Representations of Fatness and Personhood: Pro-Fat Advocacy and the Limits and Uses of Law

Introduction: “The Last Legally Allowed Form of Discrimination”

We often assume that an oppressed group can use legal change to raise its social status in something like the following way: at the appropriate historical moment, the members of the oppressed group gather the tools—financial, organizational, psychological—to understand themselves as injured by the deprivation of legal rights, and then begin to engage in a multipart strategy of popular advocacy and litigation with the object of adding theirs to the categories of persons that law liberates and protects. In other words, people imagine that the law is an instrument that can remake social relationships that cause them suffering. In this view, which is actually quite mistaken, the law is figured as being outside social relationships, as consisting of rules and principles capable of being used to create new relationships and promote new political identities. Members of social movements in the United States absorb these same cues from our political and cultural life—most notably the civil rights struggles of African Americans and women—and mold their political rhetoric and litigation strategies accordingly.

The problem, however, is that law is itself already implicated in the very production of the social relationships, personhood, and political identity that activists wish to use it to revise, and the way it intervenes in these constructions often does not conform to their expectations. There is rarely any “coming to” the law anew to take some new freedom or protection out of it; rather, one often finds a discrete list of options for describing oneself already embedded in American law: the reason-
able person, or the member of a statutorily protected class, for example. New social movements—such as the fat rights movement discussed in this paper—often arise in a particularly cluttered legal and rhetorical realm, where law’s content-laden categories intersect with their own hopeful descriptions of their political identity.1 Advocates’ self-descriptions and aspirations often lack complimentary representa-
tions in the law, and actual legal norms and rules may be inhospitable to or at least divergent from the groups’ hopes. Seeking representation in the law is thus much more reflexive, unpredictable, and multifaceted than both scholars and fat rights advocates seem able to acknowledge.

The nascent U.S. pro-fat advocacy movement seeks to use the law to reconfigure the status of fat people as members of a political identity group, that is, of a group whose members share some affinity with each other based on a shared trait and who consider that trait to be central to their powerlessness across multiple arenas of social interaction (but perhaps also a source of pride). The movement promotes at least two somewhat contradictory conceptions of fat people borrowed from the rhetoric of civil rights: first, that fat people are the victims of incorrect and hateful stereotypes that smother their true qualities (just as women are victimized by the presumption that they are fit only for domestic duties); and second, that fat citizens offer a salve to a culture obsessed with thinness and show ways to exist in the world that combat the accompanying assumptions about beauty, fitness, health, mobility, and so on (just as affirmative action in higher education is understood to widen students’ exposures to different viewpoints). The International Size Acceptance Association, in an attempt to draw a parallel between fat rights and other civil rights, calls antifat bias “one of the last legally allowed forms of discrimination in the United States.”2 Without a prior victory in a legislature in which body size has been established as a category protected from discrimination (and there are very few such jurisdictions), legal strategies in pursuit of size acceptance must attach to other legal constructs that are already in place either as a result of the efforts of other groups (such as the disabled) or by virtue of the development of common law principles of adjudication. These preexisting legal categories already describe the personhood of a claimant, in terms I shall classify as the transcendental, the communal-rational, the functional, and the actuarial views of the person. While they may intersect with the identity-based civil rights images that fat advocates promote, they operate in a manner very different from any that the fat rights movement has yet imagined.

Fat Advocacy in Popular Culture: Fatness as Injured Identity

The National Association to Advance Fat Acceptance (NAAFA), founded in 1969, is the most prominent of the national organizations devoted to the social, personal, legal, political, and health concerns of fat men, women, and
children. For the most part, NAAFA’s strategy follows the well-greased track of claiming minority group status as a means to stake a claim for legal rights. According to intellectual historian Philip Gleason, the term “minority,” as we use it in this group-constituting sense, entered American cultural parlance in the early 1930s in the context of race relations. It first appears as an important quasi-legal concept in the famous footnote four of *U.S. v. Carolene Products* in 1938, which called for judicial protection of “discrete and insular minorities” and subsequently formed a critical part of the intellectual background of U.S. civil rights laws and constitutional protections. Claiming a coherent group identity and an attendant history of oppression solidified into a primary political and legal strategy during the civil rights movements of the 1960s (the political moment of NAAFA’s founding). The preamble to the NAAFA constitution explicitly evokes a common form of legal status for fat people, arguing that “millions of fat Americans constitute . . . a minority group with many attributes of minority groups: poor self-image, guilt feelings, discrimination in getting employment, exploitation by commercial interests, and being the butt of countless jokes.” Other fat advocates have adopted a quasi-legal form of reasoning by analogy to incite sympathy for fat people as a group, comparing their sufferings to that of Nazi-era Jews, for example, and sympathetic research has tracked how being fat lowers one’s socioeconomic status.

While it aims to provide community and a broad source of affirmation, NAAFA’s stated positions take up legal topics quite prominently, borrow legal language, and track and explain legal cases to its membership. The organization maintains official positions on high-profile legal issues such as employment discrimination (“Firing, hiring, and promotional decisions should be based upon an applicant’s or employee’s qualifications, competence, and abilities”). In addition, the organization urges the addition of “height and weight” to the list of categories protected under civil rights laws; the institution of hiring and promotion “without prejudice” (and with a goal of increasing diversity through affirmative action for obese people); the outfitting of work spaces by employers for the comfort and safety of overweight workers who are otherwise qualified for the jobs; and the substitution by employers of performance tests for physical exams and weight restrictions on the job. NAAFA promotes a “like race” vision of group identity, in which fat people exist as one of the last acceptable groups whose members are identified by physical characteristics and freely vilified, harassed, fired, and shut out of public accommodations. Their strategy attempts to transform social understandings of fatness through three arguments: that being fat is compatible with health and vigor, that trying to lose weight is useless and only increases the profits of a corrupt diet industry, and that fat citizens should be accepted as they are in all spheres and activities of life.

Despite NAAFA’s rhetorical efforts, the group supports particular litigation strategies—specifically, in cases in which plaintiffs argue that obesity should be classified as a disabling disease—that fail to correspond to the concept of group identity it promotes. Dr. Conrad H. Blickenstorfer, chairman of the board of NAAFA, ad-
mitted in his latest address to the group’s yearly conference that “NAAFA doesn’t have a good answer for those who believe in size acceptance, but whose bodies simply can’t handle their size.” Establishing obesity as a disability would contradict NAAFA’s identity concept by setting fatness apart from thinness or normalcy and acknowledging that it is an affliction rather than simply part of the variation of healthy bodies. Compare such a concession to comments by one NAAFA conventiongoer (who views her body as a “marvelous gift”) about a performance by fat belly-dancing women: “We are accustomed to seeing mostly thin bodies that look more or less the same, but these bodies showed an amazing degree of delightful diversity.” In addition, NAAFA’s advocacy of civil rights protections on a “blindness” model (requiring employers to use performance tests rather than making assumptions about fat workers, for example) recreates the same difficulty other identity groups experience with antidiscrimination law. Why should affirmatively inclusive steps be taken for fat citizens (role modeling, affirmative action in hiring, modifying public spaces) if the goal is to set fatness aside as a criterion for judging people? NAAFA’s literature describes a better world as one in which fatness could be celebrated as “delightful diversity”; the cases it applauds presume that a better world is one in which fatness is at best ignored, and those who fail to function in the same way thinner people have little grounds for arguing that their fatness should be accommodated. The interplay between popular notions of rights-based struggles and law’s understandings of persons is fairly complex; this process is both a means for groups to construct a description of their political identity as well as the site at which that description meets with demotion (and sometimes affirmation).

