Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA

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Reasonable accommodations under the Americans with Disabilities Act (ADA) are at the center of the integration of people with disabilities into mainstream work environments. Responses on the part of employers, however, have couched many feasible accommodations as excessive, burdensome, and costly. Employers resist hiring people with disabilities and accommodating existing disabled employees. This position is affirmed by societal and legal messages about the inferiority of disabled workers. Courts have tended to take a pro-employer point of view, deciding that some accommodations are “unreasonable” without specifically unpacking that concept in relation to the language and spirit of the ADA. Meanwhile, one of the most important parts of the ADA remains largely undefined, and employers and courts can take cover behind a vague notion of reasonableness whenever any request seems like “too much.” While scholars have debated whether or not the ADA goes too far in requiring employers to adapt to the needs of disabled individuals, the latter are cast aside in the reasonable accommodation process by employers, courts, and scholars themselves. As a result of this exclusion, people with disabilities struggle to get even the most basic and achievable accommodations granted, such as those related to transportation and assistance with arriving at work. This Article advocates for the involvement of people with disabilities in the accommodation process, not only from a place of cooperation but also in the form of resistance to subjugation. This participation must happen at all levels for any meaningful change to happen in the American workforce. The realization of it depends not on the generosity of employers, jurists, or scholars, but on people with disabilities’

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active confrontation of unjust and irrational interpretations of the ADA. Relying on disability studies approaches and a social model of disability, the author places prospective and current workers with disabilities at the center of the reasonable accommodation process. She suggests that those models can go even farther—and be replaced by a resistance model—to recognize and respond to the biases and prejudices about people with disabilities that lead to their marginalization at work and in communities.

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I. INTRODUCTION

"We become what we are only by the radical and profound rejection of what others have said about us." — Jean-Paul Sartre

One of the most elusive concepts in the Americans with Disabilities Act (ADA) is that of "reasonable accommodation" in the context of

The ADA requires employers to provide reasonable accommodations to otherwise qualified job applicants or employees with disabilities. A reasonable accommodation is “any change in the work environment or the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.” However, the ADA’s notion of accommodation, borrowed from Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, is often difficult to define in practice. Courts have provided very little assistance in formulating tests or rules related to reasonable accommodation. A standards-driven approach has not offered much guidance, either—and it has left employers and people with disabilities questioning their respective responsibilities and duties.

Analyzing what constitutes a “reasonable” accommodation becomes timely as Congress considers the passage of the Americans with Disabilities Restoration Act—a legislative measure designed to clarify the definition of disability under the original statute. Confusion with or resistance to the existing definition of disability under the ADA has led judges and EEOC reviewers to reject the complaints of people with disabilities who were intended to be covered by the statute. The ADA Restoration Act emphasizes broad constructions and interpretations of disability, which would shift the court and EEOC’s foci from the narrow assessment of the effects of people’s impairments to the treatment of people with disabilities in a prejudiced society.

Accordingly, the Restoration Act would define disability as “a physical or mental impairment; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment,” and would thereby eliminate the ADA’s emphasis on impairments in major life

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2. See Americans with Disabilities Act, 42 U.S.C. §§12101-12213 (2006); see also Michael Ashley Stein, The Law and Economics of Disability Accommodations, 53 DUKE L.J. 79, 81 (2003) (noting that little scholarship and even less judiciary guidance informs what is or is not a reasonable accommodation under the ADA) [hereinafter Stein I].


4. Jeremy Horder, Can the Law Do Without the Reasonable Person?, 55 U. TORONTO L.J. 253, 253-255 (2005) (noting that the “merit-based assessment” of reasonableness in other legal contexts is flawed because it is not “value-neutral” and it relies on subjective conceptions of what is “normal”); see also J.H. Verkerke, Is the ADA Efficient?, 50 UCLA L. REV. 903, 954-955 (2003) (noting that with such little guidance, the issue of reasonable accommodation should go to the jury, but judges often throw out ADA employment cases before that happens by denying that plaintiffs have disabilities under the statute) [hereinafter Verkerke I].


activities. The bill’s authors are quick to highlight that the determination of impairments must “be made without considering the impact of any mitigating measures the individual may or may not be using or whether or not any manifestations of an impairment are episodic, in remission, or latent.” Sponsors also underscore Congressional findings supporting claims of discrimination against, and the oppression of, people with disabilities. Courts have downplayed these claims in recent cases.

If passed, the Restoration Act would bolster the possibility of successful employment discrimination actions on the basis of disability. The hurdle then becomes overcoming resistance to the reasonable accommodation mandate of the ADA. To date, much of the reasonable accommodation scholarship has focused on cost-benefit analyses, law and economics, and accommodations vs. rights approaches. One underrepresented voice in this debate is that of people with disabilities. They should be the ones who determine whether or not “reasonable” is a useful, independence-advancing term in the employment context. However, most disability law scholars see the problem of reasonable accommodation as being only effectively addressed by employers. I contend that prospective and current workforce participants with disabilities are best suited to answer the questions that have plagued the ADA’s reasonable accommodation doctrine thus far, allowing it to wrongfully separate the ADA from the promise of civil rights.

7. H.R. 3195, 110th Cong. § 4.2(A), “Disability,” (2007). Examples of physical and mental impairments, as well as having records of these impairments, or being treated as having them, are further defined in §§ 4.3-4.6.


10. See supra note 5.

11. Cf. RUTH O’BRIEN, BODIES IN REVOLT: GENDER, DISABILITY, AND A WORKPLACE ETHIC OF CARE 21 (Rob Tempio ed., Routledge Taylor & Francis Group) (2005) (characterizing the ADA as not only a rights law, but a “needs law,” where “individual peculiarities of all people could be addressed”). See infra § Existing Scholarship.

12. According to a study based on data from the National Health Interview Survey Disability Supplement of workers aged 18 to 69 years old with a range of disabilities, twelve-percent received workplace accommodations. Men, Southerners, and people with mental health issues were less likely to receive accommodations, while college graduates, older workers, full-time workers, and self-employed individuals were more likely to receive accommodations. Craig Zwerling, et al., Workplace Accommodations for People with Disabilities: National Health Interview Survey Disability Supplement, 1994-1995, 45 J. OCCUPATIONAL & ENVTL. MED. 517, 517 (2003).

13. See, e.g., supra Part II.B.

14. See, e.g., Jonathan C. Drimmer, Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities, 40 UCLA L. REV. 1341 (1993) (calling for a civil rights-based approach to disability); Mary T. Westbrook et al., Attitudes Towards Disabilities in a Multicultural Society, 36 SOC. SCI. MED. 615 (1993) (finding a relative degree of stigma attached by the non-disabled to different forms of disability as stable in Chinese, Italian, German, Greek, Arabic, and Anglo-Australian communities; social hierarchies were produced by these negative reactions).
To this point, people with disabilities have largely been perceived by employers, and even some scholars, as problems in the workforce—less productive and more difficult employees to have on board. People with disabilities have also been unsuccessful in making legal claims against employers. As I will discuss in this article, this failure can be linked to courts’ lack of familiarity with the ADA, and the EEOC’s rather limited and paternalistic interpretation of it. As one scholar puts it:

... the distinction at the very heart of Disability Studies, that between impairment and disability, has been lost on jurists. This is the distinction between the way in which a particular condition resides in and affects the function (or form) of an individual’s body, on the one hand, and the way in which social and cultural contexts exclude or penalize people with particular conditions, on the other.

Adding to the intersection of disability studies and the rights discourse in the legal field, I will problematize the role of “reasonable” in employment accommodations under the ADA. The ADA tempts people with disabilities to believe in the promise of access as the first step to full and equal societal participation and civil rights. Yet, this promise is largely unfulfilled.

Scholars, jurists, and practitioners of the law must consider when, if ever, it is appropriate for the vague term of reasonable to trump civil rights for this historically oppressed and disenfranchised group. As powerful “official text producers” of a society, legal scholars can reframe support and analysis for the employment provisions of the ADA. They can act in concert with people with disabilities to draw attention to primary stumbling blocks in the statute’s reception and implementation.


Working in this advocate-scholar role, I will use a controversial example of reasonable accommodations—those accommodations related to getting to work—to demonstrate the spirit by which "reasonable" has been applied thus far: as an imprecise, bias-laden, pro-employer conduit for attitudinal barriers and misconceptions about disability.20 These cases demonstrate that the consideration of reasonable accommodations has departed from the social goal of employing and integrating people with disabilities. Rather than serving as a benchmark for limitations on the feasibility of accommodations, "reasonable" has become an opportunity for employers, courts, and agencies to pause and consider what they find unreasonable about the ADA, people with disabilities, and their needs.21 It is a subtle, yet limiting (to people with disabilities), nod to prejudices in practice. An amorphous reasonable accommodation analysis quietly imports concerns about people with disabilities abusing the ADA to serve personal whims or needs.22 Even the EEOC has enforced an arbitrary personal/work binary that paralleled the private/public dynamics instituted in resistance to other civil rights struggles.23 I hold that accommodations are access, and that for people with disabilities, this access is equivalent to integrating schools, demolishing Blacks-only bathrooms, and advancing the right for interracial couples to wed.24

20. The productivity rates of disabled and non-disabled workers are comparable. The Office of Vocational Rehabilitation suggests that employers rated 91% of employees with disabilities as "average" or "better than average." Consider that some workers with disabilities may outperform their non-disabled peers. See Stein I, supra note 2, at 131-134. Without relevant information about a potential employee with a disability, an employer might assume that he or she is less skilled and less productive by taking the mark of disability as an indication of inferiority.

21. Jamie Prenkert and Julie Magid propose a Hobson's choice model for considering religious accommodation under Title VII, aspects of which could be borrowed for the ADA's resolution of the issue (which, ironically enough, the authors suggest works better than Title VII). They emphasize employers and coworkers' resistance to people being accommodated for their sincere religious beliefs. Courts attempt to avoid a "heckler's veto" where other people's doubts about accommodation needs undermine requests. Jamie Darin Prenkert & Julie Manning Magid, A Hobson's Choice Model for Religious Accommodation, 43 AM. BUS. L.J. 467, 469-470, 496 (2006).

22. One overlapping idea in this debate is that people with disabilities are able to insist upon discrimination in their favor, when they ask for reasonable accommodations. As I will argue, accommodations are vehicles of equality, not preference and whim. See Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 DUKE L.J. 1, 3 (1996) (detailing the discrimination-in-their-favor perspective).


24. See Lauren B. Gates, Workplace Accommodation as Social Process, 10 J. OCCUPATIONAL REHABILITATION 85 (2000) (highlighting the failure of employers to view the social dimensions of accommodation, such as self-esteem and well-being); see also Dennis Gilbride, et al., Identification of the Characteristics of Work Environments and Employers Open to Hiring and Accommodating People with Disabilities, 46 REHABILITATION COUNSELING BULL. 130, 133 (Table 1. Key Characteristics of Employers Who Are Open to People with Disabilities: grouping characteristics of
A new model that fuses disability studies with resistance theories that have been borrowed from social, education, and feminist theories, will move the focus from the employer's sense of "reasonable" to people with disabilities and the current experiences of disability in the United States. People with disabilities and employers must prepare for the discomfort and growth that come from radical societal shifts in thinking about disability. To this point, the only significant resistance to the ADA is that of employers and communities opposed to its presence. I suggest a form of resistance that embraces conflicts in thinking and attitudes about disability as a strategy for economic justice and social change in the employment of people with disabilities. Resistance empowers people with disabilities to define "reasonable" accommodations.

This article will proceed in four parts. Part I will provide an overview of reasonable accommodations, beginning with an explanation of how they fit into the larger structure of the ADA. Previous scholarship in the field, most notably from Professors Bagenstos, Jolls, Rutherglen, Stein, Schwab, Verkerke, and Willborn, will be discussed. In Part II, I will analyze existing case law on a particular class of reasonable accommodations—those related to getting to work—to demonstrate the conflicts and inconsistencies present. Part III will introduce disability studies, its social model, and its current permutations, as tools of revision and resistance under the ADA. In Part IV, I present resistance as a new mode of

employers most willing to hire people with disabilities along the dimensions of work cultural issues, job match, and employer experience and support).

25. See Susan Peters & Susan Gabel, Exploring Resistance Theories of Disability—A Work in Progress (working paper, forthcoming 2008). ("We knew intuitively that the social model explained [people with disabilities'] experiences, but was not very helpful when it came to changing their experiences. We felt that resistance held a key to a way forward"). I also draw upon concepts borrowed from critical legal theory, critical race theory, and cultural studies.

26. In using the language of justice, I rely on the work of Martha Nussbaum's capabilities approach—"the idea of the citizen as a free and dignified human being." MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 46 (1999). Nussbaum builds on John Rawls's emphasis on freedom and equality, which states that all people should be equal in dignity and worth by virtue of being human. She suggests that all societies should consider people in their diversity. One by one, individuals can receive support as they pursue freedom and satisfaction. See also JOHN RAWLS, POLITICAL LIBERALISM (1996).

27. Resistance theories of social change were based on Marxist and modernist challenges to existing class structures. More recent conceptions of resistance deploy it as a tool for exposing and dismantling "multiple forms of domination" and oppression, such as race, class, gender, and disability. Kathleen K. Abowitz, A Pragmatist Revisioning of Resistance Theory, 37 AM. EDUC. RES. J. 877, 886 (2000).


29. Susan Gabel & Susan Peters, Presage of a Paradigm Shift? Beyond the Social Model of Disability Toward Resistance Theories of Disability, 19 DISABILITY & SOC'Y 585, 586 (2004) (emphasizing resistance theories are not intended to supplant social or other models of disability, but rather, provide ways "to understand the complex relationships between divergent ideas like discourse,
analysis, which focuses on the experiences of people with disabilities and the dismantling of "reasonable" as a gateway for attitudinal barriers against hiring people with disabilities.30

II.
REASONABLE ACCOMMODATION - AN OVERVIEW

A. "Reasonable Accommodation" under the Americans with Disabilities Act

The Americans with Disabilities Act was a multi-year, bipartisan effort realized by legislators, citizens with disabilities, and their families and allies.31 The legislative history of the statute demonstrates that the ADA was intended to end discrimination against people with disabilities.32 Title VII’s anti-discrimination provisions served as a model in the drafting of the ADA.33 Much of the ADA’s language was also adapted from the Rehabilitation Act of 1973, which prevented federal discrimination against

the material body, socio-political systems and processes, power relations, cultural contexts of disability impairment, and so on.

30. Reactionary fears about disability may sometimes keep people with disabilities out of the workplace. Sometimes, however, these fears go unacknowledged and the gap between actions (e.g., hiring, retention, and promotion) and self-assessment of these fears (e.g., perceived attitudes, reported intentions) are great. See Susanne Bruyère, et al., Comparative Study of Workplace Policy and Practices Contributing to Disability Nondiscrimination, 49 REHABILITATION PSYCHOL. 28, 32 (2004) (finding that about half of all the U.S. and British respondent-employers proactively recruited employees with disabilities, yet disability employment rates have not risen) [hereinafter Bruyère I]; see also Richard V. Burkhauser & David C. Stapleton, The Decline in the Employment Rate for People with Disabilities: Bad Data, Bad Health, or Bad Policy?, 20 J. VOCATIONAL REHABILITATION 185 (2004) (more than any underlying health conditions among people with disabilities, social policies towards disability have increased unemployment in the population).


32. The ADA’s Congressional proponents, such as Ted Kennedy, Tom Harkin, and Steny Hoyer, used the floor deliberations to bring forward examples of the pervasive oppression of people with disabilities. Senator Orrin Hatch remarked how "senseless discrimination, intended or not," had "subjected persons with disabilities to isolation and robbed America of the minds, the spirit, and the dedication we need to remain a competitive force in a worldwide economy." National Council on Disability, Making of the Americans with Disabilities Act, http://www.ncd.gov/newsroom/publications/1997/equality_2.htm (last visited July 5, 2007) 136 CONG. REC. S9684-03 (1990); see also Statements on Introduced Bills and Joint Resolutions, 135 CONG. REC. S4979-02, S4984 (1989) (emphasizing the statement of Sen. Harkin: "[T]he full force of the Federal law will come down on anyone who continues to subject persons with disabilities to discrimination by segregating them, by excluding them, or by denying them equally effective and meaningful opportunity to benefit from all aspects of life in America.").

