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Disability, Vulnerability, and the Limits of Antidiscrimination

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DISABILITY, VULNERABILITY, AND THE LIMITS OF ANTIDISCRIMINATION

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Abstract: Despite the passage of the Americans with Disabilities Act of 1990 (ADA), disabled Americans face substantial barriers to entry into the workplace, lack material supports including health care and transportation, and may not receive reasonable accommodation that best supports their functioning. In addition, individuals with impairments have difficulty qualifying as disabled for disability protections. In light of these problems, some commentators suggest that a civil rights or antidiscrimination approach to disability discrimination—an approach for which activists fought for twenty years prior to the enactment of the ADA—may not adequately address disability discrimination. Some critics advocate a return to the social welfare model that ADA activists struggled to avoid, namely, a model focused on material supports for disabled persons.

I argue that reforming disability law requires a blend of the civil rights and social welfare models as informed by a novel lens: vulnerability as universal and constant. The current antidiscrimination approach to disability law reform is limited because it views disability as a narrow identity category and fragments disability protection. Fragmentation, a new concept I develop in this Article, results when susceptibility to disability discrimination is treated as if it arises in discrete environments, such as the workplace and particular places of public accommodation. Viewing vulnerabilities as situational generates a host of problems: it results in a patchwork of protections that do not coalesce to allow meaningful social participation, fails to appreciate the hyper-vulnerability (extreme sensitivity) of disabled individuals to certain environmental changes, artificially restricts the protected class by creating a false perception that some individuals with significant impairments are not disabled because they are able to function in particular circumstances or environments, and disregards the benefits of conceptualizing vulnerability to impairments as affecting disabled and nondisabled persons alike.

Interpreting Martha Fineman's theory of vulnerability and applying it for the first time within disability legal studies, I argue that vulnerability to disability and the vulnerabilities disabled individuals experience more acutely than those without disability are both universal and constant. The shared vulnerabilities of disabled and nondisabled individuals suggest the

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need to restructure completely social institutions to respond to barriers to work and social participation. For practical reasons, I advocate a compromise focused on disabled persons with regard to accommodation for employment and some aspects of social participation: a move away from the standard antidiscrimination approach, which fragments protections, to an approach that treats vulnerability as extending across environments and enables a broader provision of material supports for disabled individuals. In particular, the reasonable accommodation mandate should be expanded with governmental supports to allow disabled workers accommodations both inside and outside the workplace that facilitate their employment. Additionally, a dialogue between employers and employees about accommodating disability should be mandatory, and employees should be entitled to reasonable accommodation that supports their preferred methods of functioning. Given the current legal structures in place, however, recognizing vulnerability to illness as universal suggests the need for universal health care, or treating access to health care as a matter of social welfare rather than disability law.

INTRODUCTION

In many ways, the future of American disability law depends on the continued role of a civil rights or antidiscrimination approach to disability discrimination. The Americans with Disabilities Act of 1990

(ADA)[1] recognizes disability as a protected class[2] and creates a mandate against discrimination in the employment, service, and public accommodation contexts.[3] The ADA is a civil rights statute premised on notions of formal equality,[4] providing equal opportunity to individuals identified as disabled under the Act.[5] While the ADA requires some material accommodations to facilitate entry into public places,[6] access to public services and transportation,[7] and workplace functioning,[8] it is an unfunded mandate. Congress did not intend the reasonable accommodation provision to serve as a social welfare measure but as a civil rights requirement; in fact, Congress viewed reasonable accommodation as a means to avoid dependency by increasing access to the workforce and facilitating social participation.[9]

As a formal statement that the government recognizes and opposes discrimination against disabled persons, the ADA is successful on its face.[10] Additionally, the lives of some disabled individuals have undoubtedly been improved as a result of its passage. Workers with

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1. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101–12213 (2000), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

2. *Id.* § 12101(a)(7) ("[I]ndividuals with disabilities are a discrete and insular minority[.]"). While the ADA Amendments Act of 2008 strikes this language, it retains the threshold test for protected class membership. Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555(2008).

3. 42 U.S.C. § 12112 (employment); § 12132 (public services including transportation); § 12182 (public accommodation and public transportation operated by private entities).

4. *Id.* § 12101(a)(7)–(9) (discussing disability as a protected class, equality of opportunity, and the need for disabled individuals to "compete on an equal basis").

5. *Id.*

6. *Id.* §§ 12183–84.

7. *Id.* §§ 12142–48, 12184.

8. *Id.* § 12111(9).

9. *See, e.g.*, Americans with Disabilities Act of 1989: *Hearings on S. 933 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Resources*, 101st Cong. 7 (1989) (statement of Rep. Tony Coelho) ("We are not looking for welfare . . . . We just want an opportunity to be able to live and be able to have an opportunity to work . . . to be productive citizens. We know that there is going to have to be accommodations to give us our basic civil rights."); *see also* Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 636–40 (2004) (discussing congressional intent to address the exclusion of disabled persons from the workforce with the reasonable accommodation mandate).

10. 42 U.S.C. § 12101(b)(3); *see also* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 37 (2000) ("[T]he ADA was critically important to the establishment of a major federal commitment to the mission of employing people with disabilities and providing them with vastly expanded access to public programs and accommodations.").

hidden disabilities are no longer subject to pre-employment exams.[11] Buildings are more accessible to individuals with mobility impairments.[12] Evidence suggests that the most egregious acts of discriminatory exclusion may be in the past.[13] Further, the ADA serves as model legislation in more than forty-six countries.[14]

Nevertheless, disabled individuals continue to face some of the same unemployment and isolation issues that motivated Congress to enact the ADA. First, depending on which studies one finds compelling, employment rates of disabled persons are either unimproved[15] or lower[16]

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11. *See* Paul Steven Miller, *The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit*, 48 CASE W. RES. L. REV. 217, 221 (1998) (discussing 42 U.S.C. § 12112(d)).

12. *See, e.g.*, Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,469 (proposed June 17, 2008) (to be codified at 28 C.F.R. Pt. 35) (proposing regulations to address commentator views that "more than seventeen years after the enactment of the ADA, as facilities are becoming physically accessible to individuals with disabilities, the Department [of Justice] needs to focus on second-generation issues that ensure . . . accessible elements . . . such as ticketing in assembly areas and reservations of boat slips."); *see also* 153 CONG. REC. S10211 (2007) (Statement of Sen. Harkin) ("We have made great advances: . . . curb cuts, accessible buses, accessible trains, widened doors. Every building now built in the United States of America is fully accessible."). *But see* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 4 (2006) ("[T]estimony from advocates across the country affirms that many if not most businesses remain inaccessible, even in circumstances where it would be easy to remove barriers.").

13. *See* 153 CONG. REC. S10210–11 (2007) (Statement of Sen. Harkin) ("[W]hen I first came to the House and then to the Senate to work on these issues, the issues [were about] the discrimination against Americans with disabilities and how people with disabilities had been kept out of the mainstream of American life, how they had been shunted aside, warehoused, categorized in ways that demean their personhood in ways that prevented them from contributing all they could to our American society . . . . We now include people with disabilities under a broad civil rights umbrella . . . . We have made great advances since that time."); *see also* Paul Steven Miller, *Reclaiming the Vision: The ADA and Definition of Disability*, 41 BRANDEIS L.J. 769, 777 (2003) ("I was told [in the 1980s] by one law firm that even though they personally did not have a problem with my size [short stature], they feared that their clients would think that they were running . . . 'a circus freak show' if their clients were to see me as a lawyer in their firm."); *cf. Americans with Disabilities Act of 1988: Joint Hearing Before the S. Subcomm. on the Handicapped and the H. Subcomm. on Select Educ.*, 100th Cong. 75 (1988) (statement of Judith Heumann, World Inst. of Disability) ("In 1981, an attempt was made to forceably [sic] remove me and another disabled friend [in wheelchairs] from an auction house because we were 'disgusting to look at.'").

14. Sharona Hoffman et al., *The Definition of Disability in the Americans With Disabilities Act: Its Successes and Shortcomings: Proceedings of the 2005 Annual Meeting, Association of American Law Schools Sections on Employment Discrimination Law; Labor Relations and Employment Law; and Law, Medicine and Health Care*, 9 EMPL. RTS. & EMPLOY. POL'Y J. 473, 492 (2005).

15. *See, e.g.*, DAVID C. STAPLETON, RICHARD V. BURKHAUSER & ANDRED J. HUNTVILLE, HAS THE EMPLOYMENT RATE OF PEOPLE WITH DISABILITIES DECLINED? 1–4 (2004), *available at* http://digitalcommons.ilr.cornell.edu/edicollect/92 (discussing a decline in the employment of disabled individuals of working age based on Current Population Survey Data), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n15.pdf; Daron Acemoglu &

than before the passage of the ADA. Commentators believe that fear of costly accommodation[17] or litigation[18] may be disincentives for firms to hire disabled workers.

Second, lack of sufficient supports—including health care and transportation—prevents many disabled persons from accessing or retaining jobs and thereby increases their isolation.[19] Public wage and health benefits under Social Security are limited and may require a claimant to prove total and permanent disability, meaning, with some exceptions, that one cannot return to work and continue to receive the same Social Security benefits.[20] The working disabled who have

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Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act,* 109 J. POL. ECON. 915, 929 (finding a sharp decline in 1993 of the employment of disabled men between twenty-one and thirty-nine years old, and in 1992 a decline for women of the same age; both measurements are relative to the employment of workers without disability within the same age ranges); Kathleen Beegle & Wendy A. Stock, *The Labor Market Effects of Disability Discrimination Laws,* 38 J. HUM. RESOURCES 806, 850 (2003) (finding state disability discrimination laws did not result in a decrease in employment for disabled persons prior to the enactment of the ADA).

16. *See, e.g.*, Christine Jolls & J.J. Prescott, *Disaggregating Employment Protection: The Case of Disability Discrimination*, 5 (Nat'l Bureau Econ. Research Working Paper Services, 2004), *available at* http://www.nber.org/papers/w10740 (finding causal relation in years immediately following enactment of the ADA), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n16.pdf; *cf.* John J. Donohue, III & James J. Heckman, *The Law and Economics of Racial Discrimination in Employment: Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713 (1991) (arguing that civil rights protections decreased employment of persons of color).

17. *See, e.g.*, Jolls & Prescott, *supra* note 16 at 2.

18. *See, e.g.*, Acemoglu & Angrist, *supra* note 15, at 917 ("[T]he negative effects of the ADA may have been due more to the costs of accommodation than to the threat of lawsuits for wrongful termination, though poor measurement of separation rates may also account for this result."). *But see* Jolls & Prescott, *supra* note 16, at 4 (arguing that employee discharge litigation costs are not a factor in the employment of disabled individuals); *cf.* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies, supra* note 12 (arguing that litigation is a way of enforcing the reasonable accommodation mandate).

19. *See, e.g.*, Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 26–34 (2004). The significance of health care coverage for employment may be overstated, however. Australians have universal health care and a three to four percent higher unemployment rate for disabled than nondisabled workers. *See* Australian Bureau of Statistics, *Disability, Ageing and Careers: Summary of Findings* (2003), at 26, *available at* http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/978A7C78CC11B702CA256F0F007B1311/$File/44300_2003.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n19.pdf.

20. Social Security Disability Insurance (SSDI) is paid to individuals with previous sufficient payroll contributions. *See* SOC. SEC. ADMIN, 2008 RED BOOK, *available at* http://www.ssa.gov/redbook/eng/overview-disability.htm [hereinafter RED BOOK], *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n20a.pdf. Monthly support increases with previous earnings, though the average estimate for 2008 is $1,004 to each individual per month. *See* SOC. SEC. ADMIN, FACT SHEET SOCIAL SECURITY: 2008 SOCIAL SECURITY

employee benefit plans may also not receive medical services necessary to manage the effects of their disabilities, as the ADA generally does not apply to the content of health insurance policies.[21] While public transportation services are covered under the ADA,[22] routes and vehicles are limited. As a result, disabled individuals compete with the growing elderly population over benefits such as Paratransit, which provides vital transportation for some disabled employees to and from the workplace.[23]

Third, workplace accommodations remain contentious. An interactive process in which employees and employers discuss preferred accommodations is not federally mandated, meaning uniform requirements for the employer-employee dialogue do not exist.[24] The

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CHANGES, *available at* http://www.socialsecurity.gov/pressoffice/factsheets/colafacts2008.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n20b.pdf. Recipients of SSDI are eligible for Medicare. *See* RED BOOK. Supplemental Security Income (SSI) is a means-tested program paying $637 per month in 2008. *See id.* Individuals receiving SSDI are also eligible for Medicaid. *Id.* Both SSDI and SSI benefits are predicated on an inability to work. *See id.* Under the Ticket to Work and Work Incentives Improvement Act of 1999, individuals who return to work may be able to maintain limited health coverage and cash payments. Pub. L. No. 106-170, 113 Stat. 1860 (1999) (codified at 42 U.S.C. § 1320b-19 (2000)). Medicare beneficiaries may keep their insurance for eight and a half years. *Id.* § 202. Medicaid coverage may be extended or available for purchase. *Id.* § 201. Generally speaking, cash payments are phased out, given sufficient wages. *See* RED BOOK.

21. Title III requires that health insurance offices be accessible as places of public accommodation, but health insurers may determine what health care services are covered under their policies, so long as distinctions are not made on the basis of disability. *See* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1116 (9th Cir. 2000); McNeil v. Time Ins. Co., 205 F.3d 179, 185–89 (5th Cir. 2000); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 558–60 (7th Cir. 1999); Ford v. Schering-Plough Corp., 145 F.3d 601, 612–14 (3d Cir. 1998); Lenox v. Healthwise of Ky., Ltd., 149 F.3d 453, 455–57 (6th Cir. 1998). *But see* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32–33 (2d Cir. 1999) ("We believe an entity covered by Title III is not only obligated by the statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability.").

Similarly, Title II, which pertains to public services, does not apply to benefits coverage of state health care plans. *See, e.g.*, Rogers v. Dep't of Health & Envtl. Control, 174 F.3d 431 (4th Cir. 1999).

Under Title I, employers who act as insurers are prohibited from making "disability-based distinctions"—treating individuals with disabilities differently from other insureds—but this limitation does not require employers to provide any particular benefits, including mental health services. *See supra* notes 241–46 and accompanying text. A disability-based distinction is one based on a particular disability, a discrete group of disabilities, or disability in general. *See id.*; *see also* Mental Health Parity and Addiction Equity Act of 2008, H.R. 1424, 110th Cong. § 511 (2008).

22. *See* 42 U.S.C. §§ 12142–44, 12148, 12184 (2000).

23. *See, e.g.*, Liberty Res., Inc. v. Se. Pa. Trans. Auth., 155 F. Supp. 2d 242, 244, 257–58 (E.D. Pa. 2001), *vacated and appeal dismissed after compliance with court order*, 54 F. App'x 769 (3d. Cir. 1992) (finding liability under Title II for a transportation authority that effectively split Paratransit rides between elderly and disabled riders).

24. An interactive process is recommended by the EEOC. *See* 29 C.F.R. pt. 1630 app. (2008).

ADA requires that a worker who discloses a disability and requests an accommodation receive only "a" reasonable accommodation to facilitate her functioning in the workplace.[25] The accommodation might not be one that an individual prefers or that best promotes her functioning.[26] There is no requirement, for example, that accommodations support atypical modes of functioning.[27] Further, accommodations are confined to the physical workspace or to modifications to the work day.[28] Accommodations do not include assistive devices that facilitate an individual's employment by supporting her functioning both at home and at work.

