."<sup>24</sup> Sharon, through her guardian-ad-litem, sought compensation for the physical and emotional pain and suffering "which she will endure throughout life

<sup>19</sup> Allan H. Macurdy, *The Americans with Disabilities Act: Time for Celebration, or Time for Caution?* 1 B.U. PUB. INT. L.J. 21 (Winter, 1991).

<sup>20</sup> Mary Joe Frug, Commentary, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1048 (1992).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1049.

<sup>23</sup> *Berman v. Allan*, 404 A.2d 8 (N.J. 1979).

<sup>24</sup> *Id.* at 10.

because of her mongoloid condition."<sup>25</sup>

Sharon's claim is one of wrongful life. As the court put it, "the infant plaintiff [asserts] . . . not that [she] should have been born without defects but [rather] that [she] should not have been born at all . . . .' In essence, Sharon claims that her very life is 'wrongful.'"<sup>26</sup> The New Jersey Supreme Court first addressed the difficulty of determining damages. A wrongful life claim "would require the trier of fact to measure the difference in value between life in an impaired condition and the 'utter void of non-existence.'"<sup>27</sup> But "[s]uch an endeavor . . . is literally impossible" as "man, 'who knows nothing of death or nothingness, simply cannot affix a price tag to non-life.'"<sup>28</sup>

Justice Pashman moved quickly to base his rejection of the claim not on any indeterminacy of damages but upon "[o]ne of the most deeply held beliefs of our society . . . that life—whether experienced with or without a major physical handicap—is more precious than non-life."<sup>29</sup> He found evidence of this societal belief in the fact that nowhere in Articles V and XIV of the U.S. Constitution, the Declaration of Independence, nor the New Jersey Constitution is there any indication that "the lives of persons suffering from physical handicaps are to be less cherished than those of non-handicapped human beings."<sup>30</sup> As Pashman summed up, "[n]otwithstanding her affliction with Down's Syndrome, Sharon, by virtue of her birth, will be able to love and be loved and to experience happiness and pleasure—emotions which are truly the essence of life and which are far more than the suffering she may endure."<sup>31</sup>

The New Jersey court permitted the parents' claims for wrongful birth in part. Although "the enormous expenses attendant upon her rearing[.]" including raising, educating, and supervising the child, were held not to be recoverable, Pashman declared Sharon's parents were "entitled to be recompensed for the mental and emotional anguish they have suffered and will continue to suffer on account of Sharon's condition."<sup>32</sup>

#### IV. SO WHAT'S THE PROBLEM?

Liability for failure to inform prospective parents of the risks that their child might be born with birth impairments, or for failure to inform them regarding the availability of tests that might detect such birth impairments, may indeed create incentives for physicians to behave differently. But when judges must decide whom to compensate, and for what specific harm(s), misperceptions of quality of life perpetuate disability hierarchy. Should the child

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 11 (citing *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967)).

<sup>27</sup> *Id.* at 12 (citing *Gleitman*, 227 A.2d at 692).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 13.

<sup>32</sup> *Id.* at 14.

be recompensed for pain and suffering resulting from the birth impairment? For the costs of her care, education and supervision? Should the parents receive damages for the "emotional anguish" caused by the child's being born with the impairment? For ongoing "emotional anguish?" Should parents be compensated for "the medical and other costs which they will incur in order to properly raise, educate and supervise the child?"<sup>33</sup>

Each question raises troubling concerns about human value. How we answer determines not whether disability ideology is perpetuated, but what form that ideology assumes. There is no solution that can deliver us entirely from the dilemma. The court, in rejecting Sharon Berman's claim for the pain and suffering resulting from "her mongoloid condition," clearly wishes to present a strong statement about human value—that "life . . . is more precious than non-life."<sup>34</sup> In fact, the majority would transcend the binary division of humans as able or disabled:

No man is perfect. Each of us suffers from some ailments and impairments, whether major or minor, which make impossible participation in all the activities the world has to offer. But our lives are not thereby rendered less precious than those of others whose impairments are less pervasive or less severe.<sup>35</sup>

But Justice Pashman gets into difficulty when he considers damages to the parents for "mental and emotional anguish ... on account of Sharon's condition." Having previously rejected the child's claim for pain and suffering as compensation for being born, the court now declares that "defendants directly deprived [the Bermans] . . . of the option to accept or reject a parental relationship with the child and thus caused them to experience mental and emotional anguish upon their realization that they had given birth to a child afflicted with Down's Syndrome."<sup>36</sup> While the court places great emphasis upon the parents' option to accept or reject a parental relationship, what really seems to matter is the perception that birth of a "defective" child can only be a loss or burden to her parents. Parental anguish, then, is a cognizable harm because the birth of such a child may still be regarded as an undoubtedly bad event. Yet when life with Down's Syndrome is at least better than no life, as the court so fervently declares, the parents' "entitle[ment]" to anguish damages seems equally objectionable.

This dissonance can be heard in conflicting representations of the situation faced by the Bermans, particularly in the court's discussion of damages. The majority, generally sympathetic to the parents, changes its tone when addressing the costs associated with caring for someone with special needs. "In essence, Mr. and Mrs. Berman desire to retain the benefits inhering in the birth of the child—i.e., the love and joy they will experience as parents—while

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<sup>33</sup> *Id.* at 11.

<sup>34</sup> *Id.* at 12.

<sup>35</sup> *Id.* at 13.

