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ARTICLES

A COLLECTIVE GOOD: DISABILITY DIVERSITY AS A VALUE IN PUBLIC SECTOR COLLECTIVE BARGAINING AGREEMENTS

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INTRODUCTION

Public sector unions have been objects of fascination and ire recently, largely due to ideological differences that have emerged as state and local economies have plummeted.[1] Unions, such as the American Federation of State, County, and Municipal Employees ("AFSCME"), representing public workers' interests, have been harshly criticized for promoting perhaps unrealistic, fiscally unsound target goals for compensation and benefits.[2]

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[1] Attacks on public sector unions have come from as many directions as the strategies for defending them. *See, e.g.*, Editorial, *Congress vs. the NLRB*, WALL ST. J., May 4, 2011, at A16 (arguing that the NLRB and union contracts are preventing states from enacting right-to-work legislation, leaving Congress as the only body that can act). For an example of defenses of unionization, see *Public Workers, All Unions Under Fierce Attack from New GOP State Leaders*, COMM. WORKERS OF AM. (Jan 13, 2011), http://www.cwa-union.org/news/entry/public_workers_all_unions_under_fierce_attack_from_new_gop_state_leaders/.

[2] *See, e.g.*, Chris Freind, *Union Dues Funnel Millions in Tax Dollars to Democrats, Critics Say*, NEWSMAX (Oct. 26, 2010, 6:27 PM), http://www.newsmax.com/Newsfront/Unions-Millions-Democrats-taxes/2010/10/26/id

Meanwhile, people with disabilities, like other minority workers, are simply trying to find stable employment, within or outside union settings.[3] This tension between collective labor rights and individual workers' rights is ongoing. Lost in this larger current debate about economic stability and the effects of unionization, however, is what unionized public sector employment can do for promoting workplace diversity, equity, and flexibility among struggling, minority workers.

The long-term arc of the story of unions—including public sector unions—is importing voice and other democratic values into workplaces and, more recently, increasing employment access and equity for marginalized workers.[4] While unions historically proved to be a barrier to minority workforce participation, particularly among African Americans, the last twenty years have demonstrated a shift. While the percentage of the private sector workforce represented by unions has been declining, the percentage of public sector workers, particularly minorities, represented by unions has been on the rise.[5] Though there can be a tradeoff in salary in comparison to private sector

/374970 (arguing that, while AFSCME represents only five percent of the nation's workforce, it manages to funnel $87.5 million to Democratic candidates, particularly in contested mid-term elections); *Wisconsin Gov. Scott Walker Says Milwaukee County Paid Employees over $170,000 To Work for Their Unions*, POLITIFACT (May 8, 2011, 9:00 AM), http://www.politifact.com/wisconsin/statements/2011/may/08/scott-walker/wisconsin-gov-scott-walker-says-milwaukee-county-p/ (providing Governor Walker's statement that union leaders received over $170,000 in wages for solely working on union business and performing no actual work for the county). In response, in late 2010, AFSCME launched a campaign against public union criticism. *See* Jeff Mapes, *AFSCME Launches Campaign Against Union Critics*, OR. LIVE BLOG (Dec. 2, 2010, 5:24 PM), http://blog.oregonlive.com/mapesonpolitics/2010/12/afscme_launches_national_campa.html.

[3] *See* H. Stephen Kaye, *The Impact of the 2007–09 Recession on Workers with Disabilities*, 133 MONTHLY LAB. REV. 19, 19, 27 (2010).

[4] *See* Wilma B. Liebman, *Labor Law During Hard Times: Challenges on the 75th Anniversary of the National Labor Relations Act*, 28 HOFSTRA LAB. & EMP. L.J. 1, 6 (2010) ("Every day, we read in the cases that come before us about working people who, despite the odds, despite the risks and the obstacles, join together to improve life on the job."); Susan Woods, *Unions, People and Diversity: Building Solidarity Across a Diverse Membership*, 7 DIVERSITY FACTOR 38, 39–40 (1998), *available at* http://digitalcommons.ilr.cornell.edu/articles/32 (describing how unions increase diversity in the workforce and provide strategies for building collective action).

[5] *See* MICHAEL D. YATES, WHY UNIONS MATTER 189 (2d ed. 2009) (union density in the public sector is around thirty-six percent).

jobs,[6] minority workers, including workers with disabilities, have been drawn to public sector unionized jobs because of perceptions of job stability, attractive retirement plans, and comprehensive health benefits.

Minority workers represented by unions enjoy better work conditions than their non-unionized counterparts, both in public and private sector settings.[7] Increasing minority recruitment and retention in unions of all kinds has been an objective of the labor movement. Outreach to marginalized workers continues to be an important goal for public sector unions, such as AFSCME.[8] But what do the collective bargaining agreements ("CBAs") in this setting reflect about the values and conditions of those workplaces when disability is used as an empirical lens for a broader study of workplace equality issues? Broadly speaking, how is the law operationalized within the agreements? This inquiry is the first of its kind; no one has done this work before or has had the same research access to the AFSCME database. However, it is informed critically by, and builds on, existing law and society scholarship about how law is interpreted by and reshaped within organizations by employers, employees, workplace leaders, and other actors, and becomes as important and perhaps, even more nuanced, as the law itself.[9]

This Article uses empirical methods to examine how CBAs frame disability and what those conceptual models reveal about approaches to health status and diversity in public sector unionized workplaces. This study uses a random sample of 100

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[6] *See, e.g.*, JEFFREY H. KEEFE, ECON. POLICY INST., ARE NEW JERSEY PUBLIC EMPLOYEES OVERPAID? 1 (2010), *available at* http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/NJ%20Public%20Employee%20Comp.pdf (arguing that public employees are not overpaid and may, in fact, be undercompensated).

[7] *See* YATES, *supra* note 5, at 154–55, 164.

[8] For examples of union platforms with regard to diversity and disability, see *AFSCME Members' Bill of Rights*, AFSCME, http://www.afscme.org/members/member-resources/member-rights/afscme-members-bill-of-rights (last visited Mar. 3, 2014) ("No person otherwise eligible for membership in this union shall be denied membership, on a basis of unqualified equality, because of race, creed, color, national origin, sex, age, sexual orientation, disability, or political belief."); Article II, § 4 of the AFL-CIO Constitution, AFL-CIO, http://www.aflcio.org/About/Exec-Council/AFL-CIO-Constitution/II.-Objects-and-Principles (last visited Sept. 18, 2013) ("To encourage all workers without regard to race, creed, color, sex, national origin, religion, age, disability or sexual orientation to share equally in the full benefits of union organization.").

[9] *See* discussion *infra* Part I.B.

CBAs in AFSCME's database of over 7,000 current contracts. AFSCME's comprehensive database, which was readily available, allowed for a look at public sector unionized settings to which people with disabilities may gravitate as they seek stable benefits and the strengths of collective voice. AFSCME's agreements not only provide insights into what values are important to employers, unions, and workers, but also how disability and health status are regarded by federal, state, and local governments.

The contracts have been coded qualitatively and systemically, using the tools of content analysis, for how they include and discuss disability-relevant provisions.[10] Very few scholars have examined how the labor movement could increase the independence of workers with disabilities, beyond supporting their existing members that are injured at work.[11] Stripped to their basic function, CBAs provide the "law of the shop" for everything from job placement to grievance handling. But equally important is their expressive value in setting the tone for the workplace.[12] If the concerns of workers with disabilities are not captured within these contracts, how does that affect their success as workers, even when no discrimination or conflict over accommodation occurs?

This study is less concerned with basic contract terms, such as insurance, workers' compensation, and Family and Medical Leave Act ("FMLA") policies, than with how the concerns of workers with disabilities have been anticipated and provided for

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[10] THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 3–4 (Peter Cane & Herbert M. Kritzer eds., 2010).

[11] Ros Harvey, *Public Services International Inspired by the Need To Nurture Diversity in Society and To Oppose Any Form of Discrimination*, *in* TRADE UNION ACTION: INTEGRATING DISABLED PERSONS INTO WORKING LIFE 45, 52 (1998), *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106589.pdf; Paul L. Nevin, Note, *"No Longer Caught in the Middle?":* Barnett *Seniority System Ruling Eliminates Managements' Dilemma with ADA Reasonable Accommodation*, 41 BRANDEIS L.J. 199, 222 (2002) (noting that the Supreme Court's *Barnett* ruling allows for seniority to trump requested job reassignments for workers with disabilities and may leave unionized disabled workers in precarious positions).

[12] *See* Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 258 (2005) ("The agreements that emerge from collective bargaining resemble legislation by resolving disputes on a broader and more foreword-looking [sic] basis than individual litigation."); *see also* Harvey, *supra* note 11 (outlining how CBAs can protect disabled workers and encourage employers to hire more people with disabilities).

in the agreements. This focus provides information as to whether these employees are viewed as valued members of the workforce and outlines the conceptual models of disability and their implications. Here, then, the CBAs that emerge from labor law inform and interact with how disability and health status are perceived and crystallized, regardless of whether those interpretations are in line with the Americans with Disabilities Act ("ADA").[13]

These CBAs form a spectrum of approaches to disability—the "Industrialist," the "Community Stakeholder," the "Compliance Officer," and the "Idealist."[14] The Industrialist takes an individualist, medicalized approach to disability, while the Community Stakeholder places disability in the context of community concerns about the impairment and its implications for non-disabled workers. The Compliance Officer is a legalistic approach to disability, and the Idealist is a corrective civil rights framing of the process for exercising civil rights and conceiving of what the law should mean. These models also track, interestingly, but not tidily, historical approaches to disability in society—from the medical to the sociopolitical perspectives on disability as an experience. Part I of this Article explains why disability is a helpful lens and reviews the theoretical underpinnings of the roles of contracts, such as CBAs, in setting workplace dynamics and generating "informal laws."[15] Part II

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[13] Labor law and disability rights law can shape one another in profound, workplace-shifting ways. *See, e.g.*, Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1265 (2003) ("Arguably, if American society wishes to provide further workplace benefits and protections to people with a very broad range of mental and physical limitations, it should do so through expansion of labor laws, such as the FMLA and workers' compensation statutes."); Ravi A. Malhotra, *Evaluating the Relevance of Critical Schools of Law and Economics for the Equality Rights of Workers with Disabilities in Canada and the United States*, 45 ALTA. L. REV. 935, 944–45 (2008) (describing how the elements of workplace flexibility, workers' control, and lifespan attentiveness from the disability rights movement have shaped labor).

[14] I use "Idealist" here not as a pejorative term but to recognize that some of the corrective vision that it embodies has not been fully recognized and has been critiqued as being elusive and identity focused.

[15] *See* Liebman, *supra* note 4, at 6–7 (arguing that CBAs reflect a democratic process that is essential to a fair economy and the balancing of power between capital and labor); *see also, e.g.*, Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 26–28 (2005) (examining the social pressures and workplace norms that prevent workers from exercising their rights to FMLA leave, even in unionized settings).

describes the methodology used in this study of CBAs. Part III is a taxonomy of the models of disability-framing and workplace dynamics that the CBAs reflect.[16] Part IV presents a new framework for envisioning how the corrective, civil rights vision of the Idealist model might transform workplaces for all workers—marginalized or empowered, public or private—and, therefore, transform labor and employment law. In other words, these models speak to general workplace issues, such as the responsiveness of unions and employers to changing dynamics in American families and communities[17] and in providing receptive, representative, and flexible workplaces.

I. THE WORK OF CONTRACTS IN WORKPLACE DYNAMICS

A. *Disability as a Window into the Workplace*

Disability is an interesting and valuable focus because of what it reveals about the most marginalized workers in the economy, and perhaps, in unions themselves.[18] Workers with disabilities cut across all gender and race lines. Their 2011 unemployment rate is 15.0%, compared with 8.7% for non-

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[16] *See generally* Cynthia Estlund, *A Return to Governance in the Law of the Workplace (and the Question of Worker Participation)* (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-39, 2010) (constructing a taxonomy of workplace democratic governance). Estlund, in contrast to this project, posits that the future of workplace governance may not be in CBAs and unions, but in other forms of collective representation. *See generally id.*

[17] *See* Susan Sturm, Response, *Designing the Architecture for Integrating Accommodation: An Institutionalist Commentary*, 157 U. PA. L. REV. ONLINE 11, 11–16 (2008), http://www.pennlawreview.com/responses/index.php?id=51 (showing that the principle of reasonable accommodation can shift work culture for non-disabled workers too, by advancing individual inquiry and responsiveness to the needs of all employees); Mindy Toran, *Special Report; Courts, Employers Still at Odds over Application of ADA in the Workplace*, WORKER'S COMPENSATION REP. (LRP Publ'ns., Palm Beach Gardens, Fla.), Apr. 2008 ("Employers that contacted the Job Accommodation Network reported numerous benefits after making accommodations for employees with disabilities. The most frequently mentioned direct benefits were: the accommodation allowed the company to retain a qualified employee; the accommodation increased worker productivity; and the accommodation eliminated the costs of training a new employee. Indirect benefits included improved interactions with coworkers and increased company morale and productivity. In addition, a significant number of employers said the accommodation helped improve workplace safety.").

[18] *See generally* Armantine M. Smith, *Persons with Disabilities as a Social and Economic Underclass*, 12 KAN. J.L. & PUB. POL'Y 13 (2002) (highlighting how disabled people in the workplace have been socially and economically stigmatized).

disabled people.[19] However, these statistics do not give the complete picture because unemployment rates are based on people who have lost jobs and are actively seeking jobs. Only 20.9% of people with disabilities are in the labor force, compared to 69.7% of people without disabilities.[20] Even after the enactment of the ADA and the passage of two decades for the employment provisions of that civil rights legislation to take hold, these workers are largely unemployed and underemployed. When they do find work, it is often below pay that is commensurate with their skills.[21] The overall state of the employment of disabled people is, at best, precarious.[22] Workers with disabilities are the "last hired and first fired," especially during troubled economic times.[23] Indeed, embedded bias and stereotypes surrounding disability have proven to be greater obstacles to economic self-sufficiency for people with disabilities than underlying impairments.[24]

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[19] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-13-1141, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2012, at 4 (2013), *available at* http://www.bls.gov/news.release/pdf/disabl.pdf.