This study examines one group, now fairly unpopular and without much cultural or legal clout, and describes its fascinating place in this exchange.

The Possibilities for Representation in the Law: Four Models of Personhood

Fat advocacy groups like NAAFA have had very little success in promoting “size acceptance” as a civil rights cause modeled after the struggles of racial minorities or women. A very small number of jurisdictions prohibit discrimination based on body size, along with race, sex, and other axes of identity, but the idea has been rejected in many more locales. It is not the case, however, that fat litigants are absent from the law, silenced, or forgotten. The categories that follow distill out four of the most prominent legal conceptions of personhood and fatness. They are presented initially as ideal types for clarity; however, judges often write about fat subjects using more than one understanding of their personhood, and much of this inquiry demonstrates how some conceptions predictably collapse back into others.

*The Transcendental Model.* In this model, the applicable version of *Black Like Me*...
would be the story of a thin person who wears a fat suit and explores how others treat her differently and worse than when they perceived her as slender, even though she has not really changed. Law invokes the transcendental model of personhood in order to dignify the individual character of the fat legal subject; that is, to force employers and others to see beneath the fat to the real person, who is more than her appearance. The transcendental model of personhood presumes that each of us is an individual who is more than the sum of her physical and social traits, and its goal is to protect the intrinsic worth of that inner person. Though as a matter of fact being fat is highly stigmatized, the transcendental model uses law to promote “appearance blindness” so that overweight people can pursue their life plans on equal footing with everyone else, at least in the spheres where legal protection exists. Human dignity and fairness require employers to strive to treat fat men and women just as they would treat thin ones, in the same manner that they should treat members of all races the same as they would treat white people or treat women the same as men.

To invoke this model, the law must establish that being fat is morally irrelevant and involuntary. (We might think that the question of blame would always be central to law’s understanding of the fat person, but that is actually not the case.) If fatness is to be morally separable from the individual, then law must establish its illegitimacy as a criterion of evaluation. The sheer irrelevancy of fat is central to this argument for nondiscrimination against fat people, for it is designed to permit the true person to stand before the law equally with others, ready to be evaluated for her true merit. Fat cannot be allowed to hold any independent significance for the moral character of the person who is located beneath it, because if it did hold such significance then it ought not to be transcended. In its insistence upon the legitimacy of fat-blindness, the transcendental model must fight off the idea that one can best understand and judge persons by considering them as wholly embedded within their social circumstances, their bodies, and their relationship to them.

The Communal-Rational Model. Sometimes the outcome of a case turns on an assessment of whether the fat man or woman acted reasonably (as in personal injury cases, when the defendant argues that the injured fat person failed to act reasonably to mitigate the effect of the injury). This model of personhood focuses judicial scrutiny upon a local and communal concept of rationality that is neither abstract nor cruelly instrumental, but moralistic and emotive. People, in this view, are reservoirs of shared cultural knowledge (Is it easy or hard to lose weight if you really want to?), and subjectivity is easily shared among people in the same community. A jury may find that a plaintiff is simply wrong to say that he is unable to lose weight, and decide instead that he does not belong in the community of reasonable persons. Radical subjectivities (“I’m happy being fat”) are not part of reasonable personhood, but garden-variety failure to lose weight (apparently widely understood) passes muster. Often what is really at stake is the level of effort the fat plaintiff demonstrates to convince the trier of fact that she really belongs within the commu-
nity of rational actors. What is most necessary for the communal-rational model—conceptualizing an individual as socially embedded and judging her based on one’s common sense—is most antithetical to the transcendental model, because it is precisely in these social judgments that stigma, prejudice, and disgust also lie.

The Functional Model. A functionalist model conceives fatness as a question of functional capacity or incapacity. Law actually displays three versions of a functional model of personhood for fat claimants. The first functional method of framing fat people—“functionalism-as-job-testing”—responds to the transcendental model’s demands. If employers should ignore the body size of employees or applicants when making assessments of them, then they must come up with other ways of measuring how well they function in the job.14 Checklists of requirements, pre-employment tests, and other supposedly neutral tools focus attention on the person as an entity to be evaluated primarily (and probably only) in regard to level of function. Legal discourses adopt this strategy in order to avoid giving in to prejudicial understandings of fat workers, and instead try neutrally to assess whether or not a fat person can perform a given job in the same way as a worker who is not fat. Of course sometimes these tests and guidelines include things like weight limits, and courts must decide if they are really about functioning in the job or if they exist to stigmatize.

If functionalism-as-job-testing is focused on the ability of a particular fat person to do a specific job, “bureaucratic functionalism” is focused instead on the ability of a particular fat person to function tout court. Administrative agency determinations of disability benefits exemplify this version of functionality. These are not discrimination cases, and there is no defendant. Rather, a fat person is disputing the bureaucracy’s denial of her benefit claim. A person claims disabled status in order to collect benefits as an individual beneficiary, and must be evaluated in the most bureaucratically rational way. The body in question is measured against a concrete list of traits that are necessary to function as an able-bodied person in society: the ability to manage major life activities, lift fifty pounds, operate a cash register, stand for a prolonged period, and so on.

The third representation of functionality in the law—“functionalism-as-status-creation”—focuses on the question of whether fatness is a disability that systematically defines the class of fat persons. Transforming fat into dysfunction and thus into disability is a route to protection against discrimination, useful because most attempts to rely upon a transcendental defense of the rights of fat people (as healthy people, or simply as people) have failed both in law and in public opinion. The logic of this third representation goes as follows: Being disabled means that one’s body or mind does not function in the way other people’s do; civil rights laws protect otherwise qualified disabled people from discrimination in many contexts, whereas they offer no protection to fat people per se; therefore the best way to protect fat people from discrimination is to construct them as functionally depleted, that is, as disabled.
The Actuarial Model. The actuarial model of personhood, unlike any of the previous models, conceives subjects as disaggregated categories of risk. Personhood is a conglomeration of bits of data that locates the person who differs from other individuals only by reference to where she is located on a scale (like a normal curve or an actuarial table). In this conception a person is not much different than a behavior, an outcome, or a “lifestyle” to which risk and prediction also attach. Many pieces of data, including height and weight, are simply part of the composite calculation of risk that attaches to a particular employee. Like the insurance model in which a change of address changes one’s auto insurance rates, the actuarial model of the person would produce and reproduce a new person as she ages, stops and starts smoking, or gains and loses weight. Defendant corporations employ this understanding of their fat employees and job applicants, refusing to hire those whose traits cause them to fall in a category likely to draw heavily upon company resources such as disability funds, sick leave, and health insurance plans.

The actuarial model is obviously in almost total opposition to the transcendental model, and offends every one of its precepts. In the actuarial model, there is nothing more to the individual than her traits, and the list of meaningful traits includes whatever makes measurement more accurate (often going far beyond what we ordinarily think of as constituting personhood). Even in cases of healthy fat workers who display none of the other risk factors for which obesity is a proxy (high blood pressure or Type II diabetes, for example), judicial authorities discard both the functionalist model and the transcendental model, which would point toward either affirming health or at least ignoring the stigma of the mark of fatness. They instead permit employers to fire or refuse to hire based on risk projections, in the same way that insurers are permitted to increase premiums or deny coverage altogether based on perceived risk. Judges who insist on individualized assessments of particular fat persons, in contrast, often draw upon the rhetoric of the transcendental model to combat the actuarial conception of the fat person.

