

## Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act

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This is an uncertain time for disability law in the United States. To understand why this is so, we need to start with a bit of history. 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. For nearly two decades after that, the courts made rulings that consistently narrowed the scope of the ADA's mandate. They did this, most obviously, by narrowly interpreting the term "disability," thereby limiting who could bring a claim under the Act. Responding to this increasing restriction of the ADA, in 2008 Congress passed the ADA Amendments Act (ADAAA). This new act attempts to restore a broader vision of the original ADA by, in particular, expanding the statutory definition of disability (§ 12101). Courts so far have had limited occasions to interpret the revised language. The question now looms as to whether that broader vision will survive the courts.

Public attitudes toward disability played a role in the fate of the ADA over the nearly twenty years between its passage and the new amendments act. Often laws are passed to keep up with changing societal attitudes. Other times, such as in this case, the law is out ahead of attitudes. The gap

between societal attitudes and the law's demands led to the narrowing of the statute in the courts. Although the original ADA had impressive bipartisan support, it seems likely that the politicians who voted for it came together for disparate reasons. 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.<sup>2</sup>

When the ADA eventually reached the courts, it encountered prevailing societal attitudes towards disability. Judges interpreted it more narrowly than the advocates expected. Because the law was out ahead of common sense, the courts did what they often do in such moments: they narrowed the law to better fit their common sense.<sup>3</sup>

The question now is whether the revised ADA will encounter that same fate in the courts. More than three years have passed since the new Act went into effect, but courts have interpreted the revision as not applying retroactively to events that occurred before 2009,<sup>4</sup> so there is currently not much case law. My prediction is that unless attitudes change, courts will find new ways to narrow the statute to comport with judges', and society's, "common sense."

So what is that common sense about disability? It is commonly assumed that disability is unfortunate, even tragic, and at the same time very costly for employers and for society. Under this view, disability should be avoided at most costs and accommodated only at a very limited cost. There is little sense that disability can have benefits (to the person with the disability or those around her), or that accommodations benefit more than the individual who requests them. Disability is, in this view, something we should just keep hoping will eventually go away if science and medicine get good enough to cure or eliminate it.<sup>5</sup> In the meantime, this common sense 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, lest we drag down society or the economy.

And that is just the beginning. The previous paragraph is probably a fair characterization of attitudes to the more *popular* and relatively more visible forms of disability 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 the like. This is so because the more popular disabilities are the ones (like paraplegia) that apparently affect only a discrete part of a person, leaving open the possibility of competence in other parts. Such a disabled person might still be “worth something,” from this troubling perspective.

By contrast, mental or psychiatric disabilities are presumed to affect the whole person. Many people—disabled and nondisabled alike—seem utterly unaware that discrimination against people with psychiatric disabilities is (presumptively) illegal.<sup>6</sup> Imagine a lawyer who says he recently hired a new secretary with an impressive resume, even though she seemed “crazy,” because the law says he cannot discrimi-

nate on the basis of psychiatric disability. A friend of the employer might well respond, “Are you crazy?”

The prevailing “common sense” is often ignorant about disability. Consider the “spread effect,” whereby outsiders raise their voices at blind people or assume a wheelchair signals cognitive disability. And consider people’s reluctance to believe in unseen hidden physical disabilities, in light of Elaine Scarry’s insights about our frequent inability to apprehend, or even believe, another’s pain (Scarry 1985, 4).<sup>7</sup>

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. My hope is that the ADAAA will expand the scope of who is protected under the law and who obtains accommodation, through the many legal and extralegal actors who implement the law on a daily basis. If the ADAAA successfully brings more people with disabilities into the workplace, then attitudes toward disability should be improved through increased contact with a wide range of people with disabilities and with reasonable accommodations.<sup>8</sup>

While laws affect society through many channels, however, courts play an important role in shaping the parameters of the law’s implementation. My concern is that the persistence of negative and ignorant attitudes to disability will lead courts either to continue to narrow the scope of the statute, in defiance of the clear mandate of the ADAAA, or, more likely, to find new ways to limit enforcement. I hope to contribute to our understanding of those negative 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). The CRPD contains an "Awareness-raising" article explicitly requiring states' parties to promote more positive attitudes toward disability (*ibid.*, art. 8). 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. 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.