[20] *Id.*

[21] Workers with disabilities continue to be undervalued and underemployed. *See* Conference, *Lost in Transition: The If/When/How of Disclosing to an Employer*, 18 AM. U. J. GENDER SOC. POL'Y & L. 41, 64 (2009) ("We know that often, people with disabilities are not only unemployed, but they're underemployed. There are so many people out there who are so educated and not making enough money, not being promoted up to the same level as people without disabilities."); Toran, *supra* note 17 (discussing that since the passage of the ADA "employment rates have increased among people with severe functional limitations, [but] the overall employment rate of people with disabilities remains significantly lower—and unemployment rates three times higher—than those of people without disabilities").

[22] *See* Harvey, *supra* note 11, at 47 (during difficult economic times, employers are least likely to hire people with disabilities); Robert D. Wilton, *From Flexibility to Accommodation? Disabled People and the Reinvention of Paid Work*, 29 TRANSACTIONS INST. BRITISH GEOGRAPHERS 420, 420 (2004) (discussing how disabled workers' jobs are even more at risk in the current economy because of the challenge of accommodations in a fast-paced environment); Marjorie L. Baldwin & Chung Choe, *New Estimates of Disability-Related Wage Discrimination with Controls for Job Demands* 24–26 (Ariz. State Univ., Working Paper No. 2010-14, 2010) (finding that workers with disabilities are often penalized for impairments or perceived impairments that have nothing to do with the job itself).

[23] Kaye, *supra* note 3, at 19.

[24] *See* Marc Dupont, *The Role of Trade Unions in Promoting the Vocational Integration of Persons with Disabilities: ILO Policy Appraisal and Outlook*, *in* TRADE UNION ACTION: INTEGRATING DISABLED PERSONS INTO WORKING LIFE 1, 1 (1998), *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_106589.pdf ("Because it is the means of generating income, because it gives the jobholder a social purpose and role (however minimal),

Workers with disabilities disproportionately seek state and federal employment, but this attraction, if not anticipated for and realized in collective bargaining, may prove to be disastrous.[25] Historically, the federal government, in particular, has been a shelter for workers with disabilities because of its relatively strong accommodation provisions, civil service protections, quality of health insurance, and flexible workplace policies.[26] Given that collective bargaining provides some of these same benefits, workers with disabilities may have additional incentives to seek public or private sector unionized jobs that assure respect and voice.[27]

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), and AFSCME under its umbrella, have incorporated disability issues into their public agendas, perhaps recognizing that disabled workers are an underclass but one that might be particularly potent to tap for

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employment is central to considerations of personal independence, self-edification and self-esteem."); Wilton, *supra* note 22, at 429 (discussing additional stigma associated with being viewed as less productive when people with disabilities are unable to find jobs).

[25] While no statistics exist on the percentage of disabled workers in public sector unions, other evidence suggests that they would be more likely to be in public sector work (and perhaps, public sector unions) over private sector work. *See, e.g.*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-11-0063, UNION MEMBERS—2010 (2011), *available at* http://www.bls.gov/news.release/archives/union2_01212011.htm ("The union membership rate for public sector workers (36.2 percent) was substantially higher than the rate for private sector workers (6.9 percent)."); *see also* Ezra Zubrow & Marcia Rioux, *Disability, Marginalization, Empowerment, and GIS*, NAT'L CENTER FOR GEOGRAPHIC INFO. & ANALYSIS, http://www.ncgia.ucsb.edu/varenius/ppgis/papers/zubrow.pdf (last visited Mar. 23, 2014) (discussing how governmental policy can create employment "ghettos" of the majority of disabled workers).

[26] *See* OFFICE OF DISABILITY EMP'T POLICY, U.S. DEP'T OF LABOR, SURVEY OF EMPLOYER PERSPECTIVES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES: TECHNICAL REPORT 9 (2008) ("Employers in the public administration sector are much more likely to employ people with disabilities (42.7 percent) than employers in service-producing (18.9 percent) and goods producing industries (17.5 percent).").

[27] *See* Local 2989, *Why Do I Need a Union?*, AFSCME, http://laborweb.afscme.org/sites/IA_C_61/IA_C_61_L_2989/index.cfm?action=article&articleID=2d3aa400-421c-4384-9367-54c6d52459de (last visited Mar. 3, 2014) ("Union workers are more likely than their non-union counterparts to receive health care and pension benefits. More than eight out of ten union members are covered by health insurance and have a pension plan—versus fewer than half of those not in a union."); Lawrence Mishel & Ross Eisenbrey, *Union Declines Hurt All Workers*, ECON. POL'Y INST. (Dec. 12, 2005), http://www.epi.org/publications/entry/webfeatures_viewpoints_union_decline/ ("Unionized workers are also much likelier to receive paid leave, health insurance, or an employer-provided pension plan.").

the recruitment and retention of skilled workers.[28] It makes sense for the labor movement to be actively involved in disability issues, which may span anything from compensation to insurance, harassment to architectural barriers. Workers with disabilities already exist within their ranks and may face challenges arising out of or connected with disabilities. Among those problems may be bias, within unionized settings, by coworkers, employers, and the union itself.[29] Recruitment efforts will not be effective if workers with disabilities perceive that workplace issues are neither crafted in disability-sensitive and aware terms nor implemented in accord with that vision. Becoming a member of a union is not synonymous with having one's concerns included in a prominent position in a union's agenda or having the law protecting one's rights, such as the ADA, accurately captured by and expressed in the CBA.[30]

B. Contracts and Workplace Dynamics as Law

CBAs and workplace dynamics go hand-in-hand. The contracts reflect the influence of the law, but they can also serve to shape how that law is defined in the relations between workers, unions, and employers.[31] These documents become windows into what is going on in the bargaining process and the workplace itself, and what mechanisms workers can expect to have in making their concerns heard and valued.

Richard Freeman and James Medoff argued in the seminal work, *What Do Unions Do?*, that unions perform both "monopolistic" and "voice" functions.[32] That is, unions use the

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[28] *See* Elwin Green, *AFL-CIO Resolutions Give Boost to Inclusion*, PITTSBURGH POST-GAZETTE (Sept. 17, 2009, 12:00 AM), http://old.post-gazette.com/pg/09260/998620-28.stm.

[29] *See* Wilton, *supra* note 22, at 423 ("[N]on-disabled workers may interpret disabled counterparts as either 'problem workers' who do not meet organizational standards or individuals receiving accommodation as 'special treatment'. Neither characterization lends itself to the fostering of solidarity or to an understanding of how employment relationships and labour processes might be disabling.").

[30] Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. RACE & L. 369, 387 (2010); *see* Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649, 653–55 (1983) (noting that in the 1980s women and minorities were unable to have adequate voice in CBAs because they were not fully represented in unions and union leadership).

[31] *See* discussion *infra* Part III.A.

[32] RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 6–8 (1984).

monopolistic power of the collective as leverage for higher wages and benefits—and also serve as conduits for expressing employees' interests, providing a more effective voice for those interests than individual expressions can.[33] The bilateral process of collective bargaining involves the collective power dynamics of the employer and the union. The union's power is affected by the majority and minority communities of employees it represents.[34] Unionized workplaces are governed by the rules set out in their collective bargaining agreements. Thus, the content of those agreements and their enforcement affect the dynamics of the workplace, as well as equal protection, due process, and other justice issues.

Through their extensive research surrounding employment norms and the creation of informal legal systems within workplaces, law and society scholars such as Lauren Edelman have demonstrated how formalized legal rules are or are not recognized in the workplace, and how informal rules become codified "laws" that are vigorously applied at work.[35] These informal laws may supersede, contradict, or expand what law actually provides.[36] They reflect not only the psychology and

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[33] *See id.*

[34] *See* Matthew W. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 274 (1980) (noting that in public sector unions, the Constitution and its due process provisions, and a duty of fair representation, serve as safeguards for protecting, and sometimes constraining, individual rights and minority interests); Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 563–64 (1945) (providing a historical discussion of majority rule in CBAs and the need to give minority workers a voice); Joseph D. Richardson, Comment, *In Name Only: Employee Participation Programs and Delegated Managerial Authority After* Crown Cork & Seal, 62 ADMIN. L. REV. 871, 872 (2010) (noting the principle of freedom of restraint that is at the core of effective workplace cooperation and embodied in CBAs).

[35] *See generally* Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992) [hereinafter Edelman, *Legal Ambiguity*]; Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941 (1999) [hereinafter Edelman & Suchman, *When the "Haves" Hold Court*]; Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993) [hereinafter Edelman et al., *Internal Dispute Resolution*].

[36] *See generally* Edelman, *Legal Ambiguity*, *supra* note 35; Edelman & Suchman, *When the "Haves" Hold Court*, *supra* note 35; Edelman et al., *Internal Dispute Resolution*, *supra* note 35.

culture of an organization, but also the importance of context setting and the challenges of the interpretation and daily application of the law.[37]

Law and society scholars have largely looked at nonunionized or "unorganized" workplaces,[38] while labor scholars have traditionally drawn on economic theory and quantitative analysis of employment rates, compensation, job classifications, and job exit in analyzing collective bargaining and unionization.[39] The symbiotic merging of law and society scholarship with empiricism focused on the content of the CBAs themselves remains an area of expansion, which this Article addresses.

II. METHODOLOGY

AFSCME represents over 1.6 million public and nonprofit employees. For this study, the organization was the best source of public sector CBAs because it collects its current contracts and maintains a centralized, password-protected database of over

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[37] *See generally* Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479 (1997).

[38] Recently, however, these camps have started to inform one another in more significant ways. *See* Charles B. Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant*, 27 HOFSTRA LAB. & EMP. L.J. 311, 316 (2010) (suggesting that the decline of unions has led to greater self-serving behavior across employment sectors); Nancy J. King, *Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces*, 40 AM. BUS. L.J. 827, 828 (2003) (discussing how the NLRA's provisions regarding investigations, workplace policies, and discipline—intended to protect union-represented employees—are spilling over to non-unionized settings); Katherine V.W. Stone, *A Labor Law for the Digital Era: The Future of Labor and Employment Law in the United States*, *in* LABOR AND EMPLOYMENT LAW AND ECONOMICS 689, 689 (Kenneth G. Dau-Schmidt et al. eds., 2d ed. 2009) (connecting the decline of unions to a negative effect on employment law but arguing that the declines in both labor and employment laws are linked to a failure to adequately represent "vulnerable" employees).

[39] *See, e.g.*, THERESA J. DEVINE & NICHOLAS M. KIEFER, EMPIRICAL LABOR ECONOMICS: THE SEARCH APPROACH 303 (1991) (analyzing the connections between the job search process and unionization from the perspective of efficiency); BARRY T. HIRSCH, LABOR UNIONS AND THE ECONOMIC PERFORMANCE OF FIRMS 5 (1991) (suggesting that a possible explanation of profitability decline in unionized settings is less capital spent on research and development and physical resources); TRADE UNIONS: RESURGENCE OR DEMISE? 73 (Sue Fernie & David Metcalf eds., 2005) (examining the interplay of job exit and union decline); Peter Gahan, *Trade Unions as Regulators: Theoretical and Empirical Perspectives*, *in* LABOUR LAW AND LABOUR MARKET REGULATION: ESSAYS ON THE CONSTRUCTION, CONSTITUTION AND REGULATION OF LABOUR MARKETS AND WORK RELATIONSHIPS 261, 263 (Christoper Arup et al. eds., 2006) (describing labor unions as regulators of the market and economic agents).

7,700 of them.[40] While access to unions' CBAs is generally reserved for the leadership and membership,[41] I was granted access as a researcher. I am the only outside legal researcher with access to the database at this time, making the study of these contracts both novel and potentially helpful to legal scholarship and AFSCME itself.

The primary day-to-day function of the database is to provide information to other members and to AFSCME itself about the content of contracts.[42] These contracts cover a range of dates, and this project includes agreements from 1999 to 2010. The local union that is a party to the contract submits the contract to AFSCME headquarters to be included in its current contracts database. The contracts are then scanned, catalogued, and entered into the database as full-text PDFs.[43] The database provides limited search capabilities, making Boolean keyword searches difficult, but searches by union sector, state, local union number, and other descriptors manageable.

This study is based on a random sample of 100 CBAs from the database, using a random number generator to determine which contracts to download and include in the study.[44] Through the random sample, I was able to retrieve a collection of contracts from across the public employment sector, representing a range of years of coverage, bargaining units, job types, local unions, and geographic locations. According to methodological standards, sample size is typically a matter of judgment for this kind of research.[45] Further, the goals of qualitative research are to reach in-depth analyses of the specific dataset, not to make generalizable conclusions.[46] The primary goals were to avoid

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[40] AFSCME bills itself as the "nation's largest and fastest growing public services employees union." *About AFSCME*, AFSCME, http://www.afscme.org/union/about (last visited Mar. 3, 2014). At the time of the survey—December 2010—the database had approximately 7,750 CBAs.

[41] Interview with William Wilkinson, Assistant Dir., AFSCME Dep't of Research & Collective Bargaining Servs. (May 2011).

[42] *Id.*

[43] *Id.*

[44] *See* ROBERT M. LAWLESS ET AL., EMPIRICAL METHODS IN LAW 128, 143–44 (2010) (discussing the use of a computerized random number generator). I took this sample in December 2010.

[45] *See* Margarete Sandelowski, *Sample Size in Qualitative Research*, 18 RES. NURSING & HEALTH 179, 183 (1995).

[46] *See* Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 926, 934–35 (Peter Cane &

downloading copies of the same contract, and to achieve, through the use of probability sampling, a fairly representative depiction of the contracts' approaches to disability-framing. The focus was to map models and any solutions and barriers that they might pose to disability diversity and broader workplace flexibility.[47]

I limited my year span to contracts with a start date between 1999 and 2010 to ensure that I was looking at a range of contemporaries with different start dates and durations. While sociological research suggests that disability awareness and acceptance have increased slightly over time, attitudinal barriers surrounding disability are still prevalent and powerful.[48] I was doubtful that any span of ten years would show dramatic reductions in attitudinal barriers.