Fourth, many individuals with functional impairments have difficulty qualifying as disabled for civil rights protections.[29] A significant portion

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The process is adopted in many jurisdictions. *See, e.g.*, Dargis v. Sheahan, No. 05-2575, 2008 U.S. App. LEXIS 10526, at *19–20 (7th Cir. May 16, 2008) (holding that an interactive process is mandatory but not an independent cause of action); Buboltz v. Residential Advantages, Inc., No. 07-2065, 2008 U.S. App. LEXIS 8380, at *12 (8th Cir. Apr. 18, 2008) (holding that an interactive process is mandatory and failure to engage in such a process is evidence of bad faith); Freadman v. Metro. Prop. & Cas. Fire Ins. Co., 484 F.3d 91, 104 (1st Cir. 2007) (holding that an interactive process is mandatory); Jenkins v. Cleco Power, LLC, 487 F.3d 309, 316 (5th Cir. 2007) (same); Kleiber v. Honda, 485 F.3d 862, 871 (6th Cir. 2007) (same); Dark v. Curry County, 451 F.3d 1078, 1088 (9th Cir. 2006) (same); Williams v. Philadelphia Hous. Auth., 380 F.3d 751, 771–72 (3d Cir. 2004) (holding that an interactive process is mandatory though not an independent cause of action; further holding that there is no liability if reasonable accommodation is not possible); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1171–72 (10th Cir. 1999) (holding that an interactive process is mandatory); Kitchen v. Summers Continuous Care Ctr., LLC., No. 5:06-00022, 2008 U.S. Dist. LEXIS 38419, at *15 (S.D. W. Va. May 12, 2008) (holding that an interactive process is mandatory but not an independent cause of action; further holding that there is no liability if reasonable accommodation is not possible). *But see* Sullivan v. Raytheon Co., 262 F.3d 41, 48 (1st Cir. 2001) (holding that an interactive process is not mandatory); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286–87 (11th Cir. 1997) (finding that use of an interactive process is subject to case-by-case assessment).

25. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.9 (2008).

26. 29 C.F.R. pt. 1630 app. ("The accommodation . . . does not have to be the 'best' accommodation possible, so long as it is sufficient to meet the job-related needs of the individual . . . . If more than one of these accommodations will enable the individual to perform the essential functions . . . the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.").

27. *See* Ani B. Satz, *A Jurisprudence of Dysfunction: On the Role of "Normal Species Functioning" in Disability Analysis*, 6 YALE J. HEALTH POL'Y L. & ETHICS 221, 225–58 (2006).

28. 42 U.S.C. § 12111(9) (discussing modifications to the physical workplace environment, job-restructuring, and other workplace-specific alterations); *see also* Bagenstos, *The Future of Disability Law*, *supra* note 19, at 42.

29. *See, e.g.*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553 (2008).

of the ninety-four percent of ADA plaintiffs who lose their cases at the federal district court level arguably cannot satisfy the disability threshold requirement.[30] This difficulty stems from narrow judicial interpretation of the ADA in several areas[31] as well as judicial confusion about the role of normal functioning in disability analysis.[32] The recent ADA Amendments Act of 2008 (AAA)[33] seeks to address these problems by broadening the disability threshold test and requiring that courts assess individuals for disability in a pre-mitigated state—that is, before the use of drugs, devices, or other measures to improve functioning[34]—rather than after the use of such ameliorative measures.[35] The Amendments leave a number of issues unresolved, however. The U.S. Supreme Court often looks to outcomes rather than methods of functioning to determine disability—so if an individual functions atypically but effectively without legally recognized mitigating measures, she may not be

30. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100, 110–26, 133–37, 145–50, 153–56 (1999) (discussing the frequent use of summary judgment and the failure to defer to EEOC regulations that are favorable to establishing disability). This statistic does not account for the success of the ADA as measured by settlements and other informal arrangements. *See* Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?* 59 ALA. L. REV. 305 (2008).

31. The U.S. Supreme Court has narrowly interpreted the disability threshold test, that is, whether one is "substantially limited in a major life activity." *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 201 (2002) (finding that a factory worker who cannot perform "'repetitive work with hands and arms extended at or above shoulder level . . . for extended periods of time'" but who is able to complete a number of household tasks is not substantially limited in the major life activity of performing manual tasks under the ADA).

The Court also reads restrictively both "substantial" and "major life activity." In *Toyota*, the Court held that the test for whether a function is a major life activity is whether it is of "central importance to most people's daily lives." 534 U.S. at 197–98. An individual is "substantially limited" if she is "unable to perform . . . [or is] [s]ignificantly restricted as to the condition, manner, or duration under which [she] can perform a particular major life activity as compared to . . . the average person in the general population[.]" 29 C.F.R. § 1630.2(j) (2008). In four of the last five major cases addressing the meaning of "substantial," the Court found for the defendant. *Compare Toyota*, 534 U.S. at 184 (not "substantially limited" because the plaintiff is not "severely restrict[ed]"), *and* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (not "substantially limited"), *and* Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999) (same), *and* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (same), *with* Bragdon v. Abbott, 524 U.S. 624 (1998) ("substantially limited").

32. Satz, *A Jurisprudence of Dysfunction*, *supra* note 27.

33. The Act was signed into law on September 25, 2008, and will take effect January 1, 2009. AAA § 8.

34. *Id.* § 4(a). *See infra* note 125 for a list of mitigating measures.

35. *See, e.g.*, *Sutton*, 527 U.S. at 471 (not disabled using eyeglasses); *Kirkingburg*, 527 U.S. at 555 (not disabled when brain compensates for monocular vision); *Murphy*, 527 U.S. at 516 (not disabled when medicated for severe hypertension).

considered disabled.[36] For example, an individual with severe carpal tunnel syndrome who completes office tasks may not be viewed as disabled, even though she works substantially longer hours than other employees to rest her hands periodically. Further, as addressed in Part II, the AAA does not address individuals who are vulnerable to disability given certain environmental changes, nor does it remedy the fragmentation of disability protections under the current civil rights approach.

The limitations of the ADA prompted some commentators to suggest that a civil rights or an antidiscrimination approach to disability discrimination—an approach for which activists fought for twenty years prior to the enactment of the ADA—may not adequately address disability discrimination.[37] Some critics advocate a social welfare model that ADA activists struggled to avoid, namely, a model focused on material supports for disabled individuals.[38] A social welfare approach is based on compensation for disability, rather than social change to accommodate disability.[39] It does not ground equality of participation as a formal right, though it does address the need for material resources such as wage, health, transportation, and other social supports. In other words, the social welfare approach focuses on eligibility for benefits rather than on antidiscrimination.[40] This type of approach underlies Social Security disability benefits.[41]

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36. *See* Satz, *A Jurisprudence of Dysfunction*, *supra* note 27, at 243–48.

37. *See, e.g.*, Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1212–25 (2007) (appealing to a human rights paradigm); Bagenstos, *The Future of Disability Law*, *supra* note 19, at 54–70 (appealing to social welfare models); Diller, *supra* note 10, at 38–47 (noting limitations of the civil rights model).

38. *See*, Bagenstos, *The Future of Disability Law*, *supra* note 19, at 54–70; William G. Johnson, *The Future of Disability Policy: Benefit Payments or Civil Rights?* 549 ANNALS AM. ACAD. POL. & SOC. SCI. 160, 170–72 (1997); Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 940–56 (2000).

The tension between the social welfare and antidiscrimination models addressed in this Article is related to debates in other literatures, namely those between substantive and formal equality (actual equality versus sameness treatment), result and rule orientation (outcome versus procedural fairness), and distributive and formal justice (redistribution of material goods versus sameness treatment).

39. *See* ANITA SILVERS, DAVID WASSERMAN & MARY B. MAHOWALD, DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES OF JUSTICE IN BIOETHICS AND PUBLIC POLICY 74–76 (1998).

40. Johnson, *supra* note 38, at 161–63.

41. *See supra* note 20 and accompanying text. The Federal Rehabilitation Act of 1973, 29 U.S.C. §§ 705–08 (2000), is also viewed as embracing a social welfare approach to disability to the extent that the Act seeks to compensate the disabled worker through rehabilitation rather than altering the disabling environment. The Act is now "read through" ADA jurisprudence. *See* 29 C.F.R. §

While advocates of the social welfare model do not argue for the abandonment of the ADA, they suggest that disability discrimination cannot be addressed without focusing on the issue of lack of material supports.[42] This premise both understates and overstates the problem. It overstates it in the sense that some of the pressing issues facing disabled persons—such as difficulty in qualifying for the protected class or receiving a preferred accommodation—are not addressed by material supports if disability protection, including accommodation, remains tied to protected class status. These issues must be addressed within the civil rights framework. It understates matters in the sense that access to some material supports, such as health care, is not a disability discrimination issue but one of general social welfare.

This Article argues that reforming disability law requires a blend of the civil rights and social welfare models as informed by a novel lens: vulnerability as universal and constant. Part I interprets and applies for the first time to disability law Martha Fineman's vulnerability thesis, which proffers this view of vulnerability. Fineman argues that vulnerability is part of the human experience, and the state must develop structures to address substantive inequality and disadvantage.[43] Applying Fineman's theory, I argue that vulnerability to disability and the vulnerabilities of disabled persons are universal and constant. All human beings are vulnerable to disability, and, when disabled, our vulnerabilities are often the basis for discrimination. These vulnerabilities are constant and exist across environments.

Part II uses these insights to critique the current antidiscrimination approach to disability law reform. Section A discusses the limitations of viewing disability as an identity category rather than as a part of the human condition. In Section B, I develop a new concept that I term "fragmenting disability protection." The current civil rights approach treats susceptibility to disability discrimination as situational or limited to a particular environment in the public realm instead of as extending

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1614.203 (2008) ("The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), has been violated . . . shall be the standards applied under Titles I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 12201), as such sections relate to employment. These standards are set forth in the Commission's ADA regulations at 29 CFR part 1630.").

42. *See, e.g.*, Bagenstos, *The Future of Disability Law*, *supra* note 19, at 54–70; *see also* Samuel Bagenstos, *Mend It, Don't End It*, *in* THE AMERICANS WITH DISABILITIES ACT: EMPIRICAL PERSPECTIVES (Samuel Estreicher & Michael Ashley Stein, eds., forthcoming), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n42.pdf.

43. Nonhuman animals may, of course, also experience disability.

across environments in both the public and private spheres.

Part III employs the concept of universal vulnerability to advocate a blend of the civil rights and social welfare models to address the current inequities in the legal and social responses to disability. To address barriers to unemployment and desired accommodations, Section A advocates the expansion of the reasonable accommodation mandate, supported by government subsidy. Individuals will receive accommodations that facilitate employment by enabling them to function across environments. This proposal entails a social welfare approach to accommodation but leaves in place the requirement of protected class status. Section B advocates the application of vulnerability theory to its fullest extent by arguing for a social welfare approach to health care to address universal vulnerability to illness. The differences in the approaches are based largely on practical considerations, and my position is in no way intended to discourage efforts to protect the vulnerability of workers who are not disabled.

I. DISABILITY AND UNIVERSAL VULNERABILITY

This Part discusses legal scholar Martha Fineman's theory of vulnerability, namely that vulnerability is universal and constant.[44] After interpreting her theory, I apply it for the first time in legal scholarship to disability. All individuals possess a universal vulnerability to disability, and disabled individuals have other universal vulnerabilities that they may experience more acutely, which are constant and extend across their home, work, and social environments. Fineman's theory lends support to the concept I develop in Part II that the current approach to disability discrimination, which focuses on discrete environments rather than the experience of disability more generally, fragments disability protections. I argue in Part III that Fineman's theory has implications for the civil rights model of disability as well as for social supports for disabled and nondisabled individuals; it informs the mixed civil rights and social welfare model I advocate in that Part.

44. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

A. Fineman's Vulnerability Thesis

Fineman's theory of universal vulnerability has four premises: (1) vulnerability is universal and constant;[45] (2) vulnerability is not situated in the body alone, that is, it may be the product of economic, institutional, and other social harm;[46] (3) disadvantage (including discrimination)[47] that results from vulnerability is best addressed by moving past identity categories,[48] including protected classes;[49] and (4) both state and private actors must address vulnerability.[50] Fineman's vulnerability thesis is a critique of formal equality, which provides the same opportunities to privileged and to disadvantaged groups as opposed to addressing substantive inequalities embedded within legal structures. Antidiscrimination mandates such as the ADA embrace formal equality.

Fineman's concept of vulnerability is that it is a "universal, inevitable, enduring aspect of the human condition."[51] All individuals are vulnerable, in the sense that they have the potential to become dependent.[52] Her concept is similar to that used in international human rights instruments, which are framed in terms of shared vulnerabilities rather than specific deprivations and dependencies.[53] In the human rights context, "vulnerability" is exposed by a "simultaneous increase in

45. *Id.* at 1.

46. *Id.* at 9–10.

47. Fineman prefers to speak in terms of "disadvantage" instead of "discrimination," as she believes the former better captures the ills of privilege. *Id.* at 16. Further, "discrimination" invokes the protected class status of formal equality that she rejects as harmful to the very individuals it is designed to protect. Fineman acknowledges, however, that disadvantage may give rise to discrimination. *Id.* at 44 n.7 ("I acknowledge that discrimination does exist, and I do recognize that . . . personal characteristics might work to complicate the experience of vulnerability for any individual. My claim is merely that discrimination models *based on identity characteristics* will not produce circumstances of greater equality and may in fact lead to less in many circumstances.") (emphasis added).

48. Identity categories result from grouping individuals socially, culturally, or politically; gender, race, sexual orientation, religious affiliation, and disability may be viewed as identity categories.

49. Fineman, *The Vulnerable Subject*, *supra* note 44, at 4.

50. *Id.* at 19–22.

51. *Id.* at 8.

52. *Id.* at 12.

53. *See, e.g.*, Universal Declaration on Bioethics and Human Rights, art. VIII, UNESCO G.C. Res., 33/24, U.N. Doc. C/Res/33/24 (Oct. 19, 2005), *available at* http://portal.unesco.org/shs/en/ev.php-URL_ID=1883&URL _DO=DO_TOPIC&URL_SECTION=201.html (discussing "human vulnerability"), *permanent copy available at* http://www.law.washington.edu /wlr/notes/83washlrev513n53.pdf.

threats" and a "weakening of coping mechanisms."[54] This differs from the common use of "vulnerability" to describe the dependencies of particular groups or populations: individuals with malaria in Sub-Saharan Africa, people institutionalized with mental illness, or persons of young or advanced age, for example.[55]

Fineman eschews the "liberal subject"—who is viewed as a fully functioning adult[56]—and favors a "vulnerable subject," who may have social, economic, or biological limitations.[57] Every individual is constantly vulnerable to the possibility of impairment, though the ontology of their impairments may differ. State institutions are vulnerable to corruption, capture, and decline, according to Fineman, and the state must guard against this and respond when necessary.[58]

The vulnerabilities of the liberal subject are currently addressed by our legal structures only in particular contexts. For example, laws protect certain disadvantaged groups from discrimination. Fineman argues that this context-specific approach not only limits the reach of protections for universal vulnerabilities, it also fails to address existing inequalities embedded within legal and social structures, such as wage disparities and stigma.[59] Further, current laws are framed with reference to a subject whose vulnerabilities, due to existing social supports or serendipity, never manifest themselves as dependencies.[60] Those who require additional health care, wage supports, or environmental adaptations to function are disadvantaged by a system that views their needs as exceptional (requiring something akin to affirmative action),[61] rather

54. Peader Kirby, Roundtable Discussion with Bryan S. Turner & Peadar Kirby, Vulnerable Populations Speaker Series, Emory University School of Law (Apr. 17, 2008); *see also* PEADAR KIRBY, VULNERABILITY AND VIOLENCE: THE IMPACT OF GLOBALISATION ch. 3 (2006) (discussing the evolution of the term "vulnerability" in the international context).

