

# DISABILITY RIGHTS LAW

CASES AND MATERIALS

SAMUEL R. BAGENSTOS

FOUNDATION PRESS

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*by*

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Professor of Law

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*To my mother, Naida Tushnet,  
a great teacher*

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## PREFACE

In this casebook, I aim to provide an introduction to the key debates in disability rights law. I have taught disability rights law for a decade, and I have practiced disability rights law for even longer. Increasingly through the years, I have felt that the field needs a text that focuses on the large questions of doctrine, theory, and policy that disability rights law raises. I have designed this casebook with that need in mind.

My focus on the big questions, I think, makes this casebook different in several respects from the other fine texts in the field. First, in choosing cases I have tried less to find those that apply the basic rules in a myriad of contexts than to find those that illustrate the key issues in disability rights law in some distinctive way. For example, this text, unlike some of the others, contains no separate chapter on the Fair Housing Act. Fair Housing Act cases are included in Chapters Four (addressing disability discrimination by government) and Five (addressing disability discrimination in businesses' sale of goods and services), where they provide a distinctive perspective on the questions at hand. But a separate chapter on housing tempts an author to include, for the sake of "completeness," various Fair Housing Act cases that raise issues that were fully addressed in other parts of the book. Similarly, where it is important for students to understand the rule structure in a particular area, but the rules raise no especially difficult doctrinal questions, I have eschewed the use of cases and instead am presenting the material in relatively short, straightforward textual notes. (The rules governing medical examinations by employers are an example of this.) And I rarely use long notes with many squibs; I use notes like that only in the rare areas, like the application of the standard for reasonable accommodation in employment, where a student's understanding will benefit from seeing the same standard applied to a multiplicity of different factual contexts.

Second, many of the notes introducing various sections of the book (and following the cases) focus on major theoretical and policy controversies in disability rights law, with extensive citation to and excerpts from the secondary literature. A few examples: Chapter Three includes discussions of the justifications in antidiscrimination theory for, and the critiques of, the reasonable accommodation requirement, as well as of the theoretical and empirical arguments regarding the employment effects of disability discrimination law and alternative disability employment policies. Chapter Four includes materials on the "unfunded mandates" critique of the ADA as applied to state and local governments, as well as on the policy questions and political dynamics of deinstitutionalization litigation and the Baby Doe cases. Chapter Five includes discussions of the justification for the physical accessibility requirements of the ADA and Fair Housing Act, as well as of the controversy surrounding serial ADA litigation. And Chapter Six in-

cludes discussions of the policy controversies surrounding the IDEA's integration mandate and its private-school reimbursement rule, as well as the normative and policy questions involved in requests for accommodated testing. In these and other notes throughout the book, I try to present each of the contending arguments fairly. Although my disability rights practice experience comes exclusively from representing plaintiffs (the federal government, various disability rights organizations, and a number of individuals with disabilities), I have always found disability rights law fascinating precisely because it raises such difficult and complex theoretical, empirical, and policy questions. I have tried in this book to provide sufficient materials on both sides of the relevant controversies to provide the fodder for many classroom debates.

Third, and related, I have structured the normative and policy material so that it nearly always appears either immediately before or immediately after a series of cases. In my experience, discussions in law school classrooms are easiest, and most fruitful, if the class can go back and forth between more abstract normative and policy arguments and the concrete application of the law to particular cases. The discussion of the abstract questions can then shed light on what is really at stake (if perhaps unspoken) in the decision of concrete cases, while the cases themselves can offer a reality-check on, and a more nuanced texture to, the abstract arguments. I hope that this casebook will promote that back-and-forth process.

Finally, by avoiding repetition in the choice of cases, I have been able to use fewer cases than some other casebooks—while at the same time providing longer excerpts from the ones I have included. In addition to the normative and policy questions, disability rights law raises difficult and complex questions of doctrine and interpretation. I have found that longer case excerpts enable students to obtain a deeper understanding of those questions by puzzling through them right along with the judges. And when cases are severely edited, it is often necessary to cut out the portions of judges' opinions that are not part of the syllogistic logic of legal doctrine but that often shed light on the normative commitments and social vision of the judges.

In short, this is not a book for those who want to learn “the rules” of disability rights law—at least if “the rules” means the bottom-line holdings of each of the many different federal courts that have resolved questions in each of the many contexts in which that body of law applies. This book is not an encyclopedia or a treatise. But it does, I think, serve the pedagogical purpose of exposing students to the major doctrinal, theoretical, and empirical debates in the disability discrimination field and enabling them to understand the principles of the law in this area, apply those principles to new fact settings, and develop a position on the important normative and policy questions this body of law raises.

I should note a couple of housekeeping matters about the book. First, I indicate deletions from cases by placing brackets around the first letter (or

entire word, if that word is an acronym) of the word that follows the deletion. I find it far easier to read edited cases when they don't contain lots of strings of asterisks. I indicate deletions from other materials the same way, except on a couple of occasions in which I thought three asterisks looked better. Second, as I note in Chapter One, I use people-first language (*e.g.*, not "the disabled" but "people with disabilities") throughout the book, except when it makes the writing clunky. I have made no effort to alter the language of those I quote, however, and many of them refer to people with disabilities in other terms.

I'd like to thank a number of people who have helped me with and supported me in this project. I took a draft version of this casebook "out on the road" as a visiting professor at the UCLA School of Law in the Spring Semester, 2009; I'd like to thank the students in my Disability Rights class there for helping me work through a number of issues with the book. And I'd like to thank the students in my disability rights law classes through the years at UCLA, Washington University, and Harvard for helping me to better understand the doctrinal, theoretical, and empirical questions this body of law raises. I'd also like to thank my many colleagues in disability rights teaching, scholarship, and litigation, from whom I've learned more than I can possibly recall. I owe a special thanks to the deans who supported this project, intellectually as well as financially: Kent Syverud, Mike Schill, and Evan Caminker. But my biggest thanks, as always, go to my family, for their love, support, and intellectual engagement.

I should note that, to the extent that anything expressed in this book reflects *anyone's* views (as opposed to merely being provocations), those views are mine alone, and not those of any employer including the University of Michigan Law School and the United States Department of Justice.

SAMUEL R. BAGENSTOS

Ann Arbor, MI

July 2009

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