The Transcendental Model: Protecting the Dignity of the True Self

On 2 March 1994, Arazella Manuel applied for a job as a bus driver with Texas Bus Lines, which operated a shuttle service in Houston between area hotels and the airports. The company conducted an in-person interview, checked her references, and administered a road test, all of which found Ms. Manuel to be, as the manager who interviewed her later swore under oath, “very impressive” and “very personable.” The last step before hiring was a federally mandated physical examination. The Department of Transportation (DOT) regulations specify, for example, that a prospective driver should not have such conditions as an amputated
arm or leg, blindness, alcohol or narcotic addiction, or a history of heart attack and, once hired, must keep a Medical Examiner’s Certificate in possession at all times.\textsuperscript{16} Obesity is not \textit{per se} a disqualification for the job under the federal rules.

When she went to Dr. James Frierson’s office for her examination a few days later, Ms. Manuel stood five feet seven inches tall and weighed 345 pounds. In his deposition, Dr. Frierson explained his method of conducting DOT exams, beginning with observing the way people walk from the reception area: “When I call their name up front, I watch them get up out of their chair. That tells me a good deal; and I watch how they walk back to the office, how they sit down, how they undress—well, women, we don’t undress them—and then we take their blood pressure and listen to their heart.”\textsuperscript{17} He observed that Ms. Manuel was “literally waddling down the hall; and I would say it took her, oh, roughly five times as long as it would somebody else.”\textsuperscript{18} He was “surprised,” however, to find that her blood pressure was normal and that she did not have any health problems. Nonetheless, Dr. Frierson declined to issue a Medical Examiner’s Certificate for Ms. Manuel to drive for Texas Bus Lines because of her obesity, specifying that he felt he “owe[d] the public and other people the right to have a driver that [could] give them some protection in case of an accident or fire or something like that.”\textsuperscript{19} Under questioning, Dr. Frierson admitted that he lacked any special training in what it takes to be a bus driver and that he had not followed up his observations with agility testing. He responded that, well, he knew about driving a bus because he had ridden in buses plenty of times and that he knew she was not agile from watching her get out of her chair and “waddle” to the exam room.\textsuperscript{20} “Common sense” and “experience,” he claimed, made it clear to him that very fat people like her should not be hired as bus drivers.\textsuperscript{21} Relying solely on the fact that Ms. Manuel could not produce the required certificate, which had been denied her based on Dr. Frierson’s opinion, Texas Bus Lines withdrew its conditional offer to hire her.

Ms. Manuel sued Texas Bus Lines in federal court for discriminating against her under the federal Americans with Disabilities Act (ADA), under a “perceived disability” theory, and won. The ADA offers a way for those who are not \textit{actually} disabled by obesity to file lawsuits, which is to claim that the firing, failure to hire, or exclusion was based on a \textit{perception in others} that the claimant was disabled by obesity, when in fact she is perfectly healthy and able-bodied.\textsuperscript{22} Ms. Manuel, after all, had no health problems and had been a very impressive job applicant. This prong of the ADA is meant to counter the stigma and prejudice that appearances of difference prompt in others, rather than to make up for any barriers to participation in work and public life that a loss of function might entail. Perceived disability claims explicitly demand transcendence of prejudicial attitudes and assessment of the merits of the individual in a socially detached way and, significantly, do not entail shifting the baseline to accommodate anyone or increasing a stigmatized group’s representation in the workplace. Plaintiffs who litigate weight-based discrimination on a “perceived disability” theory are therefore affirming their health
and asking the courts to condemn their employers’ negative social attitudes. The ADA then becomes a classic antidiscrimination tool deployed against those who make hurtful empirical misjudgments about the abilities of fat people, and who are unable to suppress their contempt for fat bodies. As Robert Post has put it, “American antidiscrimination law understands itself as negating such prejudice by eliminating or carefully scrutinizing the use of stigmatizing characteristics as a ground for judgment.”

The person, then, is that figure left behind for judging after its volatile and stigmatized traits have been lifted away.

Thus in Equal Employment Opportunity Commission (EEOC) v. Texas Bus Lines, the court held that the bus company never should have accepted Dr. Frierson’s “perceived and mistaken belief” that Ms. Manuel was not qualified to drive for them, because they were aware that obesity on its own does not disqualify an applicant. It was unlawful discrimination for Texas Bus Lines to refuse to hire her based on Dr. Frierson's subjective and “common sense” assessment of her capabilities. On this understanding of antidiscrimination law, then, the wrongness of the employer’s act stems from the use of a certain kind of knowledge: an irrational misjudgment based upon stereotypes and social stigma. The law exists to protect people like Ms. Manuel from negative “common sense” perceptions about them—that they are unhealthy, slow, and risky to have on the job. What Dr. Frierson gathered from riding in buses and from watching Ms. Manuel walk was social knowledge, the kind we all use every day to move about in the world and by which we treat other people as socially embedded persons. Banning Dr. Frierson’s “common sense” supposedly forces a transcendence of stigmatized traits, and forces employers to consider Ms. Manuel’s dignity, merit, and intrinsic worth. But while this transcendental model highlights the intrinsic worth of all people, it is nonetheless true that some people cannot (or should not) drive buses. No one suggests that law ought to honor only the intrinsic worth of blind people when interviewing for bus driver positions.

What law attempts to accomplish, then, is to carve off fatness from the list of relevant traits in assessing employees’ capabilities explicitly for the purpose of changing the social meaning of fatness. This transcendental model of personhood is typically enacted in American antidiscrimination laws and became widespread with the enforcement of the Civil Rights Act of 1964. The model regards the individual as primary, but in a strangely denatured way because what is protected is her right to be judged apart from some of her most prominent identity traits, such as race or gender. Under the transcendental model, generalized probabilities that an obese worker will eventually cause problems for an employer cannot count as reasons for firing or not hiring, because these reasons are system-focused, actuarial, and nonindividualistic (despite their lack of moral blame). In a similar case in which a nursing home refused to hire a fat nurse and was held liable under disability antidiscrimination laws, the employer’s use of actuarial reasoning about the nurse’s future claims on the worker’s compensation system and the assumption that she was too fat to help evacuate patients in the event of a fire functioned as “a graphic
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Illustration of an employment decision based on stereotyping—exactly the sort of employment decision that [disability rights law] seeks to banish.”

Stereotyping is the opposite of transcending; it reduces a person to her offensive trait and dismisses her true worth instead of affirming that the real person is actually separate from, and more authentic than, the offending trait. The nursing home failed to look into what exactly the nurse’s physical limitations, if any, were, “and instead relied on generalizations regarding an obese person’s capabilities.” The harm, like the wrong done to Ms. Manuel, was to the true, individualized self: the failure to make a “fact-specific and individualized’ inquiry” into actual job performance. The First Circuit Court concluded the opinion with an explicit reference to the cultural context behind the denigration of fatness. “In a society that all too often confuses ‘slim’ with ‘beautiful’ or ‘good,’ morbid obesity can present formidable barriers to employment [and] . . . those who erect and seek to preserve them must suffer the consequences.” Did the First Circuit Court want transcendental reasoning to protect this nurse’s intrinsic worth, and if so, why bother with a “fact specific and individualized inquiry”? Specific facts do not diminish (or enhance) one’s intrinsic worth, which supposedly does not vary between persons. The fact that law nonetheless requires this inquiry demonstrates how the transcendental model necessarily lapses into functionalism-as-job-testing, because it is impossible to differentiate among employees otherwise.

Fatness, the argument goes, ought to be banned as a shortcut to reasoning about agility, ability to assist in an emergency, and so on, and thus the law falls back on fact-gathering about blood pressure levels, regulatory compliance, and other permissible factors that do not implicate a protected identity. This is the only reasoning process left to follow if one is trying to ignore other irrelevant and distracting features of a person, such as her body size or her race. Can this person pass the driving test? Can she type a certain number of words per minute? Can she care for nursing-home patients? This type of instrumental reasoning is the opposite of social or communal reasoning—that is, the kind that tells us that we “just know” obese people are not very agile from living in the social world (the meaning of which is often given to us through power relations fraught with inequality, stigma, disgust, and humiliation). It is a mode of reasoning explicitly chosen for its power to deflect stigmatization.