55. Fineman makes a similar point. Fineman, *The Vulnerable Subject*, *supra* note 44, at 8.

56. The concept of the liberal subject is informed by the philosophy of Immanuel Kant, which separates the individual from the external world (the subject/object distinction). Rawls famously describes the liberal subject at an original or neutral position, unaware of her social lot in life. JOHN RAWLS, A THEORY OF JUSTICE 19–21 (1971). Rawl's subject is "[a] normally active and fully cooperating member[] of society over a complete life," or perceived as healthy over a lifetime. John Rawls, *Social Unity and Primary Goods*, *in* UTILITARIANISM AND BEYOND 159, 168 (Amartya Sen & Bernard Williams eds., 1982).

57. Fineman, *The Vulnerable Subject*, *supra* note 44, at 11–12.

58. *Id.* at 12–13. Fineman questions, for example, the robust legal structures that further corporate practice and distribute wealth to few. *Id.* at 20–22.

59. *Id.* at 15–18.

60. *Id*. at 15–16.

61. *See, e.g.*, James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights*

than as a manifestation of the human condition.[62] The current legal scheme results in double jeopardy for some: individuals are disadvantaged by the realization of certain vulnerabilities, and they are consequently denied or provided limited assistance because their needs are viewed as exceptional.[63]

Fineman's response to the vulnerable subject and the vulnerable state is to move past formal equality and identity categories toward a strong state with structures that support vulnerabilities as universal.[64] She views the state as obligated to develop structures from which every person will benefit.[65] She provides, by way of example, the Common Benefits Clause of the Vermont Constitution, which was enacted prior to the adoption of the Fourteenth Amendment of the U.S. Constitution.[66] The Common Benefits Clause states that the role of the government is "for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons."[67] This provision was used by the Supreme Court of Vermont to extend the legal benefits enjoyed by opposite-sex married couples to same-sex couples.[68] Individuals in Vermont are entitled to the benefits because they are citizens of the state, not because they are part of a protected class as we commonly understand it.[69]

Fineman's arguments for framing state responsibility significantly advance academic discourse about government response to disadvantage, including discrimination. Fineman's focus on vulnerability as universal and constant redefines the relationship between the state and the individual. The state's role is expanded beyond addressing specific dependencies of some protected groups to responding to the

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Concepts has Rendered Title I of the ADA Ineffective, 56 CASE W. RES. L. REV. 1, 43 (2005).

62. Fineman, *The Vulnerable Subject*, *supra* note 44, at 17–18.

63. *See, e.g.*, Ani B. Satz, *The Limits of Health Care Reform*, 59 ALA. L. REV. 1451, 1483 (2008) (discussing the double jeopardy of individuals with poor health status or in advanced age who are disadvantaged by rationing schemes); *see also infra* note 251 and accompanying text.

64. Fineman, *The Vulnerable Subject*, *supra* note 44, at 19–22. Fineman argues that "[v]ulnerability . . . freed from its limited and negative associations is a powerful conceptual tool with the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality than is currently afforded under the equal protection model." *Id.* at 8–9.

65. *Id.* at 19.

66. *Id.* at 22.

67. *Id.*

68. *Id.* at 22–23.

69. *Id.* at 23.

vulnerability of every individual regardless of whether financial, social, or physical impairments rise to dependency. The role of the state and its institutions is to provide resilience to vulnerable individuals.[70] When legal and social institutions are structured to address universal vulnerability, the citizen and the state have a tighter, continuous, and evolving relationship.

Thus, Fineman's vulnerability thesis bears directly on the public/private distinction, or the question of when and under what constraints the state may act. The state regulates only what is deemed to be public, such as markets and some aspects of civic life.[71] When it comes to addressing vulnerability, the state is currently assumed to be non-interventionist. State intervention to address impairments to functioning outside the marketplace is considered an intrusion into the private realm. Fineman's view of vulnerability as universal and constant illuminates the difficulty with this distinction, namely, that vulnerability does not end when one leaves the public realm (or particular parts of the public arena).

Fineman envisions the state reasserting itself to address universal vulnerabilities as well as the dependencies of those whose vulnerabilities are realized. She argues that the law should move past identity categories and antidiscrimination mandates toward addressing shared, constant vulnerabilities. These vulnerabilities may be biological, social, or economic, and require social supports.

B. Universal Vulnerabilities to Disability and for Disabled Persons

This Part situates Fineman's vulnerability theory within the existing antidiscrimination critique and applies it to disability. Unlike previous commentators, Fineman stresses the need for an interventionist state to address universal vulnerability. Fineman moves beyond focusing on the vulnerabilities of target groups and removes private firms as gatekeepers of accommodation. Her vulnerability thesis applies to vulnerability to disability as well as to individuals with realized vulnerabilities that result in disability. Disabled individuals may have heightened vulnerabilities associated with their impairments and be disadvantaged by discrimination on the basis of those vulnerabilities.

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70. Fineman, *The Vulnerable Subject, supra* note 44, at 13 (citing PEADAR KIRBY, VULNERABILITY AND VIOLENCE (2006)).

71. MARTHA ALBERSTON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 38–39, 208 (2004).

1. Situating Vulnerability Theory Within Existing Antidiscrimination Critique

Before applying Fineman's vulnerability thesis to disability, it is necessary to place her theory within the existing critique of the civil rights approach to disability discrimination. Fineman does not address disability directly. Rather, she provides a more general critique of the formal equality or antidiscrimination approach to human vulnerability.[72] Fineman is critical of a formal equality approach, which focuses on equal treatment, on three grounds. First, sameness treatment does not consider or address structural inequalities; people are treated in a like manner under existing laws and practices that entrench inequalities.[73] Second, formal equality results in a "withering state,"[74] as corporate and other private interests limit the role and ability of the government to address inequalities.[75] As Fineman states, under the formal equality paradigm "the state minimally supervises . . . institutions in fulfilling their essential role in providing assets that give us resilience in the face of vulnerability."[76] Third, formal equality excludes those with vulnerabilities who are not part of a protected class.[77] Additionally, Fineman cautions that expanding the protected class may serve as "a justification for abandoning the pursuit of substantive equality," or addressing the structural issues contributing to disadvantage.[78] While this is an empirical claim, it underscores the possible dangers of addressing disability discrimination by sameness treatment.

Disability scholarship discussing the inherent limitations of the civil rights approach identifies similar issues, though not necessarily in Fineman's terms. Formal equality for disabled individuals under the ADA means being treated like individuals who do not have a disability.[79] While this may involve accommodation, scholars and

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72. Fineman, *The Vulnerable Subject*, *supra* note 44, at 2.

73. *Id.* at 3.

74. Fineman defines the "state" as "an organized and official set of linked institutions that together hold coercive power, including the ability to make and enforce mandatory legal rules, and which is legitimated by claim to public authority. In form the 'state' could be locally, nationally, transnationally, or internationally organized."). *Id.* at 6 n.14.

75. *Id.* at 5–6.

76. *Id.* at 19.

77. *Id.* at 3, 5.

78. Fineman, *The Vulnerable Subject*, *supra* note 44, at 20.

79. *See, e.g.*, Leonard, *supra* note 61, at 45–46; Bagenstos, *The Future of Disability Law*, *supra* note 19, at 37 (speaking of an "access/content distinction": disabled individuals have access to the

activists recognize that formal equality does not address the structural inequities that limit disabled individuals in work and civic life.[80]

Further, commentators acknowledge the "withering state" in a narrow sense, namely, the ADA and its supporting regulations limit the federal government's role in promoting equality because the reasonable accommodation provision is interpreted as an antidiscrimination mandate.[81] There is little to no federal funding of accommodations,[82] and the federal government generally does not interfere with the accommodations made by state and local governments or private parties so long as they are reasonable.[83]

Scholarship focused on extending the protected class and the AAA purport to address the arguments contained within Fineman's last critique: the exclusion of those with vulnerabilities from legal protections.[84] As I argue in Part II.A, however, expanding the protected class cannot resolve some of the limitations of the identity category approach to addressing discrimination. Individuals with vulnerabilities from impairments that do not rise to the level of disabilities will remain unprotected.

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same benefits as individuals who are not disabled, though the content of the benefit is not altered to meet the needs of disabled individuals).

80. *See, e.g.*, Bagenstos, *The Future of Disability Law*, *supra* note 19, at 42–50; Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 92–93 (2007).

81. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 43 (2006); Stein, *Same Struggle, Different Difference*, *supra* note 9, at 637–40; Stein & Stein, *supra* note 37, at 1210–11.

82. *See infra* note 216 and accompanying text.

83. *See supra* notes 25–28 and accompanying text. State sovereign immunity may be abrogated when states fail to make disability accommodations that support basic constitutional rights. *See* United States v. Georgia, 546 U.S. 151 (2006) (holding that Title II abrogates state sovereign immunity when conduct violates the Fourteenth Amendment); Tennessee v. Lane, 541 U.S. 509 (2004) (holding that Title II abrogates state sovereign immunity with respect to the fundamental right of access to courts).

84. *See, e.g.*, Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 373-74 (2000); Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83 (2000); Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405 (1999). Michael Stein's scholarship regarding disability as a human right is a notable exception, as he acknowledges that the "group classified as 'disabled' often overlaps significantly with other socially marginalized groups . . . . This connection underscores the universality of disability, both as a human rights issue and as part of the human experience." Stein & Stein, *supra* note 37, at 1240. Stein refers to the universality of *disability*, whereas Fineman is concerned with vulnerability.

2. Applying Fineman's Vulnerability Theory to Disability

Fineman's theory has clear applications to the disability context, both in terms of thinking about the disabled subject and the state's response to vulnerability to impairment. To begin, a vulnerable subject may become a disabled subject. Vulnerability to disability (and other impairments) is universal and constant; we are all one curb step away from disability.[85] We are susceptible to disability as part of the human condition.

An individual becomes disabled when certain vulnerabilities are realized. A disabled individual remains vulnerable to further disability and may experience particular vulnerabilities more acutely: "[u]ndeniably universal, human vulnerability is . . . particular [and] is experienced uniquely by each of us . . . ."[86] Thus, the vulnerable subject differs from the dominant conception of a liberal subject, who is viewed as a normal, fully functioning adult.[87] The vulnerable subject exists at various life stages and with a spectrum of possible abilities, including impairments to functioning.[88]

Fineman's conception of the vulnerable subject reveals that the current approach to disability discrimination based on protected class membership ignores the possible shared benefits of facilitating a variety of means of functioning. The ADA focuses on independence rather than dependence or interdependence (shared dependence) of individuals.[89]

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85. I borrow this expression from a conversation with Rosemarie Garland-Thomson, Professor of Women's Studies, Emory University.

86. Fineman, *The Vulnerable Subject*, *supra* note 44, at 10.

87. *See supra* notes 56–58 and accompanying text.

88. *See supra* note 57 and accompanying text. The concept of the vulnerable subject overcomes a limitation in Martha Nussbaum's work addressing obligations to disabled persons. Under Nussbaum's capabilities model, disabled individuals with profound impairments may not be able to realize the capabilities she suggests a state must maximize for each individual to promote human dignity. MARTHA NUSSBAUM, FRONTIERS OF JUSTICE 76–78, 179–81, 192–93 (2006); *see also* Stein, *Disability Human Rights*, *supra* note 80, at 105 (discussing this limitation of Nussbaum's theory).

89. *See, e.g.*, 42 U.S.C. § 12101(a)(8)–(9) (2000) (stressing the need to eliminate dependency and to promote independent living); *see also Americans with Disabilities Act of 1989: Hearing Before H. Subcomm. on Public Works and Transport.*, 101st Cong. 13, 14 (1989) (statement of Roland Moss); *id.* at 89 (statement of David M. Capozzi); *Americans with Disabilities Act of 1989: Hearing Before the H. Subcomm. on Educ. and Labor*, 101st Cong. 8 (1989) (statement of Hon. Steve Bartlett); *id.* at 44–47, 51 (statement of Judith Comfort); *id.* at 47, 61–63 (statement of Robert Mosbacher); *id.* at 96–98 (statement of Dr. William A. Spencer); *id.* at 133, 149 (statement of Kathy Wingen); *id.* at 278–79, 284 (statement of Oral O. Miller); *id.* at 504, 507, 510 (statement of Robert M. Werth). The ADA of 1990 is based on a publication of the National Council of the Handicapped. *See* TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS (1986).

The reason for this may be the ADA's concentration on an independence–(inter)dependence rather than a vulnerability–resilience dichotomy. While some commentators in disability studies view interdependence as a beneficial way to view the implications of disability,[90] others view it as potentially harmful to speak of disability in terms of interdependence, as it may invoke pity and other negative sentiments.[91] Focusing on shared vulnerability and resilience advances the discussion.

Appealing to universal vulnerabilities removes the stigma of needing assistance and improves protections for all, eliminating backlash by those who would otherwise fail to receive protections. In contexts such as health care and employment, it may not make sense to speak of a protected class.[92] Consider the similar vulnerabilities of disabled, minority, and at-will employees, in terms of heightened vulnerability to termination and barriers to re-entering the workforce.[93] An even stronger analogy may be made between individuals with impairments that do not rise to the level of disability and the vulnerabilities of individuals in these other categories. As Matthew Diller notes, "[I]f the plaintiffs' impairments do not appear serious enough, then there is no basis for distinguishing them from the general mass of workers who are subject to the vicissitudes of at-will employment and [for] grant[ing] [plaintiffs] the 'benefit' of accommodation and protection from discharge."[94] Similar arguments may be made in the health care context, as everyone benefits from broad, affordable coverage, given universal vulnerability to illness and other impairments requiring medical attention.

Perhaps most importantly, however, Fineman argues for a strong state to address universal vulnerabilities. This view sheds light on a current limitation of disability scholarship: disability literature focuses much attention on the role of the employer, but not the state, in addressing the vulnerabilities of disabled workers.[95] The impact of the state is assumed

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90. *See, e.g.*, SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 145 (1996).

91. *See, e.g.*, SILVERS, WASSERMAN & MAHOWALD, *supra* note 39, at 103.

92. Fineman, *The Vulnerable Subject*, *supra* note 44, at 14 (arguing that her theory of universal vulnerability applies to education, health, and employment systems).

93. Diller, *Judicial Backlash*, *supra* note 10, at 47 ("If differential and individualized treatment [under the reasonable accommodation mandate] is necessary for the establishment of equal opportunity for people with disabilities, it may also be necessary for other groups.").

94. *Id.* at 49–50.

95. *See, e.g.*, Bagenstos, *The Future of Disability Law*, *supra* note 19, at 43–44, 47.

as a constant, and immense pressure is applied to employers to address structural inequalities affecting disabled employees.[96]

This approach seems both a Sisyphean effort and an unjust request. It is Sisyphean because employers are asked to change their practices within a system that privileges employers in terms of influence on workplace practices and wealth. It may be, as Catherine Albiston and others argue, that small alterations from the ground up in employment will address some (local) structural inequalities for disabled workers, but this seems unlikely to bring about effective, systemic change.[97] Further, it may be unjust, as some conscientious employers may bear an immense burden to address structural inequalities, while others gain economically from not improving practices. If the state restructures its legal institutions to consider adequately the universal vulnerabilities of disabled employees, employers will share the same obligations. A top-down approach also affords uniformity in practice.

