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and the ADA Amendments Act

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Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act[†]

This is a crucial juncture for U.S. disability law. In 2008, Congress passed the ADA Amendments Act (ADAAA), which aims to reverse the courts' narrowing interpretations of the Americans with Disabilities Act of 1990. This legislative intervention provides an important lens through which to consider attitudes toward disability, both because the success of the ADAAA will depend on judicial attitudes, and because the changes rendered by the ADAAA shed light on pervasive societal attitudes. This Essay makes three main points. First, the ADAAA intervenes in the developing doctrine on disability discrimination in important ways; in so doing, however, the ADAAA carves up the definition of disability, for the first time distinguishing "actual disability" from "regarded as disability," and expressly reserving the right to accommodation for "actual disability." This move repudiates a strong form of the social model of disability and accedes to a hierarchy of discrimination that treats the failure to accommodate as a different and lesser form of bias than direct discrimination. Second, and less prominently, the ADAAA introduces an express ban on reverse discrimination claims. Though the provision is arguably positive on a practical level, the fact that this provision could pass without protest—at a time when reverse discrimination claims on the basis of sex and race have become increasingly prominent and legitimate—sets into relief the low status of disability in the popular imagination. Finally, the expanded definition of "disability" under the ADAAA, though useful for many potential plaintiffs, may have unanticipated attitudinal consequences. As the class of those who count as disabled grows, a legal buffer is removed between "nondisabled" and "disabled," in ways that may increase the existential anxiety of the nondisabled and result in empathy failures. A key question is how to

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turn existential anxiety about becoming disabled into an appreciation of disability law as a social insurance policy for everyone. Efforts to improve attitudes toward disability will be critical in the coming years, as anticipated by the awareness-raising Article 8 of the UN Convention on the Rights of Persons with Disabilities.

INTRODUCTION

This is a fascinating and uncertain time for U.S. disability law. In 1990, Congress passed the Americans with Disabilities Act (ADA), which prohibits discrimination (including the failure to accommodate) in employment, public accommodations, and government services.¹ For nearly two decades, the courts narrowed the scope of the ADA's mandate by, most obviously, interpreting "disability" under the ADA in a restrictive manner.² In 2008, Congress passed the ADA Amendments Act (ADAAA),³ which attempts to restore a broader vision of the original ADA by, in particular, expanding the statutory definition of disability.⁴ Courts so far have had limited occasions to interpret the revised language.⁵ The question now looms as to whether that broader vision will survive the courts.

Attitudes to disability determined the fate of the ADA in the nearly twenty years between its passage and its restoration. It was largely attitudes—specifically, the gap between societal attitudes and the law's demands—that led to the narrowing of the statute in the courts.⁶ The ADA had impressive bipartisan support,⁷ but it seems likely that those who voted for it had rather different reasons for doing so: combine a few who understand disability as a civil rights issue, with those who see it through the lens of pity, with those economically minded folks who see it as a way to get people off of welfare and onto the tax rolls, and you get the ADA.⁸ When the ADA reached the courts, judges interpreted it more narrowly than the advocates

1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

2. See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000).

3. Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12101 *et seq.*).

4. See *id.* § 12101 (ADAAA findings).

5. See *infra* note 11 (explaining that the statute is not being applied retroactively).

6. Sam Bagenstos may be right that there are competing visions of disability rights at work in the ADA, and that they come out of tensions in the disability rights movement itself, but that kind of internal tension is not unique to disability, and so we might ask whether the fault truly lies at the movement's doorstep. See SAMUEL BAGENSTOS, *LAW & THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009).

7. See, e.g., JOSEPH SHAPIRO, *NO PITY* 118–19 (1993).

8. For more sustained treatment of the ADA's passage, see, for example, *id.*; Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003).

expected.⁹ The law was out ahead of common sense (the common sense of society, and thus of most legislators and judges), and so courts did what they often do in such moments: they narrowed the law to better fit their common sense.¹⁰

Now we wait to see what will happen with the ADAAA. It has been more than two years since it went into effect, but courts have interpreted it not to apply retroactively.¹¹ The challenged discrimination in a case therefore must have occurred since the ADAAA for its revisions to apply. So there is not yet much case law.¹² What will happen as more courts interpret it? My guess is that attitudes to disability will largely determine the courts' interpretations. That is, I suspect that courts will find new ways to narrow the statute, to the extent that a broader mandate still does not comport with their attitudes to disability—with their common sense.¹³

What is that common sense about disability? That disability is unfortunate, even tragic, costly for employers and for society, to be avoided at most costs and accommodated only at a very limited cost. That disability cannot possibly have benefits (to the person with the disability or those around her), and likewise that accommodations

9. Some have argued that the advocates lack a coherent civil rights vision. Sam Bagenstos is most associated with this position, see BAGENSTOS, *supra* note 6, but other scholars have recognized the tensions in the movement, see, e.g., Michael Ashley Stein, *Same Struggle, Different Difference*, 153 U. PA. L. REV. 579, 626-29 (2004).

10. The language in the original statute arguably opened itself up to that narrowing, which the drafters of the ADA did not recognize because the same definition in an earlier statute had not been interpreted narrowly—or received much scrutiny—from courts. See Feldblum, *supra* note 2, at 91-92, 113; see also *infra* note 34 and accompanying text (quoting the ADA's definition of disability and discussing its adoption). Note also that judges' views are of course more varied and complicated than this cursory rendering of their "common sense" would suggest. See, e.g., Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV., 301, 321 (2004) (finding that political party (of the appointing president) predicts notably different voting patterns for judges deciding ADA cases, and that these differences are accentuated by the presence of other judges appointed by presidents of the same party).

11. See, e.g., *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562 (6th Cir. 2009); *Becerril v. Pima County Assessor's Office*, 587 F.3d 1162 (9th Cir. 2009); *Lytes v. DC Water and Sewer Authority*, 572 F.3d 936 (D.C. Cir. 2009). See, e.g., *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562 (6th Cir. 2009); *Becerril v. Pima County Assessor's Office*, 587 F.3d 1162 (9th Cir. 2009); *Lytes v. DC Water and Sewer Authority*, 572 F.3d 936 (D.C. Cir. 2009). Cf. *Jenkins v. National Bd. of Med. Examiners*, 2009 WL 331638 (6th Cir. Feb. 11, 2009) (applying the ADAAA to a case filed before the ADAAA went into effect because the relief sought was injunctive).

12. See, e.g., *Hoffman v. Carefirst of Fort Wayne, Inc.*, No. 1:09-CV-251, 2010 WL 3522573 (N.D. Ind. Aug. 31, 2010) (applying the ADAAA to find that a plaintiff whose renal cell carcinoma was in remission was disabled); *Horgan v. Simmons*, No. 09 C 6796, 2010 WL 1434317 (N.D. Ill. Apr. 12, 2010) (applying the ADAAA to conclude that "major bodily functions" included "functions of the immune system" and that, on that basis, an HIV-positive plaintiff was disabled).

13. See, e.g., Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000).

only benefit the individual who requests them.¹⁴ Disability is, in this view, something we should keep hoping will eventually just go away if science gets good enough.¹⁵ In the meantime, this view might say, “we” (the nondisabled people, or sometimes just “people”) should be good enough, moral enough, to do some things to help disabled people, but not too much, as of course we would not want to drag down society or the economy.¹⁶

And that is just the beginning. The previous paragraph is probably a fair characterization of attitudes to the more *popular* and more visible forms of disability—relatively speaking—such as paraplegia. My use of the word “popular” here is only slightly sarcastic; it is no coincidence that a person in a wheelchair is the symbol for disabled parking, restrooms, and so forth. The more popular disabilities are those things (like paraplegia) that apparently affect only a discrete part of a person. Notwithstanding the “spread” effect—whereby outsiders raise their voices at blind people or assume a wheelchair signals cognitive disability¹⁷—nondisabled people are generally more open to the idea of competence in a person with a discrete disability. Because the disability occupies one identifiable part of the body, outsiders can begin to imagine how that person in a wheelchair might be very talented in the rest of his being, and therefore, from this troubling perspective, worthwhile.