## INTRODUCING THE ADAAA

*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 2008

The ADA Amendments Act (ADAAA) expressly aims to "carry out the ADA's objectives . . . by reinstating a broad scope of protection" (ADAAA § 12101(b)(1)). 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. First, let's revisit the relevant aspects of the ADA, how the courts narrowed its protection, and how the ADAAA intends to intervene.<sup>9</sup>

The ADA protects against discrimination on the basis of "disability," so in order to bring a claim, the plaintiff must first qualify as having a "disability." (ADA § 12112(a)). 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 (*ibid.* §12102(2)).

This language was lifted from a previous law—the Rehabilitation Act of 1973—which had not been interpreted restrictively up until 1990. The ADA's proponents therefore had little reason to think these definitional prongs would later be interpreted as narrowly as they were.

When courts began hearing ADA cases, however, they interpreted this definition of disability strictly in (at least) five ways. First, in *Toyota v. Williams* (2002), the Supreme Court expressly required the plaintiff to meet a "demanding standard" of "disability." Second, consistent with this, courts interpreted "substantially limiting" restrictively: plaintiffs had to show that they were really *really* limited in a major life activity to count as disabled. This approach led to notorious losses for plaintiffs, such as the plaintiff whose cancer was posthumously declared not limiting enough (Long 2008, 218). Third, the Supreme Court held in *Sutton v. United Air Lines, Inc.* (1999) that since "substantially limited" is in the present tense, plaintiffs who have mitigated their disabilities must be considered in their mitigated state. This excludes anyone who has successfully mitigated her disability, such as someone whose contact lenses correct her vision (as with the plaintiffs in *Sutton*) or whose psychiatric medication or prosthesis are fully effective. Fourth, courts applied a restrictive view of what counted as a "major life activity." For example, activities were typically deemed not "major" enough if they were not "of central importance to most people's daily

lives” (*Toyota*). Fifth, courts interpreted the “regarded-as” prong of the definition restrictively, in a variety of ways. Most notably, they required plaintiffs to prove not only the impairment the employer regarded them as having, but also *precisely* which major life activity the employer regarded them as *substantially* limited in. For instance, to show she was regarded as disabled, a plaintiff with mild arthritis would have to persuade a court not only that her employer thought she had arthritis, but also that her employer thought her arthritis substantially limited her in some particular major life activity, such as walking. 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. An absurd demand.

The ADAAA addresses most of these problems with the courts’ treatment of the definition of disability. The findings of the new law explicitly reject both the “demanding” standard and the highly restrictive interpretations of the “substantially limited” language (ADAAA § 12102(4)(E)). 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) (*ibid.*). The ADAAA gives “major life activity” a clearer and broader scope, by providing an illustrative list, and by introducing “the operation of a major bodily function” (also with an illustrative list) as another form of major life activity (*ibid.* § 12102(2)(A)). Perhaps most strikingly, for the regarded-as prong, the statute completely removes the need to show any substantial limitation in a major life activity. Instead, the plaintiff need only show 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, defined in the statute as hav-

ing “an actual or expected duration of 6 months or less”) (*ibid.* § 12102(3)(B)).

Though these changes are not comprehensive, they are ambitious. But courts may nonetheless find new ways to undermine the scope of the statute’s protections, perhaps by again interpreting “substantially limits” somewhat narrowly, in the absence of a statutory definition for the term. However, this approach would directly contravene the ADAAA’s express rejection of a “demanding standard” for interpreting “substantially limits.” Alternatively, courts could raise the bar for proving that one has an “impairment,” potentially leading to a highly medicalized inquiry. But these further attempts to classify who is in and who is out would fly in the face of the statute’s explicit mandate to determine 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 with their obligations . . . . [T]he question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” The ADAAA should therefore put pressure on courts to examine other parts of the statute beyond the definition of disability: 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. In the course of addressing these questions, those courts inclined to keep the scope of the statute limited may well interpret these provisions restrictively.

