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Accommodating Every Body

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This Article contends that workplace accommodations should be predicated on need or effectiveness instead of group-identity status. It proposes that, in principle, "accommodating every body" be achieved by extending Americans with Disabilities Act–type reasonable accommodation to all work-capable members of the general population for whom accommodation is necessary to give them meaningful access. Doing so shifts the focus of accommodation disputes from the contentious identity-based contours of "disabled" plaintiffs to the core issue of alleged discrimination. This proposal likewise avoids current problems associated with excluding "unworthy" individuals from employment opportunity—people whose functional capacity does not comply with prevailing workforce design and organizational presumptions—and who therefore require accommodation. Adopting this proposal also responds to growing demands to extend the length of time people remain at work by enhancing employment opportunities for aging individuals still capable of contributing on the job. Provision of accommodations for age-related alteration of functionality, when the accommodations are effective, is reasonably prescribed because it is in everyone's interest to retain maximum capabilities as they grow older, whether or not they also possess identity-based characteristics sufficient to constitute a "disability" under the ADA.

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INTRODUCTION

Courts have struggled for more than two decades with the question of who is entitled to a reasonable accommodation under the employment provisions of the Americans with Disabilities Act of 1990[1] (ADA). Judges have found it difficult to reconcile the fine balance required by the statute that workers be sufficiently impaired to fall within the disability classification, yet remain capable of performing essential job functions with or without accommodations.[2] The Supreme Court eschewed explicating these standards by imposing stringent requirements for being "an individual with a disability" under the ADA, with the result that no

[1] Pub L No 101-336, 104 Stat 327, codified as amended at 42 USC § 12101 et seq. This remains true despite clarifications contained in the consolidating Americans with Disabilities Act Amendments Act of 2008 (ADAAA), Pub L No 110-325, 122 Stat 3553, codified in various sections of Titles 29 and 42.

[2] See, for example, *Toyota Motor Manufacturing, Kentucky, Inc v Williams*, 534 US 184, 199–203 (2002). See also 42 USC § 12111(8) (defining "qualified individual"); 42 USC § 12102(2) (defining "disability").

employment-capable plaintiff claiming disability-based discrimination achieved victory at the Court.[3] Following the Court's approach, over 97 percent of ADA claimants in federal trial courts before 2010 also lost.[4]

Ironically, it is precisely those potential employees with disabilities—work-capable individuals denied access to the workplace—that Congress intended to empower through the ADA.[5] Consequently, Congress responded to the Court's restrictive approach with the Americans with Disabilities Act Amendments Act of 2008[6] (ADAAA), rejecting the "demanding standard[s]" that courts imposed for a determination of disability.[7] The ADAAA's stipulation that disability is to "be construed in favor of broad coverage of individuals"[8] means that judges should now be reluctant to dismiss cases at summary judgment on the ground that plaintiffs' impairments do not meet the statutory definition of disability. Similarly, the ADAAA has the potential to shift attention from whether a person meets a threshold standard for disability to whether a person is capable of performing essential functions for a given position with or without an accommodation. Even with the ADAAA, however, courts may continue to struggle with balancing determinations of disability against determinations of ability to perform essential job functions with or without accommodations. Thus, the challenge of integrating disability status with work-capable status remains.

The definition of disability in the ADA, and even more so in the ADAAA, is in tension with the Social Security Administration's competing definition of disability as a complete inability to work,[9] a binary view of disability and employability that reaches

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3 Nathan Catchpole and Aaron Miller, Comment, *The Disabled ADA: How a Narrowing ADA Threatens to Exclude the Cognitively Disabled*, 2006 BYU L Rev 1333, 1364. "The Court has invented a bizarre and deeply paradoxical requirement that a disabled individual must offer specific proof of her own negative ability." Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L Rev 1279, 1289 (2000).

4 See, for example, Amy L. Allbright, *2010 Employment Decisions under the ADA Titles I and V—Survey Update*, 35 Mental & Physical Disability L Rptr 394, 395 (2011) (reporting a 98.2 percent win rate for employers for cases that were resolved at the time of the survey); Amy L. Allbright, *2009 Employment Decisions under the ADA Title I—Survey Update*, 34 Mental & Physical Disability L Rptr 339, 340 (2010) (reporting a 97.4 percent win rate for employers for cases that were resolved at the time of the survey).

5 See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 Wm & Mary L Rev 921, 926–27 (2003).

6 Pub L No 110-325, 122 Stat 3553, codified in various sections of Title 42.

7 See ADAAA § 2(b)(4), 122 Stat at 3554.

8 ADAAA § 4(a), 122 Stat at 3555, codified at 42 USC § 12102(4)(A).

9 42 USC § 423(d)(1)(A).

back to the Elizabethan Poor Laws.[10] Granted, Social Security Disability Insurance (SSDI)[11] and the ADA have different goals. SSDI is designed to transition individuals no longer work capable due to disability out of the workforce,[12] while the ADA is meant to retain work-capable disabled individuals in the workforce. Since the passage of the ADA, however, there has been conflict over which policy's conception of disability, and which of these incompatible goals, should have primacy over individuals who can remain working as long as they are accommodated.

In an early ADA case, the Supreme Court held that SSDI and ADA claims do not necessarily contradict each other; plaintiffs who file for SSDI prior to filing an ADA complaint must explain how the claim of being too disabled to work is consistent with the ADA claim of being able to perform essential job functions if provided reasonable accommodation.[13] In so ruling, the Court sidestepped the issue of which conception should prevail,[14] portraying the SSDI and ADA processes as moving along nonintersecting tracks while inviting the introduction of an SSDI-like high threshold for protection under the ADA.[15] As a result, it is more arduous for work-capable employees with disabilities to achieve accommodations needed to remain in the workplace than to obtain disability benefits tied to ceasing to work. Although the ADAAA ought to reduce this bias that tilts employees toward stepping out of work, unless courts shift the focus of accommodation claims from demonstrating deep dysfunction to facilitating capability, the incentive to pursue SSDI benefits will persist. It remains to be seen whether courts can successfully integrate determinations of disability with determinations that individuals are capable of performing essential job functions with or without accommodations.

Aging demographics further complicate the disjuncture between these competing statutory and administrative regimes. Simply put, people are living longer and are expected or required

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10 See Jacobus tenBroek and Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 Cal L Rev 809, 821–23 (1966).

11 42 USC § 423.

12 See Bagenstos, 44 Wm & Mary L Rev at 936 (cited in note 5) (stating that SSDI "seeks to provide a safety net").

13 See *Cleveland v Policy Management Systems Corp*, 526 US 795, 797–98 (1999).

14 See id at 801 (stating that both the Social Security Act and the ADA help the disabled, "but in different ways").

15 See id at 806 (holding that the plaintiff "cannot [ ] ignore the apparent contradiction" in applying for both benefits, but must proffer a sufficient explanation).

to remain at their jobs until a greater age because of economic factors like depleted pension systems.[16] A fortunate minority of aging workers will receive accommodations and remain occupationally active. However, the majority likely will experience alterations in functioning that are common to the aging process and may affect perceptions of job capability with or without accommodations. Such aging individuals are especially vulnerable to being forced out of jobs and onto Social Security disability benefits before they reach retirement age, or into earlier retirement than they desire, despite still being work capable if they lack access to accommodations for natural aging. Although aging is a normal process, it systematically distances people from the idealized bodies and minds of paradigm workers for whom workplaces are designed.[17] The tendency to force older workers out of jobs is driven by the same mistaken view that often keeps people with disabilities out of the labor market: the myth that efficiency and profit demand one-size-fits-all workplaces and workers.

This Article contends that the focus of American disability law and policy should not be the eligibility of individuals for accommodations because they happen to have a legally sufficient impairment, but the effectiveness of potential accommodations. It therefore proposes "accommodating every body"[18] in principle by extending an ADA-like reasonable-accommodation mandate to all work-capable members of the general population for whom the provision of reasonable accommodation is necessary to give meaningful access to enable their ability to work.[19] Not every desire for accommodation—even when the accommodation would, in some way, be effective—would result in entitlement. To achieve that legal right, the proposed accommodation would have to be necessary for an individual to fulfill essential job functions and not be unduly burdensome for the employer. All bodies would thus, in principle, be eligible for accommodation. The focus under our proposal is on the accommodation itself: how effectively the accommodation enables functionality that otherwise would be lost due to intolerant or exclusionary workplace practices.

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16 See Part II.A.

17 Ruth Colker, *When Is Separate Unequal? A Disability Perspective* 142 (Cambridge 2009).

18 This Article construes "body" broadly to include psychological as well as physical characteristics.

19 See Part V.

Our proposal thus shifts the locus of accommodation disputes from the contentious identity-based contours of the "disabled" plaintiff to the underlying issue of alleged discrimination. It remedies problems arising from excluding "unworthy" individuals from employment opportunity—people whose functional modes do not comply with prevailing workforce design and organizational presumptions and who therefore require accommodation. Unless such a proposal is adopted, growing demands to extend the length of time people remain at work will be compromised by severely diminished employment opportunities for aging individuals still capable of contributing on the job. Provision of accommodations for age-related alteration of functionality, when the accommodations are effective, is reasonably prescribed because maximum retention of capabilities as individuals grow older is in everyone's interest, whether or not they also possess identity-based characteristics sufficient to constitute a "disability" under the ADA.

Part I briefly addresses the history, scope, and purpose of reasonable accommodations within and beyond American disability law. Part I also observes that while courts have taken an increasingly sophisticated approach to redressing discrimination based on sex and gender, this has not translated into a sufficiently comprehensive view of the complexities of disability. Next, Part II argues that due to people living longer and dwindling pensions, excluding work-capable individuals experiencing natural limitations of aging from the economic and social benefits of employment invokes immense and unjustifiable social costs. Part II also reviews the political and judicial history that has placed the ADA's promise of accommodation as a remedy for disability discrimination beyond so many plaintiffs' reach. Part III considers post-ADAAA case law and finds early indications that the amendments are still deficient for disabled plaintiffs seeking accommodations; equality of opportunity demands a more progressive vision of workplace accommodations than the ADAAA provides. Part IV explores complexities arising from the multiple, shifting conceptualizations of disability identity and presents the problems inherent in expecting that various familiar approaches to defining disability can produce a proxy for being deserving of accommodation.

Part V argues in favor of "accommodating every body" in principle by extending the ADA's reasonable-accommodation requirement to all work-capable members of the general population for

whom reasonable workplace accommodation is necessary for, and effective in, providing meaningful access and thereby enabling the ability to work. The proposal shifts the focus of accommodation disputes away from the highly polarized identity-based contours of whether a claimant is "disabled" toward establishing allegations of discrimination. Part VI underscores the justifications for this proposal and elucidates its benefits. It distinguishes accommodations from benefits or privileges and demonstrates that accommodations are justified by the democratic values of integration, equal opportunity, and tolerance. The Article concludes by exploring the structural, expressive, economic, and hedonic benefits that arise from applying the principle of accommodating every body.

I. ACCOMMODATIONS AS EQUALITY

Reasonable workplace accommodations for disabled persons originated with the Rehabilitation Act of 1973,[20] but came to prominence with Title I of the ADA.[21] This mandate requires employers to provide a proportionately affordable alteration to a specific job, and has been adopted internationally as part of disability-based legal protections. It departs in both theory and practice from the concepts of benefits or privileges in that reasonable accommodations are part of the antidiscrimination canon.[22] Further, their provision is necessary for attaining the democratic values of equal opportunity, tolerance, and inclusive participation.

A. The Reasonable-Accommodation Mandate

The Rehabilitation Act was the first statutory mandate of reasonable accommodations for current or potential employees with disabilities,[23] but the mandate gained prominence with the ADA. The nearly two-decade interval between those statutes witnessed federal commissions advocating for expansion of disability-based discrimination laws, at least in part due to the analogue

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20 Pub L No 93-112, 87 Stat 355, codified as amended at 29 USC § 701 et seq.

21 ADA Title I, 104 Stat at 330–37.

22 See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U Pa L Rev 579, 583 (2004) (arguing that accommodations are antidiscrimination remedies); Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv L Rev 643, 645 (2001) (asserting that accommodations resemble and sometimes overlap with antidiscrimination measures).

23 29 USC § 701(a).

between race and sex discrimination and attitudes that excluded disabled persons from social participation.[24]

The initial provision of reasonable accommodation in employment was unrelated to disability and addressed religious accommodation under the Equal Employment Opportunity Act of 1972.[25] This origin is notable because every statutory iteration of the reasonable-accommodation mandate has been manifested as part of the American civil rights canon and grounded in notions of what equality requires under circumstances in which differences are salient.[26] The normative theory underlying the provision of reasonable-accommodations challenges the assumption that labor markets begin from neutral and fair baselines.[27] Instead, civil rights laws challenge the ideas and values that lead to workplaces being physically and administratively designed for the paradigmatic and idealized worker—specifically, the able-bodied, heterosexual, Protestant white male.[28] These presumed neutral baselines have in turn constructed occupational hierarchies across hiring, promotion, and retention practices and have resulted in historic inequities between an empowered mainstream group and those with marginalized-identity characteristics in regard to race, sex, and functional ability.[29] Civil rights statutes respond to the impact of such inequities by prohibiting future discrimination against nonmainstream groups while also mandating adjustments to the workplace that enable categories

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[24] See National Council on the Handicapped, Report to the President and the Congress of the United States, *Appendix to Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—with Legislative Recommendations* A-1 (1986); United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 141 (1983).

[25] Pub L No 92-261, 86 Stat 103, codified in various sections of Titles 5 and 42. See also 42 USC § 2000e-2(j); *Trans World Airlines, Inc v Hardison*, 432 US 63, 74–75 & n 9 (1977).

[26] See Anita Silvers, *Formal Justice*, in Anita Silvers, David Wasserman, and Mary B. Mahowald, eds, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* 13, 74–75 (Rowman & Littlefield 1998). See also generally Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell 1990).

[27] See Stein, 153 U Pa L Rev at 597 (cited in note 22) ("A central flaw . . . is the baseline assumption that accommodation costs are internally engendered by the disabled person's inherent lower capability, rather than externally caused by social conditions.").

[28] See Ruth O'Brien, *Crippled Justice: The History of Modern Disability Policy in the Workplace* 166–67 (Chicago 2001).

[29] See Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* 39 (Routledge 1996) ("Societies [ ] are physically constructed and socially organized with the unacknowledged assumption that everyone is healthy, non-disabled, young but adult . . . and, often, male.").

of individuals with biological differences to perform essential job functions.

In the realms of race and sex, required emendations affect the manner in which jobs are structured and performed by revising respective underlying bona fide qualifications that previously excluded those individuals.[30] In the context of sex, for example, many workplace-related standards have envisioned one particular way of accomplishing a required function, but it is often possible for women to execute the same function in an alternative manner.[31] Similarly, many employers have presupposed that a certain level of height, weight, strength, or physical capacity is necessary to perform a job, only to have such requirements invalidated by courts because a different level would still enable one to ably perform the job.[32] Moreover, many workplace environments and pieces of equipment have been built or structured with the average man in mind, thereby excluding many women.[33] Remedying

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[30] See, for example, *Griggs v Duke Power Co*, 401 US 424, 436 (1971) (invalidating aptitude tests used in hiring for their disparate impact on African American workers because the tests were not "demonstrably a reasonable measure of job performance"); *Albemarle Paper Co v Moody*, 422 US 405, 434–36 (1975) (striking down an employer's intelligence test as discriminatory to African Americans when the test may be relevant to future job progression); *Connecticut v Teal*, 457 US 440, 448–49 (1982) (invalidating a written examination required for promotions due to its disparate impact on African American employees); *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v Johnson Controls, Inc*, 499 US 187, 200 (1991) (invalidating an employer's sex-based fetal-protection policy as disparately impacting female employees).

[31] "For example, women generally cannot perform the fireman's lift to rescue people from a burning building." But there are other modes of rescue with equivalent outcomes that allow women to execute the same function in an alternative manner—"such as dragging victims out of the building rather than carrying them." Anita Silvers, *Protection or Privilege? Reasonable Accommodation, Reverse Discrimination, and the Fair Costs of Repairing Recognition for Disabled People in the Workforce*, 8 J Gender Race & Just 561, 576–77 (2005).

[32] See, for example, *Lanning v Southeastern Pennsylvania Transportation Authority*, 181 F3d 478, 485, 491–94 (3d Cir 1999) (holding that an employment screen that required transit police officers to run 1.5 miles in twelve minutes might not be justified by business necessity); *Davis v County of Los Angeles*, 566 F2d 1334, 1341–42 (9th Cir 1977) (invalidating a policy for firefighters that required a minimum height of five feet seven inches), vacd as moot, 440 US 625 (1979); *United States v City of Chicago*, 411 F Supp 218, 230–31 (ND Ill 1976), affd in part, revd in part on other grounds 549 F2d 415 (7th Cir 1977) (holding that a police department's five-feet-four-inches height requirement would be invalid, absent a strong showing of job relatedness); *Meadows v Ford Motor Co*, 62 FRD 98, 99–100 (WD Ky 1973) (striking down a policy for production line employees that required a minimum weight of 150 pounds).

[33] See Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U Colo L Rev 1297, 1303–05 (2008) (examining cockpits, work tables, machinery, and the industrial workplace generally to explore "built environment" exclusion).

all such practices or structures that result in a disparate impact on women involves accommodations of a sort to provide women with equality of opportunity in the workplace.

In the disability context, the provision of reasonable accommodation levels uneven playing fields that historically have been presumed unbiased, but operate from baselines that reflect cultural prejudice and result in workplace exclusion.[34] In this respect, reasonable-accommodation challenges assumptions that workplaces *must* operate in certain modalities and points out that the presumed inherency of a status quo is itself predicated on a noninclusive worldview.[35] Further, a social model of disability maintains that it is these culturally constructed and remediable conventions that create the category of "disabled" people, rather than any biological limitations inherent in members of the group.[36] An obvious illustration of this view is the effect that stairs at the entry point to an office will have in barring persons with various mobility impairments, whereas a flat threshold would enable those individuals (as well as many others, such as parents with stroller-bound children) to access the same site.[37] Less apparent are facially neutral policies such as those allowing all workers ten-minute smoking breaks, but not permitting breaks of equal length for workers with disabilities to focus out schizophrenic voices or administer insulin injections.[38]

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[34] See Stein, 153 U Pa L Rev at 584 (cited in note 22) (arguing that the ADA takes steps to remedy inherent discrimination against the disabled that is based on misperceptions "held out as true and rational beliefs").

[35] See Silvers, *Formal Justice* at 74–75 (cited in note 26) ("If the majority of people . . . wheeled rather than walked, graceful spiral ramps instead of jarringly angular staircases would connect lower to upper floors of buildings.").

