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## Gendering Disability to Enable Disability Rights Law

Michelle A. Travis

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# Gendering Disability to Enable Disability Rights Law

Michelle A. Travis\*

*This Essay enriches the social model of disability by analyzing the interaction between disability and gender. The modern disability rights movement is built upon the social model, which understands disability not as an inherent personal deficiency but as the result of the environment with which an impairment interacts. The social model is reflected in the accommodation mandate of the Americans with Disabilities Act of 1990 (ADA), which holds employers responsible for the limiting aspects of their workplace designs. This Essay shows that the environmental limitations imposed upon impairments result not only from the physical aspects of a workplace but also from identity-based stereotypes, biases, and oppressions that affect how disability is experienced and perceived. Specifically, this Essay furthers the social model by challenging the existing gender-neutral view of the causes and consequences of disability. The analysis reveals how ignoring gender has enabled masculine norms to become embedded in the ADA's substantive and procedural approaches to defining and remedying disability discrimination in the workplace. As a result of this inattention to gender, women with disabilities have suffered serious social and economic consequences. This Essay demonstrates, more generally, how ignoring other social identities renders nonprototypic members of the disabled community legally invisible, and it reveals how attending to other social identities may advance the social model of disability, deepen our understanding of disability discrimination, and empower disability rights law to serve a more diverse group of individuals.*

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#### INTRODUCTION

The social model of disability is a foundation of the modern disability rights movement.<sup>1</sup> In contrast to the medical model, which views disability as an inherent personal deficiency, the social model conceptualizes disability as a product of the environment with which physical and mental impairments interact.<sup>2</sup> The social model paved the way for legal and policy reform by empowering antidiscrimination law to hold employers responsible for the limiting aspects of their workplace design.<sup>3</sup> Most importantly, the social model facilitated enactment of Title I of the Americans with Disabilities Act of 1990 (ADA), which does not merely prohibit disability discrimination in the workplace, but also requires employers to accommodate disability through workplace redesign.<sup>4</sup> While the ADA's primary focus has been on the physical, structural, and organizational workplace environment, the limitations imposed upon impairments also result in significant fashion from the social aspects of a workplace. The social workplace environment includes identity-based stereotypes, biases, and oppressions that affect how disability is experienced and perceived. Giving full import to the social model of disability thus requires

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1. See SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 18 (2009); Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 *BERKELEY J. EMP. & LAB. L.* 203, 210–12 (2010); Tom Shakespeare, *The Social Model of Disability*, in *THE DISABILITY STUDIES READER* 266, 268 (Lennard J. Davis ed., 3d ed. 2010) [hereinafter Shakespeare, *The Social Model*].

2. See BAGENSTOS, *supra* note 1, at 18–19; Shakespeare, *The Social Model*, *supra* note 1, at 268.

3. See Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 *HASTINGS L.J.* 1203, 1207 (2007) (explaining how “[b]eginning in the 1970s, the disability civil rights agenda progressively influenced United States legislation towards the social model of disability,” and identifying the Rehabilitation Act of 1973 as a “primary example”).

4. See Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12117 (2012)); see also Stein & Stein, *supra* note 3, at 1208 (describing the ADA's enactment as “the social model's legislative victory in the United States”).

deeper understanding of the complex interaction between disability and other statuses when identifying the environmental elements that render impairments disabling.

This Essay advances the social model by exploring the interaction between disability and one particularly salient social identity: gender. Ignoring gender in the design and application of the ADA has enabled masculine norms to become embedded in the ADA's substantive and procedural approaches to defining and remedying disability discrimination in the workplace. These masculine norms have limited the law's capacity to address the heterogeneous experiences of prejudice and subordination facing individuals with disabilities. They have also contributed specifically to the social, political, and legal invisibility of women with disabilities, who have suffered serious social and economic consequences as a result.<sup>5</sup> Of course, women with disabilities are themselves a heterogeneous group of individuals whose experiences of disability may also be shaped by other subordinate statuses, including race, national origin, religion, sexual orientation, age, and class. Exploring the intersection of disability and gender is thus a first, rather than a final, step toward a deeper understanding of what the social model has to offer disability rights.

This Essay takes this first step by challenging the existing gender-neutral view of the experience and consequences of disability. Part I identifies the social and political forces that helped "degender" disability by casting individuals with disabilities neither as men nor as women but solely as disabled. This Part explains how a degendered approach to disability empowers masculine norms to define the prototypic lives, needs, and experiences of individuals with disabilities, and it documents the resulting social and economic harms to women with disabilities. Part II describes the growing body of research showing that gender has significant and complex effects on the construction of disability. This research confirms the need to gender our understanding of disability to more fully appreciate the varied experiences of individuals who live and work with impairments.

Part III makes a specific contribution to the larger endeavor of gendering disability by revealing how inattention to gender has enabled masculine norms to become embedded in existing disability discrimination law. Part III.A explains how masculine norms have limited the ADA's protected class of individuals with disabilities by restricting the impairments and resulting limitations that are worthy of legal recognition. Part III.B shows how masculine norms restrict the scope of the ADA's accommodation mandate by essentializing a workplace designed for male bodies and experiences. Part III.C demonstrates how masculine norms limit access to accommodations by

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5. Although this Essay focuses on how the interaction between disability and gender has negatively affected women with disabilities, non-masculine men with disabilities are likely to experience many of these negative effects as well.

allowing gender biases to affect the procedures for seeking and obtaining workplace modifications.

Part III also illustrates more generally how attending to other social identities may advance the social model and deepen our understanding of the construction of disability. The Essay concludes by suggesting that a gendered approach to disability could advance the broader feminist project of fully accounting for individual differences by shifting antidiscrimination law's ethic of rights to an ethic of care.<sup>6</sup> While a rights ethic requires individuals to assert their eligibility and prove their worthiness for a level workplace playing field, a care ethic would instead recognize the universal nature of human vulnerability and universalize the accommodation mandate accordingly.<sup>7</sup> Expanding our understanding of the unique forms of oppression that individuals with disabilities and other subordinate statuses experience could advance this broader paradigm shift by empowering disability rights law to recognize, represent, and serve a more diverse group of individuals.

## I.

### THE CAUSES AND EFFECTS OF A DEGENDERED DISABILITY

The degendering of disability is the process by which individuals with disabilities are perceived neither as men nor as women but solely as disabled. This process is rooted in the powerful and pervasive cultural tendency to view disability not only as a unitary concept but also as a “master status.”<sup>8</sup> Sociologists define a master status as one that is more determinative of a person's behavior, personality, interactions, and social roles than any other status.<sup>9</sup> Under this conventional conception, researchers, policymakers, and even activists have viewed disability as an individual's exclusive status that either overrides or assumes irrelevant all other characteristics.<sup>10</sup> This approach to disability has contributed to a limited understanding of disability-based oppression that ignores other forms of distinct but intersecting oppressions that

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6. See *infra* notes 262–70 and accompanying text.

7. See *id.*

8. See Adrienne Asch & Michelle Fine, *Introduction: Beyond Pedestals*, in *WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS* 3 (Michelle Fine & Adrienne Asch eds., 1988) (internal quotation marks omitted).

9. See Sharon N. Barnartt, *Introduction: Disability and Intersecting Statuses*, in *DISABILITY AND INTERSECTING STATUSES* 1, 3–4 (Sharon N. Barnartt & Barbara M. Altman eds., 2013).

10. See *id.* at 4; see also Carrie Griffin Basas, *The New Boys: Women with Disabilities and the Legal Profession*, 25 *BERKELEY J. GENDER L. & JUST.* 32, 46–47 (2010) (explaining how researchers take a “unitary” approach to disability by “assuming disability’s primacy over . . . other forms of identity”); Nasa Begum, *Disabled Women and the Feminist Agenda*, 40 *FEMINIST REV.* 70, 72 (1992) (explaining that disability “may be the predominant characteristic by which a disabled person is labelled”); Tom Shakespeare, *Disability, Identity and Difference*, in *EXPLORING THE DIVIDE: ILLNESS AND DISABILITY* 94, 109 (Colin Barnes & Geof Mercer eds., 1996) (explaining that disability “has the potential to transcend other identities”) [hereinafter Shakespeare, *Disability, Identity*].

individuals with disabilities also experience.<sup>11</sup> This master status conception has wielded particular force over gender. Because disability has been constructed as either gender-neutral or gender-eclipsing,<sup>12</sup> disability status has the power to effectively eliminate the sex of individuals with disabilities from the perception of others.<sup>13</sup>

A genderless conception of disability, however, leads to neither gender-neutral nor gender-inclusive social, political, or legal responses. When gender is ignored, androcentrism fills the void.<sup>14</sup> In other words, failing to explicitly recognize gender ends up implicitly defining the prototypic and purportedly neutral standard as male.<sup>15</sup> Ignoring gender thus enables men's lives, experiences, and perspectives to achieve hegemony as the "societal standard," while women are perceived as "non-prototypic exemplars" of the group.<sup>16</sup> Androcentrism particularly tends to privilege the male experience within subordinate social groups.<sup>17</sup> This means that without conscious attention to gender, the male experience defines the prototypic members of the disabled community.

Women with disabilities experience a double form of this group-based "othering." Social psychologists have found, particularly in studying race, that communities perceive individuals with multiple subordinate identities as the nonprototypic members of each of their respective constituent identity groups.<sup>18</sup> In the context of disability, this means that the prototypic disabled person is perceived as male, and that the prototypic woman is perceived as able bodied, thereby marginalizing women with disabilities within both of their identity groups.

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11. See Ayesha Vernon, *The Dialectics of Multiple Identities and the Disabled People's Movement*, 14 *DISABILITY & SOC'Y* 385, 391 (1999) (arguing that "the role of other oppressions in disabled people's lives is not given due consideration").

12. See Begum, *supra* note 10, at 70 (explaining the "tendency to view disabled people as one homogenous group with no gender distinctions"); Sally Thorne, Janice McCormick & Elaine Carty, *Deconstructing the Gender Neutrality of Chronic Illness and Disability*, 18 *HEALTH CARE FOR WOMEN INT'L* 1, 7 (1997) (explaining that the "dominant narrative" is that disability is "relatively neutral with regard to gender").

13. See Shakespeare, *Disability, Identity*, *supra* note 10, at 109.

14. See Valerie Purdie-Vaughns & Richard P. Eibach, *Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities*, 59 *SEX ROLES* 377, 380–83 (2008) (defining androcentrism as "the tendency to define men as the prototypical exemplars of a given group and women as non-prototypical exemplars of that group").

15. See *id.* at 380–81.

16. See *id.*; see also SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* 41 (1993) (defining androcentrism as "the privileging of male experience and the 'otherizing' of female experience; that is, males and male experience are treated as the neutral standard or norm . . . and females and female experience are treated as a sex-specific deviation from that allegedly universal standard").

17. See Purdie-Vaughns & Eibach, *supra* note 14, at 382–83 (explaining that "androcentrism will tend to cause the male members of subordinate social groups to be defined as prototypical group members").

18. See *id.* at 380–81, 387.

This non-neutral prototyping process resulted not just from benign neglect of gender, but also from active social and political forces that strategically imbued a degendered conception of disability with masculine norms. During critical organizing and policymaking stages, leaders in both the disability rights movement and the feminist movement recognized the need to portray and coalesce around a prototypic class norm. As Professor Anita Silvers has explained, “Group identity strategy relies on theorizing to establish the positive worth of typical members of the group.”<sup>19</sup> While this strategy has obvious benefits, it often devalues “atypical” group members in the process.<sup>20</sup> For the disability rights and feminist movements, the constructed group identity prototypes rendered women with disabilities the atypical members of both groups, which left them devalued, excluded, and largely unrepresented.

The male-dominated history of the disability rights movement is part of this larger story and is one contributing factor to the gender masking within current disability law and policy. When the disability rights movement took its modern form in the 1980s, it was marked by the iconic image of white, heterosexual men with mobility impairments.<sup>21</sup> This prototype mirrored the movement’s leadership, which for decades was made up almost entirely of white, middle-class men.<sup>22</sup> Although presenting a unified face was an effective way to advance the movement’s critical goal of replacing the medical model of disability with the more progressive social model, it has had lasting effects on the movement’s scope, direction, and impact.

The social model of disability paved the way for legal and policy reform by challenging the notion of inherently limiting internal deficits and reconceptualizing disability as the contingent result of an impairment’s interaction with some limiting aspect of the environment.<sup>23</sup> While this important shift away from internal traits facilitated the successful enactment of new laws with broad accommodation mandates,<sup>24</sup> the disability rights movement has yet to fully explore the social model’s implications for all

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19. Anita Silvers, *Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY WOMEN’S L.J. 81, 114–15 (1998).

20. *See id.* (“[G]roup identity strategy invites theorizing that devalues atypical members of the group.”).

21. *See* Corbett Joan O’Toole, *The Sexist Inheritance of the Disability Movement*, in GENDERING DISABILITY 294 (Bonnie G. Smith & Beth Hutchison eds., 2004); *see also* Purdie-Vaughns & Eibach, *supra* note 14, at 381 (“[T]he prototypical disabled person is a white, male, heterosexual and thus the experiences of nonwhite, female, or gay/lesbian disabled persons should tend to be relatively marginalized in cultural representations of disability.”).

22. *See* O’Toole, *supra* note 21, at 295 (explaining that starting in the 1980s, “[t]he staff and leadership of the disability movement in the United States . . . [was] almost completely white, middle class, and until recently, male”).

23. *See* BAGENSTOS, *supra* note 1, at 18–19; Shakespeare, *The Social Model*, *supra* note 1, at 268.

24. *See supra* notes 3–4 and accompanying text.

members of its community.<sup>25</sup> In particular, disability advocates have paid insufficient attention to the simultaneous interactions between impairments and other statuses when identifying the environmental components that render impairments disabling. For example, the male-led, mobility-focused movement has often prioritized “structural barriers to accessibility” over other challenges facing the community’s heterogeneous membership.<sup>26</sup> As one disability scholar has observed, “[s]tudying disability without looking at the intersections of multiple identities” has produced social and legal responses based upon “a very limited perspective about who disabled people are and what they need.”<sup>27</sup>

Many individuals with disabilities who deviate from the movement’s prototype have challenged the “insidious[] myth of the white, straight man in a wheelchair” as a source of marginalization,<sup>28</sup> but women with disabilities likely have experienced the greatest sense of exclusion. Commentators have criticized the social disability movement for its lack of sustained interest in assessing the gender-differentiated effects of impairments, and some have explicitly characterized the movement as sexist.<sup>29</sup> This gender critique has been leveled against not only activists and leaders in the disability rights community, but also the early disability studies movement that attempted to mainstream disability issues within academia.<sup>30</sup> While disability studies scholarship readily challenges how medical professionals construct disability, it has been less

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25. See Miriam Arenas Conejo, *At the Intersection of Feminist and Disability Rights Movements. From Equality in Difference to Human Diversity Claims*, in *DISABILITY AND INTERSECTING STATUSES*, *supra* note 9, at 23, 25, 34, 38 (explaining that while the social model of disability “create[d] a common political front,” it did so by “paying more attention to unity than to diversity,” which effectively “reproduced patriarchal assumptions”); Vernon, *supra* note 11, at 390 (describing the growing literature in the 1990s “expressing a general dissatisfaction that the differing experiences of groups such as disabled women and disabled black people are overlooked by social model theorists due to an overwhelming desire to proclaim commonality in the experience of disablement”); see also Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 394 (2001) (arguing that social justice must “appreciate[] similarities and differences among people with impairments”).

26. See O’Toole, *supra* note 21, at 294.

27. See *id.* at 297.

28. See *id.* at 295–96 (noting that “[p]eople who have deviated from this mythic image often found themselves ostracized within the disability movement”).

29. See *id.* at 294 (criticizing the disability movement’s lack of “any systemic interest in analyzing how disability might have a differential impact based on gender” and quoting British disability rights advocate Carol Thomas as saying that “the social disability movement is sexist”); see also Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099, 1102 (2017) (stating that “the intersectional discrimination encountered by disabled women . . . [has] been completely ignored by prior intersectional scholarship”).

30. See Asch & Fine, *supra* note 8, at 3 (noting that “almost all research on disabled men and women seems simply to assume the irrelevance of gender”); Thorne et al., *supra* note 12, at 2 (arguing that disability studies scholars have largely adopted a gender-neutral narrative of disability); Vernon, *supra* note 11, at 390–91 (observing that disability textbooks generally assume that gender is “irrelevant to disabled people’s lives”).



willing to explore how the meaning of disability is also constructed by social identities like gender.<sup>31</sup>

At the same time that women with disabilities were marginalized within the disability rights movement, they also were rendered invisible within the feminist movement.<sup>32</sup> To navigate the valorized norms of masculinity, feminists in the 1970s charted an initial strategy that went beyond just ignoring disability. Leaders actively distanced the movement from disabled women to strengthen the movement's presentation of women as strong, capable, and independent.<sup>33</sup> As a result, women with disabilities have been devalued in not only the larger patriarchal society, but also the women's movement and feminist theory itself.<sup>34</sup>

Without a strong voice in either the disability rights or feminist movements, women with disabilities have been unable to draw attention to their unique forms of multiple oppression: being both female in a male-dominated society and disabled in a society designed for the able bodied.<sup>35</sup> Without political power to advance their interests, women with disabilities have not been represented in law and policy reforms, which instead reflect a disability rights movement that marginalized women and a feminist movement that ignored the disabled.<sup>36</sup> Not surprisingly, those who have benefitted most

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31. See O'Toole, *supra* note 21, at 296–97; Thorne et al., *supra* note 12, at 5 (explaining that “disability literature has successfully disentangled disability (biological condition) from handicap (social ramifications) . . . and has advanced the position that disability is a social construction,” but the literature “is missing . . . a clear analysis of the intersection between disability and gender” (internal citations omitted)); see also Conejo, *supra* note 25, at 41 (“[I]ntersectionality is still an under covered issue in the disability studies field.”).