Supporters of the ADA in the early 1990s touted its potential to dismantle the systemic economic and employment discrimination faced by people with disabilities in all work settings. The major tool of this social project would be the concept of the reasonable accommodation, as laid out in the employment provisions in Title I of the ADA.

Title I imposes an affirmative duty on employers to provide “reasonable accommodations” to the known physical or mental limitations of their “qualified” job candidates or employees with disabilities. A person with a disability is qualified if he or she can perform the essential functions of the job with or without reasonable accommodation. Employers may refuse to supply accommodations where those adjustments would pose an undue hardship.

The EEOC’s Interpretive Guidance on Title I of the Americans with Disabilities Act endorses a case-by-case approach to evaluating requests for reasonable accommodations. As the Commission advises:

No specific form of accommodation is guaranteed for all individuals with a particular disability. Rather, an accommodation must be tailored to match the needs of the disabled individual with the needs of the job’s essential functions...Neither the ADA nor this part can supply the ‘correct’ answer in advance for each employment decision concerning an individual with a disability. Instead, the ADA simply establishes parameters to guide...
employers in how to consider, and take into account, the disabling condition involved.\footnote{Id.}

A request for an accommodation,\footnote{Discrimination may be defined under the ADA as "not making reasonable accommodations to the known 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; or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant." 42 U.S.C. § 12112(b)(5)(A)-(B).} therefore, must be reviewed with reference to the needs and disability of the employee and the resources and expectations of the employer.\footnote{Employers' expectations need to be more informed by the realities of hiring people with disabilities, though—a project behind the work of a statute. A 1990 DuPont survey demonstrated that eighty-six percent of employees with disabilities were rated average or above average in their performance. A Sears Roebucks study found that the average cost of workplace accommodations for employees with disabilities was $45. Most accommodations cost less than $500 (only eighteen percent cost more than $1000), according to the Job Accommodation Network, a resource provided by the U.S. Department of Labor's Disability Employment Policy. See E. I. DUPONT DE NEMOURS & CO., EQUAL TO THE TASK (1996); PETER BLANCK, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT, TRANSCENDING COMPLIANCE (1994); JOB ACCOMMODATION NETWORK, ACCOMMODATION BENEFIT/COST DATA (1999).} The process of determining what is a reasonable accommodation is intended to be interactive and collaborative, with the employee and employer working together to define the precise limitations imposed by the disability, and exploring the possible responses to those limitations.\footnote{See 29 C.F.R. § 1630.9. "When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;
(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and employer." Id.} An appropriate accommodation can be "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."\footnote{EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 1-3.1 (1992) [hereinafter TECHNICAL ASSISTANCE MANUAL].} The reasonable accommodation obligation "applies to all aspects of employment."\footnote{29 C.F.R. § 1630.2(o).}

Reasonable accommodations may include:
(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.\textsuperscript{47}

The EEOC's \textit{Interpretive Guidance on Title I} provides examples of possible reasonable accommodations, while emphasizing that this list is not intended to be exhaustive. Among the possibilities it suggests for accommodation are the provision of reserved parking spaces\textsuperscript{48} and flexible work schedules.\textsuperscript{49}

Of the kinds of discrimination prohibited by the ADA, an employer's failure to make reasonable accommodations is perhaps among the most contentious. Disability rights advocates sometimes question whether or not the reasonable accommodation mandate has increased employment opportunities for people with disabilities. Whereas many scholars agree that the actual employment rate of people with disabilities has declined since the passage of the ADA in 1990, the degree of this decline is a matter of lively debate. Some scholars also disagree about whether or not the salaries of people with disabilities have also declined since the early 1990s (after adjusting for inflation and general employment trends).\textsuperscript{50} The

\textsuperscript{47} 42 U.S.C. §12111(9), see also 29 C.F.R. 1630.2(o)(2)(i-ii).

\textsuperscript{48} 29 C.F.R. § 1630.2(o) ("This listing is not intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces.").

\textsuperscript{49} \textit{ld}.  

relationship between rates of accommodation and overall employment are contested, too. Some commentators have established a correlation between slightly more reasonable accommodation under the ADA, and lower wages for people with disabilities overall.

In sum, the ADA has not caused the dramatic changes in employment equality that its framers intended. Sources of this stalemate might include employers’ confusion about the employment opportunities the ADA promises and fears about the costs of hiring people with disabilities. However, some studies have shown that the costs of accommodation have little to do with why employers refuse to hire people with disabilities; perceptions about training, skills, and talents have more to do with the impasse.

Unlike Title VII of the Civil Rights Act, the ADA seemed to pre-date a cultural shift in attitudes about people with disabilities. One of the legacies of the ADA has been to push citizens forward in grasping disability rights as civil rights, in the face of much resistance to the ADA and its perceived burdens on employers. This push, so far, has not been enough. It has also been met with uncertainty about the relationship between

employment decline). Expanded, timely data should become available as rehabilitation researchers collaborate with the EEOC to document the employment problem, as part of the National EEOC ADA Research Project. See Brian T. McMahon & Linda Shaw, Workplace Discrimination and Disability, 23 J. of VOCATIONAL REHABILITATION 137, 138 (showing that initial findings of the ADA Research Project reveal differences in EEOC merit resolutions of ADA claims based on type of disability and industry sector). See also Katherine D. Seelman, Chartbook on Work and Disability: National Institute on Disability and Rehabilitation Research; available at http://www.infouse.com/disabilitydata/ workdisability (last visited August 6, 2007) (noting that women with disabilities have lower rates of labor force participation).

51. See Kerwin K. Charles, The Extent and Effect of Employer Compliance with the Accommodations Mandates of the Americans with Disabilities Act, 15 J. OF DISABILITY POL’Y STUDIES 86 (2004) (relying on data from several waves of the National Institute on Aging’s Health and Retirement Study to demonstrate that accommodation rates have slightly increased since the passage of the ADA, but employees with disabilities are receiving lower wages); see also Stapleton & Burkhauser, supra note 30, at 10 (finding that in the 1990s, the number of people with disabilities unable to work rose, while employment among people with disabilities able to work also rose).


53. See UAW v. Johnson Controls, 499 U.S. 187, 211 (1991) (deciding that the extra cost of hiring women did not provide an affirmative Title VII defense for refusing to hire them altogether).

54. See Bruyère I, supra note 30, at 32-34.

55. See Michael Ashley Stein, Same Struggle, Different Difference: ADA Accommodation as Antidisrcrimination, 153 U. PA. L. REV. 579, 627 (2004) (noting that legislators with family members with disabilities rallied behind the initiative, more out of personal interest than cultural changes) [hereinafter Stein II].

accommodation in disability rights and employment nondiscrimination in civil rights.

B. Existing Scholarship

Other scholars have thoughtfully explored the complicated relationship between the ADA and Title VII, its civil rights forbearer. This relationship depends, to some extent, on the purposes of the acts themselves. Is the ADA a piece of civil rights legislation, like Title VII? Or is it an accommodation program cast on employers? Or, alternatively, is its purpose to fuse rights and accommodations to reduce the number of people with disabilities in the welfare and Social Security systems? The debate over what can be inferred from the ADA's construction history and its parallels with Title VII has manifested itself in two main arguments about reasonable accommodation under the ADA. The first thread is a law and economics analysis of the ADA through the lens of efficiency and productivity. The second two assume a rights-based orientation, which is taken by scholars interested in the relationship between the accommodations mandate of the ADA and Title VII.

The rights-based approach in the existing scholarship, seen in the scholarship of professors Karlan, Rutherglen, Jolls, and Bagenstos, among others, has advanced this debate in the last twelve years. The tensions between their contributions are worthy of examination. Professors Schwab, Willborn, and Leonard provide theoretical transitions from the rights-based camp to the law and economics model of Professor Verkerke. Finally, Professor Stein fuses law and economics with civil rights.

Professors Karlan and Rutherglen's 1996 article, Disabilities, Discrimination, and Reasonable Accommodation, frames the rights

57. Disability law scholar Sam Bagenstos' analysis of the ADA as risk regulation and welfare-avoiding legislation has been a touchstone for many scholarly inquiries. His work on stigma and subordination expands his focus to take into consideration the experiences of people with disabilities in employment. See Samuel R. Bagenstos, Subordination, Stigma, and "Disability", 86 Va. L. Rev. 398 (2000) [hereinafter Bagenstos I].

58. See Stein II, supra note 55, at 582-583, 585 (challenging the canonical divide between Title I of the ADA and Title VII, and paralleling disability discrimination with other kinds of discrimination; "ADA-mandated accommodations are fundamental antidiscrimination measures that effectuate no more than equality").

59. See Bagenstos I, supra note 57; see also Amy L. Wax, Disability, Reciprocity, and Real Efficiency: A Unified Approach, 44 Wm. & Mary L. Rev. 1421 (2003) (arguing that the ADA is cost-effective because it increases social welfare by employing people who would otherwise be absent from the economy, and that efficiency needs to be viewed from more than the perspective of individual employers).

60. Stein provides a bridge to social justice models of the ADA through his work as well. Consider, too, arguments about the relationship between health inequalities and injustice, such as by Norman Daniels, et. al., Why Justice is Good for Our Health: The Social Determinants of Health Inequalities, 128 Daedalus 1 (1999) (drawing upon John Rawls' theories of justice).
analysis. They argue that the ADA is fundamentally different from Title VII in its approach to defining discrimination, and therefore, accommodations. The ADA asks employers to consider disability in order to provide reasonable accommodations—or in other words, to discriminate in favor of a person with a disability. In contrast, traditional civil rights approaches ask the very opposite: that race, gender, age, ethnicity, or national origin, not be considered. Rutherglen and Karlan point out that this "difference model" must consider disability to respond to it in an anti-discriminatory manner. In looking at whether an accommodation is reasonable, they make a comparison to "reasonable" as used in negligence law. This once again directs the analysis toward individual inquiries and assessments.61

The disjunction between the ADA and Title VII does not preclude the statutes from shaping one another. Karlan and Rutherglen view the statutes as interrelated—with the ADA as an "innovation" that might "assist in a reconception of affirmative action."62 Specifically, the "flexible, interactive process" of reasonable accommodation under the ADA could have positive crossover to other areas of discrimination where attitudinal hurdles are also significant.63

In Antidiscrimination and Accommodation, Christine Jolls departs from the mainstream argument that the curious mechanism of reasonable accommodation is what separates the ADA from Title VII.64 She demonstrates that reasonable accommodations are also made in the context of Title VII cases, where employers "take affirmative steps to 'accommodate' the special, distinctive needs of particular groups."65 Using examples of Title VII forms of accommodation, such as English-only rules, job selection criteria, pregnancy, and grooming rules, Jolls takes issue with the demarcation between ADA accommodations as "special" treatment and antidiscrimination or Title VII as equal treatment66; she contends that these too are examples of "altering the work environment."67 Jolls argues that accommodation and antidiscrimination are overlapping concepts, both of which advance anti-subordination principles.68

61. See Karlan & Rutherglen, supra note 22, at 32. I would consider the ways in which these inquiries and assessments are grounded in particular cultural contexts and dynamics that shape their outcomes.
62. Id. at 4-5.
63. Id.
65. Id. at 643.
66. Id. at 644, 653-66.
67. Id. at 668.
68. Id. at 648. Jolls defines accommodation as a "legal rule that requires employers to incur special costs in response to the distinctive needs (as measured against existing market structures) of particular, identifiable demographic groups of employees, such as individuals with (observable)
In articulating her framework for accommodation and antidiscrimination, Jolls emphasizes that both the ADA and Title VII are concerned with how jobs are defined and organized, as well as how candidates are selected for openings. Additionally, some workplace policies and procedures are related to neither selection nor retention. Therefore, the separation between “elements of the job itself” and selection procedures is not a useful proxy for distinguishing the ADA from Title VII. Accommodations, disparate impact, and disparate treatment liability all impose costs on employers. Jolls, however, acknowledges that there are some normative differences between accommodation mandates and intentional discrimination in the form of disparate treatment or disparate impact liability. She maintains the divide between acting intentionally on the basis of group membership, and failing to accommodate. This is a distinction that I do not make.

Samuel Bagenstos takes Jolls’ positions further, asserting a normative argument for viewing accommodations as civil rights. He recognizes reasonable accommodation as a tool for overcoming systemic subordination and oppression. The ADA and Title VII share similar conceptions of equality at their foundations. Professor Bagenstos urges that challenges to disability rights laws should be fundamentally conceptualized as attacks on social equality and civil rights laws. In particular, he confronts arguments in support of rational discrimination—a frequent excuse for failing to accommodate—as at odds with normative and practical approaches to civil rights. Calling ADA accommodations “merely the fullest working-out of the basic underpinnings of the antidiscrimination prohibitions of the Civil Rights Act of 1964,” he removes the boundary between civil rights and disability rights.

Stewart Schwab and Steven Willborn contest Jolls’, and therefore, Bagenstos’ and my own identified overlap between the ADA and Title VII.

69. Id. at 670.
70. Id. at 698.
71. Id. at 684 (stating that “The distinction based on the presence or absence of such intentional differential treatment may not be a sound one, but the point of what follows is not to question it. Thus I do not here claim a general or overarching normative equivalence between antidiscrimination and accommodation...”).
73. Id., supra note 72, at 829-30 (describing his approach as “targeting a practice of occupational segregation”).
74. Id., supra note 72, at 832.
75. Id., supra note 72, at 910.
In *Reasonable Accommodations of Workplace Disabilities*, they argue that Title VII and the ADA are fundamentally different in their definitions of discrimination. Title VII allows employers to safely ignore categories of difference, such as race and gender. Employers may make decisions based solely on productivity criteria and still avoid disparate impact claims. Although both Title VII and the ADA use a "sameness model," only the ADA "requir[es] employers to treat individuals with disabilities differently and more favorably than others." According to the authors, the ADA and Title VII only impose these kinds of dispensations for people with disabilities.

Schwab and Willborn's critique of Jolls' argument is that she does not distinguish the accommodations model from antidiscrimination. They argue that she uses fringe cases from Title VII to show its alignment with the ADA. According to them, this model of discrimination threatens the accommodation model by ignoring the core cases and their patterns. Schwab and Willborn distinguish between judicial restructuring of jobs and judicial scrutiny of hiring decisions, attributing the former to the ADA and the latter to Title VII.

As an alternative, Schwab and Willborn provide an informal economic model to tease out how employers choose employees, given productivity needs and costs. This model is then used to show how the ADA advances "soft" (removal of disability bias) and "hard preferences" (reasonable accommodations). These hard preferences of reasonable accommodations go beyond what Title VII provides, and Schwab and Willborn characterize these preferences as a "distinctive model of discrimination" and a "type of affirmative action to achieve the goal of integrating individuals with disabilities into the labor market," even if this integration presents economic losses for the employer. In short, the ADA is a vehicle for treating people with disabilities more favorably, even if they are not as productive as employees without disabilities. The authors propose that the kinds of job restructuring imposed on employers by the ADA will eventually spill over into the area of Title VII.

In *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, Jamie Leonard also distinguishes between disparate impact and disparate treatment claims made.

77. Id. at 1200.
78. Id. at 1238.
79. Id. at 1203.
80. Id. at 1204.
under Title VII and claims made under the ADA. Title VII focuses on immutable traits, such as race, gender, and national origin, which should be treated as irrelevant. Leonard, however, argues that disability may, at times, be relevant. Title I’s merger of civil rights and integrationist agendas fails because it has two conflicting goals: making disability an issue at work, and asking employers to not be prejudiced by the same disabilities. Leonard offers that the reasonable accommodation provision of Title I of the ADA does not meld easily with Title VII’s disparate impact and disparate treatment analyses of equality. Accommodation calls for redistribution of attention and resources to people with disabilities to overcome their impairments. In short, the ADA simultaneously insists that employers pay attention to disability (reasonable accommodations) and overlook disability (disparate treatment model adopted from Title VII). The result, according to Leonard, is that employers are left dizzied. They are unsure how to judge the costs of accommodating prospective or current employees with disabilities, and they might, in turn, not hire people with disabilities at all. Leonard emphasizes that reasonable accommodations are pro-employee in how they are structured, in that the burdens must be assumed by the employer, and in their disregard for the “profitability of the accommodated positions.” Leonard dismisses a “moral approach” and calls for consideration of the economic costs—both direct and indirect—of accommodation.