[36] Anita Silvers and Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U Mich J L Ref 81, 84 (2001) (arguing that "the methodology for assessing disability as a classification still depends on out-of-date notions rooted in empirically unsubstantiated social conventions").

[37] See Ronald L. Mace, Graeme J. Hardie, and Jaine P. Place, *Accessible Environments: Toward Universal Design*, in Wolfgang F.E. Prieser, Jacqueline C. Vischer, and Edward T. White, eds, *Design Intervention: Toward a More Humane Architecture* 155, 156 (Van Nostrand Reinhold 1991) (discussing universal design, the central tenet of which is an approach to creating environments and products that are "usable by all people to the greatest extent possible").

[38] For a discussion of how workers with mental disabilities self-accommodate, see Susan Stefan, *Hollow Promises: Employment Discrimination against People with Mental Disabilities* 179–80 (American Psychological Association 2002). For a discussion of the efficiency of basing hiring decisions on whether a candidate has a mental illness, see Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 Georgetown L J 399, 414–19 (2006).

When passing the ADA, Congress recognized that exclusionary baselines are not inexorable and can be ameliorated by provision of reasonable accommodation.[39] It is thus no surprise that the statute, with its reasonable-accommodation mandate, was consistently described and praised as enabling equal civil rights for Americans with disabilities.[40] Nor is it surprising that the ADA prominently proscribes the denial of reasonable accommodations as a prohibited form of discrimination[41] or that Congress, when amending the statute, attempted to decouple reasonable accommodation from a stringent identity criterion that limited its application.[42] Although it is too early to assess the full impact of the ADAAA, it is fair to contrast the progressive vision that Congress held, both in the original and amended versions of the ADA, with that of a judiciary that is seemingly mired in a century-old conceptualization of the proper place for, and abilities of, those with disabilities.[43]

Moreover, the provision of reasonable workplace accommodations has now become a regular feature of contemporary global disability-based legal protections.[44] The most expansive example is the United Nations Convention on the Rights of Persons with Disabilities[45] (CRPD), which has been ratified by 138 nations as of this writing.[46] The CRPD requires States Parties to ensure the provision of reasonable workplace accommodations[47] and defines the denial of reasonable accommodation as a form of discrimination.[48] On the regional level, the European Union's employment-discrimination directive requires that individual employers

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39 See ADA § 2, 104 Stat at 328–29.

40 For a collection of many words of praise for the ADA, see Robert L. Burgdorf Jr, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv CR–CL L Rev 413, 413–15 (1991).

41 42 USC § 12112(b)(5).

42 ADAAA § 2, 122 Stat at 3554 (rejecting the "demanding standard" judges used in applying the ADA).

43 See Silvers and Stein, 35 U Mich J L Ref at 94 (cited in note 36) (arguing that the judiciary is "operating from an assumption that disability as a classification is defined by a characteristic of incompetence").

44 See Samuel R. Bagenstos, *Law and the Contradictions of the Disability Rights Movement* 55 (Yale 2009) (asserting that "accommodation mandates are the centerpiece of disability discrimination laws").

45 *Resolution 62/170*, Convention on the Rights of Persons with Disabilities and Optional Protocol Thereto, 77th mtg (Dec 18, 2007) (CRPD).

46 Comprehensive information on the CRPD process is set forth on a website maintained by the United Nations Department of Economic and Social Affairs called Enable, online at http://www.un.org/disabilities (visited May 21, 2014).

47 See CRPD Art 27(1)(i) (cited in note 45).

48 See CRPD Art 2 (cited in note 45).

within each of the Member States undertake appropriate measures to provide reasonable workplace accommodations, and likewise construes the denial of reasonable accommodations as discrimination.[49] Examples of national legislation incorporating similar reasonable workplace accommodation mandates include Costa Rica,[50] Ghana,[51] Hungary,[52] Malta,[53] and the United Kingdom.[54] The reasonable-accommodation mandate is also a central part of the global legal reform of domestic disability laws precipitated by the CRPD.[55] This is especially significant because fewer than fifty countries currently have systemic disability laws,[56] and

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[49] See Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 OJ L303/16, 19 (Nov 27, 2000). The European Union ratified the CRPD as a regional body, the first time it acceded to a UN human rights treaty. One consequence is that each Member State will need to transpose the CRPD's employment provisions, which in places go beyond the Framework Directive. See Lisa Waddington, *Reflections on the Establishment of a Framework to Promote, Protect and Monitor Implementation of the UN Convention on the Rights of Persons with Disabilities (Article 33(2) CRPD) by the European Union* *7 (Maastricht Faculty of Law Working Paper 2011-3, Jan 2011), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1746866 (visited May 21, 2014) (reflecting on "the role which specific EU institutions could play in the implementation and monitoring framework" of the CRPD).

[50] See Theresia Degener and Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, in Mary Lou Breslin and Silvia Yee, eds, *Disability Rights Law and Policy: International and National Perspectives* 3, 36–37 (Transnational 2002).

[51] See id at 29, 34 (identifying Ghana as including disability under both constitutional and civil antidiscrimination laws), citing Persons with Disability Act, 2006, Act 715, § 11-11.

[52] See Degener and Quinn, *International, Comparative and Regional Disability Law Reform* at 34 (cited in note 50), citing Equalization Opportunity Law Act No XXVI, ch III § 15 (1998).

[53] Equal Opportunities (Persons with Disability) Act, ch 413, Act 1 of 2000, § 7(2)(d) (Malta) (construing discrimination on the grounds of disability as including the failure to provide reasonable accommodation).

[54] See Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* 63 (Hart 2008).

[55] See Rosemary Kayess and Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 Hum Rts L Rev 1, 27 (2008) ("The incorporation of a State obligation to ensure that reasonable accommodations are made to facilitate the exercise by persons with disability of CRPD rights is perhaps the most fundamental instrumental element of the convention."); Janet E. Lord and Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 Wash L Rev 449, 451 (2008) ("[T]he CRPD initiates an unprecedented opportunity for domestic law, policy reform, and genesis on behalf of the globe's 'largest minority.'").

[56] For the most recent catalogue, see Degener and Quinn, *A Survey of International, Comparative and Regional Disability Law Reform* at 3 (cited in note 50). Since the CRPD's passage, one of the authors has been involved in disability-related law reform in some three dozen countries. For that perspective, see Michael Ashley Stein and Janet E. Lord,

disability-related employment laws and policy initiatives are being undertaken for the first time in many parts of the world, including developing nations.[57]

B. Accommodations as Civil Rights

In at least one important respect, however, American antidiscrimination law aimed at providing disability-based equality of opportunity has yet to attain an ambit analogous to that which courts have come to accord to earlier civil rights laws. To illustrate, protection against sex discrimination was initially taken to be a benefit only for women, due to the prominence of their suffering from sex bias in the workplace and their influence in the achievement of relevant civil rights law.[58] Yet, over the last half century and especially the past two decades, an understanding that such protection must extend more widely has evolved. In *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v Johnson Controls, Inc*,[59] for instance, the Supreme Court ruled that denying women better-paying work assignments based on protecting their reproductive function was discriminatory in part because the employer did not impose the same prohibition on men to protect their reproductive function.[60] Similarly, in *Oncale v Sundowner Offshore Services, Inc*,[61] the Court ruled that Title VII prohibits workplace discrimination based on sex, even when all the parties involved are male.[62]

Changes in both science and fashion affecting gender and sex assignment also inspire evolving recognition that males and females are equally vulnerable to discrimination that invokes sex, and that the effectiveness of protection for all people, regardless of biological sex or gendered-role assignment, should be the

Forging Effective International Agreements: Lessons from the UN Convention on the Rights of Persons with Disabilities, in Jody Heymann and Adèle Cassola, eds, *Making Equal Rights Real: Taking Effective Action to Overcome Global Challenges* 27, 27–47 (Cambridge 2012).

57 See Michael Ashley Stein and Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 Hastings L J 1203, 1213–14 (2007).

58 See William N. Eskridge Jr, *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L Rev 1333, 1345 (2010) (describing women's involvement in the civil rights movement).

59 499 US 187 (1991).

60 See id at 198–200.

61 523 US 75 (1998).

62 See id at 77–80.

same.[63] For example, in regard to the gendering of a caregiver role, in 1999 a highway patrolman triumphed over his state employer that, based on his sex, had denied him protection as a primary caregiver for his newborn child under the Family and Medical Leave Act of 1993[64] (FMLA).[65] And in regard to biological sex, in 2006 a court allowed a transsexual's denial-of-employment suit to proceed against the Library of Congress under Title VII because "discrimination against transsexuals *because they are transsexuals* is 'literally' discrimination 'because of . . . sex'";[66] the court likewise rejected an eligibility standard that construed Title VII protection as a benefit only for born women because of "the factual complexities that underlie human sexual identity."[67] As the court explained, "[t]hese complexities stem from real variations in how the different components of biological sexuality . . . interact with each other, and in turn, with social, psychological, and legal conceptions of gender."[68] The US Department of Justice did not appeal, and in 2008 a federal district judge issued a groundbreaking decision finding that sex discrimination had occurred because the Library's withdrawal of a job offer was prompted by the prospective employee's sex change.[69] In consequence, the government was ordered to pay nearly $500,000 as compensation for the discrimination, the maximum allowable in the case.[70]

In contrast, the approach to protecting against disability discrimination continues to oversimplify the varied interactions

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63 See, for example, id at 79–80 (holding that a male employee's claim of same-sex sexual harassment is actionable under Title VII); *Barnes v City of Cincinnati*, 401 F3d 729, 737 (6th Cir 2005) (holding that discriminating against a preoperative male-to-female transsexual police officer for failing to conform to sexual stereotypes violates Title VII); *Smith v City of Salem, Ohio*, 378 F3d 566, 572–75 (6th Cir 2004) (holding that a male employee with gender identity disorder may not be discriminated against for failing to conform to gender expectations); *Schafer v Board of Public Education of the School District of Pittsburgh, PA*, 903 F2d 243, 248 (3d Cir 1990) (holding that reserving the benefit of one-year leave without pay exclusively for female teachers impermissibly discriminates against their male counterparts).

64 Pub L No 103-3, 107 Stat 6, codified as amended in various sections of Titles 5 and 29.

65 See *Knussman v Maryland*, 272 F3d 625, 635–37 (4th Cir 2001). Knussman's wife had a difficult pregnancy and medical complications after delivery that necessitated her taking sick leave; Knussman sought leave to care for both his wife and his child. Id at 628–29.

66 *Schroer v Billington*, 424 F Supp 2d 203, 212 (DDC 2006).

67 See id at 211–12.

68 Id at 212–13.

69 *Schroer v Billington*, 577 F Supp 2d 293, 308 (DDC 2008).

70 *Schroer v Billington*, 2009 WL 1543686, *4 (DDC).

among the components of impairment, as well as the complex interplay of physiological, social, and legal conceptions of disability. A long history of charitable public and private programs frames disability-discrimination policy, making it difficult to advance beyond the idea that accommodation protection is a special benefit for which the eligibility bar must be set high. Unlike sex-discrimination protections, which have evolved in the direction of protecting not just women, but whoever happens to be harmed by bias based on sex,[71] the scope of disability-discrimination protection seems not to have progressed. The divisions between race-based, sex-based, and disability-based workplace discrimination are not decisively sharp, however. The biases fueling all three kinds of wrong, as well as the pretexts implementing them, arise from discomfort about lack of fit with whatever workplace practices are normative at the time and thereby result in refutable attributions of incapability. Such stigmatization has precluded racial minorities and women, as well as work-capable people who depart in other ways from idealized worker paradigms, from productive and rewarding employment.

As this Article explains in Part V, European disability jurisprudence attempts to remedy vulnerability, broadly construed, to disability discrimination rather than focusing narrowly on whether each individual is sufficiently vulnerable to deserve protection. Hence, non-US courts have taken up the sophisticated civil rights conception of disability that Congress built into the ADA, but which American judges have left behind.

II. DISABLING THE WORKFORCE

Modern health-care advances are enabling people to live longer while changes to retirement and pension systems require people to work to older ages.[72] Many of these individuals will in consequence experience impairments that require workplace accommodation. Removing work-capable individuals from the labor market will invoke immense and unjustifiable social costs. ADA implementation that focuses on initial determinations dividing

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[71] See *Oncale*, 523 US at 82 (overturning Fifth Circuit precedent that sexual harassment of males by other males creates no cause of action under Title VII).

[72] See David E. Bloom, David Canning, and Günther Fink, *Implications of Population Aging for Economic Growth* *25 (National Bureau of Economic Research, Working Paper No 16705, Jan 2011), online at http://www.nber.org/papers/w16705.pdf (visited May 21, 2014); Courtney C. Coile and Phillip B. Levine, *Reconsidering Retirement: How Losses and Layoffs Affect Older Workers* 44 (Brookings 2010).

individuals who deserve to be accommodated so as to remain on the job from those who are unworthy of such retention cannot help but drive up those costs.

A. The Changing Workforce

The need for aging workers to stay on the job is spurred by both demographic changes and policy considerations. Increasing overall life expectancy,[73] combined with the baby boom generation reaching the eligibility age for retirement benefits,[74] has contributed to a significant graying of America.[75]

Yet, despite reports that aging workers need to work longer, the number of US workers claiming Social Security benefits is increasing at an unsustainable pace.[76] Recent forecasts by the federal government show Social Security and Medicare currently being funded at a rate that will not cover future expenditures.[77] Medicare, which provides health insurance to 47 million elderly and disabled Americans, is projected to begin running a deficit in 2024.[78] Social Security, which in 2010 began paying out more in benefits than it collects in taxes, is expected to be insolvent by 2036.[79] While rising public-welfare expenditures have long and often been discussed loosely as a "crisis,"[80] the looming insolvency of Social Security and Medicare helps concretize the gravity of the current situation.

Similar rising dependency costs are associated with the SSDI program, which provides income support and medical benefits to

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73 See Census Bureau, *Statistical Abstract of the United States: 2012* 77 table 105, 80 table 108, online at http://www.census.gov/compendia/statab/2012edition.html (visited May 21, 2014) (profiling a steady rise in life expectancy over the period 1970–2008).

74 Social Security Administration, *Status of the Social Security and Medicare Programs: A Summary of the 2011 Annual Reports* *4, online at http://www.ssa.gov/history/pdf/tr11summary.pdf (visited May 21, 2014).

75 The share of those aged sixty-five and over is expected to rise from 17 percent in 2000 to 28 percent by 2050. David Neumark and Joanne Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?* *1 (Michigan Retirement Research Center Working Paper No 249, Sept 2011), online at http://ssrn.com/abstract=1960716 (visited May 21, 2014).

76 Id at *1–3. For example, between 2008 and 2009, the number of workers claiming Social Security benefits rose by 23 percent. Id at *3.

77 See Social Security Administration, *Status of the Social Security and Medicare Programs* at *1 (cited in note 74).

78 Id at *11.

79 Id.

80 Deborah A. Stone, *The Disabled State* 186–89 (Temple 1984) (discussing how "crisis" is a popular, rhetorical device that does not offer insight into whether a program collapse is imminent).

disabled individuals who are fully unable to work.[81] SSDI's mutually exclusive paradigm of disability and employability was questionable even in 1956 when a substantial portion of jobs involved strenuous activity.[82] Most current jobs are not predicated on physically strenuous activities, and many individuals with impairments can remain in the labor force with appropriate accommodation.[83] Workplace accommodations such as flexible hours, assistive technologies, telecommuting, and adjusting tasks to be less physically strenuous can help keep employees working and economically independent.

Significantly and problematically, once employees develop a work-limiting impairment, the SSDI program discourages impaired workers from remaining in the workforce. Instead, the program provides strong incentives for workers to seek SSDI benefits—and for employers to terminate impaired employees.[84] In particular, employees are induced to quit their jobs immediately after the onset of a work-limiting disability since it is impossible under current law for them to obtain assistance from SSDI without first leaving the labor force; workers who participate in gainful employment during the application period are automatically denied benefits.[85] Once workers have left the labor force, they enter the throes of an SSDI application process that can take

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[81] See Social Security Administration, *How We Decide If You Are Disabled*, online at http://www.ssa.gov/disability/step4and5.htm (visited May 21, 2014) (explaining that "you are not disabled according to our rules unless your illnesses, injuries or conditions prevent you from doing your past work or adjusting to other work").

[82] See David H. Autor and Mark Duggan, *Supporting Work: A Proposal for Modernizing the U.S. Disability Insurance System* *1–2 (The Center for American Progress and the Hamilton Project Dec 2010), online at http://economics.mit.edu/files/6281 (visited May 21, 2014).

[83] See Ross C. Brownson, Tegan K. Boehmer, and Douglas A. Luke, *Declining Rates of Physical Activity in the United States: What Are the Contributors?*, 26 Ann Rev Pub Health 421, 427–30 (attributing declining levels of physical activity in part to more sedentary employment).

[84] See David Autor, *The Unsustainable Rise of the Disability Rolls in the United States: Causes, Consequences, and Policy Options* *8 (MIT Working Paper No 12-01, Nov 2011), online at http://ssrn.com/abstract=1987244 (visited May 21, 2014).

[85] See id at *9. See also Coile and Levine, *Reconsidering Retirement* at 127 (cited in note 72) (noting unemployed workers may adjust their behavior to make it more likely they will receive benefits—a "moral hazard"); Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* 20 (Yale 1983) (noting that Congress has continuously seen Social Security as, among other things, an "open invitation to drop out of the work force").

months or years, due to both the statutory waiting period and delays in the process.[86] If the claim is denied, the claimant then faces an uphill battle to return to the market after an extended absence.[87] If the process leads to an SSDI award, the claimant faces strong pressures to refrain from working in order not to jeopardize hard-fought and obtained benefits.[88] This system provides a mild incentive for employers to terminate employees and no incentive for employers to weigh the costs they impose on the SSDI system against the alternative costs of providing accommodations that might allow employees to keep working.[89] As labor economist David Autor notes, "It is difficult to overstate the role that the SSDI program currently plays in discouraging the ongoing employment of non-elderly adults."[90]

As with Social Security and Medicare, the SSDI program's costs have become unsustainable.[91] Between 1989 and 2009, the share of adults receiving SSDI benefits doubled, from 2.3 percent to 4.6 percent of Americans ages twenty-five to sixty-four.[92]

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86 See Autor, *The Unsustainable Rise of the Disability Rolls in the United States* at *9–10 (cited in note 84).

87 See id at *10. See also Stone, *The Disabled State* at 180 (cited in note 80) ("Particularly in fragmented systems like the American one, where disability evaluation is not connected with actual job-finding services, the determination of residual working ability is likely to leave the individual in a no-man's-land: he or she is 'found' able to work but not 'found' a job.").