32. See Carol Thomas, *Disability and Gender: Reflections on Theory and Research*, 8 SCANDINAVIAN J. DISABILITY RES. 177, 183 (2006) (explaining that “[i]n the 1980s and early 1990s, disabled feminists found themselves ‘shut out’ of the wider sisterhood” as the feminist movement focused on the needs and interests of nondisabled women); see also Thorne et al., *supra* note 12, at 2 (asserting that “feminist theory has, with few exceptions, avoided women’s disability issues”).

33. See Thomas, *supra* note 32, at 183; see also Begum, *supra* note 10, at 73 (“Perceiving disabled women as childlike, helpless, and victimized, non-disabled feminists have severed them from the sisterhood in an effort to advance more powerful, competent and appealing female icons.” (internal citation omitted)).

34. See Silvers, *supra* note 19, at 82, 95.

35. See Basas, *supra* note 10, at 46–47 (explaining that because “researchers have focused on the disability aspect of women with disabilities,” they have ignored that “[w]omen with disabilities experience dual oppression”); see also Purdie-Vaughns & Eibach, *supra* note 14, at 380 (urging researchers to explore “how the forms of oppression that people with intersecting disadvantaged identities experience differ from the forms of oppression that people with a single disadvantaged identity experience”).

36. See Asch & Fine, *supra* note 8, at 3 (“Women with disabilities traditionally have been ignored not only by those concerned about disability but also by those examining women’s experiences.”); Begum, *supra* note 10, at 70, 73 (explaining that “[t]he reality of being a disabled woman . . . has to a large extent been overlooked by both the disability and feminist movements,” which have rendered disabled women “perennial outsiders” to both movements); Conejo, *supra* note 25, at 34 (“[D]isabled women did not find their needs, concerns, and experiences addressed either in feminist or in mainstream disability theories.”); Margaret Lloyd, *The Politics of Disability and Feminism: Discord or Synthesis?*, 35 SOCIOLOGY 715, 716 (2001) (“[D]isabled women have been

from the disability rights movement's legal and social advances have been individuals "whose needs were the most parallel to the mythic disabled man."<sup>37</sup>

Social psychologists use the term "intersectional invisibility" to describe this phenomenon of failing to recognize individuals with intersecting subordinate identities as full members of any of their constituent groups.<sup>38</sup> Being "marginal members within marginalized groups" causes acute social isolation,<sup>39</sup> as well as political and legal exclusion.<sup>40</sup> Advocacy groups spend more time, attention, and resources advancing the interests of their prototypic constituents, which means that advocates often ignore or neglect issues predominantly affecting those with intersecting subordinate identities.<sup>41</sup> As a result, antidiscrimination law often fails to address the unique forms of prejudice and exclusion facing those with intersectional subordinate identities.<sup>42</sup>

Intersectional invisibility has had long-lasting effects on women with disabilities, who continue to fare worse than nearly all other social groups based on a wide array of social and economic indicators.<sup>43</sup> Compared to either

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caught between, on the one hand, an analysis and movement in which they have been invisible as women, and one in which their disability has been ignored or subsumed, on the other."); Lisa Schur, *Is There Still a "Double Handicap"?*, in GENDERING DISABILITY, *supra* note 21, at 253, 255 (explaining that women with disabilities feel that "neither the feminist nor the disability rights movement fully addresses their needs"); *see also* Carol J. Gill, Kristi L. Kirschner & Judith Panko Reis, *Health Services for Women with Disabilities: Barriers and Portals*, in REFRAMING WOMEN'S HEALTH 357 (Alice J. Dan ed., 1994) (stating that "women with disabilities are one of the most isolated and invisible minority groups in this country").

37. *See* O'Toole, *supra* note 21, at 295.

38. *See* Purdie-Vaughns & Eibach, *supra* note 14, at 381.

39. *See id.*

40. *See id.* at 378, 380–81 (using the term "intersectional invisibility" to describe the social, political, legal, and cultural exclusion experienced by individuals with intersecting subordinate identities who do not fit the prototypes of any of their constituent identity groups).

41. *See id.* at 385 (using the term "political invisibility" to describe the "neglect by allegedly inclusive advocacy groups of the issues that predominantly affect people with intersecting subordinate identities").

42. *See id.* at 386 (using the term "[l]egal invisibility" to describe "the mismatch between intersectional subordinate-group identities and dominant legal anti-discrimination frameworks," and explaining why "the distinctive experiences of prejudice and discrimination that people with intersectional subordinate identities face should be a relatively poor fit to existing anti-discrimination law").

43. *See* Asch & Fine, *supra* note 8, at 6 (finding "that disabled women still are more disadvantaged than either non-disabled women or disabled men"); Basas, *supra* note 10, at 46 (noting that women with disabilities are "more likely to be unemployed, paid less, live below or at the poverty line, and lack social support" than men with disabilities); Kathleen Cornelsen, *Doubly Protected and Doubly Discriminated: The Paradox of Women with Disabilities After Conflict*, 19 WM. & MARY J. WOMEN & L. 105, 110 (2012) (noting that globally, "[w]omen with disabilities contend with significantly more difficulties than any other group in almost every field, including employment"); Schur, *supra* note 36, at 253 (describing research showing that "women with disabilities fared significantly worse economically, socially, and psychologically than either disabled men or nondisabled women"); Thomas, *supra* note 32, at 178 ("Research in many countries has established that disabled women and girls face additional disadvantages when compared with disabled men and

individuals without disabilities or men with disabilities, women with disabilities have lower rates of labor force participation,<sup>44</sup> lower income levels,<sup>45</sup> less educational attainment,<sup>46</sup> higher poverty rates,<sup>47</sup> more chronic illness,<sup>48</sup> poorer psychological health,<sup>49</sup> and less access to healthcare and public services.<sup>50</sup> These disparities are particularly striking in the employment arena.<sup>51</sup> Women with disabilities are less likely to be employed than either men with disabilities or nondisabled women.<sup>52</sup> Among members of the paid labor force,

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boys in all social arenas: in securing independent living, in employment, education, healthcare, social care, housing, transport, land-ownership, access to cultural domains, and so on.”).

44. See Thomas J. Gerschick, *Toward a Theory of Disability and Gender*, 25 SIGNS: J. WOMEN CULTURE & SOC’Y 1263, 1266 (2000); see also Asch & Fine, *supra* note 8, at 10 (finding that “[d]isabled men are much more likely than disabled females to participate in the labor force”); Shinall, *supra* note 29, at 1103 (noting labor economists’ findings that “disabled men have fared better in the labor market during the post-ADA regime than have disabled women” (internal footnote omitted)).

45. See Schur, *supra* note 36, at 257; Sondra E. Solomon, *Women and Physical Distinction: A Review of the Literature and Suggestions for Intervention*, in WOMEN WITH DISABILITIES: FOUND VOICES 91, 96 (Mary E. Willmuth & Lillian Holcomb eds., 1993); see also Asch & Fine, *supra* note 8, at 10 (finding that employed women with disabilities have mean earnings “far below those of disabled men”).

46. See Schur, *supra* note 36, at 253.

47. See Marian Blackwell-Stratton et al., *Smashing Icons: Disabled Women and the Disability and Women’s Movements*, in WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS, *supra* note 8, at 306, 326 (stating that 30 percent of disabled women have incomes below the poverty line compared to 20 percent of disabled men and 10 percent of nondisabled women); Schur, *supra* note 36, at 257; see also Cornelsen, *supra* note 43, at 106 (noting that “women with disabilities are more likely to face poverty”); Rangita de Silva de Alwis, *Mining the Intersections: Advancing the Rights of Women and Children with Disabilities Within an Interrelated Web of Human Rights*, 18 PAC. RIM L. & POL’Y J. 293, 295–96 (2009) (noting that women with disabilities “are more vulnerable to poverty”); Gerschick, *supra* note 44, at 1267 (noting that women with disabilities are poorer than able-bodied individuals and men with disabilities); Bonnie G. Smith, *Introduction*, in GENDERING DISABILITY, *supra* note 21, at 1, 5 (noting that “women with disabilities are poorer . . . than either men with disabilities or women without disabilities”).

48. See Cornelsen, *supra* note 43, at 106 (noting that globally, “[w]omen generally have a much higher prevalence of disability than men”). Women’s higher rates of chronic illness are due in part to their longer life expectancy. See Lloyd, *supra* note 36, at 721 (“[W]omen tend to live longer and to be more disabled in old age than men.”).

49. See Schur, *supra* note 36, at 253 (noting that “women with disabilities continue to face gaps in . . . measures of psychological well-being compared both with men with disabilities and women without disabilities”).

50. See *id.* (finding that women with disabilities have “lower receipt of disability-income benefits” than disabled men and nondisabled women).

51. See Nancy Felipe Russo & Mary A. Jansen, *Women, Work, and Disability: Opportunities and Challenges*, in WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS, *supra* note 8, at 229, 230 (describing “the disadvantaged employment status of women with disabilities”).

52. See Solomon, *supra* note 45, at 96 (stating that “women with physical distinctions are less likely to be employed, earn substantially less, [and] fare much worse in times of economic crisis”); see also Asch & Fine, *supra* note 8, at 11 (“[R]egardless of age or educational attainment, women with disabilities are employed far less than are either non-disabled women or disabled men.”); Abbe E. Forman et al., *Beautiful to Me: Identity, Disability, and Gender in Virtual Environments*, 2 INT’L J. E-POL. 1, 5 (2011) (stating that “[m]en with disabilities are nearly twice as likely to have jobs as women with disabilities”); Schur, *supra* note 36, at 253, 257 (finding that women with disabilities have lower

women with disabilities are less likely than men with disabilities to be in secure, full-time positions,<sup>53</sup> and women with disabilities earn only 56 percent of the wages earned by their disabled male counterparts.<sup>54</sup> Their precarious labor market position also renders women with disabilities more vulnerable during economic downturns.<sup>55</sup> These dramatic disparities for women with disabilities have begun focusing greater attention on the powerful interaction between disability and gender. As a result, new research is increasingly revealing the complex relationship between these two social identities that play crucial roles in individuals' lived experiences and economic and social well-being.

## II.

### THE GENDERED NATURE OF DISABILITY

A growing body of research is challenging disability's master status by revealing complex interactions between disability and other social identities.<sup>56</sup> With respect to gender, early critics theorized an additive model to highlight the dual discrimination that women with disabilities face.<sup>57</sup> While the simple

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employment rates than "either disabled men or nondisabled women" and "much lower than nondisabled men"); Smith, *supra* note 47, at 5 (noting that "women with disabilities are . . . less likely to be well employed . . . than either men with disabilities or women without disabilities"); *see also* ECONOMIC NEWS RELEASE, U.S. DEPT OF LABOR, BUREAU OF LAB. STAT., TABLE A-6. EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY SEX, AGE, AND DISABILITY STATUS, NOT SEASONALLY ADJUSTED (Feb. 3, 2017), <http://www.bls.gov/news.release/empstat.t06.htm> [<https://perma.cc/5H8C-PQGS>] (last visited Feb. 15, 2017) (reporting in November 2016 a labor force participation rate of 33.9 percent for disabled men age 16 to 64 and 28.4 percent for disabled women age 16 to 64).

53. *See* Asch & Fine, *supra* note 8, at 10 ("Employed disabled women tend to be tracked in low-wage, service-sector positions."); Forman et al., *supra* note 52, at 5 (stating that "12% of women with disabilities have full time employment as opposed to 30% of men with disabilities"); Gerschick, *supra* note 44, at 1266 (stating that women with disabilities are "more susceptible to being tracked into low-wage service-sector jobs" than men with disabilities).

54. Forman et al., *supra* note 52, at 5; *see also* Shinall, *supra* note 29, at 1130 (citing data finding that "disabled men earned higher wages than did disabled women").

55. *See* Solomon, *supra* note 45, at 96 (citing evidence showing that "women with physical distinctions . . . fare much worse in times of economic crisis . . . than men with disabilities or non-disabled women").

56. *See* Ingunn Moser, *Sociotechnical Practices and Difference: On the Interferences Between Disability, Gender, and Class*, 31 SCI. TECH. & HUM. VALUES 537, 537 (2006) ("In feminist and cultural studies, there is a growing body of work concerned with how people's lives are subjected to multiple, intersecting axes of differentiation and power."); *see also* Thomas, *supra* note 32, at 179 (arguing that disability "intersects" with other social identities "to generate intricate webs of disadvantage and exclusion"); Vernon, *supra* note 11, at 394 (describing the "complex and often variable interaction between different forms of social oppression," including "[d]isability, race, gender, sexuality, age and class").

57. *See* Purdie-Vaughns & Eibach, *supra* note 14, at 378 (describing the "additive model," which theorizes "that a person with two or more intersecting identities experiences the distinctive forms of oppression associated with each of his or her subordinate identities summed together"); *see also* Barnartt, *supra* note 9, at 5 (describing the early intersectionality theory "that any two statuses' negative effects were additive"); Cornelsen, *supra* note 43, at 108, 115 (describing "the idea of women

additive model proved inadequate, this first-wave critique was critical in pushing researchers to recognize that disability does not override gender; rather, gender significantly determines how disability is perceived, reacted to, and experienced.<sup>58</sup>

Because disability is constructed within the broader patriarchal system, women with disabilities face both the oppression of being disabled in an environment designed by and for the able bodied and the oppression of being female in a male-dominated society.<sup>59</sup> This means that women with disabilities often bear a unique form of workplace inferiority from both the presumed weakness attached to disability and from being a member of “the weaker sex.”<sup>60</sup> Researchers have found that, as a result, women with disabilities face social stereotypes of passivity and asexuality that neither nondisabled women nor men with disabilities face.<sup>61</sup> While the failure to fulfill masculine stereotypes of physical strength and virility may reduce the perceived masculinity of men with disabilities, disability status and womanhood are often perceived as entirely incompatible.<sup>62</sup> With their womanhood negated, women with disabilities are often considered incapable of performing the nurturing roles that women are stereotypically assumed to play as wives and mothers.<sup>63</sup>

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with disabilities as an intersectional identity,” which “acknowledges that a woman with a disability will face discrimination founded on her gender and disability in all aspects of her life”).

58. See Vernon, *supra* note 11, at 395 (concluding that disability and gender interact in “varied and complex ways” and that “[o]ne plus one does not equal two oppressions”); see also Asch, *supra* note 25, at 418 (noting that sex and disability are “interwoven” in one’s experience, and that “each characteristic is influenced by the others that make up our lives”); Begum, *supra* note 10, at 72 (“[G]ender influences play an important role in determining how [a] person’s disability is perceived and reacted to.”); Purdie-Vaughns & Eibach, *supra* note 14, at 378 (describing the “interactive model,” which theorizes “that each of a person’s subordinate identities interact in a synergistic way”); Thomas, *supra* note 32, at 181 (revealing “the gendered realities” of living with disability); Thome et al., *supra* note 12, at 2 (“The social experience of living with chronic illness and disability is neither gender nor context neutral.”).

59. See Susan Wendell, *Toward a Feminist Theory of Disability*, 4 HYPATIA 104, 105 (1989); see also Silvers, *supra* note 19, at 82 (documenting work in feminist ethics that began “commenting on the confluence of disability discrimination with gender oppression”); Vernon, *supra* note 11, at 393 (arguing that “disabled women’s experiences of disability may also be compounded by patriarchal oppression”).

60. See Basas, *supra* note 10, at 46–47.

61. See Cornelsen, *supra* note 43, at 119.

62. See Vernon, *supra* note 11, at 393; see also Basas, *supra* note 10, at 47 (explaining that women with disabilities “are seen as weak, feminine not only in what they cannot do, but also not living up to a standard of beauty and attractiveness”); Gerschick, *supra* note 44, at 1265 (explaining that women with disabilities “experience ‘sexism without the pedestal,’” while for men, “disability erodes much, but not all, masculine privilege”); Robin Tolmach Lakoff, *Review: Women and Disability*, 15 FEMINIST STUD. 365, 368 (1989) (reviewing WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS, *supra* note 8) (stating that “[d]isabled man’ is a self-contradiction, because men are stereotypically supposed to be ‘able,’ strong, and powerful,” while the term “[d]isabled woman’ . . . is redundant”).

63. See Silvers, *supra* note 19, at 86, 89–90.

They are viewed as passive, dependent, and worthy of pity and sympathy.<sup>64</sup> Perhaps as a result, women with disabilities are only one-third to one-fourth as likely as men with disabilities to get married, and women who develop a disability after marriage are four times more likely to divorce than married men who develop a disability.<sup>65</sup>

While ableism thus cannot be separated from sexism,<sup>66</sup> disability and gender also cannot simply be combined.<sup>67</sup> Individuals do not always experience disability and gender at the same time; rather, one social identity or the other can predominate depending on situational factors.<sup>68</sup> As a result, men with disabilities can sometimes “unmake disability” in various situations by enacting masculinity and rendering male dominance the relevant social norm—that is, they can sometimes get others to recognize and react to them as men rather than as disabled.<sup>69</sup> This strategy, however, is not equally available to women. Because both disability and femininity are stereotyped as “weak,” women with disabilities lack the situational ability to enact femininity to make their disability less salient.<sup>70</sup>

These differences in women’s experiences of disability contribute to heightened risks of discrimination in the workplace. A recent empirical study of disability discrimination charges filed with the Equal Employment Opportunities Commission (EEOC) by full-time workers found that the annual charge-filing rate per worker averaged 42 percent higher for women than for

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64. See Comelsen, *supra* note 43, at 114 (explaining that “[b]ecause women with disabilities are subjects of pity and sympathy, society and individuals view them as ‘passive recipients of . . . assistance’”); Lakoff, *supra* note 62, at 368 (explaining how women with disabilities are viewed as “superchildlike, dependent, incompetent, even beyond the stereotypical ideal female”); Silvers, *supra* note 19, at 90 (explaining that “women with physical disabilities are viewed . . . as incapable of nurturing—indeed, as dependent people who must themselves be nurtured”).

65. See Gerschick, *supra* note 44, at 1266; see also Silvers, *supra* note 19, at 89 (noting that women with disabilities “are the group most likely to remain unmarried”).