Building on this notion of the expenses of missing information, Professor Verkerke applies a law and economics model to the problems posed by Leonard. In *Is the ADA Efficient?*, Verkerke modifies an “informal economic model of employee turnover” from his existing work to show how “incomplete and asymmetric information” about disabilities affects the labor market’s efficiency in the area of reasonable accommodations. Verkerke points out that this information climate tends to exacerbate problems of “mismatching,” “churning,” and “scarring”—concepts from his previous work on the market and discrimination. Id. at 910-11. (“Mismatching’ can occur whenever employees have inadequate information about the characteristics of current or prospective employees. ‘Churning’ results when employees move from one position to another without improving the quality of the match between worker and job. And ‘scarring occurs when employers rely on labor market signals to refuse to hire workers who could be employed productively’”).
employees with disabilities are placed in positions that will maximize their efficiency.  

Verkerke’s critique is that existing approaches to reasonable accommodation and dignitary arguments about disability have “no stopping point,” where it is only realistic that they must have one. Verkerke criticizes the current law and economics argument for failing to provide a logical model of decision-making. This model would both account for those instances in which dependency on the part of people with disabilities is inefficient and provide an economic rationale for legal interventions that promote productivity. Furthermore, while an economics approach has been a persuasive means of extending nondiscrimination arguments to people with disabilities, it has not fully addressed the issue of reasonable accommodation. Straightforward disability discrimination or bias may be easy to recognize, but how does nondiscrimination apply to reasonable accommodation? This is the opening where Verkerke places his theory, showing that economically-grounded reasonable accommodations allow qualified employees with disabilities to remain in positions where they are productive, while weeding out employees with disabilities who cannot maintain the necessary pace.

Proper matching and comparative accommodation cost analyses are at the core of Verkerke’s arguments. People with disabilities should be denied accommodations where the costs of accommodation would be lower in another job they could perform; workers would then be encouraged to take

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88. Cf. Wax, supra note 59 (arguing for a view of efficiency that goes beyond individual employers returns and matching and takes into consideration benefits to society).

89. Verkerke I, supra note 4, at 905. I would counter that a stopping point is reached when people with disabilities are treated as full and equal citizens, full and equal workers. People with disabilities should be able, if they would like, to make the same pay and enter the same fields as people without disabilities. Cf. Verkerke I, supra note 4, at 927 (“Fully informed employees would simply pay workers with disabilities according to their marginal revenue product”).

90. See e.g., Brian T. McMahon, et al., Workplace Discrimination and Traumatic Brain Injury: The National EEOC ADA Research Project, 25 WORK 67 (2005) (finding that people with traumatic brain injuries are more likely to encounter discrimination after they are hired, than during the hiring process); Brian T. McMahon, et al., Workplace Discrimination and Diabetes: The EEOC Americans with Disabilities Act Research Project, 25 WORK 9 (2005) (stating that people with diabetes are more likely to experience discrimination in the form of job retention issues than they are to experience it in the hiring process); Liza Conyers, et al., Workplace Discrimination and HIV/AIDS: The National EEOC ADA Research Project, 25 WORK 37 (2005) (finding that people with HIV/AIDS are more likely to be male, ethnic minorities, 25-44 years old, in white collar jobs, than other people with disabilities; they are also more likely to prevail on EEOC claims of discrimination than other people with disabilities); Darlene D. Unger, et al., Workplace Discrimination and Mental Retardation: The National EEOC ADA Research Project, 23 J. VOCATIONAL REHABILITATION 145 (2005) (stating that people with mental retardation encounter higher rates of discrimination in discharge, constructive discharge, and harassment, but they are less likely to experience discrimination with regard to reasonable accommodation and promotion).

91. Verkerke I, supra note 4, at 909. Verkerke points out that his framework might reverse the trend of courts to decide cases first on whether or not a person has a disability—a question that could be manipulated to avoid the issue of whether or not reasonable accommodations are in order.
those lesser jobs. Workers should be matched to jobs where their disabilities can be accommodated with ease. Verkerke views this strategy as a way of economizing on the costs of accommodations. Other methods of economizing would include allowing employees to contribute to the costs of their accommodations, distinguishing between high and low risk jobs, limiting accommodation costs, and generalizing costs of accommodation based on information about disabilities and occupations.

In a related 2003 article on accommodations, Verkerke drives home these distinctions between accommodation and antidiscrimination. He defines antidiscrimination as embodying color-blindness and positive equality. An accommodation, however, pushes employers to modify their usual employment selections based on merit to hire someone who would be otherwise rejected. The tension between equality and meritocracy guides this debate. Verkerke suggests that antidiscrimination and accommodation, with their principles of both positive and negative equality, need not be separately considered. In reality, they comprise a continuum of legal requirements and remedies, with disputes on the accommodations end of the spectrum generating more controversy and resistance.

Michael Ashley Stein steps into the space left by Verkerke's law and economics model to fuse it with social justice jurisprudence. He acknowledges that the question of what is "reasonable" under the accommodation mandate of the ADA comes with an evolving and often confusing set of potential answers. The ADA's drafters and the courts have not provided a formula for balancing the factors set out under the reasonable accommodation provisions. Nor have they helped advance inquiries about where accommodations should begin and end in the workplace.

92. Id. at 952.
93. Id. at 941-52. It is worth noting that many people with disabilities currently pay for accommodations, or self-accommodate where they fear retaliation or unease from employers.
95. Id. at 1389-1390.
96. Id. at 1390.
97. Id. at 1402.
98. See Stein I, supra note 2.
99. Stein presents Judges Posner and Calabresi's work on reasonable accommodation to offer some contours to the analysis. In Van Zande v. Wisconsin Department of Administration, 44 F.3d 538, 542 (7th Cir. 1995), Posner held that "reasonable . . . requires something less than the maximum possible care." He emphasized a cost-benefit analysis, considering the benefit to the employee, as well as the employer. Calabresi, in Borkowski v. Valley Central School District, 63 F.3d 131, 138 (2d Cir. 1995), also took a cost-benefit analysis tact in defining undue hardship and reasonable accommodation, deciding that an accommodation was only reasonable where "its costs are not clearly disproportionate to the benefits that it will produce."
100. Stein I, supra note 2, at 81-82.
Stein’s argument is essentially one for hiring people with disabilities. He uses an economic model that sometimes departs from neoclassical ones to challenge three assumptions he has identified within the literature on reasonable accommodation: “(1) the belief that employers’ hiring and retention practices relating to disabled workers are efficient; (2) the assumption that disabled workers are less productive than their nondisabled counterparts; and (3) the overall perception that the existing labor market status quo is an equitable one.”

He demonstrates that accommodations cannot only be reasonable, but can also cost very little to nothing at all. Stein proposes a reasonable accommodation cost continuum, which proceeds from “wholly efficient accommodations” (where employers provide accommodations willingly) to “wholly inefficient accommodations” (where people with disabilities should be excluded from the market).

His model makes way for “contingent reasonableness,” or the acknowledgment that an accommodation can be reasonable for some, but not all, employers. He identifies this contingent approach as a departure from neoclassical economic analysis, while showing that this same flexibility is at the heart of the ADA. Later in his other pieces of his scholarship, Stein focuses more on a social justice approach, but continues to build upon economic arguments for the employment of people with disabilities.

All of these scholars acknowledge that the definition of “reasonable accommodation” is far from settled. Additionally, they agree that people with disabilities face societal barriers to employment. They disagree in part over whether or not people with disabilities can be normal or ordinary employees, or “good hires.” To a great extent, they voice the concerns of employers that inferior employees with disabilities, once inside the door of the workplace, will never leave, and will drag down productivity, quality, and goals. And they do not offer consistent strategies to tackle the under-employment of people with disabilities. I define under-employment as the confinement of highly qualified people with disabilities to jobs beneath

101. Id. at 85.
102. Id. at 179.
103. Id. at 119. Stein also notes that employer prejudices about people with disabilities’ productivity, normally seen as neutral components of the neoclassical economic model, are not neutral at all. Characterizing them as such perpetuates bias and misinformation. (135, 155)
104. Id. at 135, 155 (noting that employer prejudices concerning the productivity of people with disabilities—normally seen as neutral components of the neoclassical economic model—are not neutral at all. Characterizing them as such perpetuates bias and misinformation).
105. See generally Stein II, supra note 55.
106. Cf. Frank Bowe, Handicapping America: Barriers to Disabled People 178 (Harper & Row 1978) (concluding that employees with disabilities are more reliable and productive than non-disabled employees); Peter Blanck, The Economics of the Employment Provisions of the Americans with Disabilities Act, 46 Depaul L. Rev. 877 (1997) (examining the effects of Title I and agreeing that employees with disabilities are productive and reliable).
their skills, talent, and education due to employers’ perceptions of
disability.107 Finally, they fail to show the roles that people with disabilities
and the disability rights movement have in resolving these problems. These
roles can be articulated most clearly through examples of the
reasonableness analysis in highly contested requests for accommodation.
One area of such debate involves those accommodations related to arriving
at work, as we will explore.

The existing scholarship demonstrates that even with a civil rights-
mined approach to Title I of the ADA, many employers (and employment
law scholars, to a certain extent) cannot move beyond the employer-myopic
concept of disabilities as requiring special treatment.108 Nor have most
practitioners, jurists, and scholars easily navigated their way around the
degree or severity of disabilities being relevant to a reasonable
accommodation analysis.109 While the ADA does call for a case-by-case
analysis of accommodation requests, should employers be involved in
assessing the severity of any employee’s disability or the needs it poses?
Entreat employers to make these determinations places them in pseudo-
clinician and arbitrator roles, and reinforces myths about what disability is,
and how it should be viewed.110 This elevation of the employer to expert
status on disability legitimizes the biases or prejudices that an employer
might have against people with disabilities.111 As Professor Bagenstos has
noted, a system of subordination results.

Later, I will build on Professor Jolls’ and Bagenstos’ approaches, to
incorporate strategies for deconstructing and challenging the social effects
of disability discrimination in employment.112 I differ with these authors’
stances on the eradication of employers’ attitudinal barriers113 and on what

107. Verkerke I, supra note 4, at 922.
MICH. L. REV. 564, 571 (1998) (arguing that the intended beneficiaries of “special rights” often end up
feeling as if they receive less than equal rights, and proposing that “legal prohibitions of discrimination
can work most successfully only when they are coupled with efforts to utilize other culturally influential
tools to reform the attitudes that underlie the myriad human impulses to discriminate”).
110. Id. at 25 (“The prohibitions against discrimination and the requirements of accommodation, to
be found through the statute [ADA], require more than efficiency and less than charity”); Stein II, supra
note 55, at 616 (identifying how some existing scholarship and approaches by employers have conflated
the economic and moral worth of people with disabilities).
111. See Rubin, supra note 108, at 573 (suggesting that antidiscrimination laws can bring attention
and even scrutiny to difference); see generally David A. Strauss, The Myth of Colorblindness, 1986 SUP.
CT. REV. 99 (1986).
112. See generally Jolls, supra note 64, and Bagenstos II, supra note 72.
113. See, e.g., Bruyère, supra note 35, at 8 (noting that the employers found that changing co-
workers and supervisors’ attitudes toward people with disabilities was seen as the most difficult to
change in the workplace). Bruyère and her colleagues noted that “there appears to be a veneer of
employment acceptance of workers with disabilities” perhaps, because “it has become socially
appropriate for employers to espouse positive global attitudes toward these individuals.” Id. at 12. This
constitutes the systemic injuries that prevent people with disabilities from attaining workplace equality. Professor Stein’s questioning of the canon that people with disabilities are inferior or less productive employees proves helpful, as well.\textsuperscript{114} And finally, I borrow from Professor Karlan and Rutherglen’s optimism (perhaps waning today) that the ADA has perspectives and remedies to offer other forms of employment discrimination.\textsuperscript{115}

My position is fundamentally employee-centric, calling for the participation of people with disabilities in dismantling and exposing the weaknesses and biases present in employers’ assessments of what is “reasonable.” A shift to employees does not have to mean poor business practices or financial doom. It does, however, require enlightened hiring practices. Rather than providing accommodations, which allow people with disabilities to become part of the mainstream in the workplace, employers are truly the ones making disability an issue. Their actions are often informed by stigma, but under the guises of commonsense and statutory clarity.\textsuperscript{116} In turn, people with disabilities are silenced and excluded from the workplace.\textsuperscript{117} The irony is that people with disabilities are often reliable and respected employees. They experience great difficulty in getting to work at all—in both the accommodation sense of the word, and in national employment trends.

III. “GETTING TO WORK” ACCOMMODATIONS

One of the largest obstacles people with disabilities face is in receiving transportation-related accommodations to “get to work,” and yet this is precisely the area of accommodation that meets the most resistance in court.\textsuperscript{118} This judicial reluctance provides a jumping off point for reflecting on how courts have approached and defined reasonable accommodations. In this section, I will examine whether assistance with getting to and from work can be considered a reasonable accommodation under existing ADA analysis. I will deploy tools of disability studies, such as the social model,
to explain how accommodations might be restructured to shift the perspective of "reasonableness" from the often fearful and misinformed employers and courts to people with disabilities, who are most aware of their particular sets of needs and concerns.\textsuperscript{119}

First, I will explore the essential function of arriving at the workplace. Then I will proceed to compare and contrast work-at-home and flexible schedule cases with cases involving requests for transportation accommodations. Each of these forms of accommodation addresses employees' limited abilities or barriers to accessing workplaces, but there are clear tensions in how employers and courts have treated them. Some accommodations have been more widely accepted, such as reserved parking spaces and flexible work schedules, while others, such as work-at-home requests and paid parking, are less accepted. This disapproval brings to the surface some of the underlying sources of resistance to more innovative, responsive, and flexible accommodations.

\textbf{A. Getting to Work as an Essential Function}

Since reasonable accommodations exist to facilitate the performance of an essential function\textsuperscript{120} of the job, the entry point in an analysis of a reasonable accommodation is an essential functions determination. Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors. The ADA provides that consideration shall be given to the employer's judgment as to what functions of a job are essential and to the employer's written description of that job.\textsuperscript{121} The ADA regulations provide that other factors to consider are: (1) the amount of time spent on the job performing the function, (2) the consequences of not requiring the incumbent to perform the function, (3) the terms of the collective bargaining agreement, (4) the work experience of past incumbents in the job, and (5) the work experience of incumbents in similar jobs.\textsuperscript{122}

Essential functions are defined as "fundamental job duties of the employment position the individual with a disability holds or desires."\textsuperscript{123} The EEOC regulations are careful to note that essential functions do not include the marginal functions of the position. However, the regulations do

\textsuperscript{119} See Darlene Unger & John Kregel, \textit{Employers' Knowledge and Utilization of Accommodations}, 21 WORK 5 (2003) (little research has been done on what employers know about reasonable accommodations or how they use workplace supports and other resources).

\textsuperscript{120} "While the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job." Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. §1630.2 (1997).


\textsuperscript{122} 29 C.F.R. § 1630.2(n)(3).

\textsuperscript{123} 29 C.F.R. § 1630.2(n)(1).
not specifically define what is meant by marginal. In defining “essential,” the EEOC states that:

A job function may be considered essential for any of several reasons, including but not limited to the following:... because the reason the position exists is to perform that function;... because of the limited number of employees available among whom the performance of that job function can be distributed; and/or the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.”

When examining a potential reasonable accommodation in the area of transportation to and from work, the essential function question becomes narrower: Is getting to work an essential function of the job?

In many jobs, employees cannot begin their job and its functions without physically arriving at work. In these cases, getting oneself to the workplace would not seem to fall within the category of marginal functions.

As I will discuss in the next section, many courts have adopted similar reasoning to decide that getting to work is an essential function. The cases fall into two major categories: those which explicitly use an essential function analysis, and those which merely imply that appearance at work is an essential function. In the latter set of cases, employees requesting flexible schedules or work-at-home arrangements have prompted the courts’ analysis. Both lines of precedent will be discussed in turn.

B. Explicit Essential Function Analyses

Carr v. Reno was a court’s first direct acknowledgment that appearing at work as an essential function. The D.C. Circuit held that an essential function of any government job was arriving at work. The reverberations of Carr took some time to be seen in the other Circuits.