### **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” disability<sup>10</sup>

The ADAAA’s move towards a more expansive definition of “disability” seems to reflect 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.<sup>11</sup> The more expansive definition should shift the emphasis from just how limited the individual with a disability is (a *medical model*), to what happened (discrimination?) or what should happen (accommodation?) in interaction with the disability.

In a crucial way, however, the ADAAA moves away from the social model. One of the ADA’s boldest features was its equal treatment of actual disability and regarded-as disability. The ADAAA, by contrast, separates actual and regarded-as into two different groups, which are expressly entitled to different remedies.

Recall the ADA’s definition of disability quoted above. 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.)

Placing actually disabled and regarded-as disabled under a single rubric affirms the social model of disability in a fairly radical way. It says explicitly that others’ perceptions of an impairment can be just as meaningful and real as an otherwise-limiting impairment, and consequently just as deserving of accommodation.<sup>12</sup>

While the ADAAA carves up the ADA’s old definition in ways that broaden the scope of the statute’s protection—a much-needed development—unfortunately it also creates two distinct types of disability, each 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)*)” (ibid. § 12102(1)(C)). 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.” So far, so good: plaintiffs no longer have to jump through hoops to prove they are regarded-as having a disability.

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.

Why should an employer accommodate someone who is only regarded-as disabled? Some people may find this idea absurd—as did some courts. However, if one accepts a social model of disability, then an employer’s regarding the

employee as “substantially limited” in a major life activity could warrant accommodation. For example, 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, because it broadens protection for the “actually disabled” prong.

Or, one can imagine a plaintiff who is both 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.

To count as actually disabled under the ADA, plaintiffs had to prove to the court *just how limited they really are*. Some plaintiffs would surely find this requirement unappealing: what does it mean to perform one’s limitations in court? We might think here, by analogy, of the critic 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, because he was so keenly aware of the ways our performances become us.<sup>13</sup> It is easy to see how a plaintiff might prefer to prove that someone else thought he was substantially limited, yet refused to accommodate his (perceived) limitation, instead of going to great lengths to prove just how limited he really is. Hopefully, the expanded protection of the actual-disability prong will also

lessen this problem, although it will not eliminate it.

Third, sometimes other people’s attitudes make a condition disabling. Facial scarring or a missing front tooth might provoke adverse reactions from others. Although neither condition creates any actual functional limitations, others’ reactions could make working or interacting with some others difficult. An accommodation in this case could involve less interaction with customers, or a non-commission-based sales job instead of one based on sales commission. Of course, care should be taken to avoid segregating or stigmatizing the affected individual.

But all of these scenarios are irrelevant under the ADAAA, because 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.”<sup>14</sup> The statute itself does not employ these terms, and both types still fall equally under the definition of “disability.” But the difference in remedies suggests to me a difference in the underlying categories. Even if there are few practical consequences, at a structural level, distinguishing between the two categories is a jarring step back from the more radical social model.

### **DISTINGUISHING ACCOMMODATION FROM ANTIDISCRIMINATION**

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

—Justice Kennedy, *Olmstead v. Zimring* (1999)

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” (ADAAA, § 12112(b)). A failure to accommodate *is* discrimination under the ADA. And yet, this remains a contested issue.

Is the ADA doing something really different from the rest (or the heart) of anti-discrimination law, or is it doing something fundamentally similar? Much scholarly energy has been spent debating this question (Jolls, 2001; Stein, 2004; Wax, 2003; Karlan & Rutherglen, 1996). In my view, a final resolution to this debate is unlikely, because ultimately it seems that both sides have some merit. On the one hand, core U.S. antidiscrimination statutes covering classifications like race and sex—such as Title VII of the Civil Rights Act of 1964—involve costs to the employer and changes to policies and practices that operate like accommodation. For instance, prohibiting discrimination in hiring may hurt the employer’s bottom line, if customers prefer their pizza delivery people to be white or their flight attendants to be men. Putting in women’s restrooms in a formerly all-male workplace may cost money. Similar to the ADA, then, Title VII requires employers to absorb costs and make structural changes. On the other hand, the ADA obliges employers to respond to individual requests by employees to change their practices, requiring a different kind of interaction between employer and employee.