66. See Wendell, *supra* note 59, at 105 (explaining that “[s]ome of the same attitudes about the body which contribute to women’s oppression generally also contribute to the social and psychological disablement of people who have physical disabilities”); see also Vernon, *supra* note 11, at 387 (“Disabled women also have to contend with the simultaneity of disability and gender stereotypes.”).

67. See Vernon, *supra* note 11, at 395 (rejecting an additive model of disability and gender and concluding that “[o]ne plus one does not equal two oppressions”).

68. See *id.*; see also Moser, *supra* note 56, at 538 (describing how there are some events “in which disability is made irrelevant while gender is made relevant”).

69. See Moser, *supra* note 56, at 545 (describing how men with disabilities can “unmake disability” or “make it irrelevant” by enacting gender in a way that asserts male dominance). See generally Thomas J. Gerschick & Adam S. Miller, *Coming to Terms: Masculinity and Physical Disability*, in *MEN’S HEALTH AND ILLNESS* 183, 184, 204 (Donald Sabo & David Frederick Gordon eds., 1995) (analyzing “the creation, maintenance, and recreation of gender identities by men who . . . find themselves dealing with a physical disability”).

70. See Vernon, *supra* note 11, at 395 (explaining how the effect of an impairment can be minimized by the presence of a privileged identity, such as being male rather than female); see also Moser, *supra* note 56, at 545 (illustrating how the subordinating effects of disability can be reduced by asserting one’s membership in the dominant group along a different axis, such as one’s position as a male along the dimension of sex).

men.<sup>71</sup> The researchers found no evidence that women were either more likely than men to have a disability or more likely to complain when they experienced discrimination, but rather concluded that women actually experienced discrimination more often than men.<sup>72</sup> The charge-filing rate disparity was highest in male-dominated industries where sex discrimination was most prevalent, indicating that women's sex exacerbates their risk of disability discrimination.<sup>73</sup>

This research revealing the complexly gendered nature of disability also highlights how much may be gained from greater collaboration between disability and gender studies.<sup>74</sup> Disability research could further expand feminist understanding of how one's body and identity are socially constructed, and a feminist perspective could help the social disability model serve a more diverse community of individuals with disabilities.<sup>75</sup> While researchers in this growing joint venture are still seeking "comprehensive theories about the relationship between disability and gender,"<sup>76</sup> this Essay contributes to that larger endeavor by examining what a gendered understanding of disability reveals about the construction, impact, and efficacy of current disability discrimination law.

### III.

#### THE ADA'S MASCULINITY REVEALED

The ADA was a major accomplishment for disability rights and a significant advancement for many individuals with disabilities. Yet the law is

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71. See Shinall, *supra* note 29, at 1118 (using EEOC charge filing data from 2000 to 2009).

72. See *id.* at 1118–36.

73. See *id.* at 1103, 1130–36.

74. See Smith, *supra* note 47, at 1 (explaining that "both gender and disability studies have reached a point where they look across boundaries for a better vision of a common landscape that can provide room for new growth"); Thomas, *supra* note 32, at 183 (arguing that "much more sustained analyses of the social and gendered character of disability and impairment—both culturally and materially—is required").

75. See Rosemarie Garland-Thomson, *Integrating Disability, Transforming Feminist Theory*, in *GENDERING DISABILITY*, *supra* note 21, at 73–74 (arguing that "[l]ike disability studies practitioners who are unaware of feminism, feminist scholars are often simply unacquainted with disability studies' perspectives," and that "[d]isability studies can benefit from feminist theory and feminist theory can benefit from disability studies"); Silvers, *supra* note 19, at 81 (exploring "how feminist thinking can be empowered to expunge bias against, and promote justice for, women with disabilities"); Thorne et al., *supra* note 12, at 2, 6–7, 11 (explaining that feminist theory has largely "ignored the important theoretical perspectives that disabled women's experiences provide for an expanded feminist understanding of the social construction of the body and identity," and that disability has rarely been "examined . . . from a feminist perspective").

76. Gerschick, *supra* note 44, at 1263. Notable works that have contributed to bridging the gap between feminist and disability theories include, among others: SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* (1996); *WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS*, *supra* note 8; Conejo, *supra* note 25; Harlan Hahn, *Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN'S STUD. 97 (1994); Silvers, *supra* note 19; Wendell, *supra* note 59.

also the product of both a disability rights movement that marginalized women and a feminist movement that ignored disability. The resulting invisibility of women with disabilities contributed to discrimination law's conception of disabled individuals as "one homogenous group with no gender distinctions."<sup>77</sup> A genderless lens, however, is neither a gender-neutral nor a gender-inclusive lens. Given the male-dominated leadership of the disability rights movement and the power of masculinity to define neutral standards in a patriarchal society, a genderless disability law ends up embedding masculine norms into its assumptions, structure, and approach to defining and redressing discrimination. As a result, a genderless disability law less effectively advances the interests of women with disabilities.<sup>78</sup>

This Part contributes to the larger project of gendering disability by identifying three aspects of the ADA that incorporate or rely upon masculine norms in ways that limit the statute's reach and effectiveness. Part III.A shows how masculine norms constrict the boundaries of the ADA's protected class of individuals with disabilities. Part III.B analyzes how masculine norms limit the scope of the ADA's accommodation mandate. Lastly, Part III.C explains how masculine norms limit access to accommodations through the ADA's procedural and organizational structures for redressing workplace discrimination. This analysis demonstrates how the degendering of disability limits our understanding of impairment-based discrimination. It also shows that attending to gender will enrich the social model with a deeper understanding of how social identities affect the construction of disability.

*A. How Masculine Norms Limit the Protected Class of Individuals with Disabilities*

The battle that has been waged over the ADA's protected class boundary line is well known. When Congress enacted the ADA in 1990, activists expected federal courts to interpret the definition of disability broadly, just as courts had done with the Rehabilitation Act of 1973, upon which the ADA was modelled.<sup>79</sup> The federal judiciary instead interpreted the ADA's disability definition very narrowly, which culminated in a series of U.S. Supreme Court opinions that dramatically restricted the ADA's protected class.<sup>80</sup> Those

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77. See Begum, *supra* note 10, at 70.

78. See Thorne et al., *supra* note 12, at 2 (arguing that the gender-neutral posture of disability scholarship "systematically ignores the social context in which women with chronic illness and disability live"); see also Begum, *supra* note 10, at 72 (arguing that "unless gender distinctions are dealt with as a matter of urgency, the oppression encountered by disabled women will be compounded and our powerless position will be exacerbated").

79. See Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 91-93, 102-13, 126-34 (2000).

80. See *id.* at 139-60 (detailing the Supreme Court's narrowing of the ADA's disability definition during the 1990s).



opinions prompted Congress to amend the ADA in 2008 to restore the intended broad scope of the statute's protected class.<sup>81</sup> Consistent with the degendered conception of disability that has pervaded both social and legal constructions, this narrative has been told in genderless terms. However, just as the intersectional invisibility model would predict, the inattention to gender has produced gendered effects in determining which individuals are and are not worthy of legal rights and recognition under the ADA.<sup>82</sup>

Social psychologists use the term “legal invisibility” to describe the failure of dominant antidiscrimination frameworks to address the unique forms of discrimination faced by individuals with multiple subordinate group identities.<sup>83</sup> This particular aspect of intersectional invisibility has two related components: the law's relative inability to protect an individual victim of intersectional discrimination, and the failure to recognize such an individual as “a credible and convincing victim” in the first place.<sup>84</sup> While most research on legal invisibility has focused on race, this Section demonstrates how this phenomenon has played out in the context of disability, where masculine norms impact how disability is defined, recognized, and protected.

The ADA defines the protected class of individuals with disabilities to include anyone with a physical or mental impairment that substantially limits a major life activity, as well as individuals with a record of a disability or who are merely regarded as disabled.<sup>85</sup> While the 2008 amendments expanded each of the component parts of this definition and demanded a broad construction of disability,<sup>86</sup> the definitional terms still require some interpretation by judges, medical professionals, and employment decision makers who must implement the statutory mandates. Conducting this interpretive process through a genderless lens has empowered unstated masculine norms to play a hidden role in defining the ADA's protected class membership.

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81. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101–12113 (2012)) [hereinafter ADAAA]. See generally Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. ON C.L. & C.R. 187 (2008) (describing the process and goals of enacting the ADAAA).

82. See Purdie-Vaughns & Eibach, *supra* note 14, at 386 (“The intersectional invisibility model predicts that the distinctive experiences of prejudice and discrimination that people with intersectional subordinate identities face should be a relatively poor fit to existing anti-discrimination law.”).

83. See *id.* (“Legal invisibility . . . centers on the mismatch between intersectional subordinate-group identities and dominant legal anti-discrimination frameworks.”).

84. See *id.* at 386–87.

85. 42 U.S.C. § 12102(1) (2012).

86. See 42 U.S.C. § 12102(4); Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 999–1000 (2012) (describing how the ADAAA expanded the component parts of the disability definition) [hereinafter Travis, *Impairment*].

### 1. *Recognizing Substantially Limiting Impairments*

The failure to explicitly recognize the gendered nature of disability during the skirmishes waged along the protected class boundary line has produced distinctly gendered results. This is particularly evident when courts decide whether an individual possesses a substantially limiting impairment, which is one requirement for meeting the ADA's definition of an actual disability. When a plaintiff alleges an impairment that primarily affects women, judges often react with heightened skepticism and hostility.<sup>87</sup> This is especially true when the impairment also involves symptoms or manifestations associated with stereotypically feminine traits like weakness, sensitivity, passivity, or emotional or irrational behavior. In these situations, judges frequently question the severity or the very existence of the condition in ways they do not typically do with other impairments.<sup>88</sup>

Individuals have faced this challenge of gaining recognition of their protected class status and access to their employment rights with conditions like chronic fatigue syndrome (also known as chronic fatigue immune dysfunction), multiple chemical sensitivity syndrome (also known as idiopathic environmental intolerance or environmental illness), fibromyalgia, and lupus (also known as systemic lupus erythematosus). These conditions all share two significant characteristics. First, they primarily affect women.<sup>89</sup> Second, they manifest with stereotypically feminine symptoms of weakness, sensitivity, and passivity.<sup>90</sup> Judges have also been reluctant to recognize as ADA-protected disabilities various psychological and emotional disorders, including depression.<sup>91</sup> These conditions are also more common in women<sup>92</sup> and are easily associated with stereotypes of women as weak, emotional, and irrational.

87. See *infra* notes 89–129 and accompanying text.

88. See *id.*

89. See Jessica M. Barshay, *Another Strand of Our Diversity: Some Thoughts from a Feminist Therapist with Severe Chronic Illness*, in FOUND VOICES, *supra* note 45, at 162 (explaining that chronic fatigue syndrome “primarily affects women”); Pamela Reed Gibson, *Environmental Illness/Multiple Chemical Sensitivities: Invisible Disabilities*, in FOUND VOICES, *supra* note 45, at 172 (explaining that women make up “the majority” of people with environmental illness or multiple chemical sensitivities); Shevy Healey, *The Common Agenda Between Old Women, Women with Disabilities and All Women*, in FOUND VOICES, *supra* note 45, at 73; Thorne et al., *supra* note 12, at 6 (noting that lupus is “most prevalent in women” and that fibromyalgia and chronic fatigue syndrome “occur almost exclusively in women”); see also *Fibromyalgia*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/fibromyalgia/basics/definition/con-20019243> [<https://perma.cc/9RJP-HEMY>] (last visited Feb. 17, 2017) (stating that fibromyalgia is much more common among women than men).

90. See *infra* notes 93, 100–102, 112, 127 and accompanying text.

91. See, e.g., *Richio v. Miami-Dade*, 163 F. Supp. 2d 1352, 1362–63 (S.D. Fla. 2001) (dismissing woman's ADA claim by finding insufficient evidence that her “emotional problems” were substantially limiting); *Polderman v. Nw. Airlines, Inc.*, 40 F. Supp. 2d 456, 463 (N.D. Ohio 1999) (dismissing woman's ADA claim by finding insufficient evidence that her dysthymia was a disability). See generally Susan Stefan, “Discredited” and “Discreditable”: *The Search for Political Identity by People with Psychiatric Disabilities*, 44 WM. & MARY L. REV. 1341 (2003) (describing the challenges of gaining social and legal recognition for individuals with mental disabilities).

Judicial reactions to employees with chronic fatigue syndrome (CFS) provide one illustration of the gendered nature of ADA class membership determinations. CFS is a long-term, debilitating disorder characterized by profound fatigue, weakness, muscle pain, insomnia, and memory and concentration problems.<sup>93</sup> Women are four times more likely than men to have the disorder.<sup>94</sup> Although an estimated one to four million Americans have CFS,<sup>95</sup> courts routinely conclude that the condition is not an actual disability and regularly dismiss ADA claims by individuals with CFS.<sup>96</sup> Because the cause of CFS is unknown and its symptoms are largely subjective, courts generally reject plaintiffs' own testimony about their symptom severity and the condition's limiting effects, which courts do not typically do with other impairments.<sup>97</sup> Even when a plaintiff produces a medical diagnosis, courts apply increased scrutiny by demanding corroborating evidence of the plaintiff's symptomology,<sup>98</sup> which means that CFS is rarely deemed a disability worthy of ADA protection.<sup>99</sup>

Multiple chemical sensitivity syndrome (MCS), which the medical literature now refers to as idiopathic environmental intolerance, provides another example of judicial hostility toward illnesses that disproportionately affect women and exhibit symptoms aligned with stereotypically feminine traits of weakness and sensitivity. The National Institute of Environmental Health Sciences describes MCS as a chronic disease characterized by unusually severe and increasing sensitivity to various chemicals and environmental

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92. See de Silva de Alwis, *supra* note 47, at 296 ("Research reveals that psychosocial disorders are more common in women than men."); *Gender and Women's Mental Health*, WORLD HEALTH ORG., [http://www.who.int/mental\\_health/prevention/genderwomen/en](http://www.who.int/mental_health/prevention/genderwomen/en) [<https://perma.cc/Y6TV-GNJH>] (last visited Feb. 17, 2017) (finding that anxiety and somatic complaints predominate in women, and depression is twice as common in women than in men).

93. See *Chronic Fatigue Syndrome (CFS)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/cfs/index.html> [<https://perma.cc/CPR2-6BTA>] (last visited Feb. 17, 2017).

94. *Risk Groups—Chronic Fatigue Syndrome (CFS)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/cfs/causes/risk-groups.html> [<https://perma.cc/SS24-JR5A>] (last visited Feb. 17, 2017).

95. See *Diagnosis—Chronic Fatigue Syndrome (CFS)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/cfs/diagnosis/index.html> [<https://perma.cc/NU2D-BRKX>] (last visited Feb. 17, 2017).

96. See, e.g., *Durley v. APAC, Inc.*, 236 F.3d 651, 657 (11th Cir. 2000) (dismissing woman's ADA claim for failing to prove that CFS was substantially limiting); *Hensler v. City of O'Fallon*, No. 09-cv-268-DRH, 2011 WL 4352778, at \*3 (S.D. Ill. July 28, 2011) (same); *Coffey v. Cty. of Hennepin*, 23 F. Supp. 2d 1081, 1087–88 (D. Minn. 2008) (same).

97. See, e.g., *Brandon v. Klingensmith Healthcare, Inc.*, 2005 WL 3434141, at \*5 (W.D. Pa. 2005) (noting in dicta that while a plaintiff's own testimony about a physical condition's limitations is often sufficient by itself to establish a disability for purposes of overcoming summary judgment, supplemental evidence will be required for conditions like CFS because "its cause is unknown and its symptoms are almost entirely subjective").

98. See *id.* (dicta).

99. See *Hinton v. City Coll. of N.Y.*, No. 05 Civ. 8951(GEL), 2008 WL 591802, at \*20 (S.D.N.Y. Feb. 29, 2008) (noting the lack of "any case where a federal court has held that . . . chronic fatigue syndrome is a disability within the meaning of the ADA").

pollutants.<sup>100</sup> Other symptoms may include extreme fatigue and lethargy, muscle and joint pain, nausea, headaches, dizziness, impaired thinking, poor memory, irritability, and sensitivity to light and noise.<sup>101</sup> MCS patients also have high rates of depression, anxiety, and somatoform disorders.<sup>102</sup> The cause of MCS remains unknown and may be environmental or psychological in nature,<sup>103</sup> and there is no laboratory test to confirm the diagnosis.<sup>104</sup> What is known, however, is that 85–90 percent of MCS patients are women.<sup>105</sup>

This combination of features has made it easy to disregard MCS claims as the imaginary overreactions of hysterical women—an image that lurks between the lines of judicial opinions that routinely dismiss MCS-based disability discrimination claims. Many courts have held that medical testimony about an employee’s MCS fails to meet the admissibility standards for scientific evidence and therefore refuse to allow any form of testimony about the condition’s existence.<sup>106</sup> In place of medical testimony, judges often supply their own assessments, which reveal their lack of respect for the lived experiences of women plaintiffs with disabilities. In one case, a district judge who excluded all medical testimony about MCS nevertheless concluded that there were stronger “psychological rather than immunologic explanations” for the employee’s symptoms—in other words, that the employee’s problems were all in her head—and therefore dismissed her claim for failure to prove an actual disability.<sup>107</sup> Another judge reached a similar conclusion—again, after excluding all medical testimony of MCS—by not only rejecting the employee’s allegation that she had MCS, but refusing to recognize MCS as “truly a valid

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100. See *Multiple Chemical Sensitivities Syndrome (MCSS)*, NAT’L INST. OF ENVTL. HEALTH SERVS., <http://web.archive.org/web/20070516181511/http://www.niehs.nih.gov/external/faq/mcss.htm> [<https://perma.cc/MPT8-EK4L>] (last visited Feb. 17, 2017); see also *Multiple Chemical Sensitivity*, <http://www.multiplechemicalsensitivity.org> [<https://perma.cc/ERL5-NRL3>] (last visited March 6, 2017) (describing MCS as “an unusually severe sensitivity . . . to many different kinds of pollutants”).