When the conversation turns to people with cognitive or psychosocial (psychiatric) disabilities, however, then the whole person is tainted, discredited (in Goffman’s terms¹⁸) in a wholly different (and differently whole) way. Many people—disabled and nondisabled alike—seem *not even to know* that discrimination against people with psychiatric disabilities is (presumptively) illegal.¹⁹ Imagine here the lawyer-employer who says he recently hired a new secretary who had a good resume, even though she seemed “crazy,” because the law says he cannot discriminate on the basis of psychiatric disability, whether real or regarded-as. A friend of the employer might well respond, “Are you crazy?,” once again invoking that common epithet. And hidden physical disabilities are often not believed, I think, in ways that

14. See Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008).

15. Cf. MARY JOHNSON, *MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS* (2003).

16. On that “we,” see *infra* text accompanying note 78.

17. See, e.g., U.S. COMM’N ON CIVIL RIGHTS, *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES* 25 (1983).

18. ERVING GOFFMAN, *STIGMA* (1963).

19. I say presumptively because there are defenses, such as someone’s inability to perform the essential functions of her job, or her posing a direct threat to others in the workplace—the same defenses available for physical disabilities.

should perhaps not surprise us, after Elaine Scarry's insights about our inability to apprehend, or even believe, another's pain.²⁰

Attitudes to disability therefore may lead to courts' finding new ways to narrow the ADA's protections, now that the ADAAA limits the ways that they can define the protected class narrowly.²¹ This is therefore a crucial juncture for examining attitudes to disability and their intersection with this evolving law. This Article therefore uses the recent changes introduced by the ADAAA to make a series of points about attitudes to disability.

A caveat is in order, as this is a fairly gloomy story about what is clearly an exciting legal development. The ADAAA intervenes in the developing doctrine on disability discrimination in important ways, and the passage of this ambitious legislation is all the more impressive in a period characterized more by retrenchment than expansion of civil rights law.²² My hope is that the ADAAA will expand the scope of who is protected and who obtains accommodation, through the many legal and extralegal actors who implement the law on a daily basis.²³ If the ADAAA successfully brings more people with disabilities into the workplace, then attitudes to disability should be improved through increased contact with a wide range of people with disabilities and with reasonable accommodations.²⁴ This Essay fo-

20. See ELAINE SCARRY, *THE BODY IN PAIN* 4 (1985) ("For the person whose pain it is, it is 'effortlessly' grasped (that is, even with the most heroic effort it cannot *not* be grasped); while for the person outside the sufferer's body, what is 'effortless' is *not* grasping it (it is easy to remain wholly unaware of its existence; even with effort, one may remain in doubt about its existence or may retain the astonishing freedom of denying its existence; and, finally, if with the best effort of sustained attention one successfully apprehends it, the aversiveness of the 'it' one apprehends will only be a shadowy fraction of the actual 'it'). So, for the person in pain, so incontestably and unnegotiably present is it that 'having pain' may come to be thought of as the most vibrant example of what it is to 'have certainty,' while for the other person it is so elusive that 'hearing about pain' may exist as the primary model of what it is 'to have doubt.' Thus pain comes unsharably into our midst as at once that which cannot be denied and that which cannot be confirmed."). For a critique of some ways of reading Scarry, see Tobin Siebers, *Disability, Pain, and the Politics of Minority Identity* (unpublished manuscript, on file with author, Oct. 2011) ("Pain does not spring from and differentiate the individual. It does not belong to one person alone. It is a social invention, external to people, that marks them as individual. The dominant social representation of pain in the West is the individual alone in pain What would it mean to conceive of pain not as an individual or personal emotion—as a feeling owned by one person—but as a socially mediated identity, as a product of social forces operating external to individuals?").

21. For ways courts might do this, see *infra* text accompanying notes 48-51.

22. See, e.g., Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 *YALE L.J.* 1141 (2002).

23. *Cf.*, e.g., Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 *J. DISP. RESOL.* 1 (2007); 76 *Fed. Reg.* 16989 (Mar. 25, 2011) (reporting, as part of the impact analysis of the ADAAA, the argument that accommodations were being provided more broadly than the court decisions required); *id.* at 16997-98 (recognizing the potential for attitudinal benefits, *inter alia*, from accommodation).

24. There is an extensive literature on the so-called contact hypothesis, the idea that working side by side in cooperative ventures can reduce animus and stereotyp-

cuses largely on attitudes in direct interaction with the statute, although the statute's effects on attitudes will also be mediated by how the statute is implemented on the ground. That process of implementation will, however, be shaped by the statute's fate in the courts. My concern is that the persistence of negative and ignorant attitudes to disability will lead courts to undercut effective implementation either by defying the clear mandate of the ADA to broaden the scope of coverage or, more likely, by finding new ways to limit enforcement.²⁵ It is therefore my aim to contribute to our understanding of those attitudes, by identifying a number of ways that they intersect with these recent changes to the law.

From an international perspective, this is also an auspicious moment to focus on attitudes to disability, in the wake of President Obama's signing of the UN Convention on the Rights of Persons with Disabilities (CRPD).²⁶ The CRPD contains an "Awareness-raising" article explicitly requiring states' parties to promote more positive attitudes toward disability.²⁷ Whether and how states implement this directive will depend in part on their appreciation of the crucial role attitudes play in the creation and implementation of disability law.²⁸ At this critical juncture, this essay examines U.S. disability law to help enrich our understanding of attitudes to disability in the U.S. context and, I hope, beyond.

I. INTRODUCING THE ADA

It is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations . . . [rather than] whether an individual's impairment is a disability under the ADA.

—ADA Amendments Act of 2008²⁹

ing. For a discussion in the disability context, see, for example, Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 843-44 & n.55 (2003). On the potential third-party benefits of contact with accommodations, see Emens, *supra* note 14; 76 Fed. Reg. 16997-98 (Mar. 25, 2011).

25. See *infra* notes 48-51.

26. The question of course remains as to whether the Senate will ratify the CRPD.

27. See Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 8 (2007) [hereinafter CRPD].

28. On the hope that this article will be implemented, and on the CRPD more generally, see Michael Ashley Stein & Janet E. Lord, *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities*, in *THE UN CONVENTION ON THE RIGHTS OF PERSON WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES* 17 (Gerard Quinn & Oddný Mjöll Arnardóttir eds., 2009).

29. ADA, 122 Stat. 3553 (2008).

The ADAAA expressly aims to “carry out the ADA’s objectives . . . by reinstating a broad scope of protection.”³⁰ In important ways, the statute has made a bold attempt to fulfill this aim; in other ways, however, the ADAAA compromises the boldest structural aspect of the statute, fundamentally altering its idea of disability and of discrimination. To understand these moves, we have to take a step back and briefly describe relevant aspects of the ADA, the courts’ narrowing, and the ADAAA’s intervention.³¹

The ADA protects against discrimination on the basis of “disability,”³² so a plaintiff has to qualify as having a “disability” to bring a claim under the statute. Under the ADA, before the amendments, the definition of “disability” was as follows:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.³³

Various work documents the reasons why the proponents of the law did not think these definitional prongs would be interpreted narrowly; most importantly, this language was lifted out of a previous law—the Rehabilitation Act of 1973—and had not been given a restrictive interpretation.³⁴

When courts began hearing ADA cases, however, they interpreted this definition of disability strictly in (at least) five ways. First, and broadly, the Supreme Court expressly declared that a “demanding standard” should be applied to determinations of whether a plaintiff fit the definition of “disability” under the statute.³⁵ Second, consistent with this, courts interpreted “substantially limiting” restrictively, requiring plaintiffs to show that they were really *really* limited in a major life activity to count as disabled. This approach led to notorious losses for plaintiffs³⁶—many enumerated in the legisla-

30. 42 U.S.C. § 12101(b)(1).

31. For more comprehensive treatments, see, for example, Kevin Barry, *Toward Universalism: What the ADA Amendments Act Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203 (2010); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217 (2008).

32. 42 U.S.C. § 12112(a). The language of this provision was also modified by the ADAAA. See *infra* note 101.

33. This was 42 U.S.C. § 12102(2).

34. See, e.g., Feldblum, *supra* note 2, at 91-92; Barry, *supra* note 31. The language came from Section 504 of the Rehabilitation Act of 1973, which prohibited discrimination on the basis of disability by employers who received federal funds.

35. *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184 (2002).

