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Debating Disability Disclosure in Legal Education

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DEBATING DISABILITY DISCLOSURE IN LEGAL EDUCATION

*Jasmine E. Harris**

69 (4) J. LEGAL EDUC. __ (forthcoming 2022).

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INTRODUCTION

More than three decades after President George H.W. Bush signed the Americans with Disabilities Act into law,¹ disability identity remains contested and continues to be conflated with medical diagnoses by both law

* Professor of Law, University of Pennsylvania Carey School of Law. Many thanks to Karen Tani and Lilith Siegel who have created a much-needed space for new narratives on disability and identity in legal education through this special symposium issue of the Journal of Legal Education. A note of thanks to Ruth Colker, Robert Dinerstein, Julia Simon-Kerr, and the faculty at the University of Connecticut School of Law for their thoughtful engagement with this project.

¹ The ADA celebrated its thirty-first anniversary on July 26, 2021.

and society.² Dichotomies endure—disabled/nondisabled; physical/mental disability; visible/invisible; disclosure/nondisclosure; individual/institutional—and, as a result, undermine the exercise of rights and claims to disability identity.³ One particularly problematic binary at the core of the others is the line drawn between ‘visible’ and ‘invisible disabilities.’⁴

² Sometimes disability rights themselves are intentionally framed using medical diagnoses as a way to secure public benefits, compensate for the absence of a strong public safety net, or—as some legal scholars have argued—to promote solidarity. *See, e.g.*, Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165 (2020); Rabia Belt & Doron Dorfman, Response, *Reweighting Medical Civil Rights*, 72 STAN. L. REV. ONLINE (2020); Allison K. Hoffman, Response, *How Medicalization of Civil Rights Could Disappoint*, 72 STAN. L. REV. ONLINE (2020); Craig Konnoth, Response, *Medical Civil Rights as a Site of Activism: A Reply to Critics*, 73 STAN. L. REV. ONLINE 104 (2020) (explaining that “while the legal scholarship has emphasized the harms of using medical discourse, it has not explicitly considered its benefits across social movements”).

³ Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895 (2019); Jasmine E. Harris, *Taking Disability Public*, 169 U. PENN. L. REV. (forthcoming 2021) and *The Privacy Problem in Disability Antidiscrimination Law*, in DISABILITY, HEALTH, LAW, AND BIOETHICS 159 (Glenn Cohen et al. eds., 2020); Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 903-08 (2008); Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U. CAL. IRVINE L. REV. 557 (2020); Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329 (2021); Katie R. Eyer, *Claiming Disability*, B. U. L. REV. (forthcoming 2021).

⁴ I use ‘visible’ and ‘invisible’ to advance the central argument in this article in this paragraph. However, to avoid perpetuating the use of these terms, my analysis describes the divide as ‘apparent’ and ‘less apparent’ disabilities. The act of “seeing”—what we notice/identify/mark—is not agnostic. Rather, what we “see” and value tend to be those markers that track accepted social norms while those we “see” and reject tend to be those markers that deviate from those accepted social norms. *See* Pam Belluck, *Yes, Looks Do Matter*, N.Y. TIMES (April 24, 2009), <https://www.nytimes.com/2009/04/26/fashion/26looks.html> (“But many social scientists and others who study the science of stereotyping say there are reasons we quickly size people up based on how they look. Snap judgments about people are crucial to the way we function, they say — even when those judgments are very wrong.”); Hanoch Livneh, *On the Origins of Negative Attitudes Towards People With Disabilities*, 43 REHABILITATION LITERATURE 338, 341 (1982) (describing aversion to disabilities as partially rooted in a threat to one’s own body image, where “seeing a person with a physical disability creates a feeling of discomfort because of the incongruence between an expected ‘normal’ body and the actual perceived reality. The viewer’s own, unconscious and somatic, body image may, therefore, be threatened due to the presence of the disabled individual”); Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1051 (2009) (discussing discrimination

This distinction, however, is much less pronounced in society than it seems. It is much more a product of existing information deficits about disability that limit public perceptions to those with a set of normative (often visible) physical and behavioral markers of disability, what I have previously dubbed “the aesthetics of disability.”⁵

In fact, while disability continues to be associated with the quintessential symbol of the wheelchair, the majority of people with disabilities in the United States have less apparent disabilities⁶ and do not fit the stereotypical emblems of disability—assistive mobility devices such as white canes and wheelchairs.⁷ For these individuals, the question of publicly claiming disability as part of their identity is ever-present.⁸ That is, unlike those who manifest the *aesthetics of disability* and forfeit the decision to disclose or not,⁹ those without apparent markers have a choice to publicly

based on appearance, often rooted in stereotypes, such that overweight people are lazy).

Thus, less apparent disabilities, while they vary, share the central common characteristic of having attributes *not seen* by others that convey an identity that is devalued or disfavored in certain social settings – e.g., some psychosocial or mental disabilities like schizophrenia, bi-polar disorder, intellectual or developmental disabilities. *See also* James Summers et al., *A Typology of Stigma Within Organizations: Access and Treatment Effects*, 39 J. ORG. BEHAV. 853, 854 (2018) (noting that “the probability of stigmatization is greater when a particular characteristic is visible and is perceived as being controllable”).

⁵ Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 897 (2019). *See also* Jasmine E. Harris, *Taking Disability Public*, 169 U. Penn. L. Rev. (forthcoming 2021) (manuscript at 2 n.3) (on file with author). *See also infra* Pt. II.B.

⁶ LAWYERS, LEAD ON: LAWYERS WITH DISABILITIES SHARE THEIR INSIGHTS 43 (Rebecca S. Williford et al. eds., 2011) (noting that individuals with [less visible/apparent] disabilities constitute the majority of individuals with disabilities, so disclosing these disabilities”).

⁷ Harris, *Taking Disability Public*, *supra* note 5, at 42 and Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U. CAL. IRVINE L. REV. 557 (2020).

⁸ Note that references to disclosure mean a “public” disclosure of disability identity (micro or macro) but not disclosure for the limited purpose of securing a reasonable accommodation alone.

⁹ This is true regardless of whether the disability actually impairs the individual’s life functioning. Individuals with facial disfigurements, for example, may not experience any physical limitations as result of their disability but nevertheless experience discrimination because of their aesthetic non-normativity. It is precisely for this reason that Congress added the third prong to the disability definition under the Americans with Disabilities Act –

identify as a disabled person, pass as nondisabled (hiding disability/actively performing nondisabled appearances and behaviors), or “cover” (downplaying disability to blend into mainstream society).¹⁰

A healthy literature exists on the disclosure of a non-apparent disfavored trait in law and sexuality (LGBTQ identity) and immigration law (immigration status),¹¹ but no similar deep debates on disclosure¹² exist with respect to disability identity in legal scholarship.¹³ My prior work seeks to

“regarded as” disabled—to recognize the social construction of disability and offer individuals a legal remedy for the harm experienced.

¹⁰ Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2001).

¹¹ See, e.g., Rose Cuison-Villazor, *The Undocumented Closet*, 92 NORTH CAROLINA L. REV. 2 (2013) (expanding on scholarship regarding the “closet” and oppression of LGBTQ persons and its interaction with undocumented immigrants); EVE K. SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 68 (1990) (describing the struggle to decide between secrecy and disclosure of sexual orientation when faced with new groups or individuals); Esther Yu-Hsi Lee, *Each Day, Over 2,600 Young Undocumented Immigrants Come Out of the Shadows*, THINK PROGRESS (June 17, 2013, 1:43 PM), <http://thinkprogress.org/immigration/2013/06/17/2167591/daca-recipients-daily/> (discussing the coming out of immigrants); Michael A. Olivas, Op-Ed., *Advice to Immigrants: Don’t Get on the Undocubus*, N.Y. TIMES (May. 13, 2015), <https://www.nytimes.com/roomfordebate/2012/08/01/is-getting-on-the-undocubus-a-good-idea/advice-to-immigrants-dont-get-on-the-undocubus> (recommending against undocumented immigrants outing themselves).

¹² But see Carrie Griffin Basas, *The New Boys: Women with Disabilities and the Legal Profession*, 25 BERKELEY J. GENDER L. & JUST. 32, 33 (2010); Elizabeth Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009).

¹³ Disability scholars have started to ask these questions in the past year or so. See, e.g., Katie R. Eyer, *Claiming Disability*, B. U. L. REV. (forthcoming 2021) (suggesting that an unstudied lack of “claiming” disability has led to the duration of biases against people with disabilities); Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. (forthcoming 2021) and *The Aesthetics of Disability*, 119 COLUM. L. REV. 895 (2019) (discussing the lack of scholarship and disability law addressing the aesthetics of disability and identity); Nicole Buonocore Porter, *What Disability Means to Me: When the Personal and Professional Collide*, 5 HLRE: OFF REC. 119, 128 (2019) (disclosing that she does not “feel” like a person with a disability, though she has one). But see Emens, *Integrating Accommodation*, *supra* note 3. Also of note, disability studies scholars in other disciplines have a well-developed literature on the issue of disability identity and disclosure; the problem is that this wealth of knowledge has only scratched the surface in legal scholarship. See, e.g., SIMI LINTON, *CLAIMING DISABILITY, KNOWLEDGE AND IDENTITY* (1998); Adrienne Asche, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62

frame and contribute to these discussions in other areas of law and society, including employment, public services and programs, places of public accommodations, intimate relationships, and family law.¹⁴

This Article builds on my broader treatment of this topic and argues that existing debates about disability¹⁵ identity—specifically in legal education—miss three critical points of nuance.¹⁶ First, discussions about the stakes of disclosure of disability identity focus almost entirely on individual rights and privacy with little attention to the relationship between disability disclosure and continued efforts to change social norms of disability or the collective benefits of disclosure.¹⁷ Second, conversations about disability in legal education presume that both law students and professors are

OHIO STATE L.J. 391 (2001); Rosemarie Garland Thomson, *Integrating Disability, Transforming Feminist Theory*, 14 NWSA J. 1 (2002); TOBIN SEIBERS, *DISABILITY THEORY* (2008); Lennard Davis, *The End of Identity Politics: On Disability as an Unstable Category*, in *THE DISABILITY STUDY READER* 263 (4th ed. 2013); ELLEN SAMUELS, *FANTASIES OF IDENTIFICATION, DISABILITY, GENDER, RACE* (2014).