88 See Autor, *The Unsustainable Rise of the Disability Rolls in the United States* at *10 (cited in note 84).

89 See id at *9. There is of course one incentive to provide an accommodation for a statutorily defined disability: to avoid litigation under the ADA. However, very few will in actuality sue. Additionally, many employees will develop a work-limiting impairment that does not rise to the level of an ADA-defined "disability." See notes 132–34 and accompanying text. There is also a mild incentive for small businesses to provide accommodations through a yearly tax credit up to about $5,000, which is available to small businesses that provide certain types of accommodations. 26 USC § 44.

90 Autor, *The Unsustainable Rise of the Disability Rolls in the United States* at *10 (cited in note 84). Richard Burkhauser further warns:

> The disproportionate growth in the younger transfer population is rapidly changing our disability-transfer system from one primarily meant to ease the transition into retirement for older workers to a program providing lifetime transfers from cradle to grave. This growth is unprecedented in the history of our system and is counter to the goal of integrating people with disabilities into mainstream employment. Increasingly, the SSI and SSDI programs are being used as alternatives to a more general income maintenance program.

Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?*, 549 Annals Am Acad Polit & Soc Sci 71, 82 (1997).

91 See Autor and Duggan, *Supporting Work* at *2 (cited in note 82).

92 Id.

Within the same time frame, annual cash payments to SSDI recipients rose from $40 to $121 billion, and accompanying Medicare expenditures rose from $18 to $69 billion.[93] SSDI expenditures now outpace the tax revenue dedicated to the program by 30 percent, leading the Trustees of the Social Security Administration to forecast SSDI insolvency as early as 2015.[94] The cumulative economic costs of these several projections are, of course, significant. It will require innovation and foresight for government entitlements to keep pace with SSDI, along with Social Security and Medicare.

Moreover, recent statistics indicate that both the aging and disabled populations are employed at relatively low rates. As the disability rolls have risen, the employment rate of people with disabilities has fallen.[95] For example, the gap in the employment rate between people aged forty to sixty-five years with disabilities and their counterparts without disabilities widened by 10 percent from 1988 to 2008.[96] This widening has resulted in an even more substantial gap between people with disabilities and those without. For example, in 2008, the employment rate of males in their forties and fifties with a self-reported disability was about 16 percent, compared to 88 percent employment of comparably aged males with no reported disability.[97] The employment rate of aging workers is low as well. Recent studies suggest that age discrimination against middle-aged workers (aged approximately forty to sixty-five years) is common, which in turn increases the likelihood they will separate from their employer and subsequently be unemployed.[98] Additionally, the most recent data suggest those aged sixty-five and over are employed at an extremely low rate relative to the population.[99] One reason for the lower employment rates of

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93 Id.

94 Id at *3. See also Phil Izzo, *Number of the Week: Disability Fund Three Years from Insolvency*, Real Time Economics Blog (Wall St J June 1, 2013), online at http://blogs.wsj.com/economics/2013/06/01/number-of-the-week-disability-fund-three-years-from-insolvency (visited May 21, 2014).

95 See Autor and Duggan, *Supporting Work* at *2–5 (cited in note 82).

96 Id at *2.

97 See id.

98 See Neumark and Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?* at *5–6 (cited in note 75) (canvassing research that has found evidence of age discrimination against those under the age of sixty-five).

99 In 2006, only 15 percent of those aged sixty-five and over were employed. David Neumark, *The Age Discrimination in Employment Act and the Challenge of Population Aging*, 31 Rsrch on Aging 41, 43 (2009). See also Neumark and Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?* at *1 (cited in note 75)

these groups is straightforward. Aging systematically and generally makes working more difficult, as people develop various illnesses and impairments. In addition, there may appear to be a net economic incentive not to hire or retain individuals with such impairments, for fear of overt efficiency or accommodation costs.[100]

For workers with impairments, there are thus demand-side and supply-side impediments to their continued employment. First, there is a demand-side dilemma, in which workers with impairments may require a modification or accommodation but be reluctant to request it from their employer. Impaired individuals' reluctance to request an accommodation may be driven by questions regarding whether they have a legally defined "disability," the desire to avoid the perception they are getting "special" treatment, an inhospitable workplace culture, fears of retaliation, and/or the incentive to pursue SSDI benefits instead of pursuing work. Second, there is a supply-side problem, in which employers are reluctant to structure the workplace to attract and retain partially disabled and elderly employees who are capable of working. Employer reluctance may be driven by a desire to avoid accommodation costs, simple bias, and/or inertia toward maintaining the status quo. Still, older workers are more able than ever to work, especially with accommodations, since the length of healthy old age—not just absolute life expectancy—has steadily increased over time.[101]

At least part of the solution to rising dependency costs is to incentivize aging workers to keep working. Many different recom-

("[T]he very low employment rate of seniors implies slowing labor force growth relative to population, and a rising dependency ratio.").

[100] See, for example, Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, 23 Regulation 21, 22–23 (2000) (documenting how the ADA's accommodation mandate has increased the cost of employing disabled workers and thus made such workers unattractive to businesses).

[101] See Bloom, Canning, and Fink, *Implications of Population Aging for Economic Growth* at *1 (cited in note 72).

mendations within this vein have been advanced, including raising the retirement age for full Social Security benefits,[102] requiring employers to offer workers private disability insurance,[103] providing a tax credit for disabled workers,[104] and increasing the amount of Social Security recipient earnings that are exempt from taxation.[105] The sum result of these demographic and economic developments is that it is more necessary than ever for aging employees—many of whom have impairments ranging from mild to severe—to continue working. In short, people who live longer must be able to work longer.

All these recommendations for responding to the graying of the national population depend upon the opportunity for aging workers to obtain and/or maintain jobs. However, aging and/or disabled workers face several naturalized, workplace-specific impediments—in addition to the incentives not to work noted above. Prominent among these may be a form of age bias that resembles disability bias by confining those targeted to unobtrusive or retiring roles. A 2013 Princeton University age-discrimination study found that while college students valued potential collaborators of all ages who were demonstratively generous, the participants downgraded only "assertive" potential collaborators who were older; potential collaborators who were both "assertive" and young (or middle-aged) still received uniformly positive scores.[106]

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[102] See Coile and Levine, *Reconsidering Retirement* at 129–30 (cited in note 72). Raising the retirement age has been an especially popular proposal. For example, in 2011, US senators Lindsey Graham, Rand Paul, and Mike Lee proposed the Social Security Solvency and Sustainability Act, which would raise the retirement age under Social Security from sixty-seven to seventy. S 804, 112th Cong, 1st Sess, in 157 Cong Rec S2446 (Apr 13, 2011).

[103] See Autor and Duggan, *Supporting Work* at *17–18 (cited in note 82) (proposing that employers be required to offer workers private disability insurance, in part so that employers have an incentive to recognize the costs their decisions regarding whether to accommodate have on the broader disability system). See also Stone, *The Disabled State* at 181 (cited in note 80) ("Since employers do not pay direct premiums for Social Security disability programs, as they do for industrial accident insurance, they do not perceive any direct costs when they shift their less productive workers into these social insurance schemes.").

[104] See Burkhauser, 549 Annals Am Acad Polit & Soc Sci at 81–82 (cited in note 90) (proposing a disabled-worker tax credit that would "subsidize the labor earnings of people with disabilities who live in low-income families").

[105] See Neumark and Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?* at *1 (cited in note 75).

[106] Michael Winerip, *Three Men, Three Ages. Which Do You Like?*, NY Times B1 (July 22, 2013). See also generally Raymond F. Gregory, *Age Discrimination in the American Workplace: Old at a Young Age* (Rutgers 2001) (considering the ways in which age discrimination persists and will likely increase as America's economic outlook becomes less optimistic).

The results of this study are illustrative of the "subtle bias" older men and women continue to face in the workforce.[107]

B. The Current Gap between Work Capability and Accommodation

Employment-discrimination statutes are intuitively promising legal avenues for helping employees with developing impairments who are still work capable to remain on the job. Yet antidiscrimination statutes generally and the ADA in particular are ironically ill suited for this group once judges are required to determine the worthiness for accommodation of a given individual's impairment.[108]

The Age Discrimination in Employment Act of 1967[109] (ADEA), the Genetic Information Nondiscrimination Act of 2008[110] (GINA), and the ADA may appear apposite for protecting aging and work-capable employees. However, there are limits to the efficacy of each of these statutes. None is likely to aid with the new hiring of workers of any age because simply enforcing existing antidiscrimination laws—when they are enforced—is unlikely to help individuals start working.[111] Additionally, the ADEA and GINA fail as a structural matter to help employees who develop work-limiting impairments keep working. The ADEA prohibits age discrimination in employment against any individual at least forty years of age,[112] but provides no positive rights (such as accommodations) for aging workers with impairments.[113] GINA prohibits discrimination in employment against anyone on the basis

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107 Winerip, *Three Men, Three Ages*, NY Times at B1 (cited in note 106).

108 See generally Silvers and Stein, 35 U Mich J L Ref 81 (cited in note 36) (comparing the judiciary's retrogressive practice of presuming the incompetency of the disabled to outmoded notions of the stereotypical incompetence of women); Anita Silvers and Michael Ashley Stein, *An Equality Paradigm for Preventing Genetic Discrimination*, 55 Vand L Rev 1341 (2002) (describing how current judicial approaches to disability and genetic discrimination fail to adequately protect otherwise productive citizens). See also Bradley A. Areheart, *Disability Trouble*, 29 Yale L & Pol Rev 347, 385–87 (2011) (discussing the extreme reliance by judges on medical diagnoses as proxies for whether someone is disabled).

109 Pub L No 90-202, 81 Stat 602, codified as amended at 29 USC §§ 621–34.

110 Pub L No 110-233, 122 Stat 881, codified in various sections of Titles 26 and 42.

111 See Coile and Levine, *Reconsidering Retirement* at 126–27 (cited in note 72) (noting that enforcement of antidiscrimination laws, such as the ADEA, "may not provide much help to older job losers struggling to find new work").

112 29 USC §§ 623(a)(1), 631(a).

113 Even if age-related impairments require accommodation for a worker to stay qualified or productive, there is no obligation under the ADEA to provide one. See, for example, *Smith v Midland Brake, Inc, a Division of Echlin, Inc*, 138 F3d 1304, 1312 (10th Cir 1998)

of genetic information.[114] However, once a genetically based condition has manifested itself, the ADA—not GINA—applies.[115] Moreover GINA, much like the ADEA, provides no right to accommodation.[116]

The ADA provides some, but not all, disabled workers with the right to reasonable accommodations.[117] The ADA's employment provisions define employment discrimination to include a failure to make reasonable accommodations for "an otherwise qualified individual with a disability."[118] Having a "disability" under the ADA means having (a) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" ("actual" disability), (b) "a record of such an impairment" ("record of" disability), or (c) "being regarded as having such an impairment" ("regarded as" disability).[119] Notably, a "qualified individual" is one who can perform the essential functions of a job either with or without accommodation.[120]

("The ADEA does not require employers to provide any sort of accommodations for employees who become unable to perform their jobs."), revd on other grounds, *Smith v Midland Brake, Inc*, 180 F3d 1154 (10th Cir 1999) (en banc).

114 GINA § 202, 122 Stat at 907, codified at 42 USC § 2000ff–1.

115 GINA § 210, 122 Stat at 920, codified at 42 USC § 2000ff–9.

116 See Bradley A. Areheart, *GINA, Privacy, and Antisubordination*, 46 Ga L Rev 705, 711–12 (2012) (explaining how GINA might benefit from an accommodation provision).

117 The ADA now expressly excludes those who meet only the "regarded as" definition of disability from having the right to reasonable accommodations. 42 USC § 12201(h).

118 42 USC § 12112(a), (b)(5) (noting that "discriminat[ing] against a qualified individual with a disability because of the disability" includes an unwillingness to make reasonable accommodations).

119 42 USC § 12102(2). "Broken out, actual disability contains three principle requirements: first, there must be a *physical or mental impairment*; second, the impairment must be *substantially limiting*; and last, the impairment must substantially limit a *major life activity*. The 'physical or mental impairment' requirement is rarely an issue in ADA case law." Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 Ind L J 181, 211 (2008). "It is the second requirement—that the impairment *substantially limit a major life activity*—that has garnered the majority of federal courts' attention." Id at 211–12 (emphasis added). Courts have interpreted these requirements narrowly, frequently finding that conditions are either not substantially limiting or do not affect a major life activity. See ADAAA § 2(a)–(b), 122 Stat at 3553 (discussing Supreme Court cases that narrowed the definition of "disability," prompting Congress to amend the ADA). And courts have interpreted "regarded as" claims to require proving one was regarded as having an "actual disability"—thus incorporating the same burdens associated with proving actual disability. Areheart, 83 Ind L J at 212 (cited in note 119).

120 42 USC § 12111(8).

Reasonable accommodations fall mainly into one of two categories. The first type concerns alteration of the physical workplace, such as ramping stairs or adjusting the height of a sink.[121] These accommodations involve "hard" costs or immediate and concrete out-of-pocket expenses.[122] The second main accommodation type requires altering the way jobs are structured. This could include modifying the criteria for applicants or rearranging work schedules.[123] These accommodations involve "soft costs," which are harder to quantify than out-of-pocket expenses, and could involve external costs such as training human resource personnel.[124] The ADAAA stipulates that accommodations are not available for individuals who qualify for protection solely under the regarded-as prong of the definition.[125]

The ADA and its accompanying regulations require an applicant or employee seeking accommodation to ask the employer for the accommodation. It is not necessary to indicate that the accommodation is being requested under the ADA or to use any magic language in making the request.[126] An employer must then engage in an "interactive process" to evaluate the individual's limitations and determine what potential reasonable accommodations might compensate for those limitations.[127] If the employer declines the request and the applicant or worker would like to challenge that denial, he or she must then file a complaint with the Equal Employment Opportunity Commission (EEOC).[128] The EEOC will investigate the issue and may attempt to resolve it through conciliation or by litigating the matter.[129] If the parties, with the help of

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[121] Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 Duke L J 79, 88 (2003). See also 42 USC § 12111(9)(A) (defining reasonable accommodation to include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities").

[122] Stein, 53 Duke L J at 88 (cited in note 121).

[123] See 42 USC § 12111(9)(B) (defining reasonable accommodation to include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations").

[124] Stein, 53 Duke L J at 88–89 (cited in note 121).

[125] See 42 USC § 12201(h).

[126] See, for example, *Taylor v Phoenixville School District*, 184 F3d 296, 313 (3d Cir 1999).

[127] 29 CFR §§ 1630.2(o)(3), 1630.9.

[128] 42 USC § 2000e–5; 29 CFR §§ 1601.6–1601.8 (providing guidelines for this process).

[129] Samuel R. Bagenstos, *Disability Rights Law: Cases and Materials* 152 (Foundation Press 2010). See also 42 USC § 2000e–5(b); 42 USC § 2000e–5(f).

the EEOC, cannot resolve their differences, then the individual may file suit in a federal district court alleging that the denial of the request for accommodation violates the ADA.[130] If the court finds the requested accommodation was reasonable, then the employer must provide the accommodation or pay damages.[131]

While the ADA provides a clear right and process for seeking reasonable accommodations, there are both structural and interpretive challenges to securing them. The most fundamental has been mediating the disability-versus-ability-binary categories: proving that one's impairment is severe enough to qualify under the ADA while at the same time showing that one is "qualified" and capable for a particular job. In other words, plaintiffs have had to show that they are "disabled enough" to seek a reasonable accommodation, but not "too disabled" and thus unqualified for the job.[132] Indeed, the very evidence that plaintiffs must provide regarding the severity of their impairment may be used by an employer to argue that it was the degree of impairment that prevented the plaintiff from performing essential job functions.[133] The result under the ADA has seemed to be that the measure of disability must be "just right" to establish an individual's worthiness to invoke the statute's protections.[134]

Pursuing accommodation presents further interpretive difficulties, because once an applicant or employee shows she is disabled enough to warrant the protections of the ADA, she faces a host of other jurisprudential challenges. While a qualified individual with a disability may always seek a reasonable accommodation, there are limits to whether an employer must provide an accommodation. Under the ADA, an employer does not have to provide an accommodation that would impose costs constituting an "undue hardship" on the operation of the employer's business.[135] Since before the ADAAA judges focused on the strictures of the definition of disability at the summary judgment phase and avoided ruling on whether an accommodation is reasonable, there is little precedent to assure a challenging party that a particular

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130 See Bagenstos, *Disability Rights Law* at 152 (cited in note 129).

131 42 USC § 1981a(a)(3).

132 Areheart, 83 Ind L J at 209–25 (cited in note 119) (analyzing in detail this complicated tension).

133 See generally National Council on Disability, *Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity* (2003).

134 Areheart, 83 Ind L J at 209 (cited in note 119).

135 See 42 USC § 12112(b)(5)(A).

accommodation will be found reasonable and not to constitute an undue hardship.[136] The matter is further complicated because the language of reasonable-accommodation holdings tends to be nongeneral and fact specific.[137]

The judiciary's reluctance to adumbrate the issue of reasonable accommodation has left a dearth of precedent and many issues unresolved.[138] Examples of contested questions include whether an employer must reassign an individual with a disability to a vacant position when there is a more qualified applicant,[139] whether accommodations must be provided that enable someone to travel to work (as opposed to enabling them to do their job once they arrive on the premises),[140] and whether there should be a presumption that allowing an employee to work from home is not a reasonable accommodation.[141] Additionally, in considering the ultimate cost of the accommodation to the employer, there are unresolved issues about what benefits and costs should be considered. For benefits, should courts weigh the value of accommodations to other current and future employees with disabilities?[142] When the benefits of the accommodation extend to nondisabled

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136 The fact-intensive nature of reasonable accommodation and the lack of precedent might help explain why many judges have, at the summary judgment stage, focused more on the question of whether a plaintiff is disabled and less on whether the accommodation sought was reasonable. Reasonable-accommodation issues simply are not easily decided at summary judgment. See Stein, 53 Duke L J at 90–96 (cited in note 121).

137 Id.

138 Michael Ashley Stein, Michael E. Waterstone, and David B. Wilkins, Book Review, *Cause Lawyering for People with Disabilities*, 123 Harv L Rev 1658, 1699–1701 (2010) (noting that in over two decades of ADA jurisprudence, there is only one employment case "defining the contours of reasonable accommodation despite the lack of clear statutory guidance"). Some of the unwillingness to resolve open accommodations issues may flow from the fact that the EEOC has historically been the entity to provide most of the specific accommodations guidance through its regulations. There is also the possibility that the medical-model mindset that accompanied the Rehabilitation Act is still strong, and prevents some judges from seeing the social solution of accommodations—instead of a medical solution—as what people with disabilities really need. See Stein and Stein, 58 Hastings L J at 1207–08 (cited in note 57) (noting that the Rehabilitation Act furthered the medical model of disability through "determining that individuals are disabled due to 'special' medical problems and were therefore dependent on social services and institutions"). See also Areheart, 83 Ind L J at 192–209 (cited in note 119) (discussing the modern-day entrenchment of the medical model of disability in both the media and federal court jurisprudence).

