Urban Cities and Accessibility

Friday
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9:30 – 10 a.m. | check-in 10 a.m. – 5 p.m. | program

Costantino Room
(Second Floor) Fordham Law School

CLE COURSE MATERIALS
Table of Contents

1. Speaker Biographies

2. CLE Materials

Panel 1: History and Hope for the Future


U.S. Department of Justice Civil Rights Division. Disability Rights Section. The ADA and City Governments: Common Problems.

Panel 2: Urban Planning and Accessibility

Duranton, Gilles; Guerra, Erick. Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective.


Panel 3: Technology and Accessibility

BSR. Smart Cities for All: A Vision for an Inclusive, Accessible Urban Future.


Panel 3: The Impact of Inaccessible Urban Cities


Fagundes, Dave.; Roberts, Jessica L. Online Essay, Housing, Healthism, and the Hud Smoke-Free Policy.
**Professor Samuel Bagenstos**  
Frank G. Millard Professor of Law  
University of Michigan Law School  

Samuel Bagenstos is the Frank G. Millard Professor of Law at the University of Michigan Law School. He specializes in constitutional and civil rights litigation. From 2009 to 2011, he was a political appointee in the U.S. Department of Justice, where he served as the Principal Deputy Assistant Attorney General for Civil Rights. Among other responsibilities in that position, he supervised all disability rights enforcement at the Department of Justice. Professor Bagenstos has published two books on disability rights laws, as well as articles in a wide array of law journals and non-academic outlets. He also has argued four cases in the Supreme Court, three of which involved the Americans with Disabilities Act. Professor Bagenstos served as a law clerk for Justice Ruth Bader Ginsburg on the Supreme Court and for Judge Stephen Reinhardt on the Ninth Circuit. He is a graduate of the University of North Carolina and the Harvard Law School.

**Dr. Mariette Bates**  
Academic Director, Disability Studies Program  
CUNY School of Professional Studies  

Mariette J. Bates is the Academic Director of Disability Studies programs and a Distinguished Lecturer at CUNY’s School of Professional Studies. She began her career as a systems change advocate, working with emerging groups of people with rare or multiple intellectual or genetic disorders who had difficulty accessing the service system. For over a decade, she also convened court-appointed monitors overseeing consent decrees and other institutional reforms to provide training and other resources. The nonprofit she co-founded completed a variety of systems change advocacy projects for un- and underserved populations, in addition providing direct services to Russian-speaking families in New York City. She came to CUNY in 2008, developing an MA in Disability Studies, and the first Bachelor’s in Disability Studies in the country. She also created the first Master’s degree for those providing accommodations to college students with disabilities. She holds a doctorate in Philanthropy and Disability and has received numerous awards including the Sussman Dissertation Prize, Outstanding Alumna awards from both Empire State College and the Union Institute, the CUNY Accessibility Award, and congressional recognition for outstanding service to the community.

**John D. Blascovich**  
Board Chair, The Matthew Foundation  
Partner, A.T. Kearney, Inc.  

John Blascovich is the Board Chair of the Matthew Foundation, a private operating charitable foundation that strives to make a meaningful impact for persons with Down syndrome. The Matthew Foundation has extensive relationships within the national and global Down syndrome community as well as externally with both governmental and non-governmental organizations (NGOs). John is also a Partner at Kearney, a management consulting firm, and is currently the global leader of the firm’s Sourcing practice within Operations. John holds an MBA from the NYU Stern School as well as M.S. and B.S. degrees in Aeronautics and Astronautics from MIT.
Professor Nicolas Dagen Bloom
Professor of Urban Policy and Planning
Hunter College

Nicholas Dagen Bloom is Professor of Urban Policy and Planning at Hunter College. His research analyzes long-term planning outcomes in essential urban systems such as subsidized housing and mass transportation. He is the author of Suburban Alchemy (OSU, 2001), Merchant of Illusion (OSU, 2004), Public Housing That Worked (Penn, 2008), The Metropolitan Airport (Penn, 2015), and How States Shaped Postwar America (Chicago, 2019). He is co-editor of four edited collections including the prize-winning Public Housing Myths (Cornell, 2015) and Affordable Housing in New York (Princeton, 2015). Bloom serves as Co-Editor in Chief of The Journal of Planning History, the flagship publication of the Society for American City and Regional Planning History.

Professor Bloom has been quoted extensively on housing and other topics in media outlets including WNYC, The New York Times, CNN, and The Washington Post. As a frequent contributor to Gotham Gazette, he has written extensively on issues related to public housing; his editorials have also appeared in Newsday, The Daily News, and City Limits. As a co-curator of housing exhibitions at Hunter College and the Skyscraper Museum he has highlighted overlooked dimensions of community life. Bloom frequently joins panel discussions on issues of concern to planners, historians, architects, and the general public. He has taught urban affairs courses to thousands of students in previous positions at NYIT, NYU, and Tulane.

His current research project explores how the demise of America’s once excellent bus transit systems damaged the quality of life of all Americans and contributed to the rise of today’s highly segregated metropolis.

Dr. Holly Jeanine Boux, Ph.D.
J.D. Student
Harvard Law School

Holly Jeanine Boux earned a Ph.D. from Georgetown University in American Government, and is currently a J.D. student at Harvard Law School. She previously taught political science at Georgetown University and Colorado State University.

Professor Christopher Buccafusco
Director, Intellectual Property & Information Law Program
Cardozo Law

Professor Buccafusco's research employs empirical social science methods to test fundamental assumptions about how the intellectual property system functions. IP law attempts to affect people's creative behavior by offering them incentives to innovate, share, and use new works and inventions, but very little is known about whether these incentives actually work. Using novel creativity experiments, Professor Buccafusco's research has shown that creators often do not behave the way that IP law assumes they will. His studies have explored how different kinds of
incentives affect creativity, how creators think about borrowing from others' efforts, and how creators assign value to their innovations. The results of these studies challenge important aspects of IP law, and they suggest opportunities for improving the legal system and creative economies.

Professor Buccafusco has teamed up with the U.S. Patent and Trademark Office and colleagues at Northwestern University to co-host the fifth annual Workshop on Empirical Studies of Intellectual Property. Professor Buccafusco, David Schwartz, and the PTO's Chief Economists founded the workshop four years ago. The workshop allows researchers from around the world to present early stage empirical projects so they can receive feedback before they begin collecting data. This enables them to refine their ideas and methods and to improve the value of the resulting data.

Prior to coming to Cardozo, Professor Buccafusco taught at Chicago-Kent College of Law. He won the SBA teaching award in his first year on the faculty, and he later won the university-wide teaching award. At Chicago-Kent, Professor Buccafusco co-founded the Center for Empirical Study of Intellectual Property.

**Commissioner Victor Calise**
Commissioner of the New York City Mayor’s Office for People with Disabilities

As Commissioner of the New York City Mayor’s Office for People with Disabilities, Victor Calise advocates for the disability community in all City decision-making.

Commissioner Calise chairs the Accessibility Committee of the City Building Code and leads efforts to integrate people with disabilities into the workforce through the *NYC: ATWORK* employment initiative. He also ensures that disability is at the forefront of the city’s emerging technologies including communication modes, autonomous vehicles, and digital accessibility.

Recognized as an expert on disability, the Commissioner frequently participates in national and international conferences. A dedicated public servant, Calise previously led efforts within the Department of Parks and Recreation to make the city’s park system—one of the most complex in the world—accessible in accordance with the Inclusive Design Guidelines.

Calise—an avid athlete—competed in the 1998 Paralympic Games as a member of the U.S. national sled hockey team. A native New Yorker, he is married with two daughters.

