2003

Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project

Mary Crossley
University of Pittsburgh School of Law, crossley@pitt.edu

PUBLIC LAW AND LEGAL THEORY
WORKING PAPER NO. 90
SEPTEMBER 2003

REASONABLE ACCOMMODATION AS PART AND PARCEL OF THE ANTIDISCRIMINATION PROJECT

Mary Crossley

Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project

Mary Crossley*

Introduction

When Congress enacted the Americans with Disabilities Act (ADA) in 1990, it explicitly stated that the purpose of the legislation was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[1] In passing legislation designed to address discrimination against a particular group of people, Congress set off down a path that it had trod before in prohibiting discrimination on the grounds of race, sex, religion, and national origin in various other pieces of antidiscrimination legislation. Not surprisingly – given common disdain for reinvented wheels – Congress' crafting of the ADA consciously reused legislative models with which Congress was familiar. So the ADA's list of prohibitions on discrimination includes prohibitions on treating individuals with disabilities differently from others based on their disabilities;[2] it also proscribes the use of qualification standards or selection criteria that have the effect of excluding individuals with disabilities.[3] In these prohibitions, the ADA respectively emulates the disparate treatment and disparate impact theories of discrimination that had been developed by the courts most extensively in the context of employment discrimination under Title VII of the 1964 Civil Rights Act.[4]

---

* Florida Bar Health Law Professor of Law, Florida State University Professor of Law. My thanks go to Kara Decker, Sarah Graham, Todd Harris, and Rob Rogers for valuable research assistance. This project was supported by a Florida State University College of Law semester research grant.

1 42 U.S.C. § 12101(b)(1).

2 *See* 42 U.S.C. § 12112(b)(1)(prohibiting "limiting. segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disabilitiy of such applicant or employee").

3 *See* 42 U.S.C. § 12112(b)(6) (prohibiting "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity is shown to be job-related for the position in question and is consistent with business necessity").

4 *See* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment…").

In addition to reusing the models developed in pre-existing antidiscrimination laws, however, Congress included in the ADA a feature that appeared to deviate from existing law – the requirement that in some instances an employer provide reasonable accommodations to enable a qualified individual with a disability to perform the essential functions of a job.[5] While some commentators have lauded the obligation to provide reasonable accommodations and others have castigated it, both friends and foes have generally viewed this aspect of the ADA's mandate as being a different beast – simply not of the same species as existing antidiscrimination laws.[6] Assertions that the ADA's reasonable accommodations requirement is somehow foreign to the body of established antidiscrimination law have various focuses, but the two most commonly (and powerfully) voiced are that (1) the ADA requires individuals with disabilities to be treated differently from (and better than) other individuals and (2) the Act imposes affirmative obligations to act on employers, rather than simply directing them to refrain from treating people differently on the prohibited grounds. Unfortunately, this perception of novelty in the ADA's reasonable accommodations directive may inhibit the ADA's effectiveness in serving as a "clear and comprehensive national mandate for the elimination of discrimination," for it may cause judges, commentators, and members of the public to question – given the perceived alien nature of reasonable accommodations –the ADA's lineage as a bona fide member of the family of

---

[5] *See* 42 U.S.C.§ 12112(b)(5)(A) (definining "discriminate" to include "not making reasonable accommodations to the know physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").

[6] The ADA's imposition of a reasonable accommodation obligation on employers is not entirely unprecedented; Title VII similarly imposes an obligation on employers to make reasonable accommodations for the religious practices of employees and prospective employees. 42 U.S.C. § 2000e(j). Nonetheless, Title VII's religious accommodation requirement is generally viewed as fairly toothless in light of Trans World Airlines v. Hardison, 432 U.S. 63 (1977), in which the Court ruled that a requested religious accommodation that imposed on an employer a "more than a de minimis cost" was not required. By contrast, while the exact extent of the ADA's reasonable accommodation requirement remains unsettled, the ADA's legislative history indicates that Congress intended that the ADA's requirement have some teeth. *See* H.R. Rep. No. 101-485, pt.2, at 68, U.S.Code Cong. & Admin. News 1990, pp. 303, 350 ("The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison* … are not applicable to this legislation.").

antidiscrimination laws accepted by our society. And if the ADA is understood as lying outside of our society's ongoing antidiscrimination project,[7] the Act may be deprived of the moral authority that antidiscrimination laws (while not wholly uncontroversial) tend to enjoy.

The purpose of this Article is to suggest that a closer examination, and particularly an examination informed by the perspectives of scholars in the field of disability theory, will draw our attention to the ways in which the ADA's reasonable accommodation requirement is indeed akin to other antidiscrimination laws. The fundamental premise underlying the assertion that reasonable accommodation is part and parcel of the antidiscrimination project is that antidiscrimination laws are broadly concerned with the removal of barriers that prevent historically disadvantaged groups from enjoying equal opportunities to participate fully in the richness of American society. Unquestionably, because of different histories and different physical traits, the barriers to participation that blacks, women, and people with disabilities encounter will to some degree be different in nature and may entail different strategies for removal. A central insight of disability theory is that the primary barriers to the full participation of people with disabilities do not lie in the direct effects of any physical or mental impairment that may limit an individual's functioning. Instead, the primary barriers faced by people with disabilities lie in how society has historically structured its institutions, attitudes, and physical environments.[8] Reasonable accommodations address this barrier – which in the context of employment opportunity typically can be distilled down to the employer's implicit or explicit

---

[7] While the precise scope of this antidiscrimination project is itself contested, Andrew Koppelman offers the following definition for his use of the term: "'[T]he antidiscrimination project' seeks to reconstruct social reality to eliminate or marginalize the shared meanings, practices, and institutions that unjustifiably single out certain groups of citizens for stigma and disadvantage." ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 8 (1996).

[8] *See infra* Part II.

assertion that "that's just how we (meaning people without disabilities) do things in this workplace."

Other scholars have started the process of demonstrating the similarity between the ADA's reasonable accommodation requirements and other antidiscrimination laws, and a rich discussion of the question is underway. To date, however, this discussion has focused primarily on similarities and differences in the realm of employer costs, labor market effects, and doctrinal details[9]. What remains largely absent from the discussion is a deeper consideration of the conceptual similarities between reasonable accommodation and other facets of the antidiscrimination project. In other words, can we understand what reasonable accommodation seeks to accomplish as being fundamentally like what disparate impact theory, hostile environment theory, or affirmative action seeks to accomplish?

Recognizing the essential kinship between the obligation to provide reasonable accommodation and other strands of antidiscrimination law serves several purposes. First, it may help to counteract what some commentators have described as a backlash against the ADA, particularly on the part of judges who understand reasonable accommodations as "special benefits" to be doled out only to a narrowly circumscribed group of the "truly disabled."[10] A demonstration that reasonable accommodations – like disparate impact theory – seek simply to remove exclusionary barriers to equal opportunity might provide a different frame of reference for determining who should be able to invoke a right to accommodation.

Second, and probably most important, the insight that reasonable accommodation's goals are the same as those of antidiscrimination law broadly may guide courts in defining the scope of

---

[9] *See infra* Part IIIA2(a).

[10] *See, e.g.,* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMPLOYMENT & LAB. L. 19 (2000); Linda H. Krieger, *Foreword – Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMPLOYMENT & LAB. L. 1 (2000).

the right to accommodation. The question of what makes a requested accommodation reasonable (and therefore obligatory unless it imposes an undue hardship on an employer) remains unsettled and hotly contested. Indeed, the reasonableness issue could prove the next vigorously litigated issue under the ADA, now that the Supreme Court has resolved many of the questions regarding who can claim the Act's protections.[11] While this Article does not seek to uncover fully the meaning of "reasonable" accommodations, it suggests that the reasonableness assessment should include asking whether a requested accommodation will serve to remove a socially imposed barrier to a disabled person's equal employment opportunity.

Third, while it is not my position that a recognition of the ADA's kinship of purpose with other antidiscrimination laws either depends upon or compels doctrinal consistency between the ADA's reasonable accommodation rule and those laws, that recognition does provide a vantage point from which to evaluate doctrinal inconsistencies. Moreover, understanding the conceptual commonalities between reasonable accommodation and other antidiscrimination doctrines could help courts think fruitfully about how Title VII doctrine might in some instances provide insights for the refinement of ADA doctrine (and vice versa).[12]

Finally, recognizing that the ADA, with its reasonable accommodation provision, is part and parcel of the antidiscrimination project also suggests the need for careful thinking about what the ADA is not. If the ADA's primary purpose truly is the elimination of discrimination

---

[11] *Cf.* Vikram David Amar & Alan Brownstein, Reasonable Accommodations under the ADA, 5 GREEN BAG 2d 361 (2002) (noting that *US Airways Inc. v. Barnett* was the Court's first decision construing the reasonable accommodations requirement).

[12] *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J.1 (1996) (forecasting doctrinal spillover from ADA to Title VII); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197 (2003) (same).

against persons with disabilities,[13] then the ADA will not necessarily provide people with disabilities with everything that they need (or want) to succeed in a workplace, even if we understand discrimination broadly to include the creation and maintenance of socially constructed barriers to full and meaningful participation in society. If discrimination is found in socially imposed barriers, then reasonable accommodations should remove those barriers, but they need not compensate for any functional limitations that flow directly from an individual's impairment. Indeed, the understanding of accommodation set forth in this Article might appear niggardly to some advocates for persons with disabilities, for it implicitly acknowledges that reasonable accommodations do not guarantee persons with disabilities equality of outcomes or even absolute equality of opportunity. Accordingly, this understanding of reasonable accommodation recognizes that an antidiscrimination approach may take us only part of the way towards remedying the disadvantages suffered by disabled people in our society.

This Article will proceed in the following fashion. Part I will examine legal scholars' arguments that the ADA's reasonable accommodation requirement is inherently distinct from and even alien to the body of pre-existing antidiscrimination law. Part II will then describe the basic insights of disability theory regarding the nature of disability and consider contrasting arguments as to how a just society should respond to the disadvantage experienced by people with disabilities. That Part also will draw upon the perspectives of disability theory to begin responding to the central arguments articulated in Part I, by contending that in some instances equal treatment for persons with disabilities will require non-identical treatment and that a

---

[13] Admittedly, it may oversimplify history to suggest that the ADA's enactment was based solely on civil rights principles. As Professor Samuel Bagenstos has demonstrated, welfare reform sentiments also animated legislators' support for the ADA. *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003). That said, the statutory purposes articulated by Congress in the statute itself clearly speak to the "elimination of discrimination" as the law's central purpose. *See* 42 U.S.C. § 12101(b)(stating statutory purposes).

refusal to remove socially imposed barriers can be understood as discriminatory. With this groundwork laid, Part III will explore the essential likenesses between accommodation and elements of antidiscrimination law developed under Title VII, specifically disparate impact theory, hostile environment theory, and affirmative action. While this exploration will uncover likenesses in each of these instances (as well as some significant differences), it will conclude that the ADA's accommodation requirement is most closely akin, conceptually, to the prohibition of disparate impact discrimination. Part IV will propose how courts' assessments of the reasonable of a requested accommodation might be guided by a recognition of accommodations' antidiscrimination nature.

I. The ADA as different from other antidiscrimination statutes

Legislators, judges, commentators, and persons with disabilities have commonly described the ADA as a "civil rights" statute for persons with disabilities.[14] The floor debates preceding the enactment of the statute are replete with comparisons between racial discrimination and the discrimination suffered by persons with disabilities in America. Indeed, one of its legislative sponsors declared the ADA to be an "Emancipation Proclamation" for persons with disabilities.[15] Nor should these comparisons between the harms of racial exclusion and the harms of disability-based exclusion be surprising. The disability rights movement that emerged in the 1960s and 1970s had self-consciously turned to the civil rights movement for moral authority and guidance as advocates sought to establish legal foundations for disability

[14] *See, e.g.,* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).
[15] 136 Cong. Rec. 17,369 (1990)(statement of Sen. Tom Harkin).

rights,[16] and at least one scholar had explicitly connected racial discrimination to society's negative attitudes towards and exclusion of disabled persons.[17]

Since the ADA's enactment, however, a growing number of commentators have voiced doubts about the characterization of the ADA as a civil rights statute. These doubts – which have been articulated both by critics of the ADA and by advocates for disability rights[18] – sound in several tones, but share a highlighting of how different the ADA is from other antidiscrimination statutes.

Some commentators' skepticism about labeling the ADA as an antidiscrimination statute is based on observations about the difference between the discrimination experienced by racial minorities and the discrimination experienced by persons with disabilities. Civil rights laws protecting African-Americans against discrimination were a response to "obvious and unambiguous patterns of exclusion"[19] and segregation in numerous segments of American society, patterns that flowed from a history of slavery and subjugation of black Americans. By contrast, these commentators point out, disabled persons have not suffered this broad, systemic, and legally enforced exclusion from social, political and economic participation. As Professor Jerry Mashaw suggested shortly after the ADA's enactment, "the notion that there has been some systematic social policy or social practice of discriminating against the disabled will strike most

---

[16] This reliance is illustrated by the fact that the language of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which preceded the ADA and prohibited handicap discrimination by recipients of federal funding, was originally proposed as an amendment to Title VI of the 1964 Civil Rights Act, which prohibits discrimination based on race, color, or national origin by recipients of federal funding. *See* Alexander v. Choate, 469 U.S. 287, 295 n.11 (1985).

[17] *See* Leonard Kriegel, Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro, 38 THE AM. SCHOLAR 412 (1969).

[18] *See, e.g.,* Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 341 (2001) (asserting that "the term 'civil rights,' as that term has traditionally been defined and interpreted, is a misnomer in the context of the different treatment faced by persons with disabilities").

[19] Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights beyond Race, Gender and Age*, 1 U. PA. J. LAB. & EMP. L. 511 (1998).

people as simply untrue."[20] Instead, any exclusion of disabled people from participation in society has been primarily the product of "benign neglect" – the inadvertent failure to consider the distinctive needs of disabled persons – rather than any prejudice or animus against them.[21] Thus, some commentators identify one difference between the ADA and other civil rights statutes as the ADA's lack of a compelling historical record justifying an anti-subjugation command.[22]

Some commentators also believe a material difference exists between racial discrimination and disability discrimination when it comes to the relative relevance of race and disability to employment decisions. Numerous comments reflect (either explicitly or implicitly) the judgment that race is always an irrelevant consideration in employment decisions, but that disability may indeed be relevant to a person's ability to perform a job. To combat racially discriminatory employment practices, Title VII eliminates race as a permissible factor in employment decision making in order to level the playing field between whites and blacks and permit a fair distribution of job opportunities.[23] The idea is that purging all racial content – which by definition is irrelevant – from employment decisions will produce merit-based decisions. Thus, what Professor Robert Post calls the "trope of blindness" functions as a tool that

---

[20] Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV, 211, 220 (1994).

[21] Justice Thurgood Marshall, writing five years prior to the ADA's enactment, noted this distinction in a case decided under Section 504 of the Federal Rehabilitation Act of 1973. He wrote: "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect." Alexander v. Choate, 469 U.S. 287, 295 (1985).

[22] Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, __ (2001) ("What is unique about the ADA is precisely that it is the first employment discrimination law that does not attempt, even as a formal matter, to derive its redistributive objective from the anti-subjugation command.").

[23] *Id.* at 314.

"renders forbidden characteristics invisible; it requires employers to base their judgments instead upon the deeper and more fundamental ground of 'individual merit' or 'intrinsic worth.'"[24]

By contrast, in the minds of many, an applicant's or worker's disability is often anything but irrelevant to the person's ability to perform a job. Even apart from the hyperbolic rants about having to hire blind bus drivers, a number of commentators highlight that the ADA – in prohibiting employers from discriminating based on disability – is not simply placing out of bounds information generally recognized as immaterial to the employers' legitimate purposes.[25] Indeed, to the extent that some view "merit" and "ability" as roughly synonymous when it comes to job qualifications, proscribing an employer's consideration of a *dis*-ability may limit the employer's ability to make merit-based employment decisions. Although the ADA itself addresses the potential relevance of an individual's disability to his employment by limiting statutory protection to "qualified individual[s] with a disability," some still cannot shake the sense that disability is relevant in the ideal meritocratic employment scheme in a way that race and gender are not.[26] In sum, while civil rights laws commanding employers to ignore race or gender in their employment decisions seem calculated to direct employer attention away from irrelevant information, some see the ADA as limiting an employer's ability to act on information believed to be relevant. Thus, those who are convinced of the (at least potential) materiality of

---

[24] Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 11? (2000).

[25] As Mashaw points out, many people would find it intuitively plausible to reject the ADA because the statute is not justifiable as a response to remedying discrimination. Under this view, the disadvantaged position of persons with disabilities in the workplace is the result of merit selection, not discrimination. *See* Mashaw, *supra* note 20, at 219-220.

[26] *See* Karlan & Rutherglen, *supra* note 12, at 23? (noting, in context of questioning any efficiency rationale underlying the ADA, that "the signal from a genuine disability is not wholly spurious");

disability to job performance – and thus the fairness of taking disability into account – may perceive this limitation as a granting of "special rights" to persons with disabilities.[27]

The most obvious distinction between the ADA and other antidiscrimination statutes, however, is the ADA's express inclusion of a failure to make reasonable accommodations in its definition of "discrimination," and many have pounced on this distinction as illustrating how unlike those statutes the ADA is.[28] Title I of the ADA, which deals with employment discrimination, states a general rule prohibiting discrimination against a qualified individual based on his disability, and then goes on to list what "discriminate" means in this context.[29] While the statutory list includes an employer's treating a disabled individual differently in a way that adversely affects the individual, it also includes "not making reasonable accommodations" to the individual's disability unless doing so would impose an "undue hardship" on the employer.[30] In other words, not only does the ADA fail to compel employer "blindness" (in the language of Post and many others)[31] to an employee's disability, it actually requires employers to consider disability in making employment decisions, at least in some instances.

Commentators have pointed out at least two ways in which the accommodation mandate distinguishes the ADA from other antidiscrimination statutes. First, and most palpably, the ADA may require an employer to affirmatively undertake some action, *i.e.*, do something to provide

---

[27] *Cf.* Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 578 (1998).

[28] *Accord* Christine Jolls, *Antidiscrimination and Accommodation,* 115 HARV. L. REV. 642, 643 (2001) (noting that observers have drawn this distinction).

[29] 42 U.S.C. § 12112(a), (b).

[30] *Id.* at (b)(5)(A).

[31] Many refer to the ideal of a "color-blind society" as one in which a person's skin color no longer affects his opportunities in life or his treatment by others. I use the term "blindness" advisedly and with some sensitivity to the power of language in reinforcing negative attitudes towards and images of persons with disabilities. Phrases such as "he turned a blind eye to their suffering" or "her argument didn't have a leg to stand on" or "his pleas fell on deaf ears" do little to enhance our connectedness to disabled persons and their experiences. Interestingly enough, however, the use of "blindness" in the sense of the refusal to consider irrelevant or prejudicial characteristics (seen also in the phrase "justice is blind") may generate positive connotations.

the necessary accommodation.[32] The types of possible actions are various; the employer may purchase specially designed ergonomic equipment, modify a work schedule, invest in voice recognition software, or shift some nonessential functions of a particular job to another employee.[33] Moreover, because these accommodations often will impose costs on employers, commentators have highlighted the potential cost burdens on employers and the lack of a mechanism for spreading these costs as setting the ADA apart from Title VII.[34] By contrast, to comply with Title VII an employer must simply refrain from acting in the prohibited fashion. As long as the employer does not differentiate among employees or potential employees based on race (or another prohibited characteristic), the employer has satisfied his legal obligation.[35] Even scholars who acknowledge that the starkness of this asserted difference between Title VII's non-differentiation model and the ADA's accommodation mandate may be overdrawn still characterize the ADA as fundamentally different.[36]

The commentators' second point is that while, ordinarily, civil rights laws prohibiting discrimination require that all persons (regardless of whether they possess a particular characteristic) receive the same treatment and consideration, the ADA's accommodation

---

[32] *See, e.g.,* Karlan & Rutherglen, *supra* note 12, at 14 ("The ADA, unlike traditional discrimination law, is centrally concerned with the affirmative obligations of employers.").

[33] The ADA's definition of "reasonable accommodation" provides a nonexhaustive list of possible accommodations, including:

> (A)making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

[34] *See* Issacharoff & Nelson, *supra* note 22, at ___?

[35] The same distinction can be viewed from the employee's perspective as the difference between the ADA's positive right to receive reasonable accommodation and Title VII's negative right not to be the subject of differentiation. *Cf.* Elizabeth Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1175, ___ (2002)(describing the dichotomy between positive and negative rights and divergent views about which kind of rights the ADA entails).

[36] See Schwab & Willborn, *supra* note 12, at ___. For a discussion of recent scholarship exploring similarities between antidiscrimination and accommodation, see *infra* Part IIIA2(a).

mandate explicitly requires that some persons (because of their disabilities) receive different treatment. Put more directly, Title VII requires employers not to take race into account in making employment decisions; consequently, it requires employers to treat white employees and black employees identically. The ADA, by contrast, sometimes directs an employer to treat an employee with a disability differently from an employee who has no disability. To some, this requirement of different treatment in the ADA (often called "special treatment"[37]) marks it as the antithesis of a civil rights statute.

Some have argued that the ADA's requirement of individualized consideration further distinguishes the ADA from the typical civil rights command of equal treatment. Rather than requiring that employers accommodate some generic disability, the ADA requires an employer to accommodate a particular employee's disability in a way that enables the employee to perform the essential functions of a particular job. Not only will the accommodation provided to a deaf employee differ from that provided to a mobility-impaired employee, but the accommodation provided to a deaf assembly line worker may differ from that provided to a deaf database manager. Thus, commentators have observed that the ADA requires employers to pay close attention to job context and individual detail in a way that is foreign to Title VII compliance efforts. As one Commissioner of the EEOC has written with respect to the individualized and contextual nature of the ADA: "[N]othing could be farther from the traditional civil rights model which holds that equality ensues when everyone is treated exactly the same."[38] While the practical necessity of requiring different treatment in order to achieve the ADA's goal of

---

[37] *See, e.g.,* Rubin, *supra* note 27, at 570 (asserting that the ADA "sometimes directly mandate[s] the provision to the disabled of special treatment"); Tucker, *supra* note 18, at 352 ("That the ADA labels the requisite special treatment as traditional nondiscrimination does not change the fact that more than traditional nondiscrimination is being required ….").