101. See Alvaro Frias, *Idiopathic Environmental Intolerance: A Comprehensive and Up-To-Date Review of the Literature*, 1 *CNS J.* 6, 6 (2015); see also *Idiopathic Environmental Intolerances*, WOMEN’S HEALTH ENCYCLOPEDIA, [<https://perma.cc/3SMEQZVK>] (last visited March 6, 2017) (listing other MCS symptoms as including malaise, tiredness, nausea, joint and muscle aches, dizziness, headache, impaired thinking, poor memory, and difficulty concentrating, as well as “stress, anxiety, and panic at the thought that environmental exposure may have occurred”).

102. See Michael K. Magill & Anthony Suruda, *Multiple Chemical Sensitivity Syndrome*, 58 *AM. FAM. PHYSICIAN* 721, 725 (1998).

103. See *id.*

104. See *Idiopathic Environmental Intolerances*, *supra* note 101.

105. See Magill & Saruda, *supra* note 102, at 724.

106. See, e.g., *Gabbard v. Linn-Benton Hous. Auth.*, 219 F. Supp. 2d 1130, 1134–38 (D. Or. 2002) (excluding treating physician’s diagnosis of MCS and noting that “no district court has ever found a diagnosis of [MCS] to be sufficiently reliable” to be admitted into evidence); *Comber v. Prologue, Inc.*, No. CIV.JFM-99-2637, 2000 WL 1481300, at \*4–5 (D. Md. Sept. 28, 2000) (excluding evidence of MCS and summarizing similar cases); *Frank v. New York*, 972 F. Supp. 130, 132–37 (N.D.N.Y. 1997) (excluding all medical and psychological expert testimony about employee’s MCS for failing to meet the standard of evidentiary reliability).

107. See *Comber*, 2000 WL 1481300, at \*4.

medical condition” in the first place.<sup>108</sup> Excluding medical testimony about MCS allows judges to easily dismiss MCS-based claims on summary judgment by concluding that the plaintiffs failed to prove they have an actual disability that entitles them to ADA protection.<sup>109</sup>

Fibromyalgia is another serious condition that shares many commonalities with CFS and MCS. Fibromyalgia is a sensory processing disorder of the central nervous system that amplifies the experience of pain.<sup>110</sup> Women are seven times more likely to suffer from fibromyalgia than men.<sup>111</sup> The condition is characterized by widespread body pain, extreme fatigue, emotional distress, cognitive difficulties, and heightened sensitivity to touch, sound, and light.<sup>112</sup> Judges have not been so skeptical of the seriousness of fibromyalgia that they completely exclude medical testimony as they do with MCS, perhaps because researchers have identified chemical abnormalities in the brains of fibromyalgia patients.<sup>113</sup> Instead, judges demand a heightened showing of evidence corroborating the illness and its effects.<sup>114</sup> In doing so, judges frequently allow their own judgments about the impact of fibromyalgia to override the testimony of the plaintiffs themselves, who are mostly women.<sup>115</sup> As a result, courts routinely dismiss ADA claims involving fibromyalgia by finding that the plaintiffs are not substantially limited and therefore do not have actual disabilities as a matter of law.<sup>116</sup> Plaintiffs with fibromyalgia do not

108. See *Gabbard*, 219 F. Supp. 2d at 1135; see also *Owen v. Comput. Sci. Corp.*, No. 97-6272 (JEI), 1999 WL 43642, at \*7 (D.N.J. Feb. 2, 1999) (suggesting that MCS may not be “a legitimate medical condition”).

109. See, e.g., *Gits v. Minn. Mining & Mfg. Co.*, No. 99-1925 ADM/AJB, 2001 WL 1409961, at \*5-7 (D. Minn. June 15, 2001) (dismissing ADA claim because employee failed to prove that MCS is an actual disability); *Comber*, 2000 WL 1481300, at \*2-6 (same); *Patrick v. S. Co. Servs.*, 910 F. Supp. 566, 570-71 (N.D. Ala. 1996) (same); *Owen*, 1999 WL 43642, at \*3-7 (same); *Minor v. Stanford U./Stanford Hosp.*, No. C-98-2536 MJJ, 1999 WL 414305, at \*3-5 (N.D. Cal. June 14, 1999) (same).

110. See *Fibromyalgia Causes*, NAT’L FIBROMYALGIA ASS’N, <http://www.fmaware.org/about-fibromyalgia/causes> [https://perma.cc/SBY3-49LR] (last visited Feb. 24, 2017).

111. See *Fibromyalgia*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/arthritis/basics/fibromyalgia.htm#2> [https://perma.cc/5C2L-LLE5] (last visited Feb. 24, 2017); see also *Fibromyalgia*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/fibromyalgia/basics/definition/CON-20019243> [https://perma.cc/S77X-8X9H] (last visited Feb. 24, 2017) (“Women are much more likely to develop fibromyalgia than are men.”).

112. See *Fibromyalgia Symptoms*, NAT’L FIBROMYALGIA ASS’N, <http://www.fmaware.org/about-fibromyalgia/symptoms> [https://perma.cc/MQ2H-FDVR] (last visited Feb. 24, 2017); *Fibromyalgia*, CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 111.

113. See *Fibromyalgia*, MAYO CLINIC, *supra* note 111.

114. See *infra* notes 118-122, 124 and accompanying text.

115. See *id.*

116. See, e.g., *Castro-Medina v. Procter & Gamble Com. Co.*, 565 F. Supp. 2d 343, 362-64 (D.P.R. 2008) (dismissing ADA claim by finding that employee’s fibromyalgia was not a disability because it was not substantially limiting); *Mincey v. Dow Chem. Co.*, 217 F. Supp. 2d 737, 738, 742-43 (M.D. La. 2001) (same); *Zimmerman v. Gen. Motors*, 959 F. Supp. 1393, 1396-97 (D. Kan. 1997) (same); *Aquinas v. Fed. Express Corp.*, 940 F. Supp. 73, 77-78 (S.D.N.Y. 1996) (same).

appear to be faring much better under the amended ADA, despite its much broader definition of disability status.<sup>117</sup>

In one typical pre-amendment case, the plaintiff presented extensive allegations about how her fibromyalgia caused her fatigue and pain, as well as “joint, muscle, and pelvic swelling, numbness, burning, cramping, and stiffness.”<sup>118</sup> She described how these symptoms affected her memory, concentration, and ability to speak, walk, communicate, work, hold objects, type, write, sit, read, cook, clean, and care for herself.<sup>119</sup> While the court acknowledged that “a plaintiff’s testimony, without more, has been found adequate to support a claim of disability under the ADA” for many other impairments, the court held that such testimony about fibromyalgia was insufficient to get past summary judgment.<sup>120</sup>

The judge instead demanded that the plaintiff submit corroborating evidence of the limitations caused by her fibromyalgia, such as affidavits from family members, friends, health care workers, or “any one who witnessed her difficulties.”<sup>121</sup> Special corroboration was necessary for fibromyalgia, the court held, because “its symptoms are almost entirely subjective” and its “associated limitations” are unlikely “to fall within the ken of the average person.”<sup>122</sup> The court did not explain why jurors would be any less equipped to assess a plaintiff’s credibility regarding the seriousness of the limitations that flow from her fibromyalgia than they would be in assessing a plaintiff’s credibility regarding the seriousness of limitations that flow from any other impairment, although the ADA requires an individualized assessment of the particular plaintiff’s experience in all cases.<sup>123</sup> Yet the plaintiff’s lack of evidence

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117. Compare *Ortega v. S. Co. Clinic, P.C.*, No. 13-cv-01397-WYD-CBS, 2015 WL 269812, \*2–3 (D. Colo. Jan. 20, 2015) (dismissing woman’s post-amendment ADA claim by finding employee failed to prove her fibromyalgia was substantially limiting), with *Mincey*, 217 F. Supp. 2d at 742–43 (dismissing woman’s pre-amendment fibromyalgia-based ADA claim on similar grounds). But see *Howard v. Pa. Dep’t of Pub. Welfare*, No. 11-1938, 2013 WL 102662, at \*11 (E.D. Pa. Jan. 9, 2013) (finding triable issue on whether woman’s fibromyalgia substantially limited “her ability to walk, sleep, and perform manual tasks” under amended ADA).

118. See *Brandon*, 2005 WL 3434141, at \*3.

119. See *id.*

120. See *id.* at \*4 (explaining that “a plaintiff’s testimony, without more,” is “adequate to support a claim of disability under the ADA . . . [when] the alleged impairment is generally uncomplicated, and its associated limitations are likely to fall within the ken of the average person,” and citing cases involving “arm and neck pain” and “missing limbs” as examples).

121. See *id.*

122. See *id.* at \*4–5; see also *Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996) (describing fibromyalgia as “a common, but elusive and mysterious, disease” for which the “cause or causes are unknown, there is no cure, . . . its symptoms are entirely subjective[, and t]here are no laboratory tests for [its] presence or severity”).

123. See 29 C.F.R. app. § 1630.9 (2012) (stating that the ADA “requires the individual assessment of . . . the specific physical or mental limitations of the particular individual”).

corroborating her fibromyalgia symptoms meant that she did not even get her case to a jury.<sup>124</sup>

Judges have reacted similarly to plaintiffs with lupus, a chronic, inflammatory disease that causes the immune system to attack various tissues and organs.<sup>125</sup> More than 90 percent of individuals with lupus are adult women.<sup>126</sup> People with lupus typically experience fatigue, joint pain, stiffness, swelling, fever, shortness of breath, confusion, and memory loss, among other symptoms.<sup>127</sup> Although an estimated 1.5 million Americans have lupus,<sup>128</sup> courts continue to apply greater scrutiny to lupus-based ADA claims. While they treat many impairments as “self-evident” disabilities, courts “cannot say the same thing with respect to [l]upus,” and they regularly dismiss claims by finding inadequate evidence that plaintiffs meet the substantial limitation requirement for an actual disability.<sup>129</sup>

Federal judges are often the most visible actors policing the ADA boundary line, but they do not act in isolation. The role that masculine norms play in separating worthy from unworthy individuals with disabilities has an extensive history in the medical establishment, which began playing a gatekeeping role as part of the medical model of disability long before the ADA empowered judges. The medical model empowered medical professionals by conceptualizing disability as an inherent biological deficit requiring medical diagnosis and a medical cure.<sup>130</sup> The medical model was a primary target of the modern disability rights movement, which reconceived

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124. See *Brandon*, 2005 WL 3434141, at \*5; see also *Kaley v. Icon Int’l Inc.*, No. IP99-1750-CH/K, 2001 WL 1781898, at \*7 (S.D. Ind. Dec. 4, 2001) (holding that plaintiff’s “own conclusory testimony” about the severity of her symptoms did not demonstrate that fibromyalgia was a disability).

125. See LUPUS FACT SHEET, OFF. ON WOMEN’S HEALTH, <http://womenshealth.gov/publications/our-publications/fact-sheet/lupus.html> [https://perma.cc/T35Y-JAFT] (last visited Feb. 24, 2017); *Lupus Definition*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/lupus/basics/definition/CON-20019676> [https://perma.cc/Q5X2-57KQ] (last visited Feb. 24, 2017).

126. See LUPUS FACT SHEET, OFF. ON WOMEN’S HEALTH, *supra* note 125; see also *Lupus Risk Factors*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/lupus/basics/risk-factors/con-20019676> [https://perma.cc/5SBB-FKLY] (noting that lupus is more common in women) (last visited Feb. 24, 2017).

127. See *Lupus Symptoms*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/lupus/basics/symptoms/con-20019676> [https://perma.cc/NE7N-C2S4] (describing lupus symptoms) (last visited Feb. 24, 2017).

128. See *Statistics on Lupus*, LUPUS FOUND. OF AM., <http://www.lupus.org/about/statistics-on-lupus> [https://perma.cc/ND6C-A97L] (last visited Feb. 24, 2017).

129. *Rodriguez v. Loctite P.R., Inc.*, 967 F. Supp. 653, 658 (D.P.R. 1997); see also *McNeill v. Wayne Cty.*, 300 Fed. App’x 358, 360–61 (6th Cir. 2008) (dismissing ADA claim by finding employee failed to show that her lupus was substantially limiting); *Cato v. First Fed. Cmty. Bank*, 668 F. Supp. 2d 933, 941–42 (E.D. Tex. 2009) (same); *Carpenter v. Wal-Mart Stores, Inc.*, 614 F. Supp. 2d 745, 762–63 (W.D. La. 2008) (same); *Temple v. Bd. of Educ. of N.Y.*, 322 F. Supp. 2d 277, 280 (E.D.N.Y. 2004) (same).

130. See BAGENSTOS, *supra* note 1, at 18; Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649–53 (1999); Shakespeare, *The Social Model*, *supra* note 1, at 268; Travis, *Impairment*, *supra* note 86, at 943.

disability as the socially constructed limitations imposed upon non-inherently limiting physical or mental impairments.<sup>131</sup> The social model helped unite the diverse disability community and facilitated the successful enactment of the ADA, which rests upon the model's core tenet that environmental modifications can render impairments non-disabling.<sup>132</sup> While the ADA thus wrested significant power away from the medical establishment, it did not eliminate the medical construction of disability altogether. Even under the social model, someone must recognize, define, and therefore legitimate the underlying biological impairments that trigger the ADA right to social accommodations.<sup>133</sup>

Recent research has revealed that the process of creating and applying medical diagnoses of impairments is not an objective endeavor based solely on biological factors.<sup>134</sup> A variety of social, political, cultural, and economic factors determine whether a diagnostic category will be recognized as legitimate, which renders the very existence of many impairments socially contingent.<sup>135</sup> Even when the medical community recognizes an impairment as an acceptable diagnostic category, social factors influence the medical process of applying a diagnosis to individual patients.<sup>136</sup> While this growing body of research has not focused specifically on the social impact of gender, its findings indicate that masculine norms are likely to play a role in legitimating impairments that may later support an ADA claim. This impact is likely to be

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131. See BAGENSTOS, *supra* note 1, at 18; Shakespeare, *The Social Model*, *supra* note 1, at 268; Travis, *Impairment*, *supra* note 86, at 943–44.

132. See BAGENSTOS, *supra* note 1, at 13; Travis, *Impairment*, *supra* note 86, at 943.

133. The term “impairment” is not defined in either the original or the amended ADA. See Travis, *Impairment*, *supra* note 86, at 959; *see also* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 76 Fed. Reg. 16,978, 17,006 (Mar. 25, 2011) (amending 29 C.F.R. pt. 1630 app. § 1630.2(h)). This absence of a statutory definition has empowered medical professionals to assert definitional control. See Crossley, *supra* note 130, at 689 (showing how the medical model continues to play a role “when courts look to physicians to validate the existence of a plaintiff’s impairment”); Vlad Perju, *Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States*, 44 CORNELL INT’L L.J. 279, 283 (2011) (showing how judges returned to the medical model by adopting a “medicalized conception of impairments”); Travis, *Impairment*, *supra* note 86, at 975 (explaining how the social model “vested significant residual authority in the hands of medical professionals, whose diagnoses have taken on a preeminent role in defining impairment”); Shelley Tremain, *On the Subject of Impairment*, in *DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY* 32, 33 (Mairian Corker & Tom Shakespeare eds., 2002) (noting that although the social model’s goal was to undermine the medical model of disability, it gave medical science control over defining individuals with impairments).

134. See Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL’Y REV. 347, 363–65 (2011) (arguing that medical diagnosis “involves more than non-social biology”); Travis, *Impairment*, *supra* note 86, at 971–81 (summarizing literature showing that “impairments are more socially constructed than previously acknowledged”).

135. See Areheart, *supra* note 134, at 363–64; *see also* Travis, *Impairment*, *supra* note 86, at 973–74 (explaining how the medical “translation of a trait or condition into an ‘impairment’ can be affected by medical fads, technological innovation, financial interests, and other social phenomena”).

136. See Areheart, *supra* note 134, at 363; *see also* Travis, *Impairment*, *supra* note 86, at 974 (explaining how social norms infuse the process of applying diagnostic labels to individuals).



strongest when a diagnosis requires a physician to interact socially with a patient to enable the physician to interpret patient-reported symptoms.<sup>137</sup> In these situations, research finds that social norms inevitably become “embedded into the ultimate diagnosis.”<sup>138</sup>

Masculine norms are particularly likely to affect the social endeavor of diagnosis when male doctors are assessing conditions that predominantly affect women.<sup>139</sup> The medical profession has a long history of ignoring, denigrating, and questioning the very existence of such conditions.<sup>140</sup> Physicians tend not to seriously consider how these conditions impact women’s daily lives or ability to work.<sup>141</sup> The continued resistance of many medical professionals to recognize CFS, MCS, and fibromyalgia as real diseases are among the most recent illustrations of the male-centric medical establishment. Some disability scholars have explicitly characterized the medical profession’s continued resistance to validating CFS as a real illness as the latest form of “medical misogyny.”<sup>142</sup>

The masculine lens through which medical judgments are rendered is particularly important when doctors rely on subjective symptoms rather than objective tests to diagnose certain conditions.<sup>143</sup> Consistent with medical literature’s historic depiction of women as emotional, overly sensitive, and hysteria-prone, numerous studies have found that doctors respond quite differently to women’s and men’s reports of pain. Women who seek treatment for chronic pain are more likely than their male counterparts to be misdiagnosed with mental health problems, including histrionic disorder, excessive emotionality, and attention-seeking behavior.<sup>144</sup> One study found that doctors are more likely to treat men’s pain with pain medication and women’s pain with sedatives,<sup>145</sup> and more recent studies consistently find that women are less likely to be prescribed pain medication—particularly opioids—even when

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137. See Areheart, *supra* note 134, at 371; see also Travis, *Impairment*, *supra* note 86, at 974 (explaining that social norms affect diagnostic labelling “[p]articularly when a diagnostic process relies upon subjective interpretation and interactional or self-assessment”).

138. See Areheart, *supra* note 134, at 371.

139. See Thorne et al., *supra* note 12, at 6–8.

140. See *id.* at 6 (describing the medical literature on chronic diseases that primarily affect women as “particularly problematic” because “[n]ot only is the impact of these diseases on daily life ignored, but the very existence of these conditions is often questioned”).