139 See, for example, *Equal Employment Opportunity Commission v Humiston-Keeling, Inc*, 227 F3d 1024, 1029 (7th Cir 2000); *Smith*, 180 F3d at 1167–68.

140 Bagenstos, *Disability Rights Law* at 92–93 (cited in note 129).

141 See, for example, *Vande Zande v Wisconsin Department of Administration*, 44 F3d 538, 544 (7th Cir 1995).

142 See Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 Ind L J 187, 222 (2010).

employees and customers, should those benefits be considered as well?[143] For costs, should courts consider nonmonetary costs, such as costs to employer autonomy and coworker morale?[144] The ADAAA does nothing to address these questions or otherwise further demarcate the bounds of reasonable accommodation.

Keeping the bar relatively high for securing an accommodation was part of the political compromise necessary to achieve the ADAAA's passage.[145] In the course of negotiations, the disability community had argued that the bar for proving one had a disability should be lower; people with impairments should be protected from discrimination no matter the severity of that impairment.[146] The business community acquiesced to this argument, but with a catch. They agreed to lower the bar for discrimination claims, allowing people with disabilities to bring a discrimination claim under the "regarded as" prong without requiring a showing of limitation on bodily functions.[147] However, the business community did not believe it should be required to provide an accommodation for people with nonsevere impairments (in other words, those that do not substantially limit one or more major life activities).[148] In enacting the ADAAA, Congress therefore coupled the expansion of the definition of disability with the provision that plaintiffs under the "regarded as" prong were not entitled to accommodations, reasoning that anyone who needed accommodation to realize work capability would be able to qualify under either the first or second prong of the definition.[149]

Perhaps the greatest conundrum occasioned by the ADA's statutory language and scope, as far as including work-capable

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143 See Elizabeth F. Emens, *Integrating Accommodation*, 156 U Pa L Rev 839, 842–43 (2008) (raising this question).

144 See Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict between Disabled Employees and Their Coworkers*, 34 Fla St U L Rev 313, 315 (2007) (proposing "an amendment to the ADA that clearly defines an employer's obligation to accommodate a disabled employee even though the accommodation conflicts with the rights of other employees").

145 See generally *2008 and the ADA Amendments Act*, Archive ADA: The Path to Equality (Georgetown Law), online at http://www.law.georgetown.edu/archiveada/#ADAAA (visited May 21, 2014). This site is then-Professor Chai Feldblum's legislative history website, which includes all of the legislative history leading up to the passage of the ADA Amendments Act.

146 Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 Berkeley J Emp & Labor L 203, 262–63 (2010).

147 Id at 264.

148 Id at 263–64.

149 *Statement of the Managers to Accompany S. 340, the Americans with Disabilities Amendments Act of 2008*, 110th Cong, 2d Sess, in 154 Cong Rec S 8346–47 (daily ed Sept 11, 2008) (Statement of Senate Managers).

persons with impairments in the workforce through its accommodation mandate, has been created by the Supreme Court's interpretive jurisprudence.[150] The Court has promoted a gatekeeping function, both through an overly parsimonious interpretation of statutory language (for example, severity of disability)[151] and through gratuitous and constricting glosses on issues not raised by litigants (notably, weighing the possibility of mitigating measures).[152] The ADAAA explicitly repealed each of these approaches, yet the inability of the Court to resolve the tension between work capability and disability status remains a critical problem. Part III explores further how this conceptual divide appears to persist in early ADAAA case law.

No ADA employment-discrimination suit brought before the Supreme Court (prior to the ADAAA) achieved victory, and every case involved persons with impairments who were both work capable and seeking to retain their employment.[153] Claimants in

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[150] Silvers and Stein, 35 U Mich J L Ref at 115–23 (cited in note 36) (surveying recent decisions by the Court and suggesting that it "may continue to draw sharp lines between species-typical and biologically anomalous people regardless of technological, social, and legal changes that permit disabled people to achieve the capabilities long practiced by the nondisabled").

[151] Areheart, 83 Ind L J at 212–18, 222–23 (cited in note 119) (canvassing the various ways federal courts have provided narrow answers to the threshold question of whether someone has a "disability" under the ADA).

[152] See Stein, 153 U Pa L Rev at 628–29 n 205 (cited in note 22) (discussing the possibility that the Supreme Court's consideration of mitigating measures in *Sutton v United Air Lines, Inc*, 527 US 471 (1999), if broadly construed, could "be understood as raising a duty to mitigate one's disability").

[153] See, for example, *Chevron USA, Inc v Echazabal*, 536 US 73, 85–86 (2002) (finding that despite the employee's ability and willingness to work, the employer could, pursuant to an EEOC regulation, refuse to hire him for fear of endangering his existing health disability without running afoul of the ADA); *US Airways, Inc v Barnett*, 535 US 391, 403–06 (2002) (holding that, without a showing of special circumstances by the employee, the employer is not required to make accommodations in contravention of an established seniority system); *Toyota Motor Manufacturing, Kentucky, Inc v Williams*, 534 US 184, 201 (2002) (holding that the employee's inability to perform certain duties required of her position did not render her disabled under the ADA, and thus no accommodation was required); *Board of Trustees of the University of Alabama v Garrett*, 531 US 356, 360 (2001) (holding that the employees' claims for money damages against the state for discrimination under the ADA were barred by the Eleventh Amendment); *Albertson's, Inc v Kirkingburg*, 527 US 555, 564–67 (1999) (declining to find the employee disabled by monocular vision because the condition constituted a mere inability rather than a "disability" under the ADA); *Murphy v United Parcel Service, Inc*, 527 US 516, 521 (1999) (holding the claimant was not "disabled" by high blood pressure because it could be mitigated by medication so that he was employable in alternative fields of work); *Sutton*, 527 US at 492–94 (holding that the job applicants' poor vision did not render them "disabled" even if it resulted in preclusion from a particular position).

Sutton v United Air Lines, Inc,[154] were nearsighted pilots deemed work-capable to fly regional aircraft, but not to pilot long-haul flights;[155] plaintiffs in *Murphy v United Parcel Service, Inc*[156] and *Albertson's, Inc v Kirkingburg*,[157] were functionally capable truck drivers with high blood pressure and monocular vision, respectively, whose employers were not required to continue their until-then acceptable employment via use of available regulatory waivers;[158] *Board of Trustees of the University of Alabama v Garrett*[159] did not raise an accommodation request—although the Court construed it as such—but rather involved a nurse returning from breast cancer treatment who sought reinstatement to her hospital job, and a prison guard allergic to cigarette smoke who saw his performance evaluations drop after filing a discrimination claim;[160] *US Airways, Inc v Barnett*[161] involved an airline baggage handler with a back condition seeking job reassignment to the company mailroom;[162] and *Chevron USA, Inc v Echazabal*[163] ruled that a sixteen-year oil-refinery worker, who had been knowingly exposed to toxic chemicals as a temporary employee while receiving good performance marks, was unqualified to be retained as a permanent employee by the same company because he tested positive for hepatitis C and thus would be a danger to himself.[164]

The Court's inability to embrace the notion that disability involves impairment but that persons with disabilities can be capable workers is most clearly seen in *Toyota Motor Manufacturing,*

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154 527 US 471 (1999).

155 Id at 475–76 (noting that the employer terminated applicants' interviews after discovering they did not meet the employer's heightened standard of "uncorrected visual acuity of 20/100 or better" for pilots).

156 527 US 516 (1999).

157 527 US 555 (1999).

158 *Murphy*, 527 US at 520 (discussing how after being erroneously certified to drive commercially when hired, an employee was fired one month later on the employer's "belief" that the employee's blood pressure "exceeded the DOT's requirements"); *Albertson's*, 527 US at 560 (describing that an employee was fired for failing to meet the Department of Transportation's (DOT) vision requirements and not rehired despite employee obtaining a waiver from the DOT).

159 531 US 356 (2001).

160 Id at 362 (noting that a nurse was forced into taking a lower-paying position at the hospital and that a security guard's performance evaluations lowered after filing a claim with the EEOC).

161 535 US 391 (2002).

162 Id at 394 (describing how the worker was displaced from the job by another employee through the employer's seniority-based employee bidding system).

163 536 US 73 (2002).

164 Id at 76 (stating that the employee suffered from hepatitis C, which the employer's doctors concluded would be exacerbated through continued employment).

Kentucky, Inc v Williams.[165] Ella Williams, who worked at Toyota's Kentucky car-manufacturing site, developed repetitive-stress disorders that restricted the amount of weight she could lift and the scope of activities in which she could engage. As a workplace accommodation, Toyota reassigned her to a "Quality Control Inspection Operations (QCIO)" team and limited her work to two of the four inspection functions, which allowed Williams to keep working.[166] However, upon a change of management strategy Williams became required, along with all other QCIO employees, to carry out all four standard functions, including the two she was physically unable to perform, and she was dismissed from employment.[167] The Court ruled that Williams was not sufficiently disabled to merit disability status under the ADA. Although Williams was substantially limited in a number of major life activities, she was not *sufficiently* limited in her abilities.[168] To merit ADA protection, the Justices reasoned, Williams would have to be restricted in a broader range of tasks—even though her impairments kept her from performing all the designated work functions.[169] In other words, Williams was not disabled enough to merit disability status, but was, according to the Court, too impaired to work without a proven and effective accommodation.[170]

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165 534 US 184, 201 (2002).

166 Id at 188–89 (noting that Williams was initially limited to "assembly paint" and "paint second inspection").

167 Id at 188–90 (explaining that her duties expanded to include "shell body audit" and "ED surface repair").

168 Id at 202:

> [H]er medical conditions caused her to avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens, and drives long distances. . . . But these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual task disability as a matter of law.

169 *Toyota Motor Manufacturing, Kentucky*, 534 US at 202 (noting that Williams could still "brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house").

170 For critical analyses of the Court's holding, see, for example, Lisa Eichhorn, *The* Chevron *Two-Step and the* Toyota *Sidestep: Dancing around the EEOC's "Disability" Regulations under the ADA*, 39 Wake Forest L Rev 177, 200, 202 (2004) (suggesting the Court "sidestepped" EEOC regulations by giving itself "license to ignore applicable regulatory language and to substitute its own language to reflect the so-called plain meaning of statutory terms"); Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 Wm & Mary L Rev 1285, 1317 (2003) (stating that "[a]fter knocking down a strawperson . . . the Court used its selective smattering of dictionary definitions as sole support for a major logical leap").

The ADAAA clarifies that for purposes of remedying disability discrimination, disability is to be broadly construed and attributions of disability should thus be afforded a wide scope. Part III explores the potential impact of the ADAAA and considers how to prevent reversion to a strict construal of disability. Part III will introduce our proposal, which is explored further in Part V, that in order to avert such retrogression courts' primary emphasis should be on the effectiveness of an accommodation rather than the disabilities or capabilities of the worker.

III. THE ADAAA

The ADAAA stipulation that disability is to be broadly construed, together with its explicit rejection of the *Sutton* and *Williams* decisions, might seem to open statutory protections to a far broader range of plaintiffs. Indeed, initial indications are that ADAAA plaintiffs are more likely to survive motions for summary judgment based on the claim that they are insufficiently disabled to warrant statutory protection. However, if the only result is to shift judgments of qualifications from the determination of disability to other aspects of the plaintiff's prima facie case—either the determination that the plaintiff is qualified with or without accommodation or the determination that the plaintiff suffered discrimination as a result of disability—the promise of the ADAAA may prove illusory. This Part presents some of the early case law under the ADAAA and explores whether there are early indications of backsliding. This Part will also foreshadow our argument that the emphasis should be on the efficacy of accommodations rather than characteristics of the person with disabilities seen in abstraction from the circumstances of the job. This Part will also show why excluding persons who qualify under the regarded-as prong from having a right to accommodation is potentially problematic.

A. Construing Disability Expansively

As of July 2013, federal appellate courts had not yet ruled in sufficient numbers for analysis of the construction of disability in cases arising after the ADAAA. Circuits that have dealt with the question are unanimous that the ADAAA does not apply retroactively.[171] A number of these cases also state explicitly that the

[171] See generally, for example, *Hetherington v Wal-Mart, Inc*, 511 Fed Appx 909 (11th Cir 2013); *Reynolds v American National Red Cross*, 701 F3d 143 (4th Cir 2012); *Wurzel v*

ADAAA analysis of the construction of disability would differ from the earlier ADA analysis.[172]

Quite a few district courts have ruled on the construction of disability in post-ADAAA cases, however. In these cases, plaintiffs have fared markedly better than pre-ADAAA plaintiffs on the determination of whether they met the initial requirement for a prima facie case, being a person with a disability under the terms of the statute. In the first six months of 2013, thirty-eight courts ruled on the issue of whether the plaintiff was a person with a disability under the ADAAA.[173] In thirty-one of these cases, the plaintiff survived a motion for summary judgment or a motion to dismiss on the disability-status issue. Cases in which plaintiffs did not prevail on disability-status claims included a two-week episode of kidney stones,[174] planned arthroscopic knee surgery with a recovery period of less than six months,[175] a knee injury that resolved before the end of the plaintiff's FMLA leave,[176] and mild Tourette's syndrome in which the plaintiff had asserted to the EEOC that he was completely functional.[177] Several of these cases reflect the ADAAA provision[178] that transitory and minor impairments—impairments with a duration of six months or less—do not come within the regarded-as prong of the disability definition.[179] Others rest on the failure to assert facts about the plaintiff's condition with any specificity.[180] Nevertheless, in still others there are clear echoes of the earlier congressionally rejected[181] Supreme Court holding[182] that to satisfy the regarded-as

Whirlpool Corp, 482 Fed Appx 1 (6th Cir 2012); *Lander v ABF Freight System*, 459 Fed Appx 89 (3d Cir 2012); *Hodges v ISP Technologies, Inc*, 427 Fed Appx 337 (5th Cir 2011).

172 *Lander*, 459 Fed Appx at 92; *Reynolds*, 701 F3d at 152; *Wurzel*, 482 Fed Appx at 10.

173 Data were compiled from a LEXIS search of "ADAAA and disability and employment" and are on file with the author.

174 *Clay v Campbell County Sheriff's Office*, 2013 WL 3245153, *3 (WD Va).

175 *Tramp v Associated Underwriters, Inc*, 2013 WL 3071258, *6–7 (D Neb). The firm in this case was undergoing a reduction in force (RIF) because of continuing losses. The plaintiff claims that she was subject to the RIF because she was over sixty-five and the employer had realized that health premiums would be lower if she shifted from the employer's plan to Medicare, which she had refused to do. Id at *1–3, 5.

176 *Martinez v City of Weslaco Texas*, 2013 WL 2951060, *9–10 (SD Tex).

177 *McBride v Amer Technology, Inc*, 2013 WL 2541595, *5 (WD Tex).

178 42 USC § 12102.

179 See, for example, *Martinez*, 2013 WL 2951060 at *9.

180 See, for example, *Phelps v Balfour, Commemorative Brands Inc*, 2013 WL 653542, *5–6 (WD Ky); *Mecca v Florida Health Sciences Center, Inc*, 2013 WL 136212, *2–3 (MD Fla).

181 42 USC § 12101(a)(4).

182 *Sutton v United Air Lines*, 527 US 471 (1999).

prong plaintiffs must show the defendant regarded them as substantially limited in a major life activity.[183]

Qualifying as a person with a disability is only the first, threshold step for plaintiffs in making the prima facie case of discrimination requisite to survive a motion for summary judgment. Nonetheless, it has been the critical stopping point for disability-discrimination plaintiffs, preventing them from presenting the remainder of their case. The other two elements of the plaintiff's prima facie case (in the absence of direct evidence of discrimination) are that the plaintiff was qualified for the position, with or without accommodations, and that the plaintiff experienced the adverse action as a result of disability. These elements of the prima facie case may be more difficult to dismiss on motions for summary judgment, as they likely involve disputed claims about the facts.[184] Plaintiffs surviving motions for summary judgment on the issue of disability may therefore obtain bargaining advantages in litigation that were not present when their cases were routinely dismissed on the basis that they did not come within the definition of disability. On the other hand, there are some signals in the case law to date that the problematic picture of judicial approaches to disability we have portrayed above may be shifting from the determination on summary judgment of disability to the determination on summary judgment of qualifications and causation, the other elements of the plaintiff's prima facie case.

B. Other Elements of the Plaintiff's Prima Facie Case

Plaintiffs lacking direct evidence of discrimination must present a prima facie case under the ADA that includes not only evidence of disability, but also evidence that they were qualified for the position and that they were treated adversely on the basis of

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[183] See, for example, *O'Donnell v Colonial Intermediate Unit 20*, 2013 WL 1234813, *7, 18 (ED Pa):

> Thus, even under the "regarded as disabled" rubric, a plaintiff is still required to plead the existence of a substantial limitation on a major life activity, either because the employer mistakenly believed he had a nonexistent impairment that caused one, or because the employer believed an actual impairment caused one, when it in fact did not.

Other courts construe the ADAAA in accord with Congress's intent. See, for example, *Kiniropoulos v Northampton County Child Welfare Service*, 917 F Supp 2d 377, 385 (ED Pa 2013).

[184] See, for example, *Snider v United States Steel-Fairfield Works Medical Department*, 2013 WL 1278973, *4 (ND Ala).

disability.[185] The burden then shifts to the defendant to produce evidence contesting one or more elements of the prima facie case, and then potentially back to the plaintiff to produce evidence that the defendant's assertions were pretextual.[186] All along, the plaintiff bears the burden of persuasion on all elements of the case.[187] If the primary result of plaintiffs surviving motions for summary judgment on the question of disability is only that they lose on summary judgment on the other elements of the prima facie case, little will have been gained by the ADAAA reassertion of an expanded understanding of disability. There are some indications in the early case law that this could occur; if so, it may replicate the mistakes of the earlier jurisprudence in regard to a different element of the case.