With its two different meanings of “discriminate”—one for actually disabled plaintiffs and another for regarded-as disabled plaintiffs—the ADAAA has further complicated the relationship between discrimination and the failure to accommodate.

Justice Kennedy makes clear his view that the ADA is doing something different than previous antidiscrimination legislation, in his concurring opinions in two

crucial cases, *Olmstead v. Zimring* (1999) and *Bd. of Trustees of the Univ. of Alabama v. Garrett* (2000), handed down one year apart. The epigraph above from *Olmstead*—“the normal definition of discrimination [is] differential treatment of similarly situated groups”—captures his basic view of discrimination. By this definition, 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.

(*ibid.*, 375)

In short, traditional prejudice arises from malice or hostile animus, as opposed to 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 impairments or disabilities into the larger society” (ibid.). 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 (ibid.). 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 remedy . . . (ibid.)

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” (ibid.).

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. No, he seems to be saying, discrimination is the stuff of racism. With disability, we are talking about the need for 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 actions for which we (should) reserve the word “discrimination.”

And now that hierarchy of types of prejudice is reproduced *within* disability law, with the ADAAA’s statutory distinction between the actually-disabled people who have one definition of discrimination—which includes the failure to accommodate—and the regarded-as disabled people who 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 each group are now substantially different.

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” (Barry 2010, 278). Indeed, the regulations present the regarded-as prong as the first port of call for plaintiffs who do not challenge a failure to accommodate.<sup>15</sup> This new statutory structure plainly incentivizes plaintiffs and their lawyers to bring suit under the regarded-as prong whenever possible. But 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? What 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, in the example mentioned earlier, women’s rooms for the first female employees—simple discrimination or does it fall in the special category of failure to accommodate? These are just a few examples of the kinds of dilemmas that straddle the line between antidiscrimination and accommodation. I admit I am not optimistic that many courts will give a broad reading to discrimination that is statutorily distinguished from “mere” failure to accommodate.<sup>16</sup> On the contrary, this bifurcation of types of discrimination seems to dovetail with Justice Kennedy’s troubling view that while disability inspires some less-than-ideal attitudes and actions from “us,” these new forms of discrimination against disabled people are not severe enough to require legal action.

### 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 Sedgwick<sup>17</sup>

In principle, under the ADAAA, the category of disability has expanded to include those who were previously “not disabled

enough” according to the ADA. The EEOC calls this the “group whose ‘coverage has been clarified’ under the ADAAA.”<sup>18</sup> This category could also be called *bidisability* (or “bi-ability,” as Ruth Colker would have it (1996)). It lies in between disabled and nondisabled, and overlaps with both.

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.

Many of those who were bidisabled under the ADA will presumably be absorbed within the ADAAA’s broader disability definition. Bidisability does not (yet) 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. I think that under the ADA before the recent amendments, the not-disabled-enough group may have been providing a kind of *buffer zone* between nondisabled and disabled.

This buffer zone was comforting to some because it seemed to draw a line in the sand between people who are disabled and people who are not. Disability is a threatening category 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 (Yoshino, 2000; Emens, 2004). This is the idea behind, for example, 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 (Hahn 1988, 27–29).

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 identity 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 (Yoshino 2000). 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 (*ibid.*).

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 rather than label them as "bidisabled," the ADA classified them as "not disabled." Anyone who was not "severely restricted" by her or his impairment was therefore "not disabled," and the case dismissed. It happened so frequently under the ADA that I sometimes thought, half seriously, that courts hoped their performative powers matched those of the evangelical preacher's "You can walk!"—curing the sick by declaring them healed. The net result was to create a large buffer zone of legally-designated "nondisabled" people who occupy the space between the small group of "actually" disabled people, and "us."