141. See *id.*

142. See Barshay, *supra* note 89, at 162.

143. See Areheart, *supra* note 134, at 371–72; Travis, *Impairment*, *supra* note 86, at 974.

144. See Diane E. Hoffmann & Anita J. Tarzian, *The Girl Who Cried Pain: A Bias Against Women in the Treatment of Pain*, 29 J.L. & MED. ETHICS 13, 20 (2001); see also Siobhan Fenton, *How Sexist Stereotypes Mean Doctors Ignore Women’s Pain*, INDEPENDENT (July 27, 2016) <http://www.independent.co.uk/life-style/health-and-families/health-news/how-sexist-stereotypes-mean-doctors-ignore-womens-pain-a7157931.html> [https://perma.cc/6MAE-F4BV] (last visited Feb. 25, 2017) (summarizing research finding that “women in acute pain . . . are more likely to be misdiagnosed with mental health problems”).

145. See Karen L. Calderone, *The Influence of Gender on the Frequency of Pain and Sedative Medication Administered to Postoperative Patients*, 23 SEX ROLES 713, 713–25 (1990).

they report similar pain levels as men.<sup>146</sup> In addition to being under-treated for their pain, women also have to wait longer to receive pain medication and get less time and attention from their medical providers.<sup>147</sup> These studies suggest that the gendered construction of impairment and disability has deep social roots in medicine as well as law.

Federal judges and medical professionals, however, are not the only players in the disability system affected by masculine norms and gender stereotypes. Even as medical knowledge progresses and the amended ADA's expanded disability definition pushes courts toward greater inclusivity, the lack of gender consciousness among the crucial front-line actors—employment decision makers—means that women's impairments and accommodation needs continue to receive different treatment in the workplace. For those employees who are unwilling or unable to pursue their legal rights, an employer's response becomes the final authority.

The heightened skepticism, scrutiny, and hostility triggered by female-dominant impairments with stereotypically feminine symptomology frequently begins in the workplace with the reactions of supervisors, human resources personnel, and coworkers.<sup>148</sup> The employer's response in a recent case involving a female biology professor with fibromyalgia is illustrative.<sup>149</sup> Although the employee produced letters from her physician confirming her fibromyalgia diagnosis and her fatigue and chronic pain symptoms, which were

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146. See, e.g., Esther H. Chen et al., *Gender Disparity in Analgesic Treatment of Emergency Department Patients with Acute Abdominal Pain*, 15 SOC'Y FOR ACAD. EMERGENCY MED. 414, 415–18 (2008) (finding in large study of emergency room patients who reported similar mean pain scores for acute abdominal pain that women were less likely than men to receive any analgesic treatment and particularly less likely to receive opiates); Charles S. Cleeland et al., *Pain and Its Treatment in Outpatients with Metastatic Cancer*, 330 NEW ENG. J. MED. 592, 595 (1994) (finding in a study of cancer outpatients that women were significantly less likely than men to be prescribed analgesic pain medication when reporting similar levels of pain); see also *Pain Is the Leitmotiv of Women's Health Issues*, NO PAIN FOUNDATION, <http://www.nopainfoundation.com/?cause=upcoming-events> [https://perma.cc/TQ6Y-HVV7] (last visited March 6, 2017) (noting the “growing body of literature that indicates that women are more likely than men to be undertreated for their pain”); Mary Jo Dilonardo, *Why Do Doctors Take Women's Pain Less Seriously?*, MOTHER NATURE NETWORK (Oct. 23, 2015, 7:45 AM) <http://www.mnn.com/health/fitness-well-being/stories/why-do-doctors-take-womens-pain-less-seriously> [https://perma.cc/BFD7-3H55] (summarizing research finding “a gender disparity in how men and women are treated when it comes to pain”); Fenton, *supra* note 144 (summarizing research finding that “[w]omen's pain is taken much less seriously by doctors than men's is”).

147. See, e.g., Chen et al., *supra* note 146, at 415–18 (finding in large study of emergency room patients who reported similar mean pain scores for acute abdominal pain that women waited longer than men to receive pain medication); Fenton, *supra* note 144 (summarizing research finding that “women in acute pain are left to suffer for longer in hospitals . . . and they are consistently allocated less time than male patients by hospital staff”).

148. See generally Maia Abbas, *Employing Disability: Deconstructing Insufficient Protections for “Non-Mainstream” Disabilities*, 5 W.J. LEGAL STUD. 1, 1 (2014) (“Persons with disabilities or conditions that are poorly understood may be subject to more scrutiny in the workplace leading to greater difficulty in obtaining appropriate accommodation or any accommodation at all.”).

149. See *Wallace v. Heartland Cmty. Coll.*, 48 F. Supp. 3d 1151 (C.D. Ill. 2014).

exacerbated by stress, the employer's human resources director did not believe the employee was disabled.<sup>150</sup> This reaction precipitated a contentious and unsuccessful interactive process to identify accommodations.<sup>151</sup> The process ended when the employee declined her employer's demand for another meeting, which the employee thought would be "futile" given the director's stated opinion "that she was not disabled under the ADA."<sup>152</sup> Without accommodations, the employee could not perform her job. She ultimately brought an ADA suit in federal court, where the employer did not even contest the employee's disability status. The human resources director's prior skepticism, however, had a very real impact on the case's outcome. Despite the employee's understandable reaction to the director's refusal to take her condition seriously, the court held the employee responsible for the breakdown of the interactive process and therefore granted the employer summary judgment on the ADA claim.<sup>153</sup>

Another district court reached a similar conclusion in a recent case involving a female resident physician diagnosed with major depression and anxiety disorder.<sup>154</sup> After disclosing her conditions to her supervisor, the employee "was scrutinized at a higher level than her classmates and received more negative feedback than she had prior to disclosing her disability."<sup>155</sup> Her assigned physician mentor reacted with skepticism and hostility that were notably gendered, as he conflated the symptoms of her psychological conditions with stereotypically feminine traits of emotionality and weakness. He criticized the employee for being "too emotional," told her that she could "not expect coddling," and warned her that "some people are just not strong enough for this profession."<sup>156</sup> As a result, the employee did not vigorously pursue her requested accommodations—once again, quite understandably given her supervisor's reaction—yet the court ultimately dismissed her ADA claim because she failed to notify her employer of her desired job modifications with sufficient specificity.<sup>157</sup>

Employers have responded similarly in many other cases involving stereotypically feminized impairments. In one case, a female employee at the United States Postal Service who requested a reduced-hour accommodation for her rheumatoid arthritis was told by her direct supervisor that she was "always whining," and that she should get used to the fact that she was "now in a man's world."<sup>158</sup> Not surprisingly, her accommodation request was denied.<sup>159</sup> In

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150. *See id.* at 1155–56.

151. *See id.*

152. *Id.* at 1156.

153. *See id.* at 1157, 1165.

154. *See Yin v. N. Shore LIJ Health Sys.*, 20 F. Supp. 3d 359, 363 (E.D.N.Y. 2014).

155. *Id.* at 364.

156. *Id.*

157. *See id.* at 376.

158. *Smith v. Henderson*, 376 F.3d 529, 536 (6th Cir. 2004).

another case, a female FedEx employee requested leave to treat her recurring lupus.<sup>160</sup> Her direct supervisor made “disparaging statements” about the disease to other managers, suggesting that “lupus really didn’t exist” and describing another lupus-sufferer he knew as someone who “really didn’t have an illness” but who was “just being lazy.”<sup>161</sup> A female employee who was denied an accommodation for her depression in another case similarly discovered that her manager had said in an administrative meeting that he thought she “was ‘faking’ her condition.”<sup>162</sup>

These cases reveal that inattention to gender in defining, diagnosing, and responding to impairments has resulted in a gendered hierarchy of disabilities: individuals with impairments that manifest consistently with masculine norms fare better in the workplace, the doctor’s office, and the courtroom than those whose impairments do not.<sup>163</sup> While leveling the playing field for all impairments will require significant education and social awareness efforts, legal reforms could also help. Most significantly, courts should apply the same standard to all conditions when assessing whether a plaintiff has a substantially limiting impairment. Consistent with Congress’s mandate in the 2008 ADA amendments that disability be construed as broadly as possible, courts should not decide on summary judgment whether an impairment is substantially limiting, but should leave that assessment to a jury.<sup>164</sup> Plaintiffs’ own testimony regarding the substantiality of their limitations should be deemed sufficient to create a triable issue on disability status for all impairments.<sup>165</sup> Eliminating judicial discretion to select only certain impairments for increased scrutiny and require only certain plaintiffs to provide medical testimony or additional corroborating evidence will reduce the gatekeeping role that masculine norms and gender biases currently play at summary judgment in ADA suits.

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159. *See id.* Although the district court granted the employer summary judgment on the employee’s ADA claim, the Sixth Circuit correctly reversed. *See id.* Many employees, however, would never litigate their accommodation denials to the appellate level to address such gendered reactions.

160. *See Cleveland v. Fed. Express Corp.*, 83 Fed. App’x 74, 76 (6th Cir. 2003).

161. *Id.* at 75. Although the district court granted the employer summary judgment on the employee’s ADA claim, the Sixth Circuit correctly reversed. *See id.* Many employees, however, would never litigate their accommodation denials to the appellate level to address such gendered reactions.

162. *Richio*, 163 F. Supp. 2d at 1357 n.2 (granting employer summary judgment on ADA claim).

163. *Cf. Abbas*, *supra* note 148, at 9 (noting that the “[s]kepticism and discrimination surrounding ‘non-mainstream’ disabilities” has established “a ‘hierarchy of disabilities,’ where ‘non-mainstream’ disabilities are considered less legitimate than mainstream disabilities”).

164. *See Areheart*, *supra* note 134, at 385 (arguing that courts should not decide whether an impairment is substantially limiting on summary judgment because “disabled persons are capable of testifying about their conditions and the effect they have on major life activities”).

165. *See id.* at 387 (arguing that “a plaintiff ought to create a fact issue on the substantiality requirement by his or her testimony alone”).

At trial, plaintiffs should be encouraged to present information to educate jurors about the unique forms of discrimination that individuals with multiple subordinate identities experience. This could help jurors recognize how their own biases may affect their perceptions of a plaintiff's credibility and experience, while also making good on the core promise of the social model to reveal the contingent and socially constructed nature of disability. Although certainly not a panacea, these steps would at least begin to confront the degendered notion of disability and empower disability rights law to serve a broader constituency.

## 2. *Defining Major Life Activities*

Even if an individual has a recognized physical or mental impairment that causes acknowledged substantial limitations, a court will only deem an individual disabled under the ADA if the individual experiences those limitations in *particular* aspects of his or her life. Specifically, an impairment will only be deemed an actual disability that triggers ADA protection if the impairment substantially limits something a court considers to be a "major life activit[y]."<sup>166</sup> Federal judges' determinations of what count as major life activities thus establish other boundary markers for the ADA's protected class. If a judge does not deem an endeavor to be a major life activity, then an individual falls outside the ADA's protected class of individuals with actual disabilities—no matter how significantly the individual's impairment limits that activity. Because what counts as a major life activity has been established through a genderless lens, the set of recognized activities is skewed in a stereotypically masculine direction. In this way, inattention to gender again sets a gendered boundary to the ADA's protected class.

The original ADA did not define the term "major life activity," but instead left that task to the EEOC and the federal courts. The EEOC's interpretive guidance of the original statutory language stated that major life activities "are those basic activities that the average person in the general population can perform with little or no difficulty."<sup>167</sup> The U.S. Supreme Court narrowed that definition to include only activities "that are of central importance to daily life."<sup>168</sup> While seemingly neutral and far-reaching, this standard nonetheless requires an implicit prototype of the "daily life" of an "average person." Masculinity studies research predicts that this "average

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166. 42 U.S.C. § 12102(1)(A) (2012). Since the 2008 amendments, this limitation no longer applies to the "regarded as" prong of the ADA's disability definition. *See id.* § 12102(3)(A).

167. 29 C.F.R. pt. 1630 app. § 1630.2(i) (1999); *see also id.* (adopting the definition from the regulations for Section 504 of the Rehabilitation Act).

168. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002), *overruled by* ADAAA § 2(a)(5).

person” standard will be influenced by masculine norms if gender is not consciously considered.<sup>169</sup>

The list of major life activities recognized to-date by the EEOC and the courts verify this prediction. The “daily life” of the prototypic “average person” has come to be filled with activities of a decidedly physical and individual nature, rather than with social or emotional endeavors.<sup>170</sup> The EEOC provides the following list of examples of qualifying activities: “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, . . . working[,] . . . sitting, standing, lifting, and reaching.”<sup>171</sup> Although this list is not intended to be exclusive,<sup>172</sup> it has had a powerful anchoring effect on the federal courts. In assessing disability status, courts have focused primarily on stereotypically masculine activities that are individual and require physical exertion, rather than on the types of relational, communicative, or nurturing activities that are stereotypically feminized. Some courts, for example, refused to consider “interacting with others” to be a major life activity under the original ADA,<sup>173</sup> particularly when an individual was asserting a psychological rather than physical impairment.<sup>174</sup>

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169. See BEM, *supra* note 16, at 41 (explaining the effects of androcentrism); see also Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1142, 1170 (“Congress, in leaving the definition of ‘major life activity’ deliberately vague to ensure flexibility, provided the judiciary with the power to inflict its own prejudices on those seeking relief under the statute.”).

170. This list is also skewed toward activities that are likely to be affected by physical rather than mental impairments. See Mark DeLoach, Note, *Can't We All Just Get Along?: The Treatment of “Interacting with Others” as a Major Life Activity in the Americans with Disabilities Act*, 57 VAND. L. REV. 1313, 1315, 1322 (2004) (noting that the EEOC’s original list of major life activities focused on “people with physical disabilities,” and that “courts have been reluctant to regard as major those activities that are affected by mental disabilities”); see also Curtis D. Edmonds, *Snakes and Ladders: Expanding the Definition of “Major Life Activity” in the Americans with Disabilities Act*, 33 TEX. TECH. L. REV. 321, 325 (2002) (arguing that the EEOC’s initial list of major life activities favored “people with readily apparent, or ‘traditional,’ disabilities”); Danielle J. Ravencraft, Note, *Why the “New ADA” Requires an Individualized Inquiry as to What Qualifies as a “Major Life Activity,”* 37 N. KY. L. REV. 441, 446 (2010) (arguing that the EEOC’s original list of major life activities was “slanted in favor of claimants with readily apparent or more traditional disabilities”).

171. 29 C.F.R. pt. 1630 app. § 1630.2(i) (1999); see also *id.* (adopting the definition from the regulations implementing the Rehabilitation Act).

172. See *id.*

173. See, e.g., *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (holding that the “ability to get along with others” is not a major life activity); *Breiland v. Advance Circuits, Inc.*, 976 F. Supp. 858, 863 (D. Minn. 1997) (stating that “normal social interaction with others, or the ability to get along with others” is not a major life activity); see also *Davis v. Univ. of N.C.*, 263 F.3d 95, 101 n.4 (4th Cir. 2001) (expressing “some doubt” about whether “the ability to get along with others is a major life activity”); *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir. 1999) (noting that it is “questionable” whether interacting with others is a major life activity); Hensel, *supra* note 169, at 1141 (finding that “few courts have been willing to explicitly recognize ‘interacting with others’ as a major life activity”). But see *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 202 (2d Cir. 2004) (holding that interacting with others is a major life activity); *McAlindin v. Cty. of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) (holding that “interacting with others . . . falls within the definition of ‘major life activity’”); *Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir. 1998) (suggesting that the ability to

Even within well-accepted major life activity categories, such as “performing manual tasks,” gender biases influence judicial interpretations. For example, courts generally reject arguments that “doing housework” or “cleaning” are the kinds of manual tasks that could constitute major life activities.<sup>175</sup> Courts have been particularly reluctant to treat housework as a major life activity when the plaintiff is male—that is, when a man is asserting a gender nonconforming role as the basis for defining a major life activity.<sup>176</sup>

The most notable influence of masculine norms on the definition of major life activities is reflected in the line of cases in which courts have held that “caring for others”—among the most stereotypically feminine of tasks—does not count as a major life activity.<sup>177</sup> While these cases are based on gender stereotypes that do not apply across the board, their holdings likely have significant gendered effects as women continue to perform the majority of caregiving work.<sup>178</sup> In the employment setting, women are far more likely to take leave under the Family and Medical Leave Act to provide care for others, while men typically take leave to care for their own serious health

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“relate to others” is a major life activity); *Lemire v. Silva*, 104 F. Supp. 2d 80, 86–87 (D. Mass. 2000) (holding that the “ability to interact with others” is a major life activity).

174. See Hensel, *supra* note 169, at 1142 (“Courts appear far more likely to recognize interacting with others as a major life activity . . . when asserted by an individual with a physical, rather than mental impairment.”).

175. See *Marinelli v. City of Erie*, 216 F.3d 354, 362–63 (3d Cir. 2000) (collecting cases); see also *Colwell v. Suffolk Cty. Police Dep’t*, 158 F.3d 635, 643 (2d Cir. 1998) (holding that “performing housework other than basic chores” is not a major life activity).

176. See, e.g., *Marinelli*, 216 F.3d at 363 (holding that male employee’s arm injury was not a disability despite its limitation on his ability to “scrub the floors in the house, wash the walls, do the dishes, [and] clean the counters” because doing “housework” and performing “household chores” are not major life activities); *Colwell*, 158 F.3d at 643 (holding that male police officer’s back injury was not a disability just because it impacted his ability to perform housework, which is not a major life activity).

177. See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (holding that because “caring for others” is not a major life activity, female employee with infertility was not disabled); *Nichols v. ABB DE, Inc.*, 324 F. Supp. 2d 1036, 1042 (E.D. Mo. 2004) (holding that because “caring for others” is not a major life activity, male employee’s back impairment was not a disability because it limited his ability to “run[] after his children”). *But see* *Emory v. AstraZeneca Pharm. LP*, 401 F.3d 174, 180–82 (3d Cir. 2005) (finding male employee created triable issue on whether his cerebral palsy substantially limited his ability to perform manual tasks, which included tasks enabling him “to care for his children,” such as “chang[ing] a diaper” and “carry[ing] his children up the stairs”); *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 337 (6th Cir. 2002) (recognizing Title II ADA claim challenging zoning restrictions on methadone clinics by showing that drug addiction affects the major life activity of “parenting,” among others).

