Bending Over Backwards: Disability, Narcissism, and the Law

Lennard J. Davis†

I am not a lawyer. But when I was a child growing up in the Bronx, my Deaf mother highly recommended that I become one because I was so good at arguing for my position against my parents’ accusations. Instead, I became an English professor and now spend much of my time arguing for my interpretations against those of others. So perhaps things are not so different.

I began this presentation with a brief story about myself. In the previous statement, I allowed a snippet of biographical detail that would permit readers to make certain judgments about me. As a result of those few words, those readers who are lawyers probably feel they can let me off the professional hook. Such readers are probably now settling back, putting their pens down, and expecting a literary jaunt, a kind of breezy, erudite entertainment rarely found in legal journals. In making such judgments, readers are relying on stereotypes about English professors arrived at by interpreting my tone and my style of writing, and they are indexing their expectations from previous life-events that were similar. In other words, such readers are interpreting me as they might any text or person, and my meager narrative has provided some grist for their mill.

I too am interpreting texts—in this instance, some legal cases concerning people who have brought suits under the Americans with Disabilities Act. Before I do that, I need to justify the value of having an English professor read through some of these cases. It has been established by many in the relatively new endeavor of critical legal studies that cases are forms of narrative that can therefore be subject to the same kind of analyses that we tend to employ on novels or poetry.¹

A second point involves the understanding that such cases are far from objective. Although cases are written in a style that suggests objectivity, impartiality, and authority, they are, after all, simply the written words of people. That style of writing, described by one scholar as comprising a “profoundly alien linguistic practice,... an archaic, obscure, professionalised and impenetrable language,” which judges use to decide cases,² is simply a literary style like any other. Because words are part of language and language is a communal practice,

† Professor, Department of English, Binghamton University in New York. I would like to thank Professor Linda Krieger, not only for inviting me to participate in this symposium, but for providing the legal cases, some of which I will be analyzing. I would also like to thank Tom Dubberke and the members of BJELL whose editorial help made this paper read as if it were written by a lawyer.


there can be no use of language that transcends the sociability and biases of any linguistic community. It might therefore make sense for a literary critic to analyze the way legal language is used to create the illusion of objectivity, impartiality, and so on. In this sense, the role of the critic is an unmasking one, an attempt to show how many factors come into the writing of a case, just as many strands of culture come into the making of an novel or an opera.

A third and related point is that, because cases are both analyzable and instantiations of a larger culture, they are therefore ideological by definition. By ideological, I don’t mean that cases are polemical, but rather that they contain the predilections, politics, nuances and biases of their authors’ particular culture or class within that culture. It is the job of a critic to tease out those predilections and nuances.

Having justified, however sketchily, the claim that legal cases are narratives and in need of interpretation by literary critics, among others, I need to make another assertion. Cases involving disability, because they are often not so much about fact as they are about personal and social attitudes, tend to involve the states of mind of the various players in the story. We are asked, for example, to imagine the state of mind of a potential employer who faces an obese job applicant and tries to decide whether or not to hire her, or the state of mind of a supervisor who fires an employee who happens to have non-symptomatic AIDS. When judges and juries rule on such cases, they have to perform a complex and creative act of identification. Since the Supreme Court advises us to consider trial participants not as “members of a faceless, undifferentiated mass” but as “uniquely individual human beings,” we then have an obligation to imagine and bring to life these individual states of mind through an act of what Martha Nussbaum calls “the literary imagination.” When we follow the narrative of the alleged crime, we must be readers, and as readers, we must place ourselves in a position to enter the state of mind of the players involved.

Two kinds of people do this for a living. One group is composed of dramaturges, directors, actors, and literary critics. The other group is composed of psychologists, psychoanalysts, or therapists. Therefore, along with saying that we need to know something about narrative to analyze these cases, we also need to know a lot about psychology. Indeed, a judge in writing such cases is acting as a kind of analyst, both literary and psychological, who attempts to resolve the questions of the case. A judge will have the same problems psychotherapists have—problems of interpretation, transference, and so on. However, judges do not seem to be very good at reflecting on these problems, so it will be the job of someone like me to do that for them.

We might begin with the first judge of psychoanalysis, Sigmund Freud. In his

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analysis of Shakespeare’s *Richard III*, Freud identifies the deformed person or the disabled person as a characteristic personality type met in psychoanalysis. Freud begins by reading Richard’s well-known opening soliloquy in which the would-be King explains his character by saying:

But I, that am not shaped for sportive tricks,
Nor made to court an amorous looking-glass;
I, that am rudely stamp’d, and want love’s majesty
To strut before a wanton ambling nymph;
I, that am curtail’d of this fair proportion,
Cheated of feature by dissembling Nature,
Deform’d, unfinish’d, sent before my time
Into this breathing world, scarce half made up,
And that so lamely and un-fashionable,
That dogs bark at me as I halt by them;

... And therefore, since I cannot prove a lover,
To entertain these fair well-spoken days,
I am determined to prove a villain,
And hate the idle pleasures of these days.

According to Freud, Richard’s soliloquy would serve to alienate the audience if Richard were merely saying, “I find this idle way of life tedious, and I want to enjoy myself. As I cannot play the lover on account of my deformity, I will play the villain.” This is the case, according to Freud, because “[s]o wanton a cause of action could not but stifle any stirring of sympathy in the audience, if it were not a screen for something much more serious.”

Freud’s point is that audiences generally tend to identify with a sympathetic rather than a villainous character, as the most elementary screenplay manual will inform the neophyte writer. If we remove the “screen” and reveal the “something much more serious,” Freud tells us what we find is that the “wantonness vanishes” and what remains is the “bitterness and minuteness with which Richard has depicted his deformity.”