1. Qualifications.

In several cases, plaintiffs have prevailed on the determination of disability only to lose on summary judgment on the determination of whether they were qualified for the position sought. For example, in one of the few appellate cases decided under the ADAAA, the plaintiff did not survive summary judgment on the issue of qualifications. Jeffery Knutson was a Location General Manager of a depot for frozen food deliveries.[188] The position description required him to be Department of Transportation (DOT) certified to drive trucks weighing over ten thousand pounds. All parties agreed that his performance was excellent until he received a penetrating eye injury in 2008.[189] After the injury, he was unable to obtain the required DOT medical clearance and was ultimately dismissed. The trial court accepted, at the summary judgment stage, the employer's contention that the DOT certification was an essential function of the manager position because sales managers must drive trucks at times, even though Knutson presented evidence that he had continued to perform the position satisfactorily and that driving a ten-thousand-pound truck was rarely necessary for his position.[190] The court also accepted at face

185 See *Monette v Electronic Data Systems Corp*, 90 F3d 1173, 1186 (6th Cir 1996).

186 Id.

187 Id at 1186–87.

188 *Knutson v Schwan's Home Service, Inc*, 711 F3d 911, 913 (8th Cir 2013).

189 Id.

190 Id at 914–15. It is worth noting that the EEOC has recently affirmed that it is the employer's prerogative to decide what are, and are not, essential functions of the job. Kevin P. McGowan, *EEOC's Views on Accommodation under Amended ADA Discussed*, Bulletin

value the employer's contention that it was not a reasonable accommodation to reassign these duties to other employees because the employer had defined DOT certification as an essential job function.[191] The court concluded that the employer had engaged in the requisite interactive process regarding accommodations by telling plaintiff that he could either pass the DOT certification or seek reassignment to a vacant position if any were available.[192] The appellate court affirmed these rulings by the district court. Cases such as this one, which credit rather than contest the employer's definition of qualifications and essential job functions, continue the jurisprudential approach of cases such as *Albertson's*[193] that exclude work-capable individuals from positions in which they have performed and continue to perform well. Early empirical work on the ADAAA confirms that there is already an enhanced focus on qualification status and that it may indeed be functioning as a new way for courts to summarily dispense of cases before reaching the merits of alleged discrimination.[194]

2. Causation.

An additional element of the plaintiff's prima facie case is evidence that any adverse action was taken on the basis of disability. In employment-discrimination cases without direct evidence of discrimination, the issue of what is required to demonstrate a nexus between membership in the protected class and discrimination has been vexed. Some courts insisted on but-for causation—a standard that is very difficult for plaintiffs to meet—while other courts insisted only on evidence that membership in the protected class was a relevant factor in the plaintiff's treatment.[195] The difference is significant: in cases in which the plaintiff alleges

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to Management (Bloomberg BNA Jan 10, 2012), online at http://www.bna.com/eeocs-views-accommodation-n12884906922 (visited May 21, 2014).

191 *Knutson*, 711 F3d at 916.

192 Id.

193 *Albertson's*, 527 US 555.

194 See, for example, Stephen F. Befort, *An Empirical Examination of Case Outcomes under the ADA Amendments Act*, 70 Wash & Lee L Rev 2027, 2065–66 (2013), observing that

> at least two post-amendment court of appeals decisions have affirmed a grant of summary judgment for the employer based on the plaintiff's lack of ability to perform the essential functions of the job, even though the lower court rulings were based on a finding that the plaintiff was not disabled. The issue of disability, the basis for the district court's rulings, was not addressed by these appellate courts on appeal.

195 *Pinkerton v Spellings*, 529 F3d 513, 517–18 (5th Cir 2008).

multiple bases for discrimination or in cases in which there is both credible evidence of discrimination and credible evidence of reasonable bases for adverse action (such as the plaintiff's performance or the employer's economic circumstances), plaintiffs will be unable to demonstrate but-for causation. Both causal language and remedies tied to a particular causal showing vary in the different civil rights statutes, so it is difficult to draw inferences from one statute to another or predict when courts will do so. In *University of Texas Southwestern Medical Center v Nassar*,[196] a decision handed down at the end of its 2013 term, the Supreme Court ruled that but-for causation is the requirement for claims of retaliation under Title VII, in which the statutory language remains "because of" membership in the protected class.[197] What the *Nassar* ruling will portend for the ADA is unknown. The ADAAA amended the statutory causation language in the antidiscrimination section of the ADA to change "because of" disability[198] to "on the basis of" disability.[199] There is no "motivating factor" language in the ADA. As with Title VII, however, Congress left the "because" causation language in the antiretaliation section of the ADA.[200] Moreover, the remedy section of the ADA still incorporates the remedy sections of Title VII by reference.[201]

In several post-ADAAA cases, courts have refused to grant motions for summary judgment for employers on the causation question.[202] In others, courts, while apparently interpreting causation broadly,[203] have still granted summary judgment for defendants. For example, in *Cody v Prairie Ethanol, LLC*,[204] the court, after concluding that Brice Cody had presented sufficient evidence to survive summary judgment on whether disability was a motivating factor in his treatment, immediately concluded that evidence of Cody's performance problems was sufficient to shift

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196 133 S Ct 2517 (2013).

197 Id at 2534. Congress had specifically amended the antidiscrimination section of Title VII to provide that plaintiffs could prevail when they could show that discrimination was a motivating factor in the defendant's action. Civil Rights Act of 1991 § 107, Pub L No 102-166, 105 Stat 1071, 1075, codified at 42 USC § 2000e–2(m). Plaintiff's remedies in such cases are also limited if the employer could show that it would have taken the same action absent the plaintiff's membership in the protected class. 42 USC § 2000e–5(g)(2).

198 ADAAA § 5, 122 Stat at 3557, codified at 42 USC § 12112(a).

199 42 USC § 12112(a).

200 42 USC § 12203(a).

201 42 USC § 12117(a).

202 See, for example, *Mercer v Arbor E & T, LLC*, 2013 WL 164107, *14 (SD Tex).

203 See, for example, *Cody v Prairie Ethanol, LLC*, 2013 WL 3246109, *6 (D SD).

204 2013 WL 3246109 (D SD).

the burden back to Cody to demonstrate that the employer's asserted reasons were merely pretextual.[205] Because Cody could not do this, his ADA claim was dismissed on summary judgment.[206] The court reasoned that even though Cody had evidence that discrimination was a motivating factor, the burden shifted back to him to prove pretext when the employer advanced a legitimate reason for his termination. In so doing, the court effectively undercut Cody's ability to contest the extent to which discrimination had motivated his employer. Other cases at the district-court level similarly illustrate this concern. For example, a police officer trainee who had difficulty passing fitness tests due to a blood condition prevailed on summary judgment on the claim that he was actually disabled, but lost on the issues of whether he was qualified or whether lighter-duty assignments were a reasonable accommodation.[207]

On the other hand, some cases are more encouraging from the perspective of placing the emphasis on the efficacy of accommodations rather than on the employee's qualifications. For example, a night dispatcher at a county's emergency-dispatch center was experiencing health difficulties because of diabetes that affected his performance.[208] His physician recommended regular sleep habits—not consistent with the night shift—as a way of addressing these conditions.[209] When the employee requested transfer to a (lower-paying) day shift as an accommodation, the employer refused.[210] The employer reasoned that because there were other methods for addressing plaintiff's condition—such as

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[205] Id at *8–9.

[206] Id at *9–10.

[207] *Lapier v Prince George's County, Maryland*, 2013 WL 497971, *3–4 (D Md). See also *Banaszak v Ten Sixteen Recovery Network*, 2013 WL 2623882, *5–6 (ED Mich) (involving a plaintiff fired because she didn't follow the employer's call-off procedure for absences); *Tate v Sam's East, Inc*, 2013 WL 1320634, *12–13 (ED Tenn) (finding the employer's legitimate nondiscriminatory reason for the job reassignment was "merely pretext for its true discriminatory intent"); *Equal Employment Opportunity Commission v Product Fabricators, Inc,* 2013 WL 1104731, *7–8 (D Minn) (concluding that the plaintiff would lose on causation and not reaching the issue of disability as a result); *Goodman v YRC, Inc*, 2013 WL 1180872, *11 (SD Ind) (concluding that an economically motivated reduction in force was a legitimate reason for termination). Against these cases there is really good discussion about the reasonableness of accommodations, in a case in which the plaintiff survived summary judgment on all elements of the prima facie case, *Gregor v Polar Semiconductor, Inc*, 2013 WL 588743, *4–5 (D Minn).

[208] *Szarawara v County of Montgomery*, 2013 WL 3230691, *1 (ED Pa).

[209] Id.

[210] Id at *2.

weight loss or exercise—a transfer was not a reasonable accommodation.[211] The court denied defendant's motion for summary judgment. In so doing, the court refused to assume that the employer's job description settled the question of what were essential job functions.[212] The court also determined that the question to be resolved at trial was the effectiveness of the accommodation plaintiff had suggested in enabling him to perform the job and maintain his health.[213]

C. "Regarded As" Plaintiffs

The case law also suggests the increased importance of the regarded-as prong for plaintiffs in surviving motions for summary judgment on the question of disability. For example, in *Mengel v Reading Eagle Co*,[214] the plaintiff had partial hearing loss and balance problems due to surgery for a brain tumor.[215] Although the court concluded that under its ADAAA case law partial hearing loss in one ear was insufficient for a finding of actual disability, absent additional evidence of a substantial limit on a major life activity, the court also ruled that plaintiff could meet the regarded-as standard for disability because the defendant was aware of her physical limitations.[216] However, as described above, the plaintiff failed another aspect of the prima facie case, the establishment that the adverse action was on the basis of her disability.[217] The defendant-employer was undergoing a reduction in force, and the plaintiff received the lowest scores in her department despite her satisfactory employment ratings. The scoring system included work quality, versatility, interpersonal/teamwork skills, productivity, disciplinary record, performance evaluations, and tenure with the company.[218] It is plausible that Christine Mengel would have fared better on an accommodated evaluation matrix, or that ratings on factors such as versatility could have been affected by accommodations in Mengel's work responsibilities. However, these possibilities are precluded for a plaintiff qualifying as disabled only under the regarded-as prong.

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211 Id at *4.

212 *Szarawara*, 2013 WL 3230691 at *3.

213 Id at *4.

214 2013 WL 1285477 (ED Pa). For similar cases, see generally *Goodman*, 2013 WL 1180872 (SD Ind); *Kiniropoulos*, 917 F Supp 2d 377.

215 *Mengel*, 2013 WL 1285477 at *1.

216 Id at *4.

217 Id.

218 Id at *1.

As an illustration, other plaintiffs claiming actual disability have survived motions for summary judgment on their qualifications with accommodations, despite losing on summary judgment on regarded-as claims for accommodations.[219]

Similarly, Professor Stephen Befort's recent empirical work on the ADAAA shows that, despite the lowered threshold for "regarded as" coverage, the prevalence of "regarded as" summary judgment determinations following the effective date of the ADAAA has not increased.[220] He notes, as one explanatory possibility, "that post-amendment plaintiffs may be deterred from asserting a prong three claim due to the need for a reasonable accommodation in order to be able to perform the essential functions of the job."[221]

Accordingly, the argument this Article develops below in regard to whether an employer should be obligated to make an accommodation focuses not on the eligibility of the individual, but on the effectiveness of the accommodation. Under this proposal, making the accommodation should be the default, though for the employer to be obligated to provide the accommodation there must be some element of the job for which the employee requires the accommodation (for example, having to stand to operate office equipment, or getting information over the phone), and the suggested accommodation must be effective.[222]

In sum, even after the hard-fought-for ADAAA, disability-discrimination jurisprudence may still fail to offer a progressive view of workplace accommodations, thus continuing to put at risk Congress's goal of keeping work-capable people working despite disability. At the conceptual level, the conflict between thinking of disabled people as work capable and as work incapacitated appears to remain unresolved, with the recipe for the requisite balancing yet to be mastered. Also, misreading the right to reasonable accommodation, as an entitlement of productivity-deficient people, may persist. Accommodation should not be thought of as compensation for suffering from disability. Accommodation remedies discrimination, whether advertent or unintentional, in workplace arrangements. Accommodation is warranted if disabil-

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219 See, for example, *Perdick v City of Allentown*, 2013 WL 3231162, *3–4 (ED Pa).

220 Befort, 70 Wash & Lee L Rev at 2063 (cited in note 194).

221 Id.

222 See Part V.

ity bias in policies, practices, or the physical plant needlessly denies disabled people equality of opportunity in the workplace.[223] Part IV discusses why conceptualizing workplace accommodation as a service or compensatory benefit for being disabled is problematic.

IV. COMPLEXITIES OF DISABILITY IDENTITY

Connecting the appropriateness of offering accommodation to the degree of an individual's disability presupposes that the line that marks the necessary level of dysfunction is sufficiently bright to serve as a sustainable, steady, and objective standard.[224] Only if this is so can an eligibility criterion for accommodation be applied fairly and cost-effectively; it is neither fair nor justifiable to force claimants to prove their worthiness for accommodations if the standard for doing so is not sufficiently clear or reliable. Yet the extensive history of disability policy suggests that there is no reliably bright line.

A. The Health-Services Model of Accommodation

The dilemmas encountered by health-care and benefits programs, which rely on there being an objective, fair, and cost-effective standard of sufficiently severe disability, suggest that the possibility of such a steadfast standard is fatally flawed. The World Health Organization's (WHO) efforts to define disease and disability illustrate the problem. Very broadly, the WHO idea of disability is any restriction or lack (resulting from any impairment) of ability to perform an activity in the manner or with the ease considered normal for a human being.[225] For the WHO, disabled people include those who are currently limited or who may

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[223] See generally Silvers, Wasserman, and Mahowald, *Disability, Difference, Discrimination* (cited in note 26).

[224] See Areheart, 29 Yale L & Pol Rev at 374 (cited in note 108):

> Blindness, deafness, disordered eating, and intellectual impairments all represent a range of qualities and/or abilities regarding certain aspects of the body. Who is blind, deaf, bulimic, or mentally retarded is thus a question of degree based on graduated differences. At some point on each continuum, a line must be drawn to effectuate the diagnosis.

[225] See World Health Organization, *World Report on Disability* 4 (2011), online at http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf (visited May 21, 2014) (defining "disability" as an "umbrella term for impairments, activity limitations and participation restrictions").

be so limited in the future due to a current condition, such as a genetic predisposition to a disease.[226]

Trying to turn the meaning of disability into a criterion for the assignment of rights immediately initiates several debates that are difficult to resolve. One so deeply divisive as to be, perhaps, irresolvable arises from disagreement about differentiating pathological from normal manners of performing various activities. From a cultural perspective, the ways in which daily life activities are performed vary from place to place and time to time. What counts as serious dysfunction at one time or in one place may thus be intransient, and be seen as only negligibly limiting in the future or in another locale.[227] From a biological perspective, the definition of disability may make a life-stage difference such as infertility—the inability to reproduce—a disability by fiat. Yet whether infertility is a disability, rather than just a biological state of a minority of young adults and of a majority of small children and elders that is within the range of normality, is regularly disputed in the context of disagreements over whether such individuals should be eligible for reproductive-technology services.[228]

The WHO approach to defining disability was the result of a lengthy process of attempting to attain global agreement to serve the practice of medicine's clinical needs, but the effort put into crafting a global standard for medical-services eligibility seems more like a stopgap than a solid solution. The WHO's International Classification of Functioning, Disability and Health (ICF) originally was compiled, under the title of International Classification of Impairments, Disabilities, and Handicaps (ICIDH), as a complement to the WHO's International Classification of Diseases (ICD).[229] Originating in something like its current form at the end of the nineteenth century, the ICD is a reporting system of morbidity and mortality causes for populations and diagnostic

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[226] Id at 7–8.

[227] See, for example, Areheart, 29 Yale L & Pol Rev at 368 (cited in note 108) (exploring the transience of certain conditions, such as eating disorders, that "exist or have existed only at certain times and in certain places").

[228] Shorge Sato, Note, *A Little Bit Disabled: Infertility and the Americans with Disabilities Act*, 5 NYU J Leg & Pub Pol 189, 190 (2001).

[229] World Health Organization, *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease* (1980; reprint 1993), online at http://whqlibdoc.who.int/publications/1980/9241541261_eng.pdf (visited May 21, 2014). See also *Resolution 54.21, International Classification of Functioning, Disability and Health*, Fifty-Fourth World Health Assembly (May 22, 2001), online at http://apps.who.int/gb/archive/pdf_files/WHA54/ea54r21.pdf (visited May 21, 2014) (adopting the second edition of the ICIDH and titling it as the ICF).

groups.[230] ICD revisions have been propelled by advances in medical knowledge, as well as by alterations in national and global health systems' clinical and policy-making needs. The ICIDH was initiated in 1980 to classify disabling health-related functional limitations, to serve as an instrument in the WHO's effort to measure the health of populations, as well as to systematize treatment planning and monitoring, goal setting, and outcomes assessment for preventative health and therapeutic policies around the globe.[231]

After a decade of trying to put the ICIDH into use in an era when disabled people were pursuing political liberation, the WHO undertook a revision that proved so contentious and complex that almost another decade passed before approval of the new classification scheme that became the current ICF.[232] The ICF revises the definition of human limitations that constitute disabilities, and consequently alters the identification of humans functionally limited by disabilities, by adopting a multivariant account of intersecting biological and social factors.[233]

Consider how the instability of this global delineation of disability is inimical to a reliable ADA-type program of righting the wrongs of disability discrimination. Individuals in the same biological condition may be substantially limited or not, depending on a multiplicity of biological and social variables that affect functionality. As situations change, individuals whose deficits once counted as mere differences may be categorized as disabled, or the functional impact of deficits that previously assigned individuals to the disability category may recede. If the ADA were to determine disability status according to the global disability scheme, however, politics and changes in social norms might still impede effective disability classification. For example, an individ-

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[230] The ICD is currently in its tenth revision, with the eleventh scheduled for 2015. See World Health Organization, *International Classification of Diseases (ICD) Information Sheet* (World Health Organization), online at http://www.who.int/classifications/icd/factsheet/en/index.html (visited May 21, 2014).

[231] WHO, *International Classification of Impairments, Disabilities, and Handicaps* at 1 (cited in note 229). See also World Health Organization, *ICF Application Areas*, online at http://www.who.int/classifications/icf/appareas/en/index.html (visited May 21, 2014).

[232] See *Resolution 54.21* (cited in note 229); Mary Crossley, *The Disability Kaleidoscope*, 74 Notre Dame L Rev 621, 646–47 (1999) (comparing and contrasting the first and second editions).

[233] See WHO, *World Report on Disability* at 5 (cited in note 225) ("The ICF emphasizes environmental factors in creating disability, which is the main difference between this new classification and the previous [ICIDH].").

ual could be accommodated due to a medical condition that is classified as a disability, and could work successfully for several years, but lose the accommodation and thereby the ability to execute an essential function of the job, because new revisions to global health-care policy now deem people with the condition not disabled, but merely regarded as disabled. Alternatively, individuals with the same biological condition might initially be granted only the protection of the "regarded as" prong and thus denied accommodation, but subsequent global categorizations might be altered to label the condition as a disability.