<sup>36</sup> *Id.* at 14.

saddling the defendants with the enormous expenses attendant upon her rearing."<sup>37</sup> A whirl with cost-benefit analysis dressed in Posnerian finery, the court finds that "such an award would be wholly disproportionate to the culpability involved, and . . . would both constitute a windfall to the parents and place too unreasonable a financial burden upon physicians."<sup>38</sup> The language here is reminiscent of product liability cases decades ago when courts denied relief to consumers harmed by defective products for failure to prove privity of contract.<sup>39</sup> The court, however, presents somewhat incompatible judgments about the quality of the child's life. Parenting Sharon is full of love and joy when the court denies costs for her care, but it is also full of tragedy and anguish when the judges uphold damages based on her parents emotional distress.

To some extent, any form of damages for failure to inform of possible birth impairments, whether paid to parents or child, can be regarded as compensation for the birth of a "defective" child. Indeed, even compensation granted where the physician has caused the birth defect through negligent conduct is, at least in perception, a remedy for diminished value. As there is no chain of direct causation between the negligent act of a physician and the birth "impairment" itself, the focus shifts from an assessment of fault to the condition of this child. In general, such a shift would appear to be justified. Indeed, if I were teaching torts, much of my approach would involve getting students to look beyond the legal rules of blame allocation and to assess the impact of actual circumstances upon real lives. My goal might be for the student to evaluate the legal rule in light of community norms, or to consider which of the parties is better able to foresee or absorb the harm. But while increased emphasis on people rather than doctrine may encourage a closer fit between law and justice, it may also permit entrenched perceptions about lives with disabilities to produce reasoning that validates such perceptions, and legitimates disability hierarchy.

The court in this case can see no further than the diagnosis of Down's Syndrome. The judge is able to relegate Sharon to the other side of that bright line of ableness, accepting without question that she can never resemble the norm of "ideally able." Beneath the careful solicitude, the court is practicing emotional anesthesia. Its awkward, stilted tone is a sign that the judges would very much prefer not to be required to examine this family's reality too closely. The benefit of this emotional distance seems clear: it allows judges to avoid the necessity of facing the fear of disability more directly, while allowing them to portray themselves as caring and compassionate people. But the cost is the reinforcement of that "otherness" in the perceptions of the observer, legitimizing the hierarchy that excludes individuals with disabilities from the sphere of ableness.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See e.g. *Goldberg v. Kollsman*, 191 N.E.2d 81 (N.Y. 1963); *Greenberg v. Lorenz v. Bernice Foods, Inc.*, 173 N.E.2d 773 (N.Y. 1961); *Chysky v. Drake Bros. Co.* 139 N.E. 576 (N.Y. 1923).

Justice Handler dissented in part because he would have permitted the child's claim that there should be compensation for being born. There is an almost unbearable atmosphere of despair and tragedy pervading Handler's opinion, an emotional loop feeding on the conviction that there is no potential for this child's life to be something positive. This "gravely handicapped infant"<sup>40</sup> is the reason that her parents will "suffer greatly when the awful truth dawns upon them . . . [facing a] welter of negative feelings—bewilderment, guilt, remorse and anguish—as well as anger, depression, and despair."<sup>41</sup> The crux of the wrong done here is that, through the defendants' failure to advise regarding the likelihood of "birth of a mongoloid child," the plaintiffs were given no opportunity to "cushion the blow, mute the hurt, or prepare themselves as parents for the birth of their seriously impaired child."<sup>42</sup> It is hard to "overcome these feelings or adjust to the tragedy of having a defective child."<sup>43</sup>

The dissent argues for a recognition of "the reality of moral injury . . . the deprivation of moral initiative and ethical choice."<sup>44</sup> Without the opportunity to apply their own moral values to the decision whether to "bring[] into the world a defective human being, some individuals will be torn by moral conflict."<sup>45</sup> But Handler would go a step further. This moral suffering "brought about by the wrongful denial of a reasonable opportunity to learn of and anticipate the birth of a child with permanent defects, and to prepare for the heavy obligations entailed in rearing so unfortunate an individual," can result in "diminished parental capacity."<sup>46</sup> If this parenting is dysfunctional, the parents "experience great difficulty in adjusting to their fate and accepting the child's impairment as nature's verdict."<sup>47</sup> They are then "denied . . . the fuller joys, satisfaction and pride which comes with successful and effective parenting."<sup>48</sup>

Here the hierarchy has come full circle. Down's Syndrome is "nature's verdict," an irrebuttable presumption of dependency, burden and tragedy. If it is natural to characterize Sharon in this way, society and Justice Handler need not bear any responsibility for building the framework and excluding the child. But the coercion and self-delusion in this analysis do not end there. The presence of the disability not only renders the child's life substantively meaningless, but it destroys the parents' ability to parent effectively. Nature's whim is cruel. Not even Sharon's parents can be expected to "provid[e] . . . the unfaltering love, constant devotion and extraordinary care such a child spe-

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<sup>40</sup> *Berman*, 404 A.2d at 16.

<sup>41</sup> *Id.* at 17.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 18.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

cially requires.”<sup>49</sup> This ideology provides parents, and the rest of us, with a justification for going along with the suppression of difference. It permits us to deny our inter-relatedness, to succumb to fear, and to cover it with oily sentiment. We are enabled by it to crush the lush breadth and power of the human spirit beneath a lifeless, cinder-block uniformity. We owe each other better. As special children, we owe each other that “extraordinary care.”

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<sup>49</sup> *Id.* at 19.