Activists and others sympathetic to the plight of fat people first find the Kantian affirmations of the transcendental model attractive, and then they resort to this kind of functionalist model of personhood as a practical necessity in using law for social change. This first version of the functionalist perspective simply helps those fat workers whose job competence can be assessed using tests, regulations, and other devices that tap into measurable ability to function in a job. But because this concept of functionalism best accommodates fat people who function in the same way as their thinner counterparts on the measured criteria, it does nothing to promote difference or to unsettle antifat biases. Furthermore, it does not promote a social
group identity for fat men and women, since it discourages mention of the relevant trait, its social meaning, or its effects. The policy of NAAFA urges replacing physical exams with performance tests, presumably to avoid embarrassing medical visits and to sever the perceived link between body size and ability to do a job well. The group is unaware, however, that this strategy marks the end of the usefulness of the “blindness” model of antidiscrimination, and that reliance upon it provides reasons for employers to evade some of their other policy recommendations, such as affirmative action for fat people or the provision of special accommodations. If this strategy predominates in the nascent fat rights movement, then advocates will have followed a dominant cultural model of “just looking at the person” into incoherence and even greater political frailty.

The Communal-Rational Model: Litigating a Reentry into Community

While trying to get out of a whirlpool tub in the Best Western Hotel in Ames, Iowa, Bruce Tanberg fell and injured his back. He brought a personal injury lawsuit against the hotel corporation, claiming negligence in its operation of the tub. Best Western argued in its defense that Tanberg’s failure to lose weight (from more than three hundred pounds at the time of the fall) constituted comparative fault and a breach of the duty to mitigate damages. When Mr. Tanberg remained fat after the back injury, the hotel’s argument went, his lackadaisical attitude and inattention to his own health made his injury worse, and thus he became the kind of plaintiff who does not deserve full compensation for his injury (even if the hotel was negligent). This defense employs a historically longstanding rule in Anglo-American common law (also called the “avoidable consequences” doctrine), that even when one has been initially hurt by someone else (who has reneged on a contract, for instance, or inflicted personal injury), one must take reasonable steps thereafter to ease the damages, and if one does not, the responsible party will not be held liable for the increased harm that the plaintiff could have prevented by acting quickly and reasonably.

Thus, when a significantly overweight person sues for personal injury, often the main issue becomes not the defendant’s fault, but the fat plaintiff’s approach to losing weight as part of the physical recovery. Several different doctors testified in Mr. Tanberg’s case, one observing that “plaintiff’s main problem was his obesity,” and another agreeing that losing weight could “theoretically decrease the back pain” and would reduce the risk of further back pain in the future. Yet another doctor, however, refused to say for sure that losing weight would decrease Mr. Tanberg’s back pain but added that excess weight certainly might strain a person’s back. Mr. Tanberg himself admitted under questioning that he “had not been as
The case went to a jury, which had to decide whether Mr. Tanberg’s failure to lose weight to help his recovery was reasonable, and whether he was primarily to blame for his injured condition. The jury found that he was 70 percent at fault and the hotel was 30 percent at fault for the injury. Under Iowa’s personal injury laws, if the plaintiff’s fault exceeds the defendant’s fault, the defendant prevails entirely (unlike systems in other states, in which the court awards damages in proportion to the fault, however unbalanced it is). The Supreme Court of Iowa upheld the jury’s findings, and Mr. Tanberg collected nothing.

Patricia Nelson injured her lower back when she tried to catch a patient who fell from a bed in the convalescent home where she worked as a nurse’s aid. She was five feet four inches tall and weighed 300 pounds at the time, and began consulting doctors about how to heal her back. As her case wound its way from the Worker’s Compensation Board and up through the state court system, each trier of fact had to resolve the question of “whether, if compensation were not an issue, an ordinarily prudent and reasonable person would submit to the recommended treatment.” The first doctor who treated her two days after the accident, a chiropractor, reported that he thought her obesity would prolong her healing time. He referred her to an orthopedic surgeon, who confirmed the diagnosis of acute lower back strain and concluded that “her only source of help” would be to lose weight. A third physician, whom the convalescent home asked to evaluate Ms. Nelson, found no cause for her symptoms at all other than her “obesity and large abdomen.” A fourth doctor, an internist, put her on a one thousand-calorie-per-day diet and prescribed weight-loss drugs, noting that she was suffering from anxiety and depression. Finally, an endocrinology evaluation by a fifth doctor turned up no physiological cause for Ms. Nelson’s obesity. The court of appeals endorsed, and the Supreme Court of Oregon upheld, the conclusion of the internist monitoring Ms. Nelson’s dieting that, after losing thirty-seven pounds, “she had lost enthusiasm to proceed further with her weight loss program and that her weight problem was completely within her control.” According to the lower court, “there was no medical impediment to success, no severe pain or other contraindications; all that was required was an exercise of will.” Therefore, “her failure to make further efforts was unreasonable.”

Even though the Nelson case was controlling law in Oregon for all similar cases as of 1984, just one year later a lower court in the state came to an opposite result in a case in which the two women had nearly the same injury and the same build, down to a mere one-inch difference in height. Marilyn Christensen was five feet three inches tall and weighed about 300 pounds when she suffered a lumbar strain at her job at an insurance company. In Christensen v. Argonaut Insurance Company, the Oregon appeals court overturned the decision of a Worker’s Compensation Board to give her an award of only 20 percent permanent partial disability, even though she had stopped work completely due to her back pain. Her employer and her
employer’s worker’s compensation insurance carrier argued that her weight was solely a function of overeating and was within her control, and that the back injury was a minimal cause of her disability. Thus, like the other corporate defendants, they argued that they should not have to absorb the cost of full disability payments.

An examining physician testified before the original Worker’s Compensation Board that Ms. Christensen had tried numerous diets and drug interventions, none with any lasting effect. In addition to these methods and techniques, Ms. Christensen also testified before the board that she was undergoing hypnosis and was considering a gastric stapling procedure, even though this treatment is sufficiently experimental that her insurance would not cover the cost. The Oregon Court of Appeals did not dwell upon Ms. Christensen’s willpower or lack thereof. The court reinstated an original determination of permanent total disability, “primarily because of the medical testimony regarding individuals with morbid obesity.” Not only was she unlikely in the eyes of the court ever to lose weight and keep it off; the court also declined to speculate about whether “claimant’s changing motivation” was of “physiological or psychological etiology,” concluding that her “repeated attempts” to lose weight were reasonable.