[38] Miller, *supra* note 19, at 519.

including persons with disabilities in mainstream society is relatively straightforward, even some strong supporters of that goal acknowledge the dissonance between ordinary understandings of equal treatment and the requirement of accommodation.[39]

Commentators also have addressed this apparent conflict in more theoretical terms. Professor Lisa Eichhorn asserts that not only is the ADA's definition of "discriminate" more expansive than that of other civil rights laws, its reasonable accommodation component also is built on a different theory of equality. According to Eichhorn, Title VII by and large embodies a "formal equality" model and non-differentiation principles; the ADA includes these principles but goes further and supplements them with an "equal opportunity" model of equality not found in Title VII.[40] Thus, a reasonable accommodation may be necessary to allow a person with a disability an opportunity equal to that enjoyed by her non-disabled peers to demonstrate her job-related capabilities; simple non-differentiation – the typical command of civil rights laws – often will be counter-productive to the goal of equal opportunity.[41]

In sum, commentators have highlighted a number of distinctions between the ADA and other antidiscrimination statutes and, in many cases, have argued that these distinctions render the ADA fundamentally different from the existing antidiscrimination project embodied in those statutes. The asserted differences between the ADA and Title VII, for example, is seen as

---

[39] As Professor Bonnie Tucker points out: "in most cases treating persons with disabilities in the same manner as persons without disabilities serves to exclude persons with disabilities from mainstream society, rather than to include them in mainstream society." Tucker, *supra* note 18, at 344. Nonetheless, she criticizes the ADA for it failure to address directly "the seeming conflict between traditional civil rights principles of equality and the provision of different treatment to accommodate individuals with disabilities. *Id*. at ___. *But cf.* Anita Silvers, *Formal Justice*, in ANITA SILVERS, DAVID WASSERMAN, & MAY MAHOWALD, DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 127 (1998) (observing that equal treatment is not necessarily always the same as identical treatment).

[40] Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575, 593-94 (2002).

[41] Others have echoed this distinction in contrasting "formal equality" with "substantive equality" or "material equality," principles of equality employed in international human rights law. *See* Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535, 542? (2001).

depriving the ADA of the moral authority that imbued the civil rights movement and its legislative progeny. This perceived dilution of the ADA's moral content may have consequences in terms of both the statute's popular acceptance and its interpretation by the judiciary. From a popular perspective, the ADA may be viewed as granting special benefits (in the form of accommodations) to members of a protected group without adequate moral justification.[42] From the courts' perspective, perceived distinctions between the ADA and Title VII may prompt judges to interpret the ADA's ambiguities inconsistently with a civil rights vision of the statute and instead consistently with a welfare reform vision of the statute.[43] Indeed, a number of commentators have attributed the courts' increasingly restrictive interpretations of the ADA as flowing from the courts' unwillingness "to fully embrace the concept of equality reflected in the ADA."[44]

Because a perception of the ADA as different from other antidiscrimination legislation may weaken both popular and judicial support for the statute, thereby sapping its ability to function as "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[45] the time is ripe for an effort to reestablish the ADA as part and parcel of our country's antidiscrimination project. To that end, this Article will examine, in Part II, the theoretical basis developed in the field of disability studies for equating a failure to accommodate with discrimination. Then, in Part III, the Article will examine the

---

[42] *Cf.* Rubin, *supra* note 27, at 566. Although he is primarily addressing the claims leveled against laws prohibiting discrimination based on sexual orientation, Rubin makes the point that the claim of special rights is "rhetorically powerful … because it tars antidiscrimination law with the brush of … preferences. Many Americans believe such preferences amount to discrimination against those who do not receive them and that they are antithetical to the idea of equal treatment for all."

[43] *Cf.* Bagenstos, *supra* note 13; Pendo, *supra* note 35, at ___ (noting tensions between the view of the ADA as addressing a civil rights problem and the view of the statute as providing a social safety net).

[44] Diller, *supra* note 10, at 47-48; *see also* Tucker, *supra* note 18. *But see* Bagenstos, *supra* note 13.

[45] 42 U.S.C. § 12101(b)(1)(stating Congressional purpose).

similarities between the ADA's requirement of reasonable accommodation and several strands of Title VII antidiscrimination law to demonstrate the two statutes' basic kinship.

II. Models of Disability, Justice for Persons with Disabilities, and the ADA's Prohibition against Discrimination

On their faces, the just-described characterizations of the ADA's reasonable accommodation requirement as essentially different from other antidiscrimination statutes carry some weight. In a political and legal culture in which "equal treatment" is often understood to entail identical treatment, the ADA's requirement that covered entities at times treat disabled persons differently from non-disabled persons appears to preclude – rather than ensure – equal treatment for disabled citizens. Examining these points of difference in light of developing scholarship on the nature and meaning of disability, however, reveals that the distinctions articulated in Part I do not support a conclusion of fundamental difference. Thus, this Part will first examine briefly the evolving theoretical understandings of the nature of the phenomenon called "disability" and then will proceed to demonstrate how the minority group understanding of disability supports a vision of reasonable accommodation as an antidiscrimination measure.

A. Medical and Social Models of Disability

Over the past fifteen years, a body of scholarship on the philosophical and moral nature of disability has emerged and now flourishes. Scholars whose work falls into the discipline of "disability studies" have examined and described evolving social understandings of disability. Within the past several years, this work has gained the attention of the legal academy, and legal scholars addressing issues arising from the enactment and enforcement of the ADA have begun

incorporating into their work the research and insights of disability theorists.[46] Without providing a comprehensive description, this subpart will explain briefly the understandings of disability embodied in what have come to be called the "medical model" and the "social model" of disability. An awareness of these models will permit a richer appreciation of the minority group, or civil rights, model of disability that undergirds the ADA.

The "medical model" of disability refers to the view of disability that traditionally has been dominant in American society. Under this view, "disability" is understood as a personal trait of an individual: an innate, biological trait that leaves the disabled individual in need of assistance to remediate the effects of the disability. Appropriate assistance is understood as medical efforts to "cure" or minimize the trait's effects or as rehabilitation efforts to allow the individual to overcome its effects. In this vision of disability, a person's disability is her own personal misfortune, for which there exists neither social cause nor social responsibility. Thus, any efforts that society undertakes in response to disabled people may be characterized as charitable efforts to respond to their neediness.[47]

In contrast to this "medical model," disability theorists have advanced an understanding of disability in which disability exists not solely in a person's body, but in the interaction between the person's body and its environment. The "social model" of disability thus recognizes that the disadvantages often associated with disability do not flow inevitably from mental or physical impairments per se, but instead flow from social systems and structures.[48] Society has

---

[46] *See, e.g.,* Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1 (1999); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397 (2000); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621 (1999); Pendo, *supra* note 35.

[47] *See* Crossley, *supra* note 46, at 649-52.

[48] Scholars who assert a social model of disability do not deny the biological reality of impairment or the existence of some limitations and (sometimes) pain unavoidably related to some impairments. They do, however, reject the

constructed barriers – physical, institutional, and attitudinal – that prevent persons with disabilities from participating fully in the mainstream of life; hence these barriers are not "natural."[49] This "social construction" of disability is fairly easy to grasp when one considers the dominant disadvantages experienced by persons using wheelchairs. A person who cannot walk may certainly experience the "natural" disadvantages associated with this inability as a loss, but more limiting is the inability to enter public buildings accessed exclusively by stairs, to use public transportation that is inaccessible, or to frequent sites with narrow restroom stalls. Similarly, a person who becomes deaf may mourn the loss of listening to music or hearing laughter, but is likely to suffer far graver injury from society's near universal adoption of telephonic communication systems that exclude him from participation in employment and social life.[50] In this view, the primary harms experienced by persons with disabilities are the products of social expectations and arrangements and conventional methods of physical construction.[51]

B. From the Social to the Political

Once one recognizes that the primary disadvantages associated with disability are the result of social practices and structures, rather than simply being the unlucky result of some

---

assertion that "the disabled" somehow constitute a distinct and inferior biological class and instead insist that it is the social response to biological reality that constructs disability.

[49] *See* Crossley, *supra* note 46, at 653-54.

[50] Recognizing the social construction of disability need not discredit medical or technological attempts to cure or ameliorate the impairment giving rise to a disability, for the "natural" losses associated with disability may lead some individuals to pursue all possible methods of cure or remediation. For example, the first deaf Miss America, Heather Whitestone McCallum, recently decided to have cochlear implants surgically implanted in her ears to allow her to hear notwithstanding her profound deafness. Ms. Whitestone has served for years as an advocate for deaf people. It was ultimately the inability to hear her children's cries for help that led her to choose the implants. *See* Jonathan Bor, *Beauty Queen Chooses to Hear her Baby's Cry*, BALTIMORE SUN, Sept. 21, 2002, at 1A.

[51] As Susan Wendell writes: "Societies that are physically constructed and socially organized with the unacknowledged assumption that everyone is healthy, non-disabled, young but adult, shaped according to cultural ideals, and, often, male, create a great deal of disability through sheer neglect of what most people need in order to participate fully in them." SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS OF DISABILITY 39 (1996).

"natural lottery," the claim that society – having caused the disadvantage – has some responsibility to remedy the disadvantage follows naturally.[52] This demand that society undertake to remedy the disadvantages that it has caused for people with disabilities is the core intuition underlying an understanding of disability that politicizes the social model described above. Variously labeled the minority group model,[53] the civil rights model,[54] and the social-political model[55] of disability, the essence of this understanding of disability is that people with disabilities are a minority group who historically have had, and continue to have, their civil rights violated both by prejudice and by entrenched patterns of exclusionary and segregating behavior on the part of the non-disabled majority.[56] The dominant majority's attitudes and conventions have resulted in the devaluation of disabled people and their direct and indirect exclusion from opportunities to participate socially, economically, and politically in our society.

Proponents of this approach to disability, which I shall refer to here as the minority group model of disability, consciously link their call to political action to the civil rights movements of other disadvantaged minority groups. They highlight how views of disabled people as biologically inferior, stereotypical assumptions about the incapabilities of disabled people, and negative attitudes towards and stigma attached to people with disabilities all can be analogized to the similar experiences of racial minorities and women.[57] While recognizing their limits,

---

[52] *See* Ron Amundson, *Disability, Handicap, and the Environment*, J. SOC. PHIL., Spring 1992, at 113 ("Someone whose disadvantage occurs as a result of a social decision has a more obvious claim for social remediation.").

[53] *See* Harlan Hahn, *Civil Rights for Disabled Americans: The Foundation of a Political Agenda*, IN IMAGES OF THE DISABLED, DISABLING IMAGES (Alan Gartner & Tom Joe eds. 1987).

[54] Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1355-59) (1993).

[55] *See* JEROME E. BICKENBACH, PHYSICAL DISABILITY AND SOCIAL POLICY (1992).

[56] *Cf.* LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 10 (1995)(advancing "idea that in an ableist society, the 'normal' people have constructed the world physically and cognitively to reward those with like ability and handicap those with unlike abilities").

[57] *See, e.g.,*Hahn, *supra* note 53, at 192 (noting that "widespread presumptions of biological inferiority" regarding disabled people are "the same assumptions that have been used to oppress other minorities"); *cf.* WENDELL, *supra* note 51, at mid-late 20s (asserting that belief that "the disabled" is a biological category is similar to the belief that

proponents of a minority group model use these analogies to place people with disabilities firmly in the company of those to whom society owes a political response vindicating their civil rights.

According to the minority group model of disability, it is only because people with disabilities are a devalued and marginalized minority that society has deemed unremarkable, natural, and entirely acceptable the exclusionary barriers that it has erected. If we expect only able-bodied people to work, shop, ride public transportation, engage in the political process, attend movies, etc. – in other words, if we assume disabled people are rare and are neither inclined to nor capable of doing these things – then it makes sense to create and maintain a society designed solely for the able-bodied. The philosopher Anita Silvers, one of the leading theorists of a minority group model, employs the exercise of "historical counterfactualizing" to demonstrate how these assumptions depend on the minority status of people with disabilities. This exercise asks how our social landscape would look different if people with disabilities constituted a dominant group in society.[58] Given a hypothetical state of affairs in which deaf people, for example, were a dominant social group, it is hard to imagine that our society would be as dependent as it is on telephonic means of communication or the predominantly (often exclusively) oral transmission of information in public venues. Silvers argues that the imposition of such needless impediments to participation "makes people with disabilities feel as if their flourishing is held hostage to the satisfaction of other peoples' gratifications and whims purely because they are a nondominant minority."[59]

"Black" is a biological category "in that it masks the social functions and injustices that underlie the assignment of people to these groups").

[58] Anita Silvers, *Reconciling Equality to Difference: Caring (F)or Justice for People with Disabilities*, HYPATIa, Winter 1995, at 48. Silvers reasons: "By hypothesizing what social arrangements would be in place were persons with disabilities dominant rather than suppressed, it becomes quite evident that systematic exclusion of the disabled is a consequence not of their natural inferiority but of their minority social status." *Id.*

[59] Silvers, *supra* note 39, at 106.

While Silvers' explanation of disadvantaged status focuses primarily on the fact that disabled people have historically been a powerless minority, Harlan Hahn, a political scientist whose work has also influenced this model, argues that the negative attitudes of the dominant majority towards the disabled minority have figured substantially in fostering environmentally produced disadvantage.[60] Hahn asserts that all aspects of the environment (including those aspects that act as barriers to the participation of people with disabilities) are fundamentally shaped by public policy and that those policies reflect pervasive social attitudes and values.[61] Because the attitudes influencing policy decisions include unfavorable attitudes towards persons with disabilities, the socially constructed barriers that people with disabilities encounter are not mere happenstance, but are traceable to the widespread negative attitudes towards the disabled.[62]

Certainly, those who espouse a minority group understanding recognize that some of the harms experienced by persons with disabilities result from prejudiced decisions.[63] Nonetheless, they see the most extensive hindrances to disabled peoples' meaningful participation in society as lying in the features of everyday life – features unremarkable and apparently benign to those who have never viewed them through the lens of disability – that act to bar disabled people from taking part alongside their non-disabled peers. This exclusion from social, economic, and

---

[60] *See* Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective,* 14 BEHAVIORAL SCIENCES & L., 41, 53 (1996).

[61] Hahn, *supra* note 53, at 184 ("Structures are built, messages are transmitted, and institutions are created, primarily because law, ordinances, and regulations permitted them to be constructed in that manner.").

[62] Hahn, *supra* note 53, at 184. *See also* CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT (1988) (advancing thesis that early public policy in the U.S. created a disabling atmosphere that translated physical abnormalities into social inferiority).

[63] *See* Jane West, *The Evolution of Disability Rights*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT ? (Jane West, ed. 1996) (asserting that prejudice and barriers comprise the two aspects of discrimination against persons with disabilities).

political participation constitutes a violation of the civil rights of disabled people and supports a claim against society that their rights be vindicated.[64]

C. The Political Morality of the Minority Group Model: Justice for Persons with Disabilities

Of course, a claim that persons with disabilities are materially disadvantaged by the commonplace violation of their rights in our society begs the logically prior question of what rights disabled people in our society should have by virtue of their disabilities. What is a just society's obligation to respond to and somehow remedy the profound social, economic, and political inequalities experienced historically, and to a lesser degree today, by persons with disabilities? The question of what rights a society should accord people with disabilities is essentially a question of political morality that is deeply intertwined with broader questions about how rights in a just society should be determined. Without plunging into the vast literature on that fundamental question, this subpart will examine briefly some of the attempts by scholars to address what society owes people with disabilities, and will focus on how equality-based theories of justice for people with disabilities dovetail with the minority group model of disability.

For much of this country's history, its policies towards persons with disabilities have reflected understandings of disability either as a category within the welfare state that entitles one to social support and exempts one from the obligation to work to support oneself,[65] or as an economic problem to be addressed through the rehabilitation or "fixing" of disabled people to

---

[64] *See* Drimmer, *supra* note 54, at ? (characterizing claims as demands for "basic civil rights necessary to combat the negative effects of cultural labeling and subordination").

[65] *See generally* DEBORAH A. STONE, THE DISABLED STATE (1984*); see also* Matthew Diller, *Dissonant Disability Policies: The Tensions between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003 (1998).

allow them to engage in productive work.[66] Within the past three decades, however, disability policy in the U.S., while not entirely abandoning its welfarist and economic commitments, has reoriented itself to pursue goals understood in terms of the equality of people with disabilities. This quest for equality for people with disabilities reflects a normative commitment to equality as a matter of justice, rather than simply charity or medical improvement, for people with disability.

1. Distributive Justice approaches

A number of philosophers have addressed the question of justice for persons with disabilities as a problem of distributive justice, considering whether and how resources should be redistributed in order to compensate disabled persons for their natural limitations.[67] For example, Norman Daniels engages in a Rawlsian analysis of how distributive justice might function to provide persons with disabilities with fair equality of opportunity, notwithstanding their impairments.[68] According to Daniels, because physical and mental impairments affect a person's range of opportunities to make life choices, they deny the disabled individual a fair equality of opportunity, which is a primary social good. Accordingly, a just society should give priority to providing health care services that may restore to normal functioning an individual with an impairment.[69]

Ronald Dworkin similarly views disabilities as creating impediments to a wide range of life choices, but in his understanding, a just response to this narrowing of opportunities lies not

---

[66] *See* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 19-24 (2d ed. 2001) (describing federal vocational rehabilitation programs).

[67] Much of the discussion that follows is drawn from David Wasserman, *Distributive Justice,* in ANITA SILVERS, DAVID WASSERMAN & MARY B. MAHOWALD, DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY (1998).

[68] *See* Norman Daniels, *Equality of What: Welfare, Resources, or Capabilities?*, PHIL. & PHENOMENOLOGICAL RES. 273 (Fall 1990 supp.); *see also* Norman Daniels, *Justice and Health Care*, in HEALTH CARE ETHICS 290 (Donald VanDeVeer & Tom Regan eds. 1987).

[69] *Id.* at 281.

redistributing resources to allow for the medical correction of the disability, but in directly compensating disabled individuals for their constricted choices.[70] Dworkin's compensation scheme is based on a hypothetical insurance market, with the idea being that a disabled individual should receive a payment that reflects the amount of insurance that a person ignorant of his actual abilities could be expected to purchase against that particular disability in the hypothetical market. In theory, purchasers in this hypothetical market would make judgments based on the degree to which various disabilities would likely interfere with their life plans; thus the payoff directly compensates for the restriction of opportunities, not for the physical or mental impairment per se.

Several vexing issues arise in discussions of possible distributive justice responses to the inequalities experienced by people with disabilities. One issue involves how to provide some level of compensation to individuals with disabilities without risking a total hijacking of social resources.[71] Another difficulty lies in the individualized focus of the redistributive scheme, which would allow payments to individuals to compensate for restricted choices, but would not necessarily translate into actual modifications of social structures to permit those individuals a broader range of choices.[72] Yet a third question is why disabled people, but not simply untalented persons, should receive compensation for their loss in the natural lottery.

This third question requires us to step back for a moment and ask why (in a society characterized by many kinds of inequality) is inequality associated with disability deemed a "problem" for which justice demands some solution? Why is it not simply another one of the inequalities that is inevitable and tolerable (at least within some limits) in a competitive,

---

[70] *See* Ronald Dworkin, *What is Equality? Part 2: Equality of Resources,* 10 PHIL. & PUB. AFFAIRS 283 (1981).
[71] *Cf.* Wasserman, *supra* note 67, at 181 (suggesting problem of social hi-jacking).
[72] David Wasserman characterizes this a "limitation[] of any approach that conceives distributive justice as a matter of dividing society's resources into individual shares." *Id*, at 169.

capitalistic society?[73] As Anita Silvers points out: "Democratic morality inveterately condemns artificial inequalities stemming from social arrangements, particularly if individuals are unwarrantedly penalized because they are identified with an unfairly disparaged group. In contrast, the democratic point of view does not likewise uniformly reject natural inequalities occasioned by individual disparities of talent, industriousness, or luck."[74] In other words, justice demands a response to the social, economic, and political inequalities that Blacks in this country have experienced as a result of institutionalized racism and segregation, but we do not understand justice to require a response to the social, economic, and political inequalities experienced by groups whom we might label "the untalented" or "the lazy." Where do "the disabled" fit in this analysis?

To some disability theorists, the suggestion that disability might be deemed a source of "natural" inequality sounds disturbingly similar to the medical model of disability, which views disability as a biological or "natural" trait inherent in an individual's body. Even if the "natural" distribution of resources resulting from this difference is deemed inequitable and subject to a distributive justice remedy, a proponent of the minority group model of disability will view a compensatory payment as failing to respond to the fundamental wrong endured by people with disabilities. That wrong lies in how social structures and organizations have functioned to exclude and segregate people with disabilities.

2. Corrective Justice approaches

---

[73] Daniels points out that under a Rawlsian analysis, fair equality of opportunity does not demand absolutely equal opportunity for everyone; instead it simply demands equality of opportunity for similarly skilled and talented persons. While the inequality resulting from differences in skills and talents may not be inherently unjust, the extent of that inequality may be constrained by application of Rawls' Difference Principle. Daniels, *Equality of What?, supra* note 68, at 279-80.

[74] Silvers, *supra* note 39, at 14-15.

Thus, the minority group model of disability supports a different understanding of what a just society owes to people with disabilities. The minority group model views the inequality experienced by people with disabilities as flowing primarily from social arrangements, and not as a "natural" inequality. Consequently, justice requires a response to this inequality, and the response must seek to correct the denial of equal opportunity flowing from exclusionary social structures. This approach to justice for people with disabilities, articulated most prominently by Anita Silvers,[75] includes two points bearing particular relevance to grasping the antidiscrimination character of the ADA. The first point is that, in some instances, equal treatment of people with disabilities requires an individual disabled person to be treated differently from, rather than identically to, a non-disabled peer. The second point is that accommodations, when understood as steps to remove discriminatory and exclusionary barriers to disabled persons' participation in society, are properly seen as instruments of equality for people with disabilities, rather than as special benefits.

a. Does equal treatment require identical treatment?

As noted previously, a dominant understanding of antidiscrimination laws in the U.S. is that those laws compel the equal treatment of persons without regard to personal characteristics – for example, race, sex, or religion – deemed to be legally out of bounds. From this flows the idea that policies must be implemented and decisions made in a "color-blind" fashion in order to advance the cause of equal treatment.[76] This understanding of equality comports with the Aristotelian notion that treating persons differently is justified only if there exists some difference between them that is relevant to the decision being made. So, when a hospital decides whom to hire for a nursing job, differences between applicants with respect to their education

---

[75] *See generally* Silvers, *supra* note 39.
[76] *Cf.* Post, *supra* note 24, at 11.

and experience are relevant and are appropriate bases for distinguishing between applicants, while differences of race or sex are deemed irrelevant. In other words, the employer must treat all applicants identically, except to the extent relevant differences justify different treatment. Indeed, this traditional understanding of antidiscrimination laws is reflected in the ADA's prohibition of an employer's "limiting, segregating, or classifying" a qualified individual with a disability in a way that negatively affects the individual's opportunities or status, if the action is because of the individual's disability.[77] This prohibition indicates that if a person is qualified to perform a job,[78] then his disability should be irrelevant to an employer's employment decisions.

As discussed in Part I, however, numerous commentators view the ADA's requirement that in some instances individuals with disabilities receive different treatment in the form of accommodations as departing radically from the traditional understanding of civil rights laws.[79] In essence, these commentators seem to reason that – for a disabled person to be treated equally – that person's disability also must be treated as irrelevant when it comes to an employer's expectations that the person employ conventional modes of job performance and conform to conventional employment policies. In other words, in this view, to treat an employee with a disability equally, the employer should ignore the disability and expect the employee to perform her job's requirements in a fashion identical to how non-disabled employees perform it. An employer who allows the disabled employee to use an alternative mode of performance that accommodates her disability may do so as a favor to the employee, but is not required to do so by equality principles.

