What’s at Stake in Fatness as a Disability?

Some advocate that we should take what we can get, and if what we can get is protection under disability rights laws, we should grab it.

--Sally Smith, fat activist and Dimensions Magazine contributor

Ack! No, no, no! Please don’t make me disabled on top of everything else!

--“Kitty Kat,” posting to BigFatBlog, April 23, 2003

I. Introduction

“Except in rare circumstances,” federal regulations currently state, “obesity is not considered a disabling impairment.” Under the reigning interpretation of the Americans with Disabilities Act (ADA), “an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one’s height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.” A recent change in Medicare policy acknowledged obesity as a disease, however, making it possible for beneficiaries to apply for coverage for weight loss treatments. (Previous guidelines had

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3 29 C.F.R. § 1630.2(i).
explicitly stated that obesity was not an illness. In addition, the state of Michigan and a few urban areas of the United States currently extend antidiscrimination protections to fat people alongside the usual occupants of our civil rights pantheon. These legal protections do not rely upon conceiving of fatness as a disability. So is fatness a status akin to race or gender, to which a norm of “fat blindness” ought to apply, or is it an afflicted state of disease, to which an accommodation-focused disability rights norm ought to apply? I should admit that I do not plan to answer this question, though it faithfully captures surface-level angst over what to do with fat people in American law. Instead, I will jump us forward to imagining what is at stake in a legal frame of disability for fat discrimination. This simple presumption turns out to be quite revealing of both current conceptions of fat and disabled personhood as well as of ways we try to help people with law. My hunch is that, since medicalization is often the first route to sympathy in America, we will make fat people disabled soon enough.

My aim here is explore how courts have described fat discrimination as unjust (when they have done so, albeit rarely) and then imagine how these justifications for legal protections will change the moral valence of fat and the social practices that attend to it. What kinds of impulses and forms of justification dominate the extension of legal protections in late modern America, and how do these form a framework for understanding what people deserve? It turns out that fat discrimination cases display significant variation at the moment, making fat identity interestingly unstable. I first survey a range of cases, not necessarily disability-framed, to draw out fat

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7 I use the term “fat” throughout this paper after the style of fat advocates.
women’s stories of workplace discrimination and judges’ reactions to them. “Obesity is a disease” is clearly a more plausible utterance in our society right now than “being fat is like being black.” Because the category of disability may well be fat discrimination’s eventual home, I then turn to the interventions available in the ADA and the accounts of the person that undergird them.

As it turns out, the idea of the disabled legal subject becomes instantiated at a particular point in disputes over disability rights in the workplace at which the disabled worker and her employer engage in the “interactive process” to find an accommodation that will make the worker fully functional in the job. Arguably, this moment of interaction proves the point that disability rights scholars maintain: that disabilities are socially created and can thus be socially dispelled. I show, however, how the intervention of the particular account of the disabled person makes this straightforward reconstitution impossible. Socio-legal scholars already know, after all, that businesses and organizations mediate and re-interpret what antidiscrimination laws mean within their own organizational cultures.9 What is waiting for fat plaintiffs is an individualized management of their functional capacities that must be discretely negotiated without the assistance of an overarching identity narrative. The creation of fat plaintiffs as recognizable legal subjects shows us a new path of legal recognition, in which medical individualization combines with managerial imperatives. Perhaps we will reconsider our critiques of overarching identity narratives; perhaps not. We will see, however, that the individualism of liberal legalism has a supple new form, made all the more powerful through consolidation with medical and managerial discourses of the person.

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II. Appearing at Work: Fat Women’s Stories

Bonnie Cook, a winning plaintiff in a fat discrimination lawsuit, sums up her court experience: “I guess all I can say is that people shouldn’t judge others because of how they look. What’s important is whether or not they can do the job.”10 Such statements about the moral neutrality of judging someone only by her ability are widely dispersed and seemingly uncontroversial in our culture. The norm of functional merit as the key to personal desert is, however, much emptier than many people, even successful fat discrimination plaintiffs, seem to realize. There are three basic forms to law’s responses in cases involving questions of functional capacity (generally arising in employment law). Should a fat-protective statute simply ban anti-fat animus or stereotyping by employers; should it require substantive accommodations if say, a worker does not fit comfortably into a space; or should it grant that in some contexts, customer preferences for thinner bodies are so strongly rooted in acceptable social norms that businesses ought to be able to hire only thinner people? All these options revolve around different answers to problems of functional capacity, and show how conclusions about identity, functional capacity, and personal merit determine the background menu of options in our antidiscrimination regime.

These three forms entail different approaches to remedying discrimination. One alternative would be to simply ban animus towards members of the group, and then test them on the same terms as everyone else to see if they can perform adequately. Plaintiffs in discrimination suits would have to show that invidious stereotyping harmed their employment or public accommodation rights, for example, and that without that intervention, their true merits

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would have been fairly evaluated. Michigan’s statute banning weight discrimination embodies
this approach (which I call transcendence-to-ability, since its imperative is to transcend visible
identity traits, seeking the true kernel of ability and merit beneath). Alternatively, law could
promote group-based redistributions in favor of an out-group with the aim of equalizing their
opportunities to establish their functional merit. This remedy would amount to affirmative
action-type innovations for fat people, and are certainly difficult to imagine. Reaching even
further, a third approach might be to challenge the social practices and ideas that construct the
idea of proper functioning in the first place. Spaces would be re-formed as part of a duty on the
part of employer and society. Our disability rights laws are supposed to share in this last, more
ambitious agenda: defining the problem as the grounds for proper functioning in the first place,
particularly where they turn out to stem more from the way able-bodied people arrange the world
(with stairs, for example) than from any inherent dysfunction in people disadvantaged by those
arrangements (say, people who use wheelchairs). All these conceptions of what fat plaintiffs
deserve currently appear in American case law, except for the affirmative action rationale. Of
course, the conception that has no remedy—that preferences for thinness are beyond criticism—
appears as well (I call it “appearance-as-ability” here).