**Professor Elizabeth Emens**
Isidor and Seville Sulzbacher Professor of Law
Columbia Law School

Elizabeth Emens is Isidor and Seville Sulzbacher Professor of Law at Columbia Law School, where she teaches and writes in disability law, anti-discrimination law, contracts law, law and sexuality, and lawyer-leadership. She is also Director of the Law School’s Mindfulness Program. Emens has published articles in the *Hastings Center Report, Harvard Law Review, Stanford Law Review, Nomos, Narrative, The Disability Studies Reader, Keywords in Disability Studies*, and many others. In 2013, she co-edited a volume on *Disability and Equality Law* with
Michael Ashley Stein (Ashgate Press). She is also the author of the book Life Admin (2019), which has been reviewed and excerpted in The Wall Street Journal, The Guardian, and The Sunday Times (London), among other places. Emens earned her BA and J.D. from Yale, and her Ph.D. from King's College, Cambridge, where she studied as a Marshall Scholar. She is a member of the New York State Bar Association and American Bar Association.

Ruth Lowenkron, Esq.
Director, Disability Justice Program
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Ruth Lowenkron is the Director of the Disability Justice Program at New York Lawyers for the Public Interest. Lowenkron has been active in the field of disability law since 1981, working at Untapped Resources, Inc. (New York), the Community Health Law Project (New Jersey), the Education Law Center (New Jersey), and Disability Rights New Jersey. Lowenkron has assisted countless persons with physical, mental and other disabilities via impact litigation, legislative advocacy, and community outreach. She has taught disability law at Seton Hall Law School and CUNY Law School, and is a special education hearing officer for the New York State Department of Education. Lowenkron received her bachelor’s degree from Cornell University and her law degree with the inaugural class of CUNY Law School. Honors include Volunteer Lawyers for Justice’s Champion of Change award, the Essex County Bar Association’s Special Merit Award, the Hofstra University School of Law Public Justice Foundation’s Commitment to Public Service Award, the New Jersey Association for Advancement of the Mentally Handicapped Award and the ARC of New York State Robert Hodgson/August Jacobs Law Award.

Professor Robin Paul Malloy
E.I. White Chair and Distinguished Professor of Law, and Kauffman Professor of Entrepreneurship and Innovation
Syracuse University College of Law

Robin Paul Malloy is the E.I. White Chair and Distinguished Professor of Law, and the Kauffman Professor of Entrepreneurship and Innovation at Syracuse University College of Law. He is a leading expert on property, real estate transactions, and land use and zoning law. His book, Land Use Law and Disability: Planning and Zoning for Accessible Communities (Cambridge University Press 2015), and his casebook, Land Use and Zoning Law: Planning for Accessible Communities (Carolina Academic Press 2018) are leading books in the field. He has just completed a manuscript for Disability Law for Property, Land Use, and Zoning Lawyers to be published by the American Bar Association Press (release date is late spring 2020). He also edited (with Blanck) the book series Disability Law and Policy (Cambridge University Press). In addition to four books with Cambridge (one currently in progress), he is the co-author of the leading casebook on Real Estate Transactions and has published a total of eighteen books and over 30 scholarly articles, in addition to numerous book chapters and essays. In addition to writing on topics related to real estate, property, and land use, Malloy has several books on issues addressing law and market theory. Several of his works on law and market theory have been translated into Spanish, Japanese, and Chinese.
**Professor Jessica L. Roberts**  
Director of the Health Law & Policy Institute and the Leonard Childs Professor in Law  
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**Rebecca Rodgers, Esq.**  
Senior Staff Attorney at Disability Rights Advocates

Rebecca Rodgers is a Senior Staff Attorney at Disability Rights Advocates. She handles complex class action lawsuits advancing the civil rights of persons with disabilities at all stages, including investigation, litigation, settlement negotiations, and monitoring. Her practice focuses on advocating for persons with all types of disabilities in fields including transportation, access to public programs and services, emergency preparedness, health care, and technology. Her representative cases include Bronx Independent Living Services v. Metropolitan Transportation Authority, where she represents a class of individuals with mobility disabilities seeking to use the Middletown Road subway station, resulting in a ruling that renovations performed at the station triggered accessibility obligations regardless of cost. In United Spinal Association v. District of Columbia, she achieved a settlement on behalf of disability rights organizations and individuals with disabilities that establishes a comprehensive three-year-plan for Washington D.C. to update its emergency preparedness plans to better include people with disabilities. She was counsel in National Federation of the Blind v. Scribd, which held that Internet-based businesses are subject to Title III of the Americans with Disabilities Act regardless of whether the business has a physical location. She received her J.D. from The George Washington University Law School in 2011 and her B.A. from The George Washington University in 2008.

**Professor Michael Ashley Stein**  
Executive Director of the Harvard Law School Project on Disability  
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Professor Michael Ashley Stein is the co-founder and Executive Director of the Harvard Law School Project on Disability, and a Visiting Professor at Harvard Law School since 2005. Considered one of the world’s leading experts on disability law and policy, Dr. Stein participated in the drafting of the UN Convention on the Rights of Persons with Disabilities; works with disabled peoples’ organizations and non-governmental organizations around the world; actively consults with governments on their disability laws and policies; advises an array of UN bodies and
Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act

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Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act†

This is a crucial juncture for U.S. disability law. In 2008, Congress passed the ADA Amendments Act (ADAAA), which aims to reverse the courts’ narrowing interpretations of the Americans with Disabilities Act of 1990. This legislative intervention provides an important lens through which to consider attitudes toward disability, both because the success of the ADAAA will depend on judicial attitudes, and because the changes rendered by the ADAAA shed light on pervasive societal attitudes. This Essay makes three main points. First, the ADAAA intervenes in the developing doctrine on disability discrimination in important ways; in so doing, however, the ADAAA carves up the definition of disability, for the first time distinguishing “actual disability” from “regarded as disability,” and expressly reserving the right to accommodation for “actual disability.” This move repudiates a strong form of the social model of disability and accedes to a hierarchy of discrimination that treats the failure to accommodate as a different and lesser form of bias than direct discrimination. Second, and less prominently, the ADAAA introduces an express ban on reverse discrimination claims. Though the provision is arguably positive on a practical level, the fact that this provision could pass without protest—at a time when reverse discrimination claims on the basis of sex and race have become increasingly prominent and legitimate—sets into relief the low status of disability in the popular imagination. Finally, the expanded definition of “disability” under the ADAAA, though useful for many potential plaintiffs, may have unanticipated attitudinal consequences. As the class of those who count as disabled grows, a legal buffer is removed between “nondisabled” and “disabled,” in ways that may increase the existential anxiety of the nondisabled and result in empathy failures. A key question is how to

∗ Professor of Law, Columbia Law School. For useful conversations and comments on earlier drafts, I thank Samuel Bagenstos, Kevin Barry, Noa Ben-Asher, Daniela Caruso, Chai Feldblum, Katherine Franke, Michael Kavey, Sarah Lawsky, Michael Rembis, Charles Sabel, Michael Stein, Kimberly Walters, and participants in the Evolutions in Anti-Discrimination Law in Europe and North America at Harvard Law School, the Columbia Law Women’s Association Workshop, and my Disability Law class in the Spring of 2011. For excellent research assistance, I thank Laura Mergenthal and Kimberly Walters.

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turn existential anxiety about becoming disabled into an appreciation of disability law as a social insurance policy for everyone. Efforts to improve attitudes toward disability will be critical in the coming years, as anticipated by the awareness-raising Article 8 of the UN Convention on the Rights of Persons with Disabilities.

INTRODUCTION

This is a fascinating and uncertain time for U.S. disability law. In 1990, Congress passed the Americans with Disabilities Act (ADA), which prohibits discrimination (including the failure to accommodate) in employment, public accommodations, and government services.\(^1\) For nearly two decades, the courts narrowed the scope of the ADA’s mandate by, most obviously, interpreting “disability” under the ADA in a restrictive manner.\(^2\) In 2008, Congress passed the ADA Amendments Act (ADAAA),\(^3\) which attempts to restore a broader vision of the original ADA by, in particular, expanding the statutory definition of disability.\(^4\) Courts so far have had limited occasions to interpret the revised language.\(^5\) The question now looms as to whether that broader vision will survive the courts.