What conception of the person and his or her relationship to fatness does this area of law depend upon? What are the differences between Mr. Tanberg and Ms. Nelson, who lost their cases, and Ms. Christensen, who won? Tort, or personal injury, law, in contrast to antidiscrimination law generally or disability law specifically, features the script of social norms and characters like “the reasonable person.” Tort law is part of the operation of the common law, inherited from the English legal system and built up over the centuries through case-by-case adjudication. The common law is “customary law,” that is, it develops through the observations of discrete community norms and the distillation of theories to generalize and analogize from those norms in order to decide new cases. Worker’s compensation schemes, developed so that injured workers would have recourse to an insurance-type system rather than having to rely upon individualized lawsuits, differ in some respects from traditional tort law but, in the cases considered here, employ the same kind of logic. The principles of tort law depend upon the use of the same kind of “common sense” social knowledge that Dr. Frierson was rebuked for using in the Texas Bus Lines antidiscrimination case. The model of personhood is “communal-rational,” that is, it must locate the person and her actions within a specific cultural context and by use of social reason. The person becomes intelligible and capable of being judged only by virtue of her traits, decisions, motivations, and relations with others. To seek to understand Mr. Tanberg, Ms. Nelson, or Ms. Christensen as transcendental persons by ignoring their fatness would be to lose all that is necessary for judgment in their cases. Their “intrinsic worth,” presumably equal, is not at issue: rather, cases like Mr. Tanberg’s and Ms. Nelson’s are simply about the legal representation of the will to lose weight, embodied in a certain person, and whether it is convincing or not.
Even where courts are in a hierarchical relationship with each other (supposedly guaranteeing that pronouncements from the higher court will bind the lower one), judges managed to come to different conclusions on nearly the same facts in the Nelson and Christensen cases. Perhaps Ms. Christensen’s willingness to consider expensive abdominal surgery more completely assured the court of her willingness to ingratiate herself with the community. By removing the question of her “changing motivation” from any consideration of her character, the court managed to preserve the reasonableness of Ms. Christensen’s inner subjectivity. Her case also demonstrates the kinder side of communal rationality. By tapping into the common sense knowledge that losing weight is often a frustrating and fruitless struggle, the court extends sympathy to Ms. Christensen. The sympathy is only possible because the court understands her as deeply socially embedded in her fatness, not as abstracted from it.

Mr. Tanberg and Ms. Nelson were not readmitted to the community of rational thinkers about fatness; Ms. Christensen was. Under the communal-rational model of personhood, if someone cannot help being fat, as the Christensen court found, then she should be pitied, not punished. The centrality of involuntariness here obviously recalls the transcendental model, and one might think that focusing upon Mr. Tanberg’s or Ms. Nelson’s true inner selves would be helpful for understanding them in a more sympathetic way. But the problem is that communal rationality is a feature of that core self that transcends the fat body; and once a plaintiff’s common sense and belonging have been debunked, there is not much left in the transcendental model worth calling upon. Why should a court adopt a transcendental model of personhood, in which Ms. Nelson and Mr. Tanberg are locked away in fat suits, if they have failed to qualify as full persons under the communal-rational model? How could they then be distinguished from people who deserve sympathy? By contrast, Ms. Christensen’s willingness to resort to drastic measures to lose weight affirmed her core self and thus made it possible for the court to find that her fatness was out of her control and that she behaved reasonably in the face of it. Whether sympathetically inclined or morally punitive, the communal-rational model draws from the very traits that the transcendental model eschews in order to locate the deeply socially embedded self, and thus to judge it.

Rather than emptying out the meaningful traits from the description of the person, the communal-rational model begins and ends with the insistence that a person’s traits indeed tell us who that person is. The point is then to assess the significance of those traits under particular circumstances. Communal-rational concepts of personhood cannot develop into the kind of political identity story that fat advocates need, however, unless there is a new story about the significance of the trait of fatness that is widely salient within or across many different communities. Fat rights advocates, so enmeshed in the culturally dominant rhetoric of civil rights, have not paid any attention to the adjudication of fatness in common law–type cases. Their efforts in discrimination cases—directed thus far at disability and job
testing—may wind up providing the content for communal musings by default. This outcome would be regrettable from NAAFA’s perspective because the very structure of the communal-rational model (due to its location in the common law) is uniquely open-ended in a way that the language of the ADA, for example, is not.

The Functional Models of Personhood

Two forms of the functional account of personhood in the law remain: bureaucratic functionalism and functionalism-as-status-creation. We have already seen how functionalism-as-job-testing developed in response to antidiscrimination norms: job-specific tests and standards to measure a person’s functioning have been developed in order to avoid stigmatization and promote “fat-blind” hiring. Pro-fat decision makers have been funneled along into yet another functionalist understanding of personhood due to lack of a political identity on the “like race” model: in this understanding, dysfunction becomes the basis of status-creation, that is, for promoting disability rights for the fat. This development illustrates the power of law’s settled paths to vitiate the power of nascent identity group movements, as advocates begin with the defiant rhetoric of the NAAFA home page and end up describing themselves as afflicted by disorder. At a different location of law—an administrative agency—we find a similar reduction of the self to measurable degrees of functioning, though, interestingly, legal reasoning humanizes the fat applicant using communal-rational tools in a demonstration of the slippery nature of these categories.

Functionalism Frames a Default Attempt at Status Creation: Disability Rights. One advocacy strategy on behalf of fat men and women has been to concede that obesity results in decreased bodily function, and to use disability rights laws to protect such people on the job. (On the Internet, NAAFA’s “Legal Resource” link goes to the Persons with Disabilities Law Center, P.C.—“the disabilities rights law firm.”) There have been a few successful lawsuits. In one federal disability rights case, a “morbidly obese” woman qualified as disabled by presenting evidence that her weight was a “dysfunction of both the metabolic system and the neurological appetite-suppressing signal system” and was potentially harmful to her “musculoskeletal, respiratory, and cardiovascular systems.” A functionalist approach to fat people that considers them as having attained the status of “disabled” (as opposed to a fat-affirming civil rights strategy) seems to be gaining support. The cultural cachet of disability rights dates to the early 1990s and the upswing of optimism surrounding the passage of the ADA; however, though the idea of using disability as a means to gain legal protection remains powerful, in practice it has proven ineffective.

Many pro-fat scholars argue enthusiastically for a highly medicalized un-
Understanding of fatness as an immutable condition with a variety of psychophysiological causes. For example, Christine Kuss argues that interpreters of the ADA should conclude that morbid obesity is involuntary, largely untreatable, and presumptively disabling because its dangerous effects on the body systems hinder the major life activity of living itself. The American Dietetic Association also maintains that being fat is a disease and should be classified as such in medical insurance benefit plans and in tax deductions for treatments. Not all fat advocates and scholars believe, of course, that emphasizing fat people’s dysfunction is the best route to liberation, and some point out that disability laws as they are currently interpreted do not provide a very affirming vision of fat people. Indeed, the enthusiasm for summoning disability status is rather baffling, given the dismal record of the ADA thus far. When it was enacted in 1992, however, the ADA seemed like a remarkably progressive civil rights statute with great potential for enacting truly substantive and far-reaching equality for disabled men, women, and children. Employers cannot discriminate against disabled people who, “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” As Professor Linda Krieger points out, “the ADA required not only that disabled individuals be treated no worse than non-disabled individuals with whom they were similarly situated, but also directed that in certain contexts they be treated differently, arguably better, to achieve an equal effect.” It defined “disability” extremely broadly, to include not only those people already accepted as disabled (blind people or people using wheelchairs, for example) but also those whose bodies and minds are configured in ways that are simply stigmatizing, and also people who once had or are at risk for developing a stigmatized or disabling condition in the future, such as cancer survivors or HIV positive people.

According to Krieger, “the ADA promised to revive the concept of stigma as a powerful hermeneutic for the elaboration and judicial application of American civil rights law.” But many social justice commentators have been quite disappointed with conservative judicial interpretations of the ADA and with data showing that defendants successfully fend off disability discrimination claims more than 90 percent of the time. Legal scholars also report that judges have often simply refused to interpret the ADA as broadly as Congress intended, especially where more ambitious concepts like being “regarded as” disabled are the focus of the litigation (a claim that does not require claiming dysfunction, but just the employer’s perception of it). The following cases illustrate what Judith Butler has termed “a modern antinomy of presocial and disembodied conceptions of personhood,” in which legal discourse resolves the problem of stigma by resorting to functionalism and instrumental rationality, but at the cost of blindness to social power.