Six years later, in Sinkler v. Midwest Property Management, Ltd., the Seventh Circuit visited the question of this essential function determination, and distinguished it from the major life activity analysis employed in the ADA. An essential functions analysis focuses on what core responsibilities a particular job entails, while a major life activity analysis is broader and used to determine not whether a person can perform a particular job, but whether she is disabled. The Sinkler court found that an employee’s specific phobia involving driving anywhere unfamiliar to her did not substantially impair a major life activity since “[g]etting to and from...
work assignments” was not a major life activity. The court was careful to distinguish between getting to work as an essential function of a job, and getting to work as a major life activity. It reasoned that “getting to and from work is important to performance at work,” but that driving to work was not a “basic function of life.” Ultimately, the court decided that Sinkler did not have a disability under the ADA. However, more interesting than the holding was how it held open the door for appearance at work to be considered an essential function.

In an Eleventh Circuit case, *Earl v. Mervyns, Inc.*, the court emphasized the necessity of arriving punctually at most jobs. Based on the store’s employee punctuality policy and its requirement that Debra Earl prepare the store for opening each day, the court concluded that punctuality was an essential function of her job. It held that Earl’s obsessive-compulsive disorder could not be reasonably accommodated by a flexible work schedule. The court cited another case in which regular attendance was an essential function of a housekeeping aide job.

The emphasis on punctuality is the take-away lesson from *Mervyns*. Punctuality is a part of getting to work, and it can, in many ways, serve as a proxy for arriving at work. Neither the court, nor the parties in *Mervyns*, ever considered how getting to work could have been reasonably accommodated. It was assumed that getting to work was a private matter. As it will become clear in later sections, the hasty assumption that an access problem is an individual’s burden alone is not consistent with the legislative history or intent of the Americans with Disabilities Act. Rather, employers and employees are encouraged to adopt interactive, brainstorming approaches to tackle work-related obstacles.

**C. Flexibility as Abrogating Essential Functions**

The view of “getting to work” as a private matter runs through the other cases involving requests to work at home, or to be granted flexible work schedules. Some of the resistance to accommodating alternative work arrangements, related to getting to work, might come from the notion that working at home is counter to the very nature of work. Employers and

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128. *Sinkler*, 209 F.3d at 685.
129. *Id.* at 684 (quoting *Knapp v. Northwestern Univ.*, 101 F.3d 473, 479 (7th Cir. 1996)).
131. 207 F.3d 1361 (11th Cir. 2000).
133. *Earl*, 207 F.3d at 1366 (citing *Jackson v. Veterans Admin.*, 22 F. 3d 277, 279 (11th Cir. 1994). In *Jackson*, the Eleventh Circuit had concluded that "unlike other jobs that can be performed off site or deferred until a later day, the tasks of a housekeeping aide by their very nature must be performed daily at a specific location."
judges might be concerned that working from home, or working with a very flexible schedule, implies that employees are working at less than their full capacities. These kinds of requests therefore become suspect.

For example, in *Kvorjak v. Maine*, the court found that an employee’s request for a work-at-home schedule was reasonably denied, even where other employees worked from home. Kvorjak, an employee with spina bifida, experienced difficulty and pain getting to work after his employer, the Maine Division of Unemployment, moved his work site farther away. His original office had been located only ten minutes from his home. After Maine consolidated many of its service offices, Kvorjak’s commute time increased to three hours each day. He requested to work from home on a full-time, permanent basis. The Division rejected this request for an accommodation. Based on communications with the New England Business and Technical Assistance Center and the Equal Employment Opportunity Commission, Kvorjak’s employer “concluded that commuting to the job is not a covered activity under the ADA.” The court avoided ruling on whether the advice given by these agencies was correct, and instead held that Kvorjak’s work as a claims adjudicator could not be satisfactorily performed from home.

Courts have reached different conclusions about working at home as an accommodation. The *Kvorjak* ruling departed from the holding of *Langon v. Dep’t of Health and Human Services*, in which the court reasoned that an agency must consider accommodating a computer programmer with multiple sclerosis by allowing her to work from home.

134. See e.g., K.A. DIXON ET AL., JOHN J. HELDRICH CENTER FOR WORKFORCE DEVELOPMENT, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, RESTRICTED ACCESS: A SURVEY OF EMPLOYERS ABOUT PEOPLE WITH DISABILITIES AND LOWERING BARRIERS TO WORK (2003) (noting that employers with experience with workers with disabilities are more likely hire them again and revisit their attitudes about them as employees).


136. Cf. *Ridgway v. Metro. Museum of Art*, 2007 U.S. Dist. LEXIS 27007 (S.D.N.Y. 2007) (finding that the plaintiff’s back injury required the plaintiff to take breaks while working, and it also made his commute difficult during rush hour on the subway); *Burton v. Metro Transp. Auth.*, 244 F. Supp. 2d 252 (S.D.N.Y. 2003) (stating that even if the employee was disabled, his mechanical heart valve surgery and blood thinners therapy prevented him from being qualified and safely working as a bus driver); *Young v. Cent. Square Cent. Sch. Dist.*, 213 F. Supp. 2d 202 (N.D.N.Y. 2002) (dismissing the employer’s motion for summary judgment where plaintiff with multiple sclerosis raised the issue that the school district, after learning about her disability, had transferred her to the site farthest from her home, complicating her commute and health); *McKechnie v. St. Paul Fire & Marine Ins. Co.*, 2001 U.S. Dist. LEXIS 15348 (N.D. Ill. September 26, 2001) (showing a case where an insurance agent claimed that his condition of neuropathy made his commute to work debilitating and painful); *Holbrook v. City of Alpharetta*, 911 F. Supp. 1524, 1542-43 (N.D. Ga. 1995) (stating that the city detective’s visual impairment prevented him from driving a car, seeing clearly at night, and gathering evidence; court distinguished between driving to work and the essential function of driving as a part of work).

137. *Kvorjak*, 259 F.3d at 51.

138. Id. at 53 n.8.

139. 959 F.2d 1053 (D.C. Cir. 1992).
However, *Kvorjak* is the more dominant view of the courts presently. And in *Vande Zande v. Department of Administration*,\(^{140}\) the Seventh Circuit held that an employer is not required to allow disabled workers to work at home, except in extraordinary circumstances.

One plausible explanation of these departures from *Langon* is that the nature of the work in that particular case was technologically based. The computer industry offers a more flexible work environment and nontraditional job options. In many ways, an employer in the software field might prefer to permit work from home situations or flexible hours. The work environment in these industries can be strikingly different from more traditional occupations, such as teaching, nursing, or banking, where work has come to mean showing up at a fixed location for set hours.

Courts continue to visit the role of flexibility under the ADA. For example, in *Humphrey v. Memorial Hospitals Association*, a medical transcription assistant with obsessive-compulsive disorder had difficulty arriving at work on time.\(^{141}\) She requested that her employer provide her one of two accommodations: either working from home or taking a medical leave of absence.\(^ {142}\) The court found that her employer failed to use the reasonable accommodation process before firing her. Defense counsel emphasized Humphrey’s inability to get to work punctually and regularly, as a means of chipping away at her status as a qualified individual with a disability.\(^ {143}\) The hospital claimed that “regular and predictable attendance was an essential function of the position.”\(^ {144}\) However, as the court admitted, Humphrey remained a qualified individual with a disability as long as she was able to perform the essential functions of her job “with or without reasonable accommodation.”\(^ {145}\) The court suggested that Humphrey could have been reasonably accommodated by either of her two requests and that the hospital had an affirmative duty to explore methods of accommodation before terminating her.\(^ {146}\) On appeal, however, the court only evaluated the reasonableness of Humphrey’s request for leave, and it did not formally rule on the reasonableness of working at home.\(^ {147}\)

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\(^{140}\) Vande Zande v. Wisconsin Dep’t of Admin., 44 F.3d 538, 544-45 (7th Cir. 1995).

\(^{141}\) Humphrey v. Memorial Hosp. Ass’n, 239 F.3d 1128 (9th Cir. 2001).

\(^{142}\) Id. at 1132-33.

\(^{143}\) See also Palazzolo v. Galen Hosp. of Texas, Inc., 1997 U.S. Dist. LEXIS 21915 (N.D. Ga. 1997) (finding that an HIV-positive plaintiff with a drug addiction missed too many days of work to be a qualified individual with a disability under the ADA).

\(^{144}\) Humphrey, 239 F.3d at 1135.


\(^{146}\) Humphrey, 239 F.3d at 1137.

\(^{147}\) Id. at 1139.
The EEOC’s approach has departed slightly from that of the courts.\textsuperscript{148} According to the agency, working at home can be a reasonable accommodation when the essential functions of the position can be performed at home, and when the arrangement does not pose an undue hardship upon the employer.\textsuperscript{149} On the subject of flexible work schedules as a reasonable accommodation, the EEOC has been much clearer in its support. It has suggested modified work schedules, flexible leave policies, and job restructuring.\textsuperscript{150} Here the Commission is merely holding to the statutory language, which similarly calls for reasonable accommodations in the form of “job restructuring, part-time or modified work schedules.”\textsuperscript{151}

\textbf{D. Transportation: A More Difficult Case}

Factors that keep many non-disabled employees from arriving at work at a designated time also keep potential employees who are disabled out of the workforce. These factors include limited public transportation, family responsibilities, fuel and insurance costs, and long commute times. Flexible work arrangements, in particular assistance with transportation to work, could assist more than people with disabilities—and make this kind of responsiveness part of the ordinary course of business.

Hurdles to arriving at work are magnified for employees with disabilities. Requests to work-at-home are often prompted by the difficulty of appearing at work, whether because the commute is particularly taxing, or because public transportation is inaccessible or unreliable. In fact, the EEOC’s \textit{ADA Title I Technical Assistance Manual} specifically considers unreliable transportation when it urges employers to recognize the potential need for modified work schedules. According to the agency, individuals with mobility impairments might find it “difficult to use public transportation during peak hours,” or to arrive on-time if they “depend upon special para-transit schedules.”\textsuperscript{152}

In some work-at-home requests, employees are concerned about being productive and at ease in their work environments. Often, the workplace is not a hospitable environment for building in breaks, taking medicine, or situating one’s body comfortably. Even when an employee’s productivity

\textsuperscript{148} See \textit{Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837, 843-44 (determining the validity of agency decisions rests on whether Congress has spoken directly on an issue. If not, the court looks to whether the agency determination is a reasonable interpretation. If the agency interpretation is unreasonable, the court has no obligation to enforce it.).


\textsuperscript{150} \textit{TECHNICAL ASSISTANCE MANUAL}, supra note 46, at §§I-3.5, 3.10.

\textsuperscript{151} 42 U.S.C. § 12111(9)(B).

\textsuperscript{152} \textit{TECHNICAL ASSISTANCE MANUAL}, supra note 46, at § I-3.10(3).
level could be the same or greater from home, employers might resist allowing an employee to escape the control of direct supervision and "face time."\textsuperscript{153}

This resistance is minimal in some workplaces, not meeting the fierce opposition that requests for transportation as a reasonable accommodation often face from employers. The irony is that transportation itself might assist those employees with disabilities who have previously requested work-at-home flexibility, since their barrier to the workplace could be inadequate transportation. Additionally, removing the transportation barrier may increase the number of people with disabilities who are gainfully employed. Transportation may be even more critical to employment victories for people with disabilities given that there have been mixed results from requests to work at home.

Analyzing the trajectory of requests for transportation facilitates an understanding of the barriers to entertaining transportation as a reasonable accommodation. The EEOC and employers share this reticence. Meanwhile, employees with disabilities are confronted with an issue that has been dismissed as personal in nature, even though it is closely aligned with the same issues and needs that are a part of the flexible work cases.

Many employees with disabilities have a sense that they are on their own when it comes to accommodations. This is affirmed by the EEOC's positions on these kinds of accommodations. In a September 1995 advisory letter, the EEOC erected the first obstacle to considering transportation-related obstacles as worthy of reasonable accommodation.\textsuperscript{154} The policy itself is not insurmountable, but the outcome does provide insight into the EEOC's view on the nature of accommodations and the responsibilities of employers.

In the advisory letter, the EEOC directed an employer that it was not responsible for assisting an employee with a transfer from his automobile to a wheelchair when he arrived at work. According to the EEOC, employers were not responsible for removing barriers outside of the work environment. Here, the EEOC drew a line between the threshold of the workplace and the periphery of it. Concurrently, the agency emphasized a divide between perceived personal responsibilities of the employee and the statute-imposed responsibilities of employer. The EEOC's advisory letter suggested:

\textsuperscript{153} Verkerke I, supra note 4, at 930 (arguing that disability advocates fail to acknowledge that employers might "sometimes refuse to hire or to retain disabled workers simply because they are less productive than non-disabled applicants"). Verkerke also suggests that because the ADA focuses on impairments that "substantially limit [ ] major life activit[ies]," individuals covered under the ADA are more likely to have impairments limiting productivity. \textit{Id.} at 931.

\textsuperscript{154} 7 NDLR (LRP) 64 (September 1995).
An employer is required to provide reasonable accommodations that eliminate barriers in the work environment, not ones that eliminate barriers outside of the work environment. For example, an employer would not be required to provide transportation to work as a reasonable accommodation for an employee whose disability makes it difficult or impossible to use public or private means of transportation, unless the employer provides such transportation for employees without disabilities. On the other hand, workplace barriers, such as work schedules or parking space assignments, must be modified for an employee with a disability unless this would impose an undue hardship. For example, an employer would be required to allow an employee who uses a wheelchair and commutes to work by public transportation to arrive at a later time in inclement weather. Transferring from an automobile to a wheelchair upon arrival at the workplace is part of the process of commuting to and from work. Although the transfer may take place on or near the employer's premises, the physical barrier encountered is one that exists apart from the work environment. Thus, unless an employer provides assistance for employees without disabilities in getting to and from work, the employer does not have to provide assistance to an employee with a disability in transferring from an automobile to a wheelchair.

This letter was termed an "informal discussion of the issues" rather than an "official opinion of the EEOC." The EEOC's distinction between reasonable accommodations in the work environment and those that exist outside of it is conflicted at best. What is the difference between a parking space and assistance with a wheelchair transfer? If the EEOC acknowledges that employers should make accommodations like flexible work schedules where public or external transportation limits employees in getting to work, employers should also be made to assist with transportation itself.

Perhaps the EEOC's internal logic is that the wheelchair transfer is a personal service, and not the employer's responsibility. Indeed, as the EEOC points out, there are three basic kinds of modifications or adjustments that are not considered reasonable accommodations. These unreasonable accommodations include eliminating essential functions of the job, lowering production standards, and providing personal use items.

155. Id.
156. Id.
157. 29 C.F.R. § 1630.2(n) (2007) (also noting in the Appendix that employers are not required to provide disabled employees with prosthetic limbs, wheelchairs, or eyeglasses). See also Mason v. Avaya Commun., Inc., 357 F.3d 1114 (10th Cir. 2004) (ruling at-home work accommodation for service coordinator was unreasonable because physical attendance at workplace was essential function of job); Beaver v. Delta Air Lines, Inc., 43 F. Supp. 2d 685, 693 (D. Tex. 1999) (noting that a court should not "second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor require employers to lower standards"); Brookins v. Indianapolis Power & Light Co., 90 F. Supp. 2d 993, 1004-5 (D. Ind. 2000) (requiring employer to make appointments for employee
The third modification, providing personal use items, has become the focus of the EEOC and the courts in examining requests for transportation accommodations. They assert that providing transportation to and from work exceeds the duties imposed by the ADA — namely, that transportation is a personal service and a personal responsibility.\(^{158}\) The EEOC’s own guidance suggests, in apparent conflict with its other positions, that “items that might otherwise be considered personal may be required as reasonable accommodations where they are specifically designed or required to meet job-related, rather than personal, needs.”\(^{159}\)

Providing transportation serves a “job-related” need, not merely a personal one. Without a reasonable accommodation of transportation, many employees (or potential employees) with disabilities are prevented from coming to work. They require transportation-related accommodations to access the workplace to work, not to enjoy a personal hobby or to attend a concert. Even the EEOC recognizes occasions and work relationships where personal services become employment-related.\(^{160}\) If job-related excursions and flexible work schedules are covered by the ADA, how can a rigid line between the internal world of the workplace and the external world of home and community be upheld? Stumbling blocks for employees with disabilities may be combinations of personal and work-related factors.