Attitudes to disability determined the fate of the ADA in the nearly twenty years between its passage and its restoration. It was largely attitudes—specifically, the gap between societal attitudes and the law’s demands—that led to the narrowing of the statute in the courts.\(^6\) The ADA had impressive bipartisan support,\(^7\) but it seems likely that those who voted for it had rather different reasons for doing so: combine a few who understand disability as a civil rights issue, with those who see it through the lens of pity, with those economically minded folks who see it as a way to get people off of welfare and onto the tax rolls, and you get the ADA.\(^8\) When the ADA reached the courts, judges interpreted it more narrowly than the advocates


\(^4\) See id. § 12101 (ADAAA findings).

\(^5\) See infra note 11 (explaining that the statute is not being applied retroactively).

\(^6\) Sam Bagenstos may be right that there are competing visions of disability rights at work in the ADA, and that they come out of tensions in the disability rights movement itself, but that kind of internal tension is not unique to disability, and so we might ask whether the fault truly lies at the movement’s doorstep. See SAMUEL BAGENSTOS, LAW & THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009).

\(^7\) See, e.g., JOSEPH SHAPIRO, NO PITY 118–19 (1993).

\(^8\) For more sustained treatment of the ADA’s passage, see, for example, id.; Samuel R. Bagenstos, The Americans with Disabilities Act as Welfare Reform, 44 WM. & MARY L. REV. 921 (2003).
expected. The law was out ahead of common sense (the common sense of society, and thus of most legislators and judges), and so courts did what they often do in such moments: they narrowed the law to better fit their common sense.

Now we wait to see what will happen with the ADAAA. It has been more than two years since it went into effect, but courts have interpreted it not to apply retroactively. The challenged discrimination in a case therefore must have occurred since the ADAAA for its revisions to apply. So there is not yet much case law. What will happen as more courts interpret it? My guess is that attitudes to disability will largely determine the courts’ interpretations. That is, I suspect that courts will find new ways to narrow the statute, to the extent that a broader mandate still does not comport with their attitudes to disability—with their common sense.

What is that common sense about disability? That disability is unfortunate, even tragic, costly for employers and for society, to be avoided at most costs and accommodated only at a very limited cost. That disability cannot possibly have benefits (to the person with the disability or those around her), and likewise that accommodations

9. Some have argued that the advocates lack a coherent civil rights vision. Sam Bagenstos is most associated with this position, see BAGENSTOS, supra note 6, but other scholars have recognized the tensions in the movement, see, e.g., Michael Ashley Stein, Same Struggle, Different Difference, 153 U. PA. L. REV. 579, 626-29 (2004).

10. The language in the original statute arguably opened itself up to that narrowing, which the drafters of the ADA did not recognize because the same definition in an earlier statute had not been interpreted narrowly—or received much scrutiny—from courts. See Feldblum, supra note 2, at 91-92, 113; see also infra note 34 and accompanying text (quoting the ADA’s definition of disability and discussing its adoption). Note also that judges’ views are of course more varied and complicated than this cursory rendering of their “common sense” would suggest. See, e.g., Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 VA. L. REV., 301, 321 (2004) (finding that political party (of the appointing president) predicts notably different voting patterns for judges deciding ADA cases, and that these differences are accentuated by the presence of other judges appointed by presidents of the same party).

11. See, e.g., Milholland v. Sumner County Bd. of Educ., 569 F.3d 562 (6th Cir. 2009); Becerril v. Pima County Assessor’s Office, 587 F.3d 1162 (9th Cir. 2009); Lytes v. DC Water and Sewer Authority, 572 F.3d 936 (D.C. Cir. 2009). See, e.g., Milholland v. Sumner County Bd. of Educ., 569 F.3d 562 (6th Cir. 2009); Becerril v. Pima County Assessor’s Office, 587 F.3d 1162 (9th Cir. 2009); Lytes v. DC Water and Sewer Authority, 572 F.3d 936 (D.C. Cir. 2009). Cf. Jenkins v. National Bd. of Med. Examiners, 2009 WL 331638 (6th Cir. Feb. 11, 2009) (applying the ADAAA to a case filed before the ADAAA went into effect because the relief sought was injunctive).

12. See, e.g., Hoffman v. Carefresh of Fort Wayne, Inc., No. 1:09-CV-251, 2010 WL 3522573 (N.D. Ind. Aug. 31, 2010) (applying the ADAAA to find that a plaintiff whose renal cell carcinoma was in remission was disabled); Horgan v. Simmons, No. 09 C 6796, 2010 WL 1434317 (N.D. Ill. Apr. 12, 2010) (applying the ADAAA to conclude that “major bodily functions” included “functions of the immune system” and that, on that basis, an HIV-positive plaintiff was disabled).

only benefit the individual who requests them.\textsuperscript{14} Disability is, in this
view, something we should keep hoping will eventually just go away if science gets good enough.\textsuperscript{15} In the meantime, this view might say, “we” (the nondisabled people, or sometimes just “people”) should be
good enough, moral enough, to do some things to help disabled peo-
ple, but not too much, as of course we would not want to drag down
society or the economy.\textsuperscript{16}

And that is just the beginning. The previous paragraph is probably
a fair characterization of attitudes to the more \textit{popular} and more
visible forms of disability—relatively speaking—such as paraplegia.
My use of the word “popular” here is only slightly sarcastic; it is no
coincidence that a person in a wheelchair is the symbol for disabled
parking, restrooms, and so forth. The more popular disabilities are
those things (like paraplegia) that apparently affect only a discrete
part of a person. Notwithstanding the “spread” effect—whereby out-
siders raise their voices at blind people or assume a wheelchair
signals cognitive disability\textsuperscript{17}—nondisabled people are generally more
open to the idea of competence in a person with a discrete disability.
Because the disability occupies one identifiable part of the body, out-
siders can begin to imagine how that person in a wheelchair might be
very talented in the rest of his being, and therefore, from this troubl-
ing perspective, worthwhile.

When the conversation turns to people with cognitive or
psychosocial (psychiatric) disabilities, however, then the whole per-
son is tainted, discredited (in Goffman’s terms\textsuperscript{18}) in a wholly different
(and differently whole) way. Many people—disabled and nondisabled
alike—seem \textit{not even to know} that discrimination against people with
psychiatric disabilities is (presumptively) illegal.\textsuperscript{19} Imagine here the
lawyer-employer who says he recently hired a new secretary who had
a good resume, even though she seemed “crazy,” because the law says
he cannot discriminate on the basis of psychiatric disability, whether
real or regarded-as. A friend of the employer might well respond,
“Are you crazy?,” once again invoking that common epithet. And hid-

\textsuperscript{14} See Elizabeth F. Emens, \textit{Integrating Accommodation}, 156 U. Pa. L. Rev. 839
(2008).

\textsuperscript{15} Cf. Mary Johnson, \textit{Make Them Go Away}: Clint Eastwood, Christopher
Reeve & the Case Against Disability Rights (2003).

\textsuperscript{16} On that “we,” see infra text accompanying note 78.

\textsuperscript{17} See, e.g., U.S. Comm’n on Civil Rights, \textit{Accommodating the Spectrum of


\textsuperscript{19} I say presumptively because there are defenses, such as someone’s inability to
perform the essential functions of her job, or her posing a direct threat to others in the
workplace—the same defenses available for physical disabilities.
should perhaps not surprise us, after Elaine Scarry’s insights about our inability to apprehend, or even believe, another’s pain.\textsuperscript{20}

Attitudes to disability therefore may lead to courts’ finding new ways to narrow the ADA’s protections, now that the ADAAA limits the ways that they can define the protected class narrowly.\textsuperscript{21} This is therefore a crucial juncture for examining attitudes to disability and their intersection with this evolving law. This Article therefore uses the recent changes introduced by the ADAAA to make a series of points about attitudes to disability.