---

[77] 42 U.S.C. § 12112(b)(1).
[78] *See* 42 U.S.C. § 12111(8) (defining a qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").
[79] *See, e.g.,* Miller, *supra* note 19, at 519 (stating, with respect to the ADA's individualized accommodations requirement, "nothing could be farther from the traditional civil rights model which holds that equality ensues when everyone is treated exactly the same").

As a practical matter, it is fairly easy to see how pursuit of this "equality means identity" approach in the case of persons with disabilities would often lead to those persons being excluded from opportunities of various sorts. Bonnie Tucker, a deaf law professor gives pointed examples of the exclusionary effect of identical treatment: if …[give e.g.].[80] The result is that equality (identity) of treatment produces inequality of opportunity, while non-identical treatment (in the form of some accommodation) is necessary to allow the individual with a disability an equal opportunity to participate.

Adherents of the minority group model of disability assert that this seeming contradiction demonstrates that the equality that justice demands for disabled persons is not always a matter of simply identical treatment by a human decision maker.[81] In so asserting, they return to the fundamental premise that most inequality suffered by persons with disabilities flows from social and physical structures and practices that serve to exclude them from the mainstream of society. In other words, even if an employer requires all employees to use an identical mode of performance, if that mode of performance unequally burdens persons with a particular disability, then the employer has not treated an employee with that disability equally, notwithstanding the identical treatment. Silvers provides a canine example. If she instructs her dog-sitter not to favor either of her dogs (a Great Dane and a dachshund) and the dog-sitter places each dog's food dish on a four-foot high table, has the dog sitter followed her instructions? Silvers argues that although the dog-sitter has treated the dogs identically in how she placed their dog dishes,

---

[80] Tucker, *supra* note 18, at 344. Even Tucker, however, equates "equal" treatment with identical treatment, as revealed by her conclusion at the end of the examples she provides: "To achieve [the goal of inclusion into mainstream society], I need to be treated differently from, *not equally to*, my hearing peers." *Id.* at __ (emphasis added).

[81] *Cf.* Silvers, *supra* note 39, at 126 ("the ADA does not reduce equality of treatment to any treatment that is the same"); Bickenbach, *supra* note 55, at 236 ("though common, the objection [to accommodations] trades on an equivocation of equality and identity").

she has not fed them equally.[82] Similarly, if the door to a meeting room in a building accessible only by stairs is held wide open, does that mean that walkers and wheelchair users have been treated equally with respect to their ability to participate in the meeting?

Ultimately, if the inequality that the ADA seeks to remedy flows not simply from humans' discriminatory decisions, but primarily from physical and social structures' unequally felt exclusionary effects, that inequality can be reduced or eliminated only by acknowledging and remedying those exclusionary effects.

b. Accommodations: when non-identical treatment promotes equality

Once we understand that equal treatment for persons with disabilities does not necessarily consist of identical treatment, a question arises as to what variation in treatment will promote equality. Silvers argues that the ADA promotes the view that justice requires that people with disabilities enjoy access and opportunities similar to that enjoyed by their non-disabled peers.[83] Under this view, the reasonable accommodations mandated by the ADA are mechanisms for refashioning the exclusionary features of a practice or place in order to allow the participation of people with disabilities; these barriers are not natural, but are instead "oppressive social arrangements [that] stifle talent, improperly elevating those with less natural ability over those more gifted."[84] So understood, accommodations are not special benefits that advantage the disabled individual in comparison to her non-disabled peers.[85] The removal of barriers does nothing more than to provide persons with disabilities with an opportunity to demonstrate

---

[82] Silvers, *supra* note 39, at 127.
[83] *Id.* at 120.
[84] *Id.* at 112
[85] *Id.* at 132

whatever competence and talents they are endowed with, so that their strengths and talents might add to the community.[86]

Silvers thus argues that what she calls "formal equality" is obligatory for persons with disabilities; her use of that phrase, however, may be jarring for those conversant in civil rights jargon. "Formal equality" typically is used to refer to a judicial approach to equal protection doctrine or antidiscrimination law that limits scrutiny to the question of whether groups receive facially similar treatment, without considering the potentially different impacts of that treatment.[87] This principle, standing alone, however, does not indicate when some relevant difference between individuals or groups makes different treatment just. Typically, the question is whether the persons involved are indeed "similarly situated" (in which case justice requires similar treatment) or are somehow different in a morally relevant aspect (in which case different treatment may be justified).

Silvers, however, rejects individuals' physical or mental impairments as differences justifying different treatment, because physical or mental impairment is not morally relevant to whether the individuals should be able to participate fully in the mainstream. Instead, Silvers looks to the difference in the effects that conventional structures and practices have on disabled and non-disabled people. And if those structures and practices have an exclusionary effect on people with disabilities, then they are presumed to be unjust in producing inequality.[88] Thus, the relevant moral difference between persons with disabilities and those without lies not in any

---

[86] *Id.* at 112, 139. Silvers contrasts this view of justice with a distributive justice approach, which she views as distributing "entitlements, benefits, and other compensatory allocations … to individuals deemed eligible because they are disabled [with the aim of] equalizing the wellbeing of people considered too incompetent to fend for or support themselves." *Id.*

[87] *See* Eichhorn, *supra* note 40, at ___; Mayerson & Yee, *supra* note 41, at ___.

[88] Silvers recognizes, however, that even some practices with exclusionary effects may be tolerable because no less exclusionary alternative practices would adequately serve the purpose of the employer. But by shifting the burden of justifying the exclusionary effect to the actor employing the practice, she claims to employ a formal mechanism that can effect substantive change. Silvers, *supra* note 39, at 113 n.199.

differences in their mental or physical makeup, but in the divergence in how they experience existing structures and practices.

So viewed, this relevant moral difference between disabled people and non-disabled people justifies different treatment, and an equality-centered understanding of justice demands that this different treatment be focused on ending disabled people's exclusion, rather than on attempting to compensate them for their impairments. Silvers characterizes this as focusing on *equalizing practices*, in contrast to the distributive approach's attempt to elevate persons.[89] If practices are equalized, the unjust discriminatory effects of existing conventional structures and practices can be mitigated and disabled peoples' ability to participate equally in society will be enhanced. Once practices are equalized (*i.e.*, barriers are removed), then the identical treatment of persons with disabilities by human decisionmakers should be sufficient to ensure justice for persons with disabilities.

D. But is a failure to accommodate really discrimination?

Having examined the argument that justice for persons with disabilities requires their inclusion in society, with opportunities to demonstrate their capabilities and talents equal to those enjoyed by non-disabled persons, let us return to the assertion that the accommodation requirement renders the ADA alien to other antidiscrimination laws. The objection, you may recall, is that the ADA mandates the provision of special benefits to persons with disabilities, rather than simply requiring equal treatment, as antidiscrimination laws are typically characterized as doing. In other words, providing accommodations gives to individuals with disabilities an advantage that non-disabled people do not enjoy; rather than leveling the playing

---

[89] *Id.* at 126.

field, accommodations tilt it in favor of people with disabilities. How compelling is this objection when viewed in light of the minority group model of disability?

1. Two Articulations of the Strong Claim that Failure to Accommodate Equates to Discrimination

One persuaded that our society is riddled with a range of barriers functioning to exclude persons with disabilities from participating in the social, economic, and political mainstream might make the claim that a legal requirement to make reasonable accommodations is simply an order to stop discriminating through the process of socially constructing disability. In other words, if our society (both collectively and in its individual members) has been erecting barriers that deprive disabled people of opportunities, that process itself can be seen as inherently discriminatory. In that light, an order to "stop discriminating" will require employers and other entities covered by the ADA not only to stop building new barriers, but also to dismantle barriers already in place. Just as an order to take down a "whites only" sign over a drinking fountain is viewed not as a special benefit for Black people, but as ending discrimination, so should the obligation to remove a less overt barrier to a disabled person's participation be viewed.

Indeed, some disability theorists and disability rights advocates make the strong claim that the maintenance of existing barriers is the equivalent of "real" discrimination and that therefore a legal obligation to provide accommodations removing those barriers is nothing more than an order to stop discriminating. This view is consistent with the ADA's defining "discriminate" to include failing to provide reasonable accommodations.

Another, more nuanced way to state the strong claim is to point out that our whole understanding of what constitutes an "accommodation" is premised on existing, conventional structures and practices in the workplace and other settings. Although the regulatory definition of a reasonable accommodation for ADA purposes focuses on modifications or adjustments to

workplace structures and practices to enable a disabled person to perform a job,[90] we know that the term "accommodation" is not inherently limited to something that disabled people seek, but instead means a thing "supplied for convenience or to satisfy a need." Indeed, we can view existing workplace structures and practices as already accommodating the needs of most non-disabled workers. It is only we because we see people with disabilities as somehow different from the "normal," non-disabled majority and because most workplaces have not been constructed or managed with the needs of a broad range of individuals in mind that we view a disabled person's request for a workplace that enables her to do her job as a request for something "special."

To illustrate the point, let us imagine an employer that employs many persons in computer data-entry positions and that has, by intention or chance, historically employed a large number of employees who use wheelchairs. As a result, this employer has saved money by not having to purchase chairs or other seating for many of its offices and cubicles. When a newly hired ambulating employee arrives at his cubicle to begin work and asks for a chair to sit in (since he is otherwise *not able* comfortably to hold himself at a level appropriate for computer work), should we see him as requesting an *accommodation*?[91] I would venture that most people are unlikely to view this request as a request for an accommodation. But isn't the difference between the walker's request for a chair and a wheelchair user's request for a ramp really just

---

[90] *See* 29 C.F.R. § 1630.2(o).

[91] *See* Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 401? (2001)(pointing out that the non-disabled majority are "accommodated in all manner of ways by social and architectural structures" and giving illustration that only wheelchair users bring their own chairs to meetings).

based on the fact that the chair request is consistent with the majority's self-reflexive understanding of "normal" job needs?[92]

Thus, we are tempted to view the accommodations requested by persons with disabilities as a request for "special" or "extra" benefits because we understand existing workplace structures as providing the appropriate baseline for what employers should provide.[93] But why we should accept the appropriateness of existing structures is by no means clear. Certainly, workplaces and most public settings historically have not been built to assure accessibility for people with a broad range of physical capabilities and limitations; instead a norm of unlimited physical ability is immanent in their structure. Indeed, Professor Jerry Mashaw has suggested that the tendency historically to build exclusionary workplaces may provide an adequate justification, even for libertarians, for legal rectification:

> [I]t is … true that the structure of jobs or tasks that confront many disabled persons are both arbitrary (in the sense that they need not have been constructed in that fashion in order to maintain efficiency or competitiveness) and malleable. … Are job categories that are less inclusive than they could be part of a set of fair-transactions rules for the acquisition and transfer of property? Indeed some aspects of shop or office design … could be seen as locking the disabled out of the workplace, i.e., as a coercive denial of access to the capital and organizational resources necessary to be productive.[94]

In other words, our view of accommodations as something special for disabled people fails to appreciate that our society constantly accommodates the needs of the non-disabled

---

[92] *See* Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy*, 92 COLUM. L. REV. 1, 2-3 (1992). Sunstein makes the point in the context of when the government should be understood as acting to favor one group:

> Of course, notions of formal equality are based on norms that are usually unarticulated and indeed reflexive but that are part and parcel of existing distributions – as in, for example – the use of the physical capacities of men as the baseline from which to decide whether women have been treated unequally.

[93] *Cf.* Mayerson & Yee, *supra* note 41, at 542 n.29 ("If society were built to be inclusive, there would be no extra costs involved in access. Therefore, viewing access as costly creates a hierarchy where nonaccessible is 'normal' and 'access' abnormal.")

[94] *See* Mashaw, *supra* note 20, at 222.

majority. We just don't see those accommodations because of the ableist ethic that suffuses our society.[95] We fail to recognize how much of the existing workplace scheme is built around the *needs* of the non-disabled,[96] and we assume that this existing scheme is maximally productive just the way it is and that, consequently, any accommodation altering the dominant scheme will increase workplace cost and decrease productivity. Disability theorists (and other skeptics) challenge this assumption, asserting that while existing workplace practices and structures may suit the convenience of and advantage the non-disabled majority, they are not in any sense "natural" and may impose real costs.[97] From this perspective, disabled people who request the reasonable accommodations guaranteed by the ADA are simply demanding the same thing that non-disabled employees receive as a matter of course – the tools reasonably necessary to allow them to perform a job. Providing those tools without a second thought to non-disabled employees, but refusing the requests of employees with disabilities is indeed discriminatory.[98]

---

[95] *See* Asch, *supra* note 91; *cf.* Barbara J.Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking,* 104 Yale L.J. 2009 (1995) (suggesting notion that race is transparent to whites).

[96] *Cf.* Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 599, 645-46 (2000)(suggesting that able-bodied persons are dependent on many features of the existing social framework, such as the public provision of potable water and police protection, but that this dependency is not stigmatized like the dependencies of persons with disabilities).

[97] *See* Mashaw, *supra* note 20, at 235 (noting that, if everyone used wheelchairs, constructing buildings with low ceilings would produce both construction and energy savings); Silvers, *supra* note 39, at 110? (suggesting that the power of the majority, rather than a natural evolution towards maximal productivity, drove the development of the dominant cooperative scheme).

[98] One objection to this point is that an employer who fails to provide a requested accommodation to a person with a disability is not discriminating against that person based on the person's disability, but based on the cost of the "tool" that the person seeks. In other words, one might argue, the refusal to accommodate can be seen as discriminatory in the way described in the text *only* if the tool (accommodation) requested by the disabled worker is no more expensive than the tools ("normal" workplace environment, policies, and practices) that the employer provides to non-disabled workers. If there is a discrepancy in cost, then the employer is not discriminating based on disability, but is instead simply make a rational business decision aimed at maximizing profits. This objection lacks force for two reasons. First, as Professor Bagenstos has demonstrated, the characterization of a refusal to accommodate as "rational discrimination" does not justify a conclusion that it is tolerable under antidiscrimination principles. Instead, established Title VII doctrine makes clear that employers are prohibited from engaging in rational, profit-maximizing discrimination on the basis of race or sex, and nothing in the ADA suggests that Congress intended that statute's "clear and comprehensive national mandate" for eliminating disability discrimination should exempt "rational discrimination." *See* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003)(forthcoming). Second, while the ADA contains no exception for "rational discrimination," it does limit the costs that an employer is

This focus on how existing, conventional structures and practices advantage the non-disabled majority harmonizes with the minority group model's assertion that these structures and practices – rather than impairments per se – are the source of exclusion for people with disabilities. It also emphasizes the contingent and plastic nature of those structures and practices,[99] an emphasis that echoes the reasoning employed by legal scholars examining how race discrimination and sex discrimination may be built into workplace structures, a theme that Part III will explore more fully.

It is worth noting now, however, that legal scholars examining the nature of legally mandated accommodations generally have also recognized that, at least in some instances, an accommodation mandate functionally parallels a prohibition of discrimination.[100] Professor Mark Kelman recognizes that "current workplace arrangements" may prevent an individual from performing a job competitively. He asserts, however, that if the employer in such a situation could change its arrangements to enable that employee without incurring any costs, a failure to do so could be seen as an instance of simple discrimination.[101] Thus, Kelman appreciates that refusing to provide a cost-free accommodation requested by a person with a disability would equate to treating that person differently because of her disability. Kelman also suggests that a refusal to provide a cost-imposing accommodation can sometimes be seen as an instance of

---

required to should in order to accommodate an employee, for employers are not obliged to provide an accommodation that the employer can show would impose an "undue hardship" on the employer's business operations. 42 U.S.C. § 12112(b)(5)(A). Although "undue hardship" provides only an indeterminate standard for limiting an employer's accommodation obligation, the statutory text makes clear that expense is a factor in determining whether "undue hardship" has been shown. 42 U.S.C. § 12111(10)(defining "undue hardship").

[99] *Cf.* Karlan & Rutherglen, *supra* note 12, at 38 (noting that the ADA incorporates an "explicit understanding of the contingency of existing job configurations).

[100] Christine Jolls, for example, suggests that, in the absence of accommodations for pregnancy, a workplace that is physically and socially constructed around a male norm can be seen as inherently discriminating against pregnant women. Similarly, according to Professor Jolls, once it is apparent that existing workplace conditions result in clearly unequal access, a failure to accommodate can be seen as discriminatory in its acceptance of this inequality. *See* Jolls, *supra* note 28, at 695-96.

[101] *See* Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 846 (2001).

"simple discrimination."[102] In cases where the costs of accommodating are largely transitional in nature – so that the long-run costs of employing the accommodated individual are not atypically high – Kelman recognizes that a failure to accommodate claim can also be presented as a claim of simple discrimination, particularly if the need for the accommodation arose from the employer's previous use of discriminatory policies.[103] Ultimately, an employer who refuses to give a disabled person a tool enabling performance that is no more costly than different tools already customarily provided to non-disabled employees discriminates against the disabled person.[104]

Thus, the strong claim – that a failure to provide reasonable accommodations is the equivalent of discrimination, as that term is used in other antidiscrimination laws – relies heavily on an appreciation of disability as socially constructed. It asserts that conventional structures and practices discriminate by allowing access to nondisabled people, while excluding disabled people, and that employers and other actors who maintain those conventional structures and practices discriminate by continuing to employ these mechanisms of exclusion.

The potential objections to this strong claim are several. The first arises from the disconnect between the ordinary meaning assigned to "discriminate" and the legal meaning that the ADA and the proponents of the minority group model seek to assign to it. The dictionary definition of "discriminate" refers to distinguishing by discerning or exposing differences; it thus

---

[102] Kelman describes the right to be free from "simple discrimination" as the right of putative plaintiffs to be treated no worse by market actors than those actors treat others who are "equivalent sources of money." *Id.*at 834-35. He contrasts this with an accommodation "right," which he defines as "a claim to receive treatment from a defendant that disregards some (though not all) differential input costs." *Id.*at 836.

[103] *Id.* at 846-47.

[104] Kelman's analysis seems to suggest that we should see a claim for accommodation as truly distinct from a claim to be free from simple discrimination only when the accommodation would impose ongoing costs on the employer that result in the accommodated employee having a lower net productivity than other workers.

comports well with the common understanding of discrimination prohibitions as requiring nothing more than refraining from making such distinctions.

Of course, if the strong claim's deficiency lies in its failure to comport with popular understandings of "discrimination," then perhaps some good old-fashioned consciousness-raising on the social construction of disability could close that gap. After all, if we would object to a business that discriminates among whom it will serve by hanging a sign out front saying "no people in wheelchairs allowed," shouldn't we also object to a business that excludes people in wheelchairs by operating in a building accessible only by stairs? The exclusionary effects of the two methods – overt discrimination and the maintenance of a physical barrier – are similar.

But even if we recognize this similarity, our attitudes toward the operators of the two businesses are likely to be different, and this difference suggests another reason that many people (even perhaps some of those who acknowledge the social construction of disability) will reject the strong claim that a failure to accommodate equals discrimination. In the familiar context of legal prohibitions on race or sex discrimination, findings of discrimination are tinged with moral opprobrium. An employer's refusal to hire an applicant based on the applicant's race or sex is broadly viewed as improper and morally blameworthy, so that the law's prohibition of that discrimination coincides nicely with our moral judgments.[105] By contrast, most people are less likely to view as morally suspect an employer's failure to provide an accommodation requested by a disabled employee. They might well applaud a decision to provide accommodations as morally praiseworthy, but view that decision as supererogatory, rather than morally required. This coincidence with moral sensibilities gives civil rights laws prohibiting discrimination much

---

[105] *Accord* Bagenstos, *supra* note 98, at ___.

of their moral authority, and many people may be reluctant to characterize actions that do not appear morally blameworthy as illegal discrimination.

Some disability theorists, however, would dispute any rejection of the strong claim premised on non-accommodators' blamelessness. While non-accommodators may not be personally motivated by prejudice or animus against people with disabilities, disability theorists would point to the historical and current pervasiveness of negative attitudes, stigmatization, and ascriptions of inferiority to people with disabilities.[106] It is because of historical and continuing negative attitudes towards people with disabilities that society tolerates the ubiquity of barriers to their participation. Thus, even if a particular employer feels no hostility to the disabled employee, the refusal to provide an accommodation removing a barrier to the employee's ability to perform her job is made within and supported by this web of negative attitudes and assumptions. From this perspective, one might compare the moral responsibility of the non-accommodating, but non-hostile employer to the moral responsibility of a restaurant owner in the segregated South who excluded blacks from his establishment not because of any personal animus against blacks, but in order to conform to social expectations.[107]

Ultimately, while the ADA defines a failure to accommodate as discrimination and while a sound theoretical argument supports the claim that the failure to remove socially imposed barriers to participation represents the maintenance of a discriminatory environment, some people undoubtedly will continue to object to the strong claim. But insisting that a failure to accommodate is precisely the same as discriminating (as commonly understood) is not the only

---

[106] *See* Hahn, *supra* note 53; Silvers, *supra* note 39.

[107] One might object that this comparison is not apt because providing the accommodation to the disabled employee may impose some cost on the employer, while allowing blacks to enter his business would not cost the Southern businessman anything, and that therefore a failure to open his store to blacks is still more morally culpable than refusing to accommodate. This assumption of no cost may not be accurate in all cases, however, for in the segregated South a decision to allow entry to blacks might have cost him the custom of some of his white clientele.

way to understand the ADA's reasonable accommodation requirement as harmonizing with, rather than fundamentally diverging from, what other antidiscrimination laws require. Instead, if we understand reasonable accommodations as being crucial to the removal of barriers that have acted historically to segregate persons with disabilities and to exclude them from the full benefits of participation in social, economic, and political life, then the ADA's accommodation requirement is compatible with the philosophy and approach of other antidiscrimination laws.

If a major concern of antidiscrimination laws is remedying the inequality of opportunity that flows from exclusionary and segregating practices, then we should be concerned with those practices whether or not they are motivated by prejudice or animus.[108] This point has been long recognized with respect to discrimination against people with disabilities. Some commentators, however, suggest that this anti-subjugation rationale for antidiscrimination laws is fitting only when the prohibited basis for discrimination is truly (and exclusively) a social construct, like race.[109] Only then, the reasoning goes, can we be convinced that the material inequalities experienced by different groups are attributable to societal discrimination, and not to the "real" differences (like age, pregnancy, or disability) between the groups. Of course, the contention that blindness, deafness, an inability to walk, or chronic illness are in and of themselves the origins of the numerous disadvantages experienced by people with disabilities is a throwback to the medical model of disability. We need not deny that there are (morally irrelevant) differences between people with disabilities and those without in order to appreciate that the bulk of

---

[108] *See* Koppelman, *supra* note 7, at __ (referring to meaning of "antidiscrimination project"). This is also what Professor Post refers to as the "sociological account" of antidiscrimination law, which acknowledges that the law seeks the transformation of social practices. *See* Post, *supra* note 24, at 31. *See also* Bagenstos, *supra* note 98, at ___.