The EEOC’s technical assistance on Title I of the ADA advises employers to provide access for “an individual employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment, and to all facilities used by employees.”\(^{161}\) The emphasis here should be on access to the workplace. A workplace cannot be accessed if the largest impediment is reaching its

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158. The EEOC acknowledges that there are situations where the employer provides transportation. In such instances, the EEOC advises that the transportation must be made accessible. See EEOC Interpretive Guidance on Title I, § 1630.2(o), 56 FR 35726-01. See also Salmon v. Dade County Sch. Bd., 4 F. Supp. 2d 1157, 1163 (D. Fla. 1998) (ruling that commute to and from work was “activity that is unrelated to work” and the employer is “not required to eliminate barriers that are outside the workplace”); Schneider v. Continental Cas. Co., 1996 U.S. Dist. LEXIS 19631, *24 (D. Ill. 1996) (asserting that transportation to work would not be “a reasonable accommodation for an employee whose disability makes it difficult . . . to use public or private means of transportation,” unless the employer provides such transportation for employees without disabilities) (citing Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995) (explaining the “interplay” between “reasonable” accommodation and “undue hardship”)).


160. See § 1630.2(o) ("Providing personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be reasonable accommodations.").

161. TECHNICAL ASSISTANCE MANUAL, supra note 46, at § 1-3.10(1).
front door. By its own words, the EEOC has recognized that access-related difficulties might be widespread, affecting work sites, equipment, and related facilities. As noted earlier, the EEOC has also acknowledged that a reasonable accommodation may take the form of allowing an employee with a disability to have a flexible work schedule when transportation options are limited. Taken together, these two statements make it appear as if the EEOC has indeed reached beyond the walls of the workplace by noting that barriers to access can exist and should be addressed at the periphery of the physical workplace. What the EEOC is saying is in direct conflict—it wants to address hurdles outside the workplace, but it refuses to make employers responsible for ameliorating those constraints.

The EEOC has not pressed employers to provide transportation to the workplace. Perhaps employer-funded or operated transportation to and from work would go too far in making employers responsible for their employees. Officials might choose to shun such paternalism and intervention, as well as the costs it imposes for employers.\(^{162}\) However, the ADA already imposes additional responsibilities and costs upon employers. The limits of those expectations call for examination.

The following discussion of parking as a reasonable accommodation will shed light on the intricacies of determining what is reasonable.\(^{163}\) Employer responsibility and funding are central to the implementation of the ADA’s Title I goals. However, often unspoken attitudes and values about accommodations limit the discussion of what is reasonable, as will be demonstrated by the example of parking.\(^{164}\)

**E. An Example: Parking as a Reasonable Accommodation**

The EEOC argues for an outside/inside distinction of workplace accommodations, while at the same time, it informs employers that reserving a parking space for an employee with a disability may be a reasonable accommodation.\(^{165}\) Generally, parking exists outside the employer’s door. As an accommodation, parking is entangled in the issues of getting to and from work. Parking can be one of the most cost-effective and easily implemented forms of transportation-related accommodation for people with disabilities who can drive and have access to cars. However,

\(^{162}\) See Stein II, *supra* note 55, at 620-622 (battling other forms of discrimination, such as gender and race, may impose its own sets of costs, but that does not excuse employers for discriminating).

\(^{163}\) To compare the arguments for parking as a reasonable accommodation to those advocating for disability-designated parking, in general, see Geoffrey P. Miller & Lori S. Singer, *Handicapped Parking*, 29 Hofstra L. Rev. 81, 82 (2000) (providing an efficiency-based argument for handicapped parking regulation).


\(^{165}\) See EEOC’s Interpretive Guidance on Title I, § 1630.2(o): Accommodations might include “providing reserved parking spaces.”
the EEOC has not taken its own guidance about reserved parking to its logical conclusion—that paid parking should be provided when it is needed as a reasonable accommodation. By extension, other transportation assistance should be considered as a reasonable accommodation, especially for people with disabilities who cannot drive or afford a car.

Why should employers provide parking as a reasonable accommodation when it would not cause undue hardship or an alteration of the essential functions of the job? First, parking can be a ramp of sorts to the workplace.\textsuperscript{166} For people with limited mobility, having parking close to work ensures access to the workplace and the ease of punctual arrival. Second, parking is often offered as part of the package of benefits that employers may already provide to supervisors or employees with seniority.\textsuperscript{167} The employer may not even have to venture into unfamiliar territory to provide parking to its employees with disabilities. Entertaining the accommodation request should be all the more expedient and manageable. Third, parking as an accommodation can be relatively inexpensive. All it may take for an employer to implement the accommodation is to contract with a garage in the building or near the workplace. Even in this context, the EEOC has been reluctant to issue any guidance or guidelines directing employers to consider paid parking as a reasonable accommodation.

Not until Lyons v. Legal Aid Society was paid parking as a reasonable accommodation addressed directly by any of the Circuits.\textsuperscript{168} Lyons, an attorney, brought suit under the Americans with Disabilities Act, alleging that her employer, the Legal Aid Society in New York City, failed to provide her a parking space near work. Without this accommodation to her physical mobility impairment, Lyons was personally bearing the expense of “$300 to $520 a month (which was fifteen to twenty-six percent of her monthly net salary) for a parking space adjacent to her office building.”\textsuperscript{169} Lyons was unable to use public transportation to get to her job in Manhattan since the commute from New Jersey would require her to walk long distances, climb stairs, and sometimes remain standing for extended

\textsuperscript{166} Parking can be seen as part of Title I’s mandate to make “existing facilities used by employees readily accessible and usable by individuals with disabilities.” 42 U.S.C. § 12111(9)(A) (2006).

\textsuperscript{167} In US Airways, Inc. v. Barnett, 535 U.S. 391, 401-02 (2002), an ADA case about an accommodation request trumping seniority relationships in the workplace, the Court suggested that a plaintiff must demonstrate that a proposed accommodation is “reasonable on its face” and not disproportionate in costs to the benefits resulting for the employee with a disability. Professor Leonard characterizes this opinion as “pro-employee” in avoiding “the sort of calculation that employers want to perform: the effects of incremental costs on profitability.” Leonard, supra note 81, at 53; see also Samuel R. Bagenstos, US Airways v. Barnett and the Limits of Disability Accommodation, CIVIL RIGHTS STORIES (Myriam Gilles & Risa Goluboff, eds., 2007). Available at http://ssrn.com/abstract=953759 (last accessed August 7, 2007).

\textsuperscript{168} 68 F.3d 1512 (2d Cir. 1995).

\textsuperscript{169} Id. at 1514.
periods of time. This exertion was too taxing for her. The court noted that neither the ADA nor the Rehabilitation Act provided a “closed-end definition of reasonable accommodation” which would address the issues posed by Lyons.

The court was unwilling to dismiss Lyon’s claim merely because the Legal Aid Society did not provide “parking facilities or any other commuting assistance to its nondisabled employees.” The court recognized the authority of Carr v. Reno to argue that an “essential aspect of many jobs is the ability to appear at work regularly and on time.” The ADA’s legislative history was persuasive, as well: “Congress envisioned that employer assistance with transportation to get the employee to and from the job might be covered.”

The court also rejected the employer’s argument that the parking space would be a fringe benefit, or a personal amenity unrelated to the essential functions of Lyon’s job. The record showed that Lyons would not be able to perform her duties as a lawyer without being able to park her vehicle next to the office building. Far from being a personal preference or a fringe issue, “Lyon’s ability to reach her office and the courts is an essential prerequisite to her work in that position.”

According to the court, there was nothing “inherently unreasonable” in the proposition of “requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work.” The employer had erred in asserting that Lyon’s only proper claim was against public transportation agencies. It could not pass along the responsibility to Lyons, or to a larger public system like a transit authority or a vocational rehabilitation office.

After Lyons, the EEOC might be concerned about a slippery slope problem where employers would be required to get into the transportation business to comply with the ADA. Would this kind of responsibility be an unreasonable interpretation of the accommodations mandates of the ADA? Would it fundamentally alter the nature of the business? Employers are

170. Id. at 1513.
171. Id. at 1515.
172. Id. at 1516.
173. Id.
174. Id. The ADA’s legislative history supports the outcome of Lyons. The House of Representatives’ Committee on Education and Labor gave an example of a reasonable accommodation as assisting an employee with a disability in getting to his “job site” at an inaccessible mall. H.R. REP. No. 485, pt. 2, at 61 (1990). The EEOC Interpretive Guidance also contains language that suggests that a possible required accommodation could be “making employer-provided transportation accessible and providing reserved parking spaces.” EEOC Interpretive Guidance, 29 C.F.R. 1630 app. § 1630.2(o) (2008).
175. 68 F.3d 1512, 1517 (2d Cir. 1995).
176. Id.
177. Id.
continually contracting with others in the course of ordinary business, and especially in the procurement of reasonable accommodations, for their employees with disabilities. And if the provision of the accommodation poses a crushing logistical or financial burden, the ADA has addressed the problem through the safety net of the undue hardship test. 178

According to the EEOC, “when an individual’s disability creates a barrier to employment opportunities, the ADA requires employers to consider whether reasonable accommodation could remove the barrier.” 179 Barrier removal cannot be the agenda when informal and prejudiced lists of accommodations that are “unreasonable” precede any interactive process or individualized inquiry. The drafters of the ADA did not envision a reasonable accommodations process where what is reasonable is decided long before an employer has made a good faith effort to assess the needs and resources particular to a given situation. 180 However informal these lists of unreasonable accommodations, or even unreasonable disabilities, they cannot be given voice or merit because they do not comport with the law. Yet, even after the Lyons decision, paid parking seems to be on the list of accommodations tacitly deemed too unreasonable to ever consider. The courts, employers, and the EEOC treat many transportation-related accommodations similarly.

The distinction between paid parking and reserved parking, and between flexible work schedules (which are largely driven by outside forces and transportation limitations) and transportation assistance seems arbitrary at best. Their “unreasonableness” is not advanced by the EEOC’s personal/work or private/employment differentiations. Even a boundary line of physical space—outside the door of the workplace versus inside the workplace—cannot be supported if Lyons is to be given merit. 181 The Lyons court recognized these inconsistencies and attempted to rectify them.

178. See Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) (stating that an accommodation may not be considered unreasonable simply because it requires an employer to assume more than a de minimis cost or because it will cost the employer more overall to obtain the same performance level from a disabled employee). See also 42 U.S.C. § 12111(10).

179. 29 C.F.R. § 1630.2

180. Similarly, reasonable accommodations often remain “reasonable” after the person granting them has moved onto another job. E.g., Tomney v. Int’l Ctr. for Disabled, 357 F. Supp. 2d 721, 744-45 (S.D.N.Y. 2005) (finding that a jury could find a denial of a previously granted reasonable accommodation was employment discrimination under the ADA).

181. See Ezikovich v. Comm. Human Rts. & Opportunities, 57 Conn. App. 767 (2000) (stating that job accommodations were reasonable where the plaintiff was allowed to work from home several days a week, but working from home all week would be unreasonable since she supervised other employees in the office. She did not have to be allowed to work when and where she wanted).
F. Other Forms of Transportation as Reasonable Accommodations

*Lyons* has cleared a rough-hewn path towards introducing other transportation-related reasonable accommodations. These accommodations could range from taxi services for employers with few employees with disabilities, to employee shuttles for employers engaged in the targeted practice of hiring people with disabilities. However, detractors are quick to target renewed commitments to innovation and flexibility in approaching accommodations and the nature of work itself.

In the Second Circuit’s *Gronne v. Apple Bank for Savings* decision for example, the court suggested that providing transportation to work was more generous than the ADA required. The employee, Gronne, had neurasthenia gravis, which prevented her from climbing stairs or driving a car. After she experienced a poor working relationship with someone in her original bank office (two miles from her home), she was transferred to another branch office (five miles from her home). Gronne claimed that the transfer violated the ADA because it made her unable to drive to work and thus forced her to take a private taxi to the new office. Apple offered to pay for one-half the cost of the transportation on days when friends or family could not drive Gronne.183 Gronne did not respond to this offer of accommodation and instead initiated the lawsuit. The trial and appellate courts held that Gronne “failed to raise a triable issue of fact as to the reasonableness of the accommodations.”184 “In narrow circumstances,” an employer must offer “assistance with transportation to get the employee to and from the job.”185 The court relied upon the *Lyons* decision to conclude that Apple’s “proffered accommodations met or exceeded these requirements.”186 Ultimately, Gronne had not demonstrated flexibility and responsiveness in the reasonable accommodation process, which may have affected the court’s perceptions of reasonableness.

While the court’s reference to *Lyons* might appear to advance accommodations, its language of “exceeding” requirements does not. If the courts are viewing *Lyons* as a case that went beyond the employer’s duty, then its legacy as a precedent is in danger. The power of *Lyons* was that it yielded a reasonable accommodation, even where the accommodation was neither routine nor inexpensive. If a legal aid society can pay for parking for its employees with mobility-related disabilities, Fortune 500 companies, universities, and other large employers are arguably left with similar or greater responsibilities.

182. 1 Fed. Appx. 64 (2d Cir. 2001).
183. *Id.* at 66.
184. *Id.* at 67.
185. *Id.*
186. *Id.*
Compare the resources of a legal aid society to a bank, and then consider why the court is so hesitant to find that more action must be taken with regard to Gronne's proposed accommodation. Most banks have just as many resources (or more) than local legal aid centers. If expense is not guiding the court, then what is the source of its resistance? If we can identify the source, we can offer new paradigms for considering these issues.

The court implies that the bank's initial offer was generous. In this context, generosity might be defined by unspoken social norms. Recall the central concern of employers that there are some areas of accommodation, though not formally enumerated, that do not merit further consideration. What distinguishes these accommodations from others is the smacking of something "personal" or excessive to them. This approach to accommodations is divorced from a socio-cultural model of disability rights.

IV. DISABILITY STUDIES AS A LENS OF ANALYSIS

Disability studies, a term only coined in the 1980s, is an interdisciplinary approach to grounding the experiences of people with disabilities in their cultural and political contexts.\(^{187}\) Once grounded, connections between this minority group experience and that of others—such as race, ethnicity, gender, national origin, and sexual orientation minorities—are teased out and explored.\(^{188}\) According to the guidelines established by an academic organization for disability studies in the United States, such studies should also "challenge the view of disability as an individual deficit or defect that can be remedied solely through medical intervention or rehabilitation." It places disability in the "broadest possible context" and "encourage[s] participation and leadership by disabled students and faculty."\(^{189}\)

At its core, disability studies is an analytic framework for deploying the social model of disability, which promotes the idea that people with disabilities become disabled by societal perceptions of their difference or

\(^{187}\) See e.g., Mike Oliver, et al., Disability Studies Today, (2002); Mairian Corker & Tom Shakespeare, Disability/Postmodernity: Embodying Disability Theory (2002); Lennard Davis, Bending Over Backwards: Essays on Disability and the Body (2002); Simi Linton, Claiming Disability: Knowledge and Identity (1998). One critique of disability studies is that it fails to accommodate non-Western realities. The resistance theory that I use is rooted in multiculturalism and class-consciousness.

\(^{188}\) See Titchkosky, supra note 15, at 201, 212 (emphasizing that the field of disability studies imports some of the low status and stigma of the experience of disability itself. Disability studies is often the stepchild to other minority and cultural studies fields in academia).

“deviance” from the norm, rather than by any intrinsic difference in worth, ability, or potential. ¹⁹⁰ Disability, therefore, is a social construction crafted and advanced by non-disabled people, who are often informed by anxieties and fears about the fragility of health and the stigma of difference.¹⁹¹ Society, its architecture and infrastructure, is propelled by these constructions of difference and it marginalizes the experiences and voices of people with disabilities—irrationally and unfairly, like other forms of discrimination.¹⁹² As a result, this group does not have the opportunity to fully participate in and integrate into communities. The barriers erected are subtle and physical, direct and attitudinal.¹⁹³ The combination of obstacles continues the process of subjugation and alienation of disabled people from all aspects of civic and economic participation.

When adopted, the social model displaces the medical model of disability—in which people with disabilities are cripples and invalids, impaired by their fundamental and calculable differences.¹⁹⁴ The medical model advances the idea that people with disabilities, depicted as “cripples,” “crazies,” “retards,” and “invalids”, overcome their inequality through medical intervention. Cripples are passive objects in the medical establishment’s goal of normalcy; it is the medical establishment that straightens crooked spines, reconstructs deformed faces, alters moods and intelligence through meds, gives blind people the power of sight, and delivers the first sounds of the outside world to formerly deaf children through cochlear implants.¹⁹⁵

¹⁹⁰ See generally Gabel & Peters, supra note 29 (noting the many uses of the social and disabilities studies models, including infusing a “historical-materialist perspective,” highlighting “disability as an individual experience within particular . . . contexts,” and destabilizing “notions of oppositional power relations” (2)).