The revolutionary transition from ICIDH to ICF is by no means the sole instance of controversially changing medical criteria that affect the determination of who is disabled. Another well-known and influential product of this kind of process is the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5).[234] This recent revision eliminates the independent identification of the configuration of symptoms previously diagnosed as Asperger's syndrome, assigning the diagnosis based on these symptoms to the more general "autism spectrum" label.[235] Some contend this change leaves high-functioning individuals without a diagnosis because autism is associated with serious functional deficit.[236] Others predict that individuals previously diagnosed with Asperger's, but denied services because that condition is associated with the potential for high functioning, will become eligible for all services offered for autistic people.[237] Similarly, a DSM-5 change

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[234] See Areheart, 29 Yale L & Pol Rev at 364–70 (cited in note 108) (exploring the DSM's role in creating diagnoses, including noting that "[t]he *Diagnostic and Statistical Manual of Mental Disorders* . . . provides a window into how the creation of diagnoses is both politically and economically driven. The *DSM* plays a critical gatekeeping role in determining which mental illnesses are valid for insurance and clinical purposes"). See generally Herb Kutchins and Stuart A. Kirk, *Making Us Crazy: DSM: The Psychiatric Bible and the Creation of Mental Disorders* (The Free Press 1997).

[235] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, DSM–5*, 299.00 (5th ed 2013).

[236] See Amy S.F. Lutz, *You Do Not Have Asperger's: What Psychiatry's New Diagnostic Manual Means for People on the Autism Spectrum*, Slate Medical Examiner (Slate May 22, 2013), online at http://www.slate.com/articles/health_and_science/medical_examiner/2013/05/autism_spectrum_diagnoses_the_dsm_5_eliminates_asperger_s_and_pdd_nos.html (visited May 21, 2014).

[237] See American Psychiatric Association, News Release, DSM-5 *Proposed Criteria for Autism Spectrum Disorder Designed to Provide More Accurate Diagnosis and Treatment* (Jan 20, 2012), online at http://www.dsm5.org/Documents/12-03%20Autism%20Spectrum%20Disorders%20-%20DSM5.pdf (visited May 21, 2014) (announcing the proposed changes).

that permits diagnosing unremitting sadness occasioned by bereavement as depression, even when the loss is only two weeks old, raises prospects of increased numbers deemed in need of health care, such as prescriptions of mood-altering medication.[238] Did courts that relied on DSM-IV[239] definitions to decide whether plaintiffs satisfied the ADA's standards make factual mistakes, or are determinations of disability mere transitory products of their times? How effective can protection against disability discrimination be when the scope of disability status is so shifty?

Pregnancy is another health condition in which the kind of disability determination demanded by benefits programs does not easily align with the objectives of a nondiscrimination program. In general, courts have held that pregnant women are not deserving of benefits meant to support those too disabled to work, primarily because being pregnant is natural and temporary.[240] But should such reasoning be permitted to deny workplace accommodation that is specifically aimed at keeping individuals in atypical health states employed, especially as pregnant workers may rely on employee health benefits as the sole support for their children? The answer remains a matter of controversy.[241]

There are early indications that interpreting pregnancy as a nondisability may continue under the ADAAA.[242] Some courts are interpreting the Pregnancy Discrimination Act of 1978[243] to

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238 Professor Allen Frances, chairman of the task force that created DSM-IV, has led the criticism of the fifth edition. See Allen Frances, *Good Grief*, NY Times WK9 (Aug 15, 2010) ("This would be a wholesale medicalization of normal emotion, and it would result in the overdiagnosis and overtreatment of people who would do just fine if left alone to grieve with family and friends, as people always have."). For a general discussion of this issue, see Benedict Carey, *Grief Could Join List of Disorders*, NY Times A1 (Jan 25, 2012). See also Ronald Pies, *How the DSM-5 Got Grief, Bereavement Right* (Psych Central May 31, 2013), online at http://psychcentral.com/blog/archives/2013/05/31/how-the-dsm-5-got-grief-bereavement-right (visited May 21, 2014).

239 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM–IV–TR)* (4th ed 2000).

240 See Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 BC L Rev 443, 445–47 (2012).

241 See, for example, Christina Wilkie, *Workplace Pregnancy Bill Introduced despite Opposition*, Huff Post Business (Huffington Post Sept 26, 2012), online at http://www.huffingtonpost.com/2012/09/25/workplace-pregnancy-bill-opposition_n_1914062.html (visited May 21, 2014) ("The Republican-controlled House has consistently opposed workplace bills like [the Pregnant Workers Fairness Act], which they argue place an unnecessary burden on businesses, lowering overall profits. The Senate is similarly inclined.").

242 See, for example, *Nayak v St Vincent Hospital & Health Care Center, Inc*, 2013 WL 121838, *2–3 (SD Ind) (ruling that the plaintiff was disabled, but only because her infirmities had lasted for eight months of the pregnancy and continued afterwards).

243 Pub L No 95-555, 92 Stat 2076, codified at 42 USC § 2000e(k).

preempt the field, precluding application of an analysis based on disability discrimination.[244] Even this reasoning, however, is problematic if it precludes the possibility that the bodily differences associated with pregnancy can be the basis for accommodations.[245]

A further notable illustration of the confusion that accompanies efforts to identify disability is the adoption of different disability definitions by federal agencies with different missions. For example, the US Census Bureau starts with the ADA's standard, but for individuals at least sixteen years old expands the definition to include anyone unable to perform any of a long list of everyday tasks, including housework.[246] To take another example, the US Department of Housing and Urban Development identifies disability with "physical, mental, or emotional impairment that: (A) [i]s expected to be of long, continued, and indefinite duration, (B) [s]ubstantially impedes the ability to live independently, and (C) [i]s of such a nature" that could be improved by more suitable housing conditions.[247]

These and other manifestations of the transience of disability identifications[248] suggest there is no stable basis for the view that being disabled is exceptional. Planners charged with implementing public programs that offer opportunities that are based on disability status thus cannot reliably project numbers of future recipients who will qualify as worthy. Additionally, the instability of disability identification invites precipitous policy-directed shifts in how diagnoses should weigh. For example, in 1984 Congress directed the Social Security Administration (SSA) to compensate for pain and discomfort and to give the judgments of applicants' physicians greater deference in determining eligibility

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244 See *Young v United Parcel Service, Inc*, 707 F3d 437, 445–46 (4th Cir 2013) ("A claim of discrimination on the basis of pregnancy must be analyzed in the same manner as any other sex discrimination claim brought pursuant to Title VII."), quoting *DeJarnette v Corning Inc*, 133 F3d 293, 297 (4th Cir 1998).

245 *Young*, 707 F3d at 446–67.

246 Matthew W. Brault, *Americans with Disabilities: 2010* Household Economic Studies 3 (Census Bureau July 2012), online at http://www.census.gov/prod/2012pubs/p70-131.pdf (visited May 21, 2014) (listing a limitation "in the kind or amount of housework" as a "nonsevere" type of disability).

247 24 CFR § 5.403 (2013) (defining what constitutes a "[p]erson with disabilities" for public housing assistance determinations). See also 42 USC § 423(d) (defining "disability").

248 See Areheart, 29 Yale L & Pol Rev at 368 (cited in note 108) (exploring the transience of certain conditions, such as eating disorders, that "exist or have existed only at certain times and in certain places").

for disability benefits.[249] Moreover, applicants with nonsevere conditions could qualify as disabled if they suffer from several such conditions.[250] As a result of this diffusion of the definitional line, the number of individuals qualifying as sufficiently disabled for social security benefits expanded.[251] There are other manipulations of such a line that might shrink the size of the eligible population, but the reasons for such possible changes cannot include approximating the number of objectively worthy individuals.[252]

The SSA's process for approving disability benefits also raises doubts about disability identification being cost-effective and fair. As the meaning of disability evolves, benefits approval has become more and more adversarial.[253] The percentage of awards made on the basis of appeals has doubled since the late 1970s.[254] About 40 percent of awards involve appeals, making their initial denial appear unfair.[255] And while such gatekeeping practices are intended to keep costs down, instead of inflating them, claimants' attorneys' fees cost the SSA nearly half a billion dollars in 1997.[256] Setting a high bar against accommodation claims promises an

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249 Social Security Disability Benefits Reform Act of 1984 § 3(a)(1), Pub L No 98-460, 98 Stat 1794, 1799, codified at 42 USC § 423(d)(5).

250 42 USC § 423(d)(2)(B) (requiring that "the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of [sufficient] severity"); 20 CFR §§ 404.1526(b)(3), 416.926(b)(3) (stating that if a claimant has "a combination of impairments," none of which is a listed impairment, the SSA will determine if the combination is of "equal medical significance" and may find that the combination is "medically equivalent" to a listed impairment).

251 See Social Security Administration, *Annual Statistical Report on the Social Security Disability Insurance Program, 2011*, SSA Publication No 13-11826, 12 (July 2012) (showing that in 1984 the number of disabled beneficiaries began a significant rise for the first time in seven years).

252 See generally, for example, Richard J. Pierce Jr, *What Should We Do about Social Security Disability Appeals? Administrative Law Judges, Overruling SSA Rejections of Disability Claims, Contribute Heavily to Federal Spending*, 34 Regulation 34 (2011) (suggesting that the doubling of the proportion of the US population deemed to be permanently disabled over the past forty years is due primarily to subjective review by SSA's Administrative Law Judges).

253 See, for example, Jennifer J. Dickinson, Comment, *Square Pegs, Round Holes, and the Myth of Misapplication: Issue Exhaustion and the Social Security Disability Benefits Process*, 49 Emory L J 957, 964–65 (2000) (describing the claims process and observing that "lawyers and representatives are taking an increasingly active role in vigorously advocating on behalf of disability claimants").

254 See Pierce, 34 Regulation at 36 (cited in note 252) (stating that the grant rate of Administrative Law Judges in particular has doubled since 1970).

255 See Autor and Duggan, *Supporting Work* at 12 (cited in note 82).

256 See David H. Autor and Mark G. Duggan, *The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding*, 20 J Econ Persp 71, 88 (Summer 2006).

even more factious process, as not only the specific state of the claimant's health and functional potential, but details of the work, the workplace, and the employer's financial and labor situations, all must be weighed in judging whether a disputed accommodation is both reasonable and warranted.

The SSA erects barriers to accommodations and thus steers many away from work.[257] In *Cleveland v Policy Management Systems Corp*,[258] the Supreme Court decided that being work disabled for social security disability insurance purposes could be compatible with being able, with workplace accommodation, to execute the essential components of a particular job.[259] The Court reckoned that the administrative resources of the SSA could not rise to the demands of determining disputed reasonable-accommodation issues, as these might turn on workplace-specific matters.[260] Therefore, the Court declared an employer's obligation not to discriminate by refusing workplace accommodation is not voided by the employee's filing for SSA disability benefits.[261]

B. The Compensatory-Benefit Model of Accommodation

Even if the tension between being disabled under the ADA and being disabled for SSA purposes does not rise to contradiction, as in *Cleveland*, modeling eligibility for reasonable accommodations on compensatory-benefits-sector procedures remains problematic. Such analogizing suggests that workplace accommodation is privileging and therefore that the effect of such accommodations is to make the job easier for recipients suffering from debilitating health defects. Portraying accommodation in this

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[257] See notes 84–90 and accompanying text (explaining how the SSDI program discourages impaired workers from remaining in the workforce).

[258] 526 US 795 (1999).

[259] Id at 803 (holding that "an ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) *without* it").

[260] Id:

> [T]he SSA receives more than 2.5 million claims for disability benefits each year; its administrative resources are limited; the matter of "reasonable accommodation" may turn on highly disputed workplace-specific matters; and an SSA misjudgment about that detailed, and often fact-specific matter would deprive a seriously disabled person of the critical financial support the statute seeks to provide.

[261] Id at 804 (explaining that "an individual might qualify for SSDI under the SSA's administrative rules and yet, due to special individual circumstances, remain capable of 'perform[ing] the essential functions' of her job") (brackets in original).

way thus suggests that whoever is being accommodated has insufficient capability to be on the job, which leads to the conundrum that to be deserving of accommodation at work is to be undeserving of being at work.

Law and policy articulated in terms of "group rights" may strike people who are not in the recipient group as being privileging rather than equalizing.[262] Such law and policy may be read—or misread—as offering benefits to individuals who are made eligible merely by being identified with the group and not because they are personally deserving. The route that has been tried for combating the perception about programs being privileging is the imposition of stringent criteria for group membership.

In the case of the right to reasonable accommodation provided by the ADA, the initial and preeminent approach to controlling for privilege has been to impose a high bar for identification as a person with a disability. This seems to have been the strategy, modeled on the procedure for SSA benefits, that courts were inclined to adopt in order to determine eligibility for accommodation. Yet there is a fundamental difference: SSA benefits are designed to enable people to leave the workforce, whereas accommodations allow people to remain in the workforce. Courts in the wake of the ADAAA may be interpreting actual disability more expansively, but as Part III explained, echoes of the earlier approach appear to be reappearing in the areas of qualifications, causation, and in relation to "regarded as" disability (in which accommodations are not available at all).

The saga of Casey Martin, the golf pro who sought golf cart transportation to accommodate a mobility impairment, illustrates the mistaken tendency to presume that accommodation is about making work easier for the disabled.[263] Martin, a skilled

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[262] See, for example, Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 Va L Rev 825, 862–63 (2003) (discussing and disagreeing with various criticisms of the ADA that identify the Act as a "redistributive scheme" aimed at privileging the disabled). See generally Silvers, 8 J Gender Race & Just at 581–83 (cited in note 31).

[263] See *PGA Tour, Inc v Martin*, 532 US 661, 682–90 (2001) (ruling against the PGA's claim that providing Martin with a cart would "fundamentally alter" the game and possibly provide Martin with an unfair advantage). See also *Pistorius v International Association of Athletics Federations*, CAS 2008/A/1480 13 (Ct of Arb for Sport 2008) (reinstating Oscar Pistorius's eligibility for international competitions). See also generally Sarah J. Wild, Comment, *On Equal Footing: Does Accommodating Athletes with Disabilities Destroy the Competitive Playing Field or Level It?*, 37 Pepperdine L Rev 1347 (2010) (discussing both cases in a broad context of disability accommodations in professional sports); Alexis Chappell, Comment, *Running Down a Dream: Oscar Pistorius, Prosthetic Devices,*

golfer with a painful circulation disorder, sought to use a golf cart in PGA competitions—a means he had been permitted to use in many other golf competitions. It took the Supreme Court, which included experienced golfers, to turn back the idea that riding between holes makes it easier to execute the essential components of the game of golf.[264]

Cutting the provision of reasonable workplace accommodation loose from the health-related services and the benefits models would dampen suspicions that accommodating workers' functional differences is privileging. To be justified under our proposal, a reasonable accommodation would need to be "effective," in that accommodation enables the accommodated individual, who otherwise could not do so, to meet the same standards as others doing the job. Thus, a workplace or work-mode alteration that merely makes executing work tasks easier for the recipient than for others doing the same job would not be justified because the objective is not to benefit the worker but to meet the competency expectations for the work. Part V will explain our proposal for accommodating every body in further detail.

V. ACCOMMODATING EVERY BODY

This Article proposes to predicate provision of accommodations on their effectiveness in elevating functionality, instead of on recipients' group-identity status. An effectiveness standard would be satisfied if the accommodation were needed by an individual to fulfill the same essential job functions required of others, but would not be satisfied if the accommodation served only to make performing those same essential functions easier than for other people. An "effectiveness" criterion is notable because a similar approach was taken by Judge Richard Posner in an early ADA case[265] but later rejected by the Supreme Court in *Barnett*.[266] The principle is also significant because it would mitigate the all-

and the Unknown Future of Athletes with Disabilities in the Olympic Games, 10 NC J L & Tech 16 (2008) (discussing Pistorius's struggles for eligibility in international running competitions).

[264] *Martin*, 532 US at 687 (incorporating the district court's findings that "the fatigue from walking during one of petitioner's 4-day tournaments cannot be deemed significant").

[265] See *Vande Zande v Wisconsin Department of Administration*, 44 F3d 538, 543 (7th Cir 1995) (stating that "[t]he employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs").

[266] *Barnett*, 535 US at 400 (finding that "a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees").

or-nothing approach continued by the ADAAA in which persons "regarded as" disabled, yet not functionally limited enough to satisfy the definition of "actual disability," are barred from receiving workplace accommodations.[267] Instead, accommodations would benefit all individuals for whom workplace alterations enable the performance of essential job functions or provide opportunity that would otherwise not exist.

One might question how the efficacy of an accommodation would be proven or defended. We recognize that establishing counterfactual claims—what would or will happen rather than what has happened—calls for some degree of epistemic sophistication.[268] As an initial matter, plaintiffs could be placed under a prima facie burden to demonstrate that the proposed accommodation would be effective but, as required under current law, not present an undue hardship. Several approaches to establishing an accommodation's effectiveness suggest themselves.

One avenue to establishing efficacy might be to show that the accommodation removes a needless or obvious barrier, for instance maintaining a sufficiently wide and clear path of travel in a corridor for individuals who have erratic balance or use mobility-assistive devices.[269] Another means could be through noting the accommodation's alignment with existing laws and regulations. That approach would have aptly accommodated Milton Ash, the second plaintiff before the Court in *Garrett*, a prison guard who was allergic to smoke and who worked in an area of the penitentiary where smoking was illegal.[270] An additional way of showing the feasibility of a desired accommodation is to request an accommodation that is viewed as standard in the workplace, and not tied to particular individuals or group members, like a

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267 42 USC §§ 12102, 12201(h).

268 For evidence establishing hypothetical and counterfactual claims, see generally Ernest Sosa, *Hypothetical Reasoning*, 64 J Phil 293 (1967); Stephen Barker, *Counterfactuals, Probabilistic Counterfactuals and Causation*, 108 Mind 427 (1999); Bence Nanay, *Neither Moralists, nor Scientists: We Are Counterfactually Reasoning Animals*, 33 Behav & Brain Sciences 347 (2010). See also generally John Collins, Ned Hall, and L.A. Paul, eds, *Causation and Counterfactuals* (MIT 2004).

269 See Equal Employment Opportunity Commission, *Technical Assistance Manual: Title I of the ADA* § 3.10(1) (Jan 1992), online at http://askjan.org/links/ADAtam1.html#III (visited May 21, 2014) (listing a number of examples in which simple changes to the physical workplace would be considered reasonable).