After reading a sample of the contracts, I crafted a spreadsheet of coding variables. To capture potential variables that may not have been prominently present in my set of random collective bargaining agreements, but nonetheless existed in the database, I also looked at another set of 100 CBAs with the most disability-related hits. I used this set of CBAs to get a sense of what the most disability-active workplaces, at least in their discussion of disability issues, were doing. I did not treat these workplaces as models of behavior, but I did let them shape what I would look for and track in my sample.[49] I then examined the membership outreach and organizing platforms of AFSCME and the AFL-CIO on issues concerning disability. This additional set of materials included a discussion of "affinity groups"—groups of

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Herbert M. Kritzer eds., 2010). My goal for future projects is to continue to code the database.

[47] *See* LAWLESS ET AL., *supra* note 44, at 143 (supporting the use of probability sampling where each unit has the same chance of being selected into the sample).

[48] *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 429–30 (2000) (emphasizing that biases and negative attitudes toward disability can be more disabling of people with disabilities at work than impairments themselves); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-81SP, PARTICIPANT-IDENTIFIED LEADING PRACTICES THAT COULD INCREASE THE EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES IN THE FEDERAL WORKFORCE (2010) ("Participants said that the most significant barrier keeping people with disabilities from the workplace is attitudinal, which can include bias and low expectations for people with disabilities.").

[49] I allowed the agreements to inform what my categories should be and adjusted accordingly when new potential coding categories emerged. I then began to code in earnest and compared my coding of an initial set of CBAs to that done by an empirical research assistant. Once I had ensured that the coding results were consistent, I continued to code the remainder of the agreements on my own.

diverse employees that gather together for workplace support and brainstorming, for example—which did not turn out to be in my random sample of coded contracts.[50] The coded variables clustered around the four approaches described in this Article: Industrialist, Community Stakeholder, Compliance Officer, and Idealist. The tracked variables and their relationships to the models appear in Appendix A.

Determinations as to what was included in each category was not based on the existence of that category—for example, health insurance, FMLA leave, workers' compensation—but, rather, on how disability language—for example, disability, disabled, handicapped, or handicap—was expressed in that category. I both read and electronically searched through the documents for variables and disability language, such as "disability" and "handicap," using appropriate extenders, plural forms and word variations, and descriptors that might be coupled with disability language—for example, "special needs," "physical," "mental," "impairment," "disabled," "handicapped," "cripple." Again, the goal was to focus on the central question of this empirical study: How do CBAs construct, frame, and discuss disability? And what models or approaches to disability are present?[51] A different kind of study may have considered quality of health insurance, the extensiveness of sick-leave provisions, or the speed by which injured workers were reincorporated in the

[50] *See* Priscilla H. Douglas, *Affinity Groups: Catalyst for Inclusive Organizations*, 34 EMP. REL. TODAY 11, 12 (2008) ("Many companies are finding that these goals of diversity and inclusion can be nurtured and supported through their organizations' existing 'affinity groups'—communities within a corporation that are organized around the employees' similar circumstances and common goals.").

[51] For other examples of legal scholars studying models of workplaces, see generally Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006) (using empirical research to model how the workplace has as many, if not more, issues with racial discrimination as it has with gender discrimination); Wilma B. Liebman, Essay, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569 (2007) (providing a qualitative study of the changing workplace).

workforce.[52] The point is if they are not treated in respectful, informed ways, what hopes do employees with disabilities have for inclusion, retention, and promotion?[53]

This project lent itself to a qualitative-coding approach because of the research questions involved and the CBAs themselves. I chose a qualitative approach for several reasons. I did not begin the project with a specific hypothesis, but rather I allowed the text of the agreements to inform what models were most relevant. The agreements themselves yield little of interest that is quantifiable in the empirical sense. They, rather, are best viewed through an ethnographic lens that treats them as objects of study that can share some valuable information about their underlying workplace cultures and bargaining processes. As a result, my framework was informed by legal anthropology and content analysis.[54]

Content analysis "sits at the cusp of the quantitative and qualitative divide in that it often involves thematic categorization or coding, as well as counting the frequency with which those themes or codes appear."[55] This form of inquiry draws generated theories and conclusions related to a theme or set of themes or groups, through the use of a coding frame or

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[52] *See, e.g.*, Daniel E. Jones, Comment, *Trapped: Judicial Review of Municipal Agencies' Sick Leave Policies*, 75 U. CHI. L. REV. 1717, 1746–48 (2008) (examining the constitutionality of the strict sick leave policies of municipal agencies); Katherine Elizabeth Ulrich, Note, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1, 10–13 (2002) (discussing the difficulties of making workers choose between their families and their jobs, and advocating for the expansion of the social insurance system through a Family Risk Insurance Proposal); Thomas C. Buchmueller et al., *Union Effects on Health Insurance Provision and Coverage in the United States* (Fed. Reserve Bank of S.F., Working Papers No. 2000-04, 2000), *available at* http://www.frbsf.org/econrsrch/workingp/2000/wp00-04.pdf (finding that unions not only improve the probability of employees having health coverage but also reduce cost-sharing and increase the likelihood that retirees will have access to insurance).

[53] *See* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1424–25, 1491–92 (1993) (arguing that true CBAs are never really implemented; if they were implemented, political and economic democracy in the workplace would follow).

[54] *See, e.g.*, JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE, at xiii (1990). *See generally* KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY (3d ed. 2013); Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63 (2008).

[55] *See* Webley, *supra* note 46, at 941.

index of descriptors.[56] Content analysts break down documents not only to offer descriptive data but also to generate theories based on the coding.

While qualitative coding can be critiqued from the point of view that artificiality and arbitrariness may enter the coding process from the very construction of the first set of variables, the best response to this critique is that simple quantitative approaches fail to grasp the significance of the content of the CBAs. Furthermore, dedicated qualitative research is transparent about its underlying methods to ensure confidence in the resulting theories.[57] Particularly in situations where not all terms are mandatory in the collective bargaining process, counting the occurrence of terms is an inadequate approach because it does not provide a context and it unduly penalizes an absence that may be benign.[58] Merely counting disability language hits or the number of provisions that appeared to be disability friendly on the surface would not come close to providing a rich, full picture of how unions and employers conceive of disability and how it informs their overall workplace policies and practices.

Further, when a researcher allows the documents themselves to inform the coding categories, these issues are addressed as part of the initial research design.[59] Some judgment is involved, of course, with any research—empirically grounded or not—but I did not impose my variables on the research data; they gave me theirs. As a researcher and scholar, I am left to apply a filter of some kind, but I return to the

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[56] *Id.*

[57] CONLEY & O'BARR, *supra* note 54, at xii–xiii.

[58] *See generally* June Miller Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience*, 1977 WISC. L. REV. 685. *See also* Charles Taylor Kerchner & Julia E. Koppich, *Negotiating What Matters Most: Collective Bargaining and Student Achievement*, 113 AM. J. EDUC. 349, 349 (2007) (recognizing the tension between a statutorily narrow scope of collective bargaining, professional unionism, and union legitimacy); Stephen A. Woodbury, *The Scope of Bargaining and Bargaining Outcomes in the Public Schools*, 38 INDUS. & LAB. REL. REV. 195, 208–09 (1985) (arguing that narrowing the scope of bargaining in the public sector has led to increased worker dissatisfaction).

[59] Judith A. Holton, *The Coding Process and Its Challenges*, *in* THE SAGE HANDBOOK OF GROUNDED THEORY 265, 265–66 (Antony Bryant & Kathy Charmaz eds., 2010).

significance of this project: the positing of models and the discussion of normative values contained in the CBAs and the potential ramifications of those expressions.

III. RESULTS AND REVELATIONS: A TAXONOMY OF THE FRAMING OF DISABILITY

A. *The Significance of Taxonomies in Socio-Legal Scholarship and the Roles of Collective Bargaining Agreements*

Using a grounded-theory method, I was able to develop a taxonomy of disability-framing and workplace dynamics that the CBAs reflected. A grounded-theory method is among the most widely utilized qualitative approaches and involves "a systematic, inductive, and comparative approach for conducting inquiry for the purpose of constructing theory" and a "persistent interaction with [the] data."[60] The process is one in which the researcher moves back and forth between data and theory, allowing each to inform one another through iterative processes. In the end, the data and theories are more focused and theoretical.[61]

A taxonomy provides both a system of classification and a conceptual framework for understanding a phenomenon.[62] Here, the taxonomy is the spectrum of possible approaches to framing disability and health status, while the four models presented constitute that range of approaches. The importance of taxonomies within the law cannot be overestimated. Models of both formal and informal legal behavior reflect much about the very workplaces constructed from those values.[63] These models

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[60] Antony Bryant & Kathy Charmaz, *Grounded Theory Research: Methods and Practices*, *in* THE SAGE HANDBOOK OF GROUNDED THEORY, *supra* note 59, at 1.

[61] *Id.*

[62] *See* RICHARD STONE, MATHEMATICS IN THE SOCIAL SCIENCES AND OTHER ESSAYS 73 (1966) (connecting the development of taxonomies to any social science enterprise interested in model-building); Michael Adler, *Constructing a Typology of Administrative Grievances: Reconciling the Irreconcilable?*, *in* THEORY AND METHOD IN SOCIO-LEGAL RESEARCH 283 *passim* (Reza Banakar & Max Travers eds., 2005) (creating a typology of people's experiences with the administrative grievance system in the United Kingdom).

[63] *See, e.g.*, Amanda Kidd Damarin, *Rethinking Occupational Structure: The Case of Web Site Production Work*, 33 WORK & OCCUPATIONS 429, 429 (2006) (studying the interplay of autonomy and flexible workplace schedules); Marty Laubach, *Consent, Informal Organization and Job Rewards: A Mixed Methods*

also hold import in clarifying issues surrounding minority representation, bargaining struggles, and underlying compromises and norms. The CBAs themselves, and the processes of arriving at them, are economic struggles and reflect these power dynamics of two organizations, the union and the employer, hashing out workplace issues. The contracts reveal something about the compromises in that process and their codification of understandings. It is a helpful project because it sets the stage for how the law might be adapted and operationalized on the ground.[64]

I realize at the same time, however, that reading a CBA does not give us everything. As documents, they are incomplete pictures of what is happening on the ground, but they do provide the parameters, rules, and laws of what should be happening and what is possible.[65] The significance of these CBAs and a resulting taxonomy is that it provides a lens onto what is important not only to unions, employers, and employees and members, but also to federal, state, and local governments, in the case of public sector employees.

Analysis, 83 SOC. FORCES 1535, 1535, 1556 (2005) (studying the role of consent in understanding informal workplace models).

[64] *See* Randall Marks, *Labor and Antitrust: Striking a Balance Without Balancing*, 35 AM. U. L. REV. 699, 707 n.37 (1986) (recognizing that "the contents of collective bargaining agreements will be determined by the economic leverage of the parties").

[65] *See, e.g.*, Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 407–08 (2004) (discussing the role of mediation in revealing underlying workplace interests and improving workplace culture as a supplement to the rights-based approach in CBAs); Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183, 217 (2006) (noting that, for example, to prevent workplace harassment, a union must not only address the content of the CBA, but also the underlying workplace culture).

In essence, the CBAs serve at least two primary roles: as workplace rules and as expressions of workplace values.[66] These two roles cannot be easily separated because they inform, feed, nurture, and challenge one another, as issues arise. Rules express values, and values can be translated into both formal and informal rules.[67] To be successful in reforming a particular issue in the workplace, should it be discrimination, harassment, or unequal pay, for example, the most enduring route to change would be to address both formal rules and workplace norms.[68]

As workplace rules, CBAs are contractually binding for a period of one year to many years, apply to all employees in the bargaining unit, and are beyond negotiation and reproach without arbitration clarifications or burdensome contract revisions.[69] In their expressive function, CBAs embody and also construct and perform the values and norms of the workplace.[70]

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[66] Other scholars have emphasized that public sector collective bargaining creates rules and procedures, essentially internal due process mechanisms, but that the bargaining process also has the potential to address policy and resource allocation concerns. In her empirical study of CBAs covering public school teachers, Julia E. Koppich describes two approaches to collective bargaining: traditional and reform-oriented. *See* Julia E. Koppich, *Resource Allocation in Traditional and Reform-Oriented Collective Bargaining Agreements* 5 (Sch. Fin. Redesign Project, Working Paper No. 18, 2007), *available at* http://www.crpe.org/sites/default/files/wp_sfrp18_koppich_may07_0.pdf. She suggests that the former approach is weakened by its narrow focus on individual gains—for example, salary, benefits, and tenure—and could be strengthened by a more collaborative, reform-based process in which teachers work with school administrators and educational policymakers to not only craft a contract for themselves but also a vision for education in that location. *Id.* at 24.

[67] *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 143 (1990) (describing how rules and their enforcement invoke important considerations of values).

[68] *See* W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1, 58–59 (2002) (arguing that to have effective changes in formal rules, one must understand the norms and values guiding social behavior).

[69] *See generally* THE ROLE OF COLLECTIVE BARGAINING IN THE GLOBAL ECONOMY: NEGOTIATING FOR SOCIAL JUSTICE (Susan Hayter ed., 2011).