36. ADA plaintiffs had been losing 97% of their employment discrimination cases. See Amy L. Albright, *2009 Employment Decisions Under the ADA Title I—Survey Update*, 34 MENTAL & PHYSICAL DISABILITY L. REP. 339, 340 (2010).

tive history of the ADAAA and in various law review articles—for instance, the plaintiff whose cancer was posthumously declared not limiting enough.³⁷ Third, and, again, relatedly, the Supreme Court held that, since “substantially limited” is in the present tense, plaintiffs who have mitigated their disabilities must be considered in their mitigated state; thus, a person who has successfully mitigated was excluded from protection under the statute.³⁸ This also led to some troubling results.³⁹ Fourth, courts applied a restrictive view of what counted as “major life activities.”⁴⁰ Fifth, in a range of ways, courts interpreted the third prong—the “regarded as” prong—of the definition of disability restrictively. Most notably, they required plaintiffs to prove not only the impairment the employer regarded them as having, but to prove *precisely* what major life activity the employer regarded them as *substantially* limited in.⁴¹ Picture plaintiffs attempting to show that their employers were—lying awake at night?—imagining exactly how their employees’ impairments limited them and in what activities. Absurd.⁴²

The ADAAA addresses most of these problems with the courts’ treatment of the definition of disability. The findings explicitly reject the “demanding” standard, as well as the highly restrictive interpretations of the “substantially limited” language.⁴³ The statute expressly indicates that plaintiffs are to be considered without regard to the ameliorating effects of any mitigating measures (other than ordinary eye glasses or contact lenses).⁴⁴ The ADAAA gives “major life activity” a clearer and broader scope, by providing an illustrative

37. See, e.g., Long, *supra* note 31, at 218 (citing *Hirsch v. National Mall & Serv., Inc.*, 989 F. Supp. 977 (N.D. Ill. 1997)); see also, e.g., ADAAA, 122 Stat. 3553 (2008) (noting that Supreme Court cases such as *Sutton* and *Toyota* “have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect” and that, “as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities”); Feldblum, *supra* note 2, at 148-57.

38. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

39. See, e.g., Barry, *supra* note 31, at 246 (citing examples).

40. See, e.g., 76 Fed. Reg. 17007.

41. And if that major life activity was working, they also needed to show that they were regarded as limited in working at a *class* of jobs. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

42. Indeed, Jill Anderson has cleverly shown how this was largely an absurd interpretation of the statute not only as a practical matter, but as a technical syntactical manner, such that revision of this part of the statute should not have been necessary to eliminate this particular demand for proof, if courts were as attentive to linguistic technicalities as they like to think that they are. Jill Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992 (2008).

43. See 42 U.S.C. § 12101(4). Neither the statute nor the subsequent regulations give precise meaning to the “substantially limited” language, but the regulations lay out nine interpretive rules that make plain the broadening of the standard. 76 Fed. Reg. 16978, 17000-01 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630.2(j)(1)).

44. 42 U.S.C. 12102(4)(E).

list, and by introducing “the operation of a major bodily function” (also with an illustrative list) as another form of major life activity.⁴⁵ Perhaps most strikingly, for the regarded-as prong, the statute completely removes the need to show any substantial limitation in a major life activity. So long as a plaintiff shows that she has been “subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment” (that is not both minor and transitory), she qualifies for coverage under the regarded-as prong.⁴⁶

Though these changes are not comprehensive, they are ambitious.⁴⁷ I nonetheless worry that courts will find new ways to limit the scope of the statute’s protections. How might they do that? Courts could continue to interpret “substantially limits” somewhat narrowly, since the final statute and the regulations abandoned any attempt to define it.⁴⁸ However, this approach would directly contravene the ADAAA’s express rejection of a “demanding standard” for interpreting “substantially limits,” as well as the regulations’ nine rules of construction. Courts could, instead, put more pressure on the evidence required to demonstrate an “impairment.” For at least some conditions, this could turn into a highly medicalized inquiry.⁴⁹ This would, more generally, run up against the statute’s explicit mandate that courts shift their emphasis from determining who is in and who is out to determining whether discrimination has occurred.

As the statutory findings indicate, “it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied

45. See 42 U.S.C. § 12102(2)(A) (“In general . . . , major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working”); *id.* § 2(B) (“For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”).

46. 42 U.S.C. § 12102(3)(A). “Transitory” is defined as having “an actual or expected duration of 6 months or less.” *Id.* § 12102(3)(B).

47. The statute neglects to address directly any issues outside the scope of the definition of disability, as well as issues such as the narrow interpretations courts have given to the “record of” prong. See, e.g., Long, *supra* note 31, at 227. The EEOC implies that the statute’s demand for lesser scrutiny of “disability,” alongside the Commission’s own broader interpretation of “record of,” will address the doctrinal problems with the “record of” prong. 76 Fed. Reg. 16984 (Mar. 25, 2011). The EEOC also makes clear its position that “record of” plaintiffs are entitled to accommodation, a point of ambiguity in the statutory text that will presumably provide fodder for courts. *Id.*

48. 76 Fed. Reg. 16981.

49. Although the emphasis of the literature critiquing courts’ interpretations of the ADA has focused on the “substantially limiting” and “major life activity,” some work suggests that courts have also put pressure on impairment. See Deirdre M. Smith, *Who Says You’re Disabled? The Role of Medical Evidence in the ADA Definition of Disability*, 82 TUL. L. REV. 1 (2007).

with their obligations [T]he question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."⁵⁰ The ADAAA should therefore put pressure on courts to decide who is "otherwise qualified" to do various jobs, what is "reasonable" accommodation, and what is an "undue hardship" that exempts an employer from providing a requested accommodation.⁵¹ As a result, courts should direct more attention to these questions, and so those courts inclined to keep the scope of the statute limited may interpret these provisions restrictively.

II. CARVING UP THE DEFINITION OF DISABILITY: ABANDONING A RADICAL SOCIAL MODEL

[A] physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.

—EEOC, Regulations interpreting "regarded as" disability⁵²

Broadly speaking, the ADAAA's move towards a more expansive definition of "disability" is consistent with a *social model*—the idea that disability inheres in the interaction between impairment and the surrounding social world, rather than being an individual medical problem.⁵³ The ADAAA reflects the social model through its shift in emphasis from just how limited the individual with a disability is, to what happened (discrimination?) or what should happen (accommodation?) in interaction with the disability.⁵⁴

Structurally, however, the ADAAA moves away from the social model. It carves up the definition of disability under the ADA, limiting certain types of discrimination claims, and certain types of remedies, to certain categories of disability. One of the ADA's boldest features—at least in principle—was that the statute *defined* disability to include both actual and regarded-as-disability, with both counting equally as disability for all purposes under the statute, including accommodation. The ADAAA does away with that, as I shall explain.

50. ADAAA, 122 Stat. 3553 (2008).

51. See generally Barry, *supra* note 31; Long, *supra* note 31.

52. 29 CFR § 1630.2(l)(2).

53. See, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 428–33 (2000); see also MICHAEL OLIVER, UNDERSTANDING DISABILITY 30–42 (1996). For useful critical perspectives on the social model, see, for example, TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS 29, 29–53 (2006); Vlad Perju, *Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States,* 44 CORNELL INT'L L.J. 279 (2011).

54. See *supra* text accompanying note 50.

Recall the ADA's definition of disability quoted above.⁵⁵ All three of the prongs counted equally as having a "disability." In principle, those who fell under the statute by virtue of *actually having* an impairment that substantially limited them in a major life activity, and those who fell under it by virtue of being *regarded as* such, had the same claim to protection, including accommodation, under the ADA. (As I shall discuss in a moment, courts worked hard to say otherwise, but nothing in the statute supported their position.⁵⁶)

This alignment of actually disabled and regarded-as disabled under a single rubric presents a fairly radical version of the social model of disability. Other legal instruments embrace the social model,⁵⁷ but the ADA was unusual in explicitly putting disability created by others' perception on a structural par with disability created by otherwise-limiting impairment.⁵⁸

By contrast, the ADAAA carves up the ADA's old definition in ways that broaden the scope of the statute's protection—a much needed development—but that also create two distinct types of disability, now with different legal protections and remedies. The ADAAA largely leaves the definition of disability as it was, but then it adds a qualifying phrase to the third prong, so that it reads as follows: "(C) being regarded as having such an impairment (*as described in paragraph (3)*)."⁵⁹ The paragraph referenced goes on to explain, as I noted above, that the "regarded as" prong now requires less than before: a plaintiff counts as regarded-as having a disability if she was subjected to an action prohibited under this statute "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."⁶⁰ So far, so good. This part is a significant improvement, in light of the ridiculous (and linguistically inapt⁶¹) contortions courts were asking regarded-as plaintiffs to make.

55. See *supra* text accompanying note 33.

56. See *infra* note 62.

57. See, e.g., CRPD, *supra* note 27, at art. 1 ("Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."); Stein & Lord, *supra* note 28, at 25 (reading this definition to "firmly ground[] the disability classification in the social model of disability").