While Fineman's theory seeks to present an alternative to an antidiscrimination approach such as the ADA, it provides insights about how a civil rights model might be improved. Fineman's conceptualization of vulnerability supports the argument that it does not make sense to view the vulnerabilities associated with disability as arising within discrete environments under any paradigm. Vulnerability does not end when one leaves a movie theater, a workplace, or a commuter train; vulnerability based on impairments to functioning is universal and constant. Part II examines the limits of the current antidiscrimination approach to disability, focusing on the requirement of protected class membership and the fragmentation of disability protections by a civil rights approach that views vulnerability as situational.

II. THE LIMITS OF ANTIDISCRIMINATION

This Part discusses the limitations of the current civil rights approach to disability discrimination in terms of reliance on disability as an

96. *See, e.g.*, Bagenstos, *The Structural Turn*, *supra* note 81, at 4 ("The challenge for civil rights advocates, then, is not to devise new doctrines so much as it is to convince judges and the broader political community that employers should be held responsible for structural problems of workplace inequality when they are not taking sufficient steps to counteract those problems.").

97. Catherine R. Albiston, *The Institutional Context of Civil Rights*, Remarks at the Annual Meeting of the Law and Society Association, Montreal, Canada (May 30, 2008) (discussing a forthcoming monograph); *see also* Bagenstos, *The Structural Turn*, *supra* note 81, at 4.

identity category and the fragmentation of disability protections. Identity categories result from grouping individuals socially, culturally, or politically. The ADA recognizes disabled persons as part of a protected class rather than viewing disability as an aspect of the human experience.[98] Thus, as in the gender, race, and religion contexts, protections for disabled individuals against discrimination are contingent upon protected class membership.

The concept of fragmenting disability protections is a novel critique of antidiscrimination law. Protections for class members are fragmented when the vulnerabilities associated with disability are viewed as arising within discrete environments—such as the workplace, the local shopping mall, or the public library—rather than existing continuously across environments. Conceptualizing the experience of disability as fragmented, rather than as constant and part of the human condition, is perhaps the most significant barrier to addressing disability discrimination under the current civil rights approach.

This Part adds to the existing critique of the antidiscrimination approach to disability law in two ways. First, I demonstrate that the limitations of class membership for disabled individuals are inherent constraints of the civil rights approach, rather than an issue of implementation of the ADA. Many scholars,[99] and indeed the authors and supporters of the AAA,[100] suggest that construing the definition of disability to include more persons with impairments will substantially address the barriers to disability protection. I recognize identity categories as a limitation of the civil rights approach that cannot be remedied by judicial or legislative adjustments to the ADA. However broadly the protected class is defined, it will necessarily exclude individuals with impairments that do not meet the disability threshold test. Restricted membership in the protected class suggests that disability law reform requires a mixed social and civil rights approach to address

98. The AAA, however, strikes 42 U.S.C. § 12101(a)(7), which states in part that "individuals with disabilities are a discrete and insular minority." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555 (2008). *See also infra* notes 112–13 and accompanying text.

99. *See, e.g.*, Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83 (2000); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?* 21 BERKELEY J. EMP. & LAB. L. 91 (2000); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).

100. *See, e.g.*, 154 CONG. REC. E1376 (daily ed. June 26, 2008) (statement of Rep. Capps) (co-sponsor); 154 CONG. REC. H6083-84 (daily ed. June 25, 2008) (statement of Rep. Jackson-Lee).

the vulnerabilities associated with some biological impairments.

Second, I develop the concept of fragmenting disability protections as a critique of the current civil rights approach. The ADA assumes that the vulnerabilities associated with biological impairments may be addressed within particular environments in the public realm, such as the workplace,[101] transportation,[102] and places of public accommodation,[103] thus failing to account for the vulnerabilities of disabled individuals while moving between and outside these environments. Viewing vulnerability as situational results in interrupted protections on two fronts. To start, accommodations within the public realm are limited to discrete contexts. Take a simple illustration: under current ADA case law, a Deaf person must be able to enter a movie theater,[104] but there is no requirement that she be able to view a film with captioning.[105] Further, accommodations within the private realm that facilitate entry into the public domain are not addressed by the ADA. For example, the Act does not speak to accommodations at home that are necessary for an employee to complete vital personal tasks necessary to maintain a routine work schedule, such as personal grooming, laundry, and meal preparation.

Fragmented protections do not adequately respond to the vulnerabilities associated with disability. Disabled citizens may be directly denied meaningful access to services in the public realm, as in the theater example. Disabled individuals may also be indirectly denied access to opportunities in the public realm when they lack accommodations in the private sphere that facilitate entry into the public domain, such as into the workforce. Viewing vulnerability as situational also makes it difficult to identify and to address structural inequalities such as wage inequities and stigma. This is because these inequities involve social discrimination that is not bounded by the contexts upon

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101. 42 U.S.C. §§ 12111–17 (2000), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

102. *Id.* §§ 12142–44, 12148, 12182(b)(2)(B), 12184.

103. *Id.* §§ 12181–89.

104. *Id.* § 12181(7)(C) (covering "motion picture house").

105. *See, e.g.*, Todd v. Am. Multi-Cinema, Inc., No. H-02-1944, 2003 U.S. Dist. LEXIS 25317, at *13–15 (S.D. Tex. Aug. 6, 2003) (holding that installing closed captioning, which is viewable only to those who choose it, poses an undue burden on defendant theaters); Cornilles v. Regal Cinemas, Inc., No. 00-173-AS, 2002 U.S. Dist. LEXIS 7025, at *15–22 (D. Or. Jan. 3, 2002) (holding that there is no obligation under the regulations to provide either closed captioning or open captioning, which is visible to all in a theater). *But see* Ball v. AMC Entm't, Inc., 315 F. Supp. 2d 120, 126–32 (D.D.C. 2003) (approving a joint motion for settlement providing closed captioning).

which the law focuses. Stigma against disabled workers, for example, usually does not originate within the place of employment but travels into the work environment from familial or social contexts.

A. Disability as an Identity Category

Much is written in critical legal scholarship about the value of identity categories and their relation to legal rights.[106] I do not in this brief Section intend to take a position in the debate about whether identity categories—groups of individuals based on social, cultural, or political affiliation—promote or hinder rights overall. My argument is simple: The civil rights approach to disability discrimination is inherently limited because it requires viewing disability as an identity category. The requirement of class membership necessarily excludes some individuals with impairments from disability protections. Thus, while expanding the definition of disability with the AAA or through judicial construction may protect more individuals with disabilities, it does not adequately address the vulnerabilities of individuals outside the protected class. These individuals must turn to other legal structures to address their vulnerabilities.

At a basic level, a civil rights approach requires creating a protected class of individuals. Prior to the AAA, disabled individuals were considered part of a "discrete and insular minority"[107] as members of protected classes are viewed in the race, religion, and national origin contexts.[108] The source of discrimination (impairments, for disabled persons) had to be immutable[109] or consist of "characteristics that are beyond [the individual's] control."[110] While the AAA strikes this language,[111] it retains the disability threshold test for class membership requiring that an individual be "substantially limit[ed]" in "one or more major life activities," have "a record of such an impairment," or "be[]

106. *See, e.g.*, JUDITH BUTLER, UNDOING GENDER (2004); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1999); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW (1997); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

107. 42 U.S.C. § 12101(a)(7).

108. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

109. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion).

110. 42 U.S.C. §12101(a)(7).

111. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555 (2008).

regarded as having such an impairment."[112]

Thus, disabled individuals bear a unique burden under the civil rights paradigm, in the sense that they must prove that they qualify for membership in the protected class. The U.S. Supreme Court limited class membership by imposing strict tests for "substantially"[113] and "major life activities"[114] as well as assessing individuals for disability after they employed drugs and devices that mitigated the effects of impairment.[115] Individuals "regarded as" disabled also had to show that their perceived disability, if actual, would substantially limit a major life activity.

The AAA makes clear that the disability threshold test is not meant to be overly restrictive. Given the recent nature of the amendments, it is worth describing their effect on class membership in some detail. The Rules of Construction state that "[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[116] The AAA further states that "the primary object of attention in cases brought under the ADA should be whether entities . . . have complied with their obligations," and it cautions that the question of "whether an individual's impairment is a disability . . . should not demand extensive analysis."[117] The AAA also strikes the language in the preamble to the ADA that "some 43,000,000 million Americans have one or more physical or mental disabilities"[118] (cited in the 1990 Supreme Court trilogy narrowly interpreting the disability threshold test).[119]

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112. *Id.* § 4.

113. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002) ("substantially" is to be "interpreted strictly to create a demanding standard for qualifying as disabled").

114. *Id.* at 198 (an impairment "must . . . prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people's daily lives").

115. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 481–89 (1999) (not disabled using eyeglasses); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (not disabled when medicated for severe hypertension); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565-66 (1999) (not disabled when brain compensates for monocular vision).

116. AAA § 4(a).

117. *Id*. § 2(b)(5).

118. 42 U.S.C. § 12101(a)(1) (2000), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); AAA § 3.

119. *Sutton*, 527 U.S. at 488–89 (holding that twin sisters with severe myopia are not disabled); *Murphy*, 527 U.S. at 521 (holding that a mechanic who manages his severe hypertension with drugs is not disabled); *Kirkingburg*, 527 U.S. at 565–66 (holding that a truck driver with monocular vision is not disabled).

Specifically, the AAA:

- Requires a court to assess an individual for class membership in an unmitigated state,[120]
- Appeals to the EEOC to develop a broader reading of "substantially" in light of its Rules of Construction,[121]
- Broadens the scope of "major life activity,"[122] and
- Reverts to a broader reading of "regarded as disabled."[123]

Perhaps the most fundamental change to class membership is that an individual is assessed in an unmitigated state prior to using drugs, devices, or other tools to promote functioning.[124] The AAA provides an extensive, nonexclusive list of ameliorative measures that are not to be considered when assessing an individual for class membership.[125] An exception is made for individuals using "ordinary eyeglasses or contact lenses."[126] These individuals are to be assessed after their vision is corrected; employers may terminate them for failing to meet vision acuity requirements only if such qualifications are "job-related" and "consistent with business necessity."[127]

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120. AAA §§ 2(b)(2), 4(a).

121. *Id.* §§ 2(b)(4)–(6).

122. *Id.* §§ 2(b)(4), 4(a).

123. *Id.* § 2(b)(3) (returning to the standard articulated in Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 282–86 (1987)).

124. This is consistent with the original EEOC regulations, which were disregarded by the Court in its 1990 trilogy of cases. The Court argued that the EEOC did not have authority to issue regulations with regard to the definition of disability, which is located in the introductory material to the ADA and outside its titles. *Sutton*, 527 U.S. at 479. While the AAA specifically grants rule-making authority to the EEOC with regard to the definition of disability, it fails to discuss deference to agency regulations. *See* AAA § 6(a)(2).

125. "Mitigating measures" include:

> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids, and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.

AAA § 4(a). "Auxiliary aids and services" are defined as

> (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; (C) acquisition or modification of equipment or devices; (D) and other similar services and actions.

Id.

126. *Id.*

127. *Id.* § 5(b).

The AAA also seeks to expand the protected class by articulating a more liberal reading of "substantial" and "major life activity." The Act explicitly rejects the standard put forth in *Toyota Motor Manufacturing of Kentucky, Inc. v. Williams*,[128] that an individual must be "severely restrict[ed] . . . from doing activities that are of central importance to most people's daily lives."[129] While the AAA leaves the task of reinterpreting "substantially" to the EEOC,[130] it demonstrates by way of example how broadly major life activities are to be interpreted; it provides an extensive list of relevant activities, including "working" and "major bodily functions."[131] Further, the AAA includes episodic or in-remission impairments that would qualify as disabilities when active.[132] This covers a large number of conditions that previously encountered mixed judicial treatment, such as epilepsy, cancer, and multiple sclerosis.[133] In addition, the Act clarifies that an individual need be impaired in only one major life activity.[134]

With respect to individuals who are "regarded as disabled," individuals meet the Act's threshold test even if they cannot show that if they actually had the condition at issue, they would be impaired in a major life activity.[135] In addition, the AAA alters the meaning of a

128. 534 U.S. 184 (2002).

129. AAA § 2(b)(4) (citing Toyota Motor Mfg. of Ky., Inc. v. Williams 534 U.S. 184, 198 (2002)).

130. *Id.* § 2(b)(4).

131. The AAA states that:

> [M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working . . . . [A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Id.

132. *Id.*

133. *See infra* note 162 and accompanying text (epilepsy). *Compare* Demming v. Hous. & Redev. Auth., 66 F.3d 950, 955 (8th Cir. 1995) (woman with thyroid cancer not disabled under Rehabilitation Act), *and* Dinsdale v. Wesley, 2000 U.S. Dist. LEXIS 12015, at *13 (N.D. Iowa Apr. 13, 2000) (woman with colon cancer not disabled under ADA after chemotherapy ended), *and* Farmer v. Nat'l City Corp., 1996 U.S. Dist. LEXIS 20941, at *16-17 (S.D. Ohio Apr. 5, 1996) (man treated for prostate cancer with lingering incontinence and impotence not disabled under ADA), *with* EEOC v. AIC Sec. Investigations, 823 F. Supp. 571, 572 (N.D. Ill. June 7, 1993), *rev'd in part on other grounds*, 55 F.3d 1276 (7th Cir. 1995) (man with terminal cancer disabled under ADA).

134. AAA § 4(a).

135. *Id*. The AAA returns to the broad standard articulated in *School Board of Nassau County v. Arline*, a case interpreting the Federal Rehabilitation Act of 1973, 29 U.S.C. §§ 705-08 (1998): "those who are regarded as impaired . . . are substantially limited in a major life activity." 480 U.S. 273, 284 (1987); *see also* AAA § 2(b)(3).

"qualified individual with a disability" from one discriminated against "because of . . . disability" to one who experiences discrimination "on the basis of disability."[136] Arguably this change more clearly encapsulates "regarded as" discrimination. Strengthening the "regarded as" prong is significant, as it demonstrates in a limited context that Congress recognizes the importance of treating vulnerability to impairment (in the sense of disadvantageous treatment) as universal; that is, both disabled and nondisabled individuals may experience the same discrimination.

While these changes greatly enhance the ability of individuals to qualify as disabled, some people with impairments are left unprotected. For example, individuals who are functional in their current environments but hyper-vulnerable to impairment by environmental alteration are not protected, unless they have a qualifying episodic disability or one that is in remission.[137] A disabled individual is hyper-vulnerable to changes in her environment when she requires certain environmental supports to function, such as a break room with a refrigerator in which to store medicine or special meals, a quiet and unpopulated workspace, or a smoke-free common area in her place of residence. It is only after an environmental change—such as an employer turning a break room into a gym and an employee becoming unable to function in her workplace—that an individual may be eligible for disability protection. Individuals who are mildly symptomatic or asymptomatic for disabling illnesses that they have not previously experienced also are not classified as disabled under the AAA.[138]

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136. 42 U.S.C. § 12111(8) (2000) (defining "qualified individual with a disability"); AAA § 5. The perceived impairment must be one that would last at least six months, however, if it actually manifest. *Id.* § 4(a).