[70] There is value to the naming of rights in setting and shifting the values of the workplace. *See* CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE, at ix (2010) (examining the interplay between rights and institutions in mobilizing change in the workplace); DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 11–12 (2003) (suggesting that the mere presence of the ADA has improved the lives of people with disabilities, but that true reform will be premised on identity formation that embraces and enacts the norms of the statute); Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the*

They "speak" those norms—for example,, what it means to be a minority worker, how disability is valued, or what forms of disability are protected—while reinforcing them in tangible forms. They may also go beyond expressing the underlying mental states and sentiments of the drafters of the agreement to intentionally communicating what those values are.[71] As Cass Sunstein and other legal scholars writing about the expressive function of law have observed, legal "statements," such as contracts, "might be designed to change social norms" by outlining "appropriate evaluative attitudes."[72] Further, as Alex Geisinger has explored in his work surrounding "belief-change theory," regulations themselves can alter norms and decision making.[73]

For example, if equal opportunity issues hold an integral place in the construction and language of the agreement, then the associated values and visions, such as respect for diversity, outlets for the voices of minority workers, and multicultural training, may also permeate the workplace culture.[74] Minority workers may feel safer in airing their concerns, or recognized for their talents, if the desire for diversity is codified in the collective bargaining agreement.[75] Even if the worker never reads the

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ADA, 90 VA. L. REV. 1151, 1155 (2004) (book review) (proposing an expressive law model to analyze the efficacy of the ADA to bridge the law and economics and sociological approaches).

[71] For a discussion of the differences between expressive and communicative effects, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1508 (2000) ("To express a mental state requires only that one manifest it in speech or action. To communicate a mental state requires that one express it with the intent that others recognize that state by recognizing that very communicative intention. One can express a mental state without intending to communicate it."). Anderson and Pildes also warn that expression should not be mistaken for causation—a point to which I will return in the last section of this Article. *Id.*

[72] Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996). Sunstein argues that the expressive function uses norms to influence behavior, rather than controlling behavior directly. *Id.* at 2024.

[73] *See* Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 62–63 (2002).

[74] *See, e.g.*, Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 495–97 (2009) (emphasizing the needs of workers in perceiving procedural justice and seeing mechanisms for its performance); *see also* Anderson & Pildes, *supra* note 71, at 1511–12.

[75] *See* Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 982–84 (describing how employees' perceptions of their rights

agreement or learns about its content, she might expect to see traces of that agreement in how people relate to one another and resolve conflicts. Making the effort to recognize a disenfranchised group of workers should translate to change within the workplace—embodied sentiment of some kind—but it also holds tremendous importance as discourse.[76]

The significance of the public aspect of the CBAs in this study needs to be underscored. Public employees hold unique positions in that they bargain for their interests with a government entity and that entity's considerations extend to its constituents and the development of a larger agenda grounded in fiscal and ethical responsibility.[77] What public employers are willing to do for their workers and the unions representing them may also reflect concomitant public policy concerns.[78] As Morley Gunderson has explored, public sector unions may be exercising more "muscle" in negotiations than private sector unions, even if wages in a particular state are off the bargaining table. When faced with bargaining limitations, public sector unions tend to redirect their energies into workplace issues themselves rather than being complacent.[79] Further, if government employers are willing to take the lead on an issue, such as disability diversity, they may encourage their contractors and other private employers in their locales to consider following suit.[80]

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are shaped by employment contracts, and in turn, shape the internal culture, and how that internal culture can shape the rhetoric of the agreements).

[76] As expressive theorists are apt to point out, the conveying of this message may not reflect the potential for actual change. I would argue, however, that being included in the language of an agreement might provide optimism to a disenfranchised, and perhaps, disenchanted worker, and that renewed energy and comfort level, however miscalculated, could be the platform for workplace change.

[77] Jonathan Brock & David B. Lipsky, *Public Sector Collective Bargaining and the Imperative for Service Delivery: An Overview*, *in* GOING PUBLIC: THE ROLE OF LABOR-MANAGEMENT RELATIONS IN DELIVERING QUALITY GOVERNMENT SERVICES 1, 4–5 (Jonathan Brock & David B. Lipsky eds., 2003).

[78] *Id.*

[79] Morley Gunderson, *Two Faces of Union Voice in the Public Sector*, *in* WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE 401, 409–10 (James T. Bennett & Bruce E. Kaufman eds., 2007).

[80] *See, e.g.*, Ezra Klein, *You Can't Separate Public and Private Unions*, WASH. POST (Feb. 21, 2011, 1:41 PM), http://voices.washingtonpost.com/ezra-klein/2011/02/you_cant_separate_public_and_p.html (arguing that private and public sector unions are intertwined in their goals and outcomes).

B. *An Overview of the Results: The Medical and the Social—What the Contracts Themselves Reveal*

A preliminary assumption about the CBAs studied might have been that they were highly uniform, copying language from one another to reach stable agreements. While these agreements are not are not immune from a certain degree of "stickiness," meaning that their terms and structure closely track existing models and are resistant to change, they show more variation than expected.[81] The contracts themselves, at times, may be the same spins on situations that demand greater creativity.[82] As will be discussed in the explanation of each conceptual model, the agreements also track some of the predominant societal models of disability that have been identified by and emerged from the vibrant disability studies literature.[83] In general, they emphasize a medical model approach to disability, in which the underlying physical or psychological impairment becomes a cause of concern and action.[84] But the contracts represent pieces of different approaches, which I have attempted to capture through the development of four conceptual paradigms—the Industrialist, the Community Stakeholder, the Compliance Officer, and the Idealist.[85]

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[81] *See* Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 655–60 (2006). *But see generally* W. Mark C. Weidemaier, *Disputing Boilerplate*, 82 TEMP. L. REV. 1, 1–3 (2009) (suggesting that sovereign debt contracts, for example, are more varied than expected, at least in their arbitration language, and offering that preferences for litigation might undergird the contract language).

[82] *See generally* BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS (14th ed. 1995). *See also* GARY CHAISON, UNIONS IN AMERICA 109–10 (2006) (outlining the various types of clauses in CBAs); Christopher L. Erickson, *A Re-Interpretation of Pattern Bargaining*, 49 INDUS. & LAB. REL. REV. 615, 615 (1996); Kathryn J. Ready, *Is Pattern Bargaining Dead?* 43 INDUS. & LAB. REL. REV. 272, 278 (1990).

[83] *See* David Locker, *Living with Chronic Illness*, *in* SOCIOLOGY AS APPLIED TO MEDICINE 83, 88 (Graham Scambler ed., 6th ed. 2008) (positing the social and medical models as the cleavages in the study and framing of disability). *But see* DAN GOODLEY, DISABILITY STUDIES: AN INTERDISCIPLINARY INTRODUCTION 28 (2010) (noting that some disability studies scholars question the rigid divide between social and medical approaches, emphasizing that impairment needs to have a place in the discussion of how disability is a lived experience).

[84] *See* Locker, *supra* note 83. *But see* GOODLEY, *supra* note 83.

[85] The breakdown of contracts is as follows: Industrialist only approach (35); Community Stakeholder only approach (1); Compliance only approach (8); Idealist only approach (0); Contracts with none of these approaches (9). The remaining contracts were hybrid approaches, as discussed *infra* Part III.C.

1. The Collective Bargaining Agreements' Approaches to Disability: From Individual to Community, Impairment to Social Subordination

The conceptual models offer ways to think about disability, while at the same time providing some insights into the perspectives on disability held by employers, unions, and individuals represented by unions. No one contract stands out as a model to emulate. Largely, these agreements trip over language about disability. Four CBAs limit disability coverage to physical disabilities and not mental ones, for example. Nine agreements discuss disability as a "handicap"—antiquated language that was replaced legally and formally with the ADA, and, informally, even decades before the passage of the Act. A handful of agreements distinguish between job-acquired disabilities, military service conditions, and preexisting conditions. Other agreements go beyond the law, while some go below it. Some of the agreements "rewrite" nondiscrimination clauses, excluding disability from what should be a simple cut-and-paste process. Ten of the CBAs privilege non-disabled colleagues in the consideration of accommodations for disabled workers or suggest that workers injured on the job have preference for reasonable accommodations.

The four models described in this Section demonstrate different conceptual approaches to disability and health status. I have coined these terms to provide some insights into how the variables relate to one another; the variables did not map neatly onto the models of disability presented in the disability studies literature: medical, charitable, and social.[86] They should not be viewed as distinct approaches but rather ones that can help inform one another. For example, if a contract is particularly strong on health insurance provisions—Industrialist—that kind of approach to disability has clear benefits to workers with ongoing health concerns, but these workers may also benefit from mechanisms by which to enforce their civil rights or collaborate with other minority workers—Idealist. Each of the approaches

(Industrialist/Compliance: 21; Industrialist-Community: 3; Industrialist-Compliance-Idealist: 6; Industrialist-Community-Compliance: 6; Community-Compliance-Idealist: 1; All four approaches: 10).

[86] *See* discussion *supra* note 83.

offers something of value to all workers, with or without serious health concerns, while at the same time presenting a glimpse of how health issues might be regarded at work.

a. The Industrialist

The Industrialist model present in this sample of CBAs is grounded in a medical approach to disability that represents disability as the injury that happens to the workers and their families. This approach is deeply focused on the workers individual and their problems. The Industrialist model encompasses the following variables: workers' compensation and/or workplace injury; sick leave and/or the FMLA; insurance; and disabled dependents. To be included in an Industrialist approach to disability, the CBA simply had to include disability in the discussion of one of these variables; it did not have to satisfy all of the variables.

These variables represent the kinds of provisions that an employer and union might focus on if they were concerned about restoring and reintegrating an injured worker or a worker distracted by the demands of an ill family member. An example of this kind of contract approach is one that only discusses disability in the context of workers or their family members getting sick:

> For employees hired prior to October 1, 2005, the [health insurance] coverage of the employee's family shall include the employee, employee's spouse and unmarried children under the age of nineteen (19). This coverage shall be extended to age twenty-two (22) in the case of employee's children who are full-time students. Disabled dependent children will maintain coverage even after the age of twenty-two (22) as long as medical documentation is provided.[87]

The implications of this kind of medical focus is that it might preclude understandings of disability as a social barrier and civil rights issue, ignore issues of disability discrimination in the workplace, and fail to provide mechanisms for addressing disability as an access concern at work.

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[87] Collective Bargaining Agreement Between Ypsilanti Cmty. Utils. Auth. and Local 3451 of the Am. Fed'n of State, Cnty., & Mun. Emps. (AFL-CIO), at art. 25(f) (Sept. 1, 2005 to Aug. 31, 2009).

The Industrialist was, by far, the most dominant approach to disability. Thirty-five percent of the agreements had a pure Industrialist approach, while another forty-six percent had some elements of an Industrialist approach combined with the other models; in total, eighty-one percent of the agreements were Industrialist. Surprisingly, not all of the CBAs contained these kinds of provisions, even though they could be regarded as the basics of considering health issues in the workplace. However, even if this approach was not universal, it did reveal that disability, as a medical problem, was the most prominent definition and understanding of disability in the context of the agreements.

The Industrialist is closely tied to the demands of labor itself. American history, particularly in the workforce, tracks the evolution of approaches to disability that is largely informed by the industrial and military conditions of the time.[88] The medical model, in particular, was a response to workplace injuries resulting from increased industrialism in the late nineteenth century, and later, into the period post-World Wars, the return of disabled veterans.[89] The idea was to fix the person's broken mind or body to more readily reincorporate that person into society and production. The end goal was to make the person as normal as possible.[90]

This Industrialist model also stems from concerns about workplace safety and desires to take care of one's own.[91] Embedded within it is the paradigm of the "worker as breadwinner" that has become injured because of work itself.[92] The employer provides health and disability insurance to offer

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[88] *See* RICHARD VERVILLE, WAR, POLITICS, AND PHILANTHROPY: THE HISTORY OF REHABILITATION MEDICINE 25–28 (2009) (chronicling the roles of war and industrialism in the establishment of modern disability approaches).

[89] Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 97 (2008).

[90] *Id.*

[91] Michelle Putnam, *Moving from Separate to Crossing Aging and Disability Service Networks*, *in* AGING AND DISABILITY: CROSSING NETWORK LINES 5, 7–9 (Michelle Putnam ed., 2007).

[92] Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1544 (1999) ("The image of a white, male, manufacturing-based working class shapes union praxis and public perception of the labor movement, excluding and alienating those who now collectively comprise the majority of the U.S. workforce: women, racial and ethnic minorities, and service workers.").

protections to the worker as he or she attempts to recover. For example, consider this framing of disability as addressed by insurance: "The Employer shall continue to provide each employee with short-term disability insurance coverage without cost to the employees. Any changes to the current plan must be negotiated with the union."[93]

Secondary to this approach is another view of disability—that of disability as happening to the family, for example, children, spouse, or elder, not the breadwinner, and the need for the primary wage earner to be able to respond to those disruptions.

The Industrialist model tracks unions' general comfort with assisting their own when the disability is the "fault" of the employer or workplace conditions.[94] Inherent to this approach is the sense that work can be a dangerous place, particularly in blue-collar occupations.[95] When someone is injured at work, everyone should stand ready to assist. When injuries or illness occur at home, a reasonable time should be allotted for the primary wage earner to attend to his other duties vis-à-vis a disabled dependent. This model is layered with working class concerns, masculinity notions, and disability-as-injury frameworks.[96]

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[93] Collective Bargaining Agreement Between Clatsop Behavioral Healthcare & Clatsop Behavorial Healthcare Emps., Local 27460-2, AFSCME Council No. 75, (AFL-CIO), at art. 8.2 (July 1, 2012 to June 30, 2016), *available at* http://www.oregonafscme.com/docs/contracts/12_16_Clatsop_Behavioral_Healthcare_L2746_2.pdf.

[94] *See, e.g.*, Amin Ghaziani, *Anticipatory and Actualized Identities: A Cultural Analysis of the Transition from AIDS Disability to Work*, 45 SOC. Q. 273, 297 n.9 (2004) (highlighting the need for studies into how unions deal with issues of disabilities, such as AIDS, that are not caused by the job); Hyman J. Weiner & Shelley Akabas, *The Impact of Chronic Illness on a Union Population: Implications for Labor-Health Programs*, 5 J. HEALTH & HUM. BEHAV. 103, 103 (1964) (describing unions' historical interest in illness prevention rather than illness management in the workplace); *accord* Susan Schurman et al., *The Role of Unions and Collective Bargaining in Preventing Work-Related Disability*, *in* NEW APPROACHES TO DISABILITY IN THE WORKPLACE 121, 137–39 (Terry Thomason et al. eds., 1998).

[95] Crain & Matheny, *supra* note 92, at 1544–45.