58. Protecting perceived-as discrimination is not unique, however; the UK's Equality Act of 2010 is an example of a jurisdiction that offers protection to those perceived to have a protected trait. The Equality Bill, *available at* <http://www.legislation.gov.uk/ukpga/2010/15/contents>; <http://www.publications.parliament.uk/pa/ld200910/ldbills/020/en/2010020en.pdf>; see also <http://www.acas.org.uk/index.aspx?articleid=3017>.

59. 42 U.S.C. § 12102(1)(C) (emphasis added).

60. *Id.* § 12102(3)(A).

61. See *supra* note 42.

The problem in the ADAAA comes with the later introduction of an exception to the contexts in which plaintiffs are entitled to accommodations:

(h) REASONABLE ACCOMMODATIONS AND MODIFICATIONS.—A covered entity . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.

In other words, plaintiffs who are only “regarded as” disabled have no right to accommodation.

The idea that the statute ever required employers to accommodate those who are regarded-as disabled may sound absurd—as it did to some courts⁶²—but it was not entirely so, for several reasons. First, if one accepts a social model of disability,⁶³ then an employer’s regarding the employee as substantially limited in a major life activity could warrant accommodation. This sounds less surprising if one remembers that courts had imposed a narrow conception of who counted as disabled under the “actual disability” prong. Thus, someone might have a limiting impairment but not count as *substantially limited enough* to qualify for ADA protection. In such a case, the fact that the employer regards the person as *substantially limited enough* would reasonably entitle the person to whatever accommodations might help him do his job better. Such cases should, however, become less frequent under the ADAAA, with its broadened protection for the “actually disabled” prong.

Second, one can imagine a plaintiff who is actually disabled, and also regarded-as disabled, and who would prefer to make a claim under the regarded-as prong. As various scholars have pointed out, the ADA puts plaintiffs in a bind: they must prove both that they are substantially limited enough to count as disabled, and that they are nonetheless capable enough to be “otherwise qualified” to perform the essential functions of the job, with or without reasonable accommodation.⁶⁴ The requirement that plaintiffs under the actually disabled prong put on evidence to prove *just how limited they really are* might be unappealing to some plaintiffs, not just for problems of proof, but

62. See, e.g., *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003) (“[T]o conclude that ‘regarded as’ plaintiffs are entitled to reasonable accommodation . . . would be a perverse and troubling result.”); *Weber v. Stripit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999) (“Imposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results.”).

63. See *supra* text accompanying note 53.

64. 42 U.S.C. § 12112(b)-(b)(5)(A) (2000).

also for what it means to them to perform their limitations in court.⁶⁵ One might think here of literary scholar Stephen Greenblatt's story about refusing a fellow airplane passenger's request to mouth the words "I want to die"; Greenblatt felt it was too dangerous to form those words, even as a brief favor to a stranger, in light of the ways that our performances become us.⁶⁶ Going into court to prove that someone else thought you were substantially limited, yet refused to accommodate your (perceived) limitation, might be preferable to going into court to prove just how limited you really are. This problem should also be lessened by the expanded scope of the actual-disability prong, although it will not be eliminated.

Third, sometimes others' attitudes are precisely what is disabling about a particular condition. Think here of facial scarring or a missing front tooth.⁶⁷ The reactions of others might make working or interacting with those affected difficult, even if neither condition creates any functional limitations. Indeed, the EEOC's regulations interpreting the regarded-as prong envisioned this prong applying, *inter alia*, to people who are "substantially limited only as a result of the attitudes of others."⁶⁸ Accommodations in such cases could include less interaction with customers, for instance, though one might worry about the segregating or stigmatizing meaning of such a measure. Requesting a non-commission-based sales job might be a

65. See, e.g., Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 302-04; see also Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 785-87 (2007).

66. The other passenger was going to visit an ailing relative, and so wanted to make sure that he knew what it would look like for a person to mouth those words. See STEPHEN GREENBLATT, *Epilogue, RENAISSANCE SELF-FASHIONING* 255-56 (1983) ("I felt superstitiously that if I mimed the man's terrible sentence, it would have the force, as it were, of a legal sentence, that the words would stick like a burr upon me. And beyond superstition, I was aware, in a manner more forceful than anything my academic research had brought home to me, of the extent to which my identity and the words I utter coincide, the extent to which I want to form my own sentences or to choose for myself those moments in which I will recite someone else's.").

67. Cf., e.g., 28 C.F.R. pt. 36, app. B (2010) (discussing the example of someone with severe burns). Another example, under a regime that took mitigation into account for determining actual disability (as was the case before the ADAAA and after *Sutton v. United Air Lines*), would be a highly stigmatized condition, such as schizophrenia, that has been effectively treated with medication. See, e.g., ELYN R. SAKS, *THE CENTER CANNOT HOLD* (2007) (discussing issues of disclosure in the context of job interviews, in relation to schizophrenia).

68. 29 CFR § 1630.2(l)(2). When discussing the regarded-as prong in *Sutton v. United Air Lines*, the Supreme Court omitted this interpretation of the regarded-as prong, opting instead to read the regarded-as prong as concerned with mistakes of fact—that is, employers who think an employee has a substantially limiting impairment when she has no impairment, or who think an employee's impairment is substantially limiting when it is not. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). This was, however, dicta.

reasonable accommodation that would not raise these problems to the same extent.⁶⁹

These scenarios are irrelevant under the ADAAA. Regarded-as plaintiffs no longer have any statutory right to accommodation. They are in their own category, distinct from the *real* disabled, and with a limited set of rights and remedies. Indeed, the interpretive regulations recently issued by the EEOC explicitly distinguish between “actual disability” and “regarded as disability,” although they accompany these terms with a disclaimer that these terms are for “ease of reference only.”⁷⁰ The statute itself does not employ these terms, and both types still fall equally under the definition of “disability,”⁷¹ but the difference in remedies suggests to me a difference in the underlying categories. Even if the practical consequences are limited, this structural disavowal of a more radical social model is disappointing as a conceptual matter.⁷²

69. Cf. EEOC v. Sears Roebuck & Co., 839 F. 2d 302 (7th Cir. 1988) (discussing types of commissioned and non-commissioned sales jobs).

70. See 76 Fed. Reg. 16980 (Mar. 25, 2011) (“For clarity, the Commission has referred to the first prong as ‘actual disability,’ to distinguish it from the second prong (‘record of’) and the third prong (‘regarded as’).”). The disclaimer succeeds in highlighting the significance of the change to the statute that requires this act of naming:

The terminology selected is for ease of reference and is not intended to suggest that individuals with a disability under the first prong otherwise have any greater rights under the ADA than individuals whose impairments are covered under the “record of” or “regarded as” prongs, other than the restriction created by the Amendments Act that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation.

See *id.*

71. 42 U.S.C. § 12102(1); see *supra* text accompanying notes 59-60.

72. Scholars involved in the ADAAA’s creation, echoing the legislative history, acknowledge this structural change to the regarded-as prong as a “compromise” necessary to passing the statute’s very expansive understanding of “regarded as.” See, e.g., 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (“[This] is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition [of disability], properly applied.”); 76 Fed. Reg. 17015 (Mar. 25, 2011) (quoting this language with approval); Barry, *supra* note 31 (same). The expanded regarded-as prong aims to bring the ADA closer to the model of other civil rights legislation that protects everyone along particular axes of identity. Kevin Barry characterizes the revised ADA as harmonizing a universal (social) model of disability (under the regarded-as prong) with a minority-group (social) model of disability (under the actual-disability prong). See Barry, *supra* note 31, at 278-79. This is an appealing way of thinking about the statute, but it does not eliminate the structural implications of creating distinct categories of disability with different definitions of discrimination. Moreover, if accommodations are “at the root of most ADA employment cases,” as Barry notes, then it is unclear how far this harmonization can go. See *id.* at 278 (citing James Leonard, *The Equity Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 23 (2005)).

III. DISTINGUISHING ACCOMMODATION FROM ANTIDISCRIMINATION

[T]he normal definition of discrimination—differential treatment of similarly situated groups.

—Justice Kennedy⁷³

The ADA defines “discriminate” to “include[] . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”⁷⁴ A failure to accommodate *is* discrimination under the ADA. And yet, I have students writing on disability issues who use the word discriminate as something clearly (to them) distinct from failure to accommodate, without remembering (despite our class discussions) that this is a contested issue.