270 *Garrett*, 531 US at 362.

screen reader or an amended work schedule.[271] The counterbalance for the employer is that if the reasonable accommodation is made, employees are implicitly agreeing that employers can fire them as being not capable if they cannot function adequately utilizing the agreed-upon workplace emendations.[272]

The denial of an accommodation request, which itself arises as part of an interactive discussion with a current or potential employee, would constitute discrimination under our proposal—much as it does under the ADA.[273] This is because the employer, by rebuttable inference, is construing the individual who requests this accommodation as being incapable of performing the job, or incapable of performing the job without creating a risk to others or him- or herself, despite the provision of any reasonable accommodation (whether said accommodation is proposed by the employee or suggested in response by the employer).[274] Here, language from the recently released California Fair Employment and Housing Agency's regulations on employment may be useful in limiting the employer's affirmative defense to proving "there is no reasonable accommodation that would allow" the plaintiff to safely perform the job in question.[275]

Under our proposal, an employer would need to feel very certain that a suggested accommodation would not work to deny it, with the result that the focus would shift squarely onto the employer's act. Consider, for example, an airline copilot who has to test tires, but has light-sensitive skin and therefore wears a burka to protect herself. The airline states that she cannot do so because people will think her a terrorist or cannot readily identify her, and in consequence fires her rather than working through a job accommodation such as switching the tire testing duties for another safety check. Or consider a trolley car driver with rigid contact lenses prescribed for keratoconus. Her employer dismisses her on the ground that the lenses will pop out and she will be without

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271 See Equal Employment Opportunity Commission, *Americans with Disabilities Act: Questions and Answers* (May 2002), online at http://www.ada.gov/q%26aeng02.htm (visited May 21, 2014) (listing "modifying work schedules" and "providing qualified readers or interpreters" as some of the common accommodations employees may need).

272 In ADA terms, the plaintiff is conceding that he or she is not a qualified individual with a disability, since that standard is defined as being able, with or without a reasonable accommodation, to perform essential job functions. 42 USC § 12111(8).

273 42 USC § 12112(b)(5).

274 42 USC § 12112. See also 29 CFR § 1630.9 (enforcing the ADA's requirement of providing reasonable accommodations).

275 Cal Code Reg § 7293.8(b).

vision as the trolley trundles rapidly downhill, rather than investigating the likelihood of that occurrence or mandating that the employee wear glasses. In both of these hypothetical cases, the focus would shift from the employee's ability to the employer's act.

Shifting the scrutiny from defining presumptive victims to explicating disability discrimination is crucial because, while there are certain types of people who historically have been subjected to discrimination more than others, anyone could be. For example, women have historically been the primary targets of sex-based discrimination, but sex-based discrimination is of course in no way exclusive to them.[276] Indeed, the prohibition of sex discrimination has evolved substantially, and beyond the view that only individuals with certain sex assignments are protected.[277] This evolution has been in part the result of courts coming to realize the complexities of sex assignment, which has been prompted to some degree by broad changes in society.[278]

Disability assignment is at least as complex and socially relative as sex assignment.[279] But disability assignment is also quite different, in that it bears heavily on various health and welfare administrative regimes. This is notable since the health-services and compensatory-benefits models do not serve civil rights purposes[280] and cannot provide a firm foundation for agreement about who is disabled and should be protected.[281] Moreover, and much

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[276] See notes 58–70 and accompanying text.

[277] See, for example, *Newport News Shipbuilding & Dry Dock Co v Equal Employment Opportunity Commission*, 462 US 669, 675–76 (1983) (holding employer's health plan impermissibly discriminated against men based on their sex).

[278] See generally Eskridge, 57 UCLA L Rev 1333 (cited in note 58) (providing a broad historical examination of the correlation between law and gender roles); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L J 1, 37–41 (1995) (noting one legal innovation in response to poststructural work on the gender/sex binary was four generations of sex-stereotyping jurisprudence, each of which was effectuated by a gradual expansion of Title VII to protect various permutations of gender and sex).

[279] See Silvers and Stein, 35 U Mich J L Ref at 91–94 (cited in note 36).

[280] See Bagenstos, *Law and the Contradictions of the Disability Rights Movement* at 18 (cited in note 44) (noting the prevalent approach to disability in the 1970s focused on "medical treatment, physical rehabilitation, charity, and public assistance" and that disability activists believed such a view encouraged "dependence on doctors, rehabilitation professionals, and charity"). The structural dependence that issues from focusing on health services or benefits is in tension with effectuating one's civil rights. See id at 21–22.

[281] This lack of a firm foundation may issue from—among other things—the cultural transience of certain disabilities, the political or economic incentives for certain disabilities, as well as general disagreement in diagnosing patients. See Areheart, 29 Yale L & Pol Rev at 368, 370 (cited in note 108) (examining the cultural transience of eating disorders and age-related impairments); id at 364–67, 369–70 (explaining how political and

as in the case of sex, although it is true that people with certain kinds of chronic illnesses or age-related conditions are more subject than others to disability-based discrimination,[282] in principle it can happen to anyone, especially since one's mental and physical abilities naturally change over the course of a lifetime. Anyone may thus be in position to need an accommodation to stay in the workplace. Trenchantly, shifting the locus of inquiry onto those who cause discrimination has been an effective method of getting to the root of undesirable workplace practices. This has been the case, most notably, for sexual harassment, in which the burden is now on employers and their personnel and workplace environments rather than on the particular qualities or actions of victims.[283]

This brings us to the challenge of defining disability discrimination. Part of the challenge under the employment provisions of the ADA was created by the statutory structure that requires plaintiffs, as a threshold issue, to first prove their eligibility for protection.[284] In consequence, courts have concentrated in great degree on the question of eligibility, often failing to reach the question of disability discrimination.[285] By contrast, other identity

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economic incentives may result in the creation or elimination of certain diagnoses); id at 372 (noting studies in which psychiatrists trained in using the DSM cannot reach agreement on diagnoses).

[282] See Erin Ziaja, *Do Independent and Assisted Living Communities Violate the Fair Housing Amendments Act and the Americans with Disabilities Act?*, 9 Elder L J 313, 314–15 (2001) (explaining the regularity of discrimination against the 52.5 percent of the elderly population with one or more disabilities). Diabetes is an illness that seems to generate many ADA decisions, which may suggest that diabetics are particularly subject to discrimination. See, for example, *Rohr v Salt River Project Agricultural Improvement and Power District*, 555 F3d 850, 858, 860 (9th Cir 2009) (surveying numerous cases applying the ADA to discrimination claims brought by diabetic employees).

[283] See *Faragher v City of Boca Raton*, 524 US 775, 805 (1998); *Burlington Industries, Inc v Ellerth*, 524 US 742, 764–65 (1998) (requiring employers to show that they exercised "reasonable care" in avoiding harassment and that the employee failed to take advantage of the provided safeguards). See also Estelle D. Franklin, *Maneuvering through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 Fordham L Rev 1517, 1538–58 (1999) (examining the standards for imposing and avoiding employer liability for sexual harassment).

[284] 42 USC § 12112(a) (prohibiting discrimination only against "qualified individual[s]"); 42 USC § 12111(8) (defining a "qualified individual"). See generally Chai R. Feldblum, *Definition of Disability under Federal Anti-discrimination Law: What Happened? Why? And What Can We Do about It?*, 21 Berkeley J Empl & Lab L 91, 139–41 (2000) (explaining how courts have thwarted the intent of the ADA's drafters by misapplying the disability definition).

[285] See, for example, Areheart, 83 Ind L J at 221 (cited in note 119) ("Because such cases are dismissed on the threshold issue of coverage, the question of whether discrimination actually occurred is never addressed.").

groups—and especially those protected under the Civil Rights Act of 1964—have been held to showing only that the discrimination practiced against them arose because of their protected category.[286] Moreover, Title VII plaintiffs have over time managed to evolve the jurisprudence to now include progressive doctrines such as sexual harassment,[287] unconscious bias,[288] and statistical discrimination[289]—even under the auspices of a conservative Supreme Court.[290]

Perhaps the differences in how "sex" is covered under Title VII and how "disability" is covered under the ADA stem in part from one way in which sex coverage has grown increasingly sophisticated: by recognizing the performative nature of identity.[291] The coverage of sexual stereotyping and gender nonconformance under the category of sex implies that how we perform our perceived sex-related roles has real-world consequences. Title VII jurisprudence has moved beyond a focus on static bodies to appreciate that identity is performative such that no matter one's sex,

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[286] 42 USC § 2000e–2. For example, if an otherwise-qualified female job applicant sues her employer, there will be a presumption of sex discrimination to overcome at the summary judgment stage. Alternatively, the same prospective employee with a disability will find it difficult to survive summary judgment due to the presumption of her incompetence. Silvers and Stein, 35 U Mich J L Ref at 122–23 (cited in note 36). See also Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 Ohio St L J 239, 252–53 (2001) (comparing the success rates of ADA and Title VII appellants and finding that "Title VII plaintiffs fare much better").

[287] See, for example, *Harris v Forklift Systems, Inc*, 510 US 17, 22 (1993) (upholding plaintiff's sexual harassment claim under Title VII despite a lack of serious subjective harm); *Meritor Savings Bank, FSB v Vinson*, 477 US 57, 66–67 (1986) (recognizing sexual harassment as an actionable claim under Title VII).

[288] See, for example, *Griggs v Duke Power Co*, 401 US 424, 432 (1971) (concluding that Title VII liability does not require intentional discrimination); *Desert Palace, Inc v Costa*, 539 US 90, 101–02 (2003) (holding that "direct evidence of discrimination is not required in mixed-motive" Title VII claims). See also generally Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala L Rev 741 (2005) (examining unconscious bias in Title VII decisions).

[289] See, for example, *International Brotherhood of Teamsters v United States*, 431 US 324, 339 (1977), quoting *Mayor of the City of Philadelphia v Educational Equality League*, 415 US 605, 620 (1974) (stating that "'[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue") (brackets in original); *McDonnell Douglas Corp v Green*, 411 US 792, 805 (1973) (finding statistics relevant in establishing a pattern of discrimination).

[290] See Anita Silvers, Michael E. Waterstone, and Michael Ashley Stein, *Disability and Employment Discrimination at the Rehnquist Court*, 75 Miss L J 945, 972 (2006) ("The Rehnquist Court has taken the lead amongst the federal courts in treating disability discrimination claims as being of a fundamentally different stripe than those on the basis of race or gender.").

[291] See Part I.B. See also Franklin, 67 Fordham L Rev at 1357–58 (cited in note 283).

one may experience discrimination or harassment simply due to gender, or the way in which sex-related roles are performed.

In the same way, our proposal's focus on accommodations underscores the way in which ability is performative and not inexorably tied to bodies. In particular, every workplace is designed to accommodate some types of bodies; it is the way in which one's abilities are performed that dictates whether a person's body is, in effect, accommodated. The ADA was premised on the value of access and enacted in part to allow more workers more opportunity to perform work effectively. Yet, while courts have implicitly accepted the idea of sex identity as performative by extending coverage to all sorts of permutations between sex and gender, courts have been less apt to accept the idea of ability being largely contingent on the structuring of the workplace. In particular, there has been a reluctance to force much structural change. "[T]he idea of a body constituted by its environment has exceeded mainstream legal norms"—at least mainstream disability law.[292]

International jurisprudence on disability discrimination is instructive regarding one way to focus more on how ability is demonstrated. International disability law has increasingly sought, as a broad goal, to reduce vulnerability to discrimination that targets deficits of body or mind.[293] This approach first assesses the reasonableness of an accommodation's effectiveness, with the goal of increasing labor market participation. This can be seen in a number of statutory provisions, including that of Holland.[294] Non-US courts rarely spend time on whether individuals with particular limitations or conditions fit the disability classification and instead focus on eliminating systemic stigmatization of people with disabilities. For instance, in *Archibald v Fife Council,*[295] the House of Lords noted in a cursory manner that Mrs.

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[292] Kathryn Abrams, *Performing Interdependence: Judith Butler and Sunaura Taylor in* The Examined Life, 21 Colum J Gender & L 72, 75–76 (2011). See also Linda Hamilton Krieger, *Sociolegal Backlash*, in Linda Hamilton Krieger, ed, *Backlash against the ADA: Reinterpreting Disability Rights* 340, 340 (Michigan 2003) (observing that the ADA may have experienced backlash because it "got too far ahead of most people's ability to understand the social and moral vision on which it was premised").

[293] See generally Dagmar Schiek, Lisa Waddington, and Mark Bell, eds, *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* ch 6 (Hart 2007) (comparing and contrasting the meaning of "reasonable accommodation" across various nations).

[294] Schiek, Waddington, and Bell, *Cases, Materials and Text* at 658 (cited in note 293) (highlighting the duty "to make effective accommodations"), citing Dutch Act on Equal Treatment on the Grounds of Disability or Chronic Illness 2003, Art 2.

[295] [2004] UKHL 32.

Archibald, a road sweeper, became disabled due to an operation and spent the remainder of the opinion on whether denying her application to over one hundred alternative and more sedentary positions constituted discrimination. The Lords concluded—taking a position directly opposite to the conclusion reached by the Supreme Court Justices in *Barnett*—that the Council of Fife should have accommodated her by allowing an exception to the prevailing seniority system.[296] Non-US jurisprudence has now taken up the sophisticated civil rights conception of disability that Congress built into the ADA, but which American judges have left behind.

VI. THE VALUE OF ACCOMMODATING EVERY BODY

Our proposal reaches in principle to all work-capable individuals, with vigilant effort expended on effective adaptation of workplace practices for those groups that have been historical targets of workforce discrimination, and equal alertness undertaken to prevent new breeds of bias from taking hold. This policy shift is necessary to retain and integrate workers and, in so doing, achieve democratic goals. Section A argues that integration is an overarching democratic value that moves beyond group-based identity theory, and that employment opportunity involves a spectrum, rather than a bright line, of abilities. Section B discusses the good likely to result from our proposal, which includes structural, expressive, economic, and hedonic benefits.

A. Integrating the Work Capable

Reasonable accommodation can be seen to be an instrument of integration. In a seminal article published during the period of time known as the civil rights era, Professor Jacobus tenBroek—University of California professor and founder of the National Foundation of the Blind—described what he understood to be a new "policy of integrationism" applicable to people like himself,

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[296] Contrast *Archibald*, [2004] UKHL at 32 ¶ 16:

> [A] substantial number of adjustments to the normal procedures were made in Mrs Archibald's case. Some of them involved positive discrimination in her favour, such as her automatic short listing for the available posts. This was within the scope of the duty, as it was necessary for the council to redress the position of disadvantage that she was in due to her disability.

with *Barnett*, 535 US at 402–03 (stating that "it will ordinarily be unreasonable" to reassign a disabled employee as an accommodation if such reassignment violates a seniority-based hiring policy).

that is, to the disabled.[297] It took nearly a quarter century for Congress (through the ADA) to endorse tenBroek's proposal that people with disabilities should also be beneficiaries of federal integration policy.[298]

In considering tenBroek's liberating vision, it is helpful to note that despite naming the disabled as a target group for integration, tenBroek's theory did not posit that any special group benefits should accrue to the members as a result of this policy.[299] As philosopher Elizabeth Anderson observes in her much-praised book *The Imperative of Integration*, the policy of integration calls for "full participation of members of salient social groups on terms of equality, cooperation, and mutual respect."[300] In other words, people's group identifications affect how an integrated cooperative scheme should be arranged, but affording such recognition to a group's differences is not the same as privileging its members.[301] An integrated cooperative arrangement enables everyone to participate fully, with each respecting all other participants. And as respecting others includes accepting who these others are, acknowledging not only their mutual similarities but their divergences as well, pursuit of integration also calls for constructing social practices that do not embed bias against various kinds of difference.[302] Thus, practices focusing on a social group's salient

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297 See Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 Cal L Rev 841, 841–52 (1966) (arguing that integration of the disabled is "the policy of the nation" and suggesting tort innovations to effectuate the disabled people's "right to live in the world").

298 The ADA's findings are centrally concerned with the societal exclusion of people with disabilities. ADA § 2, 104 Stat at 328, codified as amended at 42 USC § 12101. See also ADA § 202, 104 Stat at 337, codified as amended at 42 USC § 12132 (defining "discrimination" under Title II, in part, as being "excluded from participation in or [ ] denied the benefits of the services, programs, or activities of a public entity").

299 See tenBroek, 54 Cal L Rev at 848–50 (cited in note 297) (noting that the rights of integrationism, or public access, "belong to all men").

300 Elizabeth Anderson, *The Imperative of Integration* 184 (Princeton 2010).

301 See id (discussing how integration requires "the construction of a superordinate group identity").

302 Anderson discusses four stages of integration, which enable genuine acceptance of who others are over a period of time. These stages, while directed toward race, may also be of more general use: (1) formal desegregation, (2) spatial integration, (3) formal social integration, and (4) informal social integration. Formal desegregation consists of abolishing, often through the use of law, formal barriers to integration. Spatial integration consists of the common use of facilities and public spaces. Formal social integration consists of cooperation that is institutionally structured, and informal social integration consists of cooperation even without the structure of organizational roles. Id at 116–17. See also id at 183–84 (noting that "[t]he ideal of integration does not call for the elimination of group difference or group identity").

differences for the purpose of facilitating its members' full integration should not be viewed as special rights belonging to group members. But if not as special entitlements for groups, how should this kind of accommodation to achieve integration be viewed?

Integration of the workforce is needed for full engagement in employment by members of groups such as elders and people with disabilities who traditionally have enjoyed neither respect as workers nor equal participation as cooperators in productive arrangements. As Anderson points out, there are contingent circumstances that make achieving integration for some salient social groups stand in need of law or policy that acts affirmatively to address past or present prejudices, injuries, or deprivations.[303] Anderson delineates four models of affirmative acting: compensatory, diversity, discrimination blocking, and integrative.[304] While Anderson discusses the models in the context of race-based affirmative action, these same models map onto reasons why society needs to readily provide workplace accommodations. Accommodations require potential cooperators to act affirmatively in order to remedy past social exclusion, increase cultural and epistemic diversity, counteract ongoing discrimination, and integrate social institutions.[305] But accommodations, rightly construed, must have integration through productive functioning as a primary goal.

Some accommodation is a form of affirmative redemptive action. Such actions are focused on arrangements that liberate members of minorities from disadvantages caused by preferences for other kinds of people that prevailed in the past. This kind of accommodation is necessary to achieve integration when prior social choice has resulted in current exclusionary practice. For example, increasing reliance on text rather than talk in business transactions has, in various eras in the past, driven individuals with visual impairments from work that formerly was theirs to do, just as increasing reliance on talk when telephoning replaced telegraphing had a similar outcome for hearing-impaired people.