A caveat is in order, as this is a fairly gloomy story about what is clearly an exciting legal development. The ADAAA intervenes in the developing doctrine on disability discrimination in important ways, and the passage of this ambitious legislation is all the more impressive in a period characterized more by retrenchment than expansion of civil rights law.\textsuperscript{22} My hope is that the ADAAA will expand the scope of who is protected and who obtains accommodation, through the many legal and extralegal actors who implement the law on a daily basis.\textsuperscript{23} If the ADAAA successfully brings more people with disabilities into the workplace, then attitudes to disability should be improved through increased contact with a wide range of people with disabilities and with reasonable accommodations.\textsuperscript{24} This Essay fo-

\textsuperscript{20.} See Elaine Scarry, The Body in Pain 4 (1985) (“For the person whose pain it is, it is ‘effortlessly’ grasped (that is, even with the most heroic effort it cannot \textit{not} be grasped); while for the person outside the sufferer’s body, what is ‘effortless’ is \textit{not} grasping it (it is easy to remain wholly unaware of its existence; even with effort, one may remain in doubt about its existence or may retain the astonishing freedom of denying its existence; and, finally, if with the best effort of sustained attention one successfully apprehends it, the aversiveness of the ‘it’ one apprehends will only be a shadowy fraction of the actual ‘it’). So, for the person in pain, so incontestably and unnegotiably present is it that ‘having pain’ may come to be thought of as the most vibrant example of what it is to ‘have certainty,’ while for the other person it is so elusive that ‘hearing about pain’ may exist as the primary model of what it is ‘to have doubt.’ Thus pain comes unsharably into our midst as at once that which cannot be denied and that which cannot be confirmed.”). For a critique of some ways of reading Scarry, see Tobin Siebers, Disability, Pain, and the Politics of Minority Identity (unpublished manuscript, on file with author, Oct. 2011) (“Pain does not spring from and differentiate the individual. It does not belong to one person alone. It is a social invention, external to people, that marks them as individual. The dominant social representation of pain in the West is the individual alone in pain . . . . What would it mean to conceive of pain not as an individual or personal emotion—as a feeling owned by one person—but as a socially mediated identity, as a product of social forces operating external to individuals?”).

\textsuperscript{21.} For ways courts might do this, see infra text accompanying notes 48-51.


\textsuperscript{23.} C.f., e.g., Susan Sturm & Howard Gadlin, Conflict Resolution and Systemic Change, 2007 J. Disp. Resol. 1 (2007); 76 Fed. Reg. 16989 (Mar. 25, 2011) (reporting, as part of the impact analysis of the ADAAA, the argument that accommodations were being provided more broadly than the court decisions required); \textit{id.} at 16997-98 (recognizing the potential for attitudinal benefits, \textit{inter alia}, from accommodation).

\textsuperscript{24.} There is an extensive literature on the so-called contact hypothesis, the idea that working side by side in cooperative ventures can reduce animus and stereotyp-
uses largely on attitudes in direct interaction with the statute, although the statute’s effects on attitudes will also be mediated by how the statute is implemented on the ground. That process of implementation will, however, be shaped by the statute’s fate in the courts. My concern is that the persistence of negative and ignorant attitudes to disability will lead courts to undercut effective implementation either by defying the clear mandate of the ADAAA to broaden the scope of coverage or, more likely, by finding new ways to limit enforcement. It is therefore my aim to contribute to our understanding of those attitudes, by identifying a number of ways that they intersect with these recent changes to the law.

From an international perspective, this is also an auspicious moment to focus on attitudes to disability, in the wake of President Obama’s signing of the UN Convention on the Rights of Persons with Disabilities (CRPD). The CRPD contains an “Awareness-raising” article explicitly requiring states’ parties to promote more positive attitudes toward disability. Whether and how states implement this directive will depend in part on their appreciation of the crucial role attitudes play in the creation and implementation of disability law. At this critical juncture, this essay examines U.S. disability law to help enrich our understanding of attitudes to disability in the U.S. context and, I hope, beyond.

I. INTRODUCING THE ADAAA

It is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations . . . [rather than] whether an individual’s impairment is a disability under the ADA.

—ADA Amendments Act of 2008


25. See infra notes 48-51.

26. The question of course remains as to whether the Senate will ratify the CRPD.


28. On the hope that this article will be implemented, and on the CRPD more generally, see Michael Ashley Stein & Janet E. Lord, Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities, in The UN Convention on the Rights of Person with Disabilities: European and Scandinavian Perspectives 17 (Gerard Quinn & Oddný Mjöll Arnardóttir eds., 2009).

The ADAAA expressly aims to “carry out the ADA’s objectives . . . by reinstating a broad scope of protection.”30 In important ways, the statute has made a bold attempt to fulfill this aim; in other ways, however, the ADAAA compromises the boldest structural aspect of the statute, fundamentally altering its idea of disability and of discrimination. To understand these moves, we have to take a step back and briefly describe relevant aspects of the ADA, the courts’ narrowing, and the ADAAA’s intervention.31

The ADA protects against discrimination on the basis of “disability,”32 so a plaintiff has to qualify as having a “disability” to bring a claim under the statute. Under the ADA, before the amendments, the definition of “disability” was as follows:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.33

Various work documents the reasons why the proponents of the law did not think these definitional prongs would be interpreted narrowly; most importantly, this language was lifted out of a previous law—the Rehabilitation Act of 1973—and had not been given a restrictive interpretation.34

When courts began hearing ADA cases, however, they interpreted this definition of disability strictly in (at least) five ways. First, and broadly, the Supreme Court expressly declared that a “demanding standard” should be applied to determinations of whether a plaintiff fits the definition of “disability” under the statute.35 Second, consistent with this, courts interpreted “substantially limiting” restrictively, requiring plaintiffs to show that they were really truly limited in a major life activity to count as disabled. This approach led to notorious losses for plaintiffs36—many enumerated in the legisla-

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32. 42 U.S.C. § 12112(a). The language of this provision was also modified by the ADAAA. See infra note 101.
33. This was 42 U.S.C. § 12102(2).
34. See, e.g., Feldblum, supra note 2, at 91-92; Barry, supra note 31. The language came from Section 504 of the Rehabilitation Act of 1973, which prohibited discrimination on the basis of disability by employers who received federal funds.
36. ADA plaintiffs had been losing 97% of their employment discrimination cases. See Amy L. Albright, 2009 Employment Decisions Under the ADA Title I—Survey Update, 34 MENTAL & PHYSICAL DISABILITY L. REP. 339, 340 (2010).
tive history of the ADAAA and in various law review articles—for instance, the plaintiff whose cancer was posthumously declared not limiting enough.\textsuperscript{37} Third, and, again, relatedly, the Supreme Court held that, since “substantially limited” is in the present tense, plaintiffs who have mitigated their disabilities must be considered in their mitigated state; thus, a person who has successfully mitigated was excluded from protection under the statute.\textsuperscript{38} This also led to some troubling results.\textsuperscript{39} Fourth, courts applied a restrictive view of what counted as “major life activities.”\textsuperscript{40} Fifth, in a range of ways, courts interpreted the third prong—the “regarded as” prong—of the definition of disability restrictively. Most notably, they required plaintiffs to prove not only the impairment the employer regarded them as having, but to prove \textit{precisely} what major life activity the employer regarded them as \textit{substantially} limited in.\textsuperscript{41} Picture plaintiffs attempting to show that their employers were—lying awake at night?—imagining exactly how their employees’ impairments limited them and in what activities. Absurd.\textsuperscript{42}

The ADAAA addresses most of these problems with the courts’ treatment of the definition of disability. The findings explicitly reject the “demanding” standard, as well as the highly restrictive interpretations of the “substantially limited” language.\textsuperscript{43} The statute expressly indicates that plaintiffs are to be considered without regard to the ameliorating effects of any mitigating measures (other than ordinary eye glasses or contact lenses).\textsuperscript{44} The ADAAA gives “major life activity” a clearer and broader scope, by providing an illustrative

\textsuperscript{37} See, e.g., Long, supra note 31, at 218 (citing Hirsch v. National Mall & Serv., Inc., 989 F. Supp. 977 (N.D. Ill. 1997)); see also, e.g., ADAAA, 122 Stat. 3553 (2008) (noting that Supreme Court cases such as Sutton and Toyota “have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect” and that, “as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities”); Feldblum, supra note 2, at 148-57.