Much scholarly energy has been spent debating this question: Is the ADA doing something really different from the rest (or the heart) of antidiscrimination law, or is it doing something fundamentally similar? Scholars have labored to identify the many ways that core U.S. antidiscrimination statutes—like Title VII of the Civil Rights Act of 1964—and even our core types of discrimination claims—especially disparate impact, but also, at times, disparate treatment—involve costs to the employer and changes to policies and practices that operate like accommodation.⁷⁵ The work in this area is interesting and well done, but a final resolution is unlikely, because ultimately it seems that both sides have some merit. Much in Title VII requires employers to absorb costs and change certain policies and practices to avoid violating the antidiscrimination mandate of the statute, making it not so different from the ADA along the commonly cited axis of cost. But the obligation that employers respond to individual requests by employees to change their practices—even if those changes might operate like the remedies in a disparate impact suit, and even if those changes are sometimes costless or even benefi-

73. *Olmstead v. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring). The context includes Kennedy’s observation,

Discrimination, of course, tends to be an expansive concept and, as legal category, it must be applied with care and prudence To establish discrimination in the context of this case, and absent a showing of policies motivated by improper animus or stereotypes, it would be necessary to show that a comparable or similarly situated group received differential treatment.

Id. at 613.

74. 42 U.S.C. § 12112(b).

75. *Compare, e.g.*, Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004); Bagenstos, *supra* note 24; with Amy L. Wax, *Disability, Reciprocity, and “Real Efficiency”*: A Unified Approach, 44 WM. & MARY L. REV. 1421 (2003); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation* 46 DUKE L.J. 1 (1996).

cial to employers—requires a different kind of interaction between employer and employee on the front end. Thus, some things are different, and some are similar. But the question of whether the failure to accommodate is discrimination has now become more interesting because the ADAAA provides two different meanings of “discriminate”—one for actually disabled plaintiffs and another for regarded-as disabled plaintiffs, as discussed above.

Justice Kennedy makes clear his view that the ADA is doing something different, in his concurring opinions in two crucial cases, *Olmstead*⁷⁶ and *Garrett*,⁷⁷ handed down one year apart. The epigraph above from *Olmstead*—“the normal definition of discrimination [is] differential treatment of similarly situated groups”—nicely captures his basic view of discrimination. Thus understood, it does not include the failure to accommodate, something he makes clear in these decisions, as he contrasts that with some of the newfangled concepts in this arena. In *Garrett*, Kennedy grapples with the changing times. Here is what he tells us about evolving concepts of “prejudice”:

Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. Quite apart from any historical documentation, knowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature. There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.⁷⁸

In short, traditional prejudice arises from malice or hostile animus, but there are other more natural emotions and behaviors—“instinctive mechanisms”—that may lead us to behave in ways that “the better angels of our nature” would discourage. “*Our*” nature, Kennedy tells us, is to be “unsettled” by people with disabilities.

But law can help: “One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with

76. *Olmstead v. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring).

77. *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 375 (2000) (Kennedy, J., concurring).

78. *Id.* at 374-75.

impairments or disabilities into the larger society.”⁷⁹ The ADA is a good thing, Kennedy says, because it will get *us* “citizens” to accept *those* “persons with impairments or disabilities” into our society.

This is apparently a reason to praise the ADA—as “a milestone on the path to a more decent, tolerant, progressive society”—but it is not sufficient to make the law enforceable.⁸⁰ The forms of prejudice that involve “the failure to act or the omission to remedy” just are not enough to enforce the law against the states:

It is a question of quite a different order, however, to say that the States in their official capacities, the States as governmental entities, must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens. It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on the failure to act or the omission to remedy⁸¹

Thus, Kennedy concludes, “[t]he failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause.”⁸²

In this opinion, Kennedy makes clear his view that our learning process about “prejudice” is as much a hierarchy of types of prejudice as it is a progression over time to greater understanding. With disability, we are not really talking about discrimination. We are talking about charity, perhaps, or some other (Christian?) virtue typified by our “better angels” and contrary to our “human instincts.” With disability, we are not talking about the kind of bad actors for whom we (should) reserve the word discrimination.

And now the ADAAA says that actually-disabled people have one definition of discrimination—which includes the failure to accommodate—whereas people who are only “regarded as” disabled have another definition of discrimination—which does not include the failure to accommodate. In this way, the ADAAA has conceded something to the accommodation-is-different camp. Although the statute still formally includes actually disabled and regarded-as disabled within the definition of disability, the legal entitlements for

79. *Id.* at 375.

80. *Id.* (“*The law works this way because the law can be a teacher. So I do not doubt that the Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society.*”) (emphasis added).

81. *Id.* (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

82. *Id.*

each group are now substantially different. This kind of move is not unique to the U.S. context.⁸³

Some scholars offer a more optimistic account of the ADAAA's reconstruction of the regarded-as prong. For instance, one might read the regarded-as prong as "signal[ing] long-awaited parity between the ADA and other civil rights laws . . . [b]y defining 'disability' to include just about everyone on the continuum of impairments."⁸⁴ Indeed, the regulations present the regarded-as prong as the first port of call for plaintiffs who do not challenge a failure to accommodate.⁸⁵ This new statutory structure plainly incentivizes plaintiffs and their lawyers to bring suit under the regarded-as prong whenever possible. Will it also make lawyers less likely to take cases involving the more difficult, and now severable, accommodation claims?

Presumably at least some plaintiffs' lawyers will attempt to cast what would have previously been accommodation claims as antidiscrimination claims. This raises an interesting conceptual and practical question: What will happen when courts confront claims of discrimination that lie on the border of "accommodation"? For instance, is the failure to allow someone with mild depression to arrive and leave early one day a week to attend therapy a failure to accommodate or simple discrimination, if the employer sometimes allows others to leave early for their children's sporting events? This is a classic selective-sympathy problem. Or consider the problem of structural changes to the workplace: Is the failure to construct accessible restrooms for the first disabled employees—or, for that matter, women's rooms for the first female employees—simple discrimination or

83. This aspect of the ADAAA resembles the way the United Kingdom implemented the EU Framework Employment Directive, which contains no "justification" defense, to the Disability Discrimination Act (DDA), which did; the response was to remove the "justification" defense only for "'pure' direct discrimination" claims, leaving the defense in place for indirect discrimination claims under the DDA. See Sandra Fredman, *Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm*, in *DISABILITY RIGHTS IN EUROPE: FROM THEORY TO PRACTICE* 199, 200 (Anna Lawson & Caroline Gooding eds., 2005). The law of Washington state was the model for the ADAAA's bifurcated structure, though Washington's law differs in significant respects. See Barry, *supra* note 31, at 266; Wash. Rev. Code Ann. § 49.60.040(7) (West 2010) (defining "disability" as "the presence of a sensory, mental, or physical impairment that . . . [i]s medically cognizable or diagnosable," but requiring that, in order to qualify for a reasonable accommodation, the impairment "must be known or shown through an interactive process to exist in fact" and: (i) "must have a substantially limiting effect upon the individual's ability to perform his or her job" ("a limitation is not substantial if it has only a trivial effect"); or (ii) "[t]he employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect").

84. Barry, *supra* note 31, at 278.

85. 76 Fed. Reg. 16978 (Mar. 25, 2011).

does it fall in the special category of failure to accommodate?⁸⁶ These are just a few examples of the kinds of dilemmas that could be raised, on the cusp of antidiscrimination and accommodation.⁸⁷ I admit I am not optimistic that many courts will give a broad reading to discrimination that is statutorily distinguished from failure to accommodate.⁸⁸ On the contrary, this bifurcation of discrimination types seems to fit nicely with Justice Kennedy's sense that disability inspires some non-ideal attitudes and actions from "us," but "our" newfangled forms of discrimination against disabled people are often not bad enough to be actionable in law.

IV. MOVING THE LINE: TURNING BIDISABILITY INTO DISABILITY

Could we ask, about a concept . . . not so much 'What does it really mean?' or 'Who owns it and are they good or bad?', but 'What does it do?'—what does it make happen?—what . . . does it make easier or harder for people of various kinds to accomplish and think?