Mary Nedder, College Teacher

Mary Nedder taught in the Religious Studies Department at Rivier College, a small
Catholic religious institution in Nashua, New Hampshire, for about six years, during which time
she weighed about 375 pounds and stood five feet six inches tall. In 1994, the school did not
renew her contract. She sued under the Americans with Disabilities Act. Ms. Nedder assembled
evidence in her lawsuit that Sister Jeanne Perreault, the college President, had previously stated
that losing weight is part of promoting the health of the whole person (an explicit part of the school’s mission). The college’s mission statement also includes a commitment to “an environment in which integrated learning is the shared responsibility of students, faculty, staff, and administrators, and is pursued in all the curricular and co-curricular programs of the College” and urges those who participate in the life of the college to “take responsibility for ourselves and for others, and to engage in dialogue about basic human issues facing society, especially the plight of the poor and powerless.” Sister Perreault also said that faculty members should serve as good examples of the college’s mission, and that she believed that fat teachers did not get much respect from students. Sister Perreault’s opinion that students would react negatively to overweight faculty members (finding them “less disciplined and less intelligent”) came from a report on the subject that she had circulated among some other faculty members. Ms. Nedder, however, prevailed on a perceived disability theory under the ADA and received back pay and reinstatement at Rivier. The court found that the college’s belief that her weight kept her from being a good role model and a respected teacher amounted to an erroneous conclusion that Ms. Nedder was substantially limited in her ability to teach (even though she was not so limited).

Jennifer Portnick, Fitness Instructor

Jennifer Portnick earned credentials to be an aerobics instructor through the Aerobics and Fitness Association of America and applied to Jazzercise, Inc. for a job. The company refused to hire her, however, because at five feet eight inches tall and 240 pounds, Portnick did not meet the

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13 Nedder, p. 119-20..
14 Ibid., p. 119.
company’s requirement that instructors look fit (read: slender, athletic). She filed suit under San Francisco’s “height and weight” civil rights ordinance, and after mediation by the San Francisco Human Rights Commission and much publicity, the company agreed to change its policy. Portnick triumphantly reported that “[f]rom now on, the evaluations of applicants will be based on their skill.”15 Acknowledging studies showing that people of varying weights can still be fit, Jazzercise, Inc. conceded that “the value of ‘fit appearance’ as a standard is debatable.”16

Stacey Webb, School Bus Driver

Stacey Webb applied to the Swartz Creek Community School District in Swartz Creek, Michigan for a job as a substitute school bus driver in August 1996. On the first day of training, Ms. Webb found that the steering wheel pressed into her abdomen. At the time she was about five feet eight inches tall and weighed between 320 and 330 pounds. The next day, the test drive supervisor dismissed her from the training program because she could not fit behind the wheel. Even though this case arose in Michigan, the only state in which employment discrimination based on weight is expressly prohibited, the court found that the supervisor lacked “discriminatory animus” because “[she] only found Webb’s weight to be a problem because it prevented Webb from driving the bus safely.”17 Ms. Webb was not disabled, either, according to the court. The supervisor never made derogatory remarks about Ms. Webb, and even suggested applying for other jobs in the school district. The district had decided not to adjust the seat on the bus any further because it would require structural modification, possibly in violation of

16 Ibid.
other safety standards (something the district had been unwilling to do for other applicants as well).

Deborah Marks, Saleswoman

Deborah Marks, a woman who weighed 270 pounds, worked as a telemarketer for National Communications Association (NCA), which named her “Telemarketer of the Year” for 1993. Ms. Marks pressed the company to promote her to salesperson (a face-to-face selling job rather than a telephoning job), but instead NCA promoted another “thinner and cuter” woman with fewer job accolades as a telemarketer ahead of her.\(^{18}\) When she complained, her supervisor told her that “outside sales, presentation is extremely important” and: “Lose the weight and you will get promoted.” Another supervisor told her “to lose the weight and that was important for outside sales because you were – you weren’t just on the telephone, you were going around from person to person and therefore presentation was extremely important.”\(^{19}\) Ms. Marks sued under Title VII using a “sex plus” discrimination theory, alleging that NCA’s personal appearance rules held women to a standard of physical appearance—particularly, being slender—that did not apply to men. But because she was not able to point out any overweight men in the sales department either, the court found that NCA’s rules did not discriminate based on gender. The company simply did not hire any fat salespeople at all. Without the hook of gender discrimination, her case fell apart because discrimination based on weight alone is not covered under Title VII.\(^{20}\)

\(^{19}\) Ibid., p. 326.
\(^{20}\) Ibid., p. 330.
Though there are certainly fat plaintiffs who are men,21 the cases I retell here all involve fat women. As Debbie Notkin notes, a fat woman “is always fat, and always a woman.”22 In law’s characteristically diced-up framing of only the “relevant” identity trait specifically being contested in the lawsuit, there is no information in the cases to help us read these women’s other important markings, such as their race or sexual identity. The kind of jobs they seek tells us a bit about their class position. Critical scholars have already taken up the problem of placing fat identities alongside gender, queerness, and race, and begun to express concerns that fat activism must try to avoid traps like essentialism and commodification.23 While there may be little to go on here, we cannot assume that these cases are about fat “people” rather than fat women. At the moment, however, fatness may be so overwhelming and simple in its meaning for judges that it stands over most other traits, giving us little traction to read it against and with other identities within the texts of opinions. And of course, Ms. Mark’s company did not hire any fat men either, so perhaps the extent of the bias against fat in many contexts sometimes serves to equalize its effects. But because social science evidence clearly points to specifically gendered and raced understandings of fatness in our culture,24 I find it difficult to believe that these intersections fail

to matter in the law. We shall have to watch for and analyze them despite judges’ denials that they matter.25

At the moment, legal outcomes divide fairly neatly into two possible attitudes towards fatness: it is either irrelevant as a proxy for ability to function in a given context (transcendence-to-ability), or it is allowed to carry all its social meaning and counts legitimately in the assessment of the whole person (what I have termed appearance-as-ability). The Nedder case is a fascinating example of a court enforcing transcendence-to-ability in the face of evidence that the trait may indeed have some bearing on job performance. Mary Nedder’s weight was an externally appearing trait that signaled a character defect to her employer, and since possessing and displaying a certain character within the college community was a requirement of the job, her weight made her seem dysfunctional to Sister Perrault. The perceived disability prong of the ADA (also called the “regarded as disabled” prong) would seem to be the most obvious route in contemporary U.S. law for fat people to achieve legal victory based on transcendence-to-ability. It represents the social problem of fatness as rooted in others’ disgust, as well as stereotypes about fat people as lazy and unable to exert self-control. The perceived disability jurisprudence is quite distinct from the main thrust of the ADA, which is focused on accommodation though individual management.