¹⁹¹ See Gabel & Peters, supra note 29, at 591. As a stigma-laden social construction, disability can be divisive, emphasizing the individual differences of people, rather than the shared experiences of oppression.

¹⁹² See Mari Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1329, 1381 (1991) (“Disability law confronts head-on the fact of difference among human beings and the benefit gained from accommodating those differences.”).

¹⁹³ See Kelly L. Blanchard, Attitudes of Employers Toward People with Disabilities: A Comparison of Berlin, Germany, and Milwaukee, Wisconsin USA, (Dec. 2001) (unpublished M.S. thesis, University of Wisconsin-Stout) [on file with author] (finding, among other results, that younger employers in the United States had more positive attitudes toward employees with disabilities, as measured by the Scale of Attitudes Toward Disabled Persons).

¹⁹⁴ See Yoshihiko Goto, Bridging the Gap between Sociology of the Body and Disability Studies 5 (Center for Legal Dynamics of Advanced Market Societies, Kobe University Discussion Paper, Sept., 2004) (emphasizing the Foucauldian notion that contemporary society is focused on regulating bodies, particularly those of people with disabilities); see also MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME 1 (1978) (spurring the development of bio-political inquiries into regulation and identity).

¹⁹⁵ See generally Note, Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance, 100 HARV. L. REV. 2035 (1987) (arguing for the
The medical model was the spark that ignited the United States' extensive rehabilitation system. As more veterans returned with disabilities from the World Wars, the country needed to adopt an approach to assimilating them into their families and communities. Rehabilitation attempted to deliver the otherwise different back to their families in recognizable, conforming states of health. Its practitioners glossed over differences, and focused on the process of fixing and intervening to achieve normalcy.

The agenda of progress was laid far before the World Wars, however. Even during the Industrial Revolution, people with disabilities were measured against benchmarks of productivity. The modern factory not only caused disabilities, but it mass-produced notions of difference as inferior and impairments as damning. It is from this period that many modern conceptions of ideal or normal workers were drawn. Current oppression of people with disabilities is thus connected all the way back to the birth of the modern American workplace.

Factory work produced more than the medical model, however. Charitable models of disability sprung up where pity and paternalism were the governing factors. Perhaps unfairly, this charitable model has long been associated with churches and other faith-based organizations. However, its appeal is broad enough to have found its way into more mainstream “altruism,” including in those organizations that deploy telethons for fundraising. Some advocates characterize these telethons as preying on conventional notions of disability—struggling poster children with the hopes of walking their first unassisted steps—to raise money and spread


197. Just as other American countercultures and oppressed groups have reclaimed the terms that establish their marginalization (e.g., queer, Black), people with disabilities have played with the notion of being cripples. It is not uncommon to hear people within the disability community refer to one another or themselves as “crips,” even if their disabilities are not of a physical nature. Other terms of disability reclamation abound, including speds, gimps, spazzes, and ex-mental patients. See e.g., Ragged Edge Online, The S Word, http://www.raggededgemagazine.com/blogs/edgecentric/000492.html (last visited August 7, 2007).


200. For a powerful and sometimes uncomfortable experience for audiences unfamiliar with disability rights and community advocacy, see The Kids Are All Right, a recent documentary film about the Jerry Lewis telethons. Available at http://www.thekidsareallright.org/ (last visited June 13, 2007).
organizations' messages.\textsuperscript{201} The charitable model of disability in its pure form does not leave room for the autonomy and integrity of people with disabilities. Rather, it supports the misperception that people with disabilities pose a burden on society, which should, or perhaps must, be addressed through the altruism of community members. Under this model, those who overcome their disabilities are seen as heroes or "super crips," and their families are depicted as equally brave and inspiring.\textsuperscript{202} The false veneration further alienates people with disabilities from the mainstream.

The medical and charitable models leave little room for people with disabilities to be welcomed and encouraged as they are.\textsuperscript{203} It is not a matter of overlooking impairments or compensating for them, but of embracing disability as diversity. People are naturally different, yet some of these differences have become stigmatized, while others are viewed as simply parts of the ebb and flow of health.\textsuperscript{204} Why should there be a line between one disabling condition (such as high blood pressure) and another (such as muscular dystrophy)?\textsuperscript{205} Many of these "clear" disabilities become less clear when age or context becomes a factor. Consider a much beloved elder aunt. We will call her Bertie. She teeters along on her walker with the bright yellow tennis balls as décor for the walker's feet. If we now replace Aunt Bertie with Aunt Bertie's five-year old grandson Bert III, how do attitudes and approaches toward the individual change?

Advance some ten or eleven years. Bert III is fifteen or sixteen, in his first summer job. He is still resplendent and spry with his neon-gilded walker, but now this assistive device is with him in the work setting. Assume he makes his private school tuition money by delivering mail at Groan, Grumble, and Gripe LLC over the summer. What is an endearing slower pace for Aunt Bertie on her walker causes reactive discomfort when Bert III moves down the office hallway. Maybe the walker even causes

\begin{itemize}
\item \textsuperscript{201} Many former poster children have become disability activists and advocates in their adulthoods. See Lawrence Carter Long's weblog, available at http://www.posterbrat.com (discussing his telethon experiences as a child and his current work as an advocate in New York City. This article's author was also a poster child for local telethons in Baltimore in the early 1980s.)
\item \textsuperscript{203} Cf Sara Goering, \textit{Beyond the Medical Model? Disability, Formal Justice, and the Exception for the "Profoundly Impaired"}, \textit{12 KENNEDY INST. OF ETHICS J.} 373, 375 (2002) (noting that disability advocates often seem extremist in their views—"even their best case may sound extremist to a society that still generally perceives all disability as a purely internal state, a problem of individual bodies rather than one of social structures and attitudes").
\item \textsuperscript{204} Stigma is a product of social interaction, and the effects of it can be profound—the generation of a "not quite human person." Titchkosky, \textit{supra} note 15, at 203.
\item \textsuperscript{205} Scholar Irving Zola has emphasized that disability is a fluid category, open to all for membership. Almost every person will spend a portion of his or her life experiencing disability. The issue is whether or not they will be treated as disabled. \textit{See IRVING K. ZOLA, MISSING PIECES: A CHRONICLE OF LIVING WITH A DISABILITY} (1982).
\end{itemize}
panic for an onlooker, when it is in the hands of an otherwise thriving young adult. Have the disability and its effects changed? Or have societal expectations of what is appropriate and normative shifted? Such shifts based on age are expected, but they should not go as far as to define one group of people as pariahs or fringe characters, and another group as experiencing the normal ebb and flow of health, as it relates to aging. That two people can experience the same condition, yet one can be isolated and excluded from it—even shunned by normates\textsuperscript{206} because of discomfort—erodes the stability of perceived normalcy.\textsuperscript{207}

Aunt Bertie and Bert III remind us that in order to maintain the hegemony of the medical model we must acquiesce to the core concept that we can tell the difference between people with disabilities and people without—that disability is real, tangible, and measurable. It is precisely this assumption—that we can control for disability, predict it, and balance its imbalance—which sits at the core of a law and economics analysis. This approach can only be true if the stigma of disability were stable, or if it were always negative, and predictable across disabilities and individuals. Yet, people with disabilities struggle to make bridges with one another, even if they have the same disability. Disability, like eye color, skin color, and Sudoku skill, manifests differently, even among people who are socially defined as the same or similar. If disability were redefined as predictable and uniform, it would actually lose its cultural shock value.

Perhaps most promising is the potential of the social model of disability to reach out and bridge other forms of socially-constructed difference and identity, such as race, gender, and sexuality. If people with disabilities face many of the same struggles as non-disabled (or “socially disabled”) minorities, then disabled people’s alliance with other disenfranchised and ostracized groups can be used to subvert dominant paradigms of normalcy and self-worth. Efforts at solidarity might disassemble attitudinal barriers within and between minority groups that result in internalizations of oppressors’ messages about difference as

\textsuperscript{206} Rosemarie Garland Thomson, \textit{Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature} 8 (1997) (“The term normate usefully designates the social figure through which people can represent themselves as definitive human beings. Normate, then, is the constructed identity of those who, by way of bodily configurations and cultural capital they assume, can step into a position of authority and wield the power it grants them”).

\textsuperscript{207} Ray McDermott & Hervé Varenne, \textit{Culture As Disability}, 26 Anthropology \& Educ. Q. 324 (1995) (“Disabilities are less the property of persons than they are moments in a cultural focus. Everyone in any culture is subject to being labeled and disabled.”)
inferior and ugly. They might also erode the cultural perception that there is just one way of being or appearing that is normal and desirable.

Indeed, viewed as a social justice movement, disability rights has much to learn from the women's, civil rights, and queer movements—which are ongoing as well, but in different stages of development. From Erving Goffman's work on stigma and social identities in the 1960s to Victor Turner's identification of the liminal “betwixt and between” state of individuals who exist between groups (here, between normal and abnormal, disabled and not disabled), many of the concepts shaping disability studies have striking parallels to bodies of work about other minority experiences. For people with disabilities to be “liminal” creatures is for them to exist between full acceptance and rejection. They do not belong to society, and yet, they may wait for acceptance. Anthropologist Victor Turner described the liminal state as an ambiguous one, replete with seclusion, tests, and “communitas,” and connecting people based on equality rather than hierarchy. In other words, the stigmatized unite around their stigma and create new ways of relating and being.

Sociologist Erving Goffman characterizes stigma as an inability to conform to societal standards of normalcy. Stigmatized people are not able to achieve social acceptance. His stigmatized group includes drug addicts, ex-psychiatric patients, prostitutes, and people with physical


209. See McDermott & Varenne, supra note 207, at 327-28 (“In cultural terms, the difficulties that people in wheelchairs (or city shoppers with carts, etc.) face with curbs and stairs tell us little about the physical conditions requiring wheelchairs or carts, but a great deal about the rigid institutionalization of particular ways of handling gravity and boundaries between street and sidewalks as different zones of social interaction. Consideration of how such small matters can be turned into a source of social isolation and exclusion is a good way to ask about the nature of culture as disability.”) (initial emphasis added).

210. Rutherglen, supra note 117, at 132 (calling for multiple strategies to address different forms of discrimination and inequality).

211. See VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 90-112 (1967) (discussing the “liminal period” in rites of passage in a variety of societies); ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 1 (1963). Goffman notes that “stigma” originated in Greek society to allude to “something unusual and bad about the moral status of the signifier.”

212. See TURNER, supra note 211, at 90-112.


214. See GOFFMAN, supra note 211, at 13.
“deformities.” Goffman notes the difficulties that stigmatized individuals encounter in trying to create identities that are strong enough to withstand a social mirror of inferiority, grotesqueness, and shame. This mirror has been formed by Goffman’s “normals”—a somewhat stark term for people who are not among the stigmatized.

Even before Turner and Goffman, however, W.E.B. DuBois’ conception of the “double-consciousness” experienced by Blacks had reverberations for people with disabilities. According to DuBois, a Black person lives in

[A] world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

Similarly, people with disabilities may see themselves through the “revelation of the other world.” In the world of work, the identification of people with disabilities as un- or under-productive employees and charitable hires shapes both employers’ and employees’ attitudes. Low expectations mean that people with disabilities are never quite the employees a savvy leader would want. Is it discrimination if it is truthful? Ah, this is the very question that pervades the hiring

215. For interesting discussions of how stigmatized people “recruit” similarly situated individuals for their groups, and the roles that some stigmatized people serve as ambassadors of their stigmas to the normals, see Goffman, supra note 211, at 24-25.


217. See Goffman, supra note 211, at 5.


219. Id.

220. Amy Wax suggests that the issue of productivity should be reframed by considering the societal and economic gains that come from having more people with disabilities in the marketplace as workers. Wax, supra note 59, at 1428-30. Wax calls for a “collective commitment to the disabled.” Id. at 1429. This language raises my concern that any commitment be assessed through a lens of honoring people with disabilities as autonomous, talented individuals. Otherwise, it can easily import paternalistic language about disability (e.g., “the disabled” and “dignified survival”), reinforcing stereotypes about people with disabilities and their need for assistance.

221. Where people with disabilities are viewed as lesser employees, this kind of thinking can raise alarm in hiring committees or among human resources professionals. Legal scholars calling for tax credits for employers or economic efficiency models of hiring people with disabilities may find “Title I’s moral approach to accommodation costs . . . so far removed from the dynamics of hiring that many (and perhaps most) employers are likely to dismiss compliance as a waste of time.” See Leonard, supra note 81, at 60. Even though a more socio-cultural model may be behind the ADA, it is not necessarily the one advanced by many legal scholars.
environment for people with disabilities—a question that is, or should be, shameful to ask in the context of race and gender. It is nonetheless at the core of choosing or eliminating a job candidate with a disability.222

In the context of work, then, a social model of disability has been long in coming and it is not yet fully realized. This model has profound implications for the treatment of people with disabilities in the workplace, as well as their legal rights. It can supplant the assured “abilities discourse” (i.e., people with disabilities as having deficits or subpar abilities), which litters mainstream media depictions of disability and political acts designed to address disability, and can free its bearers from oppression. Most powerfully, it leaves us with new questions; rather than asking, “What would this cost to me?” employers must ask “Why am I even asking, when I cannot, calculate it for any other person, particularly a member of a racial or national origin minority?” Such arithmetic is beyond the pale for mainstream American academic circles when it relates to other oppressed groups.

Disability, when formulated as a general lack of ability, or possession of inferior levels of ability, legitimizes intrusive and demeaning perceptions of people with disabilities. It encourages employers to assume the worst first and then try to hobble together some redemptive qualities of the disabled worker. But that point cannot be reached without the employer indulging in some slippery rounds of the worst case scenario game—compounding the disability and distorting it as all-consuming. Consider, for example, disabilities that may never reach the workplace in their need to be accommodated, or that might not require accommodations at all. Some disabilities represent forms of illness touching only the intimate details of life, such as sexual or reproductive health. While they might limit a person in one or more major life activities, they do not necessarily result in “deficits” that spill over to completely unrelated work in the office or factory.223 Yet, employers are often encouraged to think that one problem must mean others and that all of these problems affect the quality of work offered by individuals with disabilities. Disability-by-association is a preposterous concept—that if I have one illness, I must have others, and that all these “impairments” mark me as separate from and lesser than any other employee.


223. See e.g., Verkerke I, supra note 4 (arguing that people with disabilities that are not work related nevertheless live with these disabilities in ways that will affect their work performance and productivity).
And, fundamentally, why is it that people with disabilities must be ideal or better, the Übermensch?\textsuperscript{224} Employers hesitate to ask how a completely healthy-appearing person without a disability (for now), might have hobbies or traits of sloth that are not immediately perceptible. Distracted or lazy employees can cause larger productivity downturns and costs to companies. Claims about the lowered productivity and abilities of workers with disabilities are contested by an equal amount of empirical evidence to show that qualified people with disabilities are excellent employees.\textsuperscript{225}

These studies expose the eroding foundations of neutrality and objectivity as justifications for purely economic approaches to disability laws and policies. At its core, the law and economics model assumes that most people with disabilities will be flawed employees. The analysis is pointless unless people with disabilities are different (negatively) from non-disabled people. Law and economics can therefore become a tool for generalizing and rationalizing difference and stigma.

Conversely, scholars such as Professor Michael Ashley Stein have offered a law and economics approach to support the advancement of people with disabilities in the market.\textsuperscript{226} Such approaches can provide bridges to scholars outside of disability rights whose philosophies remain deeply rooted in more employer-focused inquiries of equality. However, in using this analytical implement, the underlying stereotypes and biases of law and economics are given credence to some extent.\textsuperscript{227} Compare it to models where intelligence tests are used not to show that Native Americans or women are inferior, but rather, that they are superior.\textsuperscript{228} Does this trajectory deconstruct and acknowledge the history of the tests as reproducers of distortions and inaccuracies?\textsuperscript{229} I am not calling for

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\item \textsuperscript{225} See Dixon, et al., supra note 134, at 9 (observing persons with disabilities have 90% above average job performance) (citing Michelle Conlin, The New Workforce: A tight labor market gives the disabled the chance to make permanent inroads, BUS. WEEK, March 20, 2000, at 68).
\item \textsuperscript{226} See Stein I, supra note 2, and Stein II, supra note 55.
\item \textsuperscript{227} See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (Princeton University Press 1990) (1990) (arguing that historically excluded groups often reclaim stereotypes to convert them into new forms of identity); see also PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (Continuum International Publishing Group ed. 2000) (1970) (stating that resistance at the individual and collective levels begins with critical reflection, followed by action).
\item \textsuperscript{228} See ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN 15-17 (1985) (demonstrating that perceived intelligence variability on the bell curve shifted according to social forces).
\item \textsuperscript{229} See Robert Sternberg, Myths, Countermyths, and Truths about Intelligence, 25 EDUC. RES. 2: 11-16 (1996).
\end{itemize}
relativism, but for an acknowledgement of the underlying assumptions and presuppositions of the law and economics model.