—Eve Kosofsky Sedgwick⁸⁹

In principle, under the ADA, the category of disability has expanded to include those who were, under the ADA, "not disabled enough."⁹⁰ The EEOC calls this the "group whose 'coverage has been clarified' under the ADA."⁹¹ More generally, this liminal position—of those who fell outside the rather narrow category of disability that courts had read into the ADA—could be called *bidisability* (or "bi-ability," as Ruth Colker would have it).⁹² This category

86. Cf. Mary Anne Case, *All the World's the Men's Room*, 74 U. CHI. L. REV. 1655 (2007).

87. For more dilemmas on this cusp, see, for example, Jolls, *supra* note 75; Bagentos, *supra* note 24.

88. One approach courts may take to reading "discriminate" narrowly is to insist that plaintiffs identify "comparators" in order to prove that the employer "discriminated" (in the statute's newly narrower meaning of that term) rather than failed to accommodate. For the definitive treatment of the comparator methodology, and a discussion of its problems, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011).

89. See Clare Hemmings, *Bisexual Theoretical Perspectives: Emergent and Contingent Relationships*, in BI ACADEMIC INTERVENTION, THE BISEXUAL IMAGINARY: REPRESENTATION, IDENTITY & DESIRE 1, 16 (1997) (quoting Eve Kosofsky Sedgwick, 'Bi', Queer Studies list, QSTUDY-L@UBVM.cc.buffalo.edu, Aug. 17, 1994: 15:49:34-0400) (emphases removed). Sedgwick was writing about "a concept like bisexuality that is gaining new currency." *Id.* I thank Michael Boucai for bringing this quotation to my attention.

90. Cheryl Anderson has called this group the "not impaired enough" plaintiffs." Cheryl L. Anderson, "Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised To Eliminate the Substantial Limitation Requirement, 65 MO. L. REV. 83, 85 (2000).

91. 76 Fed. Reg. 16987 n.3 (Mar. 25, 2011).

92. Ruth Colker offered the first and most sustained treatment of a category in between disabled and nondisabled as an explicit "bi" category akin to biracialism and

is bidisabled in the sense that it lies between disabled and nondisabled, overlapping with both.

Normatively, there is no one right way to handle questions of line drawing and differential treatment across the spectrum of disability. Sometimes it seems sensible to draw finely honed distinctions between gradations of disability for legal purposes, while in other contexts it may be best to provide common treatment for various degrees of disability, as cases from other jurisdictions suggest.⁹³

Many of those who were bidisabled under the ADA will presumably be absorbed within the ADA's broader disability definition. Bidisability does not appear to have any sort of cultural identity—unlike bisexual or biracial identity—but it is worth considering what functions this category nonetheless might have served. Most notably, I think that under the ADA before the recent amendments, the not-disabled-enough group has been providing a kind of *buffer zone* between nondisabled and disabled.

Disability is a threatening category to many people because, unlike a subordinated race or sex, anyone can fall into the category of disabled at any time. As various scholars have written, the permeability of a subordinated group does not necessarily lead to empathy from outsiders; on the contrary, the possibility of falling into a subordinated group can lead outsiders to fear group members and to distance themselves from the category.⁹⁴ This is the idea behind homophobia: fear of the other in oneself makes one phobic of the other. Writing about disability, Harlan Hahn has famously called this the “existential anxiety” inspired by disabled others.⁹⁵

In-between categories can sometimes provoke this kind of anxiety to an even greater degree, because it is harder to distance oneself from categories that share traits with both ends of a particular iden-

bisexuality. See RUTH COLKER, HYBRID (1996); Ruth Colker, *Bi*, 56 OHIO ST. L.J. 1 (1995). While “bidisability” and “bi-ability” are both evocative terms, to my ears bidisability more clearly indicates the focus on disability. Because ability is the culturally unmarked category, see *infra* text accompanying note 105, I think it's harder for a reader to recognize that bi-abled refers to a category that is and is not disability, rather than a term for the possession of two different abilities. Moreover, bidisability avoids the hyphen and locates disability—rather than the dominant category—at the center of the term.

93. In recent years, the European Court of Human Rights has been generating some interesting case law involving those individuals disabled enough to be discriminated against (or at least treated differently) but not disabled enough to be protected against discrimination (or at least not granted certain benefits reserved for the *truly disabled*). The results yield no uniform vision of how interim degrees of disability should be treated, and rightly so, I think. Compare, e.g., *Glor v. Switzerland*, No. 13444/04 (Eur. Ct. Hum. Rts., Apr. 30, 2009), with *Kiss v. Hungary*, No. 38832/06 (Eur. Ct. Hum. Rts., May 20, 2010).

94. See, e.g., Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

95. Harlan Hahn, *Can Disability Be Beautiful?*, 18 SOC. POL. 26, 27–29 (1988).

tity spectrum. Kenji Yoshino has, for instance, argued in this vein that bisexuality threatens both gays and straights, because both groups are more comfortable thinking their positions are fixed and opposite.⁹⁶ The existence of bisexuality makes it much harder for people to prove that they are simply straight or gay, because the fact of desire in one direction does not disprove desire in the other direction.⁹⁷

Under this logic, one might think that the old ADA's highlighting of what I am calling the bidisabled would increase existential anxiety about disability. But recall what the courts did with the bidisabled under the ADA: classified them as "not disabled." In the hands of the courts, the broad group of positions between those "severely restricted" by their impairments and those not so limited by their impairments was declared to fall outside the definition of "disability" under the statute. (I have sometimes thought, half seriously, that courts so frequently dismissed cases at summary judgment by narrowly defining disability because they preferred to declare plaintiffs not to be disabled—as if judicial performativity could operate like an evangelical preacher's "You can walk!"—rather than judging disabled plaintiffs to be unqualified to work.) By locating the boundaries of "disability" around so narrow a group, and fixing a large group of somewhat (but not sufficiently) restricted folks just outside the rubric of disability, the courts created a kind of safe zone, a buffer between disabled and nondisabled, which was legally declared to be the latter.

The ADAAA tries to eliminate, or at least shrink and shift, that buffer zone. It aims to bring us closer to a world in which "[t]here is no 'us' and 'them.'"⁹⁸ If the ADAAA succeeds in folding many of the bidisabled into the legal category of disability, then we might also see heightened existential anxiety and associated empathy failures. The question will be how to turn the attitudinal consequences of an expanded definition of "disability" in a more favorable direction—from heightened anxiety to a better appreciation of disability law as a social insurance policy for everyone.

V. CODIFYING ASYMMETRY

There is a tradition [of saying] . . . in the acknowledgements sections of academic books . . . that others, while they might have contributed to the successful aspects of the project, are not to be held accountable for a book's "main defects[.]" From where I sit . . . this strikes me as a tradition worth inverting.

96. See Yoshino, *supra* note 94.

97. *Id.*

98. See Chai Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. ON C.L. & C.R. 187, 228 (2008) (quoting Chai Feldblum, testimony before the Senate HELP Committee, Nov. 15, 2007).

If there is anything disabled, queer, or crip about this book, it has come from my collaborative work with those named above, and many others. I take responsibility, however, for the moments when crip energies and ideas are contained or diluted in what follows, and I know that others will continue to push the work of this book, and the movements that made it possible, beyond those moments of containment.

—Robert McRuer⁹⁹

The ADAAA more firmly establishes the ADA as what I have called an “asymmetrical” statute—that is, a statute that protects some groups along a particular axis and not others—in contrast to Title VII of the Civil Rights Act of 1964, which is largely a “symmetrical” statute, in that it protects everyone on the basis of some axis of identity (such as race or sex).¹⁰⁰ The ADAAA makes explicit that this statutory regime will not tolerate so-called reverse discrimination claims: “(g) CLAIMS OF NO DISABILITY.—Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”¹⁰¹

Why is this possible for the ADA, when it is not for Title VII? An asymmetrical approach is more of an antisubordination model than an antidifferentiation (or anticlassification) model. An antisubordination model of antidiscrimination takes account of history and targets interventions to the groups that have been subject to systematic subordination. By contrast, an antidifferentiation approach looks skeptically upon any use of the protected classification, even if that aim is to rectify that history of discrimination. Many scholars (and more than one Supreme Court justice) have argued that an antisubordination model for antidiscrimination efforts would be more sensible for race and sex.¹⁰² So how do we have an explicit antisubordination model for disability and not for race and sex?

99. ROBERT MCRUER, *CRIP THEORY*, at xv (2006).

100. See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (race); *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987) (sex); see also Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 464-65 (2006).