\textsuperscript{39} See, e.g., Barry, supra note 31, at 246 (citing examples).

\textsuperscript{40} See, e.g., 76 Fed. Reg. 17007.

\textsuperscript{41} And if that major life activity was working, they also needed to show that they were regarded as limited in working at a \textit{class} of jobs. See Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

\textsuperscript{42} Indeed, Jill Anderson has cleverly shown how this was largely an absurd interpretation of the statute not only as a practical matter, but as a technical syntactical manner, such that revision of this part of the statute should not have been necessary to eliminate this particular demand for proof, if courts were as attentive to linguistic technicalities as they like to think that they are. Jill Anderson, \textit{Just Semantics: The Lost Readings of the Americans with Disabilities Act}, 117 Yale L.J. 992 (2008).

\textsuperscript{43} See 42 U.S.C. § 12101(4). Neither the statute nor the subsequent regulations give precise meaning to the “substantially limited” language, but the regulations lay out nine interpretive rules that make plain the broadening of the standard. 76 Fed. Reg. 16978, 17000-01 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630.2(j)(1)).

\textsuperscript{44} 42 U.S.C. 12102(4)(E).
list, and by introducing “the operation of a major bodily function” (also with an illustrative list) as another form of major life activity.\textsuperscript{45} Perhaps most strikingly, for the regarded-as prong, the statute completely removes the need to show any substantial limitation in a major life activity. So long as a plaintiff shows that she has been “subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment” (that is not both minor and transitory), she qualifies for coverage under the regarded-as prong.\textsuperscript{46}

Though these changes are not comprehensive, they are ambitious.\textsuperscript{47} I nonetheless worry that courts will find new ways to limit the scope of the statute’s protections. How might they do that? Courts could continue to interpret “substantially limits” somewhat narrowly, since the final statute and the regulations abandoned any attempt to define it.\textsuperscript{48} However, this approach would directly contravene the ADAAA’s express rejection of a “demanding standard” for interpreting “substantially limits,” as well as the regulations’ nine rules of construction. Courts could, instead, put more pressure on the evidence required to demonstrate an “impairment.” For at least some conditions, this could turn into a highly medicalized inquiry.\textsuperscript{49} This would, more generally, run up against the statute’s explicit mandate that courts shift their emphasis from determining who is in and who is out to determining whether discrimination has occurred.

As the statutory findings indicate, “it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied

\textsuperscript{45} See 42 U.S.C. § 12102(2)(A) (“In general . . . , major 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”); id. § 2(B) (“For purposes of paragraph (1), 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.”).

\textsuperscript{46} 42 U.S.C. § 12102(3)(A). “Transitory” is defined as having “an actual or expected duration of 6 months or less.” Id. § 12102(3)(B).

\textsuperscript{47} The statute neglects to address directly any issues outside the scope of the definition of disability, as well as issues such as the narrow interpretations courts have given to the “record of” prong. See, e.g., Long, supra note 31, at 227. The EEOC implies that the statute’s demand for lesser scrutiny of “disability,” alongside the Commission’s own broader interpretation of “record of,” will address the doctrinal problems with the “record of” prong. 76 Fed. Reg. 16984 (Mar. 25, 2011). The EEOC also makes clear its position that “record of” plaintiffs are entitled to accommodation, a point of ambiguity in the statutory text that will presumably provide fodder to courts. Id.

\textsuperscript{48} 76 Fed. Reg. 16981.

\textsuperscript{49} Although the emphasis of the literature critiquing courts’ interpretations of the ADA has focused on the “substantially limiting” and “major life activity,” some work suggests that courts have also put pressure on impairment. See Deirdre M. Smith, Who Says You’re Disabled? The Role of Medical Evidence in the ADA Definition of Disability, 82 Tul. L. Rev. 1 (2007).
with their obligations . . . . [T]he question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."\textsuperscript{50} The ADAAA should therefore put pressure on courts to decide who is "otherwise qualified" to do various jobs, what is "reasonable" accommodation, and what is an "undue hardship" that exempts an employer from providing a requested accommodation.\textsuperscript{51} As a result, courts should direct more attention to these questions, and so those courts inclined to keep the scope of the statute limited may interpret these provisions restrictively.

II. CARVING UP THE DEFINITION OF DISABILITY: ABANDONING A RADICAL SOCIAL MODEL

[A] physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.

—EEOC, Regulations interpreting “regarded as” disability\textsuperscript{52}

Broadly speaking, the ADAAA’s move towards a more expansive definition of “disability” is consistent with a \textit{social model}—the idea that disability inheres in the interaction between impairment and the surrounding social world, rather than being an individual medical problem.\textsuperscript{53} The ADAAA reflects the social model through its shift in emphasis from just how limited the individual with a disability is, to what happened (discrimination?) or what should happen (accommodation?) in interaction with the disability.\textsuperscript{54}

Structurally, however, the ADAAA moves away from the social model. It carves up the definition of disability under the ADA, limiting certain types of discrimination claims, and certain types of remedies, to certain categories of disability. One of the ADA’s boldest features—at least in principle—was that the statute \textit{defined} disability to include both actual and regarded–as-disability, with both counting equally as disability for all purposes under the statute, including accommodation. The ADAAA does away with that, as I shall explain.

\begin{enumerate}
\item ADAAA, 122 Stat. 3553 (2008).
\item See generally Barry, \textit{supra} note 31; Long, \textit{supra} note 31.
\item 29 CFR § 1630.2(l)(2).
\item See \textit{supra} text accompanying note 50.
\end{enumerate}
Recall the ADA’s definition of disability quoted above. All three of the prongs counted equally as having a “disability.” In principle, those who fell under the statute by virtue of actually having an impairment that substantially limited them in a major life activity, and those who fell under it by virtue of being regarded as such, had the same claim to protection, including accommodation, under the ADA. (As I shall discuss in a moment, courts worked hard to say otherwise, but nothing in the statute supported their position.)

This alignment of actually disabled and regarded-as disabled under a single rubric presents a fairly radical version of the social model of disability. Other legal instruments embrace the social model, but the ADA was unusual in explicitly putting disability created by others’ perception on a structural par with disability created by otherwise-limiting impairment.

By contrast, the ADAAA carves up the ADA’s old definition in ways that broaden the scope of the statute’s protection—a much needed development—but that also create two distinct types of disability, now with different legal protections and remedies. The ADAAA largely leaves the definition of disability as it was, but then it adds a qualifying phrase to the third prong, so that it reads as follows: “(C) being regarded as having such an impairment (as described in paragraph (3).)” The paragraph referenced goes on to explain, as I noted above, that the “regarded as” prong now requires less than before: a plaintiff counts as regarded-as having a disability if she was subjected to an action prohibited under this statute “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” So far, so good. This part is a significant improvement, in light of the ridiculous (and linguistically inapt) contortions courts were asking regarded-as plaintiffs to make.