178. See BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR, AMERICAN TIME USE SURVEY SUMMARY—2015 RESULTS (June 24, 2016), <http://www.bls.gov/news.release/atus.nr0.htm> [<https://perma.cc/7JK9-WSEL>] (reporting findings on childcare); *Women and Caregiving: Facts and Figures*, FAM. CAREGIVER ALLIANCE (Dec. 31, 2003), <https://www.caregiver.org/women-and-caregiving-facts-and-figures> [<https://perma.cc/N2PJ-XGDF>] (reporting findings on elder care).

conditions<sup>179</sup>—a difference mirrored in the ADA’s recognition that “caring for oneself” is a major life activity, but “caring for others” is not.

Scholars have criticized the EEOC’s and the courts’ approaches to defining major life activities from two different directions. Some have argued that major life activities should not be defined categorically but instead should be identified through an individualized inquiry that defines major life activities based on each plaintiff’s actual experience.<sup>180</sup> Others have accepted the categorical approach but have argued that more varied activities should be considered “major.” For example, Professor Ann Hubbard has suggested that major life activities should include all aspects of life that “allow us to function and flourish,” including the full range of activities that “advance human growth and development; secure personal autonomy; are important to well-being, happiness, comfort or dignity; integral to self-respect, identity or actualization; . . . or necessary for full participation in and equal benefits from community, civic, social or political activities.”<sup>181</sup> Although these critiques have not focused on gender or masculinity bias in particular, both proposed approaches would end up recognizing more stereotypically feminized activities, including interacting with others,<sup>182</sup> caring for others,<sup>183</sup> and the “belonging” that comes from the ability to make social connections and achieve social acceptance.<sup>184</sup>

Congress responded to the courts’ narrow and exclusionary approach to interpreting disability status with its 2008 amendments to the ADA, which

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179. See Kelli K. García, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL’Y 1, 9 (2012).

180. See, e.g., Kiren Dosanjh Zucker, *The Meaning of Life: Defining “Major Life Activities” Under the Americans with Disabilities Act*, 86 MARQ. L. REV. 957, 964–65 (2003) (criticizing courts for using a “categorical approach to defining major life activities” that focuses on “typical lives rather than the life of the impaired individual”); Ravencraft, *supra* note 170, at 441–42 (arguing that courts should “consider whether an activity is of central importance to the *claimant’s* life, irrespective of its importance to most people’s lives, in deciding whether that activity is [a major life activity]”).

181. Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 998, 1006 (2004).

182. See Patrick A. Hartman, “*Interacting with Others*” as a Major Life Activity Under the Americans with Disabilities Act, 2 SETON HALL CIR. REV. 139, 165 (2005) (arguing that “interacting with others” should be a major life activity because “it is important for every individual to be able to interact and communicate with others, not only for basic survival needs, but also for entertainment, work, and family purposes”); Hensel, *supra* note 169, at 1189–93 (arguing that “interacting with others” should be a major life activity because it “is a required precursor to an individual’s ability to work, to love, to reproduce and to function on a day-to-day basis in modern society”).

183. See Ann Hubbard, *The Myth of Independence and The Major Life Activity of Caring*, 8 J. GENDER, RACE & JUST. 327, 328, 333–48 (2004) (arguing that “caring for others” should be a major life activity because of the “critical role of caring in the perpetuation and flourishing of individuals, families, communities and society”).

184. See Ann Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217, 218–19 (2004) (arguing that “belonging” should be a major life activity encompassing “social connection or affiliation, including bonds of love, friendship and shared purpose, as well as the basic ability to communicate and relate to others,” and “social acceptance, which enables a person to be with and among others with a sense of comfort and entitlement”).



modified how major life activities are defined. First, the amendments added a list of major life activities to the statutory text itself, rather than leaving interpretation solely to the EEOC and federal courts.<sup>185</sup> To a large degree, however, this statutory list merely incorporated a set of individual, physical activities similar to those that the EEOC had previously recognized, including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning . . . and working.”<sup>186</sup> The new statutory list did take a step forward by including several cognitive activities, including “reading, concentrating, [and] thinking.”<sup>187</sup> And, most significantly, the new list included the relational activity of “communicating.”<sup>188</sup>

While these amendments broadened the prototypic image of the “daily life” of an “average person” and thus represent a significant step forward, Congress excluded several important activities from the new statutory list of major life activities despite the scholarly literature urging a broader definition. One is “interacting with others,” which the EEOC has added to its regulatory guidance as a major life activity, despite Congress’s decision to keep it off the list in the amended statute.<sup>189</sup> Another is “caring for others,” which remains absent from both the statute and the EEOC’s regulatory guidance. While the EEOC’s new guidance for the ADA amendments states that “the term ‘major’ shall not be interpreted strictly to create a demanding standard for disability,” and that an activity may be deemed “major” even if it is not “of ‘central importance to daily life,’”<sup>190</sup> neither the guidance nor the statute explicitly addresses the masculine lens through which courts assess life activities.

Ultimately, however, the lack of attention to gender in defining major life activities may have a more symbolic than practical effect in excluding individuals from the statute’s protected class. Many individuals with impairments that substantially limit the unrecognized life activity of “caring for others” may also be limited in other recognized life activities, which would bring those individuals within the ADA’s reach. More important, the ADA amendments likely have reduced the significance of major life activities by allowing individuals to alternatively establish disability status by demonstrating substantial limitation in a “major bodily function.”<sup>191</sup> In the amended ADA, major bodily functions broadly include, among others, “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological,

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185. See 42 U.S.C. § 12102(2) (2012).

186. See *id.* § 12102(2)(A).

187. See *id.*

188. See *id.*

189. See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(i)(1) (2012).

190. *Id.* § 1630.2(i)(2) (citing ADAAA § 2(b)(4)).

191. See 42 U.S.C. § 12102(2)(B).

brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>192</sup> For many individuals with impairments, this amendment may provide a useful legal alternative to the conventional major life activity path for proving disability status.<sup>193</sup> Nonetheless, the genderless approach to defining major life activities in a way that excludes, ignores, and devalues feminized endeavors continues to reveal the masculinity biases at work within existing disability discrimination law.<sup>194</sup>

### B. *How Masculine Norms Restrict the Accommodation Mandate*

The ADA’s defining feature is the reasonable accommodation mandate, which obligates employers to modify the workplace to enable individuals with disabilities to perform the essential functions of a job. The accommodation mandate is the mechanism by which the ADA implements the social model’s conception of disability as a socially constructed limitation. The accommodation mandate recognizes that impairments are not inherently limiting, but instead become disabling as the result of particular workplace designs. The scope of the accommodation mandate, however, ultimately depends on how the law defines a job’s essential functions. If a court concludes that an aspect of a job is an essential function, the employer has no obligation to modify or eliminate it as part of an accommodation.<sup>195</sup> If an individual with a disability is unable to perform an essential job function, the individual is “unqualified” and unprotected by the ADA.

Defining a job’s essential functions is thus critical to establishing the scope of the ADA’s accommodation mandate—that is, the extent to which employers must redesign the workplace to reduce the limiting effects on impairments. Although this endeavor appears objective, gender norms have the power to define not only the prototypic worker, but the prototypic workplace as well. Without conscious attention to gender, androcentrism empowers employers and courts to construct an essentialized workplace around male bodies, experiences, and perspectives. This process is facilitated by the statute’s failure to define essential functions. Instead, the ADA’s implementing regulations grant employers extraordinary deference to step in and fill that

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192. *Id.*

193. See Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 673–80 (2010).

194. Cf. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 282 (2000) (observing that the EEOC’s and courts’ interpretations of major life activities “have laid bare a fascinating social anthropology of American culture and values”).

195. See Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 21–23 (2005) [hereinafter Travis, *Recapturing*] (internal quotes omitted) (explaining that “[i]f an individual with a disability needs to modify something that is characterized as an essential job function, the worker does not meet the ADA’s definition of a qualified individual”).

void.<sup>196</sup> This has enabled employers to expansively define a job's essential functions to include not only a job's necessary component tasks, but also the conventional way in which a job is performed.<sup>197</sup> Those conventional working norms end up being masculine working norms that do not receive meaningful scrutiny by judges who are not actively attentive to gender bias.

The most concerning of these masculine norms do not involve actual job tasks at all, but instead define how job tasks are expected to be organized: the when, where, and how of task performance. Specifically, courts have allowed employers to define essential job functions to include the "full-time face-time norm," which embodies the masculine expectation that an employee works unlimited, on-demand hours, in full-time positions, at a central worksite, and without any career interruptions or time off.<sup>198</sup> This norm was originally built upon the "ideal worker" image: someone who is relieved of all domestic and caregiving responsibilities by the services of a full-time homemaker spouse.<sup>199</sup> This ideal worker image helped employers embed masculine norms into the ADA, as courts allowed employers to define essential job functions to include unlimited overtime, inflexible work hours, full-time work, presence at a central worksite, and an uninterrupted work-life capacity.<sup>200</sup>

Characterizing aspects of the full-time face-time norm as essential job functions is inconsistent with the ADA's statutory language and regulations, which define reasonable accommodations to include scheduling changes, flexible hour arrangements, part-time work, unpaid leave, and other forms of job restructuring.<sup>201</sup> Because essential functions, by definition, are the job duties that are *not* subject to the ADA's accommodation mandate,<sup>202</sup> these listed accommodations demonstrate that an employer's scheduling, hour, and attendance requirements cannot be essential functions of every job. Nonetheless, courts opened the door for such an expansive conception of

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196. See Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1701–03, 1707–30 (2015) [hereinafter Travis, *Disqualifying*]; Travis, *Recapturing*, *supra* note 195, at 21–36.

197. Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 70–78 (2014); Travis, *Disqualifying*, *supra* note 196, at 1715–20; Travis, *Recapturing*, *supra* note 195, at 21–36.

198. See Travis, *Disqualifying*, *supra* note 196, at 1715–20; Travis, *Recapturing*, *supra* note 195, at 4–36.

199. Travis, *Recapturing*, *supra* note 195, at 11–13; see also JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 20–24 (2000) (describing the roots of the ideal worker in the social order of domesticity).

200. See Porter, *supra* note 197, at 70–78; Travis, *Disqualifying*, *supra* note 196, at 1715–20; Travis, *Recapturing*, *supra* note 195, at 21–37.

201. See Travis, *Recapturing*, *supra* note 195, at 46–76 (demonstrating "the ways in which . . . workplace essentialism is inconsistent with the [ADA's] statutory language, objectives, and regulatory guidance").

202. *Id.* at 21–22.

essential functions under the original ADA,<sup>203</sup> and that trend has continued under the 2008 amendments.<sup>204</sup>

When masculine working-time norms are characterized as essential job functions, the ADA's accommodation mandate is constricted in significant and systematic ways. Individuals whose disabilities require them to seek accommodations in the form of flexible hours, telecommuting, part-time work, job sharing, reduced overtime, or temporary leave are then deemed "unqualified" because they are unable to perform the essential functions of full-time, unlimited, uninterrupted, and on-demand hours at a central worksite.<sup>205</sup> This ends up excluding any worker whose impairment is incompatible with conventional working-time norms.<sup>206</sup>

Courts frequently invoke the mantra that "attendance is an essential function" as a shorthand justification for rejecting ADA claims by such individuals.<sup>207</sup> In *Brown v. Honda of America*, for example, the employee

203. See *id.* at 21–23; see also William H. Danne, Jr., Annotation, *Who Is "Qualified Individual" Under Americans with Disabilities Act Provisions Defining, and Extending Protection Against Employment Discrimination to Qualified Individual with Disability (42 U.S.C.A. §§ 12111(8), 12112(a))*, 146 A.L.R. FED. 1, §§ 2(a) (1998) (summarizing pre-amendment case law showing that "employer expectations" about attendance, tardiness, and timeliness "have been deemed to constitute essential functions of all or most jobs"); Porter, *supra* note 197, at 78 (explaining that there were "relatively few" pre-amendment accommodation cases involving working-time norms "because so many cases were dismissed solely on the issue of disability").

204. Travis, *Disqualifying*, *supra* note 196, at 1717–20. Professor Nicole Porter found sufficient evidence of this trend to label it the "new backlash against the ADA." See Porter, *supra* note 197, at 70–78.

205. Travis, *Disqualifying*, *supra* note 196, at 1715–20; Travis, *Recapturing*, *supra* note 195, at 21–36; see also Porter, *supra* note 197, at 70–78 (describing the post-ADAAA trend in cases holding "that schedules, shifts, hours, and attendance policies were all essential functions of the job and thus, no reasonable accommodation was required").

206. Travis, *Recapturing*, *supra* note 195, at 36; see also Porter, *supra* note 197, at 70 ("Because the only way to accommodate an employee who cannot work a particular schedule or shift is to eliminate the requirement . . . courts then conclude that accommodation is not required because it is never an appropriate accommodation to eliminate an essential function of the job.").

207. See, e.g., *Pickens v. Soo Line R.R. Co.*, 264 F.3d 773, 776–79 (8th Cir. 2001) (dismissing ADA claim because employee's impairment interfered with the essential function of "regular, reliable attendance"); *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1099–102 (8th Cir. 1999) (holding that attendance is an essential function and dismissing ADA claim because employee's rhinosinusitis caused absences); *Nowak v. St. Rita High Sch.*, 142 F.3d 999, 1002–04 (7th Cir. 1998) (holding that "regular attendance" is an essential function and dismissing ADA claim because employee needed leave time); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 194–95, 197–98 (4th Cir. 1997) (holding that "com[ing] to work on a regular basis" is an essential function and dismissing ADA claim by employee whose back injury required leave time); *Jackson v. Veterans Admin.*, 22 F.3d 277, 278–80 (11th Cir. 1994) (holding that "presence" is an essential function and dismissing ADA claim because employee's rheumatoid arthritis caused absences); *Lewis v. N.Y.C. Police Dep't*, 908 F. Supp. 2d 313, 326–29 (E.D.N.Y. 2012) (dismissing ADA claim because employee's "excessive absences" interfered with the essential function of regular attendance); *Kinnaman v. Ford Motor Co.*, 79 F. Supp. 2d 1096, 1098, 1100–03 (E.D. Mo. 2000) (dismissing ADA claim because employee's impairment interfered with the essential function of "regular and predictable attendance"); *Robinson-Scott v. Delta Air Lines, Inc.*, 4 F. Supp. 2d 1183, 1184, 1186–88 (N.D. Ga. 1998) (holding that "consistent attendance" is an essential function and dismissing ADA claim by employee whose fibrositis caused absences); *Amato v. St. Luke's Episcopal Hosp.*, 987 F. Supp. 523, 526–31 (S.D. Tex. 1997) (holding that "regular

alleged that her employer failed to provide intermittent leave to accommodate her depression, anxiety, and migraine headaches.<sup>208</sup> The court accepted the employer's characterization of "regular and reliable attendance" as an essential job function and therefore deemed the employee unqualified and unprotected by the ADA.<sup>209</sup> Although the plaintiff could perform the *actual* job functions when at work—and even though the statute and the regulations list unpaid leave as a reasonable accommodation—the court treated attendance as a job "function" and failed to allow a jury to determine whether the attendance policy was truly essential.<sup>210</sup> In *Basden v. Professional Transportation, Inc.*, the Seventh Circuit similarly dismissed an ADA claim by an employee who requested a thirty-day leave to get medical treatment for possible multiple sclerosis.<sup>211</sup> Rather than focusing on the plaintiff's ability to perform the *actual* job functions on her return from temporary leave, the court deferred to the employer's characterization of "regular attendance as an essential job requirement" and deemed the plaintiff unqualified for ADA protection.<sup>212</sup> The Sixth Circuit took the same approach in *EEOC v. Ford Motor Co.*<sup>213</sup> In that case, the court deferred to the employer's judgment that daily, face-to-face office interaction was an essential job function, which rendered the employee unqualified because her irritable bowel syndrome required her to work from home several days per week.<sup>214</sup>

Courts have relied upon the full-time face-time norm to reach similar results when employees seek a variety of accommodations that require changes to masculine conventions about the when and where of work performance. For example, courts regularly reject accommodation requests for part-time schedules by characterizing full-time work as an essential job function.<sup>215</sup> They

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attendance is an essential function" and dismissing ADA claim because employee's impairment caused absences); *Vorhies v. Pioneer Mfg. Co.*, 906 F. Supp. 578, 580–81 (D. Colo. 1995) (dismissing ADA claim by employee whose back injury interfered with the essential function of regular attendance); *Hendry v. GTE N., Inc.*, 896 F. Supp. 816, 825 & n.12 (N.D. Ind. 1995) (holding that "regular attendance at work is an essential function of virtually all jobs" and dismissing ADA claim by employee whose migraine headaches affected attendance). *See generally* Stephen M. Crow, *Excessive Absenteeism and the Disabilities Act*, 48 ARB. J. 65 (1993) (summarizing case law on absenteeism in ADA accommodation claims); James A. Passamano, *Employee Leave Under the Americans with Disabilities Act and the Family Medical Leave Act*, 38 S. TEX. L. REV. 861 (1997) (describing cases addressing whether regular attendance is an essential function under the ADA).

208. No. 2:10-cv-459, 2012 WL 4061795, at \*1 (S.D. Ohio Sept. 14, 2012).

209. *Id.* at \*1, \*4.

210. *Id.* at \*4.

211. 714 F.3d 1034, 1036 (7th Cir. 2013).

212. *Id.* at 1037.

213. 782 F.3d 753 (6th Cir. 2015) (en banc).

214. *Id.* at 758, 763. This opinion reversed a panel decision that had correctly found a triable issue on whether the employee could perform her actual job duties from home. *See* 752 F.3d 634, 643 (6th Cir. 2014), *vacated*, 782 F.3d 753 (6th Cir. 2015) (en banc).