101. ADAAA § 12201(g). The provision was added in order to “avoid the potential for reverse discrimination suits,” in light of the ADAAA’s broadening of the definition of disability. See Barry, *supra* note 31, at 265 n.365. In addition, the ADAAA’s minor changes to the way “discrimination” is defined in § 12112(a)—from prohibiting “discriminat[ion] against a qualified individual with a disability because of the disability of such individual” to prohibiting “discriminat[ion] against a qualified individual on the basis of disability,” see 76 Fed. Reg. at 17005—might otherwise have left the statute open to claims of reverse discrimination.

102. This Essay is not making an argument for such an approach, which is a complicated matter. For a provocative new treatment, see Michael Kavey, *The Unprotected Class* (work in progress).

Most obviously, there is no constitutional impediment to an asymmetrical statute in the disability context. For better and worse, disability does not have the constitutional problem presented by race and sex, both of which are subject to heightened scrutiny, which the Court has applied (nearly) symmetrically.¹⁰³ But *why* would this explicit anti-reverse-discrimination provision not raise hackles, sink the statute, or even get publicity? Why is no one worried about, for example, the non-deaf person denied a job at a Deaf institution?¹⁰⁴

I think the answer lies in the highly negative social status of disability, in at least three ways. First, it has something to do with the still unmarked status of those who are not disabled.¹⁰⁵ To some extent, we have come to see men and whites as having a sex and a race, respectively.¹⁰⁶ True, those who are not men and who are not white are *marked* to a greater degree; they are still not the norm for many purposes. But it no longer seems strange that a white person could claim he was discriminated against based on his whiteness.¹⁰⁷

But the opposite of disability does not register as anything other than fortunate, lucky, or normal, I think. (Or as “citizens” or just “us,” in Justice Kennedy’s language.¹⁰⁸) To refer to people as “disabled” and “nondisabled” still sounds strange to many. I doubt many nondisabled people think of themselves as “nondisabled”; if they were asked to list the identity categories they fall into, nondisabled would not come high on the list, if it appeared at all. So to deny people claims on the basis of this identity does not seem to violate any aspect of someone’s being.

Second, disability is still so widely regarded as an inferior status that giving something to this group that no one else gets can go largely unchallenged. A nondisabled person who tried to claim the benefits of a statute designed for people with disabilities would likely face some stigma or opprobrium.¹⁰⁹ True, some people complain that

103. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Olmstead v. L.C.*, 527 U.S. 581 (1999).

104. Cf. Susan Kinzie, Nelson Hernandez & David A. Fahrenthold, *Gallaudet Board Ousts Fernandes*, WASH. POST, Oct. 30, 2006 (describing the controversy over Callaudet’s attempt to appoint a president who was, to some, not Deaf enough, because she learned ASL in her twenties, and the governing board’s ultimate decision to revoke her appointment).

105. See, e.g., Michael Bérubé, *Afterword: If I Should Live So Long*, in *DISABILITY STUDIES: ENABLING THE HUMANITIES* 337, 337 (Sharon L. Snyder, Brenda Jo Brueggeman & Rosemarie Garland-Thomson eds., 2002) (noting that the “default position” is “to see people without disabilities as normal and to see that category of the normal, like the category of whiteness, as unmarked”).

106. From the poetic to the satiric, see, for example, ROBERT BLY, *IRON JOHN: A BOOK ABOUT MEN* (2004), and CHRISTIAN LANDER, *STUFF WHITE PEOPLE LIKE* (2008).

107. See, e.g., *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009).

108. See *supra* note 78 (quoting *Garrett*).

109. These moves to fake subordinated status to claim associated goodies are the stuff of film comedies. Compare *THE RINGER* (20th Century Fox, 2006) (depicting Johnny Knoxville as a cash-starved man who fakes an intellectual disability in order

parents seek diagnoses to get goodies for their children in the educational context,¹¹⁰ but even if true, I think little of that has made it into the adult world, in part because of the degree of stigma. So to ban such claims does not injure any as-yet-identified group of claimants.

Third, and relatedly, the degree of inferiority society assigns to disability allows the category to escape the anxieties about a world upside down that animate racial discourse. Discussions of race discrimination are haunted by the spectre of a someday or somewhere world where the subordinated race(s) become dominant and begin to persecute whites.¹¹¹ I think the assumption that disability truly signals inferiority means that (almost) no one expects disabled people to take over society and subordinate nondisabled people.¹¹² And even in such a takeover, the unconscious logic goes, the disabled people in power would still see the superior job-related capacities of disabled people, so disabled people wouldn't face much discrimination.

Observing the ease of banning reverse discrimination claims in the ADAAA highlights other manifestations of these resolutely negative attitudes to disability. For instance, the persistence of a clear hierarchy of nondisabled over disabled also contributes to the frequent omission of disability from corporate and academic "diversity" initiatives. Some recent work makes the so-called business case for hiring disabled workers and advertising to people with disabilities.¹¹³ And some of us have written about the benefits to workplace and society of some accommodations requested by individual disabled people.¹¹⁴ But however obvious they may be to disability "insid-

to try to claim prize money in the Special Olympics), *with, e.g.*, SOUL MAN (Balcor/Steve Tisch 1986) (portraying C. Thomas Howell as a rich white kid who poses as African-American to claim a race-based scholarship when his father stopped supporting him).

110. *See, e.g.*, MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE* (1997).

111. *Cf.* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

112. A counter example would be Rosemarie Garland-Thomson's reading of Kazuo Ishiguro's *Never Let Me Go*, and particularly the film adaptation, as dramatizing an anxiety about a world upside down in which people with disabilities use nondisabled people for their own grotesque purposes. Rosemarie Garland-Thomson, "Habitable Worlds: Eugenic Spaces and Democratic Spaces," *The Ethics of Disability Studies Lecture Series*, Columbia University (Feb 25, 2011).

113. *See, e.g.*, CHARLES A. RILEY II, *DISABILITY AND BUSINESS: BEST PRACTICES AND STRATEGIES FOR INCLUSION* (2006); *see also* Helen A. Scharz, Kevin M. Scharz, D.J. Hendricks & Peter Blanck, *Workplace Accommodations: Empirical Study of Current Employers*, 75 *MISS. L.J.* 917 (2006).

114. *See, e.g.*, Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 *DUKE L.J.* 79 (2003); Emens, *supra* note 14.

ers,”¹¹⁵ these broader benefits of disability and accommodation are frequently overlooked, including by courts, in striking ways.¹¹⁶

People who run diversity initiatives are (anecdotally) uncomfortable and awkward when asked why they have omitted disability (as these initiatives often do). There is sometimes a general reluctance to focus affirmative action efforts on anything other than race—a concern that bringing in other groups waters down the attention that needs to be bestowed on race. But even where diversity initiatives go further than race, they usually skip disability.

Lennard Davis has recently argued that the era of the normal is over, and diversity is the new normal, *except for disability*. He says that disability is not part of our new cultural celebration of diversity—that impairment is the area where we still cling to a medical model and denigrate difference.¹¹⁷ I am skeptical that our cultural affinity for normality is ending—by way of example, I might ask, what fraction of America, particularly outside academia but even within it, would consider it a compliment to be called “weird”? But I agree with Davis that a thin conception of diversity circulates in the contemporary United States as part of an affirmative vision of identity and humanity, and I agree that that affirmative vision largely excludes disability.

Diversity conceives integration as affirming difference. In contrast to our standard antisubordination story of integration, which focuses on the harms to certain groups of historical exclusion and denigration, a diversity story focuses on the future gains to society of the rich cultural contributions of those with varied identities.¹¹⁸ A

115. See Elizabeth F. Emens, *Framing Disability*, U. ILL. L. REV. (forthcoming 2012) (citing sources from disability “insiders” expressing annoyance at the undue appreciation given to the benefits of accommodations to nondisabled people, in the context of an article more broadly distinguishing between “inside” and “outside” perspectives on disability).

116. For instance, in the employment domain, courts fail to notice the second- and third-party benefits of accommodation, even while acknowledging third-party costs in a cost-benefit balancing test of their own design. See Emens, *supra* note 14.

117. Lennard Davis, “The End of Normal: Multiculturalism, Disability & Diversity,” The Ethics of Disability Studies Speaker Series, put on by the Columbia University Department of English & Comparative Literature, the Center for the Critical Analysis of Social Difference, the Graduate School of Arts & Sciences, and the Center for American Studies (Apr. 1, 2011); see also Lennard J. Davis, *Why Is Disability Missing from the Discourse on Diversity?*, CHRON. HIGHER EDUC., Sept. 25, 2011, available at <http://chronicle.com/article/Why-Is-Disability-Missing-From/129088/>.