¹⁴ Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. Online (2020); Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. REV. 482 (2018); Jasmine E. Harris, *Legal Capacity at a Crossroad: Mental Disability and Family Law*, 57 FAM. CT. R. 14 (2019); Jasmine E. Harris, *Cultural Collisions and the Limits of the Affordable Care Act*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 387 (2014); Jasmine E. Harris, *Taking Disability Public*, U. PA. L. REV. (forthcoming 2021).

¹⁵ For purposes of this article, “disability” assumes a broader definition than federal statutes focused on the disability substantially limiting one or more major life activities – see, e.g., Americans with Disabilities Act, 42 U.S.C. § 12102 (“The term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual....”); Rehabilitation Act of 1973, 29 U.S.C. § 705(9) (“The term ‘disability’ means... a physical or mental impairment that constitutes or results in a substantial impediment to employment....”); Fair Housing Act, 42 U.S.C. § 3602(h)(1) (“‘Handicap’ means, with respect to a person – (1) a physical or mental impairment which substantially limits one or more of such person’s major life activities....”); Social Security Act, 42 U.S.C. § 416(i)(1) ([T]he term ‘disability’ means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months, or (B) blindness....”).

¹⁶ This special edition of the Journal of Legal Education fills existing gaps in the literature through theoretical and qualitative contributions that offer first-hand accounts of the challenges in legal education faced by individuals with disabilities and, apropos to this article, those with less apparent disabilities, specifically.

¹⁷ Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. (forthcoming 2021).

nondisabled.¹⁸ This baseline shapes the design (and accessibility) of legal education. The pervasiveness of disability in the national population (1 in 5 adults)¹⁹ relative to the poor representation of disability among law students and lawyers should raise red flags about barriers to accessing legal education, and, consequently, the legal profession.²⁰ The National Association for Legal Career Professionals (NALP) 2019 Report on Diversity in Law Firms revealed that fewer than 0.46% of all law firm partners and 0.59% of law firm associates surveyed identified as a person with a disability.²¹ Even if that number is underinclusive because it relies on self-disclosure, the percentage of people with disabilities in law firms is abysmal and disproportionate to the incidence of disability in society. Third, disclosure is not an on/off switch, but rather a complex and continuing set of decisions complicated by existing social norms, stigma, and, at times, the intersections of multiple marginalized identities. Any debate about the value of privacy and disclosure to disability rights must address these assumptions.

This Article unfolds in three parts. Part I maps representative arguments in the disclosure debate. Part II advances the central argument in the article, that the current debate misses three key considerations. Part III then zooms out to reflect on the insights in Part II and the normative

¹⁸ There is no single, reliable data source for the number of law students or faculty with disabilities. This information is often not tracked, or when it is, relies on self-identification. See Pt. II for a discussion on why self-identification in legal education is problematic and under-inclusive. People may claim disability identity regardless of whether they formally meet the federal statutory definition. There are some instances when an individual's ability to meet a legal definition matters in this article's discussion but for the most part, I explore a self-conception of disability identity where the only requisite is whether, when, and where people voluntarily self-identify.

¹⁹ MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, CURRENT POPULATION REPORTS, P70-131 4 (2012).

²⁰ The incidence of disability in society also supports the need for better data collection and dissemination on disability in legal education. Brandon Lowery, *Will Law Schools Start Counting 'Generation ADA'?* LAW360° (Aug. 16, 2018), <https://www.law360.com/articles/1074290> (“As people with disabilities face barriers to inclusion in the legal industry, disabled law students remain a rarity — but no one is quite sure just how rare they are.”).

²¹ NALP REPORT ON DIVERSITY IN U.S. LAW FIRMS 30 (2019), https://www.nalp.org/uploads/2019_DiversityReport.pdf

implications for supporting meaningful inclusion in legal education and the legal profession.

Negotiating disability identity in legal education matters can have short- and long-term consequences. Decisions to disclose shape the experiences students with *and* without disabilities have in law school, their chances of graduating, job prospects, peer acceptance, and wellbeing in the profession. These decisions affect who gets handpicked by law professors to mold and shape into future judges, political leaders, and, importantly, law faculty.²² Neither this article nor my prior work fails to recognize the potential risks and costs facing students and faculty with less apparent disabilities in legal education. This Article adopts an agnostic position in this debate relative to my other work. The goal here is not to persuade the reader that privacy or disclosure is superior to its alternatives in legal education; rather, the goal is to surface and contest the failure to account for these key elements in the discussion. Finally, this project is also epistemological in that it helps to capture recent efforts to address disability rights in legal education and the profession.

I. THE CURRENT DISCLOSURE DEBATE

The arguments discussed in this Part are illustrative and not exhaustive. Yet they provide an overview of popular justifications advanced by lawyers, law students, and law faculty (collectively, “legal actors”) for disclosure or non-disclosure of disability identity.²³

²² Although the focus of this article is on students and faculty with disabilities, questions related to staff disclosure of disability matters as well. What kind of culture or environment has the institution created? Are we prioritizing the needs of students and faculty above staff? This leads to selective inclusion or hierarchies of inclusion.

²³ The arguments in this part track many of the arguments advanced in other contexts beyond legal education. See Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1 (forthcoming 2021).

A. Relevant Disability Law Framework

To help frame this discussion, I share a few opening notes on relevant disability law operating in the background of these debates.²⁴ First, the principal statutory authorities governing reasonable accommodations/modifications in the context of higher education²⁵ are the Americans with Disabilities Act (ADA) and, in some cases, Section 504 of the Rehabilitation Act (Rehab Act).²⁶ Title II of the ADA prohibits disability discrimination by public universities while Title III of the ADA prohibits discrimination by private universities.²⁷ Section 504 of the Rehab Act applies to both public and private universities receiving federal funds.²⁸ Both the ADA and Rehab Act treat failure to provide a reasonable accommodation to an “otherwise qualified individual with a disability”²⁹ as discrimination. Second, with respect to disability discrimination experienced by law faculty

²⁴ I focus on the application of federal laws but state equivalents prohibiting disability discrimination in the different domains would also apply. See, e.g., California Fair Employment and Housing Act, Cal. Gov’t Code, § 12900.

²⁵ I use the term “reasonable accommodation” throughout this Article to refer to a physical or programmatic modification or provision of an auxiliary aid to allow a qualified person to access a public program or service (Title II of the ADA) or a place of public accommodation (Title III of the ADA). Technically, “reasonable accommodation” is a term of art used in conjunction with Title I of the Americans with Disabilities Act governing employment while “reasonable modification” refers to those changes or adaptations to access programs (such as curricula in public universities) or places of public accommodations (such as private universities).

²⁶ Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2018); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, (codified at 42 U.S.C. §§ 12101-12102 (2018)).

²⁷ Title III does not regulate religious universities and colleges.

²⁸ This provision has a wide reach as most private universities also receive federal dollars and, therefore, are subject to the prohibitions enumerated in Section 504 of the Rehabilitation Act.

²⁹ Although the 2008 Amendments to the Americans with Disabilities Act sought to correct courts’ narrow interpretation of the threshold standing question of who is a person with a disability under the statute, there is an open empirical question as to whether courts have internalized the true breadth of the definition of covered individuals post-2008. As I argue elsewhere, the shift requires recognition of the breadth of the ADA and the reality of an expansive continuum of disability in society; in other words, such a move requires a shift in social norms of disability deservedness, often permeated by how well a person manifests existing aesthetics associated with disability. See Harris, *Aesthetics of Disability*, *supra* note 12, at 950-51.

or staff, the prohibitions on employment discrimination in the ADA and Rehab Act apply as would the Genetic Information Nondisclosure Act.³⁰

Third, there is no single body of law that governs privacy and disclosure in the context of disability. One of the arguments advanced in this article is that existing individualistic legal frameworks that reduce privacy to narrow questions of informed consent, for instance, are incomplete.³¹ These reductionist views fail to capture the complexity of the stakes for the disability antidiscrimination project overall.³² Possible legal remedies for violations of unauthorized disclosure of disability identity can be found in disability antidiscrimination laws such as the Americans with Disabilities Act's nondisclosure provisions, tort law, and privacy law.³³

B. Pro-Privacy

Turning to the debate itself, consider the following arguments proffered by some legal actors in support of keeping one's disability identity private.³⁴ Although questions of disclosure are certainly context-specific, many of the arguments presented in Part I B. and C. are more broadly applicable.

³⁰ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881.

³¹ I advance more extensive descriptive and normative claims in a forthcoming article, *see supra* note 17.

³² *Id.*

³³ A deeper analysis of these legal remedies is beyond the scope of this article. *See id.*

³⁴ *See, e.g.,* Ignacio Cofone, *Antidiscriminatory Privacy*, 72 SMU L. REV. 139, 146-47 (2019) (discussing "preventive information rules" as a strong form of antidiscrimination law); Jessica L. Roberts, *Protecting Privacy to Prevent Discrimination*, 56 WM. & MARY L. REV. 2097, 2146 (2014) (arguing that prohibitions on requests for information related to race/ethnicity/national origin, religion, age, sex, genetics, or disability "could bypass discrimination in at least some instances."); and Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 14-16 (2000) (advancing a prophylactic approach that limits the information about identity in circulation). This Part simply describes the current arguments without offering a normative evaluation of them. For such evaluation challenging the assumption that barriers to information flow best serve the more comprehensive antidiscrimination normative mission, *see* Jasmine E. Harris, *Taking Disability Public*, U. PA. L. REV. (forthcoming 2021).

1. Privacy may be the best form of antidiscrimination law in law schools and legal practice.

Revealing a disability is a personal and often difficult decision. I'm very disappointed that...I can't tell you to be out, loud, and proud about your disability. As a [disabled] lawyer doing anti-discrimination work, I want to write an inspirational and encouraging letter [to law students]. I want to assure you that we have the same opportunities for successful careers as nondisabled attorneys. I'd love to say that if you disclose your disability at work, you will face no barriers to your career opportunities, growth, and success. I can't do any of that, and it breaks my heart.³⁵

The advice above from disability rights lawyer Jodi Hanna cautions law students with disabilities that disclosure is not without risk. The ongoing movement to disabuse society of its association of disability with deficit continues. In this reality, disabled law students face an ever-present question of whether to disclose a less apparent disability. Conventional wisdom cautions against disclosure, particularly in the employment setting. Consider the following question posed to New York Magazine's advice columnist.³⁶ It offers a helpful snapshot of common concerns regarding disclosure of disability identity—e.g., the risks and benefits of disclosure, as well as timing—that also apply in the context of legal education and law practice:

³⁵ LAWYERS, LEAD ON: LAWYERS WITH DISABILITIES SHARE THEIR INSIGHTS, *supra* note 6, at 50.