[109] *See, e.g.,* Issacharoff & Nelson, *supra* note 22, at 314.

disadvantages suffered by disabled people are environmentally imposed and thus appropriately subject to remedial efforts.[110]

III. Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project

This Part examines various strands of antidiscrimination law that have evolved under Title VII of the 1964 Civil Rights Act in order to demonstrate the kinship between the ADA's reasonable accommodation requirement and the bases for liability that have evolved as courts have implemented Title VII's antidiscrimination command. In other words, I seek to show that – far from being something "different" or "special" to which only persons with disabilities are entitled – the accommodations that the ADA requires are indeed part and parcel of an ongoing antidiscrimination endeavor. To that end, this Part will examine the conceptual similarities and dissimilarities between the ADA's reasonable accommodation requirement and disparate impact theory, hostile work environment liability, and affirmative action. This examination focuses primarily on conceptual, rather than doctrinal, similarities, for the discussion's point is not that liability for failure to provide reasonable accommodations is the equivalent of disparate impact liability or hostile work environment liability – it is not, as a doctrinal matter.[111] Instead, the point is that requiring accommodations for persons with disabilities can be understood as a response to discrimination, a response that emulates holding employers liable for disparate impact discrimination or a hostile work environment.

This Part explores the resemblances between reasonable accommodation and disparate impact theory, hostile environment theory, and affirmative action because these components of

---

[110] *But cf.* Tucker, *supra* note 18, at 365 (asserting that unlike race, disability is an inherent difference and that the function of reasonable accommodations is to "eliminate that inherent differentness").

[111] *Cf.* Henrietta S. v. Bloomberg, __ F.3d __, 2003 WL 21308851 (2d Cir. 2003) (holding that plaintiff in ADA Title II lawsuit based on failure to accommodate need not prove disparate impact as part of her prima facie case).

antidiscrimination jurisprudence bear the most obvious likenesses to reasonable accommodation. It is worth noting preliminarily, however, that even disparate treatment cases display accommodationist tendencies in some instances. Disparate treatment cases, in which the plaintiff alleges that the defendant intentionally discriminated against her by treating her differently from other similarly situated persons based on the plaintiff's race, sex, etc., are typically thought of as presenting the paradigm of equality as symmetry. Nonetheless, in some instances courts deciding disparate treatment claims have found the defendant's legal obligations to extend beyond simply treating everyone identically.

For example, in *Erickson v. The Bartell Drug Company*,[112] a district court held that an employer's exclusion of prescription contraceptives from its health insurance plan, which provided generally comprehensive prescription coverage, constituted discrimination based on sex and thus violated Title VII. In so holding, the court rejected the employer's arguments that its exclusion of prescription contraceptives was a facially neutral, nondiscriminatory exclusion and that it should be permitted to control the costs of providing health insurance coverage by limiting the extent of coverage. The court found that when Congress enacted the Pregnancy Discrimination Act[113] as an amendment to Title VII, "it embraced … [an] interpretation of Title VII which … required employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same."[114] As a remedy, the court

---

[112] 141 F. Supp.2d 1266 (W.D. Wash. 2001).

[113] 42 U.S.C. § 2000e(k). Although the court in *Erickson* cites to and discusses the Pregnancy Discrimination Act, its holding is based on Title VII's general prohibition of sex discrimination without necessary reference to the language of the PDA. "The Court finds that, regardless of whether the prevention of pregnancy falls within the phrase 'pregnancy, childbirth, or related medical conditions,' Congress' decisive overruling of *General Elec. Co., v. Gilbert*…, [in enacting the PDA] evidences an interpretation of TVII which necessarily precludes the choices Bartell has made in this case." 141 F. Supp.2d at 1274.

[114] *Id.* at 1270. The court also cited to a Supreme Court decision accepting the proposition that, in the insurance benefits context, Title VII's antidiscrimination mandate requires coverage that is equally comprehensive for both sexes. *Id.* at 1271(citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)).

ordered the employer to cover prescription contraceptives and contraception-related services under its health plan. Thus, a case like *Erickson* illustrates how a disparate treatment sex discrimination claim[115] may support a remedy requiring an employer to incur costs to provide benefits used only by women. This outcome bears more than a passing resemblance to the idea that the ADA at times imposes on employers the costs of providing accommodations used only by an individual with a disability.

Professor Samuel Bagenstos recently has argued for a broad recognition of the fundamental normative similarities between traditional prohibitions on discrimination and the ADA's accommodation requirement.[116] He examines how Title VII has been found to prohibit rational, non-animus-driven discrimination by employers in a way that interferes with employer profit maximization and argues persuasively that the ADA's accommodation requirement is simply a specific example of the general prohibition on rational discrimination.[117] Moreover, he argues the "the *goals* of antidiscrimination and accommodation are parallel, for both seek to dismantle a system of group based subordination and the patterns of occupational segregation that support the system."[118]

---

[115] The *Erickson* plaintiffs' complaint asserted two claims for relief. The first sought relief on a disparate treatment claim; the second sought relief on a disparate impact claim. After analyzing the disparate treatment claim and concluding that summary judgment for the plaintiffs on that claim was appropriate, the court found it unnecessary to consider the disparate impact claim. *Id.* at 1277. The parties in *Erickson* eventually ended up settling the litigation. Cite. Although *Erickson* was a case of first impression regarding the specific question of prescription contraceptives coverage, the EEOC has adopted the stance that exclusion of prescription contraceptives from health insurance plans that otherwise cover prescription drugs violates Title VII. Cite

[116] *See* Bagenstos, *supra* note 98. Professor Bagenstos focuses on the similarities between the accommodation requirement and disparate treatment law, which he characterizes as the "heartland" of antidiscrimination law – that part of the antidiscrimination project that is least contested as a political matter. *Id.* at ___.

[117] *Id.* at ___.

[118] *Id.* at ___.

Bagenstos' argument builds on recent work by Professors Christine Jolls, *supra* note 28, and Mark Kelman, *supra* note 101, who both recently have examined how two strands of Title VII disparate treatment case law can be viewed as resembling accommodation mandates. Their work points specifically to cases prohibiting "rational statistical discrimination" and discrimination based on customer preferences as requiring employers to assume additional costs in connection with the employment of certain groups. Although these cases do not involve

Thus, scholars have begun to recognize that aspects of disparate treatment law exhibit important likenesses to the ADA's reasonable accommodation requirement. The accommodation requirement's fundamental kinship with the broader antidiscrimination project, however, appears even more clearly when we turn to examining disparate impact discrimination, and to some lesser degree, hostile environment theory and affirmative action.

A. Disparate impact liability and reasonable accommodations

1. A Brief Overview of Disparate Impact Theory

Standing beside the widely recognized disparate treatment model of discrimination – in which an employer (or other actor) intentionally treats an individual differently from other similarly situated individuals because of the individual's race, sex, or other legally illegitimate characteristic – is another type of discrimination, disparate impact discrimination. Under disparate impact theory, the identical treatment of individuals can constitute discrimination if that treatment involves the use of practices or policies that have a disproportionate adverse impact on a protected group. In other words, disparate impact theory finds discrimination in the effects or consequences of an action that is neutral on its face, rather than in the actor's intentionally non-neutral treatment of individuals.

---

alterations to a work environment, they do prevent employers from simply acting in a rational, profit-driven mode in establishing employment selection standards and procedures. In this sense, the mandate of equal employment treatment, notwithstanding the preferences of customers or the employer's desire for maximally efficient selection procedures, resembles an accommodation mandate. *See* Jolls, *supra* note 28, at ___; Kelman, *supra* note 101, at ___. Jolls and Kelman part company, however, on how they ultimately characterize these cases. Jolls asserts that the prohibitions on rational statistical discrimination and customer preference discrimination are effectively accommodation mandates, Jolls, *supra* note 28, at ___, while Kelman concludes that these cases involve claims of "simple discrimination" rather than "accommodation." Kelman, *supra* note 101, at ___. Of course, he also concludes that some requests for reasonable accommodation under the ADA can also be understood as simple discrimination claims rather than accommodation claims. *Id.* at ___.

The Supreme Court first recognized disparate impact theory as a basis for holding an employer liable for violating Title VII in *Griggs v. Duke Power Co.*[119] In that case, the Court found that an employer violated Title VII by using a job qualification criterion that operated to disqualify blacks from employment at a rate substantially higher than it disqualified white applicants and that was not demonstrated to be significantly related to satisfactory job performance.[120] The Court reasoned: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in practice. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be show to be related to job performance, the practice is prohibited."[121] In reaching its decision, the Court emphasized that that "the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[122] Thus, *Griggs* recognizes that discrimination can be found even in the absence of both discriminatory intent and differential treatment, if the practice causing the adverse disproportionate impact is not shown to be tied to job performance.

In the two decades following *Griggs*, however, both the Court and commentators suggested that disparate impact theory might have a more tightly circumscribed application to neutral practices with uneven impacts than the broad language of *Griggs* suggested. Commentators asserted that disparate impact liability should focus on those cases in which evidence indicated that an employer used a neutral practice with the intent of producing a

---

[119] 401 U.S. 424 (1971).
[120] The specific criterion used by the employer was requiring, as a condition of employment in or transfer to certain jobs, either having a high school education or passing a standardized general intelligence test. *Id.* at 851-52.
[121] *Id.* at 853.
[122] *Id.* at 854.

discriminatory effect,[123] and in *Wards Cove Packing Co. v. Atonio*,[124] the Court pulled the teeth from disparate impact theory by making it far easier – both substantively and procedurally – for employer-defendants to show that any disparate impact was justified by business necessity.[125] In the Civil Rights Act of 1991, however, Congress legislatively overruled *Wards Cove* and provided disparate impact theory with clear statutory footing.[126]

Notwithstanding Congress's attempt to establish guidelines for the imposition of disparate impact liability under Title VII, the nature, scope, and precise doctrinal elements of disparate impact theory remain contested. Disagreements exist with respect to the relative importance of disparate impact liability – whether it figures centrally or merely peripherally in the antidiscrimination project – and with respect to whether its primary justification lies in its ability to "ferret out covert, yet intentional, discrimination"[127] or in a more expansive effort to eliminate all discriminatory effects that are not justified by employer needs.[128] Nonetheless, at the very least, the broad contours of disparate impact liability under Title VII are clear: an employer cannot avail itself of practices or policies that produce negative effects disproportionately for members of a protected group unless the employer has a business need for doing so.

2. Recognition of Similarities between Disparate Impact and Reasonable Accommodation

---

[123] *See, e.g.,* Julia Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869; George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987).

[124] 490 U.S. 642 (1989).

[125] Substantively, the Court in *Wards Cove* redefined "business necessity" as requiring only that the practice at issue had some reasonable employer justification, *id*. at 659, and procedurally the Court held that the disparate impact plaintiff bore the burden of persuasion with respect to the absence of a business necessity. *Id.*

[126] The Civil Rights Act of 1991 amended Title VII with the purpose of providing " statutory authority and … statutory guidelines for the adjudication of disparate impact suits under Title VII." Section 3(3) [get statutory cite]

[127] Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1143 (2002)(discussing Rutherglen, *supra* note 123).

[128] *See generally* Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523 (1991).

a. Recent scholarship comparing disparate impact and reasonable accommodation from an economic perspective

In the past several years, a scholarly discussion has begun regarding the extent of similarity between disparate impact liability under Title VII and the ADA's requirement of reasonable accommodations. Two articles published in 2001 sparked this discussion, which has focused primarily on the relative costs and labor market effects of different antidiscrimination approaches.

In *Antidiscrimination and Accommodation*,[129] Professor Christine Jolls argues that some aspects of antidiscrimination law, and most particularly disparate impact law, are in fact requirements of accommodation. For purposes of her analysis, Jolls defines an accommodation requirement basically as a legal rule that requires employers to bear special costs to respond to the particular needs of an identifiable group of employees whom the employer has no intention of treating negatively because of their group membership.[130] She describes several types of cases in which disparate impact liability effectively requires employers to incur special costs in relation to the employment of protected groups,[131] and she argues further that disparate impact liability and accommodation requirements have parallel effects on wages and employment levels.[132] Accordingly, Professor Jolls rejects the contention that laws expressly imposing accommodation requirements require something different or "special" in comparison to traditional antidiscrimination laws.

---

[129] 115 HARV. L. REV. 642 (2001).
[130] *Id.* at 648.
[131] *Id.* at 652-64.
[132] *Id.* at 688-96.

In a similar vein, Professor Mark Kelman, in *Market Discrimination and Groups*,[133] contends that the right to be free from "simple discrimination" and a claim to "accommodation" are distinctive norms that together constitute the norm against discrimination in the marketplace. Kelman defines a right to accommodation as "a claim to receive treatment from a defendant that disregards some (though not all) differential input costs,"[134] and while he views this claim as normatively distinct from a right not to be subjected to simple discrimination, he acknowledges that in some cases it can be quite hard to distinguish the two. In particular, Kelman points to situations in which the additional input costs associated with a statutorily required "accommodation" are temporary and transitional, rather than ongoing. In these situations, Kelman suggests, the employee seeking the inclusion-promoting accommodation may be able to argue forcefully that the failure to include him is an act of simple discrimination.[135] Ultimately, while Kelman appreciates that a norm of inclusion animates both the right to be free from simple discrimination and claims of accommodation,[136] he views the two components of antidiscrimination law as distinct and rejects the assertion that disparate impact law embodies accommodationist ideals.[137]

Professors Jolls' and Kelman's thought-provoking re-examinations of conventional conceptions of antidiscrimination law has stimulated other scholars to test the conventions as well, producing varying conclusions. One commentator concludes that, while employment civil rights policies can best be understood as spanning a continuum from "negative equality" to

---

[133] 53 STAN. L. REV. 833 (2001).
[134] *Id.* at 836.
[135] *Id.* at 845-46. Indeed, Kelman recognizes the success of advocates for disability rights in demonstrating that a failure to provide inexpensive accommodations is a form of simple discrimination. *Id.* at n. 71.
[136] *Id.* at 852.
[137] *Id.* at n. 86. Kelman asserts that the right to be free from simple discrimination is an unqualified right, while a claim to accommodation constitutes a distributive claim on resources to be balanced against other such claims. For an intriguing discussion and criticism of Kelman's analysis, see Bagenstos, *supra* note 98, at 870-900.

"positive equality" to "accommodation," it is "possible to draw meaningful distinctions among legal rules at different points" along the continuum.[138] By contrast, another asserts that, in terms of operation in and effect upon labor markets, not only are "antidiscrimination mandates" and "accommodation mandates" equivalent to one another, but they are equivalent to "universal mandates" as well, in that all three forms of employment regulation operate as intra-employee redistribution tools.[139] In yet a third article, a pair of scholars reject Jolls' claim of overlap between disparate impact and reasonable accommodation and argue instead that the ADA, by mandating "hard preferences" for disabled employees in the form of accommodations, expands prior conceptions of discrimination embodied in Title VII, which imposes only "soft preferences" for groups of employees who had previously been treated less favorably than equally costly and productive employees.[140]

Consequently, we now have a chorus of voices singing (albeit at times disharmoniously) about how reasonable accommodation relates to the traditional norms of antidiscrimination law embodied in Title VII. By and large, however, this recent scholarship has focused its attention on similarities and differences in terms of employer costs, labor market effects, and (to some lesser degree) doctrinal application. It has not considered, in any depth, the conceptual and normative similarities and differences.[141] Likewise, other scholarship centered squarely in

---

[138] J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM & MARY L.REV. 1385, 1410 (2003). In this analysis, "negative equality" corresponds with freedom from disparate treatment discrimination, and "positive equality" corresponds with freedom from disparate impact discrimination.

[139] Sharon Rabin-Margalioth, *Antidiscrimination, Accommodation and Universal Mandates – Aren't They all the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111 (2003).

[140] Schwab & Willborn, *supra* note 12; *but cf.* Verkerke, *supra* note 138, at 1393 (suggesting that "soft preferences" and "hard preferences" are "no more, and no less, than new and evocative labels for the familiar categories of antidiscrimination and accommodation").

[141] Near the end of her article, Professor Jolls does consider briefly three non-cost reasons for viewing prohibitions on intentional discrimination and requirements of accommodation as basically similar rather than fundamentally different. These include (1) the recognition that the social and physical construction can itself be discriminatory; (2) the idea that the acceptance of unequal access implicit in a failure to accommodate can be understood as discriminatory; and (3) the notion that focusing on the anti-subordination purposes of antidiscrimination laws erases

disability discrimination law, while occasionally noting possible parallels between disparate impact theory and reasonable accommodation, has tended to dismiss parallels largely on doctrinal grounds without addressing broader conceptual themes.[142] This Article focuses on those themes.

b. Early Recognition of Conceptual Similarities

Although recent academic discussions of the similarity between disparate impact liability and the ADA's accommodation requirement suggest that the idea is novel,[143] commentators recognized the connections between disparate impact liability and reasonable accommodations even before the ADA's enactment. These commentators considered the nature of reasonable accommodations required by regulations promulgated pursuant to the ADA's predecessor statute, Section 504 of the Rehabilitation Act of 1973.[144] Thus, the question of how an accommodation mandate fits into the antidiscrimination model predates the ADA, and early on, commentators recognized at least two points. First, in light of the types of barriers to participation that disabled persons face, disability discrimination law reflects an equal opportunity – rather than identical treatment – conception of non-discrimination. Second, some pre-ADA commentators also recognized that the reasonable accommodations required by

---

any distinctions between accommodation and intentional discrimination. Jolls, *supra* note 28, at 695-697. The normative similarities that Jolls suggests are largely consistent with this Article's analysis.

Also, as noted above, *see supra* text accompanying notes ___, Professor Bagenstos recently has considered at length the similarities between the ADA's accommodation requirement and Title VII antidiscrimination law. His analysis, however, focuses on the normative similarities between accommodation and disparate treatment law.

142 *See, e.g.,* Diller, *supra* note 10; Miller, *supra* note 19; Tucker, *supra* note 18.

143 *See e.g.,* Verkerke, *supra* note 138, at 1386 (characterizing Jolls' thesis as "provocative").

144 29 U.S.C. § 794. Although by its precise terms, Section 504 only prohibited programs or activities receiving federal funding from excluding, denying benefits to, or discriminating against an "otherwise qualified handicapped individual," the regulations issued in 1977 by the Department of Health, Education and Welfare provided that employers subject to Section 504's antidiscrimination mandate were required to provide "reasonable accommodations" for handicapped individuals. *See* 34 C.F.R. § 104.12(a); 45 C.F.R. § 84.12(a).

Section 504 were conceptually similar to aspects of antidiscrimination law already developed in cases involving race and sex discrimination.

For example, in exploring the multiple dimensions of Section 504's prohibition against handicap discrimination, Professor Judith Welch Wegner recognized in 1984[145] that precedent Section 504's accommodation requirement could be discovered in other bodies of antidiscrimination law including Titles VI, VII, and IX of the 1964 Civil Rights Act.[146] To illustrate, she pointed to *Lau v. Nichols*,[147] a Title VI action in which the Supreme Court concluded that the San Francisco school system's failure to provide English language instruction to non-English-speaking children of Chinese descent deprived those children of a meaningful opportunity to participate in the school's programs. *Lau* reflected the Supreme Court's recognition that in some circumstances, discrimination may include a failure to undertake affirmative measures to enable persons in a protected group to enjoy meaningful opportunity.[148] Wegner viewed this precedent as important for

> establish[ing] that an obligation to accommodate is implied under … statutory provisions that prohibit the denial of rights or opportunities. Because either a decisionmaker's action or inaction may lead to denial of right or opportunities, both types of conduct are forbidden if not adequately justified. In the former case, the appropriate remedy is to require that the offending action be curtailed; in the latter, an obligation to accommodate should arise.[149]

---

[145] Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity without Respect to Handicap under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984).
[146] *Id.* at 443 (asserting that "Accommodation has arisen in other contexts, although the term 'accommodation' has not been applied.").
[147] 414 U.S. 563 (1974).
[148] *Id.* at 566 ("there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum"). It must be noted the Supreme Court has effectively overruled *Lau*'s conclusion that the statutory language of Title VI extended to prohibit not only intentional discrimination but also discrimination by effect (i.e. disparate impact discrimination). *See* Guardians' Ass'n v. Civil Services Comm'n of City of New York, 463 U.S. 582, 610-12 (1983) (recognizing Court's effective overruling of *Lau*) (Powell, J., concurring). Notwithstanding the subsequent overruling on the scope of Title VI's statutory prohibition, *Lau* still illustrates of the Court's conceptual recognition that in some instances equal opportunity may require non-identical treatment.
[149] Wegner, *supra* note 145, at 443.

Likewise, other commentary that pre-dates the ADA and that analyzes section 504's regulatory requirement of accommodation also appreciated the similarity between requiring accommodation of handicaps and prohibiting disparate impact discrimination under Title VII.[150]

The early appreciation of parallels between imposing disparate impact liability and requiring accommodation was not confined to scholars. Almost twenty years ago a unanimous Supreme Court in *Alexander v. Choate*[151] implicitly recognized the kinship between legal prohibitions on actions that adversely and disproportionately affect protected groups and the requirement that members of those groups receive reasonable accommodation. In *Choate*, the Court considered a class action challenge to Tennessee's decision to cut state health care costs by reducing from twenty to fourteen the number of inpatient hospital days that the State's Medicaid program would cover annually. The plaintiffs alleged that this coverage reduction would have a disproportionate adverse impact on disabled people, and therefore would violate Section 504's prohibition of discrimination against handicapped persons.

Because plaintiffs did not allege that Tennessee officials proposed the coverage reduction in order to harm disabled Medicaid recipients, the Court approached the threshold issue as being whether proof of discriminatory animus was required to make out a violation of § 504 or whether the statute and its implementing regulations also reached actions that were discriminatory only in their effect.[152] In his analysis, Justice Marshall noted that Congress understood disability discrimination as being more often the product of "thoughtlessness and indifference – of benign

---

[150] *See* Martha T. McCluskey, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863 (1988)(arguing that "disability discrimination doctrine would be strengthened by adhering more closely to the disparate impact model, which can remedy the subtle prejudice that makes the 'differences' of disability so disadvantageous"); *but see* Michael A Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435 (1986)(rejecting as misleading the courts' use in disability discrimination cases of concepts (like disparate impact) inappropriately borrowed from the race discrimination context).

[151] 469 U.S. 287 (1985).