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'" (Feldblum 2008, 228). 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 height-

ened anxiety to a better appreciation of disability law as a social insurance policy for everyone.

## 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. 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 McRuer (2006, p. xv)

Title VII of the Civil Rights Act of 1964, is largely a "symmetrical" statute, in that it protects everyone on the basis of some axis of identity (such as race or sex). By contrast, the ADA is an "asymmetrical" statute—it protects one group along a particular axis and not others. The ADAAA further entrenches this asymmetry, by explicitly prohibiting 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" (ADAAA § 12201(g)).

Why is this possible for the ADA, when it is not for Title VII? An asymmetrical approach is based on an antisubordination model: it targets interventions to the groups that have historically 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. For example, a university admissions policy based on an antisubordination model might include affirmative action measures for groups who historically lacked access to educational opportunities based on race or sex. One based on antidifferentiation would, by contrast, be more likely to bill itself as “colorblind” or “sexblind.” 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. So how do we have an explicit antisubordination model for disability and not for race and sex?

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 rigorous constitutional scrutiny (so-called heightened scrutiny), which the Court has applied (nearly) symmetrically to more and less powerful groups in the context of, most notably, race. But *why* would this explicit anti-reverse-discrimination provision in the ADAAA not raise hackles or even get any publicity? Why is no one worried about, for example, the non-deaf person denied a job at a Deaf institution?

I think the answer lies in the highly negative social status of disability, in at least three ways. First, nondisabled is not yet an identity category. What is the opposite of “disabled”? Justice Kennedy calls it “us,” or “citizens.” Men and whites, although they have historically been the norm, or the comparator against which others were marked as “different,” today can claim a sex and a race, respectively. By contrast, I doubt many nondisabled people think of themselves as “nondisabled” (Bérubé

2002). So long as no one is rushing to claim “nondisabled” as a primary identity, denying claims on the basis of this identity does not appear 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. True, some people complain that parents seek diagnoses to get goodies for their children in the educational context (Kelman & Lester 1997), but even if this is true for parents, persistent stigma probably hinders similar efforts by adults on their own behalf.

Third, and relatedly, disability is so deeply associated with inferiority that the specter of an insurrection—in which the subordinate group takes over and starts running the farm—is beyond most people’s wildest imaginings.<sup>19</sup>

The easy prohibition on reverse discrimination claims in the ADAAA highlights other manifestations of these resolutely negative attitudes to disability. For instance, corporate and academic “diversity” initiatives regularly seek applicants on the basis of race or sex; rarely do they include “disability” as a sought-after category. Some recent work makes the so-called business case for hiring disabled workers and advertising to people with disabilities (Riley II 2006), and some scholars have described potential third-party benefits to the workplace and to society of accommodations requested by individual disabled people (Stein 2003; Emens 2008). But however obvious they may be to disability “insiders,” the broader benefits of disability and accommodation are still typically overlooked, including by courts.

People who run diversity initiatives are (anecdotally) uncomfortable and

awkward when asked why they have omitted disability. 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*. As a culture, he says, we celebrate diversity, until it comes to impairment. There, we still cling to a medical model; we equate difference with inferiority. (Davis 2011). I am skeptical that our cultural affinity for normality is ending—few people, I imagine, 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.

A diversity rationale for integration affirms difference. In contrast to our standard antistatutory 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. Although a lively debate surrounds the diversity rationale, my aim here is not to argue for (or against) a diversity agenda. Instead, I’d like to examine what disability’s relative absence from that agenda means for 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.<sup>20</sup> 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 residen-

tial sites were organized around people’s interests in different topics, such as 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 on college campuses—reflects the same attitudes that lead 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 negative perception ignores the idea of *crip culture* and the recent explosion of disability-related arts. The era of widespread institutionalization of people with physical as well as mental disabilities is far too recent to conceive of a house for people with disabilities as anything other than the product of exclusion or even warehousing.<sup>21</sup> (And as another student rightly pointed out, “disability houses” inadvertently materialize all the time, on campuses and elsewhere, when only one building or part of an institution is accessible.) But a Disability House sounds disturbing not only for its historical associations. Rather, the Disability House is inconceivable because mainstream culture is ill-equipped to see disability (as opposed to African-American history) as an issue that people with disabilities—much less people without disabilities—could affirmatively seek out and celebrate.