215. *See, e.g.*, *DeVito v. Chi. Park Dist.*, 270 F.3d 532, 534 (7th Cir. 2001) (holding that a full-time schedule is an essential function of an office receptionist and dismissing ADA claim because employee's back injury required part-time work); *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043,

reject accommodation requests for limited hours by characterizing mandatory overtime as an essential job function.<sup>216</sup> They reject accommodation requests for flextime or shift modifications by characterizing rigid start and stop times<sup>217</sup> and multiple or rotating shifts<sup>218</sup> as essential job functions. And they routinely reject accommodation requests to telecommute from home because they assume that on-site presence is an essential function of virtually every job.<sup>219</sup> In all of these situations, courts defer to employers' characterizations of an essentialized design that treats the masculine concept of full-time face-time as an immutable and defining property of the workplace.

While defining essential job functions to include masculine working-time norms ends up disqualifying a wide range of individuals who have impairments

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1045–48 (8th Cir. 1999) (holding that full-time work is an essential function of a data entry clerk and dismissing ADA claim because employee's cubital tunnel syndrome required a part-time schedule); *Terrell v. USAir*, 132 F.3d 621, 623–27 (11th Cir. 1998) (holding that working full-time is an essential function of a reservations sales agent and dismissing ADA claim because employee's carpal tunnel syndrome limited her to four hours of work per day); *Querry v. Messar*, 14 F. Supp. 2d 437, 443–45 (S.D.N.Y. 1998) (holding that a full-time schedule is an essential function of a police officer and dismissing ADA claim because employee's back condition limited her to four-hour shifts); *Burnett v. W. Res., Inc.*, 929 F. Supp. 1349, 1355–59 (D. Kan. 1996) (holding that full-time shifts are an essential function of a meter reader and dismissing ADA claim by employee whose knee injury limited him to four-hour shifts).

216. *See, e.g., Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1304–06 (11th Cir. 2000) (finding that mandatory overtime work is an essential function of an electrical worker and dismissing ADA claim because employee's back injury prohibited him from working more than eight hours per day); *Sanders v. FirstEnergy Corp.*, 813 N.E.2d 932, 933 (Ohio Ct. App. 2004) (holding that overtime is an essential function of a power plant attendant and dismissing ADA claim because employee's sleep apnea made him unable to work overtime).

217. *See, e.g., EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 945, 947–52 (7th Cir. 2001) (en banc) (holding that strict compliance with an "assigned, definite, and specific work schedule" is an essential function of a dockworker and dismissing ADA claim because employee's HIV/AIDS and cancer required an altered schedule and temporary leave time); *Earl v. Mervyn's, Inc.*, 207 F.3d 1361, 1364–66 (11th Cir. 2000) (holding that a strict start time is an essential function of a store area coordinator and dismissing ADA claim because employee's obsessive compulsive disorder required a flexible start and end time); *Salmon v. Dade Cty. Sch. Bd.*, 4 F. Supp. 2d 1157, 1160–63 (S.D. Fla. 1998) (holding that a rigid start time is an essential function of a guidance counselor and dismissing ADA claim because employee's back condition caused her to arrive late).

218. *See, e.g., Laurin v. Providence Hosp.*, 150 F.3d 52, 54–61 (1st Cir. 1998) (holding that a rotating shift is an essential function of a nurse and dismissing ADA claim because employee's seizure disorder required her to work a nonrotating shift); *Tucker v. Miss. Dep't of Soc. Servs.*, No. 2:11-CV-04134-NKL, 2012 WL 6115604, at \*1–6 (W.D. Mo. Dec. 10, 2012) (holding that working the day, evening, and overnight shifts is an essential function of a youth specialist and dismissing ADA claim because employee's migraine medication produced drowsiness and allowed him to work only the day and evening shifts).

219. *See, e.g., Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1119–25 (10th Cir. 2004) (holding that on-site presence is an essential function of a service coordinator and dismissing ADA claim because employee's post-traumatic stress disorder required working from home); *Rauen v. U.S. Tobacco Mfg. Ltd. P'ship*, 319 F.3d 891, 892–97 (7th Cir. 2003) (holding that on-site presence is an essential function of a software engineer and dismissing ADA claim because employee's cancer required working from home); *Wojciechowski v. Emergency Tech. Servs. Corp.*, No. 95 C 3076, 1997 WL 164004, at \*1–2 (N.D. Ill. Mar. 27, 1997) (holding that "being present at the office on a full-time basis" is an essential function of a sales representative and dismissing ADA claim because employee's cancer required working from home).

that are inconsistent with conventional workplace design, this approach to essential functions is particularly biased against individuals with the feminized impairments described in Part III.A. The largely female population of individuals with impairments like CFS,<sup>220</sup> MCS,<sup>221</sup> fibromyalgia,<sup>222</sup> lupus,<sup>223</sup> depression, anxiety, and other emotional and psychological disorders<sup>224</sup> often need precisely the types of accommodations that courts routinely reject. Many courts have dismissed ADA claims and denied accommodations for part-time, flex-time, unpaid leave, limited overtime, or telecommuting arrangements by individuals with these particularly feminized impairments on the grounds that these conditions render individuals unqualified to work as a matter of law.<sup>225</sup> These individuals thus face a double disadvantage: increased scrutiny when attempting to bring themselves within the ADA's protected class, and a higher bar when trying to overcome the ADA's qualification hurdle.

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220. See, e.g., *Kennedy v. Applause, Inc.*, No. CV 94-5344 SVW(GHKX), 1994 WL 740765, at \*1-3 (C.D. Cal. Dec. 6, 1994) (holding that the ability to "maintain a regular and reliable level of attendance" is an essential function and dismissing ADA claim because employee's chronic fatigue syndrome required periodic leave time), *aff'd*, 90 F.3d 1477 (9th Cir. 1996).

221. See, e.g., *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1557-61, 1566 (N.D. Ga. 1995) (holding that on-site presence is an essential function of a sales agent and dismissing ADA claim because employee's multiple chemical sensitivity required working from home).

222. See, e.g., *Turner v. United Parcel Serv.*, No. 2:13-CV-823-WMA, 2014 WL 4458917, at \*4-6 (N.D. Ala. Sept. 10, 2014) (holding that regular attendance and overtime are essential job functions and dismissing ADA claim because employee's fibromyalgia required limited hours and periodic time off); *Caroselli v. Allstate Ins. Co.*, No. 01 C 6834, 2004 WL 407004, at \*4-5 (N.D. Ill. Feb. 23, 2004) (holding that working full-time is an essential function of a channel manager and dismissing ADA claim because employee's fibromyalgia required part-time work); *Zaborowski v. Sealright Co., Inc.*, No. 5:00-CV-772(HGM/DEP), 2002 WL 1585521, \*3-4 (N.D.N.Y. July 9, 2002) (holding that extensive overtime is an essential function and dismissing ADA claim because employee's fibromyalgia required limited overtime hours).

223. See, e.g., *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 211, 212-14 (4th Cir. 1994) (holding that attendance is an essential function of a medical instructor and dismissing ADA claim because employee's lupus affected attendance); *Warren v. Aetna Life Ins. Co.*, No. Civ.A.3:97-CV-1030-R, 1999 WL 615095, at \*2 (N.D. Tex. Aug. 13, 1999) (dismissing ADA claim because employee's lupus interfered with the essential function of "regular attendance").

224. See, e.g., *Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 469 (8th Cir. 2007) (holding that reliable attendance as an essential function and dismissing ADA claim because employee's depression required periodic leave time); *Lamb v. Qualex, Inc.*, 33 Fed. App'x 49, 56-59 (4th Cir. 2002) (unpublished) (holding that a full-time schedule is an essential function of an account development specialist and dismissing ADA claim because employee's depression required a part-time schedule); *Corder v. Lucent Techs., Inc.*, 162 F.3d 924, 925-28 (7th Cir. 1998) (holding that "regular attendance" is an essential function of an account support representative and dismissing ADA claim because employee's severe depression and anxiety caused absences); *Rinaldi v. Quality King Distribs. Inc.*, 29 F. Supp. 3d 218, 227-28 (E.D.N.Y. 2014) (holding that regular attendance is an essential function and dismissing ADA claim because employee's anxiety, panic attacks, and depression required periodic leave time); *Simmerman v. Hardee's Food Sys., Inc.*, No. CIV. A. 94-6906, 1996 WL 131948, at \*1, \*3-8 (E.D. Pa. Mar. 22, 1996) (holding that working a minimum fifty-hour week and one night per week are essential functions of a general manager and dismissing ADA claim because employee's depression limited him to a forty-hour week).

225. See *supra* notes 220-24.

When assessing an employee's qualifications, courts should treat on-site attendance and shift, hour, overtime, and scheduling practices not as job functions but as organizational norms for when and where the *actual* functions take place. This would not require courts to ignore real performance impacts resulting from an individual's impairment.<sup>226</sup> It would simply require courts to engage in case-specific, fact-based analysis of whether those impacts meet the high standard of "undue hardship" that is necessary to eliminate an employer's accommodation obligation.<sup>227</sup> By incorrectly characterizing on-site attendance and shift, hour, and scheduling practices as essential job functions, courts render those aspects of the workplace untouchable by the ADA and thereby reinforce the masculine norms upon which they are built.

### C. How Masculine Norms Limit Access to Accommodation Rights

Masculine norms have affected not only which individuals the ADA protects and the scope of their rights, but also the procedures by which individuals may access those rights. To obtain a workplace accommodation, an individual with a disability typically must self-identify as disabled,<sup>228</sup> affirmatively request an accommodation,<sup>229</sup> and engage in an "interactive process" with the employer to assess the individual's functional limitations and identify appropriate job modifications.<sup>230</sup> Initially, this individualized approach to accommodations produced optimism that the ADA could effectively serve the unique needs of each employee with a disability.<sup>231</sup> That optimism has

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226. Travis, *Disqualifying*, *supra* note 196, at 1720.

227. *Id.*

228. See *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) (citing 42 U.S.C. § 12112(b)(5)(A)) (stating that the "employee has the initial duty to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations"); see also Basas, *supra* note 10, at 85 (noting that "[s]ome employees with disabilities would rather struggle with obstacles in the workplace that could be removed with reasonable accommodation rather than 'out' themselves as having disabilities").

229. See, e.g., *Rask*, 509 F.3d at 470 (placing the burden on the employee "to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations" to trigger the ADA's accommodation duty (emphasis omitted) (internal quotation marks omitted)); *Conneen v. MBNA Am. Bank, N.A.*, 334 F.3d 318, 332 (3d Cir. 2003) (stating that an employee "must make clear that [he/she] wants assistance for his or her disability" to trigger an employer's obligation to engage in the interactive process (internal quotation marks omitted)); *Ballard v. Rubin*, 284 F.3d 957, 962 (8th Cir. 2002) (stating that the accommodation requirement is only triggered if the employer knows "of both the disability and the employee's desire for accommodations"); see also Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 712 (2014) (noting that the ADA "require[s] an applicant or employee seeking accommodation to ask the employer for the accommodation").

230. See 29 C.F.R. § 1630.2(o)(3) (2012); 29 C.F.R. pt. 1630 app. § 1630.9 (2012).

231. See Ruth O'Brien, *Other Voices at the Workplace: Gender, Disability, and an Alternative Ethic of Care*, 30 SIGNS: J. WOMEN CULTURE & SOC'Y 1529, 1529 (2005) [hereinafter O'Brien, *Other Voices*] (describing the ADA's potential to "take into account human need" and "compel employers to pay heed to the individuality of their employees"); Ruth O'Brien, *A Subversive Act: The Americans with Disabilities Act, Foucault, and an Alternative Ethic of Care at the Global Workplace*,



faded, however, as the process for obtaining and enforcing accommodation rights has become an adversarial negotiation that triggers gender stereotypes and produces gendered results.

One reason that the ADA's seemingly neutral self-identification requirement produces gendered results is that women with disabilities are more likely than men with disabilities to cover their conditions and self-accommodate for longer before revealing their disabilities to employers.<sup>232</sup> This is because the stakes are often higher for women who self-identify as disabled than for men. Because both female status and disability status trigger perceptions of dependency, passivity, weakness, inferiority, and incompetence, women with disabilities face multiple and overlapping sources of presumed inability.<sup>233</sup> The risks of self-identifying as disabled are particularly high for women in male-dominated work environments that valorize masculine traits.<sup>234</sup> Outing oneself as disabled in a male-dominated workplace jeopardizes a woman's already-precarious hold on full professional recognition.<sup>235</sup> Employers often view requests for accommodations through gendered lenses, which means that an employer may view a woman's request as an admission of shortcoming, but view a man's request as brave or heroic.<sup>236</sup> Gender norms also place greater expectations on women to alleviate the social discomfort that others feel because of their disabilities, which creates further pressure for women to self-accommodate and downplay their physical and mental conditions.<sup>237</sup>

The longer an employee tries to assimilate to an existing workplace by covering a disability, the more likely it is that performance issues arise. Once the employee does self-identify as disabled and seeks accommodation, she may have trouble proving her ability to perform the essential job functions in the interactive negotiation process because of performance issues resulting from

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13 TEX. J. WOMEN & L. 55, 5658 (2003) [hereinafter O'Brien, *Subversive Act*] (describing the ADA's individualized interactive process as "manifesting an ethic of care" that can empower employees).

232. See, e.g., Basas, *supra* note 10, at 39 (studying women attorneys with disabilities).

233. See Russo & Jansen, *supra* note 51, at 238 (describing the "convergence" of stereotypes of "dependency, passivity, and incompetence [that] are applied to both women and disabled persons").

234. See, e.g., Basas, *supra* note 10, at 85, 95 (finding in a study of women attorneys with disabilities that many self-accommodated to avoid "the stigma of asking for accommodations [in a profession] where attorneys are rewarded for erecting a façade of impenetrability and repose" and are expected to present "bravado, strength, stamina, [and] endurance").

235. See *id.* at 38–39, 85, 90–92 (finding in a study of women attorneys with disabilities that many covered their disabilities and self-accommodated because of the "pressure to conform to masculine approaches," to avoid "admitting to a flaw or shortcoming," and to retain "professional recognition as equals"); see also Yin v. N. Shore LIJ Health Sys., 20 F. Supp. 3d 359, 363–64 (E.D.N.Y. 2014) (alleging that a woman resident physician had her professional status undermined after revealing her mental disabilities to her physician mentor who told her that "she [could] not expect 'coddling,'" that "she was 'too emotional'" and "'had to face the culture,'" and that "'some people are just not strong enough for this profession'").

236. See Basas, *supra* note 10, at 85, 110.

237. See *id.* at 76 (describing how disabled women in the legal profession "face the dilemma of making others feel comfortable while they are not yet fully accepted members of the profession").

the delayed accommodation request. Covering a disability is also stressful. Women's well-founded fears of adverse reactions to disclosing their disabilities often produce their own negative psychological consequences that may interfere with performance and further deteriorate health.<sup>238</sup>

When women workers do overcome the obstacles to self-identifying as disabled, they are more likely than men to suffer negative coworker or employer reactions to their accommodation requests. A robust literature demonstrates gendered differences in employer reactions to employee self-negotiation in other employment contexts. When women request raises or promotions, for example, employers perceive them more negatively, coworkers are less likely to want to work with them in the future, and they obtain less successful outcomes than men who make similar requests.<sup>239</sup>

In addition, disability studies research suggests that an adversarial negotiation process for securing accommodations will serve women less effectively than men. Negative disability biases may be "mitigated or exacerbated" if the individual is identified with an additional social identity group that is perceived as superior or inferior.<sup>240</sup> This means that men with disabilities can mitigate negative disability stereotypes by making the positive

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238. Asch, *supra* note 25, at 406–07 ("Fearing the adverse reactions of others to the disclosure of a [disability] produces its own psychological consequences; the stress of hiding may turn out to be as problematic as the feared responses from disclosure.")

239. See LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 87 (2007) (explaining that "an assertive woman, no matter how well she presents her arguments in negotiation, risks decreasing her likeability and therefore her ability to influence the other side"); Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 *ORG. BEHAV. & HUM. DECISION PROCS.* 84 (2007) (describing empirical studies on the gendered effects of self-negotiation); Hannah Riley Bowles & Kathleen L. McGinn, *Untapped Potential in the Study of Negotiation and Gender Inequality in Organizations*, 2 *ACAD. MGMT. ANNALS* 99, 109 (2008) (summarizing studies finding that "participants were significantly less inclined to work with a woman who had attempted to negotiate as compared to one who had stayed mum, and male participants consistently penalized women more than men for attempting to negotiate"); Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation Is Not a "Factor Other Than Sex" Under the Equal Pay Act*, 10 *GEO. J. GENDER & L.* 1, 2, 6–8 (2009) (summarizing research finding that "employers may react more negatively to women who *do* attempt to negotiate than they do to similarly-situated men"); Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 *GEO. J. GENDER & L.* 159, 194 (2011) (revealing how women get penalized for self-promotion); Gowri Ramachandran, *Pay Transparency*, 116 *PENN. ST. L. REV.* 1043, 1060 (2012) (explaining that women who assert their own interests in the workplace "may be penalized for it"); Mary E. Wade, *Women and Salary Negotiation: The Costs of Self-Advocacy*, 25 *PSYCHOL. WOMEN Q.* (2001) (describing the social and psychological costs imposed on women who engage in self-advocacy); Hannah Riley Bowles & Linda Babcock, *When Doesn't It Hurt Her to Ask? Framing and Justification Reduce the Social Risks of Initiating Compensation Negotiations 2* (2008) (conference paper, IACM), <http://ssrn.com/abstract=1316162> [<https://perma.cc/2D28-TRM8>] (stating that "[i]n multiple studies, researchers have found evaluators to be significantly less inclined to work with a woman who attempts to negotiate for higher compensation as compared to one who does not").