Here Freud begins to act like the judge in a disability case. He is penetrating beneath the words of the plaintiff’s complaint to the intent behind it. Freud explains Richard’s real motive by re-analyzing the soliloquy, pointing to Richard’s true message:

Nature has done me a grievous wrong in denying me that beauty of form which wins human love. Life owes me reparation for this, and I will see that I get it. I have a right to be an exception, to overstep those bounds by which others let themselves be circumscribed. I may do wrong myself, since wrong has been done me...
In this explanation, we begin to see how the analyst—and we might add the judge and even the jury—begins to perceive people with disabilities. Such disabled people claim that Nature has done them a wrong, and for this wrong they seek reparation. This reparation is really an attempt to claim themselves as an exception to the rules of society, which allows them to overstep the bounds assigned to normal people. Thus, they see themselves as entitled to do a wrong to correct a wrong—thereby violating both universal imperatives taught by parents to their children: “Two wrongs don’t make a right” and “If I make an exception for you, I have to make an exception for everyone else.” But, as children remain unconvinced by such parental logic, so it is with audiences. As Freud writes:

Richard is an enormously magnified representation of something we can all discover in ourselves. We all think we have reason to reproach nature and our destiny for congenital and infantile disadvantages: we all demand reparation for early wounds to our narcissism, our self-love. Why did not nature give us the golden curls of Balder or the strength of Siegfried or the lofty brow of genius or the noble profile of aristocracy? Why were we born in a middle-class dwelling instead of a royal palace?13

Freud tells us that as audience members we can put ourselves in the position of Richard and identify with his sense of injustice, since we all are deprived of something physical, mental, or economic that we might wish to have redressed. Freud further tells us that the core of these feelings of deprivation is “early wounds to our narcissism, our self love.”14

An application of Freud’s theory thus characterizes people with disabilities as narcissists, particularly when evaluated in psychoanalysis, as Tobin Siebers has recently pointed out.15 People with disabilities are regarded by psychoanalytic theory as inherently viewing themselves as “exceptions” to the rule. Freud says as much when he talks about a woman with “organic pain” and a man who was accidentally infected by his wet nurse.16 He describes these patients’ personalities as “deformities of character resulting from protracted sickliness in childhood.”17 In his work On Narcissism, Freud again refers to the “familiar egoism of the sick person.”18 Siebers points out that current psychoanalytic theory continues this tradition, citing William G. Niederland’s assertion that “minor physical anomalies or imperfections” are associated with “compensatory narcissistic self-inflation.”19

An analyst, or in our case a judge or jury, may find that the narcissism of the person with disabilities spills over to the observer. For example, Siebers cites analyst Kenneth R. Thomas who states that, in treating a patient with a disability,
"therapists may experience a variety of reactions including 'imaginary' pangs of pain in the genital area, headaches, dizziness, or other physical symptoms." 20 This psychoanalytic theory further argues that such reactions are a sign that the therapist "has identified with the patient" and is "mirroring what the patient is feeling." 21 In other words, the narcissistic attitude of the person with disabilities is catching, and the observer can mimic or acquire the symptoms like a kind of non-birth-related couvade.

Such insights or prejudices carry over into the judicial realm. For example, in the quest to identify with the state of mind of the plaintiff with disabilities, the judge may find him or herself reacting much in the same way that Freud and others suggest the culture demands "normal" people to react to people with disabilities. This reaction causes the judge to see the disabled plaintiff as first and foremost narcissistic and egoistic. By definition, a concern for one's disability is seen as a self-concern rather than a societal concern. One of the major struggles of the disability rights movement has been to create public awareness that the problem of disability is not solely located in the individual using a wheelchair or in the Deaf person, but rather that the problem resides in the society that does not mandate curb cuts or allow American Sign Language to satisfy foreign language requirements in high schools and colleges. 22

Many people with disabilities can testify to this general reaction in areas of accommodation and employment. When "special needs" (and let us notice the valence of that term) are required, too often the requester is seen as overly self-concerned, overly demanding. Indeed, this attitude is evident in the case of DeSario v. Thomas, 23 recently vacated by the Supreme Court in Sleikis v. Thomas, 24 in which the Second Circuit Court of Appeals had ruled that states could refuse to provide equipment that met the medical needs of a small number of people as long as the state's plan for "home health services" provided adequately for "the needs of the Medicaid population as a whole." 25 In vacating that lower court ruling, the Supreme Court countermanded the notion expressed by the lower court that people with unusual needs "will have to look for other sources of assistance. This lower court ruling saw people with even more specialized needs as overly demanding beyond the regular needs of people with disabilities. Because they are regarded as narcissists, people with disabilities are seen as demanding exceptions for themselves that overstep what employers can or should provide.

This theory of narcissism is further elaborated when we consider the very

20. Id.
21. Id.
23. 139 F.3d 80 (2nd Cir. 1998).
26. Id.
particular nature of many cases brought under the ADA. The Act defines a disability as a physical or mental impairment that substantially limits one or more of the major life activities, a record of such an impairment, or being regarded as having such an impairment.\(^{27}\) The ADA also bars discrimination against a person with a disability who can perform a job with reasonable accommodation.\(^{28}\) But the Act has not specified the range of definitions. For example, the Supreme Court recently decided that a correctable disability is not a disability under the ADA in three cases which involve correctable vision in airline pilots and truck drivers and high-blood pressure in a mechanic.\(^{29}\) A second area of ambiguity is the nature of reasonable accommodation, and a third is the very grey area which asks whether the impairment is such that it interferes with the employee's ability to perform the job. This last issue is almost the litmus test for many of these cases because, if a person claims to have been discriminated against on the basis of disability, the accuser must establish that, although she is disabled, she is not so disabled as to warrant that the employer was correct in not hiring or in dismissing her.