³⁶ Alicia M. Santuzzi et al., *Identity Management Strategies for Workers with Concealable Disabilities: Antecedents and Consequences*, 75 J. SOC. ISSUES 847 (2019) (describing negative experiences, rooted in ableism, that those who disclose a disability face in the workplace); Jessica L. Roberts, *Protecting Privacy to Prevent Discrimination*, 56 WILLIAM & MARY L. REV. 2097 (2015) (information not disclosed cannot be used to discriminate).

Dear Boss,

*Does it ever make sense to let an employer know that you suffer from depression? I take an antidepressant daily. I'm not seeing a therapist. I would call it more of a functional depression, where I can live with it, but at times it can feel worse and I have to force myself to work. Does that make my depression something I should want to disclose to an employer? Would an employer think less of you, or perhaps not hire you at all, because you suffer from depression, even if it is protected by the law? When you're currently employed, does it make sense to disclose after the fact? Would informing an employer that you have depression prevent them from firing you if you were finding it difficult to focus or concentrate? I have not disclosed this to my employer and do not include that information when I apply for new jobs. **I don't want the stigma of a disease that no one can see attached to me.** ...³⁷*

The columnist's response echoes some of the concerns raised by Jodi Hanna above:

As a general rule, I'd only disclose a mental-health condition (or any health condition, for that matter) at work when you need to ask for a specific accommodation connected with it.

One day I hope we live in a world where you can disclose a mental-health struggle without stigma. Right now, though, it's safer to proceed with caution, at least until you're certain of how your manager will respond. There's still too much risk of your employer discriminating against you in some way.³⁸

³⁷ Alison Green, *The Cut*: "Should I Disclose My Depression to My Employer?" NEW YORK MAGAZINE (Jan. 5, 2021) (emphasis in original), <https://www.thecut.com/article/should-i-disclose-my-depression-to-my-employer.html>

³⁸ *Id.* In fairness, the author does go on to say that there are other interests such as individual pride but even these benefits are framed in terms of the individual.

The argument, therefore, is that, while disclosure may be preferable, discrimination based on disability continues to generate uncertainty and negative externalities that tilt the scales in favor of non-disclosure.

Some antidiscrimination scholars, upon weighing the costs and benefits of disclosure, call for a preemptive approach that removes the decisional burden from the individual and advances privacy as a prophylaxis.³⁹ Put differently, privacy rules, according to these scholars, may best serve antidiscrimination interests because people cannot discriminate if the information is never disclosed in the first place. Similarly, the difficulty of controlling information in this age of social media, big data collection and dissemination gets harder each day.⁴⁰ An initial disclosure of one's identity may produce unauthorized secondary and tertiary disclosures with no meaningful mechanism for clawing back this information or remedying individual harms.⁴¹ Privacy, according to this position, is the strongest (and most risk-averse) form of antidiscrimination protection available.

2. Law school is about “performing” a particular type of intelligence and public admission of disability can undermine this endeavor precisely because of existing perceptions of disability as a deficit.⁴²

Many nondisabled people treat disability identity as distinct from other identities such as race or gender because they understand functional

³⁹ See, e.g., Jessica L. Roberts, *Protecting Privacy to Prevent Discrimination*, 56 WILLIAM & MARY L. REV. 2097 (2015).

⁴⁰ Neil M. Richards, *The Dangers of Surveillance*, HARV. L. REV. 1934 (2013) (discussing the pervasiveness of surveillance, among other insights and recommendations).

⁴¹ Even in the context of potential tort actions for misuse of the information—e.g., defamation, libel, professional malpractice, it is not clear that a plaintiff has a cognizable claim or easy path to recovery.

⁴² Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities out of the Stigma Straightjacket*, 79 UMKC L. REV. 123, 124 (2010) (“Lawyers stigmatize and often decline to hire other lawyers unless they have a clean mental health history—free of disabilities, disorders, and illnesses...At times, the bar only offers conditional admission to law students with current or past mental health issues.”).

differences as individual deficits rather than societal choices about institutional designs. One view, often referred to as the “medical model” of disability, labels a wheelchair user as disabled because of a concrete, physiological condition that requires the use of a wheelchair to access the world. This perception of deficiency can become the dominant lens to qualitatively judge the individual’s competence, choices, and behaviors.⁴³ In this way, disability becomes a “master” mark, a stigma, synonymous with non-normativity.⁴⁴ Another view, often referred to as the “social model” of disability, situates the deficit in societal choices; for example, the choice to design a physical world around stairs and raised sidewalks and not the person’s inability to walk creates inaccessibility and exclusion a wheelchair user.

Associations of disability with weakness are particularly problematic in legal education and the practice of law: “In a profession that may tend toward exposing weaknesses and celebrating the superhuman, many lawyers with disabilities may feel isolated, alienated, or even hesitant to come out about their disabilities.”⁴⁵ Disclosure of mental or psychosocial disabilities—such as depression or anxiety—in higher education also may be more difficult than other types of disabilities—such as using a wheelchair—because of the nature of the setting. Similarly, the perception that the practice of law requires one to regularly work long grueling hours on endlessly time-sensitive matters generates cultural (and, by extension, legal) standards that may create a false tension between the legal profession and people with chronic illnesses, for example. However, this image of legal practice assumes that (1) this is an accurate depiction of legal practice, (2) this is the only way to practice law, and (3) this is the best way to practice law. Consider the infamous “all-

⁴³ A common bias against people with disabilities is the stereotype that people with disabilities are less capable of performing than nondisabled people. Katie R. Eyer, *Claiming Disability*, B. U. L. REV. (forthcoming 2021) (citing Heidi L. Janz, *Ableism: The Undiagnosed Malady Afflicting Medicine*, 191 CMAJ E478 (2019)).

⁴⁴ See generally IRVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963).

⁴⁵ LAWYERS, LEAD ON: LAWYERS WITH DISABILITIES SHARE THEIR INSIGHTS, *supra* note 33, at 17.

nighter” made popular in college, famous in law school, and legendary in legal practice. Instead of questioning the time management priorities of students and lawyers who spend the night working to meet a deadline, we celebrate them and let them claim these as badges of honor and intellectual commitment, rather than disgrace.

This norm, therefore, may nudge law students with disabilities to prefer non-disclosure to avoid “litigating” the legitimacy of their disability identity with faculty, administrators, and peers who may believe those with less apparent disabilities are “faking” to obtain an unfair advantage. The process of requesting reasonable accommodations in law school should dispel any notion of gaming. Students embark on an incredibly time-consuming journey—from securing medical documentation, completing paperwork, engaging in self-advocacy about the specific accommodation the institution will provide (even though the individual with a disability is best positioned to identify what works from experience) and, assuming approval, ensuring that professors comply with the approved accommodations.⁴⁶ In this way, the reasonable accommodations process can trigger (and retrigger, for repeat players) trauma associated with what Professor Bradley Areheart has called “the Goldilocks dilemma.” Like the objects appropriated by the golden-haired protagonist in the classic children’s fairytale, the law on reasonable accommodations demands that law students be “just right”—a delicate balance of “disabled enough” but not too disabled to defeat the qualifications of a law student.⁴⁷

⁴⁶ See, e.g., Emens, *supra* note 3, at 2341-54 (describing the invisibility of certain costs of being disabled such as the need to document one’s disability to access reasonable accommodations or public benefits and arguing that current doctrinal frameworks do not properly account for these costs in determining “reasonableness”); Katherine MacFarlane, *Disability Without Documentation*, ___ *FORDHAM L. REV.* ___ 1, 26-34 (forthcoming) (challenging the “requirement” of medical documentation for reasonable accommodations in employment); see generally Deirdre M. Smith, *Who Says You’re Disabled? The Role of Medical Evidence in the ADA Definition of Disability*, 82 *TUL. L. REV.* 1 (2007) (examining the use of medical evidence in disability discrimination cases).

⁴⁷ Bradley A. Areheart, *When Disability Isn’t “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 *INDIANA L. J.* 181, 181 (2008).

This is particularly true in the context of less apparent disabilities. Consider what Professor Doron Dorfman calls “fear of the disability con”—a default skepticism about disability (and people’s legitimate claims to it) that underwrites disability law.⁴⁸ Stories like the recent “Operation Varsity Blues”—where Hollywood celebrities manipulated disability accommodations, among other processes, to gain unfair advantages for their children in the college admissions process—only fuel public fears of fraud, particularly in education.⁴⁹

According to researchers, withholding information about disability identity itself “is a *significant* factor in post-secondary degree completion.”⁵⁰ Why? There is a general lack of understanding in society about what it means to have a disability, something continuously reinforced by the absence of meaningful representation in educational and socio-political leadership, film,

⁴⁸ Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 L. & SOC’Y REV. 1051, 1052 (2019).

⁴⁹ Eliza Shapiro and Dana Goldstein, *Is the College Cheating Scandal the ‘Final Straw’ for Standardized Tests?* N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/us/sat-act-cheating-college-admissions.html> (describing the play book for cheating on college admissions exams, in part, by manipulating disability designations: “proctors were bribed to fake scores, test takers were hired to impersonate students and at least one family was encouraged to falsely claim their son had a disability”). See also MARK KELMAN AND GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 161-94 (1997) (exploring the moral question of accommodations on law school exams and relevant considerations).