Even Sister Perrault’s supposed empirical evidence that fat teachers did not get as much respect as role models was not enough to override the college’s obligation to ignore Mary Nedder’s weight when it judged her fitness as a teacher. The court insists that even though her job is to “represent” the college’s close communal values when she stands up in front of students to teach, it does not permit the social meaning of fatness to count in her job performance.

25 In Philadelphia Electric Company v. Pennsylvania Human Relations Commission and Joyce A. English, 68 Pa. Commw. 212 (1982), for example, the court insisted that Ms. English’s race (African American) was “totally irrelevant” to her fat discrimination lawsuit.
Teaching then becomes the kind of job that is measurable in terms that are separable from the appearance of the self. But in the close-knit, values-laden community of Rivier College, can lecturing, evaluating students, and mentoring students be separated from the appearance of the self? What if it were the case that the students did not respect Ms. Nedder as much because of her weight? (What if data were available to prove conclusively that women are not as respected in the classroom as men, or minorities as much as whites?) The court’s decision in *Nedder* is an effort to transform the social meaning of fatness by rendering it illegitimate as a part of Ms. Nedder’s teaching and role modeling.

The concession that it might not be such a bad thing to have a variety in body sizes among Jazzercise instructors is a result of San Francisco’s attempt to shift social norms through municipal laws, precisely because the appearance of the teacher to the students is a fundamental part of what takes place in the class. The law helps change the content of that message from “thin is in” to “being fat isn’t incompatible with a healthy, fit image.” But there presumably many of the participants are women who are not as thin or fit as they would like to be but who doubt their abilities to exercise or feel self-conscious doing it, and perhaps role modeling by a larger woman is actually an improvement in the business model from the clients’ perspective. The recent proliferation of the workout chain “Curves: For Women” indicates a demand for fitness services with this image.26 Rivier College, on the other hand, had to bend to a judicially mandated shift in their close-knit communal values that had nothing to do with market forces.

Transcendence-to-ability, as we see in the *Nedder* case, affirms that nondiscrimination means being legally required to repress one’s doubts about a fat employee or applicant’s

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functional abilities. True merit in employment law is the ability to do the job, and that ability must be determined without attention to the person’s fatness. On this understanding of antidiscrimination law, the wrongness of the employer’s act stems from the use of a certain kind of knowledge: an irrational misjudgment of an individual based upon stereotypes. In these cases, the view was that fat women make bad role models because they do not take care of themselves. The understanding of functioning implicit in transcendence-to-ability, then, must draw upon another type of knowledge to refute these assumptions, one tethered to empirically quantifiable results of measurements conducted across different populations of people.

Presumably Ms. Portnick could lead the same class in the same exercises for the same amount of time at the same pace that other instructors did. There, mechanical motions of the body, easily tested and compared to others, constitute the job description. When the job in question has easily testable components, transcendence-to-ability simply requires that fat employees perform just as well as any other employee, and in exchange, the employer dismisses misgivings about the effects of their appearance. The implication in *Nedder* is that there is no difference between a fat college religion teacher and a thin one as far as their community norms are concerned. The outcome in *Nedder* is much stronger than in *Portnick*, though, because the concept of functioning in that job is not so easily parsed into the kind of quantifiable measurements that a functionalist orientation absorbs best, and yet *Nedder* prevailed. The court approached (but did not reach) a modification to transcendence-to-ability, in which it would have stated explicitly that part of its aim was to undo the connection between thin appearance and competent teaching in the hopes of raising the status of the entire social group of fat people.

Why does a successful outcome in these two cases depend on measured sameness to one’s thinner counterparts and nothing more? The problem is that fat-blindness does not on its
own give any substantive account of fatness that establishes it as an identity or tells any kind of story about what it is like to be fat (or what it could be like, under more positive social conditions). The equalizing impulse of transcendence-to-ability precludes any kind of affirmative action or accommodations. There is no reason to change the standard of measurement because the argument is based on the fundamental equality and sameness of the fat women to their thinner counterparts. This justification is fundamentally incompatible with any kind of disability rights analysis, which must at least acknowledge the stigmatizing effects of a “normal” standard of measurement. The case of Ms. Webb, the would-be bus driver from Michigan, illustrates this aspect of transcendence-to-ability.

Ms. Webb was covered by Michigan’s state law extending protection in hiring based on weight. The Michigan law came about, writes one state judge, because “the Legislature was concerned that overweight people would be cast aside on the basis of inaccurate stereotypes about their abilities.”27 The school district did not base its refusal to hire Ms. Webb on stereotypes or animus against her, however; rather, the decision was based on the fact that she could not physically fit behind the wheel. The judge in her case pointed out that everyone seems to have been quite nice to her. Ms. Portnick and Ms. Nedder could perform the jobs for which they had been hired according to the same specifications that applied to everyone else, and their employers’ negative views were based upon deference to others’ social norms and conjectures about future hypothetical situations. Ms. Webb (or anyone else her size), on the other hand, would have needed some kind of accommodation in order to take the job, presumably moving the seat back and readjusting the controls.