In all of these instances, the claimant must rely on very fine distinctions. In other words, these are not cases in which the matters of fact are clear. Of course, many cases revolve around such ambiguities, but it is fair to say that in disability cases these ambiguities abound. To argue that one was discriminated against because, for example, a potential employer thought the claimant was obese is to make a strident claim about a subtle thing. To claim that an employer did not provide reasonable accommodation because it installed ramps and provided many other structural changes, but did not lower a sink, is to make a strident claim about a subtle thing. Indeed, it almost seems that, in some cases, the claimant is biting the hand that feeds her, is unappreciative of what has been done for her, or is acting in a paranoid manner. In other words, the claimant is being self-centered and narcissistic.

Let us give the attempt to accommodate this narcissistic demand for exceptions made by employees a phrase, one which occurs in the language of legal cases: "bending over backwards." Take, for example, Vande Zande v. State of Wisconsin Dept. of Admin., a case I will analyze in greater depth later in this article, wherein the court describes the employer as one who "bends over backwards to accommodate a disabled worker."\(^{30}\) The metaphor of "bending over backwards" to accommodate a disabled worker is one worth considering. The Dictionary of English Colloquial Idioms defines the phrase as to "go to extreme limits to try and

\[^{28}\] Id. at §§12112(a), 12112(b)(5)(A).
\[^{29}\] Murphy v. United Parcel Serv., Inc., 527 U.S. ___, 119 S. Ct. 2133 (1999) (high blood pressure controllable by medication does not constitute a disability under the ADA); Sutton v. United Air Lines, Inc., 527 U.S. ___, 119 S. Ct. 2139 (1999) (correctable myopia does not constitute a disability under the ADA); and Albertsons, Inc. v. Kirklingburg, 527 U.S. ___, 119 S. Ct. 2162 (1999) (individuals with monocular vision are not per se "disabled" within the meaning of the ADA, but must prove on a case-by-case basis that their conditions substantially limit a major life activity).
\[^{30}\] 44 F.3d 538, 545 (7th Cir. 1995).
satisfy someone...” The implication is that to redress a problem, the redresser must engage in a painful, extreme action. Indeed, the image is somewhat contradictory, since by bending over backwards in an awkward position, how can one help anybody? The meaning, perhaps, is that the contortion is out of the ordinary, since normally we bend forward. Bending backwards is distinctly uncomfortable for most people, except perhaps those in circuses or on videos that feature “abs of steel.” The implication in this legal usage can be construed as saying that the pain felt by the person with a disability, as a result of either being disabled or being discriminated against on account of the disability, is now felt by the employer seeking to provide reasonable accommodation. This sense of parity in the feelings of both employer and discriminated-against-employee creates a sense that justice has been served.

The concept of parity or equivalence in the law is expressed by Friedrich Nietzsche in *The Genealogy of Morals* when he describes “the notion that for every damage there could somehow be found an equivalent, by which that damage might be compensated—if necessary in the pain of the doer.” Nietzsche goes on to speak of “that ancient, deep-rooted, still firmly established notion of an equivalency between damage and pain...” In essence, the judge in this case is telling us that the pain felt by the employee is weighed against the compensatory pain felt by the employer. In this equation one pain is equivalent to the other, and the scales of justice are balanced by this awkward bending. But further, the compensatory pain is like a referred pain in that the judge feels the pain much as does the therapist who experiences in transference the pain of the narcissistic, disabled person. In fact, the judge and the employer, as observers, have to take “pains” to accommodate a narcissistic plaintiff.

A recent episode of *Ally McBeal* serves to illustrate this point as it exists in popular culture and consciousness. A man who claimed to be a sex addict argued that his marital contract was invalid because he married his wife in a state of lust that was close to insanity. In other words, he argued that his sexual addiction constituted a disability that should get him out of his marriage vows. Although this case is clearly invented, the television audience was meant to see that his claim for disabled status was the ultimate claim of a narcissistic personality. Although marriage vows are considered universally binding, the plaintiff wanted to make an exception for himself based on his disability and receive legal and financial

32. The original meaning of “bend” is actually “to bind,” related to the use of the noun “band” as in “fetters.” OXFORD ENGLISH DICTIONARY 104 (2d ed. 1989). Thus the original meaning of the word implied coercion and imprisonment, and “bend” derived from the sense of binding something by twisting it into an unnatural position, similar to forming a knot. Id. Therefore, it is possible that our phrase “to bend over backward” was originally to “to bind over backward,” indicating an even greater degree of suffering, pain, and deformation. However, the phrase is also found in the form of “lean over backwards.” In any case, that notion of pain is now retained in the current expression.
34. Id.
rewards for behavior for which even the President of the United States could not expect recompense.

Returning to Shakespeare for a moment, let us consider his other outcast villain, Shylock. While he is not a person with disabilities, there are certainly parallels between Shylock and Richard III. There is much historical and sociological work to indicate that Jews were considered by European gentile society to be disabled or physically inferior. As a Jew and an “alien,” Shylock inhabits a body that is scorned by the general Christian populace, and he specifies this perceived physical inferiority in the now-famous “Doth not a Jew have eyes?” speech. Shylock turns hateful and demands his pound of flesh in court specifically because of his treatment as an outcast, much as Richard seeks his revenge for his treatment by others. Moreover, Shylock is perceived by the characters in the play as not being “touched with human gentleness and love” when he insists on “the due and forfeit of my bond.” Shylock, like the claimants in a disability case, must counter, “I stand here for law.” But Portia’s responsive speech on the “quality of mercy” asks Shylock to “mitigate the justice of thy plea.” Shylock is thus made to seem the self-centered, irrational, vengeful claimant who is redressing past wrongs through his legal suit. He demands his pound of flesh for no reason other than that “it is my humor.” In this sense, he provides yet another instance of a narcissistic person with wounds demanding his right to receive redress.