It seems that attempts at establishing obesity as a legally recognized disability have failed because many courts refuse to believe that being fat is morally irrelevant and unrelated to the character and behavior of the true self. In other words, they...
insist on regarding the obese person as socially embedded and marked with all the attendant moral judgments that typically pertain to fatness. (Interestingly, as the previous section on the communal-rational conception of the fat person showed, this “common sense” understanding of personhood can also be highly sympathetic to the suffering and travails of fat people—a process of understanding that is assisted rather than hindered by an account of the person as deeply enmeshed in her body and its struggles.) In addition, there is the difficulty that, as a matter of fact, fatness varies widely; it is not always functionally depleting, and many thin people suffer from the same kinds of dysfunctions that afflict some fat people. Courts and administrative agencies have therefore resisted the notion that obesity per se automatically qualifies as a disability, preferring to treat it as a possible aggravating factor. Despite the lack of progress on the legal front, promoting obesity as a disabling medical condition remains popular among those who want to foster unity and belonging among fat people, so I shall term it “functionalism-as-status-creation.”

Stacey Webb applied to the Swartz Creek Community School District for a job as a substitute school bus driver in August 1996. After completing the written portion of the exam for a commercial driver’s license, Ms. Webb met with Jean Bowman, who was in charge of taking prospective employees for a test drive in the school buses in order to see if the district should invest in their training. On the first day of training, Ms. Webb found that the steering wheel pressed into her abdomen. At the time she was about five feet eight inches tall and weighed between 320 and 330 pounds. The next day, Ms. Bowman dismissed her from the training program because she could not fit behind the wheel. Even though this case arose in Michigan, the only state in which discrimination based on weight is expressly prohibited, the court found that Ms. Bowman lacked “discriminatory animus” because “Bowman only found Webb’s weight to be a problem because it prevented Webb from driving the bus safely.”

Ms. Webb was not disabled, either, according to the court. Ms. Bowman never made derogatory remarks about Ms. Webb, and even suggested that she apply for other jobs in the school district. The district had decided not to adjust the seat on the bus any further because it would require structural modification, possibly in violation of other safety standards (something the district had been unwilling to do for all other applicants as well).

Donald Coleman, a fleet mechanic for Georgia Power, failed to lose enough weight to qualify to operate his equipment under a new company weight policy (limiting employees in that job category to 280 pounds) and was terminated. To make a case under the ADA, Mr. Coleman had to prove that he was disabled; that he was qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he suffered adverse employment action because of his disability. A disability is defined as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual,” or having a record of such an impairment. The EEOC’s guidelines elaborate:
“definition of impairment does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within ‘normal’ range and are not the result of a physiological disorder.” Mr. Coleman’s weight could not then be a disability because it was not *caused by* any other physiological dysfunction (and the fact that weighing over 300 pounds could later *cause* physiological problems does not suffice). He lost his case on the first prong of the test (having a disability), and the court never decided whether or not he was qualified to perform the job. Georgia Power was free to decide that Mr. Coleman functioned at a lower level than the job required (that is, that he could not function properly when using the aerial lift devices on company trucks because he exceeded the 280-pound limit), even though the court had found that he was not dysfunctional based on his weight as a matter of law.

As we know, the functionalism-as-job-testing conception would merely be interested in ascertaining whether or not an obese worker can perform a certain job. If she, like Ms. Webb, cannot perform the job because of body size, then the law must decide whether to stop there and simply refuse to move the baseline of functioning. The second option, accommodating the worker, would be undertaken in order to increase representation of fat workers in that job or to alter the social meaning of fatness, that is, in the interest of reducing stigmatization and increasing fat citizens’ participation in the workplace. The court could have analyzed the stigmatizing meaning of the weight limit in Mr. Coleman’s job category and refused to believe that it was merely a neutral standard. This type of solution begins to slide from a purely functionalist perspective back toward the “injured identity” view put forth in NAAFA’s founding documents. The problem, however, is that the functionalist view exists precisely to avoid the messiness of a full-scale inquiry into stigmatization, animus, and social meanings. If it delves into such questions, then it forsakes the supposed advantages of instrumental reasoning that made the functionalist view attractive in the first place. Interestingly, the Michigan court would have accepted stigmatization of Ms. Webb (“discriminatory animus”) as part of the story of why she was dysfunctional, but since there was no evidence of it, the case rested upon the simple fact that she could not fit behind the wheel. The judge hints that if there had been signals of contempt or exclusion due to disgust, for example, law’s role might have been different, and perhaps the court would have ordered structural modifications to the bus so that Ms. Webb could drive it. This willingness to look for stigma reflects the fact that the Michigan statute is a nondiscrimination law, not a disability rights law.

The *Coleman* court, by contrast, accepts Georgia Power’s definition of functioning as set out in its weight requirement without the slightest interest in whether it unfairly presumes that heavy people cannot operate aerial lift devices. Mr. Coleman had to make an awkward disability-based argument that the rule should be changed to accommodate him, but without the transcendental model’s concern for stigma hovering protectively in the background. Once a court adopts a
functionalism-as-job-testing view, however, it excludes the kinds of reasons that would have to count in order to reduce stereotypes and the stigmatization of fat workers. There is also little motivation for courts to question employer’s definitions of what counts as functioning as long as it seems reasonable. Presumably Mr. Coleman considered the weight limit arbitrary and mean-spirited, since he could still operate aerial lift devices, and no one would give him the chance to prove that his weight ought not to count in the assessment of his real merit. Courts have insisted, however, that a claim of stigma or distaste by an employer is simply not enough to make out a weight-based discrimination claim. Specifically, plaintiffs who are just too fat lose their cases because the federal courts require some other instigating physical problem (that is, proof of loss of functioning that is prior to the fatness) in order to ground a disability rights claim under the ADA. As it is currently interpreted, therefore, the ADA and derivative state laws adopt a functionalist account of personhood that leaves fat men and women curiously unprotected. Fat plaintiffs are doubly exposed to functionalist reasoning, both at the hands of the law and of their employers: Fatness does not count as a genuine bodily disorder and fat persons are thus legally constructed as fully functional, but an individual fat person can be freely fired by his employer if he fails to function adequately as an employee.

Bureaucratic Functionalism’s Concept of the Fat Claimant. It is important to note one unique context in which what I shall term bureaucratic functionalism—the understanding applied within administrative agency determinations of ability to function—behaves quite differently than we might expect. Recall that when functional views of the person predominate as a response to antidiscrimination norms, it means that courts are reluctant to draw upon communal rationality. The use of tests, regulations, and standards is an attempt to force out these judgments and to rely only upon “neutral” criteria. When faced with an employment rule that probably carries some stigma (such as a weight limit), judges often defer to the employer and assume that there must be some instrumental reason for having it. But in adjudication at the Social Security Administration (SSA), the cases are not about stigma, but desert and entitlement. The changed context and legal inquiry means that we can observe how this instantiation of the functional model gives way easily to communal understandings.

The question at issue in adjudication before the SSA is whether applicants will receive disability benefits from the federal government. As Judith Butler has pointed out, functionalist conceptions of the person in American jurisprudence can be understood as a development of Max Weber’s modern bureaucratic rationality. In the next section, on the actuarial conception of personhood in the law, Weberian bureaucracy gives way to Foucaultian population management. But here, law is still processing claimants as individuals rather than as nodal points within a system. The functionalist reasoning of the SSA has developed in its most pure form within an organization formed to operate as a bureaucracy, rather than within judicial opinions as a derivative means of responding to antidiscrimination norms.
bureaucratically rational application of the functional view reaches its own endpoint too, however, and, interestingly, ends up borrowing some of the social knowledge of communal rationality to complete the judgment of the fat claimant’s entitlement.