When justice means protecting the capabilities of the self, abstracted from its appearance or politicized identity traits, then there can be no reason to modify the bus to allow Ms. Webb to take the job. There is nothing unjust about the fact that the norms of school bus construction probably always assumed that drivers would have a certain body size; the conditions of the work site are simply given, and legally understood as the neutral terrain upon which discrimination may or may not occur. The idea that justice requires modifying the bus would stand upon a different justification altogether. Accommodationist, or substantive justice-focused, judicial enactments mean that something more than individual dignity or functional capacity is being protected or remedied. Rather, accommodations hone in on past injustice done to the group through the operation of hegemonic norms that displaced or marginalized bearers of that identity trait. They acknowledge that the physical world has been assembled in the interests of some people’s functional capacities and against others’ interests. Is not simply neutral terrain upon which proper or improper functioning happens, but rather it helps to create and maintain the dysfunction of some people and promote the abilities of others. There is no account of fat women’s personhood that could convey these justifications into the Michigan law; therefore, there is no reason to modify the bus to accommodate Ms. Webb.

Ms. Webb could also have been understood as disabled but otherwise qualified to drive the bus, and availed herself of the kinds of justifications for modifying transcendence-to-ability that state and federal disability rights provide. If fatness were a disability, she could have filed a federal ADA lawsuit that would have superseded the limitations of the Michigan law. The ADA definition of the protected person is a worker with a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an
impairment; or being regarded as having such an impairment.\textsuperscript{28} Employers must reasonably accommodate disabled employees who are otherwise qualified for their jobs (as well as to accommodate job-seekers in the application and screening process).\textsuperscript{29} So if modifying the bus did not create an unreasonable safety risk or cost too much money (and if the ADA otherwise applied to the district as an employer), the school district would have been required to undertake it and to hire Ms. Webb. Mandatory employer accommodations are also redistributive requirements, aimed at making conscious what was unconscious to the able-bodied majority.

To this point we have reviewed the Jazzercise case, exemplifying the ways that simple measurements of functional capacity, such as those directed at bodily movements and stamina, may guarantee equal treatment for equally-performing fat workers; the Rivier College teacher case, one in which the court’s insistence that fatness was equally inapplicable to job performance despite a close community context, where norms differed from the judge’s conclusions; and the bus driver case that revealed the limits of transcendence-to-ability, even as it showcased its powers to vanquish bare animus against fat people. These cases have shown the outlines and limits of transcendence-to-ability as it judges fat employees. But of course it is fairly rare for courts to show much concern for anti-fat bias in any form, since it is not even against the law in most of our country’s jurisdictions. The other option for considering the relationship between fatness and functionality is for the law to simply fail to block any kind of thinking about what fatness means at all. This is Ms. Mark’s story.

In the case of the would-be saleswoman, Ms. Marks, the employer made it clear that appearance could not be separated from ability to perform the job. When her job was to talk on the phone, she was a stellar employee. When the job shifted to a face-to-face context in which

\textsuperscript{28} 42 U.S.C. 12, 181-12, 189 (2000).
\textsuperscript{29} 42 U.S.C.S. § 12111(b)(5)(A).
sales would depend upon customers’ reactions to her appearance, Ms. Marks lost her functional
capacity. Appearance was ability, hence my term for the type of functional thinking driving
these cases: appearance-as-ability. What account of justice would be necessary to condemn
such an outcome? The concept of a stereotype turns out to be quite inadequate. The notion of a
stereotype turns on inaccuracy in application to an individual (or at least a strong presumption of
inaccuracy, and sometimes a political insistence on inaccuracy). But when a trait of identity or
appearance constitutes performance all the way down, so to speak, so that it is hard to imagine
the role without the appearance, then inaccuracy simply has no place: the
appearance/performance blend is the truth about what it is to do that job. Once looking thin and
attractive is collapsed into the notion of proper job performance, then the trait that was supposed
to be ethically irrelevant and superficial becomes a meaningful measure of a person’s worth, and
there is no traction to alter the social meaning of fatness. Any and all social meanings of
fatness—from assumptions of laziness or incompetence to sheer aesthetic disgust—enter into the
calculation of ability.

Thus we see antidiscrimination law can be forced into a choice between insisting upon
transcendence-to-ability (in which an appearing trait must be ignored while ability is sought) and
conflating ability and appearance in deference to social norms in which “ability” is “appearing.”
The only way to separate them and force some other framing upon the person would be to give a
politicized account of group identity, which is not forthcoming in the case of fat women (or fat
men, either). If an identity trait is a signal for past injustices done to the group, for instance, or
of a political commitment to remake society in the interest of that group’s equality, then our laws
do not permit the identity trait hobble its bearer. Law acknowledges the trait and makes it the
focus for redistribution, accommodation, or management. Without a sufficiently strong identity
script, antidiscrimination laws can embrace the language of functioning while seeking to ban only animus. Once law settles within the functionalist framework, the main concern becomes stereotypes or animus that have content related to dysfunction—laziness, incompetence, stupidity, and so on. The concept of fat discrimination can certainly be problematized through this framework (or, as the *Marks* case shows, it is not considered much of a problem at all).

Remember one obvious problem that very large people often have, however: they do not fit, or fit comfortably, into physical spaces designed for smaller people. Simply banning animus toward them would have no implications whatsoever for employer-subsidized changes to the physical environment. A new law justified on transcendence-to-ability grounds would likely be extolled (or vilified) in the media, as we saw during the hype surrounding the San Francisco ordinance, but the *Webb* case shows that there would be no room in such a law for re-interpreting a basic feature of fat identity: big bodies.

### III. Managed Functioning in Disability Law

What kind of social practices and stories of personhood await fat plaintiffs within our disability rights regime? Such a move would certainly break out into new accounts of fatness and functional personhood, and it would be especially relevant in cases like Ms. Webb’s. As I noted, there have been a few victorious cases under the ADA for fat plaintiffs—Ms. Nedder’s, of course—but generally fatness is not yet considered a disability. To see what kind of account of functional personhood we might break into nonetheless, let us examine the unique features of the ADA and its processes of managing individual functioning. The ADA recognized the disabled as a legally protected group, even, as Congress put it in the preamble to the law, a “a discrete and

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insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”

Here we see the initial impulse: to retain the framework of functional capacities as the proper grounds for judgment and to vanquish stereotypes. If the ADA did not also mandate workplace accommodations, it would simply embody transcendence-to-ability. But businesses must go through a process of accommodating otherwise qualified disabled workers, and so the ADA seems to be special among antidiscrimination laws. So, if we come to understand obesity as beyond the control of the individual (perhaps as a regrettable affliction), we would also agree that it is the kind of feature of a person that ought to receive special accommodation.