Let us now take a case not from the court of television or the stage but rather from the annals of the law: Vande Zande v. State of Wisconsin Department of Administration, where the judge felt that the employer had “bent over backwards.” Lori Vande Zande was a thirty-five year old paraplegic woman who used a wheelchair. She developed pressure ulcers from time to time that made it difficult for her to work in the office. Ms. Vande Zande worked for the housing division of the state of Wisconsin for three years as program assistant, which involved her preparing information, attending meetings, typing, mailing, filing, and copying. The state made modifications at her request including improving bathroom access, providing adjustable furniture, paying one-half the cost of a cot, and changing plans for a locker room in a not-yet constructed building. Ms. Vande Zande complained that the State did not accommodate her requests to work full-time at home during an eight-week bout of pressure ulcers and to provide a laptop computer during that period. Instead, she was told she would have to make up the difference between a reduced schedule and a full-work week by subtracting days

37. Id. at 234.
38. Id.
39. Id. at 235.
40. Id. at 236.
41. Id. at 234.
42. 44 F.3d 538 (7th Cir. 1995).
43. Fans of legal theory might be interested to note that Judge Posner was the judge who ruled in this case.
Ms. Vande Zande had also requested that a sink in the office kitchenette be lowered to accommodate her wheelchair. If the building had been constructed after the passage of the ADA, accessible facilities would have been required; however, since the planning had occurred prior to 1990, no such requirement existed. The plaintiff did not argue that the failure to include 34-inch high sinks violated the Act, but she did argue that once she brought the complaint to the attention of her supervisors, they should have made the alteration as a reasonable accommodation. Her employer claimed that it agreed to lower a counter in the kitchenette but could not lower the sink because the plumbing was already in place. However, that repair would have cost only $150, or $2000 if the employer lowered similar sinks on every floor of the building. The employer argued that Ms. Vande Zande could use the sink in a nearby accessible bathroom. Ms. Vande Zande claimed that being forced to use the bathroom sink “stigmatized her as different and inferior.”

By nature, these cases tend to be about rather small matters. A series of small matters may add up to a large matter, but each individual request—cot, ramp, sink, shelf, and so on—seems rather insignificant and petty. Indeed, the plaintiff in this case appeared to violate a series of agreed-upon behaviors for team players, stoical American individualists, and generally agreeable people. Rather than take the self-abnegating road and wash her coffee cup out in the bathroom sink, Ms. Vande Zande protested the indignity of having to use a bathroom to fill a drinking cup. Also, rather than just accept the donation of her time, and therefore money, from accumulated sick leave, she contested such a quid pro quo. Plaintiffs making these types of claims will, by definition, seem to be bad sports, whiners, and, most of all, self-centered.

Ms. Vande Zande ultimately violates the understanding that people should be self-sufficient, and, in a culture based on independence rather than interdependence, she appears to be asking for too much. Indeed, the Seventh Circuit Court of Appeals notes as much when it critiques her demand to have a laptop at home: “Most jobs in organizations . . . involve team work . . . rather than solitary unsupervised work.” Thus, the court’s attitude is dismissive, because it envisions the plaintiff to be asking for an even more narcissistic accommodation—to work at home as a solitary player, rather than as part of a team. Next, the court implies, she’ll be asking for massages and cappuccinos. The court further states that “[i]t is plain enough what ‘accommodation’ means.” This appeal to common sense is then belied by the court’s next sentence, “The difficult term is ‘reasonable.’” Signaling a profound lack of knowledge about current non-ableist terminology, the court notes that the plaintiff “is confined to a wheelchair.”

44. 44 F.3d at 546.
45. Id. at 544.
46. Id. at 542.
47. Id.
48. Id. The preferred phrase among people with disabilities is “uses a wheelchair,” rather than “confined to a wheelchair.”
the analysis begins immediately with a central paradox. Accommodation is seen as a limpid category, while reasonableness in accommodation is not clear. Meanwhile, the court’s ableist phraseology indicates that issues around disability are not, in fact, “plain enough” to those unfamiliar with these issues.

The court refers to the fact that even if the employer is large or wealthy (or a state bureaucracy, as in this case) and cannot plead undue hardship, “it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.” The point here is that, although the court does not know what “reasonable” accommodation may be, it feels comfortable judging whether a particular accommodation is “trivial” or not. Therefore, as I have suggested, most of the kinds of complaints made in these types of cases are going to be seen by people without a disability consciousness as “trivial.” At this point, an analogy to earlier civil rights struggles might be instructive. For example, one can easily envision a Southern judge in a 1960’s civil rights case concluding that lack of access to a drinking fountain when another by its side was made available would be trivial, or that being seated in one seat versus another on a bus would be trivial. In cases of discrimination and civil rights, however, attention to the trivial is precisely the way to stop discrimination, because discrimination often operates on a trivial level or on many trivial levels, all of which add up to a substantial level of discrimination in the aggregate.

The court then fashions a reductio ad absurdum argument, saying that “if the nation’s employers have potentially unlimited financial obligations to 43 million disabled persons, the Americans with Disabilities Act will have imposed an indirect tax potentially greater than the national debt.” Considering that the national debt is in the trillions of dollars, this assertion is clearly an overstatement. The court balances on one side of the scales trivial improvements and on the other side imposition of crushing taxes equaling the national debt. In an employer-centered, pro-tax-cut world, the decision is suddenly made easy: tax the engine of prosperity or indulge the narcissistic whiners.

The court adds another color to its discussion by noting that “[w]e do not find an intention to bring about such a radical result in either the language of the Act or its history.” The new color is clearly “red”—that is, the desire to avoid going into the red because of “radical” reinterpretations of the ADA. The court’s statement further suggests another kind of “red” threat, because it contains an implication that leftist radicals may be trying to use the ADA to attack the very nature of capitalism itself. It is important for the court that the history of activism that led to the passage of the ADA not be seen as radical in nature, nor the effect become radical in intent or action. Thus, the court cites the preamble of the ADA as something that “‘markets’ the Act as a cost saver, pointing to ‘billions of dollars in

49. Id. at 542-3.
50. Id. at 543.
51. Id.
unnecessary expenses resulting from dependency and nonproductivity."\textsuperscript{52} This move is important because it casts the ADA as a putatively pragmatic, but fundamentally conservative, statute that appears to espouse cost-saving as its main goal. Seizing that Occam’s Razor, the court slices through the complex issue of civil rights, proclaiming: “The savings will be illusory if employers are required to expend many more billions in accommodations than will be saved by enabling disabled people to work.”\textsuperscript{53} So, on a simple cost basis, employing a reductionist double-entry bookkeeping model, accommodation on a “trivial” level is a tax on businesses and does not live up to the cost-saving goal of the drafters of the ADA.

It is important to note the court’s premise that the accommodation of removing barriers would be, on a national scale, too costly to enforce. So costly, in fact, that it would—and here I chose my words carefully—cripple the national economy. Again, we see the transference inherent in the analytic relation between the disabled person and the non-disabled observer—the observer feels the pain. If one weighs the discomfort of the trivializing narcissist against the crushing anguish of the crippled national economy, the former inevitably loses to the latter. Yet the government’s own statistics show that the costs of removing barriers are relatively low. In fact, tax credits give employers back at least 50 per cent of barrier removal expenses: the IRS figures for 1993 indicate that small businesses (defined as making less than $1 million in gross receipts and employing 30 or fewer employees) taking advantage of the Disabled Access Tax Credit spent on the average $3,327 for such accommodations, half of which was reimbursed for expenditures up to $10,250.\textsuperscript{54} For individually owned businesses the average expenditure for accommodations was lower, about $2,500 per employer.\textsuperscript{55} Clearly, the national economy can handle and will more than benefit from these improvements, but the Seventh Circuit Court of Appeals has unfortunately not taken even the basic steps to ascertain the nature of the expenditure on which it predicates the fall of America.

To put the final touch on this argument, and completely eviscerate any notion of civil rights inherent in the ADA, the Seventh Circuit in \textit{Vande Zande} states that the district judge had granted summary judgment to the defendants because they “had gone as far to accommodate the plaintiff’s demands as reasonableness, in a sense distinct from either aptness or hardship—a sense based, rather, on considerations of cost and proportionality—required.”\textsuperscript{56} Although the Seventh Circuit critiques the district court’s analysis, it ultimately accepts the lower court’s conception of what makes an accommodation “reasonable.” The Seventh Circuit states:

The employee must show that the accommodation is reasonable in the sense of both

\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{55} Id.
\textsuperscript{56} \textit{Vande Zande}, 44 F.3d at 543.
efficacious and of proportional to cost. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of accommodation or to the employer's financial survival or health.\(^{57}\)

In accepting the lower court's reasoning, the court of appeals has reinstated the "bending over backwards" test in what appears to be a supreme act of logic. Although the court allows that "reasonable" is a loaded word, it decides that reasonableness is based on common sense. And what constitutes that common sense? Cost and proportionality. Cost is put into a proportional equation with accommodation, while rights are magically left out of the equation.

Thus, the court concludes in effect that almost no accommodation except one that is deemed not trivial could be considered reasonable. Employers who grant any accommodations whatsoever, then, are seen as the ones who "bend over backwards.\(^{58}\) That is, this defendant employer "goes further than the law requires—by allowing the worker to work at home."\(^{59}\) How exactly compliance in regard to the ADA is seen as "going further" than the law requires is an interesting turn of phrase. If the law requires reasonable accommodation, and reasonable accommodation might require allowing the employee to work at home, then how is this "going further?" The court implies that workers with disabilities are approaching asymptotically that classic stereotype of the worker who fakes a disability to shirk work. It notes, "An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced."\(^{60}\) In this deteriorating chain of pseudo-logic, the court now sees the disabled employee as seeking institutionally sanctioned absenteeism as a way of life. Such absenteeism is automatically assumed to be linked to reduced productivity, which the court sees as an inevitable consequence of working at home (where, by the way, I am currently unproductively writing this essay). Thus, the largesse of the accommodating employer is placed in stark contrast with the trivializing, unproductive shirker using the ADA as an convenient shield to cover basic laziness.

Notice how this way of putting things leads to the court's next conclusion. The employer "must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation."\(^{61}\) Compliance is now seen as an act of "generosity" with all its resonance of charity, almsgiving, philanthropy, and altruism—that general attitude that disability activism and laws have sought to change into a discussion of rights, fairness, and equity. In the court's scenario, though, the employer is generous to a fault, while the disgruntled, disabled employee is faulted for lacking the same generosity and team spirit. In a complete reversal of intention and logic, the court concludes that to punish such a

\(^{57}\) Id.

\(^{58}\) Id. at 545.

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Id.
generous employer "would hurt rather than help disabled workers." Now, the notion of enforcing compliance with the ADA is seen as something that would paradoxically injure disabled employees. This argument brings to mind the old slogan "What's good for General Motors is good for America!" and implies that, if we impede the function of industry by insisting that it comply with the provisions of reasonable accommodations, we will reduce cash flow and thus limit industry's ability to pay for the costly barrier removal insisted on by the law.

This logic is so apparently clear to the court that it comments "we therefore do not understand what she [Vande Zande] is complaining about." It is no wonder that the court is in such a state of incomprehension; it has so mangled the intent of the ADA that the transformed act now seems merely to amount to a governmental injunction for business to cut unnecessary costs. Under that set of misapprehensions, we should not be surprised that the Seventh Circuit cannot understand the discrimination about which Vande Zande is complaining. Neither could slave owners understand why slaves were carrying on about freedom so insistently.

The court's lack of comprehension becomes obvious in its analysis of the issue of the sink in the kitchenette. The court notes that Vande Zande complains about having to use the bathroom sink to wash out her coffee cup or fill a glass with water. She claims that this situation "stigmatized her as different or inferior." The court notes that "she seeks an award of compensatory damages for the resulting emotional distress." Here we have the crux of the Richard III or the Shylock problem. The aggrieved disabled party is injured by the way people treat him or her; the person with disabilities is therefore distressed and embittered, seeks revenge or compensation, and will not be deterred. Vande Zande wants her pound of flesh, only she'll take cash to soothe her emotional distress. Its perception of how trivial and narcissistic this claim is causes the court to respond in measured, objective cadences completely devoid of understanding. The specific ways in which disability operates within the culture and throughout the economy are a mystery to the court.

Of Vande Zande's claim that she is "stigmatized," the court responds "[t]hat is merely an epithet." This parsing of the word is particularly strange. The court's statement that being stigmatized is merely an "epithet," which the dictionary defines as "a disparaging or abusive word or phrase," without further examination of the concept of stigmatization is itself no more than an epithet. In fact, the Vande Zande court pays only lip service to the concept of stigmatization. For example, while the court is willing to assume that "emotional as well as physical barriers . . .

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62. Id.
63. Id.
64. Id. at 546.
65. Id.
66. Id.
are relevant in determining the reasonableness of an accommodation,\textsuperscript{68} the very next sentence of its opinion discounts the emotional barrier by retreating to the earlier cost-saving argument: “But we do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers.”\textsuperscript{69}

Here, the court seeks to attack the claim of being stigmatized by presenting it in turns as merely emotional and at the same time as impossible to fix by economic means. But it must be pointed out that, although the stigmatization at issue may have caused emotional distress, the basic act of stigmatization is not so much an emotional issue as it is a sociological one. The term was virtually re-coined for use in relation to disability by Erving Goffman in his classic book \textit{Stigma}, which focuses not on emotional distress but on a pattern of behavior inherent in ableist society.\textsuperscript{70} To link emotion with stigma is to denigrate the rationality inherent in the study of stigma and to negatively feminize it, as it were, since women are perceived in patriarchal society to be “emotional” rather than “rational.” Further, taking the complex concept of stigma and reducing it to a simple and absurd claim that any attempt to remove or lessen a stigma requires creating an “absolute identity in working conditions between disabled and nondisabled workers,”\textsuperscript{71} eviscerates any notion that stigma can ever be lessened or neutralized because employers would be forced to such lengths of bending over backwards that they would end up virtually upside down. Under these circumstances it is no wonder the \textit{Vande Zande} court thinks that stigmatizing is “merely an epithet.”\textsuperscript{72}

Under this logic, the court can likewise conclude that \textit{Vande Zande} could not have experienced a “pattern of insensitivity or discrimination,”\textsuperscript{73} as she had claimed. First, all the events in question are “minor incidents,”\textsuperscript{74} too trivial to rise to the level of a pattern of discrimination. Second, the experiences of stigma and emotional distress are not possible since these words are merely epithets. Third, this stigma can never be removed since removal requires “an absolute identity in working conditions.”\textsuperscript{75} Finally, all accommodations done by an employer are reasonable, and reasonableness is a cost-related concept determined by the employer’s and the nation’s economic ability to pay. Even if an employer can afford an accommodation, the national economy cannot afford such remedies because it will be devastated by the exponential expenditures of millions of employers. Thus, there can never really be a pattern of insensitivity or discrimination sufficient for redress. The logic of the court becomes consistent and impeccable, with only the minor failing of being completely wrong.

\textsuperscript{68} \textit{Vande Zande}, 44 F.3d at 546.
\textsuperscript{69} \textit{Id}.
\textsuperscript{70} ERVING GOFFMAN, \textit{STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY} (1963).
\textsuperscript{71} \textit{Vande Zande}, 44 F.3d at 546.
\textsuperscript{72} \textit{Id}.
\textsuperscript{73} \textit{Id}.
\textsuperscript{74} \textit{Id}.
\textsuperscript{75} \textit{Id}.
If my reading of the case is at all accurate, then it is necessary to try and specify how we can fix the court system, if possible, to decrease the likelihood that decisions like this one will continue to appear throughout cases related to the ADA. Certainly, it would be grandiose, to say the least, for me to claim that I had the broom that could clean out these Augean stables, or that this paper could even begin to provide the impetus for that house-cleaning. Nonetheless, and because my mother was probably right about my argumentative nature, I will make the first attempts at house-cleaning measures.

The first point that needs to be acknowledged is that the general public, including those members of it in the judiciary and on juries, is by and large ableist. I don’t mean to use this brush to tar the good people of America. I am sure that each and every person, when asked, “Are you biased against people with disabilities?” will proclaim, one more loudly than the other, that they are as likely to be biased in that regard as they would be biased against mothers or national heroes. Yet my experience, and I am sure the experience of most people who work in disability studies, sheds a different light.

The point is not that rampant, overt prejudice abides in the hearts of citizens. Rather, the discrimination I am speaking about appears to be, to choose le mot just, trivial. The ordinary encounter, the glancing gaze, the innocent observation are the stock in trade of this kind of discrimination. We are not speaking of people with tattoos that say, “I hate cripples” or “Death to Deaf!” What we are speaking of is well-meaning people who simply do not have progressive information and education, in part because we do not teach disability in the public schools and colleges as we now teach race and gender. Few educated people nowadays would dare say that African-Americans are not good long distance runners but are good basketball players and dancers; yet such observations were commonplace twenty years ago and were thought to be simple observations of fact. A friend of mine who trained as a lifeguard in the 1950’s was told in a matter-of-fact way by his instructor not to save African-Americans if they were drowning because “they’re sinkers.” This wasn’t deemed to be a racist comment, but rather a simple bit of fact passed on by one lifeguard to another to avoid being pulled down to one’s death. But, thanks to an educational policy that recognized the injustices being done to minorities by well-meaning folks, racism—while hardly eliminated—has been highlighted and discouraged. Sexism is also dying a slow and protracted death.

Ableism, on the other hand, is alive, well, and playing in your local theater, if you judge by the never-ending roster of movies filled with stereotypical disabled people triumphing over their afflictions. During the period in which this essay has been written, I have also been trying to place an op-ed piece in the New York Times and The Nation, both rather progressive newspapers. My piece is about the dragging death of James Byrd, Jr. in Jasper, Texas, a subject much covered in the news. I point out that Byrd, in addition to being an African-American, was also a person with disabilities, and I question why that fact was essentially suppressed in the news. I also discuss the long history of people with disabilities who have been abused and murdered. In trying to place this essay, I spoke with an editor at The
who immediately said, "but there's a long history of blacks being murdered and abused." When I said that there was also a history of such abuse toward people with disabilities, she was surprised. Having absolutely no knowledge of that history, she nonetheless presumed to tell me there was no such history. Likewise, when I spoke to a member of the editorial board of the New York Times, he protested that although the issues about which I spoke were valid, it was wrong perhaps to link them to the Byrd story. "People will see you as an opportunist trying to promote a cause that's unrelated to the story." I replied, "Oh, yes, because people are 'ableist'," and he immediately shot back. "Not at all. It just seems like one thing has nothing really to do with the other." The Nation had agreed to publish the piece, but several months later has not yet done so because of the more "pressing" nature of other issues.

I give these examples not to grind personal axes, but rather to show how intelligent progressives simply do not see a connection between racism and ableism. Further, and this is a telling point, many people don't realize that there is a history or a politics to disability. There is nothing to be learned that an ordinary, sensitive person (and aren't we all?) can't simply intuit in the "I-feel-your-pain" scenario I laid out earlier. Just as anyone can go to the cinema and be moved by a story about a mentally retarded woman or a blind man, so too anyone, judge or jurist, can sympathize with the plight of a person with disabilities. Empathy is cheap and there's plenty to go around. But, as many of us know, there is more to disability than meets the eye (if yours happen to be able to see). Indeed, the aim of disability studies and disability activism has been to fight exactly these common sense notions of disability. Much of this knowledge is counter-intuitive and for this reason especially needs to be taught in organized curricula and through the media in special series on radio and television parallel to those multi-part extravaganzas on the oppression of other groups. To counter the notion that disability is a personal tragedy, we propose the conception that disability is a social and political problem. To counter the stereotype that people with disabilities are either bitter, lustful, and resentful, or else innocent, asexual, and resigned, we propose very different ways of thinking. To the idea that language is neutral, we expose the lexicon that contains moralized and demoralizing words associated with impairment. And so on. The answer is a radical project of education on a national level. How we could achieve this cannot be the topic of this paper, but it is clear to me that the backlash against the ADA will not be halted by legal measures alone. The people that make up the court system need more knowledge.

Thus, it should come as no surprise that legal cases are filled with such a lack of knowledge and understanding. Let me take a few concrete examples. In the case of Runnebaum v. Nationsbank, there are a host of uneducated assumptions concerning homosexuality and disability. The court notes as an example of Runnebaum's "inappropriate" behavior that "[h]e brought his gay lover to the

reception and introduced him . . . as his 'boyfriend.' This example, among others, is seen as "failing to present a professional image." I won't go into more detail about this issue, except to say that the court never questions its own attitudes toward homosexuality.

The same is true of the court's attitudes toward disability. In order to determine whether Runnebaum's asymptomatic HIV is an "impairment" and, thus, a disability covered under the ADA, the court's first recourse is to look up the word "impair" and "impairment" in Webster's Ninth New Collegiate Dictionary. What it finds is that "impair" means to "make worse by or as if by diminishing in some material respect" and that "impairment" means a "decrease in strength, value, amount, or quality." While I understand that this refreshing approach to language is characteristic of such progressive judges as Richard Posner, who would prefer to use plain or common meaning of words, it is a uniquely inappropriate strategy for dealing with words like "disability" or "impairment," which are in the process of being defined and redefined in complex ways to combat the kind of ableism one might indeed find in a dictionary.

In this case, the judge acts like a mediocre student attempting to write a freshman essay without doing much research. He simply reaches over to the shelf and selects a dictionary, and one indeed that was published in 1986, four years before the ADA was passed and eleven years before the case was heard. To beef up the serious scholarship inherent in this cantilevered swivel from desk to shelf, the court also cites two other Webster's dictionaries of the same era, and concludes that "under these definitions, asymptomatic HIV infection is simply not an impairment." The court cites an earlier case, de la Torres v. Bolger which states, "the term 'impairment,' as it is used in the Act, cannot be divorced from its dictionary and common sense connotation of a diminution in quality, value, excellence or strength." Yet, the "Act" referred to in this citation obviously cannot be the ADA because de la Torres was written four years before the passage of the ADA.

The point here is that the Runnebaum court, precisely because it has no knowledge of disability history or terminology and doesn't care to find out, deems that the only recourse is to a dictionary. Dictionaries, however, frequently contain antiquated and inappropriate definitions, particularly with regard to terms relating to race and disability. For example, had the court looked up the word "nigger" in a Merriam-Webster Collegiate Dictionary, it might have found the definition "a black person," one that has recently been protested and will be removed in subsequent editions. Likewise, "blind" would have yielded among its definitions "defective"

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77. Id. at 162.
78. Id. at 163.
79. Id. at 168.
80. Id.
81. 781 F.2d 1134 (5th Cir. 1986)
82. Runnebaum, 123 F.3d at 168.
and “unable or unwilling to discern or judge.” By that usage, the statement “justice is blind” would come out “justice is defective, unable or unwilling to discern or judge.” Actually, not a bad definition given these cases. Furthermore, the word “Deaf” would produce “unwilling to hear or listen,” and the word “lame” hobbles in as “weak.” What all this proves is that you don’t go to the dictionary to find out about constructions within society that undergird prejudice because the language itself will necessarily contain or reflect that prejudice.

But the bigger misapprehension in Runnebaum, found both in the majority and minority opinions, is that the term “impairment” is a specific term, like “stigma,” that relates to the history and conceptualization of disability as it developed within disability activism and scholarship over the past twenty years. I am speaking of the distinction, widely known and no doubt used by the drafters of the ADA, between “impairment” and “disability.” The previously used term “handicapped” did not allow a distinction between the physical condition and the barriers that cause that condition to become a problem. As a result, disability activists came to define “impairment” as the physical limitation of a particular illness or a chronic physical limitation, while defining “disability” as the social and political conditions that place barriers in the way of that “impairment,” thereby creating a disabling condition.

Thus, an impairment might be anything from HIV to paraplegia, and the disability anything from targeted discrimination to the absence of curb cuts or ramps. Since the peculiar history of the passage of the ADA included the input of many disability activists in the actual wording of legislation, particularly in the sense of encouraging civil rights-associated wording in the Act, the folly of looking up the meaning of the word “impairment” in Webster’s is obvious. The equivalent would be to look up the meaning of “atom” and “bomb” in the dictionary in an attempt to understand how to build a tactical nuclear weapon. Instead, the judge should have looked up works about the drafting of the ADA and about the history of disability rights in the United States, works such as those by Paul Longmore, David Pfeifer, Irv Zola and many others. But that would require what we might call “disability literacy,” something that the courts don’t seem to demand for the citizens who occupy the bench.

Indeed, one case shows us by its metaphors how foreign a country disability is

84. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 159 (1983).
85. Id. at 327.
86. Id. at 671.
87. And one wouldn’t want to look up “stigma” in Webster’s Ninth New Collegiate Dictionary because the definitions provided do not adequately describe the sociological term. Out of seven definitions, all but one are about marks, scars, or spots on the skin; only “a mark of shame or discredit: STAIN” comes close to the currently accepted sociological meaning. Id. at 1158.
89. There are cases that trace disability history such as Cassista v. Community Foods, 5 Cal. 4th 1050 (1993), although that case ends up using a kind of spurious continuity between older and newer legislation insofar as the distinction between disability and impairment is concerned.
for many judges. In *Cook v. State of Rhode Island, Dept. of Mental Health, Retardation, and Hospitals*, the judge describes the case as one that “calls upon us to explore new frontiers.” He therefore embarks on “our journey into the terra incognita of perceived disabilities [which] requires us to explore” the subject. The metaphor is of the pith-helmeted adventurer going into the heart of darkness to bring light. At another moment, the court describes a consideration of evidence as “[t]he next stop on our odyssey.” The pith helmet is now replaced by battle helmet and shield as the judge continues as an epic hero wandering through the Scylla and Charybdis of disability. And a final determination is referred to as “[o]ur last port of call.” Now the errant nautical type, like Odysseus, and even a bit like Lord Jim or Marlowe, travels from one insecure port to another across ever more treacherous seas. At the conclusion of the decision, the judge announces, “We need go no further.” The journey of exploration need go on no more as the judge brings light and security to the chaotic world of disability claims.

The plaintiff, on the other hand, is described as one who “did not go quietly into this dark night” of discrimination. But the plaintiff, to make her case, must “prove each element of her chain,” and the court must “turn, then, to the remaining links that forge the chain.” So, while the court is the active explorer, out in the dangerous world of disability, the plaintiff is much more stationary. She doesn’t go into “this dark night” but stays at home forging chains like a blacksmith to make her own case.

While the plaintiff in *Cook* ultimately prevailed amid this orgy of purple prose and the journey of the court led to an enlightened land, the metaphors used still tell us that the court is out there in the dark. Despite the heroic efforts of this decision and the self-referential congratulations for this exploration and bringing of light to the darkness, which perhaps comprehendeth it not, the basic problem remains. For intelligent and just decisions to be made, decisions based on knowledge and rationality rather than impulsive tropisms, bad faith, common sense, stereotyping, and a patronizing condescension to the issues, the judiciary will have to learn a lot more. Law schools should certainly teach courses on disability, and K-12 as well as college courses need to be developed. All of us will have to do much more to educate America.

Here are some suggestions:

1) Write op-ed pieces and articles for local and national magazines and newspapers;

2) Create a demand for radio and television documentaries, and help to
develop these.

3) Set up a public relations bureau that will make information available to the entertainment industry. Such entities already exist for other identity groups and foreign nationals.

4) Actively protest targeted legal cases, as for example ADAPT did on May 12, 1999 before the *Olmstead* case was decided by the Supreme Court, and coordinate such demonstrations with educational outreach programs.

These are only a few suggestions among many. But we will never see a reversal in the backlash against the ADA until the majority of Americans, or at least what pollsters call “the opinion-makers,” are educated on this subject, or until enough of these opinion-makers are themselves people with disabilities. The new millennium may see the number of people with disabilities rise to 20 or 25 percent of the population as the baby boomers age and if the trend of increasing disabilities among the young continues. But short of sheer numbers, we need to let the world know that people with disabilities who become whistle-blowers aren’t trivializing narcissists who are just whistling “Dixie.” In fact, they are really whistling “The Star-Spangled Banner.”

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