[96] This approach is not out of accord with the history of the labor movement. *See* YATES, *supra* note 5, at 154 ("An ideological underpinning of the early labor movement was that it was the duty of a man to support his family financially and the duty of a woman to keep the home fires burning. The unions pressed employers to pay a 'family wage,' one large enough for the husband to support the family without the wife working for wages.").

The striking exception to the injured male worker approach is the CBAs' approach to pregnancy. Seven CBAs—four under the Industrialist model, one under Compliance, and two that fit none of the models—discuss pregnancy as a form of disability. These contracts vary in length from 19 to 96 pages, with the mean being 60.4 pages. Of those, only four elaborate on other kinds of disability. Given that neither the Pregnancy Discrimination Act nor the ADA treats normal pregnancy as a form of disability, these agreements go beyond the law in recasting disability.[97] For example, a CBA from Wayne State in 2005 reads: "In conformity with the Pregnancy Discrimination Act, and in accordance with University policy, Employees affected by disabilities resulting from pregnancy, child birth and related medical conditions are treated the same as Employees affected by other disabilities."[98]

Here, the contract language is somewhat unclear if the pregnancy needs to be incapacitating or disabling, or simply that pregnancy itself is a disability. What pregnancy-as-disability provisions have in common with the Industrialist, however, is the sense that disability is a form of injury or deviation—temporary or not—that happens to the normal person.[99] Pregnancy as a form of disability is temporary, positive, and desirable. Some of these agreements contain provisions to address it without

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[97] The Equal Employment Opportunity Commission has consistently taken the position that "normal" pregnancies, those without related abnormal health conditions or effects, are not covered by the ADA. *See* 29 C.F.R. pt. 1630, app., § 1630.2(h) (2011); *see also* Barrash v. Bowen, 846 F.2d 927, 931 (4th Cir. 1988) ("Under the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), pregnancy and related conditions must be treated as illnesses only when incapacitating."); Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 194–97 (1993) (suggesting that feminists interested in advancing disability as protected by the ADA should rely on disability law doctrines and approaches rather than formal equality arguments).

[98] Collective Bargaining Agreement Between Wayne State Univ. and Mich. AFSCME Council 25, Local No. 1497, at art. 32(A) (Oct. 1, 2005 to Sept. 30, 2008).

[99] For greater perspective on unions' approaches to pregnancy, see ADVISORY COMM. ON CONSTRUCTION SAFETY & HEALTH, WOMEN IN THE CONSTRUCTION WORKPLACE: PROVIDING EQUITABLE SAFETY AND HEALTH PROTECTION (1999) (providing narratives of women who struggled to get pregnancy protection in their unionized construction workplaces), *available at* http://www.osha.gov/doc/accsh/haswicformal.html; Judith A. Scott, *Why a Union Voice Makes a Real Difference for Women Workers: Then and Now*, 21 YALE J.L. & FEMINISM 233, 234–35 (2009) (chronicling the role of unions in passing and honoring the Pregnancy Discrimination Act).

comprehensively handling other forms of disability that may be permanent, unwanted, or aberrational. Granted, having any pregnancy provisions is forward thinking in some contexts, but these agreements arguably just shift the discussion from one traditional category of disability—men injured on the job—to otherwise healthy women bearing children. Consistent with that argument is the appearance of pregnancy-as-disability provisions in CBAs in pink-collar jobs, such as secretarial, nursing, human services, and schools.[100] Indeed, all of the agreements with these provisions came from these fields.

In sum, disability, in this model, is stripped down to what it does to the body and the mind, and, perhaps, the finances of the disabled worker or the worker with a disabled dependent. It does not consider the social or civil rights aspects of disability, nor disability as an identity or point of pride.[101] Arguably, it also does not make room for the disabled worker who arrived to the first day of work with his or her disability. Disability here is unfortunate and the consequence of industrialism: long hours, dangerous machinery, enduring fatigue, and repetitive environments.[102] Because the worker structures his or her life around work, employers and unions need to be accountable for what happens during those hours. They also need to be cognizant of other factors that could affect the worker's ability to be productive, such as disabled family members. To a lesser extent, workplaces must be flexible when it comes to how pregnancy disables or limits women's productivity at work.

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[100] *See* Jennifer Gottschalk, Comment, *Accommodating Pregnancy on the Job*, 45 KAN. L. REV. 241, 244–45 (1996) (discussing how white and pink collar jobs are better able to adapt to pregnancies in the workplace than traditional labor jobs).

[101] *See supra* text accompanying notes 18–30 (discussing disability as a civil rights issue); *infra* Part III.B.1.d (discussing the Idealist model).

[102] Disability also challenges the underlying assumption of standardization in the workplace. Ruth O'Brien, *Other Voices at the Workplace: Gender, Disability, and an Alternative Ethic of Care*, 30 SIGNS 1529, 1530 (2005).

b. The Community Stakeholder

In contrast to the Industrialist, the Community Stakeholder model envisions a workplace that is a community unto itself.[103] This community may have members with competing interests and values, and, therefore, some degree of balancing is required to meet the needs of everyone involved. Justice is not individually focused and neither are the costs of justice.[104] Accordingly, the factors of this model are programs to place workers with on-the-job injuries, union involvement in accommodations, concerns of coworkers regarding disability accommodations, concerns regarding costs of accommodation, discussions of seniority, and the ADA. Once again, to be viewed as representing the Community Stakeholder approach, the contract had to contain one, not the majority or all, of these variables as part of its discussion of disability. Only one contract was a pure Community Stakeholder approach, but another thirteen had elements of the model.

These Community Stakeholder variables reflect a desire for the concerns of non-disabled people to figure into the rights afforded workers with disabilities. Accommodations may be given, for example, but the worker with the disability is not the only stakeholder in the process. The implications of this approach are primarily that larger group interests may subsume disability rights that belong to the individual, unless the majority wishes to extend those protections to the worker with the disability:

> The principle and philosophy of the Policy shall be to allow an employee for a return to work from an extended illness or injury, when the employee is capable of providing meaningful work which is readily available and where the City can

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[103] *See, e.g.*, DAVID L. COLLINSON, MANAGING THE SHOPFLOOR: SUBJECTIVITY, MASCULINITY AND WORKPLACE CULTURE 107–08 (1992) (explaining how members of the shopfloor use humor as a form of camaraderie and an escape from the boredom of monotonous work). *But see* Dan Clawson & Mary Ann Clawson, *What Has Happened to the US Labor Movement?: Union Decline and Renewal*, 25 ANN. REV. SOC. 95, 99–100 (1999) (noting the increasing failure of unions in continuing to foster that sense of community among workers).

[104] *See, e.g.*, Alfred W. Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge for Our Season*, 24 RUTGERS L. REV. 480, 489–91 (1970) (explaining that union representation, although mainly advancing the desires of the majority, is the best method for protecting the "full and fair representation of each worker").

> reasonably accommodate, without putting the employee or City at risk or burdening fellow employees with the accommodation(s).[105]

If the disabled worker must defer to the interests of colleagues, as above, this approach sets up a kind of dependency in its most extreme form.

The model is one of concerned intervention; it is the beginning of the articulation of a social model of disability, where the disabling effects of a health condition are not just the physical or mental impairments, but also societal reactions to them.[106] The worker exists in a larger set of workplace dynamics, where his or her health concerns may not only affect the individual, but also his coworkers, union leaders, and the general work atmosphere.[107] Others beyond the disabled or injured worker could have a stake in what happens with regard to addressing the person's disability. Those interests are not merely selfish ones. Rather, others may want to create routes for reincorporating injured or disabled workers into the workplace after some period of absence or recovery. Or the interests may be charitable ones that afford rights and mechanisms for enforcement sometimes but not always.

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[105] Collective Bargaining Agreement Between City of Virginia, Minn. and Am. Fed'n of State, Cnty. & Mun. Emps., Local Union No. 454, at 27 (2007), *available at* http://www.afscme.org/downloads/council65/Local-454-Contract-2010-0.pdf [hereinafter Virginia, Minn. and AFSCME Agreement].

[106] *See* Charles E. Bradford, *Employment and Disability: A Point of View from the Labor Unions*, *in* EMPLOYMENT AND DISABILITY: TRENDS AND ISSUES FOR THE 1990S 38, 44 (Leonard G. Perlman & Carl E. Hansen eds., 14th ed. 1990) (describing the role of unions in managing and preventing disability in the workplace).

[107] *See* Introduction to *Fighting for the Rights of Employees with Disabilities: An AFSCME Guide*, AFSCME, http://www.afscme.org/news/publications/for-leaders/fighting-for-the-rights-of-employees-with-disabilities-an-afscme-guide/introduction (last visited Mar. 3, 2014) ("The ADA cannot completely overcome discrimination; however, if AFSCME's 1.3 million members work hard to eliminate these invisible hurdles on the job and in their communities, the Union can make a difference."). While disability as an employment discrimination and civil rights issue is still an emerging area of awareness among unions such as AFSCME, union websites offer a lot of information about workplace injuries. *See* AFSCME, THE KEYS TO HEALTHY COMPUTING: AN AFSCME HEALTH AND SAFETY HANDBOOK 7–8 (2006), *available at* http://www.afscme.org/news-publications/publications/workplace-health-and-safety/pdf/557-06_Healthy_Computing.pdf; *Steps to Solving Ergonomics Problems*, AFSCME, http://www.afscme.org/news/publications/workplace-health-and-safety/safe-jobs-now-a-guide-to-health-and-safety-in-the-workplace/chapter-7-ergonomics-preventing-strains-sprains-and-back-injuries/steps-to-solving-ergonomics-problems (last visited Mar. 3, 2014).

This assimilation approach privileges retraining and re-acculturation programs, such as holding spots open for disabled workers, having unions involved in reasonable accommodation requests, and weighing the costs of accommodation against seniority advancement. The following are some examples of contract language that describes how the union, employer, and non-disabled workers envision themselves vis-à-vis the disabled worker:

> The Union and the Employer agree that they have a joint obligation to comply with the Americans with Disabilities Act (ADA). The Union and the Employer agree that they have the obligation to consider accommodation requests from qualified ADA individuals and employees returning from Worker's Compensation injuries. The Employer agrees to maintain the policy of attempting to place employees who have incurred a work related disability in areas of work which would fit the employee's physical capabilities but not to create a job just to provide employment.[108]

> Upon request, an employee seeking an accommodation shall be entitled to union representation. The union representative and the employee shall be allowed a reasonable amount of time during working hours, without loss of pay, to discuss the request. . . . Any contract waiver must be agreed to by both the Appointing Authority and the Local Union or the Council 5 Executive Board. If an employee's job duties are changed as a result of an accommodation, the employee's supervisor shall inform the employee's co-workers of any restrictions that might impact on their job duties. The supervisor shall use discretion when relaying this information.[109]

The disability, therefore, does not just belong to the individual. The problems or obstacles that it creates may stir issues for coworkers, supervisors, and others. Disability is what happens to the workplace.

This collective approach is not surprising given the temperament of unions and the triumph of the whole over the individual in union negotiations and conflict mediations, for

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[108] Virginia, Minn. and AFSCME Agreement, *supra* note 105, at 23.

[109] Collective Bargaining Agreement Between Unit 225 and the State of Minn., at art. 32(3) (July 1, 2009 to June 30, 2011).

example.[110] Arriving at a CBA requires some relinquishing or sacrificing of individual interests, but the idea is that everyone will be better off in the end and that a democratic process of union leadership and bargaining will prevent minority members from being trampled by the whims of the majority.[111] In the collective bargaining process, unions trust themselves to do well by their members, and employers trust that the unions have the power to resolve the issues facing everyone. Speaking for the whole simplifies the process of reaching an agreement in many ways and it solidifies its effects; renegotiating dissenting viewpoints is not a looming concern.[112]

The collective action paradigm might have trickle effects for what happens after the agreement is reached, as I posit these CBAs demonstrate. Everyone remains interested in outcomes and effects on the agreement and future negotiations. The seniority system itself, a hallmark of unionism, also prescribes a rote, lock-step, but reassuring and predictable, process for promotion and advancement.[113] Therefore, the community approach is not something new to emerge in the context of disability; it reflects the underlying values of unionism to assist one another and to honor an equitable system.[114]

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[110] For helpful discussions of CBAs embodying some of the strengths and problems of collective action, see Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669, 676 (2003); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 4 (1999).

[111] *See* Crain & Matheny, *supra* note 92, at 1543 (highlighting some of the problems of majority representation, such as not being as focused as necessary on issues facing women and minorities in the union).

[112] *See* PUBLIC PERSONNEL ADMINISTRATION AND LABOR RELATIONS 316 (Norma M. Riccucci ed., 2007) (emphasizing that individual bargaining in the public sector undermines the stability that collective bargaining can provide); Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 127–28 (1992) (explaining how the duty of fair representation attempts to ensure accountability to all members of the union and overcome individual concerns about being neglected).

[113] *See* Seth D. Harris, *Re-Thinking the Economics of Discrimination:* U.S. Airways v. Barnett, *the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123, 128 (2003) (suggesting that reasonable accommodations do not necessarily violate the efficiency of internal labor markets and may add value for both the employer and coworkers).

[114] But this approach may also reflect charity, not civil rights, in the face of disability. *See* Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 387–88 (2001) (arguing that the

Those values have much potential for stabilizing workforce trends for people with disabilities because they ensure a just-cause approach to firing and set out a model for promotion and tenure that, on its face, does not make disability the consideration.[115] Under this model, however, the disability is still an injury that needs to be fixed. "Normalizing" the person remains a goal, just as it was under the Industrialist.[116] Fixing the person, however, may go beyond addressing symptoms and lingering effects of injury and disability. This model is reminiscent of the vocational rehabilitation approaches of the first half of the twentieth century where healing the person entailed finding a new role for that person within a community.[117] Here, the community is that of work. In many ways, the injured person is a different person—changed—perhaps weaker or more cumbersome to manage within the rules of the CBA and union culture. The community, however, responds with concern, charity, and interest in addressing what this change for the individual does to its own dynamics and the rewards and incentives for other workers.[118] If the disabled worker is in need of an intervention, he or she is arguably on lesser footing than his or her non-disabled colleagues.[119]

This approach may also reflect a charitable model of disability. The charitable model is the next of kin of the medical model, where people with disabilities are still seen as in need of

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charitable model "reinforces the abhorrent and socially unproductive perception that individuals with disabilities are poor souls in need of charitable assistance").