55. See supra text accompanying note 33.
56. See infra note 62.
57. See, e.g., CRPD, supra note 27, at art. 1 (“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”); Stein & Lord, supra note 28, at 25 (reading this definition to “firmly ground[] the disability classification in the social model of disability”).
60. Id. § 12102(3)(A).
61. See supra note 42.
The problem in the ADAAA comes with the later introduction of an exception to the contexts in which plaintiffs are entitled to accommodations:

(h) REASONABLE ACCOMMODATIONS AND MODIFICATIONS.—A covered entity . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.

In other words, plaintiffs who are only “regarded as” disabled have no right to accommodation.

The idea that the statute ever required employers to accommodate those who are regarded-as disabled may sound absurd—as it did to some courts—but it was not entirely so, for several reasons. First, if one accepts a social model of disability, then an employer’s regarding the employee as substantially limited in a major life activity could warrant accommodation. This sounds less surprising if one remembers that courts had imposed a narrow conception of who counted as disabled under the “actual disability” prong. Thus, someone might have a limiting impairment but not count as substantially limited enough to qualify for ADA protection. In such a case, the fact that the employer regards the person as substantially limited enough would reasonably entitle the person to whatever accommodations might help him do his job better. Such cases should, however, become less frequent under the ADAAA, with its broadened protection for the “actually disabled” prong.

Second, one can imagine a plaintiff who is actually disabled, and also regarded-as disabled, and who would prefer to make a claim under the regarded-as prong. As various scholars have pointed out, the ADA puts plaintiffs in a bind: they must prove both that they are substantially limited enough to count as disabled, and that they are nonetheless capable enough to be “otherwise qualified” to perform the essential functions of the job, with or without reasonable accommodation. The requirement that plaintiffs under the actually disabled prong put on evidence to prove just how limited they really are might be unappealing to some plaintiffs, not just for problems of proof, but

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62. See, e.g., Kaplan v. City of North Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (“[T]o conclude that ‘regarded as’ plaintiffs are entitled to reasonable accommodation . . . would be a perverse and troubling result.”); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999) (“Imposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results.”).

63. See supra text accompanying note 53.

also for what it means to them to perform their limitations in court.\textsuperscript{65} One might think here of literary scholar Stephen Greenblatt’s story about refusing a fellow airplane passenger’s request to mouth the words “I want to die”; Greenblatt felt it was too dangerous to form those words, even as a brief favor to a stranger, in light of the ways that our performances become us.\textsuperscript{66} Going into court to prove that someone else thought you were substantially limited, yet refused to accommodate your (perceived) limitation, might be preferable to going into court to prove just how limited you really are. This problem should also be lessened by the expanded scope of the actual-disability prong, although it will not be eliminated.

Third, sometimes others’ attitudes are precisely what is disabling about a particular condition. Think here of facial scarring or a missing front tooth.\textsuperscript{67} The reactions of others might make working or interacting with those affected difficult, even if neither condition creates any functional limitations. Indeed, the EEOC’s regulations interpreting the regarded-as prong envisioned this prong applying, \textit{inter alia}, to people who are “substantially limited only as a result of the attitudes of others.”\textsuperscript{68} Accommodations in such cases could include less interaction with customers, for instance, though one might worry about the segregating or stigmatizing meaning of such a measure. Requesting a non-commission-based sales job might be a


\textsuperscript{66} The other passenger was going to visit an ailing relative, and so wanted to make sure that he knew what it would look like for a person to mouth those words. See \textsc{Stephen Greenblatt}, Epilogue, \textit{Renaissance Self-Fashioning} 255-56 (1983) (“I felt superstitiously that if I mimed the man’s terrible sentence, it would have the force, as it were, of a legal sentence, that the words would stick like a burr upon me. And beyond superstition, I was aware, in a manner more forceful than anything my academic research had brought home to me, of the extent to which my identity and the words I utter coincide, the extent to which I want to form my own sentences or to choose for myself those moments in which I will recite someone else’s.”).

\textsuperscript{67} Cf., e.g., 28 C.F.R. pt. 36, app. B (2010) (discussing the example of someone with severe burns). Another example, under a regime that took mitigation into account for determining actual disability (as was the case before the ADAAA and after \textit{Sutton v. United Air Lines}), would be a highly stigmatized condition, such as schizophrenia, that has been effectively treated with medication. See, e.g., \textsc{Elyn R. Saks}, \textit{The Center Cannot Hold} (2007) (discussing issues of disclosure in the context of job interviews, in relation to schizophrenia).

\textsuperscript{68} 29 CFR § 1630.2(f)(2). When discussing the regarded-as prong in \textit{Sutton v. United Air Lines}, the Supreme Court omitted this interpretation of the regarded-as prong, opting instead to read the regarded-as prong as concerned with mistakes of fact—that is, employers who think an employee has a substantially limiting impairment when she has no impairment, or who think an employee’s impairment is substantially limiting when it is not. \textit{Sutton v. United Air Lines}, Inc., 527 U.S. 471, 489 (1999). This was, however, dicta.
reasonable accommodation that would not raise these problems to the same extent.\footnote{69}

These scenarios are irrelevant under the ADAAA. Regarded-as plaintiffs no longer have any statutory right to accommodation. They are in their own category, distinct from the real disabled, and with a limited set of rights and remedies. Indeed, the interpretive regulations recently issued by the EEOC explicitly distinguish between “actual disability” and “regarded as disability,” although they accompany these terms with a disclaimer that these terms are for “ease of reference only.”\footnote{70} The statute itself does not employ these terms, and both types still fall equally under the definition of “disability,”\footnote{71} but the difference in remedies suggests to me a difference in the underlying categories. Even if the practical consequences are limited, this structural disavowal of a more radical social model is disappointing as a conceptual matter.\footnote{72}

\footnote{69. Cf. EEOC v. Sears Roebuck & Co., 839 F. 2d 302 (7th Cir. 1988) (discussing types of commissioned and non-commissioned sales jobs).}
\footnote{70. See 76 Fed. Reg. 16980 (Mar. 25, 2011) (“For clarity, the Commission has referred to the first prong as ‘actual disability,’ to distinguish it from the second prong (‘record of’) and the third prong (‘regarded as’).”). The disclaimer succeeds in highlighting the significance of the change to the statute that requires this act of naming: The terminology selected is for ease of reference and is not intended to suggest that individuals with a disability under the first prong otherwise have any greater rights under the ADA than individuals whose impairments are covered under the “record of” or “regarded as” prongs, other than the restriction created by the Amendments Act that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation. See id.}
\footnote{71. 42 U.S.C. § 12102(1); see supra text accompanying notes 59-60.}
\footnote{72. Scholars involved in the ADAAA’s creation, echoing the legislative history, acknowledge this structural change to the regarded-as prong as a “compromise” necessary to passing the statute’s very expansive understanding of “regarded as.” See, e.g., 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (“This is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition [of disability], properly applied.”); 76 Fed. Reg. 17015 (Mar. 25, 2011) (quoting this language with approval); Barry, supra note 31 (same). The expanded regarded-as prong aims to bring the ADA closer to the model of other civil rights legislation that protects everyone along particular axes of identity. Kevin Barry characterizes the revised ADA as harmonizing a universal (social) model of disability (under the regarded-as prong) with a minority-group (social) model of disability (under the actual-disability prong). See Barry, supra note 31, at 278-79. This is an appealing way of thinking about the statute, but it does not eliminate the structural implications of creating distinct categories of disability with different definitions of discrimination. Moreover, if accommodations are “at the root of most ADA employment cases,” as Barry notes, then it is unclear how far this harmonization can go. See id. at 278 (citing James Leonard, The Equity Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective, 56 CASE W. RES. L. REV. 1, 23 (2005)).}
III. DISTINGUISHING ACCOMMODATION FROM ANTIDISCRIMINATION

[T]he normal definition of discrimination—differential treatment of similarly situated groups.
—Justice Kennedy

The ADA defines “discriminate” to “include[ . . . ] not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.” A failure to accommodate is discrimination under the ADA. And yet, I have students writing on disability issues who use the word discriminate as something clearly (to them) distinct from failure to accommodate, without remembering (despite our class discussions) that this is a contested issue.