137. AAA § 4(a) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.").

138. Further, it is doubtful courts would construe the AAA to cover these individuals as "substantially limited" in a major life activity. Prior to the AAA, they were not viewed as such. *See, e.g.*, Toyota Motor Mfg. of Ky., Inc. v. Williams, 534 U.S. 184, 201–03 (2002) (individual with carpal tunnel syndrome who is largely functional with regard to manual tasks at home is not disabled); McGuinness v. Univ. N.M. Sch. Med., 170 F.3d 974, 978 (1998) (student whose "anxiety impairs his 'academic functioning,' not his ability to work" fails the disability threshold test).

The relevant "physical or mental impairment" continues to be understood as a condition that is manifest or was previously present. *See* AAA § 4(a). There are two exceptions, however. "Asymptomatic" AIDS was recognized by the Court as a "physical impairment" because of "the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease." Bragdon v. Abbott, 524 U.S. 624, 635–37 (1998). The Court noted, however, that "asymptomatic" in this context is a "misnomer . . . for clinical features persist

Further, membership in the protected class is not sufficient to establish a claim to a remedy. While the Court seems to combine under the disability threshold test the question of whether an individual is disabled with the inquiry about whether she is entitled to a remedy, these are conceptually distinct inquiries.[139] After the AAA, it is possible that the Court will more clearly separate these questions. The AAA in fact makes explicit that employers are not required to provide accommodations to employees who are "regarded as" disabled,[140] such as accommodations for impairments that do not rise to the level of disability[141] or workplace sensitivity training. More generally, however, by including greater numbers of individuals in the protected class, the AAA will likely focus more attention on whether accommodations impose an "undue hardship" on an employer.[142] In other words, protected class membership may no longer serve as the gatekeeper doctrine for accommodating disability; expanding class membership may mean that protected class status cannot be equated with a remedy, even in the narrow situational sense discussed below in Subpart B.

In sum, an antidiscrimination approach to disability necessarily excludes some individuals with impairments. Further, class membership does not guarantee a remedy. In Part III, I address the question of how the state should respond to vulnerability outside the protected class. While the AAA addresses some of the discrete issues with respect to the implementation of the ADA, it falls short in two regards. First, the protected class is not expanded to include individuals who are asymptomatic or mildly symptomatic for disability (that is, they will

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throughout, including lymphadenopathy, dermatological disorders, oral lesions, and bacterial infections." *Id.* at 635. Individuals with predispositions to genetic conditions are now protected under the Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110–233, 122 Stat. 881, 922 (2008).

139. Satz, *A Jurisprudence of Dysfunction*, *supra* note 27, at 248–50.

140. AAA § 6(a)(1). Presumably, discriminatory behavior will be halted and the usual damages will apply, however.

141. *See, e.g.*, D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1228–40 (11th Cir. 2005) (holding that an individual with vertigo not limited in the major life activity of working may be entitled to accommodation if "regarded as" disabled); Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005) (holding that an individual who is not disabled but "regarded as" disabled may be entitled to an accommodation of bringing supplemental oxygen to work).

142. "Undue hardship" is an affirmative defense under the ADA. 42 U.S.C. § 12112(b)(5)(A) (2000), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). The statute defines it as "an action requiring significant difficulty or expense," based on factors including the cost, the overall resources of the employer or those of its facility or facilities making the accommodation, and the impact on that employer or facility or facilities. *Id.* § 12111(10).

develop disability in the future), or who will be easily disabled by (hyper-vulnerable to) changes in their environments. Second, as I argue in the next Subpart, the scope of protections for class members may be limited by a situational view of the vulnerabilities associated with disability discrimination.

B. Disability Law as Fragmenting Disability Protection

This Section presents a new critique of the antidiscrimination approach to disability discrimination based on what I term "fragmenting disability protection," or treating vulnerabilities associated with impairments as if they arise in discrete environments, such as the workplace or particular places of public accommodation. This approach to vulnerability, a function of reasonable accommodation being an unfunded mandate,[143] may be the most significant limitation of a civil rights approach to disability protection. Generally speaking, it results in a patchwork of protections that do not coalesce to allow meaningful social participation. More specifically, viewing vulnerabilities as situational creates the false perception that individuals with significant impairments are not disabled in some environments. In addition, a situational approach to vulnerability disregards the benefits of conceptualizing vulnerability as universal for disabled and nondisabled individuals alike.

1. Disability and Vulnerability to Discrimination

When our vulnerabilities result in disability, we may become subject to discrimination.[144] As recognized in the original preamble to the ADA, stereotypical views about disability historically subjected disabled individuals to "purposeful unequal treatment" and to "political powerlessness."[145] Disabled individuals experience discrimination based

143. I am grateful to Emory Law Professor Charlie Shanor for his insights on this issue.

144. See, for example, 42 U.S.C. § 12101(a)(5)–(6), which states that:

> Congress finds that . . . individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities . . . people with disabilities . . . occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.

145. *Id.* § 12101(a)(7).

on stereotypes about their abilities[146] as well as social environments that privilege dominant ways of functioning.[147] The AAA states that "people with . . . disabilities are frequently precluded from [fully participating in society] because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers."[148]

One approach to addressing disability discrimination is to consider the vulnerability of individuals meeting the threshold test in a series of key environments, or to offer fragmented legal protection. This view treats vulnerability as attached to a location or function rather than as inherent in the individual. Individuals are understood to move in and out of vulnerability as opposed to vulnerability being a constant part of the human experience.

Another approach is to address the vulnerability associated with biological impairments more broadly through our legal and social structures, recognizing that vulnerability is located within individuals and therefore exists across environments. Vulnerability is part of the human condition, meaning that all individuals are vulnerable.[149] Individuals may become disabled when particular vulnerabilities are realized, creating the need for accommodation or protection from discrimination. Legal and social structures either may seek to address universal vulnerability generally, that is before it becomes realized, or to address vulnerability after it rises to disability. Currently the only example of the former approach is the movement toward universal design, or creating physical environments that accommodate multiple ways of functioning.[150] An example of the latter approach—one that acknowledges vulnerability as existing across environments but that requires eligibility for protections—are the Social Security programs for disabled citizens providing wage and health care supports.[151] Universal design and the Social Security disability programs thus recognize universal vulnerability to varying degrees.

Current disability antidiscrimination law responds to the

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146. *See, e.g.*, *id*. § 12101(a)(7) ("[I]ndividuals with disabilities are . . . relegated to a position of political powerlessness in our society . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.").

147. SILVERS, WASSERMAN & MAHOWALD, *supra* note 39, at 74.

148. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(2), 122 Stat. 3553, 3553 (2008).

149. Fineman, *The Vulnerable Subject*, *supra* note 44.

150. *See infra* notes 226–28 and accompanying text.

151. *See supra* note 20 and accompanying text.

vulnerabilities created by disability as if they were situational. Federal and parallel state laws address vulnerability within isolated contexts for certain individuals rather than more generally. The ADA covers the workplace,[152] public services,[153] places of public accommodation,[154] and transportation.[155] The Rehabilitation Act of 1973[156] applies to recipients of federal grants and programs, and litigation under the Act focuses on contexts similar to those of the public service and employment titles of the ADA. Similarly, the Fair Housing Act[157] and the Individuals with Disabilities Education Act[158] address discrete contexts.

Protections are complicated further by the fact that the law focuses on individuals and their disabilities, rather than addressing shared vulnerabilities among disabled persons. This approach differs from the one taken with regard to elderly persons, where Social Security and Medicare are premised in part on the recognition of the high probability of manifest vulnerability at a certain age without the need for individual determination of impairment.[159] Each of the above-mentioned disability protection acts requires a case-by-case inquiry for eligibility,[160] meaning the circumstances of each individual (rather than the biological impairment itself) affect whether she is entitled to disability protections.[161] As a result, the law does not recognize per se disabilities. Individuals with the same impairments may receive varying legal treatment, depending on their individual circumstances. Prior to the AAA, for example, individuals able to increase their functioning through drugs or devices were not disabled, whereas individuals who failed to

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152. 42 U.S.C. §§ 12111–17 (2000), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

153. *Id.* §§ 12131–34.

154. *Id.* §§ 12181–89.

155. *Id.* §§ 12142–44, 12148, 12182(b)(2)(B), 12184.

156. Rehabilitation Act of 1973, 29 U.S.C. §§ 705–08, *amended b*y ADA Amendments Act of 2008, Pub. L. No. 110-325, § 7, 122 Stat. 3553, 3558 (2008).

157. Fair Housing Act of 1988, 42 U.S.C. §§ 3601–07 (2000).

158. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–82 (2000).

159. *See* 42 U.S.C. § 414(a) (2000); *see also infra* note 195.

160. *See, e.g.*, 42 U.S.C. § 12102(2) (discussing the case-by-case inquiry of the ADA); *see also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999). *But see* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2001) (creating an exception to the case-by-case inquiry when disability accommodation requests interfere with seniority systems created by collective bargaining).

161. Paul Steven Miller refers to the case-by-case inquiry as a "contextual definition of *disability*," in the sense that there are no per se disabilities under the ADA. Miller, *Reclaiming the Vision*, *supra* note 13, at 770 (emphasis added).

mitigate the same disease with the requisite drugs were disabled.[162] While assessing individuals in a pre-mitigated state will allow greater numbers to qualify as disabled, some circumstances such as individual fortitude may still result in varying outcomes for individuals with the same condition.[163] Further, with regard to illness, disease expression (severity) may vary per individual. The next two sections address the effects of fragmenting disability protection.

2. Protection Interrupted

As a result of laws treating vulnerability as arising in isolated transactions rather than as a part of an integrated experience, protections for disabled individuals are often interrupted, denying meaningful social participation. Someone may be able to enter a building but not partake in the services offered, for example.[164] In addition, the ADA's response to the increased vulnerability to unemployment of disabled individuals is to address vulnerability only in terms of functioning at the workplace. Disabled workers are entitled to an accommodation at the worksite or with regard to work schedules to assist them in completing the essential functions (fundamental duties)[165] of their jobs.[166] The Act does not

162. *Compare* Landry v. United Scaffolding, Inc., 337 F. Supp. 2d 808, 816 (M.D. La. 2004 (holding that plaintiff with epilepsy who controls his seizures with medication is not disabled), *and* Roland v. Becon Constr., 2002 U.S. Dist. LEXIS 19702, at *13 (E.D. La. Oct. 16, 2002) (holding that plaintiff with epilepsy who takes medication and experiences seizures only at night is not disabled), *with* Otting v. J.C. Penney Co., 223 F.3d 704, 710–11 (8th Cir. 2000) (holding that plaintiff who suffers seizures while medicated for epilepsy is disabled), *and* Rowles v. Automated Prod. Sys., Inc., 92 F. Supp. 2d 424, 429 (M. D. Pa. 2000) (finding a genuine issue of material fact as to whether plaintiff who takes medication for epilepsy and experiences a seizure a year is disabled). There may, of course, be individuals so profoundly impaired that they would be disabled in any circumstance.

163. The AAA accounts for "learned behavioral or adaptive neurological modifications" as forms of mitigation. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555. Fortitude and endurance arguably fall outside this context, however.

164. *See supra* notes 104–05 and accompanying text.

165. EEOC Regulations state: "A job function may be considered essential for any of several reasons, including but not limited to the following: . . . the reason the position exists is to perform that function . . . [there are a] limited number of employees available [who can perform that function] . . . [and] [t]he function [is] highly specialized . . . ." 29 C.F.R. § 1630.2(n)(2) (2008). Essential functions may be determined by a variety of sources including the employer, written job descriptions, collective bargaining agreements, the time an employee spends performing the function, the impact on the workplace of eliminating the function for the relevant employee, and the past and present work experiences of others. *Id.* § 1630.2(n)(3).

166. 42 U.S.C. § 12111(8) (2000), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (defining a "qualified individual with a disability" as one who "with or without reasonable accommodation, can perform the essential functions of the employment position

address barriers to employment outside the workplace, such as lack of transportation to work,[167] accommodations that facilitate employment by aiding a person at work as well as at home,[168] and employer-based health insurance that includes services for mental illness.[169]

Viewing the vulnerabilities associated with disability as situational in this way also masks structural inequalities. Disability protections that target particular aspects of a disabled individual's life, such as fulfilling the functions of her job or entering an insurance office, shift legal focus away from inequalities like wage disparities and health care policies that disfavor mental disability. Even if these structural inequalities are identified, the current approach to vulnerability, which seeks to provide localized remedies, cannot address them.

The consequences of the interrupted protections of the situational approach to vulnerability have prompted scholars to turn prematurely to social welfare models to reduce disability discrimination.[170] Scholars argue that it is necessary to appeal to social welfare programs to fill the gaps in protection, in particular with regard to employment.[171] As I argue in Part III, however, if the vulnerabilities associated with disability and employment are understood to extend beyond the workplace proper (or under Titles II and III to include more meaningful access to services and places of public accommodation), many of the perceived shortcomings of the civil rights model may be addressed without turning to broad social welfare programs. For example, entry into the workplace and

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that such individual holds or desires").

167. Transportation to work is generally considered a personal rather than an employment issue. *See, e.g.*, Self v. Bd. of Review, 453 A.2d 170, 171 (N.J. 1982) (employees who voluntary left their employment because they were without transportation to work are not entitled to unemployment compensation).

168. Under the ADA, an employer need not provide an accommodation that benefits the employee both at home and at work. 42 U.S.C. § 12111(9) ("[R]easonable accommodation" means "making existing facilities used by employees readily accessible to and useable . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.").

169. *See infra* notes 247–49 and accompanying text.

170. *See, e.g.*, Bagenstos, *The Future of Disability Law*, *supra* note 19; Bagenstos, *Mend It, Don't End It*, *supra* note 42; Diller, *supra* note 10; Johnson, *supra* note 38; Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 ILL. L. REV. 889, 940–56 (2000).

171. *See, e.g.*, Bagenstos, *The Future of Disability Law*, *supra* note 19; Bagenstos, *Mend It, Don't End It*, *supra* note 42; Diller, *supra* note 10; Johnson, *supra* note 38; Weber, *supra* note 170, at 940–56.

disabled worker retention could be facilitated by more reliable Paratransit and workplace accommodations that benefit the employee at work as well as have utility at home. To be sure, some vulnerabilities associated with disability are best addressed by social welfare programs (I argue this is the case with medical needs), but that is a separate issue from whether there is more work to be done working within the civil rights paradigm.

In addition, interrupted protections cause scholars to reexamine and undervalue the social model of disability, that is, the view that disability is socially constructed or of environmental origin.[172] When disability is understood to be of environmental origin (social model of disability), and the relevant environment assessed is narrow (vulnerability as situational), the social model appears to limit disability protections.[173] As a result, accommodations are restricted because they are made only to support an individual's functioning within a particular environment.

The problem, however, is not with the social model of disability, but with its current application under the ADA. It is the restricted scope of the environment rather than the concept of disability as socially constructed, or a civil rights approach more generally, that undermines protections. Within the civil rights framework, vulnerability to socially constructed disability may be understood to exist continuously and to extend across contexts instead of being situational. As argued in Part III, conceptualizing disability as involving universal vulnerabilities expands the environments for assessment beyond those related to a discrete aspect of a form of social participation, such as accommodation at the worksite, to those relevant for a form of social participation itself, like employment.

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172. *See, e.g.*, Stein & Stein, *supra* note 37, at 1208–12. The ADA adopts a functional definition of disability, in the sense that it looks to impairment of a major life activity or function. Because the definition looks to a "physical or mental impairment" that "substantially limits a major life activity," it is often interpreted to be a mixture of the medical and social models of disability. "Impairment" is determined according to medical criteria, and the limitation of a major life activity considers social or environmental impediments to functioning. The medical model views disability as a biological defect (physical or mental impairment) to be ameliorated. *See* SILVERS, WASSERMAN & MAHOWALD, *supra* note 39, at 59–63. The social model views disability as environmentally created and requires social adjustment to facilitate functioning. *Id.* at 74–76.