[115] *See* Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1781–83 (2001) (linking workers' estrangement with unionism with unions' estrangement from the social justice movements of the left, including civil rights for people with disabilities).

[116] *See* LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 24–25 (1995) (describing how the construction of normalcy creates the category of disability).

[117] *See* SHARON BARNARTT & RICHARD SCOTCH, DISABILITY PROTESTS: CONTENTIOUS POLITICS 1970–1999, at 12–13 (2001).

[118] This approach is consistent with a charitable model of disability. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 480–94 (1992).

[119] Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 896–97 (1997) ("This analysis may show that, in practice, accommodating qualified workers with and without disabilities leads to efficient and cost-effective workplace operation."); *see also* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 849–50 (2003) (discussing coworker bias and preferences).

assistance, but their effects on non-disabled union members prescribe the limits of that assistance. If the medical model embodies a desire for all citizens to be healthy and productive in their contributions to the economy and community, the charitable model offers assistance in helping them get there.[120] Scholars such as Anita Silvers have warned that these perspectives "permit flawed social arrangements to cause us to be overcome with despair and to depreciate the lives of people just because they suffer from being oppressed."[121] The worker, therefore, could be trapped between needing flexibility and acceptance at work and attempting to overcome, alone, any deficits or differences that might manifest themselves at work. In essence, the disabled worker becomes perceived as, and internalizes a sense of, being "lesser than" the nondisabled worker because of his or her external manifestation of interdependence and the ways in which others respond, or do not respond, to those needs. The worker is waiting to be recognized, to be incorporated in the work community, but how that happens makes a difference.

For example, helping a disabled union member might mean positive self-regard for the members who assist the person. But it might also mean costly architectural alterations to the workspace itself, or the bumping of one senior person from a coveted job to accommodate the new limitations posed by the disabled union member. In that scenario, assistance of the disabled member will take a backseat to honoring tradition and rules. If the disabled worker needs help of some kind, the coworkers may choose to render whatever help they would like—rather than the asked-for version or the most useful assistance—because their feelings, job security, and statuses are as much parts of the consideration as the individual's disability.[122] In essence, this seemingly community-based approach is dual-edged, providing some support through the experience of

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[120] *See* ANITA SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 94 (1998).

[121] *Id.*

[122] *But see* Agnes Fletcher & Nick O'Brien, *Disability Rights Commission: From Civil Rights to Social Rights*, 35 J.L. & SOC'Y 520, 520 (2008) (suggesting that the next phase of evolution beyond disability as charity or even civil rights is disability as universal participation and equality).

disability and workplace issues, such as reasonable accommodation, while also limiting the independence of the disabled worker to assert his or her particular needs.

c. The Compliance Officer

The Compliance Officer is less interested in establishing a sense of community among workers and more concerned about meeting formal legal requirements. The letter of the law needs to be followed and stated clearly, from this position. Rather than expanding on what the law can do or creating a process for honoring the law, the Compliance Officer approach simply states that the equal employment opportunity requirements concerning disability or the ADA provisions will be followed—those were the two variables tracked under this model. To satisfy the Compliance Officer approach, the contract just needed to contain disability language in the nondiscrimination clause or have a separate statement of compliance with the ADA. The Compliance Officer inserts the language of the law without any accompanying statement of how these goals will be accomplished. The result may be that workers with disabilities are unsure of what the unions' and employers' commitments are to disability as diversity and how their rights are enforced.

Eight contracts were only Compliance Officer-oriented; another forty-four contained elements of the approach combined with others. Nineteen contracts contained statements regarding compliance with the ADA, with a mean contract length of 79.5 pages, and forty-eight contracts contained an equal opportunity compliance statement inclusive of disability language, with a mean contract length of 60 pages. That number may seem high, perhaps even uplifting, but there were additional contracts that had equal employment opportunity clauses that were scrubbed of references to disability, even though this kind of language is generally sticky and boilerplate.[123]

This approach is highly legalistic: We comply; we are protected.[124] Take, for example, some representative language from the contracts embodying the Compliance Officer approach:

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[123] *See* Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 737–38 (1997); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 543 (2001).

[124] *See generally* sources cited *supra* note 35.

> There shall be no discrimination against any employee in the matter of training, upgrading, promotion, transfer, layoff, discipline, discharge or otherwise because of race, color, creed, national origin, sex, age, marital status, disability, handicap, political affiliation, reasonable grievance activity or Union activity.[125]
>
> The Library will administer the Americans with Disabilities Act as provided for by law, and as agreed to in procedures negotiated between the Parties.[126]

The worst fault of the Compliance Officer approach is its tone of bureaucracy and its almost reluctant compliance with the law.[127] It is not an expansionist, nor a creative, view of the law, and it speaks very little about an underlying plan for meeting legal requirements. Perhaps the idea is that a statement of compliance merely condenses the underlying values and requirements of that approach. Truly effective compliance, however, entails addressing the other factors that I have captured under the Idealist approach.[128]

Compliance may not be flawed in its stated commitment to the law, but it is arguably flawed in its strategy. What does compliance mean, for example, if this stark statement is not accompanied by a clear, forward process for reasonable accommodation requests or consideration of and explanation of disability as a diversity category in the collective bargaining agreements? Because process is so important in the honoring and enforcement of disability rights and other equal opportunity

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[125] Collective Bargaining Agreement Between Local 319 Ohio Ass'n of Pub. Sch. Emps. and Westlake City Sch. Dist. Bd. of Educ., at 71 (Jan. 1, 2009 to Dec. 31, 2012).

[126] Collective Bargaining Agreement Between Library of Cong. and AFSCME Local 2910, at art. 30, § 6.

[127] *See, e.g.*, Lauren B. Edelman et al., *Internal Dispute Resolution*, *supra* note 35, at 497 (arguing that compliance officers transform issues of civil rights into mere managerial decisions); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2067 (2003) (warning of the role of compliance bureaucrats in using complaints, such as sexual harassment, and their interpretation of the laws, to act in discriminatory ways in the workplace).

[128] *See generally* Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 L. & POL'Y 73 (1991); *see also* Timothy H. Madden, Note, *Adverse Employment Actions: The Wisdom of EEOC Guidance*, 54 RUTGERS L. REV. 739, 755 (2002) ("EEOC interpretation better effectuates the purpose and public policy behind the anti-discrimination statutes in general. . . .").

issues, the process surrounding compliance and the expanding of what compliance actually means cannot be left to chance or individual interpretation when problems arise.[129]

Stating, "we comply with the law" also holds expressive and communicative value. But complying can be like tolerating—it has the potential to be self-protective and evasive, rather than proactive and inclusive, unless it provides some outline of mechanisms for enforcement or greater detail about what compliance means.[130] Workers with disabilities could possibly receive the message that they are included reluctantly in the agreement's language and the workplace itself because the law forces the union and the employer to deal with them.[131]

Perhaps, the Compliance Officer is not hesitant to include workers with disabilities in the language and process of the workplace. The failure to touch upon other disability factors in the contracts could be because of drafters' tendencies toward concise contracts, if we accept the argument that inclusion of disability diversity means longer contracts. When the Compliance Officer approach is compared to the actual length of contracts under the Idealist approach, however, there is no significant difference in the mean length of the contracts. In fact, contracts containing ADA compliance provisions without

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[129] Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 591–93 (2006) (outlining various strategies that organizations use to increase diversity and positing that the most useful approaches were implementing committees, formal practices, and diversity managers, rather than focusing on mere education about the elimination of bias); *see also* Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 339 (2008) (suggesting that the advancement of the goals of the ADA are better achieved "through voluntary conduct by U.S. employers, who must embrace and become committed to them" rather than litigation).

[130] *See* WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE 24 (2006) (questioning tolerance as a "norm-free tool of liberal governance").

[131] Hilary Greer Fike, Comment, *Learning Disabilities in the Workplace: A Guide to ADA Compliance*, 20 SEATTLE U. L. REV. 489, 533 (1997) ("Unless the employer clearly sets forth and enforces a policy prohibiting disability discrimination, coworkers may also question [a disabled employee's] ability and competence."). For a discussion of the importance of language, in general, in shifting public attitudes toward disability, see Irving Kenneth Zola, *Self, Identity and the Naming Question: Reflections on the Language of Disability*, 36 SOC. SCI. & MED. 167, 168 (1993).

additional Idealist elements tend to be longer than most contracts with Idealist elements; in some cases, these contracts were up to twenty pages longer.

There is space, therefore, to include more of these elements, but the prioritization of elements may be different depending on the union, employer, and job. One other possible explanation could be that different public sector employers handle these issues differently, adopting more of a restrained drafting approach that takes the form of short, direct statements that the employer and union comply with the ADA and equal opportunity employment for people with disabilities. However, these contracts represent employment settings ranging from schools to courthouses. Other theories about why these contracts are longer, yet may not espouse a full range of disability diversity values, could be that they involve other terms or conditions of employment that tend to take up a lot of space—for example, complex benefits programs or uniform requirements—or it may simply be more difficult to get some employers to include these provisions.

This set of CBAs might also reflect a cosmetic compliance approach, as scholar Kim Krawiec has elaborated on in her work.[132] Under cosmetic compliance, a corporation, or employer and union, such as in this set of CBAs, may have all of the written expressions of appropriate values for the workplace but may fail to actually realize a cultural shift and genuine compliance with the law and diversity ideals.[133] The presence of the stated "appropriate" values can be a subterfuge for a lack of compliance. As Donald Langevoort has noted in the area of corporate compliance, "the objective indicators of a values-based program are also easy to mimic, making it difficult to separate out the sincere programs from the fakes."[134] While he was writing in the area of corporate compliance and not labor relations, Langevoort's statement could be no less true applied to this dataset. Overall, the presence of ADA and equal-opportunity-affirming language could say very little about on-

[132] *See generally* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003) (arguing that emphasizing compliance structures may actually lead to under-enforcement and the under-realization of actual compliance).

[133] *See generally id.*

[134] Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 106.

the-ground workplace conditions for disabled and other minority workers.[135] Most of concern is the presence of this language with the absence of other indicia of actual compliance—such as the mechanisms and procedures to be further elaborated on in the Idealist section.

d. The Idealist

How might we consider the interaction of statements of espoused compliance and actual procedural compliance in moving towards a disability rights approach in unionized settings? The data show a gap between compliance-in-word and compliance-in-action, as noted in the earlier section.[136] The Idealist model tracks the social model of disability where both procedural and substantive justice matters. The social model is a civil rights approach that recognizes the power of social responses—from peers, supervisors, and the government itself—in fostering marginalization and oppression of people with disabilities. This stigma can create profound discrimination based on perceived differences.[137] Further, the argument challenges the assertion that disability is a stable category that is easily or neutrally defined.[138]

The Idealist vision realizes that the attainment of inclusion and respect turns on acknowledging the social experience of disability, such as attitudinal barriers, bias, discrimination, and marginalization.[139] This model is inherently corrective in its vision, and is therefore concerned with safeguards on the ground that serve as witnesses to and rectifiers of disability

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[135] *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 3–4 (2004) (contending that employment rates for people with disabilities have not improved since the passage of the ADA because of a failure to address structural barriers in conjunction with the antidiscrimination measures of the Act).

[136] *See supra* Part III.B.1.c.

[137] Bagenstos, *supra* note 48, at 427–29.

[138] *See generally* CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS (1988); Tom Shakespeare & Nick Watson, *Making the Difference: Disability, Politics, and Recognition*, *in* HANDBOOK OF DISABILITY STUDIES 546 (Gary L. Albrecht et al. eds., 2001).

[139] SILVERS ET AL., *supra* note 120.

discrimination.[140] It is antidiscrimination with teeth, but it also recognizes that disability can be the basis of community, such as in recognizing the benefits of affinity groups.[141]

As such, the variables coded were the following: (1) a statement about the ADA as civil rights; (2) disability in the context of equal pay; (3) disability-based harassment; (4) affinity groups inclusive of disability issues; and (5) reasonable accommodations. One of these variables alone was enough to satisfy an Idealist approach to disability. These variables all reflect disability as being a civil rights movement and advancing socially-situated concerns; they provide a contrast to a purely Industrialist orientation. They also go beyond a charitable Community Stakeholder approach or a legalistic Compliance Officer approach. This is a model where some, if not all, of the tenets of the ADA as a civil rights, antidiscrimination law have been made operational in the language of the agreement.

As explored earlier, these variables were drawn from a purposive sample of AFSCME's CBAs where disability-related language had the highest number of hits. They were also informed by reading AFSCME's website materials about diversity and inclusion.[142] The only variable that proved to be

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[140] *See* Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75, 91 (2007) (identifying that one limitation of the social model and its corrective approach is overcoming the embedded assumption that people with disabilities are justifiably excluded from society).

[141] Rosemarie Garland-Thomson, *Integrating Disability, Transforming Feminist Theory*, 14 NAT'L WOMEN'S STUDIES ASS'N J. 1, 2, 28 (2002) (recognizing how disability is overlooked as a form and source of community).