In this sphere of administrative law, the only question up for adjudication is, Can this claimant function, and to what degree is she unable to function because of her weight? These plaintiffs are not making a discrimination claim under the ADA or any other civil rights law; rather, they are appealing from the determination of an administrative law judge (ALJ), who has concluded that there is not sufficient evidence of lack of function to grant disability insurance benefits and supplemental security income. After an individual has taken her case through the agency, here the SSA, she may seek judicial review in a federal trial court. A claimant who is not working (in legal terms, not performing “substantial gainful activity”) must show that the reason is “a severe impairment or combination of impairments which significantly limits [her] physical or mental ability to do basic work activities.” The federal regulations stipulate that if the claimant’s assessed Residual Functional Capacity (RFC) is sufficiently diminished that she can no longer perform at her previous job and there are no other suitable jobs considering the age, education, past work experience, and RFC of the claimant, then the ALJ should find her disabled and begin benefits payments.

Although obesity qualifies as grounds for finding a claimant disabled, many ALJ decisions find that there are still many sedentary jobs available that even an extremely overweight person could perform. The opinions in these cases simply recite the outcome of the tests of function and then match these (albeit limited) functions with hypothetical job descriptions. If there are some jobs that the claimant could obtain, then she ought to do so rather than collect disability payments. One ALJ, for example, found that a depressive, 350-pound woman named Barbara Parker with limited range of motion in her joints and a low tolerance for personal interaction (as measured by physical and psychological testing) had an RFC to lift up to thirty-five pounds with the functional ability “consistent with the performance of a full range of sedentary work and a limited range of light work” such as “production inspector, parking lot attendant, and courier.” Because there were enough such jobs available in the local economy, the federal court upheld the ALJ’s decision to deny benefits to Ms. Parker.

Brenda Fulbright, who weighed more than 300 pounds, filed for widow’s insurance benefits based on a disability claim. She claimed that her chronic pain, high blood pressure, and other problems prevented her from working as a hair stylist as she had done previously. She took several Residual Physical Functional Capacity Assessment tests, and her doctors concluded that she “could occasionally lift 50 pounds and frequently lift 25 pounds; that she could sit, stand, and/or walk 6 hours in an 8 hour workday, and that her ability to push and/or pull was unlimited.” Federal courts are quite deferential to administrative agency judgments, and here,
as usual, the reviewing court found that the ALJ had “substantial evidence” from which to conclude that the plaintiff had enough functional capacity to work and thus to be denied benefits. The agency seemed to conclude that Ms. Fulbright simply did not want to work, noting disapprovingly that she was able to travel, shop, go out to restaurants, do housework, drive a car, and supervise contractors who were remodeling a house.69

Despite the use of tests and agency guidelines, it was impossible for the ALJs to regard these women in a fully abstract and bureaucratic style, however. The conclusion that Ms. Fulbright was simply lazy and evasive rather than disabled ultimately rested not upon her Residual Physical Functional Capacity Assessment test results, but upon her habits of daily life. The ALJs had to judge her based upon their common sense and experience. Are traveling and shopping similar in relevant ways to doing hair? How could one decide that without also including some feelings of obligation and indignation (against those who would insist that she can travel and shop but not do hair)? Even in this supposedly pure functionalist model, strict Weberian rationality was insufficient to locate Ms. Fulbright’s obligations. Supplementing the bureaucratic functionalist view with communal rationality, these administrative courts imagined what it was like to be Ms. Fulbright and Ms. Parker and to live in their bodies, to move about in their hometowns and local economies, and to adopt their attitudes. Not surprisingly, the women just were not intelligible otherwise.

The Actuarial Model of Personhood: Calculating Deviation from the Norm

Joyce English, an African American woman and a college graduate, stood five feet eight inches tall and weighed 341 pounds when she applied for a job as a customer service representative at the Philadelphia Electric Company (PECO).70 Like Arazella Manuel, she passed all pre-employment tests and then had to submit to a physician’s examination. The medical department at PECO refused to certify Ms. English for employment because they believed that her obesity would create the risk of medical problems that might result in excessive absenteeism, underproductivity, and other costs to the company. The Human Relations Commission, from which this case was appealed, had concluded that Ms. English was a handicapped person protected by antidiscrimination laws because she belonged to a class of morbidly obese people who were susceptible to potentially severe restrictions on mobility and breathing.71 But the doctor who examined her found that she was not in fact limited in her functioning by any of the usual health problems that obese people have, and she herself claimed that she was perfectly able to do a normal day’s work. Therefore, the Pennsylvania court concluded that Ms. English was not a
“handicapped person” in the legal sense. Ms. English’s weight put her well outside the company’s weight charts, however, and the court defended the employer’s “inherent right to discriminate among applicants for employment [based on risk of loss to the company] and to eliminate those who have a high potential for absenteeism and low productivity.”

At the time she applied for the job as a senior business systems consultant, Catherine McDermott exceeded, by more than 100 pounds, her desirable height and weight category under the 1966 Metropolitan Life Insurance Company height/weight tables. Like Ms. English, she was healthy at the time and suffered no disability as a result of her weight. Ms. McDermott’s case arose because the Director of Health Services for Xerox who reviewed the results of her pre-employment medical examination “explained [to her would-be manager] the significance of gross obesity and its relationship to emotional disease . . . [and also] the serious risk to the Short Term Disability, Long Term Disability, and life insurance programs.” According to this doctor, obesity would probably not have any short-term affect on her job performance, but “over the long term the obese group will have a higher absenteeism rate, higher utilization of long-term and disability benefits, medical care plans, [and] life insurance.” He recommended that Ms. McDermott not be hired on the basis of this actuarial conjecture alone, and she was not. At trial, Xerox’s defense consisted entirely of recitations of the output of insurance calculations, without discussing Ms. McDermott’s appetite, dieting habits, abilities, or levels of self-control.

The Supreme Court of New York found in favor of Ms. McDermott, though it did not directly confront Xerox Corporation’s actuarial defense. The court deftly turned the defense into the necessary evidence to buttress Ms. McDermott’s disability claim. The court reasoned instead that the fact that Xerox had refused to hire her based on her status as “a medically unacceptable risk” in the future could mean that her obesity constituted a legitimate medical impairment in the present (for which Xerox could not refuse to hire her without violating disability antidiscrimination laws). Her future risk calculation became part of her legal personhood in the present, and the court then read it back into disability law in order to counter Xerox’s own actuarial account of Ms. McDermott’s personhood. This reasoning is the basis for ADA protection for currently healthy people likely to develop stigmatized conditions, for example, HIV positive workers, women of childbearing age, smokers, and so on. Xerox was ordered to offer Ms. McDermott a position equivalent to the one denied; give her back pay; and pay damages for hurt, humiliation, and mental anguish.