A quarter century ago, both public and private employers made the social choice to replace mainframe computing with

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[303] See Anderson, *The Imperative of Integration* at 148–53 (cited in note 300) (advocating and describing an "integrative model" of affirmative action).

[304] Id at 135–37.

[305] See id (describing the four models of affirmative action).

desktop-level programs that enabled employees to execute secretarial and research functions themselves.[306] Visually impaired workers could participate and even benefit from this trend, but only if versions of the screen-reading software that gave them access to the powers of computing could keep up with improved versions of office and statistical programs. And doing so required that screen-reading-software developers could gain access to the popular office- and statistical-package proprietary codes. In this matter, a remarkable turnabout of prevailing social choice was promoted by the political efforts of organizations of affected individuals, effected by progressive state governments, and energized by the fascination of programmers and other technological types with solving the challenges of voice output and input. Today, off-the-shelf productivity software typically has enlargement and some voice output function built in. Providing employees with the special software needed for accessible computing is thus a standard and paradigmatically reasonable accommodation.[307] An employer's doing so hardly seems privileging. That providing such access now appears to be a reasonable effort for employers to integrate visually impaired individuals into their workplaces is the result of just social choice having been embraced more than a decade ago.

Affirmatively accommodating workers' inability to read computer screens is different than affirmative actions based only on broad group membership such as race or sex. Only individuals who cannot read a screen by looking at it would be accommodated by having screen-reading software, for only these individuals require such software to participate fully in activities for which computers are central. Screen-reading software merely enables visually impaired workers to access the text on a computer screen—something those who are not visually impaired already do by other means.

Providing screen-reading software to people who cannot otherwise read or access a computer screen is thus far from favoring

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306 Valerie Reitman, *PCs Replacing Mainframes in a New Computer Revolution: Many Firms Have Found That Personal Computers Are Cheaper, More Flexible, and as Powerful as Their Old Computers*, Philadelphia Inquirer C1 (Sept 16, 1990).

307 "For blind and visually-impaired persons, reasonable accommodations may include adaptive hardware and software for computers, electronics [sic] visual aids, braille devices, talking calculators, magnifiers, audio recordings and brailled material." *Americans with Disabilities Act of 1990*, HR Rep No 101-485(II), 101st Cong, 2d Sess 64 (1990), reprinted in 1990 USCCAN 346.

them. This accommodation may appear to be a group-based preference because it is bestowed on members of a salient group. But it is not their group membership that warrants the accommodation; the accommodation is instead warranted because it addresses a deficit that otherwise would prevent them, given prevailing workplace practices, from doing the work, and because it enables them to do the work successfully. Increased workforce participation by a previously excluded group progresses person by person, and individual accommodations in the workforce constitute piecemeal efforts by which the goal of full integration can be reached. Similarly, affirmatively responding to the kinds of organizational biases and barriers that have barred potential workers from employment is often most effectively accomplished by alterations targeted to accommodate what otherwise would be a limitation that characterizes a group.

Parenthetically, this feature of the kinds of groups for whom accommodation is a matter of justice explains why invoking the "access/content" distinction,[308] which is supposed to distinguish equalizing accommodation from privileging favor, cannot exactly do that job. Effective accommodation must be narrowly tailored to whatever deficit, or divergence from the usual type of employee, the group's members share, as well as to the group's capacities for deploying alternative modes of functioning. Accommodating may mean providing instruments or arrangements differing from what other employees are given opportunity to use. But to affirm the goal of integration, and therefore accommodate rather than privilege, such an action must respond to what will effectively offset a deficit or difference so that members of the group do not suffer being set aside. In other words, access requires appropriately tailored content.

Redemptive action to enable execution of the job is not the only way in which accommodation facilitates integration. Another circumstance that calls for accommodation also combats discriminatory exclusion, but in this case employers' current preferences rather than past social choice constitute the source of the bar, and the remedy often is a matter of dispensing with rather than compensating. Policies by which an employer manages a particular work site can prevent individuals who otherwise can execute a job from getting to or functioning at it. While formally neutral, such

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[308] Samuel R. Bagenstos, *The Future of Disability Law*, 114 Yale L J 1, 37 (2004) (naming and discussing the "access/content" distinction).

policies in practice are not at all substantively neutral.[309] For example, an individual with diabetes may need to keep an orange handy to remedy hypoglycemia and thus cannot do a full day's work if the employer bans all food from workstations. Or an individual with a walking deficit may not be able to mobilize from the part of a parking lot the employer has designated for workers of his rank or assignment, but be able to do so from a closer parking place provided for higher-ranking members of the organization.

Thus, exempting employees from nonessential policies can be accommodating rather than privileging when such exceptions promote integration, that is, under conditions in which an individual's difference from typical employees would prevent that person's working were the usual work-site rule to be applied. Accommodating can be distinguished from privileging in cases like these by counterfactually hypothesizing whether the employer would retain the rule were all workers like the accommodation-needing one.[310] If all workers were diabetic, an employer who failed to arrange for a means of rectifying insulin shock to be readily at hand could not remain in business, nor could an employer whose workers all arrived at work exhausted because they had to walk from employee parking situated ten miles away.

While the previous two approaches to accommodation address the effects of bias by lowering job or work-site-specific bars that prevent potentially productive people from being allowed to work, a third approach promotes integration in another way. Here we find familiar tools for furthering diversity. These include not only recruitment programs aimed at full integration, but also training aimed at eliminating bullying, harassment, and other producers of chilling effects.

B. Benefits of Accommodating Every Body

Beyond the prudential and philosophical justifications set forth above, four types of value—structural, expressive, economic, and hedonic—would be increased by extending the right to meaningful access through workplace accommodations to include all work-capable members of the population.

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[309] It is worth reemphasizing that a particularly problematic aspect of the Supreme Court's jurisprudence is the mistaken identification of policies as neutral that are not. See note 27 and accompanying text.

[310] For an account of the "counterfactualizing" test in assessing the reasonableness of accommodation requests, see Silvers, *Formal Justice* at 129–31 (cited in note 26).

1. Structural benefits.

Disability-rights advocates have long seen social impediments as primarily structural. In other words, it is the arrangement of policies, norms, and workplace environments, and the behavior of people who implement and control such constructs, that exclude people from workplace opportunity.[311] Accordingly, equal opportunity requires more than antidiscrimination protection, including a legal right to accommodation, which currently exists only under relatively narrow circumstances. Genuine equal opportunity requires changing social structures and attitudes, so that people's thoughtlessness and biases do not perpetuate systemic exclusion. Challenging structural and attitudinal barriers is difficult and requires incremental progress, but is necessary to effectively "influence society towards a social norm of inclusion."[312] For people with impairments, genuine equality of employment opportunity will require overcoming exclusionary structural impediments.

Extending the ADA's reasonable-accommodation mandate to all work-capable members of the general population with impairments could enhance US employment practice by normalizing the process of considering workplace accommodation as a workplace-productivity-enhancement tool. By eliminating the question of whether persons seeking accommodations are deserving of them (that is, whether they have an impairment that is considered serious enough under the ADA), our proposal would change current workplace norms by encouraging employers to take accommodation requests more seriously and engage in good faith discussions about whether accommodations are warranted.[313] In other words, enhancing the scope of liability for accommodation denial would induce employers to consider accommodation requests (including the requesting employee's unique capabilities, job responsibilities, and the relative burden of the request) more proactively and thoroughly.

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311 See Areheart, 29 Yale L & Pol Rev at 350–52 (cited in note 108) (discussing the social model of disability and its emphasis on structural barriers).

312 Stein, 153 U Pa L Rev at 664 (cited in note 22).

313 This is consonant with the argument, advanced by some, that providing reasonable accommodations for even those who are only "regarded as" having a disability enhances the benefits of the interactive process. See, for example, Austin Ozawa, Note, *Reasonable Accommodation for Those "Regarded As" Disabled: Why Requiring It Will Create Positive Incentives for Employers*, 2007 Colum Bus L Rev 313, 346 (arguing that "increased potential liability for the employer encourages the employer to engage in the interactive process").

Of course, questions would remain as to whether the accommodation sought is reasonable—that is, whether it is effective and not an undue hardship for the employer. If more people seek accommodations and employers become less resistant to facilitating them, a more collaborative "interactive process," as aspired to by the ADA and its regulatory agency,[314] would result. Employers and employees would join together efficiently to adjust features of the job to help capable persons work, keep working, or otherwise optimize workplace productivity—all of these outcomes being results that avail management and worker alike. Such interactions are intrinsically beneficial since the more people interact proactively, the more likely they are to be inclusive of—instead of thoughtless toward or subconsciously averse to—people with accommodation needs.[315]

Our proposal should also lead employers who value efficiency and innovation to prophylactically implement changes in policy so as to make the workplace more accessible for everyone. This could involve employers publicizing, and implementing standard protocols for, common accommodations such as work breaks, modified work schedules, modified job equipment, additional training, assistive software, or the provision of readers or interpreters. The proposal could also further facilitate the contemporary movement toward Universal Design, an architectural principle in which environments are designed to be "usable by all people to the greatest extent possible."[316] If employers anticipate having to make more accommodation-related changes to the workplace environment, they may be more apt to invest time and effort on the earlier "design" end to avoid subsequent needs to retrofit. These changes, taken together, could create organizational cultures in which making accommodation to achieve an inclusive workplace no

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[314] See 29 CFR § 1630.2(o)(3):

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

[315] See Stewart J. Schwab and Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 Wm & Mary L Rev 1197, 1258–59 (2003) (discussing the benefits of "[a]ccommodation as procedure" and noting that even forced interactions may, over time, change employer preferences). See also, for example, Office of Technology Assessment, US Congress, *Psychiatric Disabilities, Employment, and the Americans with Disabilities Act*, OTA-BP-BBS-124, 80 (GPO 1994) (finding that contact increases tolerance and positive attitudes toward workers with psychosocial disabilities).

[316] Mace, Hardie, and Place, *Accessible Environments* at 156 (cited in note 37).

longer is approached as a burden uniquely imposed by the ADA. Accommodations and making workplaces generally accessible as a matter of course could evolve into just another component of doing business, shedding the antiquated perception that ensuring employment opportunity for citizens with accommodation needs is an onerous imposition.[317]

Such collective and institutional results, if realized, would stand in stark contrast to the current state of accommodation claims under the ADA. Claims for accommodation usually proceed in the following way: individuals advance individual claims and, when successful, those claims result in employers granting one-time exceptions to otherwise standard rules and policies.[318] There has been a dearth of collective action in this area, as disparate impact and class actions predicated on absence of accommodation have been missing from ADA jurisprudence.[319] Our proposal would ameliorate the lack of collective action by incentivizing employers to initiate broad, structural changes to the workplace. There is thus the potential, under our proposal, to transform workplace environments cost-effectively by motivating employers to take preemptive action.

2. Expressive benefits.

Law does not merely control or constrain behavior; laws "mak[e] statements" and affect the way that people internalize certain values.[320] Law thus has the capacity to change social norms. Promoting inclusion requires changing social mores and cultural attitudes so that attitudinal and institutional barriers do not perpetuate the exclusion of work-capable individuals who require accommodation. Detaching the right to accommodation from assignment of a special disability identity is consistent with integrating employees with disabilities rather than marking, and

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317 Even under our proposal, only those accommodation costs that are "reasonable" would be remediable.

318 See Michael Ashley Stein and Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 Duke L J 861, 879–82 (2006) (discussing accommodation claims as "highly atomistic").

319 Id at 882–84.

320 Cass R. Sunstein, *On the Expressive Function of Law*, 144 U Pa L Rev 2021, 2024–25 (1996) (exploring "the function of law in 'making statements' as opposed to controlling behavior directly"). See also Stein, 153 U Pa L Rev at 664–68 (cited in note 22) (discussing the expressive capacity of law).

perhaps stigmatizing, them as essentially different from most workers.[321]

Accommodations are often seen as a net cost of hiring people with disabilities and thus irrational.[322] Focusing ADA implementation on the effectiveness of accommodation as we propose would highlight both real costs and realized benefits of accommodations.[323] Most accommodations are inexpensive or even costless and do not require expensive renovation or restructuring. Moreover, accommodations can yield residual benefits, such as "higher productivity, greater dedication, and better identification of qualified candidates for promotion."[324] Decreasing the perception that it is disadvantageous to hire people with disabilities[325] may reduce experiences of harassment, including remarks demeaning the individual's condition, an allegation that frequently is an element of disability-discrimination complaints.[326]

3. Economic benefits.

Facilitating implementation of the ADA's reasonable-accommodation mandate should have profound economic benefits. As explained above, there is a mounting economic crisis in the areas

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[321] For another example of how disabled persons may be rightly seen as having no essential difference, see Areheart, 29 Yale L & Pol Rev at 363–75 (cited in note 108) (arguing through various concrete examples that disability is socially constructed).

[322] See, for example, Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* 484–88 (Harvard 1992) (discussing various costs associated with enforcing disability protections in the workplace and concluding that "[t]he mismatch of cost and benefit is a fatal flaw of any antidiscrimination law for the handicapped"). See also Areheart, 83 Ind L J at 190 (cited in note 119) ("[M]any people seem to view discrimination against disabled people as rational—the result of their own bodies' deficiencies—and distinguishable from other forms of discrimination. The result is that even people who avoid other forms of discrimination may be apt to rationalize disability discrimination."); Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 Harv L & Pol Rev 477, 491 (2007) (noting that adverse reaction to the ADA is centrally about the fact that it "targets *rational* employer conduct").

[323] See Stein, 153 U Pa L Rev at 667–70 (cited in note 22) (employing an expressive-law analysis of the ADA and discussing how the ADA plays a significant role in educating the public about people with disabilities).

[324] Michael Ashley Stein, *Empirical Implications of Title I*, 85 Iowa L Rev 1671, 1675 (2000).

[325] See Michael Ashley Stein, Book Review, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 Va L Rev 1151, 1186–87 (2004) (observing that the ADA's expressive value may tip an employer "from being a fence-sitter towards an inclusive equilibrium").

[326] See, for example, *McBride v Amer Technology, Inc*, 2013 WL 2541595, *1 (WD Tex); *Wright v Memphis Light, Gas & Water Division*, 2013 WL 2014050, *9 (WD Tenn).

of Social Security, Medicare, and SSDI.[327] The costs for these public programs are unsustainable.[328] Incautious pension programs will similarly fall prey to the fact that people are living longer, but not working and paying in enough to make up for the increased costs. As older workers and their employers become familiarized with the idea of, and facilitated in achieving, effective workplace accommodation, individuals experiencing normal deficits of aging should be better able to remain work qualified. And helping workers stay in the workforce as they age is a partial solution for all of the public-benefit crises explained above.[329] For example, empirical data show that receiving a workplace accommodation reduces the likelihood that someone will apply for SSDI benefits.[330] Lowering the bar for securing an accommodation should thus decrease SSDI applications and expenditures. Helping people stay in the workforce for more years should, in much the same way, support maintenance of the current Social Security and Medicare programs.[331]

There are additional economic advantages for employers who embrace a nonadversarial accommodation process. Such employers stand to benefit from less sick leave used, fewer workers' compensation and other insurance claims, and "reduced post-injury rehabilitation costs."[332] These kinds of costs can be avoided, for example, by accommodating employees in danger of serious repetitive stress injury with voice-recognition technology before they are seriously impaired.

4. Hedonic benefits.

Though sometimes understated in discussions about employment discrimination, there are hedonic costs to both employers

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[327] See Part II.A.

[328] See notes 76–79, 94–97 and accompanying text.

[329] See notes 87–89 (explaining that part of the solution to rising dependency costs is to incentivize aging workers to keep working).

[330] Richard V. Burkhauser, Lauren H. Nicholas, and Maximilian D. Schmeiser, *The Importance of State Anti-discrimination Laws on Employer Accommodation and the Movement of Their Employees onto Social Security Disability Insurance* *5–6 (Michigan Retirement Research Center Research Paper No 2011-251, Jan 2011), online at http://ssrn.com/abstract=1961705 (visited May 21, 2014).

[331] Increasing contributions to Medicare and Social Security or decreasing the associated costs are two ways to help with the mounting crises for these programs, and helping aging workers keep working assists with both. In particular, people working longer means they will contribute more and cost less.

[332] Stein, 85 Iowa L Rev at 1675 (cited in note 324).

and employees that result from frustrated attempts to seek justice. Hedonic costs represent "an increase in negative emotions or a loss of positive emotions."[333] In the accommodation context, there are hedonic costs for employees who do not request accommodations (because they do not know about their rights or feel constrained by the employer not to make such a request), request accommodations and then feel their identity is under great scrutiny, or ultimately face an employer's refusal to grant a reasonable accommodation.[334] Accordingly, to the extent that our proposal improves the current accommodations scheme for claimants or would-be claimants, there may be resulting hedonic benefits.

To the extent that people who need an accommodation do not, under our proposal, have to feel as if they are advancing a unique adversarial request—but can instead see their request as something that national public policy now encourages for everyone—they may feel less stigmatized. Unrestricting the scope of workplace accommodations makes accommodations less stigmatic for all who seek them. Similarly, shifting the focus of the reasonable-accommodation query from the eligibility of the individual to the effectiveness of the proposed response should be less marginalizing, in that people do not perceive (or are less likely to perceive) their identity as the object of scrutiny. If we can move toward a culture in which accommodations are commonplace, there should be far-reaching and significant destigmatizing effects for all people with disabilities who work (whether they themselves need accommodation or not). Additionally, to the extent some employees are laboring under the pressure and stress of requiring an accommodation but not even considering the possibility of requesting one, their quality of work life may improve substantially upon receipt of such an accommodation. Accommodations may also significantly increase employees' productivity or efficiency, which should concomitantly increase the satisfaction they derive from work.

CONCLUSION

Disability status has proven to be a poor proxy for identifying individuals with functional limitations whose work capability can

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[333] Emens, 94 Georgetown L J at 401 (cited in note 38).

[334] Employers may also incur hedonic costs, which could result from employing and interacting with someone who has a disability. See id at 402. Such costs may be warranted, however, since antidiscrimination efforts such as the ADA are not envisioned as costless and "expressly envision[ ] employers absorbing some costs." Id.

be realized by accommodations in the workplace. Congress adopted the ADAAA to refocus Title I implementation on the legislation's original employment-inspiring aspiration. The facility of the ADAAA, however, in inducing courts to intersect ideas of dysfunctional disabilities and serviceable work capabilities is at this point unclear. This Article has argued that focusing on the effectiveness of accommodations, rather than on the worthiness of individual employees to obtain such remedies, better serves the national interest of maintaining an optimally productive population, and best supports democratic investment in equitable opportunity and integration of diverse people.