For Ruth Colker, interpreting the ADA is a form of judicial contestation over “the politics of economics” because its accommodationist provisions require employers to expend resources to help a certain disadvantaged class of workers.

On the other site is libertarian scholar Richard Epstein, for example, who argues that “. . . the disabled should be allowed to sell their labor at whatever price, and on whatever terms, they see fit,” and that efforts to protect them simply distort the market and result in inefficiency.

Many scholars on the left celebrate the ADA as a clear win over Epstein and his ilk. Linda Krieger calls it a “transformative statute . . .

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requiring structural equality” and Pam Karlan and George Rutherglen applaud its “fundamentally different approach to . . . and remedy for invidious discrimination.” My approach, which I term the “managed functional approach,” re-describes ADA accommodations, however. My view is that the ADA would never have been able to sustain a full-blown group-based rethinking of the subordination of people with disabilities, as other progressive scholars seem to have assumed. Law’s understanding of justice, proper functioning, and disabled identity is not most accurately characterized by an identity script derived from a moment of political consensus; rather, it is defined by the discord over who belongs within the category and the case-by-case negotiation of what to do with those who are (provisionally) understood to fit into it.

Much of the political-legal-scholarly consensus about disabilities has emphasized the wide range of forms that disablement takes. This focus on individualism and variation dominates the contemporary judicial reception of disability cases, and, as Ruth O’Brien explains in her study of the evolution of disability policy since World War II, also helps explain why the ADA has been remarkably ineffective and even punitive towards many of the people its preamble claims to protect. The notion of a legal remedy for discrimination that is person-specific and contextually crafted provides the chance to produce and to manage functional

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personhood on a minute level. This interaction of law with identity is regulatory. As Alan Hunt defines it, “'[r]egulation’ refers to a specific style of purposive, instrumental, and policy-oriented mechanisms of control that avoid negative or prescriptive imposition of rules in favor of regulatory negotiation that makes the regulated agent play some part in the process of both the development and implementation of those processes of control.”37 That is, rather than looking for a certain suspect ratio that may trigger suspicion of disparate impact against disabled people (as EEOC regulations set out for marking suspicious ratios of minorities to whites or women to men, for instance),38 the ADA makes use of a process of negotiated accommodations for disabled people that the employee herself helps to develop and implement. In this section, I examine this “interactive process” for accommodating disabled workers, reading cases about it as law’s newest account of how to bring about just outcomes for differently functioning individuals.

“Unlike other civil rights categories, like race,” O’Brien notes, “people with disabilities must prove they have one.”39 We have never before had an antidiscrimination law that insists on the complete indeterminacy of the line between who is covered under it and who is not. For better or worse, most antidiscrimination laws help describe and solidify certain stories of what it means to bear an identity marker such as race, and the first step in doing that it always to

38 Disparate impact as a legal theory has brought along a bureaucratic apparatus meant to survey and track the representation of the named identity traits in the workforce. The Equal Employment Opportunity Commission’s guidelines to employers to categorize applicants and hired workers “by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals.” 29 CFR 1607.4(B). A simple bureaucratic norm called the “four-fifths rule” has been established in the federal regulations to test for disparate impact in any given work setting: “A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.” 29 C.F.R. 1607.4 (D).
explicitly or implicitly define the boundaries of the group to whom the law is directed. The ADA, of course, protects disabled people, but nearly all the jurisprudential scuffling has been over whom that label actually covers. The statutory definition of the protected person is a worker with a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.\textsuperscript{40} The odd balance is between being substantially limited in a major life activity,\textsuperscript{41} but able to perform the job with or without accommodation.\textsuperscript{42} According to the Court, determining membership in the group is “an individualized inquiry,”\textsuperscript{43} “not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.”\textsuperscript{44}

When Congress deliberated on the ADA, members referred to the 43 million Americans with disabilities that the bill would help.\textsuperscript{45} The Supreme Court has seized upon the number as an upper bound, using it to reason that inclusion of people with extremely common conditions in the

\textsuperscript{40} 42 U.S.C. 12, 181-12, 189 (2000).
\textsuperscript{41} The Supreme Court seemed to waver on the question of what a “major life activity” is, first taking a case in which they interpreted “major” to mean something like (these are my own words) “comparatively more important than many things one does in life,” \textit{Bragdon v. Abbott}, 524 U.S. 624 (1998), but then switching to a notion that major means something like “performed on a daily basis” in \textit{Toyota Motor Manufacturing, Kentucky., Inc. v. Williams}, 534 U.S. 184, (2002). In \textit{Toyota}, Justice O’Connor seems to be holding back the floodgates, saying she wants to create a “demanding standard for qualifying as disabled.” Ibid., p.197.
\textsuperscript{42} One scholar sarcastically describes Supreme Court statements on the question: “According to the Court, to fit under the ADA, an individual has to be neither too little disabled nor too greatly disabled; has to be disabled despite measures that mitigate her disability; has to be credentialed as disabled if an employer perceived of her as disabled, but only if the employer admits that it did so; and always needs to be able to perform essential job functions while at the same time (absent accommodation) be functionally impaired from conducting not only the job at issue, but a range of other jobs as well.” Michael Ashley Stein, “Foreword: Disability and Identity,” \textit{William and Mary Law Review} 44 (2003) (internal citations to cases omitted).
\textsuperscript{44} 29 C.F.R. pt. 1630, app. 1630 2(j) (1999).
ADA would expand the population covered beyond 43 million and thus could not be what Congress intended.\textsuperscript{46} Justice O’Connor seems to be holding back the floodgates, saying she wants to create a “demanding standard for qualifying as disabled.”\textsuperscript{47} Those who want a broader interpretation of the statute point out that 43 million surely captures more than just severely disabled people and that the “regarded as” prong captures potentially anyone, and so Congress could not have intended such a pinched view of the population meant for protection.\textsuperscript{48} It is telling that a simple number has taken on such significance in ADA jurisprudence. Disabled identity as a legal idea does not on its own tell us anything about who is included, so arbitrary markers become significant. The identity group must be restrained by judicial definition or it will burst right open, and so many people will be included within it that businesses could be overwhelmed by their obligations.