[152] 469 U.S. at 292.

neglect" than the product of any discriminatory animus, and also observed that many issues that Congress unquestionably sought to address in the Rehabilitation Act – like the existence of architectural and transportation barriers – would fall outside the scope of a law construed to prohibit only intentionally discriminatory behavior. Based on this analysis, the Court assumed that "§ 504 reaches *at least some* conduct that has an unjustifiable disparate impact upon the handicapped."[153] This limited embrace of disparate impact theory in disability discrimination cases, however, also clearly implies that there may exist some conduct with an unjustifiable disparate impact that § 504 would not reach.[154]

To accomplish the task of delineating the proper scope of disparate impact liability under § 504, the Court turned to caselaw and regulations addressing what accommodations a handicapped person was entitled to under § 504. From *Southeastern Community College v. Davis*,[155] a case dealing with a deaf plaintiff's claim to accommodation by a nursing school, the Court drew the proposition that § 504 requires that handicapped persons must be provided "meaningful access" to the benefit that the federal grantee offers and that, in some instances, "reasonable accommodations in the grantee's program or benefit may have to be made" in order to assure meaningful access.[156] The point here is that, when faced with the challenge of defining the proper boundaries of potential disparate impact liability under disability discrimination law, the Court viewed authorities regarding the scope of required accommodations as the best

---

[153] 469 U.S. at 299 (emphasis added).
[154] The Court expressed its concern that an unbounded application of disparate impact doctrine in the disability discrimination context would impose too weighty a burden on federal grantees who would have to consider the potential impact of their every action on persons with disabilities, effectively requiring those grantees to engage in a "handicapped impact statement" analysis. 469 U.S. at 307-08.
[155] 442 U.S. 397 (1979).
[156] 469 U.S. at 301. The Court also noted that "regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access," *id.* at 302 n.21, and looked to the § 504 regulations promulgated by the Department of Health and Human Services for guidance in refining the concept of "meaningful access."

guidance.[157] Without directly addressing the relationship between disparate impact theory and reasonable accommodations, the Court implicitly recognized the close functional and conceptual relationship between the two models of antidiscrimination.

Moreover, the *Choate* opinion also demonstrates the Court's early appreciation that the "equal treatment" demanded by antidiscrimination law does not always mandate identical treatment.[158] Instead, equal treatment sometimes requires the provision of accommodations.[159] In the same breath, however, the Court also acknowledges a critical limit to the purpose of accommodation. Section 504 does not demand that federal grantees ensure equal outcomes for handicapped persons; instead, the law focuses on providing persons with disabilities with an equal opportunity to take part in the program or receive its benefits.[160] This vision of disability discrimination law, articulated by the Court in 1985, contains the same essential insight as Anita Silvers' theory of corrective justice for people with disabilities, discussed above in Part IIC2.[161]

This discussion of *Choate* is not to suggest that the Court's opinion should be viewed as leading the charge for the minority group model of disability. Indeed, the plaintiffs in *Choate* lost, for the Court concluded that the durational limit on the number of covered hospital days did not deprive handicapped persons of meaningful access to the benefit package provided by

---

[157] "To determine which disparate impacts § 504 might make actionable, the proper starting point is *Southeastern Community College v. Davis* …" 469 U.S. at 299.

[158] While this proposition is particularly true in the context of disability discrimination law, the Court also refers in a footnote to *Lau v. Nichols*, 414 U.S. 563 (1974), a national origin discrimination case brought under Title VI of the 1964 Civil Rights Act, discussed in text accompanying note 147 *supra*.

[159] 469 U.S. at 302, n. 21 ("The regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access."). The Court also cites to an interpretive analysis of § 504 regulations stating that regulatory requirement of "equally effective" benefits or services "is intended to encompass the concept of equivalent, as opposed to identical, services." *Id.* at 305 n. 26 (citing 45 CFR, pt. 84, App. A, para.6 (1984)).

[160] *See* 469 U.S. at 305 (citing 45 CFR § 84.4(b)(2)(1984).

[161] The Court's analysis also can be viewed as rejecting any characterization of § 504 as implementing a distributive justice approach to health care for persons with disabilities. *See* 469 U.S. at 303 ("Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs.") and 306 ("Tennessee is not required to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users.").

Tennessee's Medicaid program.[162] Because the Court viewed § 504 as mandating "meaningful access," rather than absolute access, the outcomes in cases – whether invoking disparate impact liability or a right to accommodation – are likely to hinge on a judicial understanding of when access is "meaningful." And there is no guarantee that the minority group model of disability will inform a particular judge's interpretation of when differential access is nonetheless meaningful. Nonetheless, the Court's opinion in *Choate* embodies a critical recognition of the conceptual affinity between disparate impact theory and the right to receive reasonable accommodation.

3. Understanding the Conceptual Affinity between Disparate Impact Theory and Reasonable Accommodations

While the Court's opinion in *Choate* implicitly recognizes the correspondence between disparate impact liability and the right to accommodation, it leaves unspoken the key conceptual similarity between the two theories. The fundamental likeness between reasonable accommodation and disparate impact lies in their common goal of eliminating unjustified barriers to equal workplace opportunity and inclusion. The Court's understanding of disparate impact theory as a mechanism for removing apparently neutral barriers to equal employment opportunity is clearly intelligible, however, in its original description of the theory in *Griggs v. Duke Power Co.*[163]

a. Present at the creation: re-reading Griggs *from a disability perspective*

Although it was addressing allegations of racial discrimination against blacks in violation of Title VII, much of Chief Justice Burger's language in the *Griggs* opinion is deeply resonant when read from the perspective of disability theory. As such, it provides a fruitful starting point

---

[162] 469 U.S. at 306.
[163] 401 U.S.424 (1971).

for exploring how the purpose and the approach of disparate impact and reasonable accommodation proceed along parallel tracks in their efforts to combat discrimination.

First, in identifying the purpose of Title VII, the *Griggs* Court spoke in language that presaged Congress's statement of the ADA's statutory purposes. The Court saw Title VII's goal as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees. … What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of a racial or other impermissible classification."[164] Thus, the Court understood Title VII's antidiscrimination mission as concerned not simply with differential treatment prompted by racial animus, but as more broadly undertaking to remove barriers to equal opportunity. This same pair of goals – elimination of prejudiced decisions and the removal of barriers to opportunity – clearly motivated Congress' enactment of the ADA.[165]

The mere sharing of goals, however, does not prove that disparate impact and reasonable accommodation are conceptually similar. We must also ask what approaches to accomplishing these goals each body of law employs. In considering how Title VII goes about accomplishing these goals, Chief Justice Burger's opinion referred to Aesop's fable of the fox and the stork. Addressing the legality of facially neutral selection criteria, the Court (somewhat obliquely) explained:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. … [Instead, Congress] has – to resort again to the fable – provided that the vessel in which the milk is proffered be one all seekers can use.[166]

---

[164] 401 U.S. at 429-31.
[165] 42 U.S.C. § 12101 (listing Congressional findings and purposes).
[166] 401 U.S. at 853.

Now certainly, even those not well versed in Aesop's fables can understand the Court's basic message regarding disparate impact as a form of discrimination. But re-reading the fable[167] referred to reveals how well the Court's original understanding of the harm potentially inflicted by facially neutral practices accords with justifications for reasonable accommodation.

In the fable, the fox invites his friend the stork to dinner, but as a joke, serves only some soup[168] in a very shallow bowl. While the fox can lap up this dinner easily, the stork can only moisten the end of her long bill in it and leaves the table hungry. The stork does not complain, but instead invites the fox to sup at her home. When he arrives she serves their dinner in a jar with a long neck and a narrow mouth. While the stork enjoys dinner, the fox cannot fit his snout into the jar to eat.

As told by Aesop, the moral of the story is that one bad turn deserves another. As employed by Chief Justice Burger, though, the fable demonstrates that the Court understood that disparate impact discrimination may be found in the exclusionary force of apparently neutral physical apparatuses. Similarly, later in the opinion, the Court used a metaphor drawing upon the exclusionary potential of physical (rather than purely attitudinal) forces: "[The] absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[169] Again, the Court's description of how practices with lopsided effects function to discriminate relies on imagery of physical obstacles.

The Court's chosen imagery in *Griggs* splendidly illustrates the kinship between disparate impact theory and the minority group model's justification for the requirement of

---

[167] I found it online at http://www.creighton.edu/~gcarls/afables.pdf.
[168] Apparently in the version of the fable that Chief Justice Burger was familiar with, the entrée was milk.
[169] *Id.* at 854.

accommodation. Moreover, it can be read as an implicit acknowledgement by the Court that disparate impact theory might justify requiring an employer to alter the physical employment environment by, for example (and again using the fable's terms), altering "the vessel in which the milk is proffered."

The fable and the metaphor employed by the Court also demonstrate that the barriers created by facially neutral practices may exclude either by making a job absolutely inaccessible (as when the fox can eat nothing from a narrow-mouthed bottle) or by simply rendering access more difficult (as when a ship must sail against a headwind). The phrase "built-in headwinds" exquisitely captures many of the insights of the minority group model's understanding of disability, insights regarding how the very structures (physical, institutional, and attitudinal) of our society and our workplaces operate to exclude and segregate people with disabilities.

b. Going beyond Griggs *to Consider the Theories' Kinship*

When the Court first recognized disparate impact liability in *Griggs*, it described disparate impact theory as a vehicle for removing barriers to equal workplace opportunity, much as Congress viewed the reasonable accommodation requirement as removing barriers to participation by people with disabilities. Admittedly, Title VII plaintiffs have most often used disparate impact theory to address barriers embodied in employers' methods of deciding whom to hire or promote, as contrasted to barriers in physical environments or methods of job performance. Often, as in *Griggs*, an employer will rely on facially neutral selection criteria that seek attributes that blacks or women are less likely to have because of a history of exclusionary practices; in other words, the "built-in headwinds" blow out of a history of discrimination.[170]

---

[170] *Id.* at 853 (recognizing that plaintiffs "have long received inferior education in segregated schools").

The same point can be made regarding the "built-in headwinds" encountered by persons with disabilities who seek to enter or remain in the workforce. Here, the notion is that, without accommodations, persons with disabilities may be unable to work because both the physical workplace and conventional expectations about how job functions should be performed – while apparently neutral – are products of a history in which persons with disabilities were shunned, ignored, and excluded from the workplace. And, to the extent that conventional performance expectations or workplace design operate as built-in headwinds to a historically disadvantaged group, disparate impact theory indicates that they should be considered illegal discrimination. This result logically follows whether the group disparately impacted is a group protected under Title VII or under the ADA. The primary distinction is that the ADA's accommodation requirement expressly provides for the means of countering a built-in headwind.

Nonetheless, the cases and commentary begin to suggest how Title VII disparate impact theory might be understood as requiring changes to workplace environments and expectations (effectively, accommodations) in some situations. Perhaps the best example is the case of *Lynch v. Freeman*,[171] in which the Sixth Circuit found an employer liable for disparate impact sex discrimination based on its practice of providing only unsanitary portable toilet facilities to its employees.[172] The court rejected the employer's defense that disparate impact theory was inapplicable to working conditions and found that workplace facilities used equally by men and women could nonetheless be discriminatory.[173] Because the employer made no attempt to show

---

[171] 817 F.2d 380 (6th Cir. 1987).

[172] The plaintiff in the case proved that the employer's reliance on unsanitary portable toilets posed greater health hazards to women than to men, regardless of whether the women used the filthy toilets or avoided using the toilets by holding their urine. *Id.* at 388.

[173] "If the apparent equality of the facilities could shield an employer from Title VII liability the entire rationale for disparate impact theory – based as it is on 'consequences' – would be undercut." 817 F.2d at 387. *See generally* Sarah A. Moore, Note, *Facility Hostility? Sex Discrimination and Women's Restrooms in the Workplace*, 26 Ga. L. Rev. 599 (2002).

that the state of the toilets was justified by business necessity, the court found the plaintiff entitled to judgment on her disparate impact claim.[174] Implicit is the court's recognition that the employer could have avoided liability by ensuring the portable toilets were kept clean or allowing female employees to use indoor bathrooms. Such changes to the physical job site or employer policies parallel closely the actions one might expect of an employer accommodating a disabled worker in order to avoid liability.

Professor Jolls discusses several areas of disparate impact caselaw that she asserts recognize that Title VII sometimes may require employers to modify workplace policies in order to avoid liability. Cases challenging English-only workplace policies provide one example.[175] One such case is *Garcia v. Spun Steak Co.*,[176] a challenge by Spanish-speaking employees to an employer's English-only policy. While recognizing that a challenge to the conditions of employment, rather than to qualification standards, lay outside the mainstream of existing disparate impact cases, the Ninth Circuit accepted the proposition that "a disparate impact claim may be based upon a challenge to a practice or policy that has a significant adverse impact on the 'terms, conditions, or privileges' of the employment of a protected group."[177] Thus, if the plaintiffs could prove that they were adversely and disproportionately affected, the employer would be liable unless it could prove a business necessity for the policy.[178] In sum, the court recognized that an employer's policy establishing an exclusive method of communication could create a barrier to equal employment opportunity for workers who were either unable to

---

[174] 817 F.2d at 389.
[175] Jolls, *supra* note 28, at 658-660.
[176] 998 F.2d 1480 (9th Cir. 1993).
[177] *Id.* at 1485-86.
[178] In *Spun Steak* itself, the court found that the plaintiffs had failed to make a prima facie case of disparate impact discrimination because they failed to show that the English-only policy caused any significant adverse impact on them. *Id.* at 1488.

communicate using that method or could do so only with significant difficulty.[179] This recognition is analogous to a requirement under the ADA that an employer accommodate hearing-impaired employees by making alternative modes of communication available for those employees.[180]

Another example that Professor Jolls cites is cases involving no-beard policies. These employer policies have an adverse disparate impact on blacks because many black men have a skin condition that makes shaving difficult or impossible, and the policies have been struck down as unjustified by business necessity.[181] Jolls characterizes the resulting inability of employers to invoke a no-beards policy as a type of mandated accommodation, because it requires the employer to incur special costs in response to the distinctive needs of black employees. In this case, the cost lies not in purchasing assistive technology or rebuilding bathroom stalls, but in acting contrary to perceived customer preferences.[182] Moreover, the use of disparate impact theory to strike down the no-beard policy further demonstrates that disparate impact may apply not solely to job selection criteria, but also to job performance requirements.[183]

Other scholars also have recognized how disparate impact theory could support granting accommodations needed for pushing back against built-in headwinds in sex and race discrimination cases. For example, Professor Nadine Taub has argued that disparate impact analysis, with its business necessity standard, can be used to identify the "male tilt" in how

---

[179] "As applied '[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home,' an English-only rule might well have an adverse impact." *Id.* at 1488 (quoting Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)).

[180] *See* Bonnie Poitras Tucker, *The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, 549 ANNALS 24, 28 (1997) (suggesting that reasonable accommodations for a hearing impaired employee might include "the provision of special equipment, such as teletypewriters (TTYs) or amplified telephones, assistive listening devices, qualified interpreters, real-time captioning, or other auxiliary aids or services").

[181] *See* Jolls, *supra* note 28, at 653-54 (discussing Bradley v. Pizzaco of Nebraska, Inc., 939 F.2d 610 (8th Cir. 1991)).

[182] *Id.* at 654; *but see* Schwab & Willborn, *supra* note 12, at 1241 (disagreeing with Jolls' interpretation).

[183] Jolls, *supra* note 28, at 669.

workplaces and performance standards are structured: "[r]etaining only those rules that are necessary to some other agreed-upon purpose is … an important way of rooting out and replacing norms and policies based on the assumption of a male standard."[184] From this vantage point, Taub views accommodations needed to correct for society's "male tilt" as instruments of equality for women, rather than as special benefits limited to women. As an example, she points to airline-imposed height requirements for pilots, which disparately impact women and exist only because cockpits were designed and built based on male specifications. Once the physical elements of an apparently neutral work environment are revealed as embodying a non-neutral baseline, Taub suggests that a "creative engineering solution" might remedy the discrimination.[185]

Along the same lines, Professor Barbara Flagg contends that disparate impact theory under Title VII is premised on an equal opportunity notion of equality, and that equal opportunity should itself be interpreted from a pluralist perspective.[186] Flagg is specifically concerned with built-in headwinds existing in workplace standards for advancement that, while appearing neutral to whites, are "adopted by a dominantly white culture … [and] may be in fact covertly race-specific."[187] She recognizes the potentially accommodationist nature of Title VII in asserting Title VII's promise of equal opportunity can best be achieved by requiring

---

[184] Nadine Taub, *The Relevance of Disparate Impact Analysis in Reaching for Gender Equality*, 6 SETON HALL CONST. L.J. 941, 948 (1996).

[185] *Id.* at 950-51. In *Boyd v. Ozark Airlines*, 419 F. Supp. 1061 (E.D. Mo. 1976), a district court found that an airline's minimum height requirement for pilots did have a disparate impact on women. The court went on, however, to accept the airline's assertion that business necessity justified the requirement, stating: "In view of the cockpit design, over which defendant has little control, a height requirement must be established." *Id.* at 1064.

[186] Flagg, *supra* note 95, at 2031. Flagg uses the playing field metaphor to contrast an assimilationist interpretation of equal opportunity with a pluralist interpretation. Under an assimilationist interpretation, equal opportunity simply means that non-white employees have the right to play on an existing playing field by attempting to conform to prevailing workplace norms. By contrast, under a pluralist interpretation, equal opportunity may require alteration of the playing field itself in order to "accommodate equally able players with diverse playing styles." *Id.* at 2033.

[187] *Id.* at 2013.

employers to "restructure the workplace in ways that mitigate the effects of preexisting white dominance."[188] In essence, Flagg contends that disparate impact theory supports some type of "cultural accommodation" of workplace standards in order to correct for non-neutral baselines.

Professors Taub and Flagg thus grasp that when racial minorities and women encounter built-in headwinds that deprive them of an equal opportunity to perform jobs successfully, those barriers may be remediable only by requiring employers to adjust either workplace performance standards or the physical workplace itself. In those cases, Title VII disparate impact theory may support a requirement of employment accommodations similar to those required by the ADA.

As a practical matter, persons with disabilities are far more likely than are blacks or women regularly to face built-in headwinds in the form of performance standards, job structure, or workplace environment. It stands to reason, since some sort of functional limitation is an element of disability itself, that persons with disabilities who seek to participate in society and display their competency as employees will respond to limitations on conventional functioning by functioning unconventionally.[189] In other words, a person who cannot move from place to place in the conventional manner of walking will do so unconventionally, by rolling.[190] When physical structures or Procrustean employer expectations regarding job performance prevent

---

[188] *Id.* at 2037. In a similar vein, see Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 328-334 (1999) (suggesting approaches to Title VII disparate impact suits to challenge "masculine ideal worker norms").

[189] Professor Kelman makes a similar point in suggesting that it is an unaccommodated worker's lower productivity that identifies a person as disabled and suggests that it is unconventional functioning that defines the persons disability:

> The inability to produce as much without the atypical inputs, despite the ability to do so with the aid, ordinarily should define the person as disabled. If the plaintiff is aided a good deal by capital equipment or aides of no use to most employees…, it is because the equipment or aide helps him to do some task that most others do readily without the aide. This atypical physical difference is the plaintiff's disability.

Kelman, *supra* note 101, at 878.

[190] Or a person who cannot access the content of printed material conventionally by reading it may do so unconventionally, by using Brailled materials or voice-output technology. Or a person who may not be able to move heavy objects from one place to another conventionally by employing his arm and back muscles may do so unconventionally by using assistive devices such as dollies.

disabled people from displaying their competency and using their talents, accommodations are necessary in order to remove these facially neutral barriers to equal opportunity. From this perspective, Congress' imposition of the reasonable accommodation requirement in the ADA appears not as an entirely new creation foreign to existing antidiscrimination law, but instead as an adaptation of disparate impact theory to the particular circumstances more typically faced by persons with disabilities.

B. Hostile environment liability and reasonable accommodations

The previous section explored the resemblance that the ADA's requirement of reasonable accommodation bears to disparate impact theory, which is essentially an alternative approach to proving discrimination under Title VII. By contrast, this section proceeds to consider the nature and extent of accommodation's similarities to a subcategory of Title VII cases that are commonly designated as involving "sexual harassment" or "hostile work environment." While the conceptual affinity between an employer's obligation to provide reasonable accommodations and an employer's liability for hostile work environment are less striking than the similarities discussed in subpart A above, several parallels emerge upon careful examination.

1. A Brief Overview of Hostile Environment Liability

Although Title VII does not employ the terms "sexual harassment" or "hostile environment," courts interpreting Title VII first recognized over thirty years ago that the statute's prohibition of discrimination in the "terms, conditions, or privileges of employment"[191] should be read to protect employees against an employer's maintenance of a work environment that is

[191] Section 703(a)(1) of Title VII states that it is an unlawful employment practice for an employer" to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a)(1).

imbued with racial or ethnic discrimination. This understanding of a hostile work environment as discriminatory found its first expression in *Rogers v. Equal Employment Opportunity Commission,*[192] a case in which a Hispanic employee of a dental office claimed that the office's segregation of its patients by national origin constituted unlawful discrimination against her. Although the employer maintained that any discrimination was directed only against its patients and not against the employee and that she could not show that she was treated differently from any other employee, the court rejected this defense. Instead, the Fifth Circuit reasoned that Title VII should be read broadly to protect not only employees' financial fringe benefits, but also their psychological fringe benefits, from abusive employer practices, including the "practice of creating a working environment heavily charged with ethnic or racial discrimination."[193]

Although courts first recognized liability for hostile work environment in the context of racially hostile workplaces, in time courts also acknowledged that sexual harassment of women in the workplace constituted a form of sex-based hostile environment that violated Title VII. This understanding received the Supreme Court's imprimatur in 1986 in *Meritor Savings Bank v. Vinson.*[194] The facts of *Meritor*, like those of many cases involving sexual harassment, involved an employer's unwelcome sexual advances towards a female employee. The Court held in *Meritor* that a Title VII violation may be found when an employer's sexual harassment of an employee creates a hostile and abusive working environment, regardless of whether the harassment takes the form of the employer's conditioning employment advantages on an employee's submission to sexual advances (so-called *quid pro quo* sexual harassment) or instead simply involves the creation of an abusive environment that inflicts no tangible economic injury

---

[192] 454 F.2d 234 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972).
[193] *Id.* at 238.
[194] 477 U.S. 57 (1986).

on its victim.[195] To be actionable, though, any alleged sexual harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[196] Although both the Supreme Court and the lower courts have continued to refine and (sometimes) clarify the contours of employer liability for sexual harassment over the past two decades,[197] the central message of *Meritor* remains the stalwart cornerstone of sex-based hostile environment law: An employer who creates or allows the maintenance of a workplace environment characterized by severe or pervasive harassment based on an employee's sex may be held liable for sex discrimination.

It bears noting at this point that most sexual harassment cases are addressed under a disparate treatment theory of liability.[198] In other words, the harassing behavior – whether it be sexual advances or offensive and sexist remarks – is typically treated as being directed at female employees because of their sex; the conduct is not directed at male and female employees equally. In this sense, the majority of sexual harassment cases comport with the dominant

---

[195] *Id.* at 67-68.