⁵⁰ See, e.g., Amy Gaylard, *A Flawed System of Accessibility: A Mixed-Methods Study of the Shortcomings of Disability Accommodations for Female Undergraduate Students with Autism Spectrum Disorder, Level One*, 4 THE YOUNG RESEARCHER 94, 96 (2020) (emphasis added). For example, the enrollment rate of young adults with Autism Spectrum Disorder (ASD) to four-year universities is 17% and the rate of successfully obtaining a degree from any post-secondary institution for people with ASD is 39% (compared to 52% of neurotypicals). *Id.* Neurotypicality is often used as a foil to neurodivergence. Gillian Gilles, *10 Everyday Ways We Shame Neurodivergence*, THE BODY IS NOT AN APOLOGY MAGAZINE (Oct. 1, 2018), <https://thebodyisnotanapology.com/magazine/10-everyday-ways-in-which-we-shame-neurodivergence/> (“Neurotypical a way of describing one way of functioning amongst many variations of being, but in our society, it is expected that everyone must fit within this norm. People who fit within the norm are described as ‘neurotypical,’ ‘neurotypical functioning’ or just simply labeled as ‘normal.’...People who deviate from the norms of neurotypicalness are shamed, discriminated against or othered. These people and experiences are considered Neurodivergent.”).

television, and pop culture. This, in turn, can lead to “the spread effect” or assuming the presence of one disability transfers to other parts of the body and act as a master identity.⁵¹ When nondisabled people, for instance, raise their voices in conversation with a wheelchair user, they mistakenly assume that deafness or low hearing readily accompanies wheelchair use, i.e., impairment in one area means impairment more globally.

Similarly, those students who may openly identify as a student with a disability, may subject themselves to constant public scrutiny, surveillance, and judgment. In some cases, if the disabled person does not “perform” the stereotypical markers associated with their disability, the disabled person may face negative consequences of varying degrees of severity and significance.⁵² Those with less apparent (and perhaps less “severe”) disabilities, not only may not want to be on display, but they also may not consider themselves “disabled enough” to deserve or successfully secure reasonable accommodations. As a result, these students may choose not to disclose and, importantly, to forgo their rights to reasonable accommodations, even if they need them.

A related argument is that the progenitors of legal institutions were white, able-bodied, neurotypical men who did not design these institutions to serve disabled people but, rather, others like them.⁵³ Consider how the default

⁵¹ Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 208 (2012); see also Goffman, *supra* note 44.

⁵² Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 L. & SOC’Y REV. (2019). Law schools (and other legal institutions) may also practice what Professor Nancy Leong has called “identity capitalism,” where schools can derive value (social or economic) from particular identity categories such as race, gender, or class. Nancy Leong, *Identity Entrepreneurs*, 104 CAL. L. REV. 1333, 1337 (2016). If an institution operates in this way, individuals may become “identity entrepreneurs” who claim disability identity for particular gain. *Id.* Query whether such an institutional move, that is, valuation of disability identity, operates differently for disability identity from how it operates in the context of race, gender or class.

⁵³ Sandra R. Farmer & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 271, 288 (1999). See also Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. L. ED. 562, 566 (2015) (discussing the disproportionate negative effects of the Socratic method on female law students). See also William S. Blatt, *Teaching Emotional Intelligence*

construction of legal education is inherently ableist, from the LSAT⁵⁴ (the gateway to admission) through the bar examination and moral character evaluation (collectively, the gateway to the profession). Other features of legal education that raise equity concerns include (1) the physical designs of lecture halls with only a few designated areas for those with assistive mobility devices (segregating these students in one area of the classroom), (2) the use of the Socratic method⁵⁵ (exacerbating existing mental or psychosocial disabilities; privileging those without learning or speech disabilities as well as those who communicate well orally); and, most recently, (3) the proliferation of laptop bans which can negatively and disproportionately affect students with disabilities, for example, by “outing” them if they receive permission to use a laptop in class as an accommodation.⁵⁶

to Law Students: Three Keys to Mastery, 15 NEV. L. J. 464, 465 (2015) (“Much of what is missing from legal education falls within the domain of “emotional intelligence,” an aptitude that assumes increasing importance over one’s career.”); Karen L. Degenhart, *Emotional Intelligence Competencies of Highly Effective Law Firm Business Leaders*, Dissertation, Capella University (Feb. 2020) (finding that law firm leaders’ emotional intelligence competencies has significant positive benefits to law firms including: “buy-in, trust, client relationships, firm culture, role modeling, firm stability, firm business development, the facilitation of change, knowledge sharing, and maintaining a competitive edge”); Marjorie Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL., PUB. POL’Y, & L. 1173 (1999) (arguing that lawyering requires emotional intelligence but legal education places less value on this skill set). Note that discussions of emotional intelligence may not be inclusive and focus on neurotypical students.

⁵⁴ See, e.g., Ruth Colker, *Test Validity: Faster is Not Necessarily Better*, 49 SETON HALL L. REV. 679, 680 (2019) (arguing that we need a new default rule for standardized testing that does not adversely affect individuals with disabilities unless test developers can validate the use of time limits and calling for a universal design approach to tests such as the LSAT).

⁵⁵ Meredith George & Wendy Newby, *Inclusive Instruction: Blurring Diversity and Disability in Law School Classrooms Through Universal Design*, 69 U. PITT. L. REV. 475 (2008) (discussing key issues for law schools in determining questions of reasonable accommodations, particularly for those students with less apparent disabilities).

⁵⁶ See, e.g., Katharine Silver Kelly, *Banning Laptops Is Not the Solution to Better Learning*, ABA FOR LAW STUDENTS, STUDENT BLOG (Dec. 13, 2017), <https://abaforlawstudents.com/2017/12/13/banning-laptops-not-the-solution-better-learning/> (“Banning laptops is about professor insecurity, not student learning. ... Instead of thinking about pedagogy and the effectiveness of the teaching method, it shifts the blame onto the student.”).

3. The burden of educating nondisabled people about disability should not rest on the shoulders of already taxed, marginalized individuals.⁵⁷

“Coming out” as a person with a disability should not be about educating nondisabled people. In other words, we should not expect that individuals with disabilities should carry the burden of solving existing information deficits about disability. This is especially true considering the genuine risks associated with disclosure (and secondary disclosure) such as perceptions by peers and professors as being less capable or experiencing skepticism about the legitimacy of their claim to reasonable accommodations.⁵⁸

Consider how integration becomes an opportunity for greater education of those ingroup members who may lack information about outgroup identity. Some advocates framed the benefits of racially integrated schools (and the harm of segregation) in terms of the need to educate society about “the other.”⁵⁹ The Supreme Court in *Regents of the University of California v. Bakke* reasoned that a “diverse” student “may bring . . . experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service

⁵⁷ Priya Lalvani & Alicia A. Broderick, *Institutionalized Ableism and the Misguided “Disability Awareness Day”*: *Transformative Pedagogies for Teacher Education*, 46 EQUITY & EXCELLENCE IN EDUC. 468 (2013) (recommending ways for educators to engage in teaching students about disability and social justice education).

⁵⁸ See, e.g., LAWYERS, LEAD ON: LAWYERS WITH DISABILITIES SHARE THEIR INSIGHTS, *supra* note 47, at 17. (“Being “out” about disability can come with its risks, including employers’ lowered expectations, professional stagnation, coworker and supervisor stereotyping, positions of tokenism, and the creation of professional “ghettoes” of lawyers with disabilities.”).

⁵⁹ Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 172 [add end pg] (2003) (describing the shift from Brown to Bakke and Grutter of discussing integration in terms of benefits to Black students to discussing the benefits of “diversity” to white students to “diversity” for everyone); [Lia Epperson’s work/others]; Harris, *Aesthetics*, at 906-11 (discussing the mainstreaming model in Brown v. Board of Education and benefits to Black students from the model of integration premised on placing Black students in white schools); Emens, *Integrating Accommodation*, at 916.

to humanity.”⁶⁰ The labor of educating white people, for example, about the harms of racism experienced by people of color has fallen disproportionately on the shoulders of people of color recreating or compounding subordination.⁶¹ Yet this dynamic—sometimes referred to as “derailing” or “decentering”—is neither just or effective as an anti-racist strategy.⁶²

Similarly, for people with less visible disabilities, should they also have to disclose and discuss their disability identity in service of society’s collective education? Imagine a relatively common experience for law students of color, women, or non-cis, heterosexual identifying individuals who are expected to act as the designated spokesperson for their gender, sexual identity, race or ethnicity in class discussions, either because they are explicitly called to do so by faculty, or the mismanagement of these discussions leads to unchallenged assumptions that the individual student

⁶⁰ 438 U.S. 265, 314 (1978).

⁶¹ See AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 115 (2007) (“[People of color] are expected to educate white people as to our humanity. Women are expected to educate men. Lesbians and gay men are expected to educate the heterosexual world. The oppressors maintain their position and evade their responsibility for their own actions.”); B.L. Wilson, *I’m Your Black Friend, But I Won’t Educate You About Racism. That’s On You*, Wash. Post, June 8, 2020, at <https://www.washingtonpost.com/outlook/2020/06/08/black-friends-educate-racism/> (“Asking black people in the United States to discuss race is asking them to relive every moment of pain, fear and outrage they have experienced: the insult of a supervisor who objected to your going to China to report but was very open to sending you to Africa, or the distress of having your child picked up by the police while waiting for the bus because he ‘looked like someone.’”). See Erin C. Lain, *Racialized Interactions in the Law School Classroom*, 67 J. L. ED. 780 (2018) (explaining how and why people of color overperform this type of education of white peers and students in the law school setting).

⁶² David Scharfenberg, *Here Come the White People — A New Antiracist Movement Takes Flight*, BOSTON GLOBE, June 12, 2020, at <https://www.bostonglobe.com/2020/06/12/opinion/white-anti-racist-movement-has-arrived/> (describing the promise of “deep canvassing” rather than other methods as an effective antiracist tool); Kali Holloway, *Black People Are Not Here to Teach You: What So Many White Americans Just Can’t Grasp*, SALON, Apr. 14, 2015, at https://www.salon.com/2015/04/14/black_people_are_not_here_to_teach_you_what_so_many_white_americans_just_cant_grasp_partner/ (“Conversations around race are often microcosmic representations of structural racism at large. Derailing tactics. . .divert the conversation back to territory where the derailer feels more comfortable, and perhaps most importantly, help reestablish the traditional power dynamic. Once again, a person of color must focus on and give precedence to a white person’s opinions and queries—and often, their expressions of disbelief—instead of merely being able to speak their experiences.”).

feels pressure to address.⁶³ A 2009 study found that common reactions of students during these racialized classroom interactions included “fear, anxiety, anger, defensiveness, sadness, crying, leaving the classroom, and withdrawing from the class.”⁶⁴ These students experienced “a cognitive dilemma” of whether to speak up. They also reported feeling defensive as if their integrity was under siege, fearful of the consequences of the conversation, and exhausted from the emotional labor they expended. This same dynamic might well develop in the context of claiming disability identity in law school classrooms.⁶⁵

In the aggregate, therefore, proponents of the arguments above may conclude that the risks of disclosure in legal education are greater than those of nondisclosure.⁶⁶

C. Pro-Disclosure

The following represents a sample of the arguments proffered by some legal actors in support of public disclosure of disability identity.⁶⁷

1. Disability pride matters to law student wellbeing.⁶⁸

⁶³ *Id.* at 783-84.