Disability studies as a field of inquiry has set out to highlight the person-to-person variations in functioning among disabled people rather than to emphasize them as a “like-race” subgroup. Anita Silvers argues against collectivizing disability perspectives into one political identity, because to do so would impose fealty to a certain banner-carrying way of being disabled, undermining the individualized inventions that disabled people develop in order to function in new ways.\textsuperscript{49} As it turns out, the focus on individual variation among disabled people and socially situated accommodation constitutes the overlapping vocabulary between Congressional representatives, judges, disability scholars, and activists. The Supreme Court has

\begin{footnotes}
\item [46] Justice O’Connor wrote: “If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher.” \textit{Toyota}, p. 197.
\item [47] Ibid.
\end{footnotes}
an unlikely ally in its insistence upon the individuality of disabled people (though not in its insistence on the narrow definition of the population). The prevailing Justices and disability rights scholars agree on at least two important things: that “the disabled” are in fact a heterogeneous group without any sustained connections or shared experiences, and that accommodations, when they are required, must be adapted to the individual and her working conditions. It is these two factors that I argue comprise the unique substantive account of disabled people’s functional personhood, and it is no coincidence that they have been elaborated upon in multiple sites of knowledge.

The managed functional approach moves beyond the idea that law ought to simply ban stereotyping about dysfunction and nothing more; that is, disability discrimination lawsuits transform the dominant norm of what a properly functioning worker looks like. It also acknowledges that proper functioning is produced rather than naturally occurring, in contrast to transcendence-to-ability (which assumes that abilities are just there in the person, under the irrelevant and distracting identity traits). It refuses to collapse appearance into ability, of course, having as its central political aim the dissolution of the connection between dysfunction and having a disability. What is fascinating about this shift, though, is the management of the individual that seems to be inherent in an accommodationist approach. Each disabled person enters into a collaboration with her employer in a discrete location—her building, her workstation, the assembly line, the bathrooms, the stairs—to produce and to manage an account of what changes to the environment her disability requires and what she should do in return to continue to perform her job. This functioning or not-functioning person cannot be said to exist before the worked-out job accommodations are put in place; that is, both the worker and the employer must move through a legally mandated process and only then do the employer’s
obligations become clear: to accommodate disabled workers who can be reasonably accommodated and still do the job, but not to keep on those whose accommodations are either too expensive or who fail to participate properly in their own re-fashioning. The managed functional approach in the law also links up to (and often seems directly derivative of) other important practices of managing the person, such as medical evaluations and bureaucratic determinations of eligibility for government benefits based on disability, for example.

Supposedly the ADA’s uniqueness and potential for substantive justice rather than mere “disability blindness” hang on this accommodation prong. The employer and the employee must under take an “interactive process” in order to determine what precise accommodation will be made. The requirement for an interactive process does not occur within the language of the ADA itself. Interpretive regulations promulgated by the Equal Employment Opportunity Commission (EEOC) at the behest of Congress provide that in order “to determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations.”

Not all federal courts have accepted that an interactive process is necessary, but in some jurisdictions it has been read into the jurisprudence of the ADA. The lead case from 1996, Beck v. University of Wisconsin Board of Regents, stipulates that “once an employer knows of an employee’s disability and the employee has requested reasonable accommodations, the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary.” Indeed, some judges have been quite

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50 29 C.F.R. § 1630.2(o)(3) (emphasis added).
51 Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996), p. 1137.
enthusiastic about the interactive process requirement as a tool of social justice. One judge has particularly high hopes: “[The process] may . . . not only lead to identifying a specific accommodation that will allow a disabled employee to continue to function as a dignified and valued employee, it may also help sensitize the employer to the needs and worth of the disabled person. It therefore furthers the interest of the employer, and the dignity and humanity of the disabled employee.”

So the implementation of the ADA turns on a conversation or series of interactions between workers and employers meant to bring to light the employee’s lack of functioning and to accommodate it. From published cases in which the interactive process was a primary feature of the dispute, we can glean some important details about how these interactions play out, and begin to form conclusions about the structural and personal power relations that produce judgments of managed functional personhood. Many cases address the duties of both parties to enter the interactive process in good faith, and turn on the question of who is responsible for a breakdown in the process. If the employee is responsible, he does not qualify for accommodation and job protection. He is then not covered under the ADA, not a legally disabled person. Watching how the process breaks down shows how it is supposed to build up the properly functioning worker. When courts assign blame for malfunctions in the interactive process, they are delineating what kind of persons deserved to be functionally re-formed, and how that reformation should have proceeded. One case example shows this process in action, as well as hints at what kinds of organizational cultures may be springing up to manage disabled identity.

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Romell Carter, Baggage Handler

Romell Carter worked for Northwest Airlines at O’Hare airport for several years, loading and unloading baggage until he crushed his foot in a forklift accident in 1999. Soon after his return in 2000, Northwest hired Margaret Sommers, a professional “accommodations assessment advisor,” to assess what kind of work Carter could still do.\(^{53}\) Ms. Sommers first tried to set up an evaluation at the job site with Mr. Carter, but he could not attend on the date she had set and could not notify her because he did not have a phone. She conducted the evaluation with his supervisor present instead, and found that he was not able to do his old job anymore. More senior employees already filled the sedentary jobs, or the job required passing a typing test and Mr. Carter did not know how to type (and failed the test). The ADA does not require bumping more senior employees to find an accommodation for a disabled employee, and so Northwest paid for Mr. Carter to take a keyboarding class at a local community college. He took the class, but never re-took the test despite being invited to do so by Northwest on two occasions. Because he was still not able to work, Carter sued under the ADA, claiming that Northwest had failed in their duty to accommodate him. In the *Beck* case, the court gave examples of what to look for in assigning blame: “A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.”\(^{54}\) Mr. Carter was responsible for the breakdown, in the court’s view. Northwest prevailed on summary judgment by arguing that their evaluation and attempts at job shifting were reasonable (and, under *Beck*, a “reasonable effort” is all that is required of employers).