173. *See, e.g.*, Stein & Stein, *supra* note 37, at 1208–12.

3. Artificial Restriction of the Protected Class

Viewing the enhanced particular vulnerabilities associated with disability as situational also impairs membership in the protected class, exacerbating the limitations addressed in Section One of this Part. Class membership may be limited when an individual's functioning is assessed within a small environment. Some individuals with significant impairments may not be considered disabled because they are able to function in particular circumstances or environments. For example, an individual who manages her rheumatoid arthritis partially with drugs and mostly with willpower, and is able to perform manual tasks working as an airline stewardess, might not be considered disabled for purposes of workplace assessment.[174] This individual may be disabled, despite such measures, outside the workplace if her arthritis prevents her from performing vital household and personal tasks.

On the other hand, class membership may be constrained when the environment assessed is expanded beyond the situation where an individual most acutely experiences impairment to functioning. Typically, the broader the context for assessing impairments of a major life activity, the less likely an individual is to be considered part of the protected class because she will be able to function in some portion of the environment. The disability threshold test requires that impairments to functioning are "substantial" for a particular environment.[175] The breadth of the environment is determined by the major life activity affected. In some cases, the environment is extremely narrow: one's own body. This is the case for the major life activities of walking, seeing, hearing, speaking, breathing, learning, and reproducing, for example.[176] Class membership is usually recognized with respect to significant impairment of these major life activities. In other cases, however, the relevant environment is broadly construed, and class membership is often denied.

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174. Prior to the AAA, an individual was not considered disabled when she adapted by using drugs, devices, or other mitigating measures. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 480 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565–66 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 520–21 (1999).

175. 42 U.S.C. § 12102(2)(A) (2000), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

176. *See* 29 C.F.R.§ 1630.2(i) (2008) ("Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."); *see also* Bragdon v. Abbott, 524 U.S. 624, 639–41 (1998) (recognizing reproduction as a major life activity).

The U.S. Supreme Court looked to the "tasks that are of central importance to most people's daily lives"[177] to assess the major life activity of "performing manual tasks." Applying this standard to a wrongful employment termination claim, the Court held that the relevant environment for assessing manual tasks is one's home as well as one's workplace: an employee who functions at home performing most manual tasks but is unable to complete the manual tasks associated with her job is not disabled.[178] If the Court limited the relevant environment for performing manual tasks to the workplace (which arguably better aligns with the plaintiff's legal claim), the employee would be disabled.[179] While the AAA abandons the test that an individual must be "prevent[ed] or severely restrict[ed]" in tasks "of central importance to most people's daily lives," it is significant that the AAA would not change the outcome in this case if the relevant environment for assessing manual tasks continued to include both the home and the workplace.[180]

Similarly, the Court indicates in dicta that if working is a major life activity (it is recognized as such under the AAA),[181] an individual must be impaired in a "broad class of jobs" to be considered disabled.[182] In other words, a particular job cannot be the relevant environment for assessing impairment of the major life activity of working. The EEOC regulations do not determine with specificity the breadth of the environment, but they consider both "[t]he geographical area in which the individual has reasonable access" as well as jobs "within [the immediate] geographical area . . . from which the individual is also disqualified."[183]

Strikingly, the Court's assessment of the major life activities of

177. Toyota Motor Mfg. of Ky., Inc. v. Williams 534 U.S. 184, 187 (2002).

178. *Id.* at 200–02.

179. Williams v. Toyota Motor Mfg. of Ky., Inc, 224 F.3d 840, 843 (6th Cir. 2000), *rev'd*, 534 U.S. 184 (2002).

180. It is possible, however, that the plaintiff might be limited in a different major life activity, even within a broad environment for assessment. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008). ("An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.").

181. *Id.* § 3.

182. *Toyota*, 534 U.S. at 200 (quoting Sutton v. United Airlines, Inc., 527 U.S. 471, 491 (1999)); *see also* 29 C.F.R. § 1630.2(j)(3) (2001) ("With respect to the major life activity of working[,] [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.").

183. 29 C.F.R. § 1630.2(j)(3)(ii)(A)–(C).

performing manual tasks and working acknowledges that the human experience is not a fragmented one. The ability to perform manual tasks is recognized as relevant in both the public and private realms. The capability of working is understood to extend outside the immediate workplace environment and into the broader public realm. Unfortunately, the Court uses this perspective to determine that functioning in a particular environment requires the denial of disability protections, rather than to inform jurisprudence about constant vulnerabilities that may manifest at certain times.

The Court's treatment of the major life activities of performing manual tasks and working identifies a notable inconsistency in the judicial recognition of the relevant environmental boundaries for assessing an individual's functioning for purposes of the ADA. The Court expands the environment-frame to deny protected class membership (for example, assessing the ability to perform manual tasks at home and at work) and contracts the environment-frame to limit entitlement to a remedy (for example, assessing the need for accommodation only within the workplace).[184] As discussed earlier in this Part, the narrower the environment is for accommodation, the *less* likely an individual is to receive an accommodation that addresses her impairments because they probably extend beyond the environment assessed. Thus, treating impairments as situational in these contexts undermines disability protections in two ways: assessing a large environment may deny protected class membership, and using a small environment to determine entitlement to accommodation may not address impairments to functioning and fragment protections. If the expanded protected class under the AAA focuses the Court on remedy,[185] the narrow environment-frame for accommodation may result in the denial of protections for disabled individuals. This is significant because it might shift the gatekeeping function from class membership to entitlement to remedy and continue to restrict disability protections.

Viewing impairments as situational also disregards the benefits for disabled and nondisabled individuals alike of responding to vulnerability as a universal aspect of the human condition. All workers benefit from flexible work schedules or architectural design integrating ramps (for

184. This phenomenon is similar to the "time-framing" construct in criminal law described by Mark Kelman where laws implicitly embrace arbitrary time-frames to avoid certain political problems. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600–42 (1981).

185. *See supra* notes 139–42 and accompanying text.

wheelchairs, strollers, or luggage on wheels), wider elevators and bathrooms, and lever door handles (easier to open when hands are occupied). A better approach would consider a diverse range of methods of functioning and design social programs and buildings accordingly. Such an approach is supported by Fineman's vulnerability thesis.

Section III applies the insights of Fineman's vulnerability thesis to argue for a mixed civil rights/social welfare approach to disability law reform. The concept of disability as universal and constant vulnerability is discussed with regard to the four "second generation" disability discrimination problems identified in the introduction—remaining barriers to entry into the workforce, lack of material supports such as health care, constraints on accommodating atypical modes of functioning, and limitations on protected class membership due to what now may be understood as fragmenting disability protections. Susceptibility to disability discrimination must not be viewed as merely situational, requiring only material supports within limited public environments. Further, some shared vulnerabilities of disabled and nondisabled individuals, including those related to medical care, are best addressed through programs that do not require protected class membership.

III. BLENDING CIVIL RIGHTS AND SOCIAL WELFARE

Disabled individuals continue to experience barriers to class membership, work, desired accommodation, and material support. The problems of protected class membership are only partially resolved by the AAA. Under the Act, individuals will be assessed in a pre-mitigated state and qualify for disability protections with impairments that do not "significantly restrict" a major life activity.[186] Enlarging the protected class, however, places pressure on the reasonable accommodation mandate, which is currently unfunded. Further, some individuals with impairments will continue to be excluded from the class due to the nature of their impairments or the problems of fragmentation, raising the question of when the state should provide social welfare programs to address vulnerability.

Fineman's vulnerability thesis supports a move toward broad social welfare programs in areas such as employment, health care, and education. This would entail a departure from the civil rights approach to

186. AAA § 2(a)(8).

disability and other vulnerabilities and the restructuring of legal and social institutions to respond to universal vulnerability. In the employment context, institutions would address the shared vulnerabilities of disabled and other workers associated with barriers to entry and accessing accommodations that facilitate employment. As William Johnson argues, workers disabled as adults face similar barriers to reentry into the workforce as those unemployed by workforce cut-backs or factory closings: "low skills, intermittent or marginal employment, [and] the relative ease with which an employer can find replacement workers . . . ."[187] Workers who are *not* disabled are worse off in the sense that they are ineligible for Social Security Disability Insurance, Supplemental Security Income, and corresponding health care benefits.[188]

The approach I advocate is a compromise. I employ the insights of Fineman's theory to understand the problems with the way in which the ADA responds to disability. Vulnerability theory reveals that the goals of the ADA of increasing employment and reducing isolation are not fulfilled by equal protection or sameness treatment. Rather, they require accommodation that responds to universal and constant vulnerability that may give rise to discrimination. I do not argue, as Fineman does, that the liberal subject must be replaced by the vulnerable subject. My view is that legal structures do not have to be shaped exclusively around one or the other but rather that it is possible for them to respond to a "liberal subject who has universal vulnerabilities." In other words, our conception of the autonomous individual under traditional democratic theory is impoverished.[189] Vulnerability theory demonstrates that disability and the vulnerabilities associated with it are part of the human condition and helps to inform our picture of the individual at the center of democratic theory. In practical terms, this means that I advocate law reform that appeals to both the civil rights and social welfare paradigms to address the significant impediments to the social participation of disabled persons.

In Subpart A, I advocate a mixed civil rights/social welfare approach to employment. While class membership will be restricted in accordance

187. Johnson, *supra* note 38, at 168–69.

188. *Id.* Displaced workers who are not disabled receive unemployment and health benefits for a limited period after their termination, the latter at a higher premium then when they were employed. *Id.*

189. I thank Emory Law Professor Tim Terrell for this point.

with an antidiscrimination approach, accommodations will be more broadly available and subsidized by the state as a matter of social welfare. This Subpart discusses the role of reasonable accommodation in addressing barriers to employment, including lack of material supports such as transportation, and in supporting atypical modes of functioning. I argue that the reasonable accommodation mandate must be given a broader social purpose—one that extends beyond what formal equality requires but continues to rely on membership in the protected class. Vulnerability will be addressed as constant and universal for disabled individuals rather than as situational.

In Subpart B, I argue that the state should adopt a social welfare approach to health care to address universal vulnerability. Illness is perhaps the prime example of a universal and constant vulnerability. When manifest, it significantly heightens other vulnerabilities for disabled and nondisabled people alike; it is not a disability issue. Access to health care must be addressed outside the civil rights context.

The difference in my approach to employment and health care stems largely from practical considerations. In the employment context, I do not believe that a radical departure from the formal equality approach to disability discrimination to a system addressing the universal vulnerability of workers is politically feasible. Historical resistance to expanding most social welfare programs,[190] declining benefits of existing programs,[191] and sustained periods of low unemployment during solid financial times[192] provide support for this view. In addition, the history of oppression of individuals with disabilities and the staggering numbers of disabled persons who are denied entry into the workplace bolster an approach that focuses on disability as a protected class. The

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190. *See generally* Margaret R. Somers & Fred Block, *From Poverty to Perversity: Ideas, Markets, and Institutions over 200 Years of Welfare Debate*, 70 AM. SOC. REV. 260 (2005) (discussing how social welfare regimes fail in light of market-based approaches to wealth distribution due to "the perversity thesis," or the view that social welfare contributes to the plight of the poor).

191. *See, e.g.*, Robert Moffitt, David Ribar & Mark Wilhelm, *The Decline of Welfare Benefits in the U.S.: The Role of Wage Inequality*, 68 J. PUB. ECON. 421, 423–24 (1998).

192. *See, e.g.*, Rebecca M. Blank, *Distinguished Lecture on Economics in Government: Fighting Poverty: Lessons from Recent U.S. History*, 14 J. ECON. PERSP., Spring 2000, at 7 (discussing consistently low unemployment rates during economic prosperity in the 1990s); *see also* U.S. Dep't of Labor, Labor Force Statistics from the Current Population Survey, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000 (last visited Nov. 18, 2008) (indicating low unemployment rates during times of economic prosperity from 1998–2002 and 2006–2008), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n192.pdf.

ADA may in fact be understood as a law that seeks to draw a particularly isolated protected class into the greater polity, whereas other civil rights mandates speak to various protected classes.

Universal health care is a political and practical possibility, however. Forty-six million Americans are uninsured,[193] and studies indicate that twenty-five million adults are underinsured, as measured by medical expenses relative to income.[194] Large-scale government health care programs already operate,[195] and public spending on health care is at sixty percent.[196] Unsurprisingly, the last three presidential elections witnessed universal health care as a platform.[197]

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193. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007 19 (2008), *available at* http://www.census.gov/prod/2008pubs/p60-235.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n193.pdf.

194. Cathy Schoen et al., *How Many Are Underinsured? Trends Among U.S. Adults, 2003 and 2007*, HEALTH AFF., Jun. 10, 2008, at w300, *available at* http://content.healthaffairs.org/cgi/reprint/hlthaff.27.4.w298v1?ijkey=rhRn2Tr4HAKZ.&keytype=ref&siteid=healthaff, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n194.pdf.

195. Government programs include Medicare, Medicaid, the State Children's Health Insurance Program (SCHIP), the military entitlement programs (TRICARE and the Civilian Health and Medical Program of the Department of Veteran Affairs (CHAMPVA)), and the Federal Employees Health Benefits Program. Medicaid and SCHIP operate at the state level with federal oversight, and the other programs are federal. Medicare provides "basic protection against the costs of hospital, related post-hospital, home health services, and hospice care" for all individuals age 65 or over, certain disabled individuals who are government or railroad employees, and individuals suffering from end-stage renal disease. 42 U.S.C. § 1395c (2000). Medicaid provides "medical assistance on behalf of families with dependent children and of the aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." *Id.* § 1396. Medicaid is typically provided to individuals at or below 150 percent of the federal poverty line, which is currently $20,650 for a family of four. *See, e.g.,* Kaiser Family Found., Income Eligibility for Parents Applying for Medicaid by Annual Income as a Percent of Federal Poverty Level (FPL), 2008, http://www.statehealthfacts.org/comparetable.jsp?ind=205&cat=4 (last visited Dec. 22, 2008), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n195.pdf; *see also* Annual Update of the HHS Poverty Guidelines, 72 Fed. Reg. 3147 (Jan. 24, 2007). SCHIP provides basic medical coverage to children ineligible for Medicaid; its target population is children in families at or below 200 percent of the federal poverty line. State Children's Health Insurance Program, 42 U.S.C. §§ 1397aa–jj (2000); 42 C.F.R. 457.310(b)(1)(i) (2007) (describing "targe[t] low-income child").

196. Steffie Woolhandler & David U. Himmelstein, *Paying for National Health Insurance—And Not Getting It*, 21 HEALTH AFF. 88, 91, 94 (2002) ("Public funding" includes all tax-financed health care, such as health care and research programs, hospital subsidies, individual and employer tax subsidies, and government employee health care plans.).

197. *See, e.g.*, Robin Toner, *2008 Candidates Vow to Overhaul U.S. Health Care*, N.Y. TIMES, July 6, 2007, at A1, *available at* http://www.nytimes.com/2007/07/06/us/politics/06health.html, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n197a.pdf; Robin Toner, *The 2004 Campaign: The Issue: Democrats See a New Urgency in Health Care*, N.Y.

I do not mean to suggest that law reform efforts should abandon the push for greater equity in employment irrespective of identity categories. Women, racial minorities, unskilled laborers, disabled workers whose impairments limit their productivity,[198] and individuals whose impairments do not rise to legally cognizable disabilities also face barriers to employment due to fragmented protections of their vulnerabilities. Ideally, the state would respond to all such vulnerabilities.