[196] *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[197] *See, e.g.,* Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993)(reaffirming *Meritor*'s standards and rejecting contention that only harassment leading to serious psychological harm is actionable under Title VII); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) (holding that same-sex sexual harassment may violate Title VII); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)(establishing standards for employer liability in sexual harassment cases where the plaintiff suffered tangible job detriment); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (establishing standards for employer liability and affirmative defense for employers in hostile environment cases not involving tangible job benefit). Professor Martha West asserts that in these latter two cases the Court "relabeled and rearranged the two categories of sexual harassment complaints" by dubbing what had formerly been know as a "quid pro quo" case as a "tangible job detriment" case and by excluding from this category (and relegating to the "hostile environment" category) any quid pro quo case in which a supervisor's threats of adverse action had not actually been carried out. *See* Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-up Call for Women*, 68 Brooklyn L. Rev. 457, 458 (2002)

[198] *See* Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-targeted Workplace Sexual Conduct be Actionable Under Title VII?*, 81 NEB. L. REV. 1152, 1154 (2003); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1714 (1998).

understanding of antidiscrimination law as mandating that employers treat male and female employees the same.[199]

As Professor Kelly Cahill Timmons recently has pointed out, however, in theory sexual harassment claims may also be pursued under a disparate impact theory.[200] In essence, Timmons asserts that at least some cases of non-targeted sexual conduct in the workplace might be remediable under a disparate impact approach, if the plaintiff can show that conduct which was neither directed exclusively at women nor caused by their sex nonetheless had an adverse disparate impact on women. Citing to the *Lynch* and *Spun Steak* cases discussed in Subpart A,[201] she argues that disparate impact analysis may be applied not only to qualification and promotion standards, but also to conditions of employment including physical structures (unhygienic toilet facilities) and employer requirements of particular modes of performance (English-only policies).[202] According to Professor Timmons, non-targeted sexual conduct is a workplace condition that might be similarly analyzed under a disparate impact approach. The immediate relevance of this idea – that a finding of hostile work environment might be based on non-targeted conduct (*i.e.,* facially neutral conduct) – will become more clear in the next subsection, which examines conceptual similarities between hostile environment liability and liability for failure to provide accommodations.

2. Hostile Environment and Reasonable Accommodation: Exploring Parallels

At first blush, parallels between employer liability for failure to provide reasonable accommodations and employer liability for sexual harassment are not obvious. After all, when

---

[199] *See* Eichhorn, *supra* note 40 (asserting that Title VII's approach to hostile environment liability embodies a "formal equality" model).
[200] Timmons, *supra* note 198 .
[201] *See* text accompanying notes ___.
[202] *Id.* at ___.

we think of sexual harassment, we (and the courts) typically think of conduct that involves some sort of sexual dynamic, whether it be physical advances, lewd gestures, leering, or suggestive comments.[203] All of this behavior is premised on the (at least potential) existence of sexual relations between individuals. Postulating an analogous type of dynamic flowing from differences between people with disabilities and those without strains the imagination. Some of the issues that courts have struggled with in refining sexual harassment/ hostile environment doctrine – such as how to construe the "unwelcomeness" requirement[204] – seem simply inapt in the disability context.

To recognize that the sexual dynamic that permeates the sexual harassment caselaw has no parallel in cases alleging disability discrimination is not, however, to question the viability of a claim under the ADA for "disability harassment." Although the ADA does not expressly define the discrimination it prohibits as including harassment based on disability, commentators have explored the possibility of exporting aspects of Title VII sexual harassment law into the disability law realm.[205] Likewise, the courts have begun to accept the viability of ADA claims for disability-based hostile environment.[206] Scholarly and judicial discussions of disability-based hostile environment to date have focused primarily on harassment in the form of verbal harassment, social shunning, malicious actions, and the like. Little attention has been paid to

---

[203] Professor Vicki Schultz asserts that "[t]he prevailing paradigm for understanding sex-based harassment places sexuality – more specifically, male-female sexual advances – at the center of the problem." Schultz, *supra* note 198, at 1686. She challenges this "sexual desire-dominance" paradigm as underinclusive in its failure to address "many of the most prevalent forms of harassment that make workplaces hostile and alienating to workers based on their gender." *Id.* at 1689.

[204] *See* Henry L. Chambers, *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733 (2002).

[205] *See, e.g.,* Eichhorn, *supra* note 40; Christine Neagle, *An Analysis of the Applicability of Hostile Work Environment to the ADA*, 3 U. PA. J. LAB. & EMP. L. 715 (2001); Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475 (1994).

[206] *See* Eichhorn, *supra* note 40, at 575-76 (citing Flowers v. Southern Regional Physician Services, 247 F.3d 229 (5th Cir. 2001) and Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001)). Eichhorn also notes that before these two decisions, a few other circuit courts had assumed the viability of such claims in dicta. *Idi*

whether and under what circumstances an employer's liability for failure to provide requested accommodations is akin to employer liability for a hostile work environment.[207]

If we step away from focusing on how the doctrinal elements of a Title VII hostile work environment claim might be employed in structuring disability harassment claims, we can focus instead on the underlying conceptual basis for hostile environment liability. As the Supreme Court indicated in *Harris v. Forklift Systems, Inc.*, a working environment that is hostile or abusive only to women deprives women of equal workplace opportunity: "A discriminatorily abusive work environment … can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[208] Once we recognize the essential harm of a hostile work environment as its negative impact on an employee's ability to perform her job successfully, the relationship between a sexually or racially hostile work environment and an unaccommodated work environment becomes more evident. When an employer refuses to provide an accommodations needed to allow a disabled worker to perform a job successfully, the workplace is in effect a hostile environment for that worker.[209] The similarity is particularly striking when we recall the social model of disability discussed in Part II. As Professor Lisa Eichhorn points out: "The ADA's equal opportunity model assumes that the world is always, already, a hostile environment for people with disabilities because it is fraught with socially-constructed obstacles."[210]

Further similarity is apparent when one considers an employer's obligation to respond to a hostile environment if that employer wishes to avoid liability for violating Title VII or the

---

[207] Ravitch considers the interplay of reasonable accommodations and hostile environment and suggests that in some instances a failure to accommodate may be one factor contributing to a hostile work environment, but indicates that only rarely will the failure to provide accommodations be enough to create a hostile work environment. *See* Ravitch, *supra* note 205, at 1509-1510.

[208] 510 U.S. 17, 22 (1993).

[209] *See* Eichhorn, *supra* note 40, at 602.

[210] *Id.* at 618.

ADA. Under the ADA, an employer who refuses to supply reasonable accommodations requested by an employee (necessary to remedy the workplace's hostility to a disabled worker) may be liable for violating Title I.[211] As sexual harassment doctrine has developed under Title VII, the steps an employer must take to avoid potential hostile environment liability are analogous. An employer is generally liable for a hostile work environment created by someone with supervisory authority over the victim, but the employer can raise an affirmative defense to liability if it can show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[212] Similarly, employer liability for non-supervisory, co-worker harassment is governed by a negligence standard: Employers are held liable only if they knew or should have known of the harassment, but neglected to undertake quick and effective corrective action.[213] In other words, if a female employee believes that she is being sexually harassed and she reports the harassment to her employer, the employer may[214] be able to avoid liability by acting reasonably to take steps to remedy the hostile environment.[215] Thus, although Title VII

---

[211] The obligation, of course, is limited to accommodations that do not impose an "undue hardship" on the employer's business operations. *See* 42 U.S.C. § 12112(b)(5).

[212] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1993). The showing of the employer's reasonable care in preventing or responding to the harassment is one of two prongs of the affirmative defense established by the Supreme Court. The other prong requires the employer to prove that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

[213] *See Faragher*, 524 U. S. at 799 (noting lower courts' consistent application of a negligence standard for imposing vicarious liability on employers for co-worker harassment).

[214] I use "may" here because the employer must also prove the affirmative defense's second prong. *See supra note* ___. If the employee acts reasonably in taking advantage of the employer's preventive/corrective mechanisms and the employer acts promptly to correct reported harassing behavior, it seems likely either that any conduct occurring prior to the report and response would not be deemed to rise to the level of actionable harassment or at least that any employer damages for harm would be minimal in most cases.

[215] A further similarity lies in the fact that neither hostile environment law nor disability discrimination law holds an employer held strictly and fully liable for all failures to remedy the discriminatory environment. As noted in the text, an employer is not liable for a hostile environment created by employees if the employer acted with reasonable care in responding to complaints of harassment. In the same vein, an employer who "demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation," will not be liable for compensatory or punitive damages based on its failure to provide an accommodation that a court ultimately determines to be reasonable. *See* 42 U.S.C.A. § 1981a(a)(3).

does not expressly provide that an employer's failure to remedy a sexually hostile work environment constitutes sex discrimination (as the ADA provides that an employer's failure to provide reasonable accommodations constitutes disability discrimination), the effect the Supreme Court's hostile environment rulings is similar: An employer may be required to take affirmative steps to avoid being held liable for sex discrimination.

Admittedly, the resemblance between employer liability for failure to accommodate and employer liability flowing from a failure to correct reported harassment is imperfect. An employer who receives a report of sexual harassment may most often respond by disciplining or counseling the offending harasser(s) or by instituting or enforcing workplace policies designed to end the offensive behavior (*e.g.*, instituting policies against on-the-job viewing of pornographic websites or sending sexual emails).[216] These types of steps may at first seem dissimilar to steps to modify the physical workplace or the purchase of adaptive equipment – actions that we often think of as typifying accommodations under the ADA. But ADA accommodations may also include the modification of policies, job structures, or work schedules,[217] changes that are more administrative than physical in nature. Moreover, in some cases, the sexually hostile nature of a workplace may include physical elements, such as the posting of nude pin-ups,[218] and the employer action necessary to avoid liability in those cases would include steps that change the offensive physical environment. Granted, only a small number of sexual harassment cases are based primarily on such physical elements and the cost of taking down pin-ups is minimal[219]

---

[216] *Cf.* William G. Porter & Michael C. Griffaton, *Between the Devil and the Deep Blue Sea: Monitoring the Electronic Workplace*, 70 DEF. COUNS. J. 65 (2003).

[217] *See* 29 C.F.R. § 1630.2(o) (defining "reasonable accommodation").

[218] *See, e.g.,* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

[219] *Cf.* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 589 (2001)(characterizing, based on study of approximately 650 court opinions in sexual harassment cases, cases involving nonverbal expression such as pinups and pornography as rare); Timmons, *supra* note 198, at 1240 .

compared to costs that may be incurred to render a workplace physically accessible (and therefore nonhostile) to an employee with a disability.

Nonetheless, the purpose here is simply to suggest that liability based on hostile work environment and liability based on failure to provide accommodations exhibit some central likenesses to one another – likenesses that belie the assertion that the ADA's reasonable accommodation mandate is fundamentally foreign to Title VII's approach to antidiscrimination. Consideration of several additional points may serve to further reinforce an understanding of the basic similarities between the two grounds for liability.

a. Employer's expenses associated with preventing sexual harassment

While the foregoing subsection notes that an employer's cost in remedying a sexually hostile work environment often may be smaller than an employer's cost in providing accommodations,[220] a comparison limited to these two types of costs presents an incomplete picture of the costs that employers incur in order to avoid hostile environment liability. Even prior to the Supreme Court's 1998 decisions establishing an affirmative defense to sexual harassment liability for an employer who exercises reasonable care in preventing a hostile environment,[221] many employers devoted resources to adopting sexual harassment policies and conducting sexual harassment employee trainings in attempts to minimize their exposure to liability.[222] The Supreme Court's 1998 decisions establishing an affirmative defense based in part on an employer's proactive attempts to prevent and respond to sexual harassment have

---

[220] Certainly, this will not always be the case. In many instances, the cost of accommodating a disabled employee is itself quite small. By contrast, disciplining a harassing employee and promulgating lawyer-reviewed policies to respond to claims of harassment may themselves prove in some cases to be expensive.

[221] *See* text accompanying note ___ *supra.*

[222] *See* Elizabeth Larson, *Flirting with Dangerous Precedents*, WALL ST. J., June 7, 1996, at A12 (stating that in response to increasing number of sexual harassment complaints filed with the EEOC, "American corporations are spending hundreds of millions of dollars on seminars to educate their employees about sexual harassment, and hiring executives to deal with complaints before they get filed").

generated further advice to employers about the prophylactic steps they should take.[223] Any meaningful comparison of the costs that employers incur in taking affirmative steps to avoid sexual harassment liability with the costs that employers incur in taking affirmative steps to avoid liability for failure to accommodate must take the costs of prevention into account.

Today, attorneys and human resources consultants advise employers to fashion and put into operation a range of mechanisms for preventing and responding to sexual harassment. These mechanisms include the adoption and dissemination to employees of formal, written anti-harassment policies; the training of supervisors and employees regarding harassment; the development of a grievance procedure created specifically to manage sexual harassment complaints; and systems for responding promptly and effectively when harassment complaints are filed.[224] A survey conducted in 2001 by the Institute of Management & Administration suggests that a vast majority of employers are following through on this advice, with ninety-seven percent of responding employers having a formal policy against sexual harassment, eighty-eight percent having a formal, written procedure for reporting and investigating claims, and

---

[223] *See, e.g.,* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. W.L.J. 3, 9-21 (2003) (describing the advice that employers receive in the wake of the *Faragher* and *Ellerth* opinions); G. Roger King, *Sexual Harassment Claims in the New Millenium: A Litigator's Point of View*, 27 OHIO N. U. L. REV. 539 (2001). In *Faragher*, the Supreme Court emphasized the importance of adopting formal anti-harassment policies, while not requiring such policies as a matter of law, to satisfy the first prong of the employer's affirmative defense: "While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." *Faragher*, 524 U.S. at 807.

[224] *See* Carla D. Barboza, *Prevention Policies and Programs from a Plaintiff's Perspective*, Am. Bar Ass'n Center for Continuing Leg. Educ., Nat'l Inst. On Sexual Harassment (1997); Grossman, *supra* note 223, at 9-21; King. s*upra* note 223. Professor Grossman is critical of existing liability standards applied by the courts as "calculated to ensure that employers adopt basic policies and procedures with respect to workplace harassment, not, surprisingly, to ensure that they actually prevent it." *Id.* at 3. In the same vein, Professor Martha West identifies a trend among the lower federal courts to interpret the employer's "reasonable care" obligation under the first prong of the affirmative defense as requiring "only minimal prevention efforts by the employer." West, *supra* note 197, at 461. Based on this trend, she questions whether the Court's erection of the affirmative defense will be effective in actually preventing hostile environment sexual harassment. *Id.*

seventy-four percent conducting prevention or awareness training for employees.[225] Based on these responses regarding the measures that employers actually undertake, it is misleading to assert that avoiding liability for sex discrimination under Title VII requires nothing more of employers than a costless eschewing of treating female employees differently from male employees. Instead, employers are taking costly, affirmative steps to avoid this liability.[226]

One might contend that expenses incurred to establish institutional mechanisms designed to prevent sexually hostile work environments are quite different from expenses incurred responding to an individual employee's request for an accommodation and thus the two cannot be appropriately analogized.[227] The first set of costs is incurred before any claim of hostile environment; the second is triggered by a claim (effectively) that the unaccommodated workplace is hostile to an employee. Money spent to prevent sexual harassment arguably redounds to the benefit of all female (and some male) employees; money spent on accommodations benefits the accommodated employee primarily (if not exclusively).

While this description of distinctions between sexual harassment prevention costs and disability accommodation costs is accurate, these distinctions do not, to my mind, undercut the observation regarding the basic similarities between an employer's potential liability for a hostile work environment and an employer's potential liability for failure to accommodate. Instead, these distinctions reflect several factors that distinguish the problem of sex discrimination from

---

[225] *See* Institute of Management & Administration, *Handling Sexual Harassment: Are You a G-Rated Company in an R-Rated World?*, Human Res. Dept. Management Rep., Jan. 1, 2002. The survey was addressed to small, medium, and large sized employers, and 232 companies responded to the survey. *Id.*

[226] It should be noted that avoiding liability is only one reason – and not always the foremost reason – that employers cite as motivating their adoption of preventive measures. Most employers also cite their desire to provide a harassment-free workplace as a prime motivator. *See id*.

[227] *Cf.* Timmons, *supra* note198, at 1240 (noting that employers may incur prevention costs in enforcing a ban on non-targeted sexual conduct, but asserting that these costs "are arguably different from the cost of physically modifying the workplace").

the problem of disability discrimination. These factors include the ubiquity of women in the workplace and the diversity of disabilities and resulting functional limitations.

Prevention is widely recognized as the preferred approach to the problem of sexual harassment,[228] and because virtually all but the smallest employers can be presumed to have women in their workplace, it is logical for employers across the board to undertake preventive measures. By contrast, it is hard to imagine the feasibility or utility of employers attempting to prevent the countless ways in which socially constructed barriers can render workplaces hostile to workers with a wide array of different disabilities. While the number of workers with disabilities is large, disabled workers are not as commonplace as women in workplaces generally. More importantly, while measures to prevent sexual harassment can be gauged to prevent objectively offensive behavior[229] and thus can be standardized, preventing a hostile workplace for employees with a range of disabilities would require consideration of a complex web of variables, including the nature of each potential disability, the functional limitations that the disability might impose, and how those functional limitations play out in relation to a range of different job functions performed in a variety of worksites. Because individualized consideration is essential to effective accommodation (and is consequently firmly embedded in ADA caselaw), we cannot expect an employer to implement measures capable of preventing hostile work environments (in the form of unaccommodated workplaces) for all disabled

---

[228] Cite to EEOC reg'ns.

[229] According to the Supreme Court, liability for sexual harassment depends on a showing that the alleged harassment is sufficiently pervasive and severe from the perspective of a reasonable person. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). While the courts and commentators have debated whether the proper standard is instead that of a "reasonable woman," in either case the standard remains an objective one. *Cf.* Juliano & Schwab, *supra* note 219, at 582-85 (discussing debate). While the alleged harassment must satisfy this objective standard in order to be actionable, the Court in *Harris* made clear that a sexual harassment plaintiff must also show that she subjectively experienced the harassment as objectionable. 510 U.S. at __.

employees[230] in the same way that we can expect an employer to implement measures capable of preventing sexually hostile work environments. Instead, in the case of disability discrimination, the employer's obligation is triggered by a request from a particular individual with a disability. While this obligation is admittedly most closely analogous to an employer's obligation to respond to complaints of sexual harassment by a particular employee, for the reasons discussed above, it remains analogous to an employer's obligation to incur costs to prevent sexual harassment.

b. Unaccommodated workplaces as non-targeted hostile environments

Professor Kelly Cahill Timmons' contention that hostile environment liability may be premised on a disparate impact, rather than disparate treatment, analysis[231] has particular relevance for grasping the kinship between liability for hostile work environment and liability for failure to accommodate. As she points out, sexual conduct in the workplace that is neither directed at a particular woman nor caused by the presence of female workers may nonetheless at times constitute prohibited sex discrimination because of its significant detrimental impact on female employees as a group. This analysis closely parallels the understanding of why unaccommodated workplaces both may be effectively hostile to individuals with disabilities and constitute discrimination against them. An employer that expects employees to use stairs to move between operations on different floors of the worksite, to use the telephone to communicate with the public or co-workers, and to refrain from eating while on the job has in all

---

[230] The ADA does indirectly impose on some employers – namely those who own or operate places of public accommodation – an obligation to undertake limited prophylactic measures in some instances. The ADA provides that "discrimination" for Title III purposes includes the failure to make new construction and alterations to existing facilities "readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a). While this requirement will enhance the accessibility of new or altered facilities for employees of public accommodations (and therefore prevent, to some extent, the creation of a hostile work environment for disabled employees), it does nothing to address non-physical barriers.

[231] *See* Timmons, *supra* note 198, at ___. For a discussion of her thesis, see *supra* text accompanying notes ____.

likelihood not established these expectations in response to the presence of disabled workers or directed their enforcement at particular disabled workers. Nevertheless, these expectations will have disproportionate impacts on employees (or prospective employees) who are mobility impaired, hearing impaired, and hypoglycemic,[232] respectively.

This analysis is valuable in demonstrating a connection between disparate impact reasoning and hostile environment reasoning. Indeed, the facts of *Rogers v. Equal Employment Opportunity Commission*,[233] the case originally recognizing hostile environment liability demonstrate this connection. In that case, the court reasoned that a dental office that segregated its patients by ethnicity could not defend against an employee's charge of discrimination by claiming that it had not intentionally directed any discriminatory treatment against the Hispanic employee. Instead, the court found that the employer's segregation of patients (a practice to which all employees were equally exposed) might create a workplace atmosphere "heavily charged with ethnic or racial discrimination."[234] Although the *Rogers* court did not explicitly acknowledge that liability in such a case seems premised on the adverse disparate impact that such a discriminatory atmosphere would have on members of a particular ethnic group, it did cite to *Griggs v. Duke Power Co.* in its analysis.[235] Thus, *Rogers* can be understood as standing at the intersection of hostile environment liability and disparate impact liability – in much the same way as do employer refusals to provide reasonable accommodations to disabled workers and Timmons' cases of non-targeted sexual workplace conduct.

---

[232] The last illustration comes from Eichhorn, *supra* note 40, at ___.
[233] 454 F.2d 234 (5th Cir. 1971).
[234] *Id.* at 238.
[235] *Id.* at 239. The court stated that *Griggs*: "held that the absence of discriminatory intent by an employer does not redeem an otherwise unlawful employment practice, and that the thrust of Title VII's proscriptions is aimed at the consequences or effects of an employment practice and not at the employer's motivation." *Id.* The court went on to suggest that the employer's segregation of patients might also be a "subtle scheme" for indirectly discriminating against minority group employees. *Id.* This reasoning mirrors an often stated justification for disparate impact liability as ferreting out covert but intentional discrimination by employers.

Admittedly, this connection should not be pushed too far. Important distinctions exist between a garden-variety disparate impact case and a hostile work environment case. Not every employment practice that causes an adverse disparate impact on blacks, women, or blind persons creates a working environment imbued with discrimination against members of those groups.[236] In addition, employers who are charged with disparate impact discrimination under Title VII may avoid liability by proving that the practice or workplace condition that creates the disparate impact is justified by business necessity, a defense not available to employers found to have created or maintained a hostile work environment. For purposes of this Article, however, the potential intersection of disparate impact theory and hostile environment theory in some – probably rare – cases does serve to bolster the conclusion that, conceptually, an employer's obligations to provide accommodations to a person with a disability is in many ways quite similar to employer's obligations to avoid discrimination under Title VII.

c. Sexual Harassment and Refusals to Accommodate as Denials of Competency

A final notable similarity between sexual harassment and failures to accommodate is scholars' characterization of each as entrenching established norms and denying the individual competency of outsiders (women and people with disabilities, respectively). As noted previously, the Supreme Court has recognized that the harm flowing from a hostile work environment may include "detract[ing] from employees' job performance, discourage[ing] employees from remaining on the job, or keep[ing] them from advancing in their careers."[237] Some scholars, in exploring the wrong associated with sexual harassment, recently have taken this idea to a more theoretical plane and argued that sexual harassment functions to reinforce

---

[236] Timmons recognizes this distinction as well and argues that non-targeted sexual conduct should be seen as creating hostile environment liability only when that conduct …..

[237] Harris v. Forklift Systems, Inc., 510 U.S. at 22.

masculine norms in the workplace and to deny women's competency to perform in the workplace.[238]

For example, Professor Kathryn Abrams comprehends harassing behavior as a practice that preserves male control of the workplace and entrenches masculine norms in the workplace, with the resulting wrong being an interference with the human agency of women.[239] In Abrams' words: "Not only do masculine qualities define the effective or successful worker, but also masculine tastes and prerogatives shape the environment in which people do their jobs. Some of this male interaction … may not seem 'masculine' so much as 'the way things are done.'"[240] In this sense, sexual harassment of female workers functions to foreclose any contest of male baseline norms regarding how work is to be done.