\(^{53}\) *Carter v. Northwest Airlines*, 2003 U.S. Dist. LEXIS 2416. This case took place in the 7th Circuit, controlled by *Beck*.

\(^{54}\) *Beck*, p.1135.
In the Jazzercise case, Ms. Portnick’s argument rested on the assumption that functioning well as an instructor was a clearly quantifiable issue that, if they could only remove their distortive bias against fat, her employers would be able to clearly understand. A Jazzercise routine goes on for a certain length of time, involving certain conventions of movement, communication, tempo, and so on. Determining a person’s functioning is not similarly measurable here, however. It is both a social and a legal process, and the varying resources the opposing parties bring to bear on that determination help produce the employee as one who functions suitably or as one who does not. Unlike race and sex-based disparate impact cases, there is no numerical ratio to use for measuring likely group disadvantage. One understanding of Ms. Sommers’ job is that she was hired to monitor Mr. Carter and to make sure Northwest could prove that it tried to accommodate him. By hiring her, Northwest secured immunity from judgment under the ADA well before any lawsuit was even filed; indeed, it is difficult to imagine that Northwest would not be found “reasonable” if it devoted an entire position towards accommodating employees. Mr. Carter, on the other hand, had no context for realizing the full ramifications of the interactive process. He alleged that it was not fair that Ms. Sommers and his supervisor assessed his job without his presence, and that the job listings Ms. Sommers sent him were so abbreviated that he could not tell what the jobs required. There was no explanation for his failure to re-take the typing class, however, and so it seems like he did not do everything he could have done to get another position. We cannot tell from the record what he thought was happening in the interactive process—did he realize he was ceding away his rights under the ADA by not responding in the proper way? Perhaps his skill level was not sufficient to transfer from a job based on physical labor to one based on technological skills and customer service.
The sedentary job that involved typing was in Tampa—perhaps he did not want to relocate from Chicago.

The important thing to notice about the Carter case, then, is the institutional context of the interactive process as well as the legal background, and the way they work together to determine the functioning of persons. Even with a smashed foot, we simply cannot know in advance of the process whether Mr. Carter belongs in the class of 43 million disabled Americans. If Mr. Carter had mastered typing and had been willing to move from Chicago to Tampa, then the legal obligations of Northwest Airlines would have redefined and reproduced him as a functioning worker. This outcome depended upon the interactive process happening in a certain smooth way (to avoid “break down”). The meetings, phone calls, applications, evaluations, transfers, and so on should ideally fit together with the disabled worker’s proper attitude and efforts. Once Northwest expended a reasonable effort and negotiated in good faith, however, its duties to Mr. Carter ended. Mr. Carter failed to re-invent himself as a functioning worker, and so he did not get ADA protection. There no fixed identity script to justify the accommodation, but rather an indeterminate managerial process to hash it out, to be repeated over and over in contexts in which law emphasizes the uniqueness of the individual being managed.

IV. Conclusion: Margaret Sommers, Accommodations Assessment Advisor

The first two approaches in American antidiscrimination law to questions of proper functioning, human dignity, and legal protection—transcendence-to-ability and appearance-as-ability—vacillate between denying the relevance of an outwardly appearing trait and acceding to its constitutive social meaning as part of its bearer’s merit in a certain context. The fat plaintiffs
we examined were caught between transcendence-to-ability and appearance-as-ability, illustrating the two poles of possible judicial interpretations of their personhood. Their position, when courts offer the scanty protections I discussed above, quite nicely illustrates what it is to have no legally composed identity script. Judges could protect the simply measured functional abilities of fat workers if they felt so inclined (as a few have), or they could classify obesity as a disability (as a few have).\textsuperscript{55}

There are no grounds for arguing that perhaps the standards by which fat workers are measured are the result of a hegemonic ideology of thinness and that therefore the structure of the workplace itself is unjust. Even where there is some political will to grant protection against stereotypes of dysfunction, limiting protection to stereotype blockage narrows down the concept of the harm to mere bad thoughts. The remedy is to stop thinking bad thoughts about fat people and carry on as before. The result gives the courts’ implicit blessing to employers’ use of other important correlations between functioning and body size, such as costing more as an employee in benefit payments or simply failing to fit comfortably into uniforms, office furniture, and so on. Blocking stereotypes seems like the most attainable form of protection for groups with a meager or absent account of the political meaning of their identity, but its narrowing and sanctifying effects should give advocates pause.

But what about the possibilities for the critiquing the hegemonic ideology of thinness through disability laws, which are not appearance-blind and which do not simply vacillate between transcendence-to-ability and appearance-to-ability? That kind of critique would require that law play a role in accommodating fat workers as fat people. It would recognize their difference, and instead of just blocking stereotyped thinking about them, it would actually try to

\textsuperscript{55} Cook v. State of Rhode Island Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17 (1993).
re-make the world to fit them. The justification for the change must be rooted in a political
conception of fat Americans as a group whose continued subordination is (to some degree and in
some forms) intolerable. The salient trait must be considered constitutive of personhood in a
way that attracts injustice, and not be merely an unjust distraction or evidence of gluttony. Fat
people are not such a group in the contemporary U.S., however, though perhaps recent policy
shifts toward a disease model for obesity will become part of the way judges regularly describe
fat plaintiffs in the future.