Much scholarly energy has been spent debating this question: Is the ADA doing something really different from the rest (or the heart) of antidiscrimination law, or is it doing something fundamentally similar? Scholars have labored to identify the many ways that core U.S. antidiscrimination statutes—like Title VII of the Civil Rights Act of 1964—and even our core types of discrimination claims—especially disparate impact, but also, at times, disparate treatment—involves costs to the employer and changes to policies and practices that operate like accommodation. The work in this area is interesting and well done, but a final resolution is unlikely, because ultimately it seems that both sides have some merit. Much in Title VII requires employers to absorb costs and change certain policies and practices to avoid violating the antidiscrimination mandate of the statute, making it not so different from the ADA along the commonly cited axis of cost. But the obligation that employers respond to individual requests by employees to change their practices—even if those changes might operate like the remedies in a disparate impact suit, and even if those changes are sometimes costless or even benefi-

73. Olmstead v. Zimring, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring). The context includes Kennedy’s observation,

Discrimination, of course, tends to be an expansive concept and, as legal category, it must be applied with care and prudence . . . . To establish discrimination in the context of this case, and absent a showing of policies motivated by improper animus or stereotypes, it would be necessary to show that a comparable or similarly situated group received differential treatment.

Id. at 613.

74. 42 U.S.C. § 12112(b).

cial to employers—requires a different kind of interaction between employer and employee on the front end. Thus, some things are different, and some are similar. But the question of whether the failure to accommodate is discrimination has now become more interesting because the ADAAA provides two different meanings of “discriminate”—one for actually disabled plaintiffs and another for regarded-as disabled plaintiffs, as discussed above.

Justice Kennedy makes clear his view that the ADA is doing something different, in his concurring opinions in two crucial cases, *Olmstead* \(^76\) and *Garrett*, \(^77\) handed down one year apart. The epigraph above from *Olmstead*—“the normal definition of discrimination [is] differential treatment of similarly situated groups”—nicely captures his basic view of discrimination. Thus understood, it does not include the failure to accommodate, something he makes clear in these decisions, as he contrasts that with some of the newfangled concepts in this arena. In *Garrett*, Kennedy grapples with the changing times. Here is what he tells us about evolving concepts of “prejudice”:

> Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. Quite apart from any historical documentation, knowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature. There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will. 78

In short, traditional prejudice arises from malice or hostile animus, but there are other more natural emotions and behaviors—“instinctive mechanisms”—that may lead us to behave in ways that “the better angels of our nature” would discourage. “*Our*” nature, Kennedy tells us, is to be “unsettled” by people with disabilities.

But law can help: “One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with


\(^78\) Id. at 374-75.
impairments or disabilities into the larger society.” 79 The ADA is a good thing, Kennedy says, because it will get us “citizens” to accept those “persons with impairments or disabilities” into our society.

This is apparently a reason to praise the ADA—as “a milestone on the path to a more decent, tolerant, progressive society”—but it is not sufficient to make the law enforceable. 80 The forms of prejudice that involve “the failure to act or the omission to remedy” just are not enough to enforce the law against the states:

It is a question of quite a different order, however, to say that the States in their official capacities, the States as governmental entities, must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens. It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on the failure to act or the omission to remedy . . . . 81

Thus, Kennedy concludes, “[t]he failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause.” 82

In this opinion, Kennedy makes clear his view that our learning process about “prejudice” is as much a hierarchy of types of prejudice as it is a progression over time to greater understanding. With disability, we are not really talking about discrimination. We are talking about charity, perhaps, or some other (Christian?) virtue typified by our “better angels” and contrary to our “human instincts.” With disability, we are not talking about the kind of bad actors for whom we (should) reserve the word discrimination.

And now the ADAAA says that actually-disabled people have one definition of discrimination—which includes the failure to accommodate—whereas people who are only “regarded as” disabled have another definition of discrimination—which does not include the failure to accommodate. In this way, the ADAAA has conceded something to the accommodation-is-different camp. Although the statute still formally includes actually disabled and regarded-as disabled within the definition of disability, the legal entitlements for

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79. Id. at 375.
80. Id. (“The law works this way because the law can be a teacher. So I do not doubt that the Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society.”) (emphasis added).
81. Id. (citing Washington v. Davis, 426 U.S. 229 (1976)).
82. Id.
each group are now substantially different. This kind of move is not unique to the U.S. context.83

Some scholars offer a more optimistic account of the ADAAA’s reconstruction of the regarded-as prong. For instance, one might read the regarded-as prong as “signal[ing] long-awaited parity between the ADA and other civil rights laws . . . [b]y defining ‘disability’ to include just about everyone on the continuum of impairments.”84 Indeed, the regulations present the regarded-as prong as the first port of call for plaintiffs who do not challenge a failure to accommodate.85 This new statutory structure plainly incentivizes plaintiffs and their lawyers to bring suit under the regarded-as prong whenever possible. Will it also make lawyers less likely to take cases involving the more difficult, and now severable, accommodation claims?

Presumably at least some plaintiffs’ lawyers will attempt to cast what would have previously been accommodation claims as antidiscrimination claims. This raises an interesting conceptual and practical question: What will happen when courts confront claims of discrimination that lie on the border of “accommodation”? For instance, is the failure to allow someone with mild depression to arrive and leave early one day a week to attend therapy a failure to accommodate or simple discrimination, if the employer sometimes allows others to leave early for their children’s sporting events? This is a classic selective-sympathy problem. Or consider the problem of structural changes to the workplace: Is the failure to construct accessible restrooms for the first disabled employees—or, for that matter, women’s rooms for the first female employees—simple discrimination or

83. This aspect of the ADAAA resembles the way the United Kingdom implemented the EU Framework Employment Directive, which contains no “justification” defense, to the Disability Discrimination Act (DDA), which did; the response was to remove the “justification” defense only for “pure” direct discrimination claims, leaving the defense in place for indirect discrimination claims under the DDA. See Sandra Fredman, Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm, in DISABILITY RIGHTS IN EUROPE: FROM THEORY TO PRACTICE 199, 200 (Anna Lawson & Caroline Gooding eds., 2005). The law of Washington state was the model for the ADAAA’s bifurcated structure, though Washington’s law differs in significant respects. See Barry, supra note 31, at 266; Wash. Rev. Code Ann. § 49.60.040(7) (West 2010) (defining “disability” as “the presence of a sensory, mental, or physical impairment that . . . [i]s medically cognizable or diagnosable,” but requiring that, in order to qualify for a reasonable accommodation, the impairment “must be known or shown through an interactive process to exist in fact” and: (i) “must have a substantially limiting effect upon the individual’s ability to perform his or her job” (“a limitation is not substantial if it has only a trivial effect”); or (ii) “[t]he employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect”).

84. Barry, supra note 31, at 278.

does it fall in the special category of failure to accommodate? These are just a few examples of the kinds of dilemmas that could be raised, on the cusp of antidiscrimination and accommodation. I admit I am not optimistic that many courts will give a broad reading to discrimination that is statutorily distinguished from failure to accommodate. On the contrary, this bifurcation of discrimination types seems to fit nicely with Justice Kennedy’s sense that disability inspires some non-ideal attitudes and actions from “us,” but “our” newfangled forms of discrimination against disabled people are often not bad enough to be actionable in law.