⁶⁴ *Id.* at 784.

⁶⁵ This emotional labor is part of the costs associated with having a marginalized identity generally, and in the context of disability specifically. Professor Elizabeth Emens discusses the administrative and emotional toll navigating an ableist world has on some people with disabilities. *See, e.g.,* Emens, *supra* note 3, at 2341-42.

⁶⁶ Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities out of the Stigma Straightjacket*, 79 UMKC L. REV. 123, 124 (2010) (describing the hurdles law students face in being admitted to the bar and hired into practice if they disclose a disability or mental illness during law school).

⁶⁷ *See, e.g.,* Katie R. Eyer, *Claiming Disability*, B. U. L. REV. (forthcoming 2021); I also advance some of these arguments in a forthcoming article. Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. (forthcoming 2021).

⁶⁸ Though pride in one’s disability was rare in the sample, disability pride was associated with greater self-esteem and protection against ableism. Kathleen R. Bogart, Ph.D., *How Disability Pride Fights Ableism, Reflections on the 30th Anniversary of the Americans with Disabilities Act*, PSYCHOLOGY TODAY (Aug. 10, 2020),

Empirical research indicates that students may choose to have “rhetorical agency” around disability identity—empowerment and voice through disclosure—which often correlates with a reduction of stigma at the individual level, greater self-confidence in social and educational situations, and greater mental health and wellbeing.⁶⁹ Furthermore, participants with one or more impairments, in one study, who did not self-identify as disabled, reported lower self-esteem and greater stigma than people without disabilities, whereas those participants in the study with impairments who self-identified as people with disabilities had the same levels of self-esteem and perceived-esteem as nondisabled people.⁷⁰

Law students who choose to disclose their disabilities may find community where so many find isolation.⁷¹ Law school itself is a pressure cooker for all, but students with disabilities may face distinct challenges such

<https://www.psychologytoday.com/us/blog/disability-is-diversity/202008/how-disability-pride-fights-ableism>; Joseph Shapiro, *Disability Pride: The High Expectations of a New Generation*, N.Y. TIMES (Jul. 17, 2020), <https://www.nytimes.com/2020/07/17/style/americans-with-disabilities-act.html> (“Members of the A.D.A. generation are quicker than earlier ones to claim disability as a crucial part of identity — and with pride.”).

⁶⁹ Tara Wood, *Rhetorical Disclosures: The Stake of Disability Identity in Higher Education*, in NEGOTIATING DISABILITY: DISCLOSURE AND HIGHER EDUCATION 83 (Stephanie Kerschbaum et al. eds., 2017).

⁷⁰ Holly McCartney Chalk, *Disability Self-Identification in Emerging Adults: Relationship with Self-Esteem, Perceived Esteem, Mindfulness, and Markers of Adulthood*, 4 EMERGING ADULTHOOD 200 (2015).

⁷¹ The National Association of Law Students with Disabilities formed in 2007 to offer a space for law students to connect on a national level. LAWYERS, LEAD ON: LAWYERS WITH DISABILITIES SHARE THEIR INSIGHTS, *supra* note 62, at 17; ABA Law Student Division, *Meet a Group: National Association of Law Students with Disabilities (NALSWD)*, ABA FOR LAW STUDENTS (Nov. 8, 2015), <https://abaforlawstudents.com/2015/11/08/meet-a-group-nalswd/>. The group had a reduced presence on social media in 2016-17 and now appears inactive. *See, e.g.*, <https://www.facebook.com/NALSWD/> (last post Mar. 13, 2017); Twitter Handle (@NALSWD) (last post Mar. 3, 2016); <http://www.nalswd.org/> (last visited Jan. 15, 2021) (inactive webpage). However, in 2019 (and perhaps a year earlier at the annual Yale Law School Rebellious Lawyering Conference), a coalition of law students with disabilities and recent graduates created the National Disabled Law Students Association (NDLSA). Grace Burnham, *Interview with Andrea Parente*, NDLSA NEWSLETTER: THE DISABLED DIGEST 2 (Dec. 20, 2020), <https://ndlsa.org/2020/12/20/the-disabled-digest-december-issue/> (discussing the origin story of NDLSA out of an “identity caucus” for people who identified with disability).

as greater isolation and self-doubt. One recent law graduate described her experience as follows: “Having a disability at law school can be pretty terrifying. When you have a disability, it is so easy to get in your head or think there’s something wrong with you.”⁷² She described her advocacy for and efforts to organize law students with disabilities as “push[ing] against that internal dialogue” and “help[ing] them feel like they had a space in this profession.”⁷³

2. Disclosure of disability identity can be an act of individual and collective resistance to entrenched stigma.

I understand that you need to consider the ramifications of self-disclosure. However, I encourage you to proudly claim your disability whenever and wherever possible. The best way to dispel stereotypes and end discrimination is to show the world that attorneys with disabilities are competent and skilled advocates. Oh, and remember that being an attorney gives you power, status, and privilege. Use it to make the world a better place for people with disabilities.⁷⁴

Whereas other marginalized identities—most notably, race, gender, and sexuality—have experienced public pride movements asserting the beauty and worth of these discredited identities, disability has yet to have an

⁷² Grace Burnham, *Interview with Andrea Parente*, NDLSA NEWSLETTER: THE DISABLED DIGEST 2 (Dec. 20, 2020), <https://ndlsa.org/2020/12/20/the-disabled-digest-december-issue/>.

⁷³ *Id.* See also LAWYERS, LEAD ON: LAWYERS WITH DISABILITIES SHARE THEIR INSIGHTS, *supra* note 62, at 48 (“For people like me who have non-apparent disabilities, it is particularly important to learn how to talk about your disability... In my experience, it also helps to cultivate one’s ‘disability pride’ or disability cultural identity. I would encourage you to think of your disability like you think about your gender, race, or hometown— an important part of your life that helps differentiate you and helps you connect with others, but doesn’t necessarily define you or limit you.”).

⁷⁴ *Id.* at 51.

expansive pride movement.⁷⁵ There is a significant deficit of information about the disabled experience in society that undercuts the development of an umbrella “disability pride” movement.⁷⁶

Disability studies scholar Rosemarie Garland-Thomson describes this information deficit as follows:

[W]e have a much clearer collective notion of what it means to be a woman or an African-American, gay or transgender person than we do of what it means to be disabled. A person without a disability may recognize someone using a wheelchair, a guide dog or a prosthetic limb, or someone with Down syndrome, but most don’t conceptualize these people as having a shared social identity and a political status. “They” merely seem to be people to whom something unfortunate has happened, for whom something has gone terribly wrong. The one thing most people do know about being disabled is that they don’t want to be that.⁷⁷

Disclosing one’s disability identity, then, adds to the available heuristics about disability that exist in society and helps populate a continuum of

⁷⁵ See, e.g., Rosemarie Garland-Thomson, *Becoming Disabled*, NY TIMES (Aug. 19, 2016), <https://www.nytimes.com/2016/08/21/opinion/sunday/becoming-disabled.html>. “Mad pride” and general “disability pride” are professed and claimed but they have not yet taken hold the same way as other identities.

⁷⁶ Harris, *Taking Disability Public*, *supra* note 69, and *Processing Disability*, 64 AM. U. L. REV. 457 (2015) (arguing that the general information deficit is partly due to a view about the nature of disability as private and shameful and exploring this theory through the default rules for closed proceedings in cases about disability—e.g., guardianship, civil commitment, and administrative proceedings like social security and special education).

⁷⁷ Garland-Thomson, *supra* note 75.

disability that complicates existing binaries.⁷⁸ It allows us to move beyond the limited aesthetic markers that dominate the public consciousness.⁷⁹

Professor Elyn Saks's memoir, *The Center Cannot Hold: My Journey Through Madness*, offers a vivid and honest account of her life with schizophrenia from her early years to her time at Oxford and Yale Law School to her days as a law professor.⁸⁰ Her narrative creates a cognitive dissonance that forces the reader to contend with the juxtaposition of schizophrenia—a serious mental disability—and Professor Saks's indisputable professional success.⁸¹ The pressure to perform intelligence and exceptionalism is particularly salient for faculty and even more so for those with psychosocial, intellectual, or developmental disabilities: “the rhetoricity of the ‘mad’ subject runs counter to ... the ‘presumption of normativity’ upon which the entire academic enterprise is predicated.”⁸² In this sense, therefore, the act of claiming disability at both the individual and collective levels can be a form of resistance to disability stigma and ableism.⁸³ “[S]hare your incapacities[,]” advises one recent disabled law graduate. “It resonates with

⁷⁸ The majority of disabilities are invisible or able to be hidden, but when those with invisible disabilities choose not to disclose them, the choice “perpetuates the idea that disability is an undesirable and uncommon experience.” Additionally, disclosing invisible disabilities can lead to discovering a network of people who share that disability or one similar. Kathleen R. Bogart, Ph.D., *How Disability Pride Fights Ableism, Reflections on the 30th Anniversary of the Americans with Disabilities Act*, PSYCHOLOGY TODAY (Aug. 10, 2020), <https://www.psychologytoday.com/us/blog/disability-is-diversity/202008/how-disability-pride-fights-ableism>.

⁷⁹ Harris, *The Aesthetics of Disability*, *supra* note 28.

⁸⁰ ELYN R. SAKS, *THE CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS* (2007).