118. A range of work could be cited on the various benefits of various disabilities. One colorful example comes from Temple Grandin: “If you got rid of all the autism genetics, you’d get rid of scientists, musicians, mathematicians. Some guy with high-functioning Asperger’s developed the first stone spear; it wasn’t developed by the social ones yakking around the campfire.” See Andrew Solomon, *The Autism Rights Movement*, N.Y. MAG., May 25, 2008, available at <http://nymag.com/news/features/47225/> (quoting Temple Grandin); see also Kevin M. Barry, *Gray Matters: Autism, Impairment, and the End of Binaries*, 49 SAN DIEGO L. REV. (forthcoming 2012) (discussing, inter alia, the growing neurodiversity movement); see also Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J.L. & MED. 483,

diversity narrative can of course be criticized on numerous grounds—for instance, for stereotyping or reifying certain notions of identity,¹¹⁹ or for viewing some people as “more diverse” than others and treating those diverse others as valuable more for the way they make classrooms and workplaces colorful for the real (e.g., white, normal) participants than for the pursuit of their own interests.

While these debates over the merits of a diversity approach to discrimination are interesting, they are tangential to this essay. My aim here is not to argue for (or against) a diversity agenda, but rather to use disability’s relative absence from that agenda to help limn contemporary U.S. conceptions of disability.

At a talk I gave recently, a student raised an example that helps to illustrate disability’s position in relation to diversity thinking.¹²⁰ The student had apparently not thought much about disability in the past, but our discussion that day made her think about the cultural houses at her undergraduate college. These residential sites were organized around people’s interests in, for instance, the environment or music. The African-American House was somewhat controversial, but it was framed around a focus on African-American history, which opened it up to people who were not themselves African-American, although most residents were. The student posited the possibility of a “Disability House,” and immediately concluded that such a house would be even more controversial than the African-American House, though she was not entirely sure why.

I think the reaction the student anticipated to a Disability House—and the absence of Disability Houses—is related to the neglect of disability in diversity initiatives, and to the ADAAA’s easy inclusion of a ban on reverse discrimination suits. Disability is rarely understood as a positive state or identity with social or cultural benefits to its bearers or those around them. This perspective lacks any appreciation of the idea of crip culture or the recent explosion of disability-related arts.¹²¹ We are still close enough to an era of widespread institutionalization of people with physical as well as mental disabilities, such that a house for people with disabilities could hardly be understood as anything other than the product of exclusion or even warehousing.¹²² (And as another student rightly

485–87, 494–501 (2010) (analyzing the politics of neurodiversity in the context of the broader social movement surrounding autism).

119. See, e.g., RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* (2005).

120. Discussion with the Columbia Law Women’s Association on *Intimate Discrimination* (Mar. 23, 2011).

121. See, e.g., SIMI LINTON, *MY BODY POLITIC*, and the film in progress based on Linton’s memoir, *Invitation to Dance*; films like *Murderball*; The DISThis film series, <http://disthis.org/>; The GIMP Project, <http://www.thegimpproject.com/gimp/>.

122. One might say that the problem with Disability House is that disabilities are so diverse; they are indeed diverse, but a Blind House seems just as likely to raise these concerns.

pointed out, “disability houses” of course occur all the time on campuses and elsewhere, when only one building or part of an institution is accessible.) But the reason a Disability House sounds troubling to most is not just historical associations. Rather, the Disability House is inconceivable as an affirmative story because mainstream culture has so little sense that people with disabilities could *want* to be together—much less that nondisabled people could affirmatively seek out a disability-centered context.

U.S. law on integration in the context of “special education” and of community-based living for people with mental disabilities reflects and reinforces this understanding. Statutes and cases in these areas explicitly focus on the extent to which people with disabilities are interacting with people without disabilities.¹²³ That is, environments are better or worse depending on how much contact they offer with nondisabled people.¹²⁴ There are important historical reasons for this focus—even if some of the normative presuppositions are being debated in particular areas¹²⁵—but the language in these cases is jarring if one begins to question, even for a moment, the presumed desirability of interacting with nondisabled people.¹²⁶ Imagine a similar discussion about racial integration rather than disability integration—for instance, a case that repeatedly and explicitly stressed how one environment was superior because of how much contact it offered with white people. (Of course this has effectively

123. See, e.g., Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, 20 U.S.C. § 1412(a)(5) (requiring that participating states establish “procedures to assure that[,] . . . [t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled”); Disability Advocates, Inc. v. Paterson, 653 F.Supp.2d 184, 208 (E.D.N.Y. 2009) (saying repeatedly, in a judgment that adult homes run by the state of New York violate the integration mandate of Title II of the ADA and *Olmstead*, that these “Adult Homes limit the development of relationships with people who do not have disabilities”).

124. *Id.*

125. See, e.g., RUTH COLKER, WHEN IS SEPARATE UNEQUAL?: A DISABILITY PERSPECTIVE (2009).

126. Although parents of nondisabled children do sometimes want their children in special classroom settings with disabled children, this seems to be because of the enhanced resources and better student-teacher ratios, rather than a sense that interacting with disabled children will benefit their nondisabled children. See, e.g., Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1462 n.264 (2007); Emens, *supra* note 14, at 866 n.69. Relatedly, for an incisive theoretical take on the difference between inclusion and access, see Tobin Siebers, *Disability Studies and the Future of Identity Politics*, in DISABILITY THEORY 70, 93–94 (2008) (“How might disability studies revise, for instance, the concept of exclusion? . . . Enlightenment philosophy was eager to right the wrong of exclusionary behavior, and its objective, inherited by every subsequent age, involves naming who is being excluded by whom and insisting on inclusion . . . Here is where disability studies might a sea change by asking that the inclusion-exclusion binary be reconceived in terms of accessibility and inaccessibility . . . In short, all worlds should be accessible to everyone, but it is up to individuals to decide whether they will enter those worlds.”).

been the implication of some of our racial integration efforts and decisions.)

What is striking, I think, once one considers the possibility of disability as something that people (disabled or nondisabled) could be drawn to—for community, culture, or concepts—is that the discussions of integration in the disability context are not framed, *even superficially*, in terms of what nondisabled and disabled offer each other. Rather, benefits are almost always seen as traveling one way—from nondisabled to disabled. In this light, why would voluntary efforts to diversify an institution incorporate disability? Why would an institution choose to seek out people who would bring costs and no benefits? And how could a university have a Disability House that students—disabled and even nondisabled—would choose to join? They wouldn't. No one would seek to affiliate with this group, the story goes, and so eliminating the possibility of lawsuits brought by nondisabled people who feel they were discriminated against for not being disabled raises no hackles, and passed into law unnoticed.

CONCLUSION

*every built thing has its unmeant purpose . . .
[e]very built thing with its unmeant
meaning unmet purpose
every unbuilt thing*

—Adrienne Rich¹²⁷

When I heard Adrienne Rich read these lines in October of 2007, I was finishing an article on the unintended benefits of workplace accommodations under the ADA.¹²⁸ “Unmeant purpose” resonated deeply with my sense of benefits developed for one use and exapted to another.¹²⁹ The built world was my frequent focus in that article, in fact and metaphor.

These lines now reach further. The “unmet purpose” of the ADA has been my subject here; indeed, it is the subject of the ADA AAA. Metaphors of the built environment circulate always in discussions of the ADA, both challenging and constraining our thinking about disa-

127. Adrienne Rich, *Powers of Recuperation*, 8 A PUBLIC SPACE (2007), available at http://www.apublicspace.org/poetry/powers_of_recuperation.html.

128. Emens, *supra* note 14 (identifying ways that changes to the workplace to accommodate individual workers with disabilities can benefit other workers, disabled and nondisabled, depending upon their design, and tracing the courts' lack of appreciation of these potential benefits); *cf.* 76 Fed. Reg. 16997-98 (Mar. 25, 2011) (acknowledging these and other direct and indirect benefits of accommodation).

129. *See* Emens, *supra* note 14, at 855 (explaining that the “broader uses of disability-related innovations might be analogized to what evolutionary theorists call exaptations, which are traits (i.e., aptations, the progress-neutral variation on the term adaptation) that emerge for one purpose and then turn out to be useful for another purpose” (citation omitted)).

bility. And in this Essay the broader benefits at issue extend beyond the workplace and beyond accommodations. Our inquiry now reaches towards the benefits of disability per se, for diversity efforts or antidiscrimination concepts, through the possibility of shifting attitudes. What lies ahead, in law and theory, is only every unbuilt thing.