Defendant corporations such as PECO have succeeded in representing fat job applicants as risky hires because of the statistical likelihood that they will miss work more often, be more likely to become disabled, and generally will suffer a greater number of health problems than thinner employees. Companies are not afraid to state bluntly that regardless of the prospective employee’s present health, a fat applicant is rightly rejected on an actuarial basis, and, as in Ms. English’s case, many
courts have defended this reasoning as simply sound business practice that has nothing to do with stigmatizing fat people.\textsuperscript{77} Xerox’s and PECO’s positions in these cases exemplify the application of what François Ewald has described in Foucaultian terms as “the shift . . . from the level of the micro-instrumental to that of the bio-political”—in other words, as the change from a disciplinary social scheme that primarily directs the body and the control of its movements to that of a norm, whose purpose is to measure individuals in relation to a group standard.\textsuperscript{78} Many of the cases discussed in this paper feature law’s scrutiny and discipline of fat bodies. However, Ewald’s parsing of the Foucaultian concept of normalization in terms of risk, statistics, and insurance shows another route to the making of the fat employee besides focusing on her body and its moral or functional status. She is simply a member of the “obese group,” classified by a chart and tables, and marked with a certain risk of making demands on employee benefit funds. “Risk,” Ewald explains, “plays the same role in insurance that the norm does in the constitution of disciplinary strategies.”\textsuperscript{79} Technologies of risk are ways of managing the individualization of people in aggregate classes, through the calculation of the probabilities of certain events and the application of such calculations to individual people. Ewald argues that insurers and statisticians are free from “the usual play of signification” of victimhood, causation, and avoidability “by concentrating on the pure factuality of facts, the pure recording of occurrences.”\textsuperscript{80}

The transcendental model, which takes as its preeminent value the genuine attempt to discover the true person beneath all the irrelevant axes of identity, is absolutely incompatible with Ewald’s description of Foucaultian normalization through probabilistic placement of the individual within the predictably dispersed population. To call this amalgamation of traits an “individual” is rather euphemistic, even; the actuarial model loses all the boundaries and content of what we understand a person to possess. The Foucaultian description of the placement of an obese person in weight tables and actuarial projections locates her not so much as an individual but as a data point. To the \textit{Texas Bus Lines} court, allowing that conclusion to count as a reason not to hire Arazella Manuel would be to dishonor and devalue her transcendental personhood.

The \textit{McDermott} court, in a very different response, transforms an actuarial projection into a property of a person, describing her future risk as a disability. Disabilities in this sense can only attach to persons, not to systems. This concept of disability, interestingly, is not the status-creating one that fat advocates have promoted; instead, it is simply a rebuttal to the actuarial conception of fat personhood. Law has a limited reservoir of descriptions from which to draw a protective cover against corporate calculations such as these, and here the \textit{McDermott} court had to invent a disability, or at least the company’s perception of one, for Ms. McDermott, who was perfectly healthy and fully functioning. Without any reason to protect fat people as a group from corporate decisions (in the way women are protected, for example,
from policies against hiring them because of the future risk of insurance costs due to pregnancy), there was no legal rebuttal available to Ms. English, by contrast. The actuarial conception of fat claimants will either serve as a useful shield for corporate defendants or further enhance some version of the disability theory of fat rights. Either way, future encounters with these legal descriptions also seem unlikely to provide NAAFA with theoretical grounds for articulating a political identity for fat people.

Conclusion

By quietly proceeding to establish multiple and conflicting representations of the personhood of fat people, law demonstrates its multifarious powers as a complex system of adjudication that is neither ruled by unitary moral rules, predictable outcomes, or stable requirements nor populated by easily understood persons. Because law is not an instrument outside of culture, legal representations of fat people share in the multifarious and contradictory means of understanding one another that we commonly use for social recognition. It is difficult to imagine meeting people and abstracting from their traits to their intrinsic worth; likewise, we have seen how legal actors must shift back and forth between reasoning about people as transcendental subjects, as functioning beings, as provocations to risk, and as socially embedded persons just to make sense of such ordinary legal questions as, “Is this woman eligible for Social Security benefits due to her obesity?” or “Was it wrong for this company not to hire this very fat person?”

The strategy of NAAFA and other advocates, of comparing themselves by analogy to other oppressed minority groups, has not usurped the representations of fatness that hold sway in court decisions, administrative agency hearings, and jury verdicts. If these groups have undertaken their legalistically framed advocacy projects in the hopes of summoning law to fulfill its best and most humane principles as applied to them, they have misapprehended what law is and how it works. Instead of amplifying accounts of fat people as members of a politically and socially oppressed group who deserve more respect, more room, more income, and so on, the actual legal battles that fat plaintiffs wage divert notions of fat personhood down more narrow and less politically viable paths. Whereas these litigants begin with hopes of defending themselves as healthy, competent workers, often the best they can hope for in the end is to join the class of disabled persons or to pass a job test designed with thinner workers in mind. Meanwhile, legal instruments that have nothing to do with a political program on behalf of fat identity, such as the notion of the reasonable person or the calculation of future risk, operate unnoticed and supply their own descriptions of fat men and women. Imagining law’s powers at least partially constitutes the ambitions of the fat rights movement, but over time
a reciprocal relationship with all of these forms of legal personhood will push the notion of what fat identity means in directions that would have been nearly impossible to anticipate at the start of the movement.

Strategies of liberation and protection through law ought to be much more closely examined for descriptions of exactly what liberation or protection the law can grant, and on what terms. Moreover, it looks as though legal descriptions of personhood and identity also influence the ambitions of those who undertake political change. It would be a mistake for advocates to assume that a conception of personhood is singularly oppressive or liberating—I have shown here how communal norms inherited from common law can be forgiving as well as punishing, for instance, and effusive transcendental ideas of personhood, though flattering, are not currently digestible throughout antidiscrimination law. Only after fully describing these multiple axes of representation does it become clear that law works by combining its adversarial structure and unique institutional apparatuses (pleading requirements, written decisions, rules of evidence, common law rules, and so on) with social norms, cultural representations, human emotions, and the demands of other institutions (such as corporations). Similarly, efforts to establish or shift the social understanding of a group of people work—whether advocates know it or not—by borrowing from cultural representations of legal ideas but also by giving in to law’s own descriptions and being borne along by them.

Notes

Anna Kirkland is a doctoral candidate in the Jurisprudence and Social Policy Program at the University of California, Berkeley. This article has benefited tremendously from exchanges with Robert Post, as well as from suggestions by the editorial board of Representations.

1. This article adopts the term “fat” in the same sense that advocacy groups use it. The NAAFA website, for example, explains that the organization uses the word “fat” as a way of “casting off the shame we have been taught to feel about our bodies.” The strategy is to eschew medical terms (such as “obese”) in favor of ordinary language, in the hope that the word “fat” will lose its derogatory meaning and become just an adjective “like short, tall, thin, or blonde.” See http://www.naafa.org/documents/brochures/naafa-info.html#word. Visited 10 March 2003.


9. Ibid.


25. Ibid. 26. Ibid. 27. Ibid., 28.


29. Restatement (Second) of Torts, § 918 (American Law Institute, 1979).


31. Ibid. 32. Ibid.


34. Ibid., 251. 35. Ibid., 248. 36. Ibid. 37. Ibid., 249. 38. Ibid., 252.


40. Ibid., 113–14. 41. Ibid., 114. 42. Ibid., 115. 43. Ibid.


46. Cook, 23.


52. Ibid., 3. 53. Ibid., 6.


60. Americans with Disabilities Act, 42 U.S.C. § 12101(2)(A) and (B).


65. 20 C. F. R. § 416.920(c).

66. 20 C. F. R. § 416.920 (e)(1).


69. Ibid., 39.

70. Philadelphia Electric Company v. Pennsylvania Human Relations Commission and Joyce A. English, 68 Pa. Commw. 212 (1982). Interestingly, the court insisted that Ms. English’s race was “totally irrelevant” to her case, but there are often connections between race, gender, and obesity in the law’s construction of plaintiffs.

71. Ibid., 223. 72. Ibid., 228.

74. Ibid., 545. 75. Ibid., 547–48. 76. Ibid., 543.
77. For example, in Cook, the department stated that its reasons for not rehiring Ms. Cook were due to speculation that her morbid obesity would promote absenteeism and increase the risk that she would file a worker’s compensation claim.
79. Ibid. 80. Ibid., 143.