[142] *See, e.g.*, Dep't of Prof'l Emps., AFL-CIO, *Resolution 18: Unions Should Give People with Disabilities a Voice and a Face*, *in* PROPOSED RESOLUTIONS AND CONSTITUTIONAL AMENDMENTS BOOK TWO 30, 30–31 (2009), *available at* http://dpeaflcio.org/pdf/DPE-res_18amend.pdf (arguing that people with disabilities need to be included within the union and given a constituency group); James Parks, *Actors with Disabilities All but Invisible on TV*, AFL-CIO NOW BLOG (Oct. 11, 2011), http://www.unions.org/home/union-blog/2010/10/11/actors-with-disabilities-all-but-invisible-on-tv/ (discussing the roles of people with disabilities within union membership and union's efforts towards diversity); *Constituency Groups*, AFL-CIO, http://www.aflcio.org/About/Allied-Organizations/Constituency-Groups (last visited Mar. 4, 2014) (providing information about AFSCME's civil rights foci and its constituency group program). AFSCME also gives a "Disability Award" to affiliates that have made differences in the lives of people with disabilities. *See* Las Vegas, *Disability Award Winners*, AFSCME WORKS MAG. (AFSCME, Washington, D.C.) Jan./Feb. 2000, *available at* http://www.afscme.org/news/publications/newsletters/works/januaryfebruary-2000/disability-award-winners.

nonexistent in the random sample, however, was affinity groups.[143]

Interestingly, of the fifty-two CBAs that met the Compliance Officer model, only nine of them had other provisions related to the actualization and enforcement of compliance—for example, reasonable accommodations, equal pay, or affinity groups—that are found in the Idealist model. Conversely, every contract that fit the Idealist model also had a compliance element. Perhaps, the Idealists are not so idealistic after all, but rather pragmatic and creative, in recognizing the importance of mechanisms and procedures for realizing and enforcing disability civil rights at work.

The Idealist model examples were strong in spelling out both rights and processes for recognizing them. For example, the 2002 University of Indiana-Bloomington's CBA discusses not only reasonable accommodation in great detail, but also advances that accommodations must be "made in a timely manner and on an individualized and flexible basis."[144] The drafters of the agreement seemed to recognize the need for alternate, accessible formats of such job-related materials as job postings themselves and employee handbooks and provided for them in the agreement. The agreement then goes on to discuss the issue of HIV in the campus community and the need to treat it as a disability rights issue. Later in the contract, the university espouses a commitment to affirmative action, "positive and extraordinary, to overcome the discriminatory effects of traditional policies and procedures with regard to the disabled, minorities, women, and Vietnam-era veterans."[145]

Similarly, the 2004 UMass Medical Center CBA outlines an extensive policy for complying with the ADA. It then recognizes that "full access" should be the goal and that issues such as disability-based harassment detract from this goal of inclusion. Taking this vision farther, the drafters suggest that disability issues extend not only to employees but also to visitors and patients of the hospital:

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[143] *But see* Luann Heinen & Helen Darling, *Addressing Obesity in the Workplace: The Role of Employers*, 87 MILBANK Q. 101, 106 (2009) (recommending affinity groups to promote health in the workplace).

[144] Collective Bargaining Agreement Between Ind. Univ. and Serv. Maint. Emps., AFSCME, Local 832 (2002).

[145] *Id.*

> HEALTH CARE: UMass Memorial provides equal access to its health services and does not discriminate on the basis of race, color, religion, gender, age, sexual orientation, national origin, veteran status, or disability. UMass Memorial is proactive in seeking to ensure access to high quality care in a manner compatible with its patients' primary languages, health beliefs and practices, based on an understanding of cross-cultural differences.[146]

Another example of the Idealist approach demonstrates how CBA drafters have recognized the subtle and pervasive qualities of discrimination and situated disability discrimination in a larger context:

> The Employer shall not practice nor tolerate discrimination against employees through employment practices including, but not limited to, recruitment, hiring, training, education, reassignment and promotion on the basis of any non-merit factors such as race, color, religion, sex, ancestry, ethnicity, national origin, political affiliation and/or beliefs, age, mental or physical disability, sexual orientation, marital or family status, Union activity, or use of a second language other than English.
>
> . . . .
>
> . . . Bargaining unit employees are subject to disciplinary action for just cause. Examples are outlined below: . . . Harassment, intimidation and discriminatory behavior towards any person because of race, religion, gender, sexual orientation, gender identity, age, national origin, and disability.[147]

Similarly, other contracts emphasize removing barriers to access in the dissemination of information about rights and the making of complaints: "A copy of this [harassment] policy will be provided to every employee, and extra copies will be available in the City Manager's Office. Reasonable accommodations will be provided for persons with disabilities who need assistance in filing or pursuing a complaint of harassment, upon advance request."[148]

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[146] Collective Bargaining Agreement for UMass Med. Ctr., at 38 (Oct. 1, 2004 to Sept. 30, 2006).

[147] Collective Bargaining Agreement Between the City of Santa Fe and the Am. Fed'n of State, Cnty. & Mun. Emps., at 6–7, 9 (July 1, 2007 to June 30, 2010).

[148] Collective Bargaining Agreement Between the City of Montpelier and the Am. Fed'n of State, Cnty. & Mun. Emps., Vt. Pub. Emps. Council, Local 2787, Council 93 (AFL-CIO), at 58 (July 1, 2007 to June 30, 2010).

These agreements are not strictly Idealist in their visions and perhaps that is where they have the most strength. No CBAs exclusively reflected the Idealist model; rather, the Idealist vision infused other approaches, such as the Individual, Compliance Officer, and Community models. Six CBAs were Individual-Compliance Officer-Idealist-oriented, and one was Community-Compliance Officer-Idealist-oriented. Ten agreements reflected all four models. Every contract with corrections language contained compliance language, as noted. Idealist contracts tended to be shorter than the average contract, a mean of 45.5 pages, pushing aside the notion that creating effective disability strategies in the workplace means procedural complexity and excessive use of definitions and jargon.[149]

In some ways, the co-existence of the Idealist with other models is not surprising. For the corrective Idealist model to work effectively, it needs the supporting mechanisms of resources such as leave, adequate health insurance, and commitment to the rule of law. The Idealist recognizes that rights are but a first step and people require concomitant means for expression and enforcement of those rights and any disability identities. In Part IV, I will further discuss how the Idealist can inform the drafting of model CBAs and the setting of workplace dynamics in both unionized and non-unionized settings.

2. *Parting Observations: Hybrids and Context*

These agreements are far from neat in their divides. Thirty-seven of the CBAs demonstrate more than one approach. The most common of these hybrids is the Industrialist-Compliance Officer approach, representing twenty-one CBAs. Under this approach, the contract contains both a medical framing of disability, as well as a stated commitment to antidiscrimination law, but it does not contain mechanisms for how that commitment is enforced or realized, such as the Idealist does. It also does not discuss the community's role vis-à-vis the disability. The least common model is the Community Stakeholder-Compliance Officer-Idealist, accounting for one contract.

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[149] Michael C. Collins, *The ADA and Employment: How It Really Affects People with Disabilities*, 28 GONZ. L. REV. 209, 210 (1993) (characterizing the ADA as "complicated" and "bewildering").

The contracts also seem to differ in their approaches in particular parts of the country. For example, CBAs in the Midwest seem particularly strong on considering disability in various contexts—from the basics of insurance to the procedural aspects of antidiscrimination. Recent contracts in the sample are also less generous in their disability provisions than slightly older contracts that were initiated before the U.S. economic downturn.

Finally, the length of the agreements is not closely tied to the approaches to disability.[150] Industrialist agreements dominate the spectrum at both ends, whereas Idealist and Community Stakeholder provisions are extremely rare. Medium-length contracts—fifty to sixty pages—are slightly more divided between the four models, contributing to the notion that it may not be mere brevity that is leading to the discussion of certain issues over others.

IV. IDEALIST VISION

In this section, I consider why the Idealist model is worth further study by scholars and adoption by unions and employers. By focusing on the Idealist, I do not intend to privilege this model alone. The Idealist needs to be coupled with elements of the other models. Clearly, a civil rights orientation without adequate benefits and protections, such as health insurance and sick leave, will not serve a worker with either a temporary or chronic health condition well. The importance of the Idealist, however, is that it can be a way to think about disability as a signifier for broader workplace dynamics.[151] If people with disabilities are provided for, recognized, and respected, even as a marginalized workforce population, then the workplace may reflect other values that are of significance to all workers, such as inclusiveness, diversity,

[150] Of the nine contracts twenty pages or fewer, five of them included aspects of the Industrialist model, while only one contained an Idealist provision. Of the seven contracts over one-hundred pages, every one contained an Industrialist variable and three contained Compliance Officer provisions. Only one contained an Idealist provision, and one contained a Community Stakeholder provision.

[151] *See generally* MARTA RUSSELL, BEYOND RAMPS: DISABILITY AT THE END OF THE SOCIAL CONTRACT (1998) (arguing that the treatment of people with disabilities in society reveals a great deal about the equating of work and human value and the overall marginalization of groups based on a failure to be "normal").

communication, due process, and cultural competence.[152] Unlike other minority communities, the disability community may take in and release new workers over the course of any person's lifespan. For this reason, disabled people are considered by many scholars to be the largest minority group in the United States, representing about twelve percent of the overall population.[153] I posit that if disability is being addressed, then that highly marginalized minority experience may tell us something about how ready the workplace is to deal with larger issues of discrimination.[154] Further, by examining how the law is made operational in these contracts, perhaps a reader is given insights into how social change can happen within organizations and how the informal law of workplaces can be as powerful as the law itself.

Much of the socio-legal literature has addressed the issue of how disability rights are the "new civil rights."[155] If disability civil rights, rather than medical intervention, union rights, or mere compliance, are the foci in the CBAs, then what flows from that orientation is a much broader question than disability. In essence, we are asking how responsive the CBAs are to legal and social changes, and how they then embody those changes and

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[152] *See* LENNARD J. DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM, AND OTHER DIFFICULT POSITIONS 13–14 (2002) (warning against essentialism and positing disability as a diverse, yet potentially coalition-building experience; "disability may turn out to be the identity that links other identities").

[153] When disability was defined in terms of six general disability categories, the American Community Survey in 2008 found that 12.1% of people had a disability of some kind. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, REVIEW OF CHANGES TO THE MEASUREMENT OF DISABILITY IN THE 2008 AMERICAN COMMUNITY SURVEY 7 (2009), *available at* http://www.census.gov/people/disability/files/2008ACS_disability.pdf. For additional statistics about disability, see REHAB. RESEARCH & TRAINING CTR. ON DISABILITY STATISTICS & DEMOGRAPHICS, ANNUAL DISABILITY STATISTICS COMPENDIUM 2010, at v (2010), *available at* http://disabilitycompendium.org/docs/default-source/previous-compendium-releases/2010-compendium-release.pdf.

[154] Anita Silvers calls this exercise "historical counterfactualizing" and suggests that imagining society and its policies from new realities unearths existing discrimination. Anita Silvers, *The Unprotected: Constructing Disability in the Context of Antidiscrimination Law*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 126, 139 (Leslie Pickering Francis & Anita Silvers eds., 2000).

[155] *See generally* DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION (2001); RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (2d ed. 2001); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993).

create their own laws of the workplace. These laws, as I argue in this Article, then inform whether people will exercise their rights, find comfort and collegiality at work, utilize the grievance processes, and even sue their employers or unions. The informal laws both create and reflect the workplace and workers' rights.

The Idealist environment encourages a kind of rule-setting that can be beneficial to other employees. Just as non-disabled people may find sidewalk curb-cuts to be of use as they ambulate with strollers, shopping carts, or luggage, non-disabled workers may find the provisions of the Idealist model to have direct and ripple effects on their own work experiences. If disability represents an accommodating approach, most notably seen in the reasonable accommodations provisions of Title I of the ADA,[156] it also encapsulates a shift toward recognizing the need for interdependence and flexibility at work.[157]

My second point is that disability is about more than flexibility and responsiveness at work. It is also about recognizing that diversity exists everywhere: from how an individual functions along certain metrics—for example, physical, psychological, cognitive, or social—to how those metrics are constructed and what those assessments then mean, or should mean, if anything, about individual worth.[158] Disability is a prime example of diversity, yet is overlaid with negative reactions to this form of diversity.[159]

This approach in many ways is not a new one. Scholars Janet Lord, Michael Stein, and others have described disability as difference and diversity.[160] This characterization is not limited

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[156] 42 U.S.C. §§ 12111–12117 (2006 & Supp. II 2008).

[157] Ruth O'Brien, *A Subversive Act: The Americans with Disabilities Act, Foucault, and an Alternative Ethic of Care at the Global Workplace*, 13 TEX. J. WOMEN & L. 55, 56 (2003) (arguing that the ADA is visionary in constructing an ethic of care based on human need); *see also* Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2620 (2011) (arguing that labor unions promote interdependence at work through their diversity).

[158] Ron Amundson, *Biological Normality and the ADA*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, *supra* note 154, at 104.

[159] *See* DAVIS, *supra* note 152, at 87–90 (recognizing the tensions in making studies of disability part of larger minority studies movements).

[160] Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights To Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L.J. 249, 258 (2009); *see also* DIVERSITY AND MULTICULTURALISM 352 (Shirley R. Steinberg ed., 2009) (suggesting strategies for teaching disability as diversity and

to theoreticians. On the ground, some members of the autism advocacy community, for example, react to attempts to label them as "disabled," by calling upon arguments of "neurological diversity" or "neurological difference."[161] They argue that autism is a difference in functioning, not an impairment, just as others who are not labeled as "disabled," function in diverse ways.[162]

While I have made disability the focus of this study, perhaps the "dilemma of difference," as Martha Minow has identified it, is the more useful perspective because it does not limit itself to just the difference of disability.[163] Minow suggests that the "stigma of difference may be recreated both by ignoring it and by focusing on it" and that the dilemma is one where choices need to be made between "special treatment" and integration.[164] The dilemma is part of a system that categorizes and sorts differences and creates legal structures and policies that account for or exclude based on those differences. Therefore, the dilemma of difference, as filtered through the lens of disability, reveals more than what is uncomfortable or unusual about the actual physical or mental impairments of a particular disability. In addition, the dilemma and the difference show us what impairments reflect about the social, legal, and political awkwardness of anyone in the workplace who may be different—disabled or not.

These "disability lessons" are diversity lessons on a grander scale. As Elizabeth Emens has captured in her work, the very act of accommodating a disability at work, when done thoughtfully, may provide third-party benefits by encouraging a culture of adaptability that "may alter the workplace structure or practices for everyone."[165] Workplace rule setting around disability, whether formalized in the contract or made informal in the culture, then, goes beyond disability to larger questions about the desire for diversity and inclusive problem solving.