A. Rethinking Reasonable Accommodation

This Section argues that the reasonable accommodation mandate must account for the universal vulnerabilities of disabled individuals in social and civic life. This requires that the mandate have a broader social or redistributive purpose than that embodied in the ADA. Broadening the scope of reasonable accommodation entails a mixed civil rights/social welfare approach to accommodation. Eligibility for accommodation remains tied to membership in the protected class, though vulnerabilities of disabled individuals are viewed as extending across contexts. As a result, disabled persons are entitled to greater material resources as enabled by government support. While expanding the reasonable accommodation mandate does not reflect the intent of the drafters of the ADA,[199] it supports stated congressional goals of decreasing barriers of entry for disabled workers and lessening isolation more generally.[200] Such an expansion substantially addresses employment barriers for disabled individuals occurring outside the workplace, including lack of reliable transportation and accommodations that benefit an employee at work as well as at home. The focus of this Section is employment, but I briefly discuss how my concept of reasonable accommodation might

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TIMES, Jan. 14, 2004, at A1, *available at* http://www.nytimes.com/2004/01/14/politics/campaigns/14HEAL.html, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n197b.pdf; James Dao, *The 2000 Campaign: The Challenger; Bradley Nod to Clinton on Universal Health Care*, N.Y. TIMES, Feb. 23, 2000, at A18, *available at* http://query.nytimes.com/gst/fullpage.html?res=9404EEDB1330F930A15751C0A9669C8B63, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n197c.pdf.

198. These workers are not "qualified individuals with a disability" for purposes of the ADA if they are unable to fulfill the essential functions of their job. 42 U.S.C. § 12111(8) (2000), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

199. *See, e.g.*, Stein, *Same Struggle, Different Difference*, *supra* note 9, at 637–40.

200. 42 U.S.C. §§ 12101(a)(3), (5), (9), (b).

facilitate greater accommodation of multiple ways of functioning for people utilizing public services or places of public accommodation.

1. Addressing Barriers to Employment

Individuals with disabilities continue to face substantial barriers to receiving and maintaining employment. Prior to the passage of the ADA, the Congressional Record indicates that "[t]wo-thirds of all disabled Americans between the age of 16 and 64 are met [sic] working . . . . Sixty-six percent of working-age disabled persons . . . say that they would like to have a job . . . . [T]his means that about 8.2 million people with disabilities want to work but cannot find a job."[201] As of today, statistics indicate the same or lower rates of employment.[202] Evidence also suggests that the greatest problems for workers disabled as adults (the majority of disabled individuals) are obstacles to reemployment following disabling incidents, rather than structural issues such as wage discrimination.[203]

Commentators suggest that the potential barriers to employment (and arguably to reentry into the workplace) for disabled individuals include employer concern that accommodations will be costly, employee difficulty maintaining necessary work schedules due to lack of transportation or accommodations at home, and the absence of legally mandated accommodations for workers whose impairments limit their productivity.[204] The first two difficulties—employer fear of accommodation costs and employee need for material supports related to working—pertain to accommodating productive workers as mandated by the ADA.[205] Employing individuals with impairments that limit their productivity, in particular those born with severe disabilities, would entail social commitment to a stronger view of equity and the value of employment for all persons.[206] I do not address this latter issue, though it

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201. H.R. REP. NO. 101-485, pt. 2, at 32 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 314 (citing STEWART LEICHENKO, ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 47–50 (1986)).

202. *See supra* notes 15–16 and accompanying text.

203. Johnson, *supra* note 38, at 168–69.

204. *See supra* notes 17–18 and accompanying text discussing accommodation; *see also* Bagenstos, *supra* note 19, at 26 (discussing lack of material supports); Johnson, *supra* note 38, at 164 (discussing how the ADA does not adequately address workers with limited productivity).

205. *See supra* note 166 and accompanying text discussing a "qualified individual with a disability."

206. Johnson, *supra* note 38, at 168.

warrants serious discussion elsewhere.

Current accommodations under the ADA are limited even for productive workers. In theory, disabled persons are entitled to the same benefits that individuals without disabilities receive, namely, jobs as well as access to services and places of public accommodation. The scope of the remedy is dictated by a statutorily recognized environment or situation. Disabled workers may be provided with "job related" accommodations to function in the workplace.[207] A reasonable accommodation is not required if employers establish that it poses an "undue hardship"[208] or a "direct threat" to the health or safety of others.[209] Access to services and places of public accommodation most often amounts to physical access rather than meaningful enjoyment of services or public space. Public areas outside the workplace must be accessible unless alterations to existing structures are not "readily achievable";[210] public services need not be altered if they require an undue burden or a "fundamental alteration" of the "nature of the service, program, or activity."[211]

As it stands, the reasonable accommodation provision is redistributive in a pure sense: with the exception of scarce government subsidies, resources are taken from employers and other firms to make accommodations. The framers of the ADA did not intend for the Act to be more broadly redistributive, that is, to require a shift of wealth or material resources from firms to disabled persons beyond that required by the antidiscrimination mandate.[212] Even within this narrow context, commentators question whether the role of the reasonable accommodation provision under Title I is to shift costs of workplace accommodations to employers or to require that the employer and

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207. 42 U.S.C. § 12111(9) (2000), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

208. *See supra* note 142 and accompanying text.

209. 42 U.S.C. § 12113(b); *see also* Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (holding that a direct threat is one that poses a "significant risk" to others, as indicated by "medical or other objective evidence").

210. 42 U.S.C. § 12182(b)(2)(A)(iv). The statute defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense . . . . [F]actors to be considered include—the nature and cost of the action . . . the overall financial resource of the facility . . . the overall financial resources of the covered entity . . . and the [nature] of the operation . . . ." *Id.* § 12181(9). New construction must comply with the ADA. *Id.* §§ 12146, 12183(a).

211. 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3) (2008).

212. *See* Stein, *Same Struggle, Different Difference*, *supra* note 9, at 637–40.

employee both contribute to accommodation (cost-sharing).[213]

Under the mixed civil rights/social welfare approach I advocate, protected class members would receive accommodations that exceed the scope of the current antidiscrimination mandate (and formal equality). The reasonable accommodation mandate would be expanded with more robust government supports for disabled workers.[214] Employees who are susceptible to impairment would receive accommodations throughout their daily environments. For example, disabled workers may receive accommodations for transportation to work or tools that facilitate their functioning at home as well as at the workplace.

This expansion of the reasonable accommodation mandate requires law reform on two fronts. First, it is necessary to create funding structures to relieve employers from the financial burden of fulfilling all reasonable accommodations. The legislature could determine a ceiling for the percentage of annual earnings an employer is required to spend on accommodations for disabled employees. Affected employers as currently defined by the ADA[215] would not be required to fund accommodations outside this amount. Government subsidies would begin where employer subsidization ends.[216] This approach would allow employer responsibility for accommodations to be capped, while expanding disability protections beyond discrete environments.

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213. *Id.* at 636–70; *see also* Elizabeth A. Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1175, 1180–86 (2002).

214. I want to emphasize that I am making a normative argument for the expansion of the reasonable accommodation mandate. I am not making a cost-benefit argument or considering the constraints of current budgets.

215. 42 U.S.C. § 12111(5)(A) ("The term 'employer' means a person engaged in industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks . . . ."). The definition of "employer" does not include the United States, Indian tribes, or private firms exempt from taxation under 26 U.S.C. § 501(c). *Id.*§ 12111(5)(B).

216. Current subsidies are limited. The Work Opportunity Credit provides a tax credit of up to forty percent of the first $6000 ($2400) of an employee's qualified first-year wages. I.R.C. § 51(a) (2008); *see also* IRS Form 5884, Work Opportunity Credit (OMB No. 1545-0219) (2007), *available at* http://www.irs.gov/pub/irs-pdf/f5884.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n216a.pdf. Employers of veterans with a service-related disability are eligible for up to twice that amount. I.R.C. § 51(d)(1)(b), 51(d)(3). The Disabled Access Credit provides a credit for up to $10,000 per year for disability accommodations made by businesses earning $1 million or less or with fewer than 31 full-time employees. *Id.* § 44; *see also* IRS Form 8826, Disabled Access Credit (OMB No. 1545-1205) (2006), *available at* http://www.irs.gov/pub/irs-pdf/f8826.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n216b.pdf. The Architectural Barrier Removal Tax Deduction provides a deduction of up to $15,000 per year for expenses that remove architectural or transportation barriers for disabled or elderly individuals. I.R.C. § 190 (2008). The Disability Access Credit and the Barrier Removal Tax Deduction may be obtained in the same year.

Second, the interactive process recommended by the EEOC, a process by which employers engage employees in a dialogue about the accommodation that would best facilitate their functioning, must be federally mandated and refined. During this process, employees would identify accommodations they need to function in the workplace as well as those that may assist them indirectly with their employment by enabling their functioning at home. The law would require that adaptive tools benefitting an individual in her workplace as well as at home and in other environments be given preference. In addition, preference would be given to accommodations that support employees' desired modes of functioning, whether they are typical (for example, walking with braces) or atypical (wheeling). The undue hardship test would remain as a defense for failing to make an accommodation, though the burden would be measured taking into account government subsidies for which the employer is eligible, even if the employer fails to apply for them.

To the extent this approach forces a reexamination of the norms of the workplace, I believe it may go some distance in addressing structural inequalities for disabled workers. The mandated interactive process, coupled with the provision of reasonable accommodation to facilitate functioning across various environments, would focus more attention on the systemic treatment of disabled workers. Federal funds for accommodations could be made contingent on the hiring and retention practices (including pay equity) of employers with respect to disabled employees. I believe this approach holds more promise for addressing bias against disabled workers than asking employers to make local changes. Seeking change from within individual workplaces asks employers, who are in a position of advantage, to reexamine their practices.[217] Imposing uniform incentives for change may provide a much greater impetus for altering stigmatizing or exclusionary procedures and policies.

2. Supporting Atypical Modes of Functioning

In addition to addressing barriers to employment, the mixed civil rights/social welfare approach to reasonable accommodation would provide greater support for atypical ways of functioning for employees.

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217. Bagenstos discusses a "structural" approach to antidiscrimination law, which would rely on the law to identify norms that reduce workplace bias (including unconscious bias) and empower employees, but does not believe it will be successful due to difficulties with implementation. Bagenstos, *The Structural Turn*, *supra* note 81, at 4.

This approach recognizes that the vulnerabilities associated with disability, while part of the human condition, are uniquely experienced by each individual.[218] The ultimate choice of a reasonable accommodation would remain with the employer, but the mandated interactive process would give preference to employees' preferred modes of functioning. A disabled employee may favor typing with her feet instead of her upper arm prosthetics, working in a dark office space rather than wearing shaded glasses to address light sensitivity, or working from the floor rather than a cushioned chair to avoid back pain. The employer's comfort with atypical modes of functioning is not relevant, so long as the employee is able to fulfill the essential functions of her job.[219]

As I discuss in previous work, the role of typical or normal functioning (the importance of functioning as most people do) is not directly addressed by the courts, and current judicial treatment of functioning is inconsistent and misguided.[220] Most Supreme Court case law under Title I indicates that when the Court considers the relevance of normal functioning in relation to workplace accommodations, it does so under the disability threshold test in a manner that excludes individuals with impairments from the protected class.[221] If an individual is able to function atypically, she is denied disability protections.[222] When it comes to the issue of accommodation, however, the Court does not give preference to an employee's preferred mode of functioning, be it typical or atypical.[223] Thus, the Court has it exactly backwards: effective atypical functioning is considered a barrier to disability class membership but is not treated as a relevant factor for accommodation.[224] The AAA broadens protected class membership, though individuals who function atypically with mitigating measures that are not legally recognized may still be excluded.[225] My approach requires that

218. *See supra* note 86 and accompanying text.

219. *See supra* notes 165-66 and accompanying text.

220. *See* Satz, *A Jurisprudence of Dysfunction*, *supra* note 27, at 243–48.

221. *Id.* at 245–46.

222. *Id.* The AAA lessens the impact of this to some extent by assessing an individual for disability in a pre-mitigated state. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3555 (2008).

223. *See* Satz, *A Jurisprudence of Dysfunction*, *supra* note 27, at 246–48.

224. *Id.* at 248–65.

225. *See supra* note 163 and accompanying text discussing willpower and fortitude as a mitigating measure.

individuals are assessed prior to all mitigating measures.

Supporting atypical functioning under Title II (public services) and Title III (public accommodations) is more complex than under Title I. It requires facilitating meaningful access to key areas of social and civic participation; access into various physical spaces is insufficient. For example, an individual should be able to enter a movie theater as well as experience a film, board a commuter train and signal for a stop, and access a public library as well as appreciate its collection. Given the number of people partaking in these experiences and the variety of ways in which people function, reasonable accommodation in these contexts will require a more radical departure from current practices than in the employment context. Funds must be allotted to improve the provision of transportation and other services. While government subsidies may enable private firms to make greater structural changes, most efficient change will likely not occur through renovation but with new construction that aims to support more ways of functioning.

Universal design, "the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design,"[226] may ultimately be the most economical way to address the vulnerabilities of disabled individuals arising from physical spaces. Universal design relies on seven principles: "equitable use," "flexibility in use," "simple and intuitive" use, "perceptible information," "tolerance for error," "low physical effort," and "size and space" appropriate for use.[227] These principles could also guide the initial planning of the infrastructure for a facility's service operations. By accommodating a greater number of ways of functioning at the construction stage, fewer buildings would need to be retrofitted as access issues arise. Universal design responds to impairments that may not be considered disabilities under law, however, and supports impairments to functioning and universal vulnerability more

226. The Ctr. for Universal Design, N.C. State Univ., About UD, http://www.design.ncsu.edu/cud/about_ud/about_ud.htm (last visited Nov. 22, 2008), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n226.pdf; *see also* ROBERT F. ERLANDSON, UNIVERSAL AND ACCESSIBLE DESIGN FOR PRODUCTS, SERVICES, AND PROCESSES 17 (2008).

227. The Ctr. for Universal Design, N.C. State Univ., UD Principles, http://www.design.ncsu.edu/cud/about_ud/udprinciplesshtmlformat.html#top (last visited Dec. 24, 2008), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n227.pdf; *see also* ERLANDSON, *supra* note 226, at 67 ("ergonomically sound, perceptible, cognitively sound, flexible, error-managed (proofed), efficient, stable and predictable, equitable").

generally.[228] As a result, it extends beyond what my framework (or the ADA) requires for reasonable accommodation, and individuals would implement universal design principles on a voluntary basis.

One area where a universal approach to vulnerability may be politically and practically feasible is health care. I argue in the next Subpart that the issues facing disabled individuals with regard to health care access are likely best addressed by moving away from the civil rights paradigm altogether.

B. Disability and Health Care Justice

This Subpart argues that access to health care is a universal vulnerability rather than a disability issue and that vulnerability analysis provides a strong argument for a social welfare (universal) approach to health care. To be clear, I do not intend in this brief discussion to provide a comprehensive normative argument for universal health care; I have done so in other work.[229] My goal is to provide arguments for why illness is not a disability issue but a matter of universal and constant vulnerability. I suggest that this concept of vulnerability lends support to a move away from government insurance programs that target particular groups of individuals to a more comprehensive state response to medical needs. Viewing illness as universal and constant vulnerability contributes a new perspective on the need for universal health care. Restructuring current health care institutions to support health care as a public good may be the best way to address vulnerability to illness and the vulnerabilities that result from illness.