The social model is an explicit admission that the status of people with disabilities—legal or otherwise—is lodged in a morass of cultural stereotypes and social mores. It recognizes the interaction of legal tools—here, civil rights, Title VII, the Rehabilitation Act, the Individuals with Disabilities in Education Act (IDEA), and the ADA—with stalwart attitudinal and physical barriers. While legal acts might advance or embody a notion of disabilities as impairments, a social model instead identifies these impairments as located within law, communities, or any conception of normalcy that reifies itself to the exclusion of others. The social model acknowledges physical diversity and its splendor, while dismantling assumptions about equality as a function of normalcy. Resolutely, this new paradigm challenges the idea that discrimination against people with disabilities is rational, efficient, or justified.

A social model is therefore liberating, as it casts the “What is wrong with you?” question on the asker—on the one staring rather than on the one observed.

Without action resulting in legal and other tangible changes, however, the social model merely taunts individuals with disabilities with an opening to work alongside “normals” as equal contributors. The social model is on the brink of acceptance. For now, it continues to push people with disabilities to reach for equality in not just the nine-to-five hours, but also in their social interactions and identities that come from work. Increasingly, what people do for work defines their roles outside of work. Esteem and confidence are connected to employment. Yet, many people with


231. See e.g., Sagit Mor, Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy, 18 YALE J. L. & HUMAN. 63 (2006) (describing Israeli ableism and how it leads to the cultural inferiority and the rejection of people with disabilities).

232. See Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (deciding that Congress had not identified a pattern of irrational employment discrimination, by state actors, against people with disabilities, such that 11th Amendment immunity could be abrogated). Chief Justice Rehnquist, writing for the majority, emphasized that state employers may discriminate against people with disabilities for economic reasons, without violating the Constitution. While Garrett did not ask for accommodations, the Chief Justice referred to the “special accommodations” she requested. The majority opinion and concurrence reflected attitudes about pity, charity, and stigma. In the concurrence, Justice Kennedy called for “the better angels of our nature” to summon sympathy for people with disabilities. Id. at 367-372. See also Aviam Soifer, Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims, 44 WM. AND MARY L. REV. 1285 (2003) (exploring the Court’s dismantling of disability rights and Congressional intent in Garrett).


234. See Bruyère, supra note 35.
disabilities do not experience workplace inclusion, even if they are ready to work.  

In the next section, I will examine how shifting to a model that fuses action with a social model of disability attempts to make employment more than an aspiration. Resistance demands dropping the language of reasonableness, or at least, shifting attention from gut reactions about reasonableness to more detailed analyses of hardship. When reasonableness becomes transparent, and more attention is paid to the concrete factors that prevent accommodation, more people with disabilities are likely to find meaningful, challenging employment.

V. RESISTING REASONABLE, PROMOTING FULL PARTICIPATION IN THE LABOR FORCE

A. Moving Beyond the Social Model of Disability to Envision Resistance

To many audiences, the social model of disability is a seismic shift from medical and charitable models. Conceiving of people with disabilities as equals, and of accommodation as antidiscrimination, overhauls disability as a cultural construct. As this model is increasingly advocated by people within the movement for disability rights, people outside the field will experience the attitudinal reverberations.

However, the social model has its limitations. The first one is immediately apparent. The model helps explain how people with disabilities are regarded by society and how their marginalization shapes their opportunities. It does not provide a framework for moving beyond attitudinal barriers and other tools of oppression. In many ways, disability studies has dropped off the newest converts at the beginning of a marathon without shoes, entry numbers, or ending points. Disability studies pushes its supporters forward, but without a clear answer to the questions of where and how.

The social model furthered by disability studies can be a starting point, even if it is not the ultimate destination. Disability studies expands critical

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235. Id.


237. See e.g., Adrienne Colella, Coworkers' Distributive Fairness Judgments of the Workplace Accommodation of Employees with Disabilities, 26 ACAD. MGMT. REV. 100 (2001) (arguing that employer and colleagues' attitudes toward employees with disabilities are more negative when they believe the disability to be self-caused; receptivity to accommodations is also stymied when this perception is in place).

thinking by presenting re-imagined methods of inquiry and analysis. However, knowing and doing too often occupy separate domains. As the social model raises awareness among scholars, employers, coworkers, school administrators, and even people with disabilities themselves, it must also provide a realistic framework for eliminating the barriers it identifies.  

Moving beyond the social model entails praxis—action fused with thought—a form of resistance to the societal and legal status quo. Praxis first demands revisiting cultural images. One of the largest hurdles that people with disabilities face is being perceived as passive vessels of welfare, charity, and pity. Being regarded as the objects of employers' benevolence or generosity can further the internalization of stigma by people with disabilities. Passivity reinforces charity and medical models.

At the same time, this imagery is juxtaposed with unfair media depictions of angry, bitter people with disabilities—abandoned Vietnam Vets wandering the National Mall in Washington, DC, and politically outspoken survivors of forced psychiatric treatment. Then, sports or movie stars acquire disabilities, and spend time asking to be cured so that they can be whole again. Here, disability is not portrayed as a positive experience or a cultural identity, such as race, gender, and sexual orientation. Rather, disability is to be overcome, and when it cannot, it only serves to marginalize its bearers. Positing disability as ghastly, as "Other" in postmodern terms, reinforces the subjugation and subordination of its bearers.

239. See Colella, supra note 237 (coworkers often perceive people with disabilities as being unjustly and unfairly enriched by ADA accommodations).

240. See Peters & Gabel, supra note 25, at 7 (using example of the 1% employment rate of people with disabilities in India to demonstrate that culturally promoted shame and stigma keep people from full participation in their communities.).

241. See Celeste Langon, Mobility Disability, 13 PUB. CULTURE 459, 463 (2001) (noting that access to buses is viewed as a civil right, but access to reserved parking spaces meets "ambivalence" and accusations of "affirmative action" and "distributive injustice"); see also Couser, supra note 17, at 73 (describing the convergence of disability law with cultural narratives of oppression and marginalization).

242. For example, no more iconoclastic image of the fallen superhero could be found than when Christopher Reeve sustained his spinal cord injury. Rather than joining the disability rights movement, he asked the public to join him in ending disability altogether through stem cell research and other medical interventions. See Christopher and Dana Reeve Foundation, http://www.christopherreeve.org; see also Langon, supra note 241, at 468, 473 (calling for social justice and the end of "socially constructed poverty" for people with disabilities, by abandoning "liberalism's dream of the autonomous subject").

243. Employers and coworkers' familiarity with disability, or with the particular person who has the disability, may result in increased acceptance and accommodation of the disabled individual in the workplace. See generally Michele Campolieti, The Correlates of Accommodations for Permanently Disabled Workers, 43 INDUS. REL. 546 (finding that Canadian workers who experienced accidents which resulted in disabilities and went for vocational training, were more likely to receive reasonable accommodations from their time-of-injury employers than new employees with disabilities).
But, what if disability itself is neutral, as much a part of human biological and physical variation as eye color, stature, and hair type? Some degree of disability is a given for many people at various times in their lives, if not throughout their entire lives. Conceiving of disability as a neutral begins to erode the characterization of disability as isolating and other. That kind of transformation may be powerful enough to shift institutional and employers' responses to disability.\(^\text{244}\)

Even so, disability does not have to become neutral to be exercised as a subversive and progressive instrument. Resistance theories consider “the contested nature of domination, the prerogatives of agency and voluntarism, the relative autonomy of some sectors or institutions of society, and the idea of hegemonic limits rather than determined necessity.”\(^\text{245}\) In essence, a resistance-oriented route to disability rights links oppression and inequality with agency and transformation, through the interplay of both sets of factors.\(^\text{246}\) Such approaches were first developed from Marxist and education theory perspectives, and enhanced by post-structuralism and feminism.\(^\text{247}\)

Through the lens of resistance, people with disabilities do not form a monolithic community, but are rather individuals with hybrid identities and the potential to use hegemony as a tool of social change.\(^\text{248}\) Resistance theorists view no legal or social situation as static, but as existing in a shifting context with various actors and transformative possibilities. Conflicts and confrontations thus become opportunities for transforming patterned social interactions and institutions.\(^\text{249}\) These kinds of radical shifts in belief and treatment have the potential to emancipate people with disabilities in the workplace and provide them with a path toward economic equality.

To reach that point, however, people with disabilities must begin by educating communities about the social model of disability. This discomfort that disability brings in many social settings—for both people

\(^\text{244.}\) See e.g., Amy Merrick, Erasing “Un” from “Unemployable, WALL ST. J., Aug. 2, 2007, at B1 (describing Walgreen drugstore’s effort to hire people with mental and physical disabilities in ordinary, competitively paid jobs); Dixon et al., supra note 134.

\(^\text{245.}\) See N.C. Burbules, Education Under Siege 36 EDUC. THEORY 301, 302 (calling for a renewed effort of promoting resistance in social change, rather than merely analyzing its sources).

\(^\text{246.}\) In contrast, much of the legal scholarship so far has focused on the ADA and its accommodation provisions as being distinct from antidiscrimination. For example, Professor Kelman characterizes the ADA as a redistributive program with people with disabilities as beneficiaries. See Mark Kelman, Strategy or Principle the Choice Between Regulation and Taxation 5-10 (1999).

\(^\text{247.}\) See Ronald G. Sultana, Transition Education, Student Contestation, and the Production of Meaning: Possibilities and Limitations of Resistance Theories, 10 BRT. J. SOC. EDUC. 288 (chronicling how human agency has taken on a new role in the structuring of institutions, such as schools).

\(^\text{248.}\) See Abowitz, supra note 27, at 897.

\(^\text{249.}\) Id. at 898.
with disabilities and non-disabled people—is shaped by the same attitudes
and fears that keep people with disabilities out of the workplace: that
disability symbolizes human frailty, that people with disabilities are flawed,
that disability is ugly and undesirable. When people with disabilities are
cast away to the fringes of society, the insidious distinction between the
perceived private concerns (e.g., necessary accommodations, workplace
support) of people with disabilities and employers’ responsibilities is
strengthened. People with disabilities could confront these divisive
characterizations, both in community with others and as individuals.

One of the difficulties of resistance is that many people with
disabilities do not recognize their own agency. They may not see the ability
to resist from positions of little power or recognition, existing in a state of
internalized helplessness after years of hearing about their inferiority,
worthlessness, and undesirability from family members, employers, and the
mainstream media. Routine and repeated discrimination discourages
people, with or without disabilities, from fighting back or trying again. The
difficulties of surviving, finding work, and living day-to-day are consuming
in themselves. Energy that could be dedicated to resistance is often
expended daily on combating attitudinal barriers. The ADA was passed
before people with disabilities were welcomed into mainstream society,
truly before their subordination and struggles were recognized by most
individuals in the United States. Yet, its passage did not achieve attitudinal
and cultural enlightenment. Relying on politicians or employers to bring
that enlightenment and to make workplaces just and fair is also an
apparition.

Viewing disability rights at the meta-level, resistance should be
targeted at the places in which people with disabilities are most
disenfranchised. The first step to resistance is addressing the attitudinal
barriers and misconceptions that reify disability as pitiable, and normalcay
as the only way of existing productively and happily. Interactions between
people with disabilities and people unfamiliar with disability can be quite
powerful. While it is beyond the focus of this article, community
organizations, lobbyists, and allies can work alongside people with
disabilities as persuasive conduits of accurate information about and
societal comfort with disability.


251. Abowitz, supra note 27, at 901; see also Sultana, supra note 247, at 287.

252. Resistance models strike at power relationships. See Peters & Gabel, supra note. 25, at 3 (challenging the notion that resistance should be about achieving integration and suggesting a “heuristic approach,” which focuses on gaining power to open wider arrays of choices).
In summary, the social model from disability studies has identified the possible sources of antipathy on the part of employers. Now people with disabilities and their allies must be prepared to dismantle those barriers through education and action. This action challenges passivity and paternalism. The workforce is a powerful place to begin this project, as advances in that realm provide economic security and stability for people with disabilities in ways not yet experienced. By re-centering the accommodation mandate around employees, individuals with disabilities witness and steer a new form of resistance: their own. Having identified the sources of stasis, individuals with disabilities can apply the collective strategies they have used in the area of employment to other social injustices they face.

B. Resistance at Work: The Example of Displacing “Reasonable” with Undue Hardship

If disability rights are civil rights, and access is a civil right, then accommodations should promote access. Employees and their employers need to focus on what is attainable within the limits presented by the job, the workplace, and the individual factors of the request. The word “reasonable” cannot be used as a proxy for dismissing qualified people with disabilities because of employers’ or coworkers’ discomfort, unfamiliarity, animus, or ableism. People with disabilities regularly combat

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253. See Peters & Gabel, supra note 25, at 9 (emphasizing the importance of forming a collective when trying to resist, and basing action on both individual and community needs).

254. See David Willer, et al., Power and Influence: A Theoretical Bridge, 76 SOC. FORCES 571, 576 (defining resistance theory as “the branch of elementary theory that systematically relates expected best payoffs and payoffs at confrontation to predict resource divisions and thus the amount of power exercised in exchange relations”).

255. See Sultana, supra note 247, at 290 (noting that resistance theories consider “the wider social formation” and once individuals have acted upon those sources of social control, they are empowered to transfer those strategies to new domains).

256. See generally Bagenstos II, supra note 72, at 867-70 (discussing the roles of animus, indifference, and selective sympathy in employers’ responses to requests for accommodation).

257. See Lisa Schur, et al., Corporate Culture and the Employment of People with Disabilities, 23 behavioral sciences & the law 3, 20 (2005) (arguing that corporate culture and its accompanying attitudinal barriers toward disability must be dismantled before people with disabilities can be fully incorporated into the mainstream workforce).

258. See Stein II, supra note 55, at 668 (“the general impetus to exclude disabled people arises from benign neglect rather than from animus”). I would argue that reliance on a socio-cultural resistance model of disability and social change calls for the acknowledgment that many non-disabled people have strong visceral reactions to people with disabilities, or they may have reactions informed by anger over the “special privileges” that people with disabilities receive, such as SSDI, handicapped parking, and larger bathroom stalls. Sometimes, this animosity rises to the level of hate crimes. Some advocacy groups have contended that the higher rates of violent crime against people with disabilities are also motivated by hate and animus. See, e.g., civilrights.org, The Cause for Concern 2004: The Human Face of Hate Crimes, http://www.civilrights.org/publications/reports/cause_for_concern_2004/ ch4p3.html (last visited August 2, 2007). See also Mark C. Weber, Disability Harassment (2007).
mainstream assumptions that they are inferior, slow, expensive, and unqualified employees. They are asked to perform as everyone else does without an equal playing field. Employees with disabilities are not just in the back rooms of workplaces, segregated and relegated to lower paid, lower prestige positions and part-time work. Without accommodations, they might as well be in the back rooms of their homes, isolated from their communities and the satisfaction of a vocation, because working often becomes an impossibility without the equitable enforcement of the ADA and its accommodations mandate.259

Recall that the reasonable accommodation inquiry is not halted because of a mere feeling that something is a bit too costly or too unfamiliar and uncomfortable. Rather, an accommodation is reasonable if it is effective.260 People with disabilities are presented with exacting tools for resistance if the ADA's interactive process is honored. They can tinker in service of the spirit of the ADA by demanding, individually and collectively, that denied accommodations be transparently linked to factors outlined in the undue hardship test. In many cases, they will need to educate employers about the nature of their disabilities and which accommodations will work, in order to advance a system where dialogue and transparency are central. However, this kind of exchange is what was intended by the ADA.261 Considerations that go into a reasonable accommodation analysis must be enumerated and exposed to prevent negative reactions to disability itself being the sole reason behind refusal.