IV. MOVING THE LINE: TURNING BIDISABILITY INTO DISABILITY

_Could we ask, about a concept . . . not so much ‘What does it really mean?’ or ‘Who owns it and are they good or bad?’, but ‘What does it do?’—what does it make happen?—what . . . does it make easier or harder for people of various kinds to accomplish and think?_

—Eve Kosofsky Sedgwick

In principle, under the ADAAA, the category of disability has expanded to include those who were, under the ADA, “not disabled enough.” The EEOC calls this the “group whose ‘coverage has been clarified’ under the ADAAA.” More generally, this liminal position—of those who fell outside the rather narrow category of disability that courts had read into the ADA—could be called bidisability (or “bi-ability,” as Ruth Colker would have it). This category

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86. Cf. Mary Anne Case, _All the World’s the Men’s Room_, 74 U. Chl. L. Rev. 1655 (2007).
87. For more dilemmas on this cusp, see, for example, Jolls, _supra_ note 75; Bagents, _supra_ note 24.
88. One approach courts may take to reading “discriminate” narrowly is to insist that plaintiffs identify “comparators” in order to prove that the employer “discriminated” (in the statute’s newly narrower meaning of that term) rather than failed to accommodate. For the definitive treatment of the comparator methodology, and a discussion of its problems, see Suzanne B. Goldberg, _Discrimination by Comparison_, 120 Yale L.J. 728 (2011).
89. See Clare Hemmings, _Bisexual Theoretical Perspectives: Emergent and Contingent Relationships_, in *Bi Academic Intervention, The Bisexual Imaginary: Representation, Identity & Desire* 1, 16 (1997) (quoting Eve Kosofsky Sedgwick, ‘Bi’, _Queer Studies list, QSTUDY-L@UBVM.cc.buffalo.edu_, Aug. 17, 1994: 15:49:34-0400) (emphases removed). Sedgwick was writing about “a concept like bisexuality that is gaining new currency.” Id. I thank Michael Boucai for bringing this quotation to my attention.
92. Ruth Colker offered the first and most sustained treatment of a category in between disabled and nondisabled as an explicit “bi” category akin to biracialism and
is bidisabled in the sense that it lies between disabled and nondisabled, overlapping with both.

Normatively, there is no one right way to handle questions of line drawing and differential treatment across the spectrum of disability. Sometimes it seems sensible to draw finely honed distinctions between gradations of disability for legal purposes, while in other contexts it may be best to provide common treatment for various degrees of disability, as cases from other jurisdictions suggest. In recent years, the European Court of Human Rights has been generating some interesting case law involving those individuals disabled enough to be discriminated against (or at least treated differently) but not disabled enough to be protected against discrimination (or at least not granted certain benefits reserved for the truly disabled). The results yield no uniform vision of how interim degrees of disability should be treated, and rightly so, I think. Compare, e.g., Glor v. Switzerland, No. 13444/04 (Eur. Ct. Hum. Rts., Apr. 30, 2009), with Kiss v. Hungary, No. 38832/06 (Eur. Ct. Hum. Rts., May 20, 2010).

Many of those who were bidisabled under the ADA will presumably be absorbed within the ADAAA’s broader disability definition. Bidisability does not appear to have any sort of cultural identity— unlike bisexual or biracial identity—but it is worth considering what functions this category nonetheless might have served. Most notably, I think that under the ADA before the recent amendments, the not-disabled-enough group has been providing a kind of buffer zone between nondisabled and disabled.

Disability is a threatening category to many people because, unlike a subordinated race or sex, anyone can fall into the category of disabled at any time. As various scholars have written, the permeability of a subordinated group does not necessarily lead to empathy from outsiders; on the contrary, the possibility of falling into a subordinated group can lead outsiders to fear group members and to distance themselves from the category. This is the idea behind homophobia: fear of the other in oneself makes one phobic of the other. Writing about disability, Harlan Hahn has famously called this the “existential anxiety” inspired by disabled others.

In-between categories can sometimes provoke this kind of anxiety to an even greater degree, because it is harder to distance oneself from categories that share traits with both ends of a particular iden-
tity spectrum. Kenji Yoshino has, for instance, argued in this vein that bisexuality threatens both gays and straights, because both groups are more comfortable thinking their positions are fixed and opposite.96 The existence of bisexuality makes it much harder for people to prove that they are simply straight or gay, because the fact of desire in one direction does not disprove desire in the other direction.97

Under this logic, one might think that the old ADA’s highlighting of what I am calling the bidisabled would increase existential anxiety about disability. But recall what the courts did with the bidedisabled under the ADA: classified them as “not disabled.” In the hands of the courts, the broad group of positions between those “severely restricted” by their impairments and those not so limited by their impairments was declared to fall outside the definition of “disability” under the statute. (I have sometimes thought, half seriously, that courts so frequently dismissed cases at summary judgment by narrowly defining disability because they preferred to declare plaintiffs not to be disabled—as if judicial performativity could operate like an evangelical preacher’s “You can walk!”—rather than judging disabled plaintiffs to be unqualified to work.) By locating the boundaries of “disability” around so narrow a group, and fixing a large group of somewhat (but not sufficiently) restricted folks just outside the rubric of disability, the courts created a kind of safe zone, a buffer between disabled and nondisabled, which was legally declared to be the latter.

The ADAAA tries to eliminate, or at least shrink and shift, that buffer zone. It aims to bring us closer to a world in which “[t]here is no ‘us’ and ‘them.’”98 If the ADAAA succeeds in folding many of the bidisabled into the legal category of disability, then we might also see heightened existential anxiety and associated empathy failures. The question will be how to turn the attitudinal consequences of an expanded definition of “disability” in a more favorable direction—from heightened anxiety to a better appreciation of disability law as a social insurance policy for everyone.

V. CODIFYING ASYMMETRY

There is a tradition [of saying] . . . in the acknowledgements sections of academic books . . . that others, while they might have contributed to the successful aspects of the project, are not to be held accountable for a book’s “main defects.” From where I sit . . . this strikes me as a tradition worth inverting.

96. See Yoshino, supra note 94.
97. Id.
If there is anything disabled, queer, or crip about this book, it has come from my collaborative work with those named above, and many others. I take responsibility, however, for the moments when crip energies and ideas are contained or diluted in what follows, and I know that others will continue to push the work of this book, and the movements that made it possible, beyond those moments of containment.

—Robert McRuer

The ADAAA more firmly establishes the ADA as what I have called an “asymmetrical” statute—that is, a statute that protects some groups along a particular axis and not others—in contrast to Title VII of the Civil Rights Act of 1964, which is largely a “symmetrical” statute, in that it protects everyone on the basis of some axis of identity (such as race or sex). The ADAAA makes explicit that this statutory regime will not tolerate so-called reverse discrimination claims: “(g) CLAIMS OF NO DISABILITY.—Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”

Why is this possible for the ADA, when it is not for Title VII? An asymmetrical approach is more of an antisubordination model than an antidifferentiation (or anticlassification) model. An antisubordination model of antidiscrimination takes account of history and targets interventions to the groups that have been subject to systematic subordination. By contrast, an antidifferentiation approach looks skeptically upon any use of the protected classification, even if that aim is to rectify that history of discrimination. Many scholars (and more than one Supreme Court justice) have argued that an antisubordination model for antidiscrimination efforts would be more sensible for race and sex. So how do we have an explicit antisubordination model for disability and not for race and sex?


101. ADAAA § 12201(g). The provision was added in order to “avoid the potential for reverse discrimination suits,” in light of the ADAAA’s broadening of the definition of disability. See Barry, supra note 31, at 265 n.365. In addition, the ADAAA’s minor changes to the way “discrimination” is defined in § 12112(a)—from prohibiting “discrimination] against a qualified individual with a disability because of the disability of such individual” to prohibiting “discrimination] against a qualified individual on the basis of disability,” see 76 Fed. Reg. at 17005—might otherwise have left the statute open to claims of reverse discrimination.

102. This Essay is not making an argument for such an approach, which is a complicated matter. For a provocative new treatