

The Gender Analogy in the Disability Discrimination Literature

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This article examines how gender analogies are used by disability scholars to gain credibility for claims under the Americans with Disabilities Act. By devoting analytic attention to the complicated nature of the disability-gender analogy, this article details the benefits of such analogies as well as their limitations. "Common sense" assumptions about gender help explain why certain sex discrimination claims fail under Title VII. An exploration of this dynamic will help shed light on the nature of institutional barriers to disability rights claims under the ADA.

I. INTRODUCTION

Claims to equal justice under the law are complicated. It is a difficult task to build such claims because dynamics of inequality are themselves complex. For those who do not experience inequality, the dynamics of privilege and disadvantage are often difficult to recognize. And for those who do experience it, it is often difficult to translate a critique of inequality into a persuasive legal argument for a remedy.

The need to examine the complicated nature of claims to equal justice may be particularly acute for claims made by people with disabilities. Within the fast growing legal literature on the Americans with Disabilities Act (ADA),¹ several lawyer-activists have argued that federal courts have largely departed from the legislative history and original intent in their interpretations of the Rehabilitation Act of 1973² and the ADA.³ A more recent wave of literature criticizes various

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¹ 42 U.S.C. § 12101–12213 (1994).

² 29 U.S.C. §§ 701–794 (1994 & Supp. IV 1998).

³ See Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997); Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997); Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit under the Americans with Disabilities Act*, 38 S. TEX. L. REV. 907 (1997).

1999 Supreme Court cases⁴ for similar reasons and terms these cases “judicial backlash.”⁵

This article focuses on legal discourse on disability in a different way. Rather than focusing on court decisions, this article begins a sociological examination of the academic legal literature on disability.⁶ This means treating the legal academic scholarship on disability as a form of work—with cognitive habits, institutional contexts, and modes of persuasion—and asking questions about the processes of construction and persuasion entailed in the production of institutional legal knowledge about disability and the ADA. A sociology of legal knowledge, developed by Pamela Brandwein in another context,⁷ can be fruitfully applied here, if only in the most preliminary way.

A sociological investigation of legal scholarship on disability might seem unusual to readers of law reviews and perhaps a bit disconcerting. It is easy for participants in scholarly debates to forget that they are contributors to a particular discourse. Debaters most certainly understand themselves as proponents of a “more true” thesis. However tempting it is to think that we need sociological studies of only bad knowledge claims, we should remember that the arguments we find persuasive and credible are contingent and subject to institutional forces as well. By viewing the knowledge claims of lawyer-activists as structured institutional practices, this article hopes to foster reflexive thinking about the production of legal scholarship on disability.

More specifically, this article examines the use of gender analogies as a strategy to gain credibility for various definitions of legal equality for people with disabilities. This article also participates in the practice of writing an extended analogy of disability to gender. A noticeable characteristic of disability-gender analogies is that the types of sex discrimination claims that succeed institutionally tend to get more attention than the types that fail. This article argues, for a variety of reasons, that it is critical to devote more analytical attention to the types of sex discrimination claims that fail.

⁴ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

⁵ See, e.g., Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000); Linda Hamilton Krieger, *Foreword-Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 Berkeley J. EMP. & LAB. L. 1 (2000); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53 (2000).

⁶ Pamela Brandwein develops ways of studying academic legal literatures in *Disciplinary Structures and “Winning” Arguments in Law and Courts Scholarship*, 10 LAW AND COURTS, Summer 2000 (American Political Science Assoc., Washington, D.C.), at 11–19.

⁷ PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999) (examining the history of the canonical treatment of Fourteenth Amendment history by legal scholars and judges, including how this version survived even after it has been called into question by other scholarship).

One type of sex discrimination claim that fails is illustrated by *EEOC v. Sears*.⁸ This case illuminates what is likely to be an institutional obstacle to claims for reasonable accommodation. This well-known “lack of interest” case and the analysis of it by legal scholar Vicki Schultz⁹ is a focus *infra*.¹⁰ A discussion of *Sears* is useful strategically and is in line with recent work by Matthew Diller, who has called attention to cultural and legal obstacles to reasonable accommodation claims.¹¹ While extended attention has already been paid to the persistence of medical models of disability,¹² this article hopes to shed some light on some additional obstacles.

While this article focuses on the use of gender analogies in the production of legal arguments about disability discrimination, it does not examine the success of these analogies in gaining credibility for disability rights claims. It would be difficult to isolate and assess the impact of these gender analogies, and such an assessment extends beyond the scope of a single article. An assessment, however, would be part of a larger sociological project that maps both the production and institutional reception of legal arguments.

II. THE ANALOGY OF DISABILITY TO GENDER

A. *The Disability Discrimination Literature*

It makes sense to draw analogies to gender as a strategy to persuade others of the legitimacy of disability rights claims. It makes sense because “we learn by importing understandings from one context to another . . . [I]nsights about one area of difference may be relevant and instructive to other areas of difference.”¹³ Indeed, law often proceeds by analogy.

Many prominent writers in disability literature make analogies to gender. Robert Burgdorf comments that “[t]he history of gender discrimination in this country counsels that it can be very harmful to be deemed ‘special.’”¹⁴ Anita

⁸ *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988).

⁹ Vicki Schultz, *Women Before the Law: Judicial Stories About Women, Work and Sex, Segregation in the Job*, in *FEMINISTS THEORIZE THE POLITICAL* (Judith Butler & Joan Scott, eds. 1992).

¹⁰ See *infra* Section II.D.

¹¹ See Diller, *supra* note 5, at 44. (“[P]eople with disabilities find themselves on the front lines of a legal and cultural war.”).

¹² See *supra* notes 3 and 5.

¹³ Martha Minow, *The Supreme Court 1986 Term, Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10 (1987), reprinted in *FEMINIST LEGAL THEORY: FOUNDATIONS* 308 (D. Kelly Weisberg ed., 1993).

¹⁴ Burgdorf, *supra* note 3, at 568.

Silvers refers to the "striking resemblance in how the general culture has operated to debar both women and people with disabilities from flourishing."¹⁵ She states:

[There is] a history of being marginali[z]ed by group identities which have operated to mark group members as weak and incompetent Despite having progressively liberated themselves from their former legal subordination, women still are disadvantaged by physical and social environments arranged to favour the physical and social preferences of men, as are people with disabilities As additional evidence of commonality, observe that our workplace practice has not fully advanced beyond imagining being pregnant, an element of the life plans of many women but no men, to be a disability.¹⁶

Authors have also noted certain limitations of the gender analogy. Silvers makes it a point to distinguish the situations of women with and without disabilities. Women with disabilities are "excused or disallowed from being cast in [the] roles [of nurturer and sexual being]."¹⁷ In addition, "the social construction of women with disabilities commonly prevents women with disabilities from even assuming these roles."¹⁸

There are, of course, other limits to the gender analogy. For example, women have not been subject to forced segregation. Sex segregation in the labor force certainly exists, but it is a different kind of segregation.¹⁹

Gender analogies are often made in the same breath with race analogies. Matthew Diller states, "Both the rhetoric and structure of the ADA are . . . based on an implicit analogy between the problems facing people with disabilities and those faced by women and racial minorities."²⁰ Robert Burgdorf compares the exclusion of people with disabilities to exclusions based on race, gender, and religion. Such channeling is "reminiscent of race, gender, and religious discrimination in that it involves an overreaction by others to a particular characteristic of an individual, i.e., prejudice."²¹

A careful delineation of similarities and differences among race, gender, religion, and disability would promise a more comprehensive analysis of inequality, generally while making more effective use of such analogies for disability rights claims in particular. An examination of race and religion

¹⁵ Anita Silvers, *Double Consciousness, Triple Difference: Disability, Race, Gender, and the Politics of Recognition*, in *DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE* 85 (Melinda Jones & Lee Ann Bassar Marks eds., 1999).

¹⁶ *Id.* at 84.

¹⁷ *Id.* at 88.

¹⁸ *Id.* at 81.

¹⁹ See NANCY FOLBRE, *WHO PAYS FOR THE KIDS: GENDER AND THE STRUCTURES OF CONSTRAINT* 91-125 (1994) (discussing the complex historical origins of sex segregation in the labor force).

²⁰ Diller, *supra* note 5, at 32.

²¹ Burgdorf, *supra* note 3, at 517.

analogies, however, takes us beyond the scope of this Article and that will have to wait for another day.

The main point here is that the gender analogy is often more complicated than authors allow. Indeed, Diller's comment about the successful adaptation of the civil rights model to gender issues²² is too simple and this is addressed in greater detail below.

In making a gender-disability comparison, Burgdorf offers contradictory assessments of whether things are "working" under sex discrimination law as compared to disability discrimination law. In his analysis of *Hatfield v. Quantum Chemical Corp.*,²³ Burgdorf states:

If this were a case of race, religion or gender discrimination, the court would not focus on the relative darkness or lightness of the plaintiff's skin, how religious the plaintiff was [or] how feminine or masculine the plaintiff was... or any nondiscrimination law, this would be a strange set of affairs.²⁴

In fact, it is not a strange set of affairs under sex discrimination law. Sexual harassment law is replete with such examples.²⁵ Indeed, Burgdorf makes gender an exception. He states that the intense focus on ADA plaintiffs is similar to the focus on alleged victims in rape trials where "the alleged victim is often on trial rather than the alleged perpetrator."²⁶ This sort of sporadic insight into similarities between gender and disability discrimination law, coupled with over-generalization about the nature of sex discrimination law, makes a gender-disability comparison ripe for analysis. Such a comparison could aid the advancement of both kinds of claims, as well as contribute to a broader critique of discrimination law generally.

²² See Diller, *supra* note 5, at 39.

²³ 920 F. Supp. 108 (S.D. Tex. 1996). In this case, a male supervisor directed Hatfield, his male employee, to engage in oral sex with him and on some occasions "summoned [him] by calling him 'pussy.'" Hatfield entered into therapy and claimed to be unable to work under this supervisor. Hatfield requested a transfer to another supervisor. When this request was refused, Hatfield brought a disability claim under the ADA for the employer's failure to provide reasonable accommodation. The court granted summary judgment for the employer, finding that Hatfield was not disabled and therefore not entitled to a reasonable accommodation.

²⁴ Burgdorf, *supra* note 3, at 560-61.

²⁵ See Susan Estrich, *Sex and Work*, 43 STAN. L. REV. 813 (1991); see also Pamela Brandwein, "Sexual Harassment and the Legal System," in *ANALYZING SOCIAL PROBLEMS* 98 (Dana Dunn & David W. Waller, eds., 2d ed. 2000).

²⁶ Burgdorf, *supra* note 3, at 561.

B. *An Overall Pattern in Sex Discrimination Law?*

Before examining the *Sears* case, it is important to provide a brief look at the various patterns in sex discrimination cases. This is useful because there might be an analogy between an early line of anti-stereotyping sex discrimination cases in the 1970s²⁷ and a recent line of circuit court cases on disability discrimination.²⁸ In these cases, courts interpreted the third prong of the definition of disability—the “regarded as” prong—in the Rehabilitation Act of 1973²⁹ and the ADA.³⁰ Both groups of cases are marked by an emergent recognition of capacity and ability to do certain kinds of work.

But “common sense” still considers women and men differently. This difference lies in women’s perceived inability to do certain jobs, such as a combat soldier³¹ or a prison guard in contact positions in a maximum-security prison,³² and in their perceived lack of interest in certain jobs.³³ This “common sense” gender difference is analogous to “common sense” differences between people with and without disabilities.

There is no simple pattern of court response to sex discrimination claims. In fact, courts have provided no coherent yardstick—theoretical or otherwise—for deciding when gender classifications may be used and when they may not. A statute that grants female officers two more years than men to gain promotion in the Navy’s up-or-out policy is permissible.³⁴ A Social Security Act provision that

²⁷ See *Reed v. Reed*, 404 U.S. 71 (1971) (holding an Idaho statute preferring men as executors of estates unconstitutional); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding military laws automatically giving spousal benefits to married men but denying them to married women absent a showing that the wife provided more than half the husband’s support unconstitutional); *Orr v. Orr*, 440 U.S. 268 (1979) (holding an Alabama statute exempting women from alimony obligation unconstitutional).

²⁸ See, e.g., *Thornhill v. Marsh*, 866 F.2d 1182 (9th Cir. 1989) (holding an individual may be both “handicapped” and “otherwise qualified” for the purposes of the Rehabilitation Act); *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996) (holding that determining whether an individual is disabled must be made on an individual bases and is a question for the jury); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996) (holding that a disability includes “being regarded as having a substantial limiting impairment”); *Cook v. Rhode Island*, 10 F.3d 17 (1st Cir. 1993) (holding whether a plaintiff had a physical impairment was a question for the jury).

²⁹ 29 U.S.C. § 706(7)(B) (Supp. IV. 1998).

³⁰ 42 U.S.C. § 12102(2) (1994).

³¹ *Rostker v. Goldberg*, 453 U.S. 57 (1981).

³² *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

³³ *Johnson v. Santa Clara Transportation Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting) (stating that the majority’s holding establishes that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect of society’s attitudes which limits the entry of protected classes into certain jobs).

³⁴ *Schlessinger v. Ballard*, 419 U.S. 498 (1975).

gives women an advantage in calculating base period income by being able to exclude three more low-earning years is permissible.³⁵ A Florida statute that gives widows, but not widowers, the benefit of a \$500 annual property tax exemption is permissible.³⁶

The classifications at issue in the above cases, in the Court's view, do not run aground of its anti-stereotyping rule. However, classifications in other cases do. For example, a Social Security provision awarding a widow automatic benefits based on the earnings history of her dead husband, but allowing a widower such benefits only if he shows he received at least half his support from his dead wife is not permissible.³⁷ An Oklahoma statute that prohibits the sale of 3.2% beer to males under the age of 21, and to females under the age of 18 is not permissible.³⁸

It is critical to figure out what it is about a sex discrimination claim that leads courts to choose either the anti-differentiation model³⁹ or the "common sense" difference model. *Sears* is the exemplar case of this latter model. There is also the anti-subordination approach seen in *Schlessinger*, *Califano*, and *Kahn*, that is concerned with ameliorating the effects of prior disadvantages. With regard to affirmative action claims, the anti-differentiation model has been dominant since *City of Richmond v. J.A. Croson Co.*⁴⁰ was decided in 1989.

It is important for both analytical and strategic reasons to determine what influences court choices in both sex and disability discrimination claims. But it is clear, at least in the context of sex discrimination claims, that courts can simultaneously use anti-stereotyping rules and "common sense" assumptions about differences. A comprehensive critique of court reasoning about discrimination, including disability discrimination, requires building a picture about the types of social relationships and fact situations that influence a court's approach to a civil rights claim.

³⁵ *Califano v. Webster*, 430 U.S. 313 (1977).

³⁶ *Kahn v. Shevin*, 416 U.S. 351 (1974).

³⁷ *Califano v. Goldfarb*, 430 U.S. 199 (1977).

³⁸ *Craig v. Boren*, 429 U.S. 190 (1976).

³⁹ Ruth Colker identifies two different principles that underlie the equal protection doctrine: the principle of anti-differentiation and the principle of anti-subordination. While the anti-differentiation principle equates the harm of all classificatory distinctions (e.g., Jim Crow and set-aside programs), the anti-subordination principle is not hostile to race and gender classificatory distinctions that ameliorate inequality. See Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59 (1987), reprinted in, FEMINIST LEGAL THEORY: FOUNDATIONS 288 (D. Kelly Weisberg ed., 1993): "[I]t is often the principle of anti-differentiation [that underlies equal protection doctrine]. The anti-differentiation principle seeks a color blind and sex blind society where racial and sexual differentiations do not exist." Colker discusses equal protection jurisprudence and the anti-differentiation model in the context of disability-based discrimination in Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000).

⁴⁰ 488 U.S. 469 (1989).

C. *Contributions of 1980s Feminist Theory*

Feminist theory from the 1980s pays extensive attention to the “difference dilemma.” On the one hand, if legislatures take actual differences, such as pregnancy, into account, these classifications risk reinforcing the stereotype that women need special protection because they are weaker. On the other hand, if legislatures do not take differences into account in a world that disadvantages those differences, the negative impact of differences may be reinforced.

In 1966, a famous law review article by Tussman and tenBroek articulated the idea that those “similarly situated” must be given the same treatment.⁴¹ The legal mandate of equal treatment became a matter of treating likes alike and unlikes unlike. Such an interpretation was not necessary because this was not the only way of interpreting a legal mandate of equal treatment. Writing in 1987 about gender inequality, Catherine MacKinnon stated, “Doctrinally speaking, gender is socially constructed as difference epistemologically; sex discrimination law bounds gender equality by difference doctrinally . . . the deepest problems of sex inequality will not find women ‘similarly situated’ to men.”⁴² The same can be said about disability.

Critical for the purposes here are feminist explications of how constructions of “difference” are built on taken-for-granted assumptions. Courts have generally remained blind to MacKinnon’s point that to treat issues of sex equality as issues of sameness and difference is to take a particular approach:

Concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard.⁴³

Academics articulating a socio-political model of disability argue in similar fashion.⁴⁴ Constructed social environments consist of architecture, attitudes, behaviors, and institutional rules and practices. These characteristics reflect assumptions about what constitutes “normal” human function. The dynamics that

⁴¹ Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344–53 (1949).

⁴² CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW*, 32–33, 44 (1987).

⁴³ *Id.* at 34.

⁴⁴ See, e.g., Harlan Hahn, *Toward a Politics of Disability Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87 (1985).

support such assumptions are often not recognizable to people holding traditional definitions of power.⁴⁵

Thus, if dynamics of inequality actually create both perceived and actual differences among social groups, claims to legal equality can be difficult to win, given the “similarly situated” model. If courts tend to think of equality as equivalence, not distinction, the differences created by relations of hierarchy and power will render “equal (literally the same) laws” sometimes, but not always, helpful. Careful distinctions between “equal” laws and “identical” laws must be made. Thus, contributors to the disability discrimination literature often contrast laws that protect all people from exclusionary stereotypes and laws that require all people to use the stairs.

MacKinnon has proposed an alternative approach to the difference dilemma. “In this approach, an equality question is a question of the distribution of power.”⁴⁶ The distribution of power would thus provide a yardstick for deciding when gender classifications are acceptable and when they are not. But it is doubtful MacKinnon would trust courts with such an assessment. It is also problematic to assume that objective determinations can always be made about whether particular legal classifications promote women’s subordination or male power. Pornography is just one example of disagreement among feminists about subordinating practices.⁴⁷ While disagreement is likely about the kinds of practices that subordinate people with disabilities, this might be a fruitful avenue of discussion.

D. EEOC v. Sears and the Gendered Jobs Analogy

This section examines the *Sears* case in order to caution against undue optimism when using litigation strategies to seek extensive accommodations. *Sears* is a sobering example of deep institutional entrenchment of baseline assumptions about the nature of jobs, even in the face of disconfirming facts.

In the 1970s, the Court handed down a number of decisions that used anti-stereotyping rules. Cultural thinking about gender—“common sense” about women and men—had changed enough so that certain gender stereotypes became disfavored, such as the notion that men were more capable of handling business matters, even while others remained largely undisturbed. The view that traditional women would want to work only in traditionally female jobs is one example. When the Supreme Court ruled in *Reed* that legislatures could not enact a statute

⁴⁵ Traditional definitions of power emphasize a conscious intent or will to achieve an outcome or specific effect. Though they have concrete effects on the distribution of benefits and resources, the operations of taken-for-granted belief systems are not intentional or willful in this sense.

⁴⁶ MACKINNON, *supra* note 42, at 40.

⁴⁷ Compare, e.g., MACKINNON, *supra* note 42, with, NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS (1995).

containing a preference for men as executors,⁴⁸ it was clear to the Justices that women could do the job. The Court now perceived erroneous beliefs and stereotypes where earlier it had not. However, harder-to-see dynamics of social construction were still at work culturally.

Anita Silver's examination of the *Sears* case reveals the kinds of resistance likely to be faced by certain kinds of legal claims generating from the social model of disability.⁴⁹ This model sees the primary problem faced by people with disabilities as one that is external to them. Architecture, workplaces, and institutional practices have been constructed using baseline assumptions about the "normal" user. This model admits that individual impairment is a factor in understanding the predicaments/situations of people with disabilities. What matters is the relationship between an individual's impairment and the nature of the environment in which the individual must function. Burgdorf, too, emphasizes the role of context in imposing limitations.⁵⁰

In *Sears*, 61% of all applicants for sales jobs were women, but they only constituted between 5.3 and 10.5% of those hired in commission sales.⁵¹ Men were twice as likely to be hired into commission sales, after adjusting for differences in qualifications. The EEOC charged that the low percentage of women in commission sales was a result of discrimination by Sears. Sears argued that (1) commission sales intrinsically required the masculine traits selected for in the Active & Vigor test,⁵² (2) women had an intrinsic feminine and family

⁴⁸ *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

⁴⁹ Anita Silvers, *Formal Justice, in DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 13, 75 (Anita Silvers, et al eds., 1998).

The social model of disability transforms the notion of 'handicapping condition' from a state of a minority of people, which disadvantages them in society, to a state of society, which disadvantages a minority of people. The social model traces the source of this minority's disadvantage to a hostile environment and treats the dysfunction attendant on (certain kinds of) impairment as artificial and remediable, not natural and immutable.

Id. See also Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213 (2000).

⁵⁰ Burgdorf, *supra* note 3, at 522 ("A person may perform some mental or physical function in a way that falls short of most other people, but the limitations imposed upon that individual frequently result as much from the social context as from the impaired function itself.") (citation omitted).

⁵¹ *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 321 (7th Cir. 1988).

⁵² Ruth Milkman, *Women's History and the Sears Case*, 12 FEMINIST STUDIES 375 (1986). The test asked, "Do you have a low-pitched voice?" "Do you swear often?" "Have you ever done any hunting?" "Have you played on a football team?" In screening applicants to sales positions, Sears also used a manual titled the "Big Ticket Salesman," describing commission salespeople as liking tools (even though draperies were among those things sold by commission), having considerable physical vigor, and liking work that requires physical energy.

orientation and had a lack of interest in these jobs; and (3) Sears had made enormous efforts to recruit women but could not get women interested.⁵³

The Court accepted the lack-of-interest argument. The Court took a traditional perspective in assuming workers to be fully formed in their job aspirations, in their leadership styles, and in their attitudes before they reach the workplace.⁵⁴ The Court also took Sears' job description as objective and accurately defining the traits needed to do the job.⁵⁵

Schultz develops an account of gender and work that "traces gendered work attitudes and behaviors to organizational structures and cultures in the workplace."⁵⁶ "It is not enough," she states, "to provide women formal labor market opportunities because deeper aspects of organizational life provide powerful disincentives for women to aspire and succeed in nontraditional employment."⁵⁷ Schultz also cites an array of research to support this conclusion,⁵⁸ including work that examined the effects of "masculine" job descriptions on women's choices to pursue such jobs.⁵⁹ When a telephone lineman's job was presented to women in masculine terms, 5% of the women in the study expressed interest. When the job was presented in gender-neutral terms, 25% expressed interest. When the job was written to appeal to women, 45% expressed interest.⁶⁰

Lessons about the importance of job descriptions can be applied to the *Sears* case. Here, the Court did not recognize that Sears had a choice in presenting the job in made terms and images. It is certainly possible, after all, to describe commission sales work in gender-neutral terms, emphasizing such traits as communication skills, friendliness, product knowledge, etc. More neutral descriptions might easily have stimulated greater interest on the part of female applicants.

Schultz also discusses the judicial belief that traditional women will only be interested in traditionally female work. She cites a major study conducted by Mary Walshok of women in blue-collar trades.⁶¹ Walshok found that traditional women, with no prior interest in or knowledge about the trades, became committed to the trades after they started working in these jobs. Many had contact with community-based programs designed to attract women into the trades, while

⁵³ *Sears*, 839 F.2d at 319–24.

⁵⁴ *Id.* at 320–24.

⁵⁵ *Id.* at 319–20.

⁵⁶ Schultz, *supra* note 9, at 311.

⁵⁷ *Id.*

⁵⁸ *Id.* at 310, 320–21.

⁵⁹ Sandra L. Bem & Daryl J. Bem, *Does Sex-Biased Job Advertising "Aid and Abet" Sex Discrimination*, 3 J. APPLIED SOC. PSYCHOL. 6 (1973), *cited in* Schultz, *supra* note 9, at 310.

⁶⁰ *Id.* at 332 n.59.

⁶¹ MARY LINDENSTEIN WALSHOK, *BLUE-COLLAR WOMEN: PIONEERS ON THE MALE FRONTIER*, 137–38 (1981), *cited in* Schultz, *supra* note 9, at 313.

others had heard trade organizations were looking for women. Only when these women started working in these jobs did they come to define this work as a central interest and source of identity.⁶²

Finally, Schultz cites findings that women's job preferences are not necessarily fixed.⁶³ That is, their job preferences can change over time after they begin working. Also, women in non-traditional jobs often begin their work histories in traditional jobs. Interestingly, the likelihood that a woman will change the sex-type of her occupation is unaffected by marital status, family responsibilities, age, or race.

To rebut the assumption that women have traits that suited them for slower, less competitive, and more social jobs, Schultz cites a series of studies in the 1950s that looked at men in low-mobility jobs. These studies found that men in dead-end jobs lowered their work aspirations, looked for satisfaction elsewhere, came to define work as secondary in their lives, and valued extrinsic features of the job, such as friends, rather than its intrinsic features.⁶⁴ Conventional stereotypes tend to attribute these sorts of attitudes and behaviors to women, representing women as naturally this way, without recognizing that low-mobility jobs can actually produce such traits and behaviors. Rosabeth Moss Kanter's famous study of corporate secretaries makes this same point.⁶⁵

Thus, judicial assumptions about the nature of the workplace, like the commission sales job description and women's job preferences, were rooted in cultural ideology. They could not believe the possibility that a workplace, structured to hang a "not welcome" sign for women, could be restructured in a more gender-neutral way.

Regarding the *Sears* case, it is clear to many in academia that women could do the job and would choose to pursue such jobs if they were framed in less masculine terms. In making the analogy to disability, it is often the case that a job might be structured somewhat differently so that persons with disabilities might pursue such jobs. In pushing for such restructuring, the fight will be with "common sense" ideas about the capacities of people with disabilities, since that common sense will underestimate those abilities—probably for a long time to come. Of course, it is possible that certain jobs can be restructured only so far, or not at all, resulting in an unavoidable exclusion. Separating these sorts of cases from those in which reasonable accommodations can be made is necessary. Such categorizations will likely be contested, especially when significant cost is attached.

⁶² *Id.*

⁶³ Schultz, *supra* note 9, at 312

⁶⁴ Schultz, *supra* note 9, at 315.

⁶⁵ See ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1977).

III. COURTS, THE CONSTRUCTED ENVIRONMENT, AND REASONABLE ACCOMMODATION

Perhaps the worries stemming from *Sears* are misplaced. Both Silvers and Burgdorf cite elements of the legal landscape that seem to indicate that congressional and judicial understandings of equality are responsive to difference based on disability.

Silvers believes the Architectural Barriers Act of 1968,⁶⁶ the Air Carriers Access Act of 1986,⁶⁷ and *Lloyd v. Regional Transportation Authority*⁶⁸ exemplify the responsiveness of public officials to differences based upon disability.⁶⁹ She cites *Lloyd* in a philosophical essay that examines the usefulness of a politics of recognition for people with disabilities. In the course of arguing that responsiveness to difference is necessary and does not entail the privileging of any group's perspective, Silvers offers a concrete example drawn from legal doctrine. "Recent U.S. civil rights history illustrates that, to be meaningful, equality must be responsive to difference."⁷⁰ As evidence, she refers to *Lloyd*, a circuit court case which held that public transportation systems have an affirmative duty to provide wheelchair lifts.⁷¹ However, while *Lloyd* is certainly part of case law, it is not representative of recent civil rights history in which a post-*Croson*⁷² formalism—the anti-differentiation model requiring sameness of treatment—has become dominant. Diller's concern about the current dominance of post-*Croson* formalism remains relevant.

Robert Burgdorf argues that the Supreme Court has already approved the concept of reasonable accommodation, citing a footnote from *Alexander v. Choate*.⁷³ Burgdorf states, "The Supreme Court has recognized that reasonable

⁶⁶ 42 U.S.C. § 4151–4156 (1994).

⁶⁷ 49 U.S.C. §1301 (1994 & Supp. IV 1998), amended by General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101 (1994 & Supp. IV 1998). Silvers cites the 1986 Air Carriers Act as legislation related to the ADA which "offers added insight into the discrimination against disability that must be arrested if the disabled are to increase their social participation." Anita Silvers, *Disability Rights*, in *ENCYCLOPEDIA OF APPLIED ETHICS* 781, 790 (Ruth Chadwick ed. 1998). See also Silvers, *supra* note 49, at 125.

⁶⁸ 548 F.2d 1277 (7th Cir. 1977).

⁶⁹ See Silvers, *supra* note 49, at 118.

⁷⁰ Silvers, *supra* note 49, at 78.

⁷¹ *Lloyd*, 548 F.2d at 1284.

⁷² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that a city's requirement that all contractors awarded a city construction contract must subcontract to one or more minority owned businesses was not narrowly tailored to remedy prior discrimination and that city failed to show a compelling government interest to justify the plan).