Redirecting employers to defend their denials of accommodations based on the facts—the resources of the employer, and the effects or burdens of the accommodation that has been requested—is not a perfect test, but it is a place to begin resisting the assumptions behind

259. See Bagentos II, supra note 72, at 870 ("The employer is the only party in a position to dismantle the structure of occupational segregation that undergirds a system of subordination."). I would emphasize that people with disabilities—even those individuals pushed to the fringe of the economy and society—can and should participate in this project of dismantling. Granted, allies are required. However, I distinguish myself from Professor Bagenstos in emphasizing the role that people with disabilities must play in this process. Change should begin with them.

260. See 29 C.F.R. Pt. 1630, App. § 1630.9; H.R. REP. NO. 101-485, pt. 2, at 66 (1990) ("[a] reasonable accommodation should be effective for the employee"); S. REP. NO. 101-116, at 35 (1989) (stating that the "reasonableness" of an accommodation is assessed "in terms of effectiveness and equal opportunity"). Some courts have held that to determine the reasonableness of an accommodation, they must weigh its costs against its benefits. See, e.g., Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 543 (7th Cir. 1995). This "cost/benefit" analysis has no foundation in the statute, regulations, or legislative history of the ADA. See 42 U.S.C. §§ 12111(9), (10); 29 C.F.R. 1630.2(o), (p); see also H.R. REP. NO. 101-485 pt. 2 at 57-58 (1990). The EEOC, in its enforcement guidance, also warns against oversimplifying the reasonable accommodation process by relying upon cost-benefit analyses.

261. The ADA Restoration Act will also make it easier for people with disabilities to meet the statutory definition of disability under the ADA. See ADA Restoration Act of 2007, H.R. 3195, S. 1881, 110 Cong. (2007).
According to the EEOC Enforcement Guidance on Reasonable Accommodations:

The statutory definition of reasonable accommodation does not include any quantitative, financial, or other limitations regarding the extent of the obligation to make changes to a job or work environment. The only statutory limitation on an employer’s obligation to provide reasonable accommodation is that no such change or modification is required if it would cause ‘undue hardship’ on the employer. Undue hardship addresses quantitative, financial, or other limitations on an employer's ability to provide reasonable accommodation.

As it is made clear from the guidance, “undue hardship” includes more than financial burdens. The hardship analysis takes into consideration several factors: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the facility making the reasonable accommodation; (3) the number of persons employed at the facility; (4) the effect on expenses and resources of the facility; (5) the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity); (6) the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility and the employer; and (7) the impact of the accommodation on the operation of the facility.

Even after a particular accommodation has been ruled out, the employer is not excused from considering whether or not a different accommodation might be adequate, while not posing a hardship.

The original function of reasonableness was to limit burdens placed on employers in conforming to the ADA. However, reasonableness went undefined, save the undue hardship factors outlined in the statute. If “reasonable” is defined by these undue hardship factors alone, and an interactive, perspective-shifting process between employer and employee informs it, then any prejudices or biases about disability are bared for examination. However, if reasonableness stands alone as a catch-all

262. For a discussion of the EEOC’s recommended interactive “case-by-case approach” to the reasonable accommodation process, see 29 C.F.R.§ 1630.2(o) (1997).

263. See Enforcement Guide, supra note 149.

264. See 42 U.S.C. § 12112(b)(5)(A) (it is a form of discrimination to fail to provide a reasonable accommodation “unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . . .”); see also 42 U.S.C. § 12111(10); (defining “undue hardship” based on factors assessing cost and difficulty).

265. See 42 U.S.C. § 12111(10); 29 C.F.R. 1630.2(p).

266. 29 C.F.R. § 1630.2(p). Note that the hardship test uses the word “undue,” which could import some of the bias of reasonableness, if it is not balanced and checked with factual support.

267. See Richard Epstein, The Case Against Employment Discrimination Laws 486-88 (1995) (arguing that the prejudices of employers, customers, and other third parties should be taken into consideration when calculating the costs of a potential accommodation).
category for denying the hiring, advancement, or accommodation of workers with disabilities, the cycle of discrimination continues unchecked.  

The accommodation process must be transparent, rather than a hunch or a will that something be done or avoided. The social model calls for the deconstruction of the systems and relationships that foster oppression. Shifting the focus to the undue hardship test's factors adds transparency to the analysis, removing any hiding room for attitudinal barriers and gut reactions to disability to be the unspoken considerations. It removes the default idea that people with disabilities have needs that are generally unreasonable to accommodate. Accommodation requests are not attempts at special treatment on the part of individuals with disabilities. They are about access to the most common and ordinary experiences of living in a democratic, capitalist economy, where working in a challenging position can be a part of independence, and sharing the costs of equality requires interdependence.

In openly identifying the problems with a particular accommodation, resistance becomes possible and targeted. By resistance, I mean more than mere opposition. Resistance is intended to progressively transform social and economic institutions by exposing underlying sources of oppression and inequality. In dialogue, employers and people with disabilities can tackle the barriers to particular accommodations by rigorously examining and rerouting around any potential hardships. Fundamentally, resistance is not only about transparency, but also about flexibility.

C. Flexibility and Resistance

When people with disabilities and the non-disabled share the project of employment, attitudes become flexible, as do responses. The language of reasonableness was never intended to preclude creativity and effort, even though its interpretation by jurists and employers has been rigid. The ADA, especially under a renewed commitment to people with disabilities,

268. See Jolls, supra note 64, at 685, listing four causes for intentional discrimination—employer animus; coworker or consumer animus; "correct employer beliefs that group members are lower quality or higher cost employees on average;" and incorrect employer beliefs about the decreased quality and higher costs of potential employees. Professor Jolls notes, too, that both intentionally and unintentionally discriminating poses costs to employers. Id. at 687.

269. See Jolls, supra note 64 (noting that all forms of antidiscrimination come with associated costs).

270. See Abowitz, supra note 27, at 878 ("Theories of resistance have contributed to the body of knowledge in social theory concerning the issues and meanings of opposition and conflict present when marginalized individuals or groups . . . speak or act out regarding their status, treatment, or relative position in the institution.")

271. See Id. at 877 (arguing that by looking at the sources and expressions of resistance, institutions can be pushed to change in the direction of inclusion and respect).
encourages innovative solutions to obstacles that are initially considered insurmountable.

Take the example of an employer who receives a request to pay for a taxi service to transport an employee with mobility concerns to work everyday. Under a more flexible, disability-welcoming model, if the employer concludes that taxi service exceeds her resources, she might then consult with the employee to brainstorm other options that fit the needs of the employer and the employee. These options could include establishing a carpooling incentive policy for all employees, offering the employee a parking space close to work, or giving the employee an opportunity to work from home several days a week. As the courts are apt to warn plaintiffs, the ADA does not require that the person with a disability get his or her ideal accommodation, just one that is feasible and meets the needs of the qualified employee given the employer's resources. A disability-positive perspective does not change this reality, nor should it.

As I have argued, an employer short-changes the interactive process when she automatically concludes that an accommodation is outside the scope of the company's operations, without creating a dialogue with the employee about alternatives and her sources of concern. Employers should explain and be able to defend denials of accommodation and they need to be able to articulate concrete reasons, not that it "just felt like too much," when they are making these decisions that have so much of an impact on employees with disabilities. This process challenges them to dismantle prejudices about people with disabilities and to exercise creativity and resourcefulness in the accommodations process. While the EEOC might be more sympathetic to an employer that asserts, "We are simply not in the transportation business," accommodation is, at the crux, about employers engaging in modifications to their workplaces or policies that are not typical fare. Accommodation frequently places a duty upon employers to explore things that are outside of the ordinary course of business. In turn, these pursuits make people with disabilities part of the ordinary course, which is the model of justice I advance. When accommodation is rightfully viewed as a process by which current or potential employees with disabilities are able to access the workplace, there is little difference between a large-screened monitor and a parking space. Both are accommodations that could be reasonable in a variety of work settings.

272. See e.g., EEOC v. Sears, 417 F.3d 789, 806 (7th Cir. 2005) (emphasizing that employers should continue to engage in the ADA's interactive process where an appropriate accommodation has been suggested, and that they should offer explanations as to why an accommodation will not work).

273. Horder, supra note 4 at 258, exposes the weakness in looking at behavior through the lens of ordinariness, when trying to evaluate its reasonableness. As he suggests, it is often difficult to tell whether ordinary behavior is justified by logic and rational thought.
The ADA and resistance theories of social change call for cooperative, collaborative actions. Concerns about hardship and reasonableness cannot be pushed aside, and all actors in the employment process must be committed to confronting conflict and dissent. Resistance theories embrace these conflicts as sources of knowledge and understanding, which may advance positive, empathic rights-based attitudes about disability, and the equality of people with disabilities. The challenge is then to move forward as either a partnership of employer and employee, or as a larger community of people with disabilities suffering employment injustices.274

In everyday interactions, people with disabilities have, and need more, opportunities to educate employers, agencies, and peers about their experiences of disability.275 These moments of mutual learning are foundations for changes and flexibility in the ADA in practice. The everyday interpretation of the ADA is the most important level of transformation, even more critical than case law or statutory reform. The EEOC or civil society (e.g., nonprofit organizations, disability and civil rights leaders, media) could assume responsibility for educating employers, or employers could take it upon themselves. Any of these routes could improve employment outcomes gradually. Regardless of the division of labor around defeating prejudice against people with disabilities and generating new forms of collaboration in the workplace, people with disabilities need to be at the center of the ADA; it is their/our civil rights statute, about us, for us, and ultimately, an effort to be undertaken with us.276

Finally, flexibility is helpful where a system of belief and change is self-perpetuating. Bias and animus against employees with disabilities continue to keep them from the workforce and therefore, they are not present to offer themselves as real life, daily examples of the talents and skills of people with disabilities. Without these attitudinal changes, legal advancements mean very little. Supervisors, coworkers, and prospective employers must see people with disabilities in positions of power and talent, to spur changes in attitudes and assumptions and critically, in how

274. See Abowitz, supra note 27, at 885.
275. See Rubin, supra note 108, at 578 (arguing that when people believe in the justness of discrimination, any laws to eradicate it become viewed as special treatment). Ultimately, however, Rubin characterizes the ADA as providing people with disabilities with “special treatment.” Id. at 594. He misses the opportunity to draw parallels between discrimination against gay, lesbian, bisexual, and transgendered people, and people with disabilities. People with disabilities need to become part of the awareness of both scholars (not just disability experts, either) and employers, so that their requests for accommodation are not denied out of ignorance or disgust. See also id. at 589 (noting the moral assessment element of responding to discrimination concerns).
prospective employees are treated.\textsuperscript{277} The ADA works when people at the ground level apply it in spirit. This statement is not intended to reinforce characterizations of people with disabilities as victims, outsiders,\textsuperscript{278} or charity cases, but to highlight the need for the inclusion of these considerations about disability in the initial human resources screening, as well as in creating a flexible workplace for all employees after they have been hired. These attitudes, but not this article, go beyond considerations of reasonable accommodation.\textsuperscript{279}

\section*{VI. \textbf{CONCLUSION: THE NATIONAL AGENDA OF GETTING TO WORK}}

The major civil rights movements of the 20\textsuperscript{th} century were marked by marches and fulminations—cultural signifiers of the end of subordination. Blacks marched on Washington, DC. Women formed underground abortion transportation networks to ensure their choices before \textit{Roe v. Wade}.\textsuperscript{280} From Students for a Democratic Society to the Black Panthers, people most affected by discrimination and injustice assumed leadership roles and defied existing hierarchies to advance their missions. They labored at the front during times of cultural upheaval and radical challenges to existing modes of treating difference. They remained there until the new ideas settled into everyday interactions and practices.

\textsuperscript{277} Consider Colella's argument, \textit{supra} note 237, that coworkers can be stakeholders in the accommodation process. See e.g., Anna T. Florey & David A. Harrison, \textit{Responses to Informal Accommodation Requests from Employees with Disabilities: Multistudy Evidence on Willingness to Comply}, 43 ACAD. MGMT. J. 224, 230-32 (2000) (factors most affecting employers' willingness to comply with accommodations requests were “controllability of a disability's onset, the employee's past performance, and the size of the requested accommodation;” a supervisor's sense of obligation and attitude toward disability were also predictive of receptivity); Joy E. Beatty & Susan L. Kirby, \textit{Beyond the Legal Environment: How Stigma Influences Invisible Identity Groups in the Workplace}, 18 EMP. RESP. & RIGHTS J. 29, 34-39 (2006) (presenting four factors—moral threat, responsibility, course of the disability, and performance—in employers' responses to invisible disabilities).

\textsuperscript{278} The issue of discrimination is not necessarily tied to identifying, or not, as a person with a disability. Identity may offer a community of support, or a connection to disability culture, but even those people who do not self-identify as disabled may be treated as such if they are perceived as different.

\textsuperscript{279} Cf. Verkerke I, \textit{supra} note 4, at 937. Verkerke defends approaches to hiring people with disabilities based on “matching,” even if it is not the highest use of the employee's education and skills. With regard to the issue of under-employment, he suggests that advocates interested in a “dignitary defense of disability discrimination law,” fail to recognize the efficiency benefits of his proposal. \textit{Id.}

\textsuperscript{280} 410 U.S. 113 (1973). See generally LAURA KAPLAN, \textit{THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE} (1997). Before \textit{Roe}, an underground collective of women performed more than 12,000 safe and affordable abortions in the United States, with volunteers also working as liaisons between pregnant women and medical doctors. Women found this service through word-of-mouth.
The end of disability discrimination—beyond mere statutory declarations—may take the same level of consciousness-raising. In fact, it is this kind of overthrow of shame and fear about disability that will be the catalyst for overcoming perceptions of passivity and inferiority. When feasible accommodations are granted without ado, the playing field in employment will be closer to level. Only at that time will the American workplace’s response to disability approach reasonableness.

When the process of granting or denying reasonable accommodations becomes transparent, people with disabilities can resist the cultural and economic oppression that excludes them from meaningful work. This shift can begin by challenging the assumptions behind “reasonableness,” and involving the needs and experiences of employees with disabilities in the conversation. Issues related to getting to work keep many potential employees with disabilities from working to their fullest potential. These issues also speak to a greater social segregation of people with disabilities over people without disabilities. All employees, whether or not they have disabilities, are different from one another. Yet such stigma has been attached to the difference of disability. Nothing less or more than equality in hiring, retention, and advancement is in order.

281. KRISTIN L. SZAKOS & JOE SZAKOS, WE MAKE CHANGE: COMMUNITY ORGANIZERS TALK ABOUT WHAT THEY DO—AND WHY, at xi (2007) (listing all the civil rights movements of the 20th century, and then awkwardly announcing, “the movement that brought about the ADA,” as if the disability rights movement did not exist). Ordinary characterizations of disability often reinforce these ideas of disability as passivity and reception (versus change and resistance), however unintentionally and innocently. Note the role that these social movements, and their concomitant academic theories and schools of thought, such as critical race theory and queer studies, can have on the disability rights movement. See, e.g., Carlos A. Ball, Looking for Theory in all the Right Places: Feminism and Communitarian Elements of Disability Discrimination Law, 66 OHIO ST. L.J. 105 (2005).

282. See generally Robert Silverstein, et al., WHAT POLICYMAKERS NEED AND MUST DEMAND FROM RESEARCH REGARDING THE EMPLOYMENT RATE OF PERSONS WITH DISABILITIES, 23 BEHAV. SCI. & L. 399 (2005) (suggesting several approaches to gathering “credible evidence” about the disability and unemployment problem, and sorting through existing data to critique proposed cause-effect relationships).

283. While outside of the scope of this article, barriers to accessing public transportation also motivated the passage of the ADA. See, e.g., S. Rep. No. 101-116, at 52 (1989) (discussing the role of accessible transportation in the daily activities of community life).

284. See Anita Silvers, Protection or Privilege? Reasonable Accommodation, Reverse Discrimination, and the Fair Costs of Repairing Recognition for Disabled People in the Workforce, 8 J. GENDER RACE & JUST. 561, 576 (2005) (describing how women’s bodies are no longer viewed as inferior in their difference in the workplace, yet people with disabilities have not achieved the same recognition).

285. See Stein II, supra note 55, at 590 (questioning scholars’ characterization of the divide between formal and distributive justice, in relation to the ADA’s accommodation mandate).