In *Reconceptualizing Sexual Harassment*,[241] Professor Vicki Schultz similarly views sexual harassment as driven not "by a need for sexual domination but by a desire to preserve favored lines of work as masculine."[242] She argues that courts need to look beyond whether allegedly harassing conduct is sexual in nature and recognize that a core element of harassing behavior is "conduct having the aim or effect of undermining [women's] work competence."[243] Schultz contends that courts' adoption of her conception of sexual harassment would "restor[e]

---

[238] Not all of the recent scholarship takes this view. *See, e.g.,* Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect,* 83 CORNELL L. REV. 1231 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

[239] *See* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1172 (1998).

[240] *Id.* at 1210. In the same vein she writes: "Sexual harassment helps perpetuate the workplace as a site of male control, where gender hierarchy is the order of the day and masculine norms *structure the working environment*." *Id.* at 1219 (emphasis added).

[241] 107 Yale L.J. 1683 (1998).

[242] *Id.* at 1690.

[243] *Id.* at 1762.

Title VII's principal emphasis on whether such conduct makes it more difficult for women to develop and express their capability as workers."[244]

Thus, in both Abrams' and Schultz's views, a central part of the wrong associated with sexual harassment is the implicit denial that women are equally capable as men of successfully performing in the workplace. Harassing conduct conveys this denial by insisting that women must conform to pre-existing, male expectations of how work is performed. This account of sexual harassment is markedly similar to Anita Silvers' account of the injustice experienced by persons with disabilities who are prevented from demonstrating their competency by the existence of socially constructed barriers. As Silvers writes:

> Compensatory action is called for where oppressive social arrangements stifle talent, improperly elevating those with less natural ability over those more gifted. The state thus has an interest in protecting people with disabilities, one predicated not on their being weak and incompetent but rather on their having been arbitrarily, incorrectly, or unfairly excluded from contributing their strengths and talents to the community.[245]

C. Affirmative Action and Reasonable Accommodation

The preceding two subsections have argued that greater conceptual similarities than are commonly recognized exist between employers' obligations to provide reasonable accommodations, on the one hand, and employers' liability for both disparate impact discrimination and hostile work environment, on the other. By contrast, this subsection takes the position that the likenesses between reasonable accommodation and affirmative action – likenesses that have been suggested by numerous commentators – are less robust than often suggested.

On first consideration, the apparent resemblance between the implementation of affirmative action programs and the provision of accommodations is straightforward, for each involves an

---

[244] *Id.* at 1773-74.
[245] Silvers, *supra* note 39, at 112.

employer (or other entity) taking affirmative steps to provide something of benefit only to members of a group protected by antidiscrimination laws.[246] Some commentators have suggested that the employer's taking account of a protected characteristic demonstrates reasonable accommodation's parallels to affirmative action programs and divergence from Title VII's dominant demand to abstain from taking account protected characteristics.[247]

This facial similarity between reasonable accommodations and affirmative action largely dissolves when one's conception of reasonable accommodation embodies the minority group model of disability.[248] Indeed, the nature and purpose of accommodations – as conceived by disability theorists – is in important aspects quite unlike affirmative action. Some of the ADA's original proponents,[249] as well as several commentators,[250] have noted this dissimilarity. Because I find the comparison between affirmative action and reasonable accommodation to be of only limited value in demonstrating how accommodation is fundamentally like other strands of antidiscrimination law, this subsection will be relatively brief in exploring the comparison.

---

[246] *Accord* Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1431 (1991) (noting facial similarity); Eichhorn, *supra* note 40, at 603 (same).

[247] *See* Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance in the Supreme Court's Response, and the Future of Disability Discrimination Law,* 78 OR. L. REV. 27, 75 (1999); Karlan & Rutherglen, *supra* note 12, at 14 ("Reasonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual's disability and to provide special treatment to him for that reason."); Sandra R. Levitsky, *Reasonably Accommodating Race: Lessons from the ADA for Race-Targeted Affirmative Action,* 18 LAW & INEQ. 85, 106 (2000); Miller, *supra* note 19, at ___ n.7 (indicating that affirmative action, like reasonable accommodations, is an exception to the theory that civil rights laws have traditionally required equality of treatment); *see also* Kenneth R. Davis, *Undo Hardship: An Argument for Affirmative Action as a Mandatory Remedy in Systemic Racial Discrimination Cases*, 107 DICK.L. REV. 503, 509 (2003)(describing the similarities between affirmative action and reasonable accommodation and asserting that "reasonable accommodation is essentially a transmutation of affirmative action").

[248] *See* text accompanying notes ___ *supra*.

[249] *See* Mayerson & Yee, *supra* note 41, at 537 (asserting that the ADA's drafters "were insistent that reasonable accommodation was not affirmative action but simply part and parcel of meaningful nondiscrimination"); Tucker, *supra* note 18, at ___ (stating that the ADA's proponents do not view the reasonable accommodations mandated by the statute as constituting affirmative action).

[250] *See, e.g.,* Cooper, *supra* note 246, at 1431-32 (recognizing "superficial similarity" but asserting that "the two concepts differ both in terms of theory and implementation"); Eichhorn, *supra* note 40, at 603-04 (distinguishing two concepts).

1. Limited Parallels between Affirmative Action and Reasonable Accommodation

While "affirmative action" is a phrase that encompasses a variety of legally mandated and voluntarily adopted programs, the theme unifying the various programs is that members of a group that has historically been disadvantaged in our society should, in certain contexts, receive some type of preferential consideration by a decision maker for the purpose of increasing group members' participation and representation in a particular activity in which the group has historically been underrepresented. This remedial consideration of factors such as race, ethnicity, or sex may play a role in decisions regarding employment, government contracting, admission to higher education, voting rights, and housing.[251]

Just as critics of the ADA have condemned "special treatment" (in the form of accommodation) for people with disabilities, critics of affirmative action have objected to "special treatment" for members of racial or ethnic minorities and women. These criticisms do reflect an at least superficial similarity between the two practices: each involves treating members of a statutorily protected group differently from non-group members. Moreover, the ADA and affirmative action also share the fundamental conceptual justification for this different treatment: A firm belief that in order to provide differently situated groups with equal opportunity, you must sometimes treat them differently.[252] In other words, both the ADA and proponents of affirmative action reject the proposition that "equal" treatment of persons necessarily requires their identical treatment.

In their recent book on affirmative action, Leiter and Leiter indirectly suggest another broad ground of similarity between affirmative action and reasonable accommodation. Leiter

---

[251] *See generally* SAMUEL LEITER & WILLIAM M. LEITER, AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW & POLICY: AN OVERVIEW AND SYNTHESIS (2002).

[252] *See* Cooper, *supra* note 246, at 1431; Miller, *supra* note 19, at ___ n.7. For a discussion of disability theory's perspective on this point, see *supra* text accompanying note ___.

and Leiter view affirmative action policies as a natural outgrowth of disparate impact liability, in that affirmative action provides a systemic (rather than individual) remedy for the harms that systemic biases cause collectively to all members of the historically disadvantaged group.[253] If we understand the obligation to provide accommodation as being akin to potential liability for disparate impact, as discussed in Part IIIA, then we can view reasonable accommodation and affirmative action programs as both being responses to systemic biases.[254] It is when we focus a bit more on the particulars of how and when affirmative action responds to systemic biases that important differences between affirmative action and reasonable accommodation emerge.

2. Sources of systemic bias

While both reasonable accommodation and affirmative action may entail positive steps to respond to systemic bias, the source and nature of the bias are typically characterized differently. The primary justification for affirmative action programs generally has been that the programs are necessary to counteract the lingering effects of past intentional discrimination.[255] By contrast, a right to accommodation under the ADA requires no showing of any past intentional

---

[253] *See* LEITER & LEITER, *supra* note 251, at 53 (asserting that systemic bias against protected groups justifies a remedy that goes beyond compensating individuals for their injuries and instead broadly granting group members an advantage to redress the harms suffered by virtue of group membership).

[254] As Professor Jolls points out, disparate impact, reasonable accommodations, and affirmative action all three "require employers to bear undeniable financial costs associated with a particular group of employees." Jolls, *supra* note 28, at 698.

[255] This justification assumes constitutional stature in the instance when a public actor implements an affirmative action program that takes an applicant's race into account in making decisions. In considering equal protection challenges to such programs, courts have deemed states to have a compelling interest in remedying the effects of past intentional discrimination; therefore, affirmative action programs premised on this remedial purpose are constitutionally justified. Cite Recent debates regarding affirmative action in admissions to public universities have focused on a non-remedial purpose: the achievement of a diverse student population. The Supreme Court's recent affirmative action decision holds that achieving such diversity is also a compelling state interest that can support a narrowly tailored affirmative action plan. *See* Grutter v. Bollinger, 123 S.Ct. 2325 (2003)(holding that public law school has a compelling interest in achieving a diverse student body).

Professor Lisa Anderson has recently suggested that this "compensatory conception of remediation" does not exhaust the possible justifications for affirmative action. She asserts that an "integrative conception of remediation" recognizes "segregation of the major institutions of civil society as a cause of unjust racial inequality and a threat to democracy." Because of the harms that flow from segregation, regardless of its cause, the goal of integration provides an alternative justification for affirmative action programs. *See* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1197 (2002).

disparate treatment by an employer. Instead, the accommodation's purpose is to remove an existing barrier to successful employment.[256] The Supreme Court itself has acknowledged this distinction.[257]

Admittedly, the precision of this distinction may have been a bit oversold. While a disabled person seeking an accommodation bears no burden of showing a history of past discrimination, the minority group model recognizes the link to our society's historical disregard for people with disabilities. As Anita Silvers writes:

> In virtue of their imagined inferiority, the nation's capital assets, as well as its infrastructure, developed using procedures that excluded and continue to exclude [people with disabilities] from the terms that frame, and the processes that further, enjoying a cooperative commercial and civic life. It thus is the strategy of the ADA to remedy the environmental outcomes of disablist oppression….[258]

Notwithstanding the recognition that today's barriers to participation for persons with disabilities can be seen as simply the most current embodiments of an ongoing history of societal disregard, the remedial purpose of affirmative action still seems distinct. For it is the *residual* effect of historical discrimination against blacks in various contexts that may cause blacks today to be less likely to satisfy the qualification standards used by employers, universities, lenders, or government procurement agencies. Accordingly, affirmative action programs typically operate by adjusting those standards to compensate for the residual harms. By contrast, reasonable accommodations do not act to adjust an employer's job qualification standards; instead, the

---

[256] *See* Cooper, *supra* note 246, at 1432; Eichhorn, *supra* note 40, at 603-604; Tucker, *supra* note 18, at 345.
[257] *See Choate*, 469 U.S. at 300 n.20.
[258] Silvers, *Formal Justice*, *supra* note 39, at 128.

accommodation mandate requires employers to permit qualified disabled individuals to use non-conventional means of performing job functions.[259]

3. Class focus vs. individual focus

Another dissimilarity between affirmative action and reasonable accommodation lies in the degree to which each response is particularized to the harm of bias experienced. Affirmative action policies are class focused; they provide benefits to all members of a class that has been disadvantaged by historical discrimination, regardless of whether particular individuals have personally experienced discrimination or its lingering effects. Group membership alone triggers access to the affirmative assistance,[260] and the assistance provided tends to be similar across the board.

By contrast, legal entitlement to accommodation is a particularized determination. Proof that an individual has a disability within the meaning of the ADA (itself an individualized assessment) does not by itself trigger any right to accommodation. Instead, employers are obligated to provide accommodations only when they are necessary to enable a particular qualified individual to perform the essential functions of a particular job.[261] When it comes to a right to the "affirmative" action of accommodation, group membership is a necessary but not sufficient predicate. Furthermore, the requisite accommodation itself must be individualized to respond to the particular barrier encountered by a disabled individual in a particular job setting.[262]

---

[259] The employment provisions of the ADA protect a "qualified individual with a disability," which the statute defines as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

[260] Supporters of this group focus assert that harm from systemic bias can be presumed to flow from group membership. *Cf.* LEITER & LEITER, *supra* note 251, at 53.

[261] *See* 29 C.F.R. § 1630.2(o)(1)(ii) (defining "reasonable accommodation").

[262] As the EEOC's regulations on reasonable accommodations explain: "This process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular

4. Preferences vs. barrier removal

Probably the most important difference between affirmative action and accommodation, however, lies in the extent to which differences in treatment provide benefited individuals with a competitive advantage vis-à-vis other workers in a particular workplace. Although employers implementing affirmative action programs and providing accommodations both take affirmative steps to provide a benefit only to group members and thus treat group members differently from others, the benefit provided to affirmative action recipients provide them with a competitive advantage compared to other workers or prospective workers, while an accommodation provided to a person with a disability does not.[263] The adjustment of qualification standards involved in affirmative action would be just as valuable to individual white males seeking a job as it is to blacks or women; because it is provided only to group members, affirmative action treats them not only differently from, but better than non-group members.

Thus, affirmative action is typically understood as involving not merely different treatment, but preferential treatment, often described as "reverse discrimination." If we expand the relevant time frame sufficiently, one might respond that preferences accorded to group members today merely counterbalance the preferences afforded the historically advantaged group, thereby producing an equitable balance of preferences over time. While this argument might persuade

---

individual in need of reasonable accommodation. With regard to assessment of the job, 'individual assessment' means analyzing the actual job duties and determining the true purpose or object of the job. … After assessing the relevant job, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions." 29 C.F.R. app. § 1630.9. *See also* Karlan & Rutherglen, *supra* note 12, at 15 (noting that in contrast to sex or race affirmative action, reasonable accommodation will more probably involve "personalized special treatment"). Karlan and Rutherglen also point out that an employer's obligation to provide reasonable accommodation will at times involve ongoing assistance or modifications, whereas an employer's use of affirmative action likely involves a one-time grant of preferential access to a position. *Id.* at 16-17. *Cf.* Davis, *supra* note 247, at 521-23 (recognizing but contesting distinction).

[263] *Accord* Cooper, *supra* note 246, at 1431-32; Eichhorn, *supra* note ___, at 603-04; Tucker, *supra* note ___, at 345-46; *but see* Davis, *supra* note ___, at 524-25 (rejecting this distinction).

some that a time-limited system of preferences is justified,[264] it does not change the fact that in a particular job applicant pool some protected group members (who may or may not have themselves suffered the disadvantages of protected group membership) will receive a preference at the expense of non-protected-group members (who may or may not have themselves not enjoyed any historical advantages).

By contrast, an employer who somehow modifies the physical environment, equipment, or policies of a workplace in order to enable a qualified disabled worker to perform a job does not provide that worker with an advantage over the qualified non-disabled worker who is capable of performing the job without accommodation. In providing an accommodation, the employer is removing a barrier to the disabled worker's ability to perform competently, a barrier that does not exist for the non-disabled worker. Consequently, an accommodation provided to a disabled worker typically would not be of benefit to a non-disabled worker.[265] Thus, while the ADA's

---

[264] Proponents of affirmative action programs may also justify them on distributive justice grounds. *See, e.g.,* LEITER & LEITER, *supra* note 251, at 53 ("In theory, then, affirmative action is not an end in itself, but a tool for ensuring equitable distribution of America's bounty."). As Professor Bagenstos points out, distributive concerns may be seen as supporting antidiscrimination laws more generally, but distributive concerns do not themselves rationalize the choice to effect redistribution by imposing employer mandates rather than by employing some other mechanism such as tax and transfer programs. *See* Bagenstos, *supra* note 98, at ___.

[265] This generalization is not always true. Instances certainly exist when a non-disabled worker would find an accommodation desirable, particularly when the accommodation involves administrative modifications, such as modifications to work schedules or workplace policies. In these instances, even though a non-disabled worker might deem an accommodation beneficial, the accommodation is not necessary to allow the non-disabled worker to perform job functions successfully. Nor would providing the accommodation only to the disabled worker provide that worker with a competitive advantage in performing a particular job.

One type of accommodation contemplated by the ADA may in some instances place a disabled worker at a competitive advantage over co-workers. "Reassignment to a vacant position" is included in the statute's list of possible accommodations, 42 U.S.C. § 12111(9)(B), but as a number of courts and commentators have pointed out, finding that a disabled employee has a statutory right to be reassigned to a vacant position may disadvantage other, non-disabled workers who might also seek to fill the open position. *See* Stephen F. Befort & Tracy Holmes Donesky, *Reassignment under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 Wash. & Lee L. Rev. 1045, 1058-59 (2000). The courts are divided on whether the ADA's inclusion of reassignment in its list of possible accommodations requires an employer to reassign a disabled employee to a vacant position even when a better qualified employee or applicant seeks that position. *Id.* at ___. Certainly, if it is conclusively established that the ADA requires this result, then the reassignment accommodation will function much like affirmative action in preferring a group member over a non-group member.

Even in that event, however, the justification for the reassignment requirement would not appear to be consistent with the primary justification for affirmative action policies. It is difficult to imagine how giving an

accommodation mandate may require an employer to provide a disabled individual not ordinarily provided to other, non-disabled individuals, it generally does not require that an employer provide preferential treatment to persons with disabilities.[266] Indeed, some courts have made explicit their unwillingness to allow disabled individuals to use the statutory right to accommodation as a way of gaining a competitive edge.[267] So understood, providing accommodation for disabilities represents an effort to level (or clear of barriers) the playing field, even as between employees in a particular employment setting,[268] and in many cases, even optimal accommodations may not serve to put the disabled worker in as good a position as her non-disabled peers.[269]

---

already-employed disabled person a right of reassignment to a position for which he is qualified, but not the best qualified, is meant to compensate that individual for the lingering effects of discrimination against people with disabilities. A better justification (for what could well be a logical policy choice to require reassignment) would seem to be that an individual who is either newly or increasingly disabled (so that he can no longer perform the essential functions of his current job even with accommodations) may be more likely to be successful in remaining in the workforce if the individual's existing employer has some obligation to reassign the individual, than if the individual is forced to enter the labor market as a job seeker. If that indeed is the justification for the reassignment provision, I would argue that the provision embodies a redistributive policy to maximize the employment of people with disabilities and that it, therefore, fits uncomfortably at best in the ADA, which is an antidiscrimination statute.

[266] The majority opinion in *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1521, seems to disagree. Justice Breyer writes:

> … [T]he Act specifies … that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.,* preferentially.

This passage, while it appears to equate accommodation with preferences, gives to the term "preference" a different meaning than the meaning I intend in the text of this Article. I do not equate the different treatment involved in an accommodation with a preference if the accommodation simply places the disabled individual on equal footing with non-disabled employees, and not on better footing. Another passage confirms that Justice Breyer is using the term "preference" in sense broader than its dictionary meaning. *Compare Barnett*, 122 S.Ct. at 1521 ("… an accommodation would provide a 'preference' – in the sense that it would permit the worker with a disability to violate a rule that others must obey…") *with* Webster's New Collegiate Dictionary 899 (defining "preference" as "the act, fact, or principle of giving advantages to some over others").

[267] *See, e.g.,* Roth v. Lutheran General Hospital, 57 F.3d 1446 (7th Cir. 1995).

[268] *Cf.* Jolls, *supra* note 28, at 697 (noting that affirmative action more clearly contemplates "the possibility of disrupting discrete interests of identifiable fellow employees" than does reasonable accommodation). Jolls, however, does recognize that an employer's obligation to provide accommodations to employees with disabilities may affect other workers as a group by imposing an additional cost of business that may lower overall employment levels. *Id.*

[269] *See* Tucker, *supra* note 18, at 347 (describing how her ability to communicate via telephone is limited even with the use of TDD technology).

Ultimately then, notwithstanding the superficial similarity between accommodation and affirmative action, the ADA's mandate of reasonable accommodation appears more closely related to disparate impact liability and hostile environment liability than to affirmative action. Like disparate impact theory and (to some lesser degree) hostile environment theory, the reasonable accommodation mandate imposes on employers the legal obligation to eliminate workplace standards, policies, or physical environments that serve to interfere with equal workplace opportunities for racial or ethnic minorities, women, and people with disabilities. In light of this conceptual alignment, the ADA's accommodation mandate appears to fit comfortably within the realm of antidiscrimination law.

IV. Implications of Accommodation as a Species of Antidiscrimination

The goal of this Article has been to rebut the assertion made by numerous commentators that the ADA, with its requirement that employers provide reasonable accommodations, represents a radical divergence from pre-existing understandings of antidiscrimination law, as embodied in Title VII. This rebuttal has drawn on the insights of scholars in the field of disability studies regarding the sources of the inequality experienced by persons with disabilities; specifically, it has focused on how conventional workplace environments and expectations may embody disregard for and devaluation of people with disabilities and function as impediments to disabled people's opportunity to compete in the workplace. In this light, an employer's refusal to remove such barriers is revealed as a form of discrimination against people with disabilities. Moreover, examination of the conceptual foundations of disparate impact liability and hostile environment liability under Title VII demonstrate that the removal of barriers to equal employment opportunity is a core goal of antidiscrimination. Thus, the ADA's accommodation

requirement – understood to demand that employers eliminate discriminatory barriers – fits comfortably within the body of antidiscrimination law.

Developing and articulating this conception of reasonable accommodation as part and parcel of antidiscrimination law has been this Article's purpose. Fully considering the range of implications that this understanding suggests is a project unto itself, which I do not undertake in this Article. Nevertheless, for those readers who wonder what possible relevance this understanding has, this final Part will briefly note several potential implications and sketch the broad outlines of a proposal for how this notion could assist courts in determining what accommodations are "reasonable" in the context of the ADA.

First, recognizing the fundamental kinship between reasonable accommodation and other models of antidiscrimination law could affect judicial attitudes towards the ADA generally. As discussed earlier, some commentators have identified an ADA "backlash" in judicial decisions limiting the group of people who qualify as individuals with disabilities.[270] The unwillingness of courts to interpret the ADA's definition of disability broadly may reflect in part a concern that the ADA's right to reasonable accommodation is truly in the nature of a welfare benefit, rather than being an integral part of the ADA's protection against disability discrimination.[271] If courts understand accommodation as a potentially costly "special" or "extra" benefit, then their willingness to dole out that benefit only to those who truly need it – the so-called "truly disabled" – is unsurprising. If courts could be persuaded that reasonable accommodation is instead a crucial way of protecting persons with disabilities against a form of discrimination, they may become more willing to view the ADA as remedial legislation to be interpreted

---

[270] *See supra* text accompanying note ___.

[271] *Accord* Tucker, *supra* note 18, at 353-54 (suggesting that decisions narrowing the definition of disability may be understood as flowing from court's failure to understand or accept the civil rights premises underlying the reasonable accommodation requirement).

broadly. Put simply, courts may be more disposed to grant civil rights, as compared to welfare rights, to individuals whose disability status is contested.

That said, acknowledging the similarities between reasonable accommodation and Title VII antidiscrimination theories does not decrease the importance of how Congress and the courts define what individuals have disabilities entitling them to the ADA's protection. A central argument of this Article is that, because society's physical and institutional structures reflect a disregard for people with disabilities as full and equal members of society, we should comprehend accommodation as a mechanism for remedying discrimination by demanding the removal of socially imposed barriers to equal employment opportunity for people with disabilities. Given this understanding, it seems logical to accord statutory protection (at least with respect to accommodation rights) to those individuals who, because they have been the subject of societal disregard and devaluation, are likely to encounter such barriers. It is not clear that the existing statutory definition of disability[272] serves this purpose, but some scholarship regarding the meaning of disability proposes such an understanding.

A. A Proposal for Fleshing Out Reasonableness

A more interesting and important implication of appreciating how accommodation functions to remove barriers to equal workplace opportunity faced by people with disabilities is that this appreciation provides courts with a tool for assessing when a requested accommodation is "reasonable." Courts have long struggled with the challenge of delineating "reasonable" from "unreasonable" accommodations,[273] without achieving any definitive standard for assessing

---

[272] *See* 42 U.S.C. § 12111( ) (defining "individual with a disability").

[273] Even prior to the passage of the ADA, regulations promulgated under section 504 of the Rehabilitation Act of 1973 had imposed a duty of reasonable accommodation on entities receiving federal financial assistance. *Cf.* Borkowski v. Valley Central School Dist., 63 F.3d 131, 136 (2d Cir. 1995) ("Given the rather obscure regulatory

reasonableness. While some have argued that the term "reasonable," when modifying "accommodation," should be interpreted simply to require an accommodation that will be effective in enabling a disabled worker to perform his job, the Supreme Court rejected this interpretation in *US Airways, Inc. v. Barnett*.[274] Much of the lower courts' analysis of what reasonableness means in the context of accommodations is actually limited to identifying unreasonable accommodations, *i.e.*, steps that employers are not required to take.[275] A few Circuit Courts of Appeal, however, have provided some forward motion in the project of developing a standard for gauging reasonableness by suggesting that the statutory qualifier requires a consideration of the costs and benefits that will be associated with a proposed accommodation.[276] As Judge Newman wrote for the Second Circuit: "'Reasonable' is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce. This requires an inquiry not only into the benefits of the accommodation but into its costs as well."[277] This understanding of

---

language, it is perhaps not surprising that courts have struggled to give content to the terms reasonable accommodation and undue hardship.")

[274] 122 S. Ct. 1516, 1522 (2002). The Court in *Barnett* did not explore at length the general meaning of "reasonable" as applied to "accommodation." Instead, the Court focused on a specific question: whether an employee's request for reassignment to a vacant position is a "reasonable accommodation" when the requested reassignment would violate the rules of the employer's seniority system. *Id.* at 1523-24. The Court's opinion suggests, however, without so holding, that "an ordinary language interpretation" (whatever that means) of reasonable is appropriate. *Id.* at 1523.

[275] For example, a number of courts have ruled that the mandate of reasonable accommodation does not require an employer to eliminate or reallocate an essential function of a job, *see* Davidson v. America Online, Inc., 2003 WL 21752934 (10th Cir. 2003); Shannon v. New York City Transit Authority, 332 F.3d 95 (2d Cir. 2003); Alexander v. Northland Inn, 321 F.3d 723 (8th Cir. 2003), create a new position for a disabled employee, *see* Watson v. Lithonia Lighting, 304 F.3d 749 (7th Cir. 2002); Buskirk v. Apollo Metals, 307 F.3d 160 (3rd Cir. 2002); Mathews v. Denver Post, 263 F.3d 1164 (10th Cir. 2001), or allow a disabled worker an indefinite leave of absence, *see* Lynch v. U.S. Postal Service, 3 Fed. Appx. 287 (6th Cir. 2001); Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000).

[276] *See* Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir 1995); Vande Zande v. State of Wisconsin Dept. of Admin., 44 F.3d 548 (7th Cir. 1995).

[277] 63 F.3d at 138. Judge Newman was also careful to note, however, that the suggested cost-benefit calculus should consider benefits flowing from the accommodation beyond those enjoyed by the employer. *Id.* at 138 n.3.

reasonableness as a limitation on the accommodation mandate mimics the function of reasonableness in negligence law.[278]

This proposition that a cost-benefit analysis may be useful to put some flesh on the bare statutory term "reasonable" does not seem illegitimate as far as it goes, but it fails to catch the sum total of how we should understand the reasonableness of an accommodation. Even in negligence law, a cost-benefit analysis of reasonable care is conducted in light of the overarching purpose of negligence law to allocate the costs of accidents in a way that balances the competing goals of optimal deterrence, loss distribution, and compensation. Accordingly, it seems that if we are to assess the reasonableness of an accommodation by weighing costs and benefits, we must do so in light of the ADA's overarching goal of ending discrimination against people with disabilities.

Thus, I would propose that a court deciding whether an accommodation requested by a qualified individual with a disability is reasonable should consider whether the requested accommodation, if provided, would function to remedy discrimination by removing a socially imposed and disability-related barrier to equal opportunity for the disabled individual. If the policy, practice, or physical structure that the disabled individual seeks to have modified is one that would not be likely to exist if persons with a wide range of disabilities were welcome, common, and fully participating members of society, then it can be deemed to be discriminatory and its removal or modification can be seen as furthering the ADA's goals. Or, to put the same idea another way that draws on accommodation's kinship with disparate impact theory, if the policy, practice, or physical structure has the adverse impact of disproportionately excluding

---

[278] "So 'reasonable' may be intended to qualify (in the sense of weaken) 'accommodation,' in just the same way that … in law … the duty of 'reasonable care,' the cornerstone of the law of negligence, requires something less than the maximum possible care." Vande Zande, 44 F.3d at 542.

persons with disabilities (or persons with a particular disability) from the workplace, then it is discriminatory.[279] By contrast, if any barrier to the disabled individual's job performance is either totally unrelated to his disability[280] or flows solely from functional limitations associated with his impairment, then removal of that barrier – while it might help the disabled individual become or remain employed – will not function to remedy disability discrimination and should not be deemed a "reasonable" accommodation.

Undoubtedly, this proposed standard for assessing the reasonableness of accommodations calls for fuller examination and closer scrutiny than I give it here. Nevertheless, applying just this rough sketch to the facts of an accommodation case decided under the Rehabilitation Act demonstrates how it might work. In *Gardner v. Morris*,[281] the Army Corps of Engineers refused a request for assignment to Saudi Arabia made by a technician who had been diagnosed with bi-polar condition. The reason for the refusal was the Corps' concern that the lack of adequate medical facilities at the requested location, combined with frequent difficulties with communications and transportation in the desert, would place the technician and other individuals in potential danger. The technician requested that the Corps accommodate his disability by expanding its medical capacity at the site in order to permit the implementation of a medical protocol for responding to his condition. The Eight Circuit, focusing solely on the costs

---

[279] I recognize that this expression of the proposal focuses on the nature of the barrier (*i.e.,* that aspect of the work environment that the disabled individual seeks to have modified) rather than on the proposed modification itself. By extension, a "reasonable" modification would be one that serves to remove the barrier.

[280] For example, imagine a hearing impaired individual who holds a job that requires her to be at work every morning at 6 AM. She is an excellent employee until she starts being frequently tardy for work when the schedule for public transportation in her neighborhood changes. When her employer threatens to discipline her for tardiness, she requests that her starting time be adjusted as an accommodation. While the proposed accommodation might enable her to perform her job successfully, it would not be reasonable in light of the ADA's purposes because the barrier to her success – a public transportation schedule – has no relation to her hearing impairment.

[281] 752 F.2d 1271 (8th Cir. 1985).

of expanding the medical facilities, denied the employee's right to the requested accommodation.[282]

Under the proposed standard for assessing the reasonableness of accommodations, however, the employee should have lost even if the proposed expansion had not been too costly. This conclusion flows from the fact that the barrier to the employee's successful job performance (the primitive nature of medical resources in a remote desert location), while it was related to his disability (in that but for his disability the medical limitations wouldn't have prevented his assignment), was not the product of societal disregard for people with disabilities. The rudimentary health care situation presumably had nothing to do with society's (whether American or Saudi) expectations that disabled people would not participate in societal life as full citizens, but instead had everything to do with limited resources, sparse population, and a generally low level of medical technology. Accordingly, even though the requested accommodation might have enabled the technician to do his job, it would not have served to remedy disability discrimination and therefore should not be deemed reasonable if the case arose under the ADA.

The proposed approach to judging reasonableness is similar to the thrust of Justice Scalia's dissent in *US Airways, Inc. v. Barnett*.[283] Justice Scalia's fundamental disagreement with the majority in that case lay in his belief that overriding a seniority system in order to assign a disabled employee to a vacant position could never be a reasonable accommodation because a seniority system poses "no *distinctive* obstacle to the disabled."[284] According to Scalia, the

---

[282] In so doing, the court effectively collapsed the separate inquiries of whether the accommodation requested is reasonable and, if so, whether that reasonable accommodation is not required because it would impose an undue hardship on the employer. 752 F.2d at 1283-84.
[283] 122 S. Ct. 1516, 1528-1532 (2002) (Scalia, J., dissenting).
[284] *Id.* at 1528 (emphasis in original).

ADA's accommodation mandate requires only "the suspension (within reason) of those employment rules and practices *that the employee's disability prevents him from observing*."[285] Thus, in Scalia's view, the ADA requires the modification of rules and practices that act as barriers because of an employee's disability, but not those rules and practices that burden disabled and non-disabled employees equally.[286] Justice Scalia's reasoning reveals an attempt to tether the ADA's reasonable accommodation mandate to the statute's antidiscrimination purpose.[287]

While the proposed standard's purpose is to guide courts in ascertaining the reasonableness of an accommodation, it certainly raises questions of its own. An obvious question is just how exhaustive is the employer's barrier removal obligation under a standard of reasonable accommodation. In other words, is an accommodation reasonable if it serves to remove any socially imposed barrier to an employee's ability to perform her job, regardless of the significance of the barrier, or are reasonable accommodations limited to remedying barriers of some magnitude? A range of different approaches would certainly be possible.

---

[285] *Id.* (emphasis in original).

[286] Justice Scalia reasons as follows:

[T]he ADA eliminates workplace barriers only if a disability prevents an employee from overcoming them – those barriers that would not be barriers *but for* the employee's disability. … But they do not include rules and practices that bear no more heavily upon the disabled employee than upon others – even though an exemption from such a rule or practice might in a sense"make up for" the employee's disability. *Id.* at 1529.

[287] That said, I do not read Justice Scalia's dissent in *Barnett* as fully consistent with my proposed approach, in large part because I question whether his analysis of the burdens imposed by facially neutral policies would scrutinize those policies as closely as the minority group model of disability would suggest is appropriate. For example, he endorses the view that seniority policies and policies of giving full-time employees priority over part-time employees in assigning vacant positions as "legitimate, nondiscriminatory" policies. *Id.* at 1530-31. I would speculate, however, that such policies, which favor longer-term and full-time employees over more recent and part-time employees, might indeed bear more heavily on employees whose disabilities have delayed their entry into the job market, interrupted their employment history, or limited their ability to work full time. *Accord* Amar & Brownstein, *supra* note 11, at 366 ("Don't seniority rules 'bear more heavily' on disabled workers because such workers have shorter work histories with particular employers, in part due to an historical (and economically rational) pre-ADA unwillingness by employers to modify workplace rules to accommodate the physical needs of the disabled?"). In addition, Justice Scalia's attempt to distinguish policies that have a "harsher effect" on a particular disabled employee (and that do not justify an accommodation) from policies that "burden" a disabled person because of his disability (and that do justify an accommodation), *id.* at 1529, potentially confuses the relevant inquiry.

First, one could argue that if the ADA's goal is the full and equal inclusion and participation of people with disabilities in American society, then an accommodation that removes any barrier is reasonable. The continued existence of any rule, practice, or structure that disproportionately impedes the ability of people with disabilities to succeed in the workplace tolerates unequal workplace opportunity. Moreover, to the extent that the failure to remove barriers – even though seemingly insignificant – causes disabled workers to be set apart or treated differently in a visible way, the barriers' continued existence threatens to contribute to the stigma experienced by those workers.

The plaintiff in *Vande Zande v. State of Wisconsin Department of Administration*[288] made a similar argument, asserting that her employer violated the ADA by refusing to lower a sink in an employees' kitchenette so that she could use the sink while in her wheelchair.[289] Although an accessible sink was available to her in the restroom, Vande Zande claimed that consigning her to use the bathroom sink for rinsing her coffee cup or lunch dishes when other employees could use the kitchenette sink would stigmatize her as "different and inferior."[290] These facts do suggest a situation in which a disability-related barrier subjects a disabled worker to unequal conditions in the workplace. The question, however, is whether this barrier functions to deny the worker equal workplace opportunity, so that its removal reasonably furthers the ADA's goals. Certainly a strong argument can be made that it does not,[291] because using a bathroom sink for washing does

---

[288] 44 F.3d 538 (7rh Cir. 1995).

[289] Her employer had previously made numerous accommodations, both physical and administrative in nature, to Vande Zande's disability. In the litigation, Vande Zande also claimed a failure to accommodation in her employer's refusal to grant her request that she be allowed to work full time at home and be provided with a desktop computer at home for an eight week period while she was recovering from pressure ulcers. *Id.* at 544.

[290] *Id.* at 546.

[291] Judge Posner easily concluded that the requested accommodation, even though its cost would be low, was not required by the ADA. He dismissed Vande Zande's stigma argument as "merely an epithet" and reasoned that an employer does not have "a duty to expend even modest amount of money to bring about an absolute identity in working conditions between disabled and nondisabled workers." *Id.* at 538.

not directly interfere with the plaintiff's ability to perform her job and does not segregate her with respect to any significant employment activity.[292]

To state the argument against the reasonableness of Vande Zande's requested accommodation is not to say that the stigmatizing effect of an employer's refusal to remove an arguably insignificant barrier may not be substantial enough, in some instances, to require its removal as a reasonable accommodation. Contrast the scenario in *Vande Zande* with a case in which a law firm hires an associate who uses a wheelchair. Part of the law firm's culture is to have a firm meeting every week, in the firm's fancy conference room, with all attorneys in attendance, but it turns out that two steps lead into the conference room. When the new associate requests that the firm construct a ramp into the conference room or hold the weekly firm meeting in an accessible venue, the firm's management refuses and suggests to the associate that if she positions her wheelchair outside the entrance to the conference room she will be able to hear what is said in the meeting. In this scenario, while the associate can arguably perform the functions of her job without the accommodation, the associate's segregated participation in a vital aspect of firm life can be seen as depriving her of equal workplace opportunity.

At the other end of the "what is reasonable" spectrum, one might argue that, because the ADA is concerned with increasing the participation of persons with disabilities in the labor market, the proposed standard for assessing reasonableness should inquire whether a requested accommodation is needed to avoid a disabled person's exclusion from the labor market (and not simply from a particular job). This approach would be akin to Professor Mark Kelman's reasoning that employer-subsidized accommodation should be required only for individuals who

---

[292] The EEOC's regulations defining "reasonable accommodation" indicates that the term comprises either modifications or adjustments that "enable a qualified individual with a disability to perform the essential functions of her job" or that "enable … [an] employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by … other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o).

require accommodation to participate in social life and that accommodation can justifiably be denied to persons who are "unquestionably disabled in a medical sense … if they can avoid segregated status without accommodation."[293] In other words, in this strict view of the proposed standard, even if a requested accommodation is needed to enable a disabled individual to do a particular desired job, the accommodation would not be "reasonable" if the individual could perform other jobs without accommodation and thus does not need the accommodation in order to participate in the workforce.

This strict view strikes me as a stingy reading of reasonable accommodation, one inconsistent with the ADA's broader goal of equal workplace opportunity (and not merely *any* workplace opportunity).[294] Moreover, it is inconsistent with regulations defining reasonable accommodation as one that "enable[s] a qualified individual with a disability to perform the essential functions of [the position held or desired]."[295] Thus, objections to either end of the spectrum suggest the plausibility of a middle ground approach to the question of when an accommodation that removes a barrier to equal workplace opportunity for a disabled individual should be deemed reasonable. A balanced approach could recognize the psychological or stigmatic impact that even seemingly trivial barriers may have, while simultaneously acknowledging that not every barrier demands an employer response. In this regard, looking to courts' attempts to draw similar lines in kindred areas of Title VII law may provide some

---

[293] *See* Kelman, *supra* note 101, at 886-89. Professor Kelman's reasoning goes to which individuals should be able to invoke the right to accommodation, while the strict version of the proposed standard discussed in the text goes to which accommodations should be required for individuals with disabilities.

[294] *Cf.* Cripe v. City of San Jose, 261 F.3d 877 (9th Cir. 2001)(reasoning that ADA requires that every type of employer seek to accommodate workers with disabilities).

[295] *See* 29 C.F.R. § 1630.2(o).

guidance. Not every disparate impact is sufficiently adverse to violate Title VII,[296] and not every denigrating comment creates an actionable hostile work environment.[297]

I anticipate that some may criticize the proposed standard for fleshing out the meaning of reasonableness in the ADA's reasonable accommodation mandate as vague and likely to produce indeterminate results. This criticism is not without force. When one moves from the scholarship of disability theorists to employers' offices and federal courtrooms, limits as to how far society can be deconstructed are inevitable. The standard calls for courts (and employers attempting to comply with the ADA) to distinguish between employee limitations that flow directly from an impairment and barriers to employee success that result from society's aggregated choices regarding how to structure society and the workplace. Responses to remedy the latter, but not the former, would be reasonable accommodations. Serious questions may be raised regarding the extent to which courts will be equipped and ready to make these determinations.

That said, it bears emphasis that Congress chose to employ the term "reasonable" to qualify "accommodation," and this Part simply suggests one important factor that courts should consider in assessing the reasonableness of a requested accommodation. I do not suggest that a precise answer to the question of "Is this barrier natural or socially constructed?" will by itself determine the outcome of the reasonableness inquiry. No court would conclude that Congress intended the common term "reasonable" to be limited to such a specialized meaning. But when courts consider a mix of factors to gauge the reasonableness of a particular accommodation, fundamental rules of statutory construction direct that their interpretation should be informed by

---

[296] *See Spun Steak*, 998 F.2d at 1488 ("Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class. Rather, Title VII protects against only those policies that have a *significant* impact.").

[297] *See Rogers,* 454 F.2d at 238 (cautioning that "an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not violate Title VII).

the ADA's purposes.[298] Thus, based on the analysis in Parts II and III, I suggest that a court, in thinking about whether an accommodation is reasonable, should not simply ask whether the employee needs the accommodation to do the job. Instead, the court should consider whether the accommodation would function to remove a barrier to the disabled individual's successful job performance and whether that barrier can be attributed to societal disregard for persons with disabilities. This question, while unlikely to provide any bright-line answer to the reasonableness inquiry, would certainly help make clearer how a failure to provide reasonable accommodation can be seen as disability discrimination, as well as more tightly tie the determination of what accommodations are required to the advancement of the ADA's core purpose.

B. Coda: What the ADA Doesn't Do for People with Disabilities

This Article's argument that the ADA's reasonable accommodation provision should be understood as firmly grounded in antidiscrimination principles largely focuses on the affirmative obligations that flow from that understanding – specifically, employers' obligations to remove discriminatory barriers to employment opportunity. But this conception of reasonable accommodation also limits the obligations of employers. According to my thesis, the ADA does not impose on employers any obligation to take affirmative steps (beyond removing discriminatory barriers) to increase the overall social welfare of persons with disabilities.

It is a reality that some people with disabilities need more than the ADA's protections against discrimination – even if those protections are broadly construed to advance the ADA's purposes – in order enjoy participation in the richness of American society. For some, full participation is inhibited by effects flowing directly from their impairment without the

---

[298] *Cf.* US Airways v. Barnett, 122 S.Ct. at 1522 (looking to ADA's primary purpose for guidance in interpreting statute).

intermediation of societal devaluation. Many individuals need the assistance of a personal attendant to perform their activities of daily living. Other individuals may have overwhelming health care needs that employers may be practically unable to provide coverage for.[299] Some persons have physical or mental impairments that – even when fully accommodated – may render them less competitive than fellow employees.[300] And a guarantee of reasonable accommodation in employment does nothing to improve the lives of persons with profound mental disabilities.[301]

I close with these points not to deny the value of reasonable accommodation and the ADA's antidiscrimination mandate more broadly to millions of individuals with disabilities, but to emphasize that the ADA must be understood as only one element in our country's disability policy.[302] It is too easy to assume, particularly for those not involved in disability issues, that by passing the ADA Congress undertook to remedy all the problems that people with disabilities face in our society. Indeed, the very breadth and generality of the Act's name bolsters this impression. Instead, the ADA must be understood as targeted at the harms that people with disabilities face because of discrimination, broadly understood. Recognizing the limits to what we have done so far may ultimately help fuel our resolve to take the additional policy steps needed to ensure that all people with disabilities can live with dignity.

---

[299] *See* Bagenstos, *supra* note 13, at 21.

[300] *Cf.* Matthews v. Commonwealth Edison Co., 128 F.3d 1194 (7th Cir.1997)(rejecting ADA claim of plaintiff whose termination as part of employer's reduction in force was based on the plaintiff's absenteeism and lower productivity).

[301] *Cf.* Sara Goering, *Beyond the Medical Model? Disability Formal Justice, and the Exception for the "Profoundly Impaired,"* 12 KENNEDY INST. ETHICS J. 373 (2002)(suggesting that Silvers' formal justice model falls short when applied to "profoundly impaired" individuals); Eva Feder Kittay, *When Caring is Just and Justice is Caring: Justice and Mental Retardation*, 13 PUB. CULTURE 557, 558 (2001) ("Of all disabled people, the severly mentally retarded have least benefited from the inclusion fought for by the disability community").

[302] *Accord* Andrew I. Batavia & Kay Schriner, *The Americans with Disabilities Act as Engine of Social Change: Models of Disability and the Potential of a Civil Rights Approach,* 29 Policy Studies J. 690, 693 (2001) (recognizing value of ADA, but asserting that the statute is "legally … no substitute for the laws needed to achieve such goals as access to health insurance, personal assistance services, employment, smoke-free environments, and the electoral process").

Conclusion

The ADA's reasonable accommodation provision has commonly been characterized as a departure from the essential precepts of antidiscrimination law. These characterizations, however, fail to appreciate either the insights offered by disability theorists regarding the sources of inequality experienced by people with disabilities or the intrinsic conceptual kinship between the ADA's accommodation requirement and disparate impact liability and hostile environment liability under Title VII. Disability theory scholarship affirms that that society's historic disregard for and devaluation of people with disabilities has resulted in workplaces where conventional structures, policies, and practices commonly act as barriers to disabled persons' equal employment opportunity. Examination of the conceptual foundations of disparate impact liability and hostile environment liability demonstrates that the purpose of established antidiscrimination law is the removal of barriers to equal employment opportunity.

Accordingly, this Article contends that the ADA's reasonable accommodation requirement should be properly understood as a mechanism for ending discrimination against people with disabilities by requiring the removal of those workplace obstacles whose presence reflects society's disregard for and devaluation of people with disabilities. This understanding may guide courts called on to determine whether a particular requested accommodation should be deemed a "reasonable" accommodation in light of the ADA's antidiscrimination purpose. Ultimately, it may also prompt a broader recognition that the reasonable accommodation requirement is an integral part of our society's antidiscrimination project.