⁸¹ Incidentally, I have a practice of purchasing multiple copies of Professor Saks's book and keeping them on hand to give to law students and faculty colleagues across the country. Whenever I see it in a bookstore while browsing or even in a yard sale, the book makes it home with me. Why? Because Professor Saks's story is real and messy and disruptive of so much of what people believe they know about mental illness. In January 2020, the AALS Section on Law and Mental Disability awarded Professor Saks the first Elyn R. Saks Lifetime Achievement Award, named in her honor.

⁸² Wood, *supra* note 71, at 89.

⁸³ Susan Peters et al., *Resistance, transformation and the politics of hope: imagining a way forward for the disabled people's movement*, 24 *DISABILITY & SOC'Y* 543 (2008) (identifying critical incidences of resistance in the disability context).

people...To show a person that...disability is compatible with success is a really powerful thing.”⁸⁴

3. Disclosure of disability identity in law school, even if for the limited purpose of obtaining reasonable accommodations, provides law students with opportunities for self-advocacy and a deeper understanding of the types of accommodations needed to succeed on the bar exam and in the practice of law.

Law school presents a host of challenges distinct from undergraduate education.⁸⁵ For instance, law students must intimately understand the language of the law, its deliberate vagaries, and subtle tools of persuasion, in order to critically discern its meaning in ways that matter to a profession and to expertly mold its content into tools of litigation and negotiation. Law students learn how to read a text within an existing hierarchy of sources and authority, to actively place distance between individual experiences in service of a broader rule as “professors redirect your gaze from what’s fair to what the law says you can or can’t do.”⁸⁶

In addition, law students must further develop (or refine) such skills as time management, strategic reading comprehension (to complete lengthy

⁸⁴ Grace Burnham, *Interview with Andrea Parente*, NDLSA NEWSLETTER: THE DISABLED DIGEST 3 (Dec. 20, 2020), <https://ndlsa.org/2020/12/20/the-disabled-digest-december-issue/>. See also LAWYERS, LEAD ON: LAWYERS WITH DISABILITIES SHARE THEIR INSIGHTS, *supra* note 75, at 43 (“Individuals with [less visible/apparent] disabilities constitute the majority of individuals with disabilities, so disclosing these disabilities can be a very powerful way for lawyers with disabilities to make their voices heard.”).

⁸⁵ See generally ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK” LIKE A LAWYER* (2007). See also William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 5 (2007) (“Compared to other professional fields, which often employ multiple forms of teaching through a more prolonged socialization process, legal pedagogy is remarkably uniform across variations in schools and student bodies. With the exception of a few schools, the first-year curriculum is similarly standardized, as is the system of competitive grading that accompanies the teaching and learning practices associated with case dialogue. The consequence is a striking conformity in outlook and habits of thought among legal graduates.”).

⁸⁶ *Id.* at 10.

reading assignments in short order), oral presentation skills (to spar in real time classroom debates), legal research and writing, and, perhaps the most difficult of all, comfort with ambiguity.⁸⁷ While students may have needed some of these skills to be successful at the undergraduate level, the demands in law school are often much greater: “‘Law school is a grind’ [and] ‘requires that you read, comprehend, and apply different logical processes and analyses more quickly than you have before.’”⁸⁸ In some ways, then, law school offers a trial-run for law students who can discover which accommodations work best for them and might translate into accommodations in legal practice. They may also gain insights into the types of work environments that are most attractive to and inclusive of them. Of course, as previously discussed, this process can be onerous, time consuming, and emotionally depleting.

For proponents of the arguments above, the benefits of disclosure may outweigh the risks.⁸⁹

⁸⁷ See generally Robert D. Dinerstein and Elliott Milstein, *Learning to Be a Lawyer: Embracing Indeterminacy and Uncertainty in Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy* (S. J. Bryant et al. ed., Carolina Academic Press) (2014) (arguing that a key part of the pedagogical charge of training law students how to “think like a lawyer” is to impart a sense of agency with indeterminacy in the law); RICHARD MICHAEL FISCHL & JEREMEY PAUL, *GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS* (1999) (discussing the need for law students to develop a general comfort with and manage uncertainties in the law).

⁸⁸ Ilana Kowarski, *How Long Is Law School and What Is It Like?* U.S. NEWS (Jan. 14, 2019), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2019-01-14/how-long-is-law-school-and-what-is-it-like> (internal quotation omitted).

⁸⁹ Pooja Jain-Link & Julia Taylor Kennedy, *Why People Hide Their Disabilities at Work*, HARVARD BUSINESS REVIEW (June 3, 2019), <https://hbr.org/2019/06/why-people-hide-their-disabilities-at-work> (study showing that “employees with disabilities who disclose to most people they interact with are more than twice as likely to feel regularly happy or content at work”); George Mambolio, Ph.D et al., *Students with Disabilities’ Self-Report on Perceptions toward Disclosing Disability and Faculty’s Willingness to Provide Accommodations*, 8 REHABIL. COUNS. EDUC. J. 8 (2015) (reporting that most undergraduate and graduate students felt that their professors were willing to provide disability accommodations, impacting student likeliness to report).

II. CONTESTING ASSUMPTIONS AND EXPANDING THE CURRENT DEBATE

Central to the arguments above are three assumptions: (1) that the individual is the only party with an interest in disclosure; (2) that law students are able-bodied and neurotypical; and (3) that law students with disabilities do not have other intersecting marginalized identities. This Part contests these assumptions and explains why they matter in the disclosure debate in legal education.

A. *The Interests in and Nature of Disclosure*

The privacy versus disclosure debate sets up a false dichotomy precisely because it assumes that the individual is the only party with an interest in disability identity.⁹⁰ This is a critical omission from the debates because such framing masks institutional choices that place the burden and, at times, stress, on disabled law students (and faculty) to manage their disability identities and seek out individual accommodations to an inaccessible space or curriculum. Furthermore, if we understand information about identity as exclusive and proprietary to the individual (or even a particular institution), we miss the collective value of the aggregate information for legal and policy reforms, social solidarity and movement-building, and opportunities for structural reform, universal design and innovation. For example, faculty committees on educational policy could propose the adoption of certain pedagogical designs as a matter of policy including the required use of microphones, captioning of all images used in teaching materials, use of the auto-captioning function on PowerPoint for remote learning, release of PowerPoint slides in advance of class, and anonymous surveys of law students at the beginning and middle of the

⁹⁰ See, e.g. [add Anita Allen's work on race and privacy here; Jeremy Bearer-Friend's paper on IRS and racial identity]; Neil M. Richards, *Privacy's Trust Gap*, 126 YALE L.J. 1180 (2017); Frederik Zuiderveen Borgesius et al., *Open Data, Privacy, and Fair Information Principles: Towards a Balancing Framework*, 30 BERKELEY TECH. L.J. 2073 (2015) (proposing a framework for addressing the balance between respecting privacy and protecting benefits from disclosure).

semester to see if they have any access or mental health needs that are not being met.

Consider the mental health crises in law schools and in the legal profession and why narrowly framing these as individual issues misses their structural roots. The current statistics from the Dave Nee Foundation and the American Bar Association on law student mental health offer a useful entry point:⁹¹

- Depression increases as students move through law school: prior to matriculation, depression is 8-9%; after one semester of law school rises to 27%, after two semesters of law school increases to 34%, and after three years of law school, the incidence of depression has risen to 40%.
- Almost all law students (96%) experience significant stress compared to 70% of medical students and 43% of graduate students.
- Entering law school, law students have a psychological profile similar to that of the general public. After law school, 20-40% have a psychological dysfunction.

With respect to the legal profession:⁹²

- U.S. lawyers are “the most frequently depressed occupational group” in the US.

⁹¹ All statistics below come from the Dave Nee Foundation. *Lawyers and Depression*, Dave Nee Foundation, <http://www.daveneefoundation.org/scholarship/lawyers-and-depression/> (last visited Jan. 14, 2021). See also Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J.L. EDUC. 116 (2016) (discussing the results of the Survey of Law Student Well-Being, a longitudinal, multi-law school study of the mental health of law students and their help-seeking behaviors).

⁹² *Lawyers and Depression*, Dave Nee Foundation., <http://www.daveneefoundation.org/scholarship/lawyers-and-depression/> (last visited Jan. 14, 2021).

- U.S. lawyers are 3.6 times more likely to experience depression than non-lawyers.
- U.S. lawyers rank 5th in incidence of suicide by occupation.

Student concerns about disclosure of their disability may prevent them from seeking the help they need; the reasons proffered for their unwillingness to seek help underscore the structural nature of the problem itself and may also signal the limits of existing data collections:

- Potential threat to bar admission
- Potential threat to job or academic status
- Social stigma
- General concerns about privacy
- Financial reasons
- The belief that they could handle the problem themselves
- Not having the time⁹³

Although not listed, a barrier to disclosing disability is the belief that the stigma outweighs the value of accommodations. While this belief connects to concerns about time and money, it goes even further.⁹⁴ Some legal scholars have argued that the quality of the experiences of disabled law students directly correlates with faculty attitudes and culture, pedagogical choices, and institutional policies.⁹⁵

B. Pervasiveness of Disability Among Students and Faculty

There are two interrelated problems here.

⁹³ Organ, *supra* note 91, at 116.

⁹⁴ See Emens, *supra* note 3.

⁹⁵ Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues*, 22 AM. U. J. GENDER SOC. POL'Y & L. 519, 602 n.417 (2014) (including examples of relevant academic research); Robert D. Dinerstein, *Symposium, Assisting Law Students with Disabilities in the 21st Century: A New Horizon?, Keynote Address: "Disability: When, Why, and How It Matters and When, Why, and How It Doesn't,"* 18 AM. U. J. GENDER SOC. POL'Y & L. 79, 93-94 (2009).

1. Inadequate Data re: Law Students with Disabilities

First, the incidence of disability among law students is underreported and not systematically collected, tracked or analyzed the way schools track other demographic data about race or gender.⁹⁶ In fact, most law schools have no duty to collect or report disability related data and arguably no incentive to do so.⁹⁷ While undergraduate universities and colleges must collect and report this data,⁹⁸ disclosure is also voluntary, though students may formally report this information at different points in their law school careers from their initial application for admission, financial aid requests, and annual reenrollment. Furthermore, individual students always have the option to self-disclose informally to other students, faculty, staff, or other students (though universities do not and would be difficult to track these informal disclosures in any consistent way).⁹⁹

⁹⁶ See *infra* Pt. III. See also Rothstein, *supra* note 95, at 602 n.416 (“Although some have advocated encouraging more students to self-report disabilities, stigma and other concerns make this reporting difficult. Currently, the ABA Annual Questionnaire asks law schools to report the number of students for whom accommodations are provided. This is the only reliable number a law school would have. Many students, such as those with conditions like HIV, may not report the condition to the law school administration and may not require or request accommodations.”).