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difference); Martha T. McCluskey, Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 868 (1988) (discussing the "flawed assumptions about the problem of [disability] difference").

[161] STEPHEN JAMES MACDONALD, TOWARDS A SOCIOLOGY OF DYSLEXIA: EXPLORING LINKS BETWEEN DYSLEXIA, DISABILITY AND SOCIAL CLASS 66–67 (2009).

[162] *Id.*

[163] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 19–20 (1990).

[164] *Id.* at 19–22.

[165] Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 895 (2008).

Susan Sturm has expanded on Emens's work by recognizing how conflicts around disability may trigger broader institutional shifts and promote "functional integration" across race, gender, sexual orientation, and other lines.[166] If an employer can "do right" or be perceived as "doing right" on the difference of disability, then that stance sets the tone for addressing other concerns and grievances. The critique of this argument is that disability is an isolated phenomenon and that there is no causal relationship between disability rights provisions and larger workplace reform in the direction of civil rights, diversity, flexibility for families, and the like.[167] But this argument fails to capture what disabilities, or other minority experiences, do in the workplace.[168]

I return to the actual and expressive functions of CBAs and contend that disability civil rights represent a shift toward understanding that workplaces are made up of more than physical buildings, wage scales, benefits packages, and grievance rules. CBAs can be viewed as relational contract or contracts that create and reflect dynamics of relationships, as Ian Macneil has explored in his work.[169] They are legislatures and courts unto themselves, as Edelman and Suchman have posited.[170] They are cultures and communities that accept or shun certain members.[171] They are environments, not just places, where people spend the bulk of their waking time, constructing identities and relationships, and encountering attitudes about who they are as individuals, workers, colleagues, and employees.[172] These external attitudes can become internalized and they can affect work performance, problem raising, and

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[166] Sturm, *supra* note 17, at 15.

[167] Richard Epstein extends this argument further by saying that antidiscrimination laws at work should be repealed and that the Americans with Disabilities Act is perhaps one of the most burdensome on society's members. *See* EPSTEIN, *supra* note 118, at 480–87 (suggesting that the ADA creates a struggle of resource allocation between healthy and disabled people and erroneously elevates pity and unfounded bias arguments over market efficiencies and economic choices).

[168] *See, e.g.*, LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11–14 (2002) (arguing that racial disparities reflect injustices and disparities beyond race).

[169] *See generally* Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000).

[170] Edelman & Suchman, *When the "Haves" Hold Court*, *supra* note 35, at 942–43.

[171] Edelman & Suchman, *supra* note 37, at 493.

[172] *Id.*

personal and professional identities.[173] Workplaces are creative hubs and battlegrounds for addressing and tackling discrimination and they are very much vibrant and fertile in their propensities for taking on these roles.[174] Incorporating and honoring the struggles of marginalized workers through the example of disability may send the message to all workers that no matter what they experience in their own lives—for example, family demands, temporary illness, cultural misunderstandings, bias surrounding sexual orientation or gender identity, or racial harassment—they may have a safe workplace to voice their concerns and to pursue equality and justice.[175]

Granted, various pieces of inclusion in a union or workplace agenda provide reassurance and affirmation: quality benefits, effective union leadership, and committed supervisors, for example, but this focus is also self-reflective and individualistic. At the next level, a workplace may display a community-driven approach to handling disability or other individual grievance and discrimination issues, and that approach, too, might evince a sense of camaraderie, security, or solidarity. Add in a written compliance statement concerning equal opportunity laws and the ADA. At this point, the workplace has all the functional, textual makings for compliance and responsiveness. It misses, however, the final outcome of the Idealist model—tackling disability-related stigma and shifting the focus from sameness to an underrepresented category of difference. Sturm has called this awareness "institutional mindfulness" and explains that it "reduces bias and advances inclusion by building inquiry into workplace processes and routines, particularly those practices that ultimately determine whether workers with different identities and backgrounds will have the opportunity to thrive, succeed, and advance."[176] Of course, there could be other

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[173] Sally Riggs Fuller et al., *Legal Readings: Employee Interpretation and Mobilization of Law*, 25 ACAD. MGMT. REV. 200, 201 (2000).

[174] Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659, 660–61 (2003).

[175] While Guinier and Torres's arguments do not address disability specifically, their examples of race, gender, and class as potential agents of social transformation are apt here. *See* GUINIER & TORRES, *supra* note 168, at 298 ("[V]ictims are potential agents of a form of social change that is both more structural and transformative [than a traditional civil rights paradigm].").

[176] She continues: "Institutional analysis requires employers to address many questions: Where are the barriers to participation? Why do they exist? Are they signals of broader problems or issues? How can they be addressed? Where are the

workplace canaries beyond people with disabilities, but being disabled is something that all workers could experience if they live long enough, like being elderly.

Combating disability stigma, further, not only benefits disabled people or "disability issues." It benefits anyone who might become disabled, who feels pressure to conceal a disability, who lives with anyone who has a disability, or who cares about disability because of some other connection. In work environments, where there is tremendous pressure to appear independently strong, invincible, capable, even perfect, disability acceptance challenges the notion that those should be the primary goods.[177] It carves out a space for recognizing the ways in which we can all limit one another's productivity, careers, and economic stability through attitudinal barriers and poor institutional design.[178] Disability becomes the example, an important one, but one that has no set boundaries for its effects. If disability is an unwieldy category of difference, as other scholars have observed, it is powerful in challenging the message that strict definitions and divides are necessary and productive.[179]

CONCLUSION

Disability rights are mirrors for how we can all come to deal with one another at work. The discomfort of disability is its external manifestation of impairment and the need for assistance.[180] The disability rights movement has contested the notion that shame should ever be associated with this form of

openings or pivot points that could increase participation and improve quality?" Sturm, *supra* note 17, at 13.

[177] *See generally* Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55 (2006) (challenging the superwoman trope in the legal profession); *see also* Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 778–79 (2010) (identifying the struggles of "real workers" in the face of employers desiring "ideal workers").

[178] Sturm, *supra* note 17, at 18–19 (describing systems that encourage accommodation in a greater sense and focus on removing barriers to productivity that may be gender or disability-related).

[179] Bagenstos, *supra* note 48, at 420.

[180] Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3, 4–7 (1988).

difference.[181] Disability law itself has struggled with finding footing among non-disabled people because disability is always easier to believe as an undesirable event happening to someone else.[182] But disability is what can happen to any person, any worker. Rather than being marginalized as a consideration in labor and employment law and the drafting of CBAs, in particular, it deserves a central place in understanding the fluidity of health status. If we were to construct workplaces and the CBAs governing them from a disability-centric position, how would they be different and whom would they benefit?

That is a challenge to which I have no easy answer; it is a thought experiment rather than an empirical one for which there is a rich, existing dataset of workplace exemplars.[183] Let me suggest here, in the summarizing of the arguments of this paper, the five main ways that disability as *the* organizing consideration transforms work for all: (1) questioning the rigid divides between categories of difference;[184] (2) promoting individual and institutional problem-solving and learning;[185] (3) creating cultures of adaptability and flexibility based on the appreciation of vulnerability and difference as sources of innovation, not failure;[186] (4) bringing awareness to physical and social spaces and the reproduction of inequality and inequity in them;[187] and

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[181] Bagenstos, *supra* note 48, at 427–28.

[182] *See* Jeannette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429, 433 (2010) (noting "the socially-imposed obstacles faced by people with disabilities," including "disability-based animus, unnecessary paternalism, and harmful stereotypes").

[183] Theories and thought experiments have the power for transformation, however. As bell hooks has noted in her feminist theory work, any act directed at "transforming consciousness, that truly wants to speak with diverse audiences works." bell hooks, *Theory as Liberatory Practice,* 4 YALE J.L. & FEMINISM 1, 10 (1991).

[184] *See* Mairian Corker, *Sensing Disability*, 16 HYPATIA 34, 34–35 (2001) (questioning the binaries involved in understanding disability); Candace West & Sarah Fenstermaker, *Doing Difference*, 9 GENDER & SOC'Y 8, 8 (1995) (examining the overlaps between experiences and performances of race, class, and gender as categories of "difference").

[185] Sturm, *supra* note 17, at 13–14.

[186] Vic Finkelstein, *Emancipating Disabling Studies*, *in* THE DISABILITY READER: SOCIAL SCIENCES PERSPECTIVES 28, 29–30 (Tom Shakespeare ed., 1998).

[187] Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 COLO. L. REV. 1297, 1298–1301 (2008) (showing the ways in which gender-biased design limits access to professional opportunities). *But see* Cox, *supra* note 182, at 431 (suggesting that the universal design movement has

(5) challenging an additive approach to diversity, equality, and equity where disability is merely tagged onto a laundry list of diverse experiences that are to be respected.[188] These are all transformations that have guided this article, but their full development should be the focus of future work.[189]

Disability rights and labor rights may end up needing one another, sooner rather than later. They share pragmatic concerns. In addressing rampant unemployment in their community, the disability rights movement and its leaders seek coalition for increasing job stability. Over thirty-three million working-age Americans have disabilities.[190] Running in parallel with separate, but arguably overlapping concerns, are the two-thirds of public workers that currently have the right to be represented by a union; that number may be rapidly dwindling as states in crisis apply pressure to workers to take concessions or leave unions.[191] As they face attacks on membership and organizing rights, public sector unions and their leaders need a consistent, dedicated membership pool to promote growth and provide additional ballasts. Gaining diverse members is a goal and losing members who acquire disabilities or have disabilities that need to be addressed at work can derail that endeavor.

Much like unions, and now more than ever in the public sector, the disability rights movement has struggled similarly with changing the negative image of its members and building

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only been effective at addressing physical disabilities, not hidden or less apparent disabilities).

[188] For a parallel in the field of education, see JAMES A. BANKS, AN INTRODUCTION TO MULTICULTURAL EDUCATION 47–49 (4th ed. 2008) (challenging an approach that merely adds in themes and concerns surrounding diversity without addressing the underlying structures and institutions); *see also* Ahu Tath, *Discourses and Practices of Diversity in the UK*, *in* INTERNATIONAL HANDBOOK ON DIVERSITY MANAGEMENT AT WORK: COUNTRY PERSPECTIVES ON DIVERSITY AND EQUAL TREATMENT 283, 286–88 (Alain Klarsfeld ed., 2010) (emphasizing that the new field of diversity management focuses on eliminating tensions between diverse groups, homogenizing visions, and working toward both the business case for diversity and overall business goals).

[189] Irving Zola argued that a "special needs approach to disability" was a short-term fix and that the social change that needed to happen was a movement toward "universal policies that recognize that the entire population is 'at risk' for the concomitants of chronic illness and disability." Irving Kenneth Zola, *Toward the Necessary Universalizing of a Disability Policy*, 67 MILBANK Q. 401, 401 (1989).

[190] *Frequently Asked Questions (FAQs)*, U.S. DEPARTMENT LAB., http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=66&faqsub=Statistics&faqtop=People+with+Disabilities&topicid=11 (last visited Mar. 4, 2014).

[191] CHAISON, *supra* note 82, at 23, 104.

alliances outside of its own community.[192] Disability rights and labor rights share similar journeys. They must be proactive in shifting the ways in which their agendas are viewed by society, yet do so in a manner that allows them participation in the mainstream economy and public policy.[193] In this mix, the informal laws of the workplace can be just as important as formal legislative action and contract drafting.

In the end, disability rights has the potential to transform collective bargaining from a distributive enterprise to one that is integrative—considering the possibilities of collaboration and problem-solving for both employees and employer.[194] It also has the potential to shift conversations about disability from behind closed doors to places of public prominence as employers hash out what is important to them and how to both address worker satisfaction and workplace equity in the context of rampant unemployment for disabled and non-disabled workers alike.[195] Finally, disability holds promise as a way of voicing greater concerns about what counts as diversity, what it means to create life-span career paths for all workers, and how issues of health equity are intimately intertwined with both public policy and employment.[196] Labor, in turn, offers a new source of community for workers with disabilities, a long history of organizing, and solidarity for workers previously marginalized.

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[192] *See* Michael S. Wald, Comment, *Moving Forward, Some Thoughts on Strategies,* 21 BERKELEY J. EMPL. & LAB. L. 473, 475 (2000) (suggesting that the disability rights movement partner with employers, businesses, and others to advance its vision).

[193] *Id.* (proposing the need for "new causal stories").

[194] CHAISON, *supra* note 82, at 105.

[195] According to the U.S. Bureau of Labor Statistics, 20.9% of people with disabilities were in the workforce compared with 69.7% of people without disabilities. BUREAU OF LABOR STATISTICS, *supra* note 19. The unemployment rate for people with disabilities was 15.0% compared with 8.7% for people without disabilities. *Id.*

[196] *See* Richard V. Burkhauser & Mary C. Daly, *Policy Watch: U.S. Disability Policy in a Changing Environment,* 16 J. ECON. PERSP. 213, 219–20 (2002) (describing the complexities of the benefits system and barriers to work for people with disabilities); *Social Determinants of Health: Definitions,* CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/socialdeterminants/Definitions.html (last updated Jan. 24, 2013).

APPENDIX A

CONCEPTUAL MODELS OF DISABILITY

Individual Approach to Injury and Disability—Fix the Broken Person and the Family ("Industrialist")

Workers' compensation/workplace injury
Sick leave or FMLA
Insurance
Disabled dependents

Community Stake in Addressing Disability and Impairment ("Community Stakeholder")

Program to place workers with on-the-job injuries
Union involvement in accommodations
Coworkers concerns regarding accommodations
Costs of accommodation
Seniority and the ADA

Compliance Orientation Towards Civil Rights ("Compliance Officer")

ADA compliance
Nondiscrimination (EEO) statement inclusive of disability

Societal Corrections—Discrimination and Disability as a Form of Community and Diversity ("Idealist")

ADA as civil rights—more detailed than just an EEO nondiscrimination statement
Equal pay
Disability-based harassment
Affinity groups
Reasonable accommodations