When it was enacted, the ADA looked like it might fulfill advocates’ hopes for both
accommodation of a group (a sufficiently coherent notion to attract the necessary political
consensus) without suppressing individual variation and adaptation among disabled people. As
theorists like Janet Halley have emphasized, civil rights campaigns on behalf of other groups
such as “women” and “gays” have put up with a monolithic account of their groups’ experience
because individual variation within the group often counts as evidence against group
subordination.\footnote{Janet Halley, “‘Like Race’ Arguments,” in Judith Butler, John Guillory, and Kendall Thomas, eds. What’s Left of Theory?: New Work on the Politics of Literary Theory (Routledge, 2000).} I have elsewhere also been critical of the idea of promoting an essentialist
conception of group identity in law as a liberation strategy.\footnote{<cite removed for blind review>.} The obvious fact that disabilities
can be of many kinds would seem to undermine such solidifying tendencies, and law’s
enthusiastic embrace of this individualist, inessentialist picture of disabled people alleviates this
particular worry. If one is opposed to highly scripted identities, then one might wish for more
openly defined legal categories. Should we be pleased that the ADA seems to represent a legal
subject whose identity is inessential, protean, and available for re-creation? Will such a
conception help construct new practices that fat advocates describe, through which they hope to
“revamp fat subjectivity, accord new usefulness to the signifier of fat, and to explore new linkages of affinity and action”? 58

People with disabilities, as we saw, emerge in a legal framework that acknowledges the social production of functional capacity but that nonetheless must work itself out on particular individuals (what I called the managed functional approach to judging the person). The high level of contestation over who fits under ADA coverage begins at the highest levels of its interpretation and carries all the way down to the level of the interactive process (as we saw with Mr. Carter). Because the identity group to be protected was understood as constituted socially and environmentally and not pre-fixed, the ADA adopted a threshold inquiry into membership into the group, then a negotiation of accommodation. These are its two most critical features. The ADA, I argued, regulates the self through its categorical elasticity and the practices of accommodation that it has produced within organizations. While other laws certainly do so as well, the ADA is unique for blending this regulation with a still-unstable identity category. Most commentators have been focused on the ADA’s accommodations as yet-to-be-realized redistributive benefits, but my analysis troubles the linkage between justice and accommodation.

Principally, I find the trouble in the ways that the social practices of the ADA construct a regime of what could be best termed “managerial individualism.” Nikolas Rose points out that in the current period, “regulatory practices seek to govern individuals in a way more tied to their ‘selfhood’ than ever before.” 59 We cannot afford to consider the ways that law promotes certain social practices of identity without also noting the managerialization of law, which sociologists Lauren Edelman, Sally Riggs Fuller, and Iona Mara-Drita define as “the process by which conceptions of law may become progressively infused with managerial values as legal ideas

58 LeBesco, Revolting Bodies, p. 123.
move into managerial and organizational arenas.”

In their study of the transformation of “diversity rhetoric” within organizations, Edelman, Fuller, and Mara-Drita suggest that “the managerialization of law has the potential to undermine legal ideals as managers shift the focus of attention from law to management.”

Recall Margaret Sommers, the professional “accommodations assessment advisor” from the Carter case. Could she represent a contingent of knowledge workers who are currently constructing the social practices by which law intervenes into the meaning of disability? Is she part of the group that Eric Abrahamson calls “management fashion setters—consulting firms, management gurus, business mass-media publications, and business schools” that promote, as he puts it, “the appearance of rationality and progress”?

Her function was literally to manage Romell Carter’s relationship to the legal protections offered under the ADA.

When the context is the legal determination of functionality, emphasizing the socially constructed nature of disability along with individualized assessments of disabled workers touches off powers of management within the organizations that the law regulates. Managed individualism may be the new legal individualism. It may preserve the functionalist account of what people deserve, even in the face of compelling group-based subordination and even where there is some political consensus that redistributions or accommodations are acceptable. Now the Supreme Court is strictly monitoring the boundaries of the protected category “disabled,” and

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61 Ibid. Edelman, Fuller, and Mara-Drita argue that their managerial model explains a shift within organizations away from the occupants and identities of the named civil rights categories to a model that conceives of diversity as equally implicated in features of the person such as “geographic location, organizational rank, dress style, communication style, and attitudes.” Ibid., p. 1632. “Diversity rhetoric may represent a weakened ideal of civil rights,” they note, “but it has the potential to have a broad impact on the daily lives of employees.” Ibid.

individual disabled people find their functioning “socially constructed”—through organizational practices and personal interactions—but without a sustained critique or shared agreement about the power dynamics of the workplace that delineate the functional from the dysfunctional. I intimated at the start of this essay that medicalization often secures sympathy from the dominant culture. Might we secure medicalization for fat citizens, but without a critique of the politics of disgust? Tobin Siebers’s analysis of disability and the culture wars reminds us that oppression “often takes the form of an aesthetic judgment, though a warped one, about [minority groups’] bodies and the emotions elicited by them.” One could call to mind our current panic over the “obesity epidemic” as Siebers points out that “[t]heir actions are called sick, their appearance judged obscene or disgusting, their minds depraved, their influence likened to a cancer attacking the healthy body of society.”

This situation seems like the worst of the legal, organizational, and socio-medical worlds. Managed functional approaches to personhood in the law are uniquely susceptible to takeover within powerful institutions. We ought to be more sophisticated about the unique ways that identity-based claims take root in the law, and turn our attention towards these new social practices of individualism. The ADA was supposed to mean a lot of things initially: perhaps that disabled people were a “discrete and insular minority,” or perhaps that disability is a socially constructed idea that can be unmade through sympathetic accommodations. People with disabilities certainly did not turn out to be legally “discrete” in the sense of “readily identifiable, marked, set apart.” Who is disabled as a matter of law is anything but clear. Nor does insularity play any part in legally defining disability. The boundaries of fatness will no doubt become equally mysterious, and, where law gives up clear standards, it must have process instead. What

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disability laws actually mean for disabled identity can be understood through the social practices they establish. The answer to functional personhood has been managerial individualism, and we must anticipate that fat identity will likely be drawn into legal coverage on these terms.