240. See Begum, *supra* note 10, at 72.

norms of masculinity more salient.<sup>241</sup> By contrast, women with disabilities may exacerbate negative disability stereotypes by making salient the redundant norms of femininity.<sup>242</sup> This research indicates that if men with disabilities aggressively negotiate for accommodations during the interactive process, they may reduce the negative stereotypes that attach to disability because their aggressive negotiation is consistent with masculine norms.<sup>243</sup> When men with disabilities enact masculinity, they are able to “unmake disability” by getting others to interact with them as men rather than as disabled.<sup>244</sup> Conversely, aggressive negotiation is inconsistent with feminine stereotypes, which means that women with disabilities who self-advocate during the interactive process will be negatively viewed both for violating gender norms and for being unable to meet the workplace norms of the able bodied.<sup>245</sup> If women with disabilities instead enact feminine norms through passive negotiation, however, they are seen as doubly weak. Thus, women lack the same opportunity as men to mitigate the negative biases that attach to their disabilities.<sup>246</sup>

Concerned that aggressive self-advocacy may result in more negative employer responses, women with disabilities often decide—quite rationally—not to press their accommodation rights. They often do not demand particular accommodations with specificity or they accept inferior accommodations that do not address their real needs.<sup>247</sup> This appears to happen with particular frequency when an employee has one of the stereotypically feminized

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241. See Asch & Fine, *supra* note 8, at 3 (explaining the “*masculinity/dependence* contradiction” that men with disabilities may use to their advantage); Begum, *supra* note 10, at 72 (explaining how men with disabilities can “strategically choose to identify with the powerful and advantageous male role”).

242. See Asch & Fine, *supra* note 8, at 3 (explaining the “redundant intersection of *femininity* and *dependence*” faced by women with disabilities); Begum, *supra* note 10, at 72 (explaining how women with disabilities are placed in a double bind because both their gender and disability roles attach a label of “inferior, passive and weak”).

243. Cf. Russell P. Shuttleworth, *Disabled Masculinity*, in *GENDERING DISABILITY*, *supra* note 21, at 166 (explaining that men with disabilities can assert their masculinity in “interpersonal negotiations” by meeting “masculine expectations such as initiative, competitiveness, self-control, assertiveness, and independence”).

244. Moser, *supra* note 56, at 545 (describing how men with disabilities can “unmake disability” or “make it irrelevant” by enacting gender in a way that forefronts male dominance); see also Gerschick & Miller, *supra* note 69, at 184, 204 (analyzing “the creation, maintenance, and recreation of gender identities by men who . . . find themselves dealing with a physical disability”).

245. See Bowles & McGinn, *supra* note 239, at 109 (summarizing studies finding that women will achieve less successful pay negotiation results than men when they “take a stereotypically masculine approach and advocate assertively for their self-interest”); Russo & Jansen, *supra* note 51, at 240 (explaining how “[d]ependence, passivity, and nonassertive behavior traditionally are viewed as appropriate and desirable behaviors for all women” and for individuals with disabilities); see also Porter & Vartanian, *supra* note 239, at 164, 194 (explaining how “gender schemas can and do influence the way employers react” to employee negotiation).

246. See Moser, *supra* note 56, at 545.

247. See *infra* notes 249–254 and accompanying text.

conditions described in Part III.A—conditions that employers often treat as illegitimate in the first place.<sup>248</sup>

The rational decision to tread cautiously with accommodation requests has serious procedural consequences when women later assert ADA claims. Specifically, it increases the risk that courts will hold the employee responsible for failing to meet the requirements of the interactive process and therefore dismiss her accommodation claim.<sup>249</sup> In one typical case, a woman employee with cancer requested a voice recorder to accommodate her chemotherapy-related memory problems.<sup>250</sup> The employer instead told the employee to use the voice-recording function on her cell phone, which did not fully meet her needs.<sup>251</sup> Because the employee was hesitant to complain to her employer about the shortcomings of the phone, the court dismissed her ADA accommodation claim by holding her responsible for the breakdown of the interactive process.<sup>252</sup> In another case, a court dismissed the ADA claim of a female employee with fibromyalgia for failing to engage in the interactive process because she did not describe her desired accommodations with enough specificity.<sup>253</sup> The court reached this conclusion even though the employee's reticence came after the employer's human resources director explicitly said that she did not believe the employee's fibromyalgia was a real disability.<sup>254</sup>

A recent study of women attorneys with disabilities illustrates this lose-lose dynamic facing women at the intersection of gender and disability when

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248. *See id.*

249. *See, e.g.*, Jackson v. City of Chicago, 414 F.3d 806, 812–14 (7th Cir. 2005) (dismissing ADA claim by female police officer with fibromyalgia by holding her responsible for the interactive process breakdown for failing to provide detailed medical information about her specific physical limitations); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135–37 (7th Cir. 1996) (affirming dismissal of ADA claim by female employee with depression by holding her responsible for the interactive process breakdown for failing to provide sufficient medical information “to isolate the necessary specific accommodations”); Wallace v. Heartland Cmty. Coll., 48 F. Supp. 3d 1151, 1156, 1158–65 (C.D. Ill. 2014) (dismissing ADA claim by female employee with fibromyalgia by holding her responsible for the interactive process breakdown because she did not state her requested accommodations with sufficient specificity after the human resources director told her that she did not believe the employee was actually disabled); Yin v. N. Shore LIJ Health Sys., 20 F. Supp. 3d 359, 363–64, 376 (E.D.N.Y. 2014) (dismissing female resident physician's ADA claim for failing to notify her employer of the specific accommodations she needed for her major depressive and anxiety disorders, even though she had been told after revealing her disability that “she [could] not expect ‘coddling’” and that “she had to face the culture” of the medical profession); Galarza v. Ochsner Health Sys., Inc., No. 12-722-JJB-RLB, 2014 WL 1431708, at \*5 (M.D. La. Apr. 14, 2014) (dismissing ADA claim by female employee with cancer who requested a voice recorder to assist with chemotherapy-related memory issues because she failed to complain about the shortcomings of the phone voice-recording function that the employer provided instead, which made her responsible for the interactive process breakdown).

250. Galarza, 2014 WL 1431708, at \*5.

251. *Id.*

252. *Id.*

253. Wallace, 48 F. Supp. 3d at 1156, 1162–65.

254. *Id.*

they try to access accommodations through the ADA's interactive process.<sup>255</sup> Many of the women interviewed reported covering and self-accommodating their disabilities to "downplay[] their differences" and "avoid drawing attention to themselves."<sup>256</sup> They believed that requesting an accommodation would be viewed as "admitting to a flaw," and they wanted to avoid both "the shame of difference" and "the stigma of asking for accommodations."<sup>257</sup> Many women attributed their concerns to the masculine culture of the legal profession, in which attorneys must present "bravado, strength, stamina, [and] endurance" and are expected to "hide imperfections in themselves and their work."<sup>258</sup> In that work environment, requesting an accommodation is an admission of shortcoming that undermines a woman's already questionable professional status.<sup>259</sup> The pressure on women attorneys to pass as nondisabled is "intensely felt and tangible" and greatly increases their workplace stress.<sup>260</sup> Many of these women also doubted that their employers would provide the specific accommodations they needed, so they chose self-accommodation—even at significant personal cost—to have more control over designing the best accommodation for their needs.<sup>261</sup>

This study highlights the fundamental problem with the ADA's approach, which had the potential to embody what Professor Ruth O'Brien has called "an ethic of care," but has instead adopted "an ethic of rights."<sup>262</sup> An ethic of care would embody feminist principles by recognizing the universal nature of human vulnerability and therefore assuming workplace mutability as the norm.<sup>263</sup> An ethic of rights, by contrast, requires one individual to affirmatively assert and defend a claim that is contested by another.<sup>264</sup> While an ethic of care would require a conversation among equals to jointly identify the most

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255. Basas, *supra* note 10, at 40–46.

256. *Id.* at 38–39, 83.

257. *Id.* at 85.

258. *Id.* at 97; *see also id.* (explaining why a woman attorney with a disability will not want to "out herself as having an issue with surviving in the workforce").

259. *See, e.g., id.* at 38–39, 85, 91–92 (describing the pressure that women attorneys with disabilities feel "to conform to masculine approaches" to retain "professional recognition as equals").

260. *Id.* at 56.

261. *Id.* at 88 (finding that many women attorneys with disabilities self-accommodate "to maintain a semblance of control over the accommodations themselves—to determine the provider or source and to configure the accommodation to meet their specific needs"); *see also* Galarza v. Ochsner Health Sys., Inc., No. 12-722-JJB-RLB, 2014 WL 1431708, at \*4 (M.D. La. Apr. 14, 2014) (citing 29 C.F.R. pt. 1630 app. § 1630.9) (holding that the ADA does not provide a right to "the employee's preferred accommodation," or to "the 'best' accommodation possible," and that the employer "may choose the accommodation that is cheaper and easier for it to provide" (internal quotation marks omitted)).

262. O'Brien, *Subversive Act*, *supra* note 231, at 56–58.

263. *See id.* at 55–56; Conejo, *supra* note 25, at 25 (explaining how a feminist approach to disability studies would "acknowledg[e] interdependency and vulnerability as an intrinsic human trait," which would "shift[] the focus from specific to universal claims").

264. *See* O'Brien, *Subversive Act*, *supra* note 231, at 58–59.

effective workplace design for each individual employee,<sup>265</sup> employers and courts have actively limited access to ADA accommodations by instead creating an adversarial, rights-claiming regime. The ADA's rights-based interactive process systematically includes and advantages some, but excludes and disadvantages others—particularly “those who do not have the economic or social power, or perhaps even the inclination, to wield their rights against the claims of others.”<sup>266</sup> Unlike an ethic of care, an ethic of rights ignores both the gender stereotypes that are triggered by the act of asserting rights and the gendered results of an adversarial, rights-claiming interaction between individuals with unequal bargaining power.

To the extent that critics have recognized the masculine norms embedded in the interactive process, the general response has not been to question the ADA's rights-based approach, but instead to offer women assistance to overcome their purportedly deficient negotiation skills. For example, commentators have suggested that women with disabilities participate in various forms of assertiveness training to help them become better self-advocates.<sup>267</sup> This response, however, doubly burdens women instead of addressing the source of their intersecting disadvantage.

To work more effectively for all individuals with disabilities, the ADA's process for accessing accommodations must be redesigned to incentivize joint problem-solving so that employees are not positioned as “advancing a unique adversarial request.”<sup>268</sup> This may require using an external intermediary, such as the EEOC's mediation process, or expanding the use of expert advice services that recommend accommodations based on information gathered from both the employer and the employee.<sup>269</sup> Congress should also reframe the ADA

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265. See *id.*; see also O'Brien, *Other Voices*, *supra* note 231, at 1532, 1548 (describing the potential of the ADA's interactive process to empower employees to “change the male-dominated workplace culture” by reducing employers' “monopoly power over setting workplace rules and regulations”).

266. See O'Brien, *Subversive Act*, *supra* note 231, at 58 (quoting Francis Carleton & Jennifer Nutt Carleton, *An Ethic of Care and the Hazardous Workplace*, 10 WIS. WOMEN'S L.J. 283, 289 (1995)).

267. See Schur, *supra* note 36, at 255 (describing literature that responds to the ADA's deficiencies by suggesting “programs to empower women with disabilities and help them become advocates for themselves,” such as “assertiveness training programs”). Commentators have taken a similar approach to addressing the gender pay gap: marketing self-help books to women to help them overcome their purportedly deficient wage negotiation skills. See Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, 91 DENV. U. L. REV. 893, 903–07 (2014).

268. See Stein et al., *supra* note 229, at 755.

269. See, e.g., *About JAN*, JOB ACCOMM. NETWORK, <http://askjan.org/links/about.htm> [<https://perma.cc/D4FW-33QQ>] (last visited Feb. 26, 2017) (describing itself as “the leading source of free, expert, and confidential guidance on workplace accommodations,” which provides “practical solutions that benefit both employer and employee”); EMPLOYER ASSISTANCE AND RESOURCE NETWORK ON DISABILITY INCLUSION (EARN), <http://www.askearn.org/about/what-we-do/> [<https://perma.cc/P29L-F2RE>] (last visited March 7, 2017) (providing employers education, resources, training, and individualized technical assistance to help “recruit, hire, retain and advance qualified

to provide incentives for joint resolution, rather than rewarding employers for creating hostile environments that cause employees to fear participation or to disengage from the adversarial process—reactions that courts then use to dismiss the employees’ ADA claims because the employees failed to meet their interactive process obligations. These procedural prescriptions flow from envisioning the ADA through a care-based lens rather than a rights-based lens, and they could move disability rights law closer to the universal accommodation ideal that some longtime disability scholars and activists believe is necessary to fully implement the social model of disability.<sup>270</sup> While that ideal remains distant, using a gendered understanding of disability to help shift the ADA from its existing rights-based ethic toward a feminist care-based ethic would be an important first step.

#### CONCLUSION

The social model of disability, upon which the ADA is founded, was a major step forward for disability rights. The social model empowered antidiscrimination law to hold employers responsible for the limiting aspects of their workplace design by replacing the medical model’s view of disability as an inherent personal deficiency with the understanding that disability actually results from the environment with which one’s impairment interacts. The limitations imposed upon impairments result not only from physical, structural, and organizational aspects of the environment, but from social aspects as well. Implementing the social model of disability thus requires attention to the complex ways that other identity-based stereotypes, biases, and oppressions affect how impairments are constructed, experienced, and perceived. Allowing disability to assume a master status role in the lives of individuals with intersecting social identities renders those individuals socially, politically, and legally invisible. For individuals with intersectional subordinate group identities, “[t]he struggle to be recognized or represented is the most distinctive form of oppression.”<sup>271</sup>

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individuals with disabilities”); PARTNERSHIP ON EMPLOYMENT & ACCESSIBLE TECHNOLOGY, <http://www.peatworks.org> [<https://perma.cc/WP8J-6M4Q>] (last visited March 7, 2017) (providing resources to help employers adopt “accessible technology in the workplace” to expand access for workers with disabilities).

270. See Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 108–10 (2016) (advocating for a right to universal workplace accommodation to reduce the “special treatment stigma” that currently attaches to accommodated workers); Stein et al., *supra* note 229 (proposing a policy of universal accommodations); see also Asch, *supra* note 25, at 403–04 (envisioning a universal accommodation mandate by suggesting that “[w]hen individuals complained that they were barred from . . . [a] job because they were deemed outside the range of people the organization could accommodate, society could then decide on a case-by-case basis whether it wished the environment to change or wished to permit the exclusion of individuals because the environment found their characteristics unacceptable”).

271. Purdie-Vaughns & Eibach, *supra* note 14, at 383.

This Essay contributes to the larger objective of challenging a unitary view of disability discrimination by exploring the complex interactions between disability and gender. Insufficient attention to these interactions has imposed serious social and economic consequences on women with disabilities and limited the reach and effectiveness of the ADA. Ignoring gender has enabled masculine norms to become embedded in the ADA's substantive and procedural approaches to defining and remedying disability discrimination in the workplace. Attending to gender to disrupt these entrenched masculine norms will require conscious and sustained effort by judges, medical professionals, and employment decision makers.

Gendering disability is an initial step in the broader feminist project of fully accounting for individual difference by infusing antidiscrimination law with an ethic of care.<sup>272</sup> That broader project will require similar exploration of how other social identities—including race, ethnicity, religion, sexual orientation, age, and class—affect the construction of disability.<sup>273</sup> Initial research suggests that impairments also interact in complex ways with these social statuses, which are not always experienced simultaneously or in a simple hierarchical or additive fashion.<sup>274</sup> Yet just like women with disabilities, other individuals with disabilities who share multiple subordinate statuses find themselves ignored and unrepresented by their respective constituency groups and movements.<sup>275</sup> Understanding the unique forms of oppression experienced

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272. See O'Brien, *Subversive Act*, *supra* note 231, at 55–56; see also O'Brien, *Other Voices*, *supra* note 231, at 1529 (describing the need for the ADA to “take into account human need” and “compel employers to pay heed to the individuality of their employees”); Wendell, *supra* note 59, at 105 (describing a “feminist theory of disability” as one that “takes adequate account of our differences”); cf. Stein et al., *supra* note 229 (prosing a universal accommodation mandate).

273. See Asch & Fine, *supra* note 8, at 3 (explaining how disability research tends not only “to assume the irrelevance of” gender, but also to assume that disability “eclipses” other “dimensions of social experience,” including “race, ethnicity, sexual orientation, [and] social class”); Barnartt, *supra* note 9, at 18 (stating that more research “relating to disability and the many other statuses with which it interacts is needed”); Basas, *supra* note 10, at 47 (noting that researchers “assum[e] disability’s primacy” over not only gender, but also race, sexual orientation, and other forms of identity); O’Toole, *supra* note 21, at 296–97 (criticizing disability studies programs for ignoring both the intersection between disability and gender and the intersection between disability and age, race, and sexual orientation); Purdie-Vaughns & Eibach, *supra* note 14, at 381 (explaining how the experiences of women as well as “nonwhite [and] gay/lesbian disabled persons” are “marginalized in cultural representations of disability”); Thorne et al., *supra* note 12, at 2 (criticizing disability research for ignoring gender and for taking “a posture of . . . race and social class neutrality”); Vernon, *supra* note 11, at 390–91 (noting that in disability textbooks, issues of gender as well as “race, . . . class, sexuality and age” are typically “omitted as irrelevant to disabled people’s lives”); Wendell, *supra* note 59, at 105 (urging researchers to learn more about “how experiences of disability and the social oppression of the disabled interact with sexism, racism and class oppression”).

274. Vernon, *supra* note 11, at 387–88, 394 (noting that research indicates that disability interacts in complex ways not only with gender but also with “race . . . sexuality, age and class,” which “are not invariably experienced at the same time on a daily basis”).

275. See *id.* at 396 (challenging the “assumption that the other experiences of disabled people, such as racism, sexism, and heterosexism, are taken care of by other social movements,” and arguing that “disabled people, because of the stigma of being impaired, are also excluded from the movements of race, gender, and sexuality”).



by individuals with both disabilities and other subordinate statuses will empower disability rights to recognize, represent, and serve a much broader group of individuals within its community.