⁷³ 469 U.S. 287, 300–01 n.20 (1985).

accommodation 'relates to the elimination of existing obstacles' against [individuals with disabilities]."⁷⁴

The *Choate* footnote was an attempt to clarify affirmative action language used in an earlier Rehabilitation Act case, *Southeastern Community College v. Davis*.⁷⁵ In the *Choate* footnote, Justice Marshall, writing for a unanimous Court, responded to criticism of the use of affirmative action language in *Davis*. Justice Marshall wrote:

Regardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term "affirmative action" referred to those "changes," "adjustments," or "modifications" to existing programs that would be "substantial," or that would constitute "fundamental alteration[s] in the nature of a program . . ." rather than to those changes that would be reasonable accommodations.⁷⁶

In the previous footnote, Justice Marshall stated, "the ultimate question is the extent to which a grantee [of federal funds] is required to make reasonable modifications in its programs for the needs of the handicapped."⁷⁷

Thus, it would appear from *Choate* that the Court distinguished affirmative action from reasonable accommodation. However, *Choate* does not establish this distinction definitively. Contrary to Marshall's assertion, it is not clear in *Davis* that the term "affirmative action" applies only to changes that are substantial and fundamental, and not just reasonable.⁷⁸ More importantly, *Choate* is a 1985 case occurring before *Croson*. It would be a more reliable indicator if it had been decided after the solidification of the five-member Court majority consisting of Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor that favors *Croson* formalism.

Of course, even if the Supreme Court regards reasonable accommodation to be within the boundaries of its formalism, the Court's definition of what counts as reasonable accommodation will likely remain contested. That is, the Court's

⁷⁴ Burgdorf, *supra* note 3, at 530. Burgdorf also cites *School Board of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987) ("Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee.").

⁷⁵ *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979). *Davis* involved section 504 of the Rehabilitation Act of 1973 wherein Justice Powell wrote an opinion for a unanimous Court frequently using the language of affirmative conduct and affirmative action. He used this language in discussing the question of whether Southeastern was required under section 504 to modify their program to permit participation by the plaintiff and disabled people generally. Justice Powell stated, "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW." *Davis*, 442 U.S. at 412-13.

⁷⁶ *Choate*, 469 U.S. at 300-01, n.20 (citations omitted).

⁷⁷ *Id.* at 299, n.19.

⁷⁸ *Davis*, 442 U.S. at 409-12.

conceptual foundation for reasonable accommodation might very well fall short of the conceptual foundation built by disability activists.⁷⁹ In other words, disability activists might be successful in claiming the need for reasonable accommodation, but perhaps not on the basis of equal rights under the Fourteenth Amendment. This last point is especially important.

As previously mentioned, Matthew Diller forecasts an inhospitable legal context for claims to reasonable accommodation because the formalism of the current Court will lead them to see reasonable accommodations as “different treatment,” a violation of the anti-differentiation model. Diller states:

[T]he ADA relies on notions of equality that have proven to be especially controversial. The ADA’s requirement of reasonable accommodation rests on the idea that in some circumstances, people must be treated differently from others in order to be treated equally. This “different treatment” form of equality has long been contested and in the context of affirmative action has met with deep resistance from the courts.⁸⁰

IV. CONCLUSION

There are, certainly, many specific legal questions of definition raised by the Americans with Disabilities Act and its interpretation by the courts. However, at least some of the disagreement over the meaning of the ADA can be traced to differing fundamental assumptions about the nature of equal treatment and the application of this concept to situations where people with disabilities are excluded from employment, public accommodation, and civic participation. All too often, parallels among different forms of discrimination are asserted or assumed without a close examination of legal and broader cultural interpretations of the meanings of disability and gender. As this article has discussed, a more careful examination of gender analogies to disability, as well as a more comprehensive understanding of the contested points in anti-discrimination law, may reveal points of similarity and difference across these categories.

It may be politically advantageous to build support for simple policy statements of nondiscrimination and to emphasize the equivalence of practices that exclude persons from participation because of gender and disability. Ultimately, disability law may require something more than the ADA. In order to determine what is needed, we first must achieve a better understanding of how specific legal discourses about equality and fairness are associated with specific policy outcomes. Comparing anti-discrimination policies related to gender and disability is an important first step in this inquiry.

⁷⁹ See Burgdorf, *supra* note 3, at 513–36. Burgdorf argues that the courts have largely misunderstood the conceptual foundations and underlying principles of disability nondiscrimination laws.

⁸⁰ Diller, *supra* note 5, at 23.