⁹⁷ Katherine C. Aquino & Joshua D. Bittinger, *The Self-(un)Identification of Disability in Higher Education*, 32 J. POSTSECONDARY EDUC. & DISABILITY 5 (2019) (describing the difficulty in accurate disability reporting because “[d]isability may be self-disclosed [to the student disability services, admissions and financial aid offices, etc.] any point within a student’s college experience, with a student requesting or denying accommodation services based on their preference and perception of service functionality”).

⁹⁸ *Id.* Title IV schools (schools that process federal financial aid) have to report “[t]he percentage of undergraduate students enrolled at the institution who are formally registered with the office of disability services of the institution (or the equivalent office) as students with disabilities, except that if such percentage is three percent or less, the institution shall report ‘three percent or less.’” Higher Education Opportunity Act, 20 U.S.C. § 1015(i)(1)(I).

⁹⁹ Interestingly, a growing trend in law schools is the creation of student disability organizations. However, these organizations are not always affinity organizations targeting students who publicly claim disability as part of their identities. For example, at UC Davis, the King Hall Disability Rights Law Association has adopted a general organizational name to reflect its mission of advancing disability rights issues in legal education and the profession. The membership is not limited to students with disabilities but includes allies and

In the absence of meaningful data on law students with disabilities, we can look to available data on college students with disabilities to get a sense of self-identification. The percentage of undergraduates who self-disclosed having a disability in the 2015-2016 academic year was 19 percent overall: 19 percent for male students and 20 percent for female students.¹⁰⁰ Disaggregated data is also available with some differences in percentages of undergraduates with disabilities according to veteran status, age, dependency status, and race/ethnicity.¹⁰¹ Of note, the percentage of postbaccalaureate students who reported having a disability (12 percent) was lower than the percentage for undergraduates (19 percent).¹⁰² Law professors, particularly

others interested in the substantive law in this area. Law students came together in 2016 to rename and redefine the goals of the organization. It was previously known as the “Law And Disability Society (LADS)” whose stated purpose was “to provide a forum to focus on disability law and resources for law students with disabilities.” *Inactive Student Organizations*, UC DAVIS LAW STUDENTS ASSOCIATION, <https://students.law.ucdavis.edu/lsa/student-organizations/inactive.html> (last visited Jan. 14, 2021).

¹⁰⁰ *Fast Facts, Students with Disabilities*, NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=60> (last visited Dec. 29, 2020) (based on U.S. Department of Education data collection).

¹⁰¹ *Fast Facts, Students with Disabilities*, NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=60> (last visited Dec. 29, 2020) (based on U.S. Department of Education data collection). For example, twenty-six percent of undergraduates who were veterans reported having a disability, compared to nineteen percent of undergraduates who were not veterans. *Id.* The percentage of undergraduates with disabilities was higher among those thirty and over (23 percent) than among those ages fifteen to twenty-three (18 percent). *Id.* Seventeen percent of those “dependent” undergraduates reported having a disability as compared to the percentages of those undergraduates who were married (21 percent) or unmarried (24 percent). *Id.* A lower percentage of undergraduates identifying as Asian reported having a disability (15 percent) than those undergraduates identifying as White (21 percent), Latinx (18 percent), and Black (17 percent). *Id.*

¹⁰² *Fast Facts, Students with Disabilities*, NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=60> (last visited Dec. 29, 2020) (based on U.S. Department of Education data collection); *see also Students with Disabilities Graduating from High School and Entering Postsecondary Education: In Brief*, EVERYCRSREPORT.COM (Jul. 10, 2017), <https://www.everycrsreport.com/reports/R44887.html> (“More recent data from the National Postsecondary Student Aid Study, examining a nationally representative sample of all students enrolled in postsecondary institutions in SY2011-2012, indicates that roughly 11%

those who teach disability law courses or openly disclose their own disabilities, report that students in their classes with disabilities often have less apparent disabilities but choose to selectively disclose to law professors because it is often perceived as a “safe space.”¹⁰³

2. Data re: Faculty with Disabilities

Second, the presumption is that faculty—with the narrow exception of those near, at, or beyond retirement age—do not have disabilities.¹⁰⁴ Consider the institutional resources available for students with disabilities on college and university campuses: for example, student support offices, university funded student organizations, student-specific disability social events, and in law schools, the addition of on-site, dedicated mental health professionals, mindfulness classes (including meditation and yoga), and, of course, “puppy day.” These resources tend to be more established (even if underutilized) for consumers of legal education than they are for consumers of post-secondary education.¹⁰⁵ For faculty with disabilities, structural support services are much less developed and institutionalized—e.g., they may fall under disparate employee benefit and health insurance programs such as mental health counseling.

The absence of structural support for faculty with disabilities in legal education led a group of law faculty with disabilities and their allies to organize an ad hoc committee and seek formal recognition as an affinity group through the Association of American Law Schools (AALS). The idea

of all undergraduates and 5% of all post-baccalaureate students self-identify as having a disability....”). Again, there is no one consistent data bank or mandate to collect (and how to collect) this data.

¹⁰³ See, e.g., *A Profile of a Visiting Law Professor Carrie Basas in Diversity and the Bar*, THE DAILY (Aug. 1, 2011), <https://thedaily.case.edu/a-profile-of-visiting-law-professor-carrie-basis-in-diversity-the-bar/>.

¹⁰⁴ Leslie Pickering Francis & Anita Silvers, *No Disability Standpoint Here!: Law School Faculties and the Invisibility Problem*, 69 U. PITT. L. REV. 499, 508 (2008).

¹⁰⁵ Stephanie L. Kerschbaum et al., *Disability, Disclosure, and Diversity*, in NEGOTIATING DISABILITY: DISCLOSURE AND HIGHER EDUCATION 2 (Stephanie L. Kerschbaum et al., eds., 2017) [hereinafter, “DISABILITY DISCLOSURE”].

took shape during the AALS Annual Conference in January 2020 in Washington, D.C. A packed room of law professors with disabilities and allies discussed issues motivating their collective interest in critical issues facing disabled law faculty such as accommodations at AALS meetings, centralized AALS programming guidelines on accessibility and inclusion, and accommodations for the annual law faculty hiring conferences.¹⁰⁶ A central goal of this group would be to establish institutional pathways for data collection and dissemination about law faculty with disabilities. To get a sense of the interest, when the ad hoc committee met in Washington, D.C. in January 2020, the room was packed with individuals quite diverse in terms of age; connection to disability (identity as a person with a disability or an ally); career level; race, ethnicity, and nationality; gender; law school; and geographic region. Many attendees commented that their preconceived notions of who would attend were radically different (most expected the room to look predominantly white, male, and near retirement age).

Ultimately, an ad hoc committee petitioned for and recently received formal recognition from the AALS as an affinity group distinct from the AALS Section on Disability Law, which is dedicated to the study and discussion of substantive disability law.¹⁰⁷ The Section on Law Professors with Disabilities and Allies' stated mission is "to provide a forum for the discussion of matters of common concern to law professors with disabilities and their allies, to put on programming related to the same, and to provide a forum for the recognition and celebration of the accomplishments of law professors with disabilities."¹⁰⁸

¹⁰⁶ Many thanks to Professors Katherine MacFarlane, Katie Eyer, Megan Wright, Stacey Tovino, Pamela Foohey, and Nicole Porter and others for their work on organizing efforts to create and lead this new AALS Section.

¹⁰⁷ The AALS approved the charter on May 21, 2021. AALS, Section on Law Professors with Disabilities and Allies, at <https://www.aals.org/sections/list/section-on-law-professors-with-disabilities-and-allies/>.

¹⁰⁸ *Id.*

C. Intersectional and Temporal Considerations

The disclosure of one's disability does not take place in a void, apart from other people or apart from other identities held by the individual. The work of critical race scholars calls for a more nuanced examination of discrimination experienced by people who sit at the intersection of multiple marginalized identities. For example, Professor Kimberlé Crenshaw's work on intersectionality tells us that a disabled Latina may experience discrimination distinct in nature or quality from a nondisabled Latina or a disabled Latino. Consider the following reflection on intersectionality:

Your identities as a person of color, a woman, a person with a disability, and a law professor [or law student] each bring with them ever-changing challenges and opportunities. No matter how you see yourself, others may be socialized to see you only through one or more of these lenses. It's not always clear which one is dominant at any given moment. Being a member of more than one marginalized group can mean that the specific, compound nature of the discrimination you face is never fully addressed.¹⁰⁹

Disability disclosure happens at the intersection of multiple identities.¹¹⁰ Although we may not often consider class in discussions of disability intersectionality, economic insecurity, along with disability and other identities, can complicate disclosure in higher education. Disability studies scholar Ellen Samuels describes the interactional nature of disclosure:

[W]hile in our ideal scenarios the disabled person should be able to simply disclose their disability status and be recognized and perhaps

¹⁰⁹ LAWYERS, LEAD ON: LAWYERS WITH DISABILITIES SHARE THEIR INSIGHTS, *supra* note 75, at 70.

¹¹⁰ See, e.g., Ellen Samuels, *Passing, Coming Out, and Other Magical Acts*, in *NEGOTIATING DISABILITY: DISCLOSURE AND HIGHER EDUCATION* (Stephanie L. Kerschbaum et al. eds., 2017).

accommodated, such disclosures do not take place in a vacuum. Rather, they are issued into a complex representational realm in which each person at the other end of disclosure tends to do their best to fit the revealed identity into a preexisting matrix of meanings and assumptions.¹¹¹

While certainly true that this experience is person to person, it takes place in the shadow of preexisting social norms of disability that are repeatedly reinforced by institutions, including those of the legal profession and legal education.

Finally, the disclosure of disability identity is not a singular, isolated moment. Rather than a “once-and-for-all action,” disclosure is “a process of continuously, in a variety of settings and contexts, performing and negotiating disability awareness and perceptibility.”¹¹²

III. NORMATIVE RECOMMENDATIONS

Where do we go from here? This Part outlines a few examples of legal and policy priorities.