First and foremost, disability does not equate with illness. The population of individuals who are ill or medically fragile exceeds the disability class. Illness may give rise to disability, but it does not presuppose it.[230] All individuals are vulnerable to illness. When such vulnerabilities are realized, they result in dependencies for care and impairments that may or may not be disabling. Thus, disabled and nondisabled individuals alike are vulnerable to illness and share

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228. *See* ERLANDSON , *supra* note 226, at 6.

229. *See* Ani B. Satz, *Toward Solving the Health Care Crisis: The Paradoxical Case for Universal Access to High Technology*, 8 YALE J. HEALTH POL'Y L. & ETHICS 93 (2008); Ani B. Satz, *The Limits of Health Care Reform*, 59 ALA. L. REV. 1451 (2008).

230. *See, e.g.*, WENDELL, *supra* note 90, at 20 (arguing that chronic illness may be disabling); SILVERS, WASSERMAN & MAHOWALD, *supra* note 39, at 79 (arguing that illness normally does not constitute a disability though "disability often is a sequela of illness and . . . illness, especially chronic illness, can itself be disabling.").

vulnerabilities from illness. Without health, disabled and nondisabled individuals cannot work or socially integrate. Indeed, philosophers argue that for this reason health care is a vital social good.[231]

Second, current legal structures that impede access to health care for disabled individuals also disadvantage individuals who are not disabled. Access to care may be understood both as the ability to obtain health insurance as well as the ability to have necessary services under a health plan (the content of health insurance). Health insurance is provided through public and private mechanisms. Public insurance is offered through government entitlement and government employee benefit programs, and private insurers offer group or individual health care plans.[232] Most health insurance in the United States is provided through private employee benefit plans.[233] Government programs target only particular segments of the population, including disabled individuals who are eligible for Social Security benefits.[234] Employers are not required to offer health insurance plans or any particular level of benefits, so long as employees are treated in the same manner.[235] Lack of health insurance is therefore a problem for both disabled and nondisabled individuals. In fact, disabled persons who receive Social Security benefits may receive more support through federal programs

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231. *See, e.g.*, NORMAN DANIELS, JUST HEALTH CARE (1985); THOMAS W. POGGE, REALIZING RAWLS 181–96 (1989); JOHN RAWLS, THE LAW OF PEOPLES 50 (1999).

232. *See supra* note 195 and accompanying text. Private payors include indemnity insurers, employers (self-insured or insured through private companies), and a variety of managed care arrangements.

233. *See, e.g.*, KAISER FAMILY FOUND., EMPLOYER HEALTH BENEFITS: 2007 SUMMARY OF FINDINGS 1, *available at* http://www.kff.org/insurance/7672/upload/Summary-of-Findings-EHBS-2007.pdf (158 million Americans receive health insurance through their employer), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n233a.pdf. Employers pay 74.4 percent of health care expenses for their employees. CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH AND HUMAN SERVS., SPONSORS OF HEALTH CARE COSTS, BUSINESSES, HOUSEHOLDS, AND GOVERNMENTS, 1987-2006 Table 4, *available at* http://www.cms.hhs.gov/NationalHealthExpendData/downloads/bhg08.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n233b.pdf.

234. *See supra* note 20 and accompanying text.

235. As one commentator notes:

> Under civil rights principles it is sufficient that people with disabilities have equal access to insurance offices and, once inside those offices, have equal right to purchase insurance policies having the same contents as policies purchased by nondisabled persons. Changing the terms or contents of the insurance policies so that people with disabilities receive coverage equal to that provided to nondisabled people, however, requires affirmative action that goes beyond basic civil rights premises.

Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 382 (2001).

than those without disability.

Similarly, disabled and nondisabled individuals with health insurance may not receive coverage for the services they need. So long as plans provide contracted-for benefits, they are allowed to employ cost-containment mechanisms that may result in the denial of certain services.[236] The ADA provides that such distinctions may not be disability-based, however. Under Title V, the plan must be "bona fide" and "underwriting risks, classifying risks, or administering such risks" may not be "used as a subterfuge to evade the purposes of subchapters I and III."[237] A bona fide plan is understood as one with clear contractual terms that pays benefits.[238] Title I pertains to employers, and Title III to places of public accommodation, including insurance offices.[239] While the plain language of Title III requires that individuals have physical access to insurance offices, a few courts have applied the title to the health care services covered by an insurance policy.[240]

The EEOC Guidance on Disability-Based Distinctions in Employer Provided Health Insurance[241] defines a disability-based distinction as one that "singles out a particular disability (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., non-coverage of all conditions that substantially limit a major life activity)."[242] Examples of illegal disability-based distinctions by employers include

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236. *See* Pegram v. Herdrich, 530 U.S. 211, 220–22 (2000).

237. 42 U.S.C. § 12201(c) (2000), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

238. U.S. Equal Employment Opportunity Comm'n, Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance, EEOC Notice No. 915.002 (June 8, 1993), *available at* http://www.eeoc.gov/policy/docs/health.html [*hereinafter* EEOC Interim Enforcement Guidance], *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n238.pdf. The EEOC regulations do not define "bona fide" plan for purposes of the ADA, though it is defined in the regulations implementing the Age Discrimination in Employment Act, 29 C.F.R. § 1625.10(a)(2)(b) (2008) ("A plan is considered 'bona fide' if its terms (including cessation of contributions or accruals in the case of retirement income plans) have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan.").

239. 42 U.S.C. § 12181(7)(F).

240. *See, e.g.*, Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559–60 (7th Cir. 1999); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 33 (2d Cir. 1999); Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, 37 F.3d 12, 19–20 (1st Cir. 1994); Baker v. Hartford Life Ins. Co., No. 94 C 4416, 1995 U.S. Dist. LEXIS 14103, at *8–9 (N.D. Ill. Sept. 27, 1995).

241. *See supra* note 238 and accompanying text.

242. EEOC Interim Enforcement Guidance, *supra* note 238, § (7)(III)(B).

refusing to insure individuals based on HIV status, capping reimbursement for the treatment of neurological conditions, or lowering health care upon retirement based on disability status.[243] An insurance policy may distinguish broadly between a "multitude of dissimilar conditions" and limit access to disabled individuals, so long as it imposes the same restriction on individuals without disability.[244] Limitations on certain medical procedures, waiting periods for preexisting conditions, and caps on coverage are examples of allowed constraints that may affect the ability of disabled and nondisabled individuals alike to access care.[245] Further, a plan is not a subterfuge if its disability distinctions are based on actuarially sound principles that treat disabled and nondisabled individuals the same, are necessary to preserve the plan's solvency, or are required to avoid undermining or significantly altering the plan for other employees.[246]

Until recently, complete parity between mental and physical health care benefits was not required, under the views that mental health care services are provided to individuals who have statutorily recognized disabilities as well as to those who do not, and mental health care covers a range of dissimilar conditions.[247] The recent Mental Health Parity and Addiction Equity Act of 2008[248] mandates complete parity between physical and mental health benefits for insurers who offer plans that cover mental health care services. Caps on annual or lifetime spending,

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* § 7(III)(C)(2).

247. The EEOC argues that long-term disability plans that distinguish between mental and physical conditions are disability-based, and courts are split on the issue. *Compare* Fletcher v. Tufts Univ., 367 F. Supp. 2d 99, 111, 114 (D. Mass. Apr. 15, 2005) (finding that termination of disability payments based on mental disability but not physical disability violates Title I), *with* EEOC v. Bath Iron Works Corp., No. 97-355-P-H, 1999 U.S. Dist. LEXIS 10600, at *17–22 (D. Me. Feb. 8, 1999) (finding that defendant company's two-year limit on benefits for mental or nervous disorders but not physical ones does not violate Title I).

248. Mental Health Parity and Addiction Equity Act of 2008, H.R. 1424, 110th Cong. § 511 (2008). Previously, complete parity was not required. *See, e.g.*, Mental Health Parity Act of 1996, 42 U.S.C. § 300gg-5(a)(1)-(2) (2000); EEOC Interim Enforcement Guidance, *supra* note 238 ("Typically, a lower level of benefits is provided for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions . . . . Such broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability . . . . and do not violate the ADA."); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1113–18 (9th Cir. 2000) (finding no violation of Titles I and III for disparity between mental and physical disability benefits under employee disability insurance policy); Ford v. Schering-Plough Corp., 145 F.3d 601, 612–14 (3d Cir. 1998) (same).

coinsurance, deductibles, and the number of covered visits must be the same for physical and mental health benefits.[249] Insurers, including employers, need not offer any mental health benefits, however.

Thus, individuals who are disabled face the same barriers as other patients to access to health care in terms of being able to obtain health insurance and having coverage for the particular services they need. Complicating factors include the high rates of unemployment for disabled individuals who do not qualify for Social Security benefits based on permanent disability, a possible higher consumption of health care resources, health care rationing schemes that disfavor those with medical impairments, and difficulty moving between assistance programs that include health care and the workforce. Arguably, individuals who are not disabled are also vulnerable in similar terms, however. Unskilled workers and at-will employees are vulnerable to unemployment; unskilled workers have a smaller range of employment opportunities than skilled workers, and at-will employees are vulnerable to discharge. Individuals who are not disabled may also require a significant amount of health care services. In fact, elderly persons and premature infants are the greatest consumers of health care resources, with high costs for care during the last or the first few months of life.[250]

Further, elderly as well as disabled individuals may be disproportionately impacted by the metrics used to ration care and to segregate risk. In Oregon, for example, care for the indigent through Medicaid is rationed based on predicted health outcomes and cost.[251]

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249. H.R. 1424, 110th Cong. § 512.

250. In 2004, health care expenditures for people 65 years and older were $531.46 billion, which is 5.6 times the amount spent on children and 3.3 times the cost of care for adults. CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH AND HUMAN SERVS., HEALTH CARE EXPENDITURES BY AGE, *available at* http://www.cms.hhs.gov/NationalHealthExpendData/downloads/2004-age-tables.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n250a.pdf. Of course, some of these individuals may be disabled. In 2005, the estimated "social cost" ("medical, education, and lost productivity") of preterm births was $26.2 billion. Ctrs. for Disease Control & Prevention, CDC Features–Premature Births, http://www.cdc.gov/Features/PrematureBirth/ (last visited Nov. 22, 2008), *permanent copy available at* http://www.law.washington.edu/ wlr/notes/83washlrev513n250b.pdf.

251. Health care services are scaled in order of priority. Jonathan Oberlander, *Health Reform Interrupted: The Unraveling of the Oregon Health Plan*, HEALTH AFF., Dec. 19, 2006, at w96, *available at* http://content.healthaffairs.org/cgi/reprint/26/1/w96, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n251a.pdf. During 2008–2009, the Oregon Medicaid plan will provide 503 of the 680 basic health services the state aspires to cover. Or. Health Servs. Comm'n, Current Prioritized List, *available at* http://www.oregon.gov/OHPPR/HSC/current_prior.html, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n251b.pdf.

Disabled, elderly, and medically fragile individuals may face double jeopardy if they are medically needy but not entitled to health care resources based on their perceived health status or length of life. Under private insurance schemes, those with existing illnesses may be viewed as high-risk insureds. While the Health Insurance Portability and Accountability Act[252] provides some protections for continued insurance for individuals previously covered under group health insurance plans, high-risk individuals who retain insurance may be forced to pay high premiums.[253]

Temporarily unemployed disabled and other individuals may experience difficulty moving between social welfare programs for the unemployed that include health care and the workforce. William Johnson notes that health insurance is vital for disabled individuals to forego Social Security disability benefits,[254] and wages must be significantly higher for all individuals to fund health care for a chronic condition.[255] While the Ticket to Work Incentives Improvement Act (1999) remedies this issue to some extent for disabled individuals, it leaves eligible workers uninsured after eight and a half years.[256]

In sum, vulnerability to illness as well as the vulnerabilities and dependencies created by illness with respect to access to care are not disability issues. Illness is in fact the paradigmatic example of universal vulnerability. The universal vulnerability thesis explicated in this Article lends support (and perhaps a new voice) to a move toward universal health care.

On a practical level, responding to vulnerability to illness through a patchwork of programs that target certain groups—disabled, indigent, elderly, and minor-age persons—has historically failed to insure the

252. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 29 and 42 U.S.C.).

253. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-99-100, PRIVATE HEALTH INSURANCE: PROGRESS AND CHALLENGES IN IMPLEMENTING 1996 FEDERAL STANDARDS 12–14 (1999) (premiums for individual plans for nonsmoker with juvenile-onset diabetes range from 100–464 percent of the standard premium), *available at* http://www.gao.gov/archive/1999/he99100.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n253.pdf.

254. *See* Johnson, *supra* note 38, at 171.

255. *See id.*; *see also supra* note 194 and accompanying text discussing underinsurance.

256. The Act extends Medicare Part A (hospital) premium-free coverage for disability beneficiaries who return to work. Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 202, 113 Stat. 1860, 1894 (1999). In addition, the Act allows states to extend Medicaid payments, possibly for cash payments, including providing Medicaid to workers who are not actually disabled but who have physical or mental impairments that are "reasonably expected" to become severe disabilities in the absence of health care. *Id.* §§ 201, 204.

medically needy or to provide sufficient care to those who are covered. Further, it resulted in extraordinary government expenditures. Recall that government spending is at sixty percent, and in 2005, health care costs reached $1.9 trillion.[257] Other countries provide a universal level of coverage for their citizens at a similar or lower cost.[258] For many decades the United States has witnessed advocates, scholars, and politicians arguing for universal health care from a variety of moral and economic perspectives, but it may be that the recognition of illness as universal vulnerability is what will drive future reform efforts.

CONCLUSION

Since the passage of the ADA in 1990, disabled individuals have continued to face great barriers to entry into the workplace, job retention, protected class membership, access to health care, transportation, and accommodations that support their preferred methods of functioning. Emerging scholarship suggests that remedies for these problems lie in the development of social welfare structures to provide material supports as well as requirements that employers more substantially address barriers to the employment of disabled persons. I advocate a mixed civil rights/social welfare approach that requires a more responsive and vigilant state and lessens the burden on employers.

My approach is informed by the view that vulnerability to disability as well as the vulnerabilities of disabled individuals are universal and constant. Current antidiscrimination law fragments disability protections by treating vulnerability as if it arises in discrete situations rather than as an aspect of the human condition. To address the universal and constant vulnerabilities associated with disability, the reasonable accommodation provision must be given a broader social purpose and the interactive

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257. John A. Poisal et al., *Health Spending Projections Through 2016: Modest Changes Obscure Part D's Impact,* HEALTH AFF., Feb. 21, 2007, at w242–43, *available at* http://content.healthaffairs.org/cgi/reprint/262/2/w242.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n257.pdf.

258. *See, e.g.*, CHRIS L. PETERSON & RACHEL BURTON, CONG. RESEARCH SERV., U.S. HEALTH CARE SPENDING: COMPARISON WITH OTHER OECD COUNTRIES 58 (2007), *available at* http://assets.opencrs.com/rpts/RL34175_20070917.pdf ("In 2004, the United States spent more than twice as much on health care as the average OECD [Organization for Economic Cooperation and Development] country, at $6,102 per person (compared with the OECD average of $2,560). Health care spending comprised 15.3% of the U.S. GDP in 2004, compared with an average of 8.9% for the average OECD country."), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev513n258.pdf.

process mandated and developed. The universal vulnerability thesis also provides strong arguments that some material supports, such as health care, are issues of social welfare rather than disability law.