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 negative conception of disability. Statutes and cases in these areas explicitly measure success by the extent to which people with disabilities are interacting with people without disabilities: the more contact, the better.<sup>22</sup> There are some important historical reasons for this focus, but the legal language makes the troubling assumption that interacting with nondisabled people is an unqualified good. Imagine a similar discussion about racial integration, in which one environment was repeatedly and explicitly deemed superior because of how much contact it offered with white people. (Of course, past racial integration efforts and decisions have effectively implied exactly that.)

Once one considers the possibility that people, disabled or nondisabled, could be drawn to disability—for community, culture, or concepts—the biases at the heart of the integration discussion are thrown into sharp relief. These discussions, in the disability context, are not framed *even superficially* in reciprocal terms. There is no consideration of what nondisabled and disabled offer each other, as equals. 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. According to this narrative, no one would seek to affiliate with this group, so eliminating the possibility of lawsuits brought by nondisabled people alleging discrimination for *not* being disabled raises no hackles, and passes into law unnoticed.

## CONCLUSION

*every built thing has its unmeant purpose . . .  
Every built thing with its unmeant  
meaning unmet purpose  
every unbuilt thing*

—Adrienne Rich, “Powers of Recuperation”

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. “Unmeant purpose” resonated deeply with my sense of benefits developed for one use and exapted to another (Emens 2008). 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 ADAAA. Metaphors of the built environment circulate always in discussions of the ADA, both challenging and constraining our thinking about disability. 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.

## NOTES

1. The essay included here is a condensed version of an earlier article. See Elizabeth F. Emens, *Disabling Attitudes*, 60 *Amer. J. of Comparative L.* 205 (2012). As part of the condensing, I have omitted the acknowledgements and much of the citation material; interested readers might consult the earlier article. For excellent editorial assistance with the preparation of this version of the article, I thank Laura Mergenthal and Anna Louie Sussman. For useful conversations and comments on earlier drafts, I thank Rachel Adams, Samuel Bagenstos, Kevin Barry, Noa Ben-Asher, Daniela Caruso, Chai Feldblum,

- Katherine Franke, Michael Kavey, Sarah Lawsky, Laura Mergenthal, Michael Rembis, Charles Sabel, Michael Stein, Kimberly Walters, and participants in the Evolutions in Anti-Discrimination Law in Europe and North America at Harvard Law School, the Columbia Law Women's Association Workshop, and my Disability Law class in the Spring of 2011.
2. For more sustained treatment of the ADA's passage, see, for example, Joseph Shapiro, No Pity 118–19 (1993); Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 Wm. & Mary L. Rev. 921 (2003); Samuel Bagenstos, *Law & the Contradictions of the Disability Rights Movement* (2009).
  3. 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 2000 at 91–92, 113.
  4. See, e.g., *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).
  5. Cf. Mary Johnson, *Make Them Go Away*: Clint Eastwood, Christopher Reeve & the Case Against Disability Rights (2003).
  6. 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 other disabilities.
  7. 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, October 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?”).
  8. 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 stereotyping. 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).
  9. 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).
  10. 29 CFR § 1630.2(l)(2).
  11. 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).
  12. 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.
  13. 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 . . . . 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.”).
  14. See 76 Fed. Reg. 16980 (Mar. 25, 2011).
  15. 76 Fed. Reg. 16978.
  16. One approach courts may take to reading “discriminate” narrowly is to insist that plaintiffs identify “comparators” in order to prove that 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).
  17. 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).

18. 76 Fed. Reg. 16987 n.3.
19. 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).
20. Discussion with the Columbia Law Women's Association of Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Love*, 122 Harv. L. Rev. 1307 (2009), (Mar. 23, 2011).
21. 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.
22. 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").

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