A. Data

Data matters. Without a better understanding of the scope of disability in legal education, we cannot fully identify the problem we are trying to solve. What are the most critical barriers for students seeking to access legal education and enter the legal profession? Answering these questions requires an understanding of how many students identify as disabled and more information about the nature of their disabilities. It is also important to collect other demographic data such as race/ethnicity, income, undergraduate institutions and, for law professors, information on the scope of disability and impairments that can be reasonably accommodated. Longitudinal studies can

¹¹¹ *Id.*

¹¹²

help track faculty through the hiring and tenure processes as well as post-tenure promotions, course evaluations, and service requirements (formal and informal) across different time periods.

B. The Personal is the Political

Disability identity is personal *and* political. It is more than the sum of a person's medical information. Identity is personal but it is also collective and for historically marginalized groups, the collective matters with respect to normative change. This does not mean that we should not respect individual agency; instead, it suggests that true agency requires informed decision-making on the risks and benefits associated with non-disclosure *as well as* those associated with disclosure. In *Framing Disability*, Professor Elizabeth Emens examines decisional moments when nondisabled people deeply engage with disability.¹¹³ She argues that we ought to invest in the production of positive, more balanced information about the lives of people with disabilities. Professor Emens offers genetic testing as an example of a decision point that implicates disability and explains how genetic testing and counseling tends to focus on misconceptions about living with a disability. She notes that the empirical research shows that the lives of people with disabilities are not any less happy than those of nondisabled people, contrary to existing perceptions. Including more balanced information to parents, she suggests, will lead to better decisions less motivated by disability discrimination. Similarly, disability disclosure is an important decisional point that demands more balanced information available to the individual, legal institutions, and the profession on the benefits of disclosure.

C. Beyond Individual Conceptions of Privacy

There is a collective interest in information about disability identity beyond the individual, as I have argued in this Article. When conversations

¹¹³ Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1383-89 (2021).

are limited to individual interests, we are missing a big part of the puzzle. This information can help make better choices about the allocation of increasingly limited resources in higher education. As individual claims to disability identity¹¹⁴ increase, we will more easily identify possibilities for universal design in the classroom as well as throughout legal education.¹¹⁵ For example, imagine a situation where a student with attention difficulties requests an individual accommodation to make an audio recording or receive a video recording of every class session. One solution is to grant his individual accommodation. Assume another eight students in the classroom have requested similar accommodations and have engaged in the interactive process with the student disability services office. Each student can be provided with a recording device or the faculty member might agree to record and post the audio/video for all students as the default. If this is the default, then not only will the students with formal accommodations benefit without having to jump through the administrative hoops associated, but other students in the room with attention difficulties but without formal accommodations (those who may or may not have official diagnosis and evaluations) will benefit as will the students without attention difficulties who may be visual or auditory learners.

¹¹⁴ See, e.g., Peter Blanck & M. Rotella, *Universal Design's Positive Return on Investment and Social Impact: The Mary Free Bed YMCA Living Laboratory and Study*, NUMBERS MAGAZINE (Nov. 3, 2017) at 22; Peter Blanck & M. Rotella, *Universal Design and People with Disabilities: "Destiny Arms," a Global Universal Design Commission Living Laboratory*, NUMBERS MAGAZINE (March 21, 2017) at 19; see also Donald H. Stone, *The Least Restrictive Environment for Providing Education, Treatment, and Community Services for Persons with Disabilities: Rethinking the Concept*, 35 TOURO L. REV. 523 (2019) (general discussion of disability education).

¹¹⁵ Professor Ruth Colker's work provides a nuanced analysis of universal design as prescriptive for disability discrimination. See, e.g., Ruth Colker, *Test Validity: Faster Is Not Necessarily Better*, 49 SETON HALL L. REV. 679 (2019) (arguing that speed does not correlate with greater success in the legal profession and recommending the elimination of time restrictions on the LSAT as a universal design and a structural antidiscrimination remedy that is empirically sound) and *Symposium: Universal Design: Stop Banning Laptops!*, 39 CARDOZO L. REV. 483, 483 (2017) (arguing against laptop bans and offering universal designs as alternative approaches).

This approach is not without drawbacks or objections. For example, some faculty may wish to support students with disabilities in the classroom and still raise legitimate concerns about the widespread availability of recordings. Recording class lectures and discussions may chill speech for both students and professors. Students may feel less free to engage with less politically popular arguments, a concern shared by some professors. In addition, faculty may not wish to have their proprietary pedagogical approach or content in a shareable form beyond the individual student or group of students.

D. #RepresentationMatters

Disability representation matters. Legal scholars and empiricists have persuasively argued (to the Supreme Court, nonetheless)¹¹⁶ that diversity in law schools has a positive, desirable (and measurable) impact on legal education in the context of race.¹¹⁷ I will not make the case for disability as a laudable form of diversity in legal education in this Article (though I most certainly agree that disability should be treated as desirable on par with other axes of diversity).¹¹⁸ Instead, I will simply point out that successful pipeline programs for disabled students (college to law school and law school to the profession) should also invest in pipeline programs to mentor and support

¹¹⁶ See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹¹⁷ See, e.g., Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1550 (2011) (advancing the case for student and faculty diversity in law schools and citing to research studies supporting the claim that diversity adds value to legal education)

¹¹⁸ My scholarship overall makes the case for why we ought to encourage disability disclosure, track, and study this data in legal education and the profession. Further discussion of disability as diversity is beyond the scope of this Article. In mid-May 2021, the American Bar Association's Council of the Section of Legal Education and Admissions to the Bar approved for Notice and Comment proposed revisions to several standards including Standard 206 on diversity and inclusion to include 'disability.' Should this standard be revised accordingly, there may be greater incentives for law schools to actively value and collect data on students, faculty, and staff who identify as people with disabilities. https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/21-may-notice-and-comment-standards-205-206-303-507-508.pdf

disabled law students to enter legal academia. The presence of faculty who publicly claim disability not only allows disabled law students opportunities to embrace their own identity and possible mentorship, but disabled faculty also model a career path.

Interestingly, the presence of disabled faculty, students, and staff on campus may offer support for disability organizing and movement building. “Although people who find themselves in subordinate positions can attempt to construct positive identities for themselves in their struggles to gain recognition, it is often the dominant regimes of the powerful that dictate the identity game to them based on a rigged and stacked text.”¹¹⁹ Students have successfully constructed positive conceptions of their disability identity where they were able to build connections with others based on “interdependence and validation.”¹²⁰

Efforts to increase the number of law students with disabilities necessarily requires attention to diversification of both law faculties and the legal profession. In the end, the success of all three endeavors touches the disability disclosure debate—what kind of culture allows students and faculty to publicly identify as a people with disabilities? These students become lawyers and the next generation of mentors in the profession.¹²¹ “The teaching and research arm of our profession has a critical role in determining how justice will be done and what our legal system will look like in the

¹¹⁹ STEPHANIE L. KERSCHBAUM ET AL., DISABILITY DISCLOSURE, *supra* note 105, at 84. (citation omitted).

¹²⁰ *Id.*

¹²¹ See, e.g., MEERA E. DEO, UNEQUAL PROFESSION, RACE AND GENDER IN LEGAL ACADEMIA (2019); Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441 (2015) (discussing barriers that women of color law faculty members face when working towards leadership positions); Meera E. Deo, *Intersectional Barriers to Tenure*, 51 U.C. DAVIS L. REV. 997 (2018) (discussing barriers that women of color law faculty members face in seeking tenure); Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER, L. & JUST. 352 (2014) (proposing that future research empirically investigate faculty diversity); Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COLUM. J. GENDER & L. 7 (2015) (discussing the impact of bias on teaching evaluations of law faculty women of color).

coming decades. . . .If the legal system is to be reshaped, one would hope that legal educators will be among the principal architects.”¹²²

CONCLUSION

The words of autistic graduate student Alyssa Hillary offer an apt conclusion and further food for thought:

Disabled students are inconvenient. How varies by disability.

The student who uses a wheelchair takes up more space in the hall.

The student who is blind needs braille textbooks, a screen reader, maybe both.

Because these disabilities are visible, are obvious, something is done (not necessarily something good- exclusion is often the thing.)

They get their wheelchair, or they get their braille, or they get sent to a special school where everyone is blind and everyone uses braille and it's not even a special accommodation.

You can't pretend it doesn't exist simply because it is inconvenient to deal with. You decide to do nothing about it, but you can't pretend it's not there.

Autistic? Depressed? OCD?

They don't want to deal with that. So it just doesn't exist.

We don't have those problems here.

They do, of course, but they pretend it's not there.

With no obvious difference, nothing you can see that says there is something different, they can pretend.

They can pretend that we are making things up.

They can pretend that we are just being difficult.

¹²² Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J.L. ED. 285, 285-86 (1988).

They can pretend that we are simply lazy.

They can pretend that our inconvenient behaviors are there for any reason at all.

So it is for a reason which makes it purely our fault.

So it is for a reason that does not require accommodation or education, but shame and punishment.

It exists, but they can pretend it doesn't.

And then we pretend it doesn't exist either, not wanting to face what they dish out when we try to make them see what is in front of their eyes.

Disability becomes an inconvenient part of ourselves that we would simply rather ignore, and then they have won. I refuse.

*I will be inconvenient, and they will just have to deal with it.*¹²³

Self-perception and societal attitudes shape the exercise and quality of disability rights, including, most relevant to this special issue, rights to reasonable accommodations in legal education. Disability continues to hold a negative valence in legal education and the profession largely because of its association with incapacity, a characteristic that appears incompatible with excellence in a learned profession. For those students and faculty with less apparent disabilities, questions of disclosure present complex and recurring dilemmas with significant risks and benefits for individuals, and as this Article has argued, for institutions and for shifting social norms of disability. This Article helps to contextualize those decision points, surface underlying assumptions, and add nuance to these debates in service of more inclusive law schools and, by extension, a more inclusive legal profession.

* * *

¹²³ Alyssa Hillary, *Inconvenient, YES, THAT TOO* (Jan. 21, 2013), <http://yesthattoo.blogspot.com/2013/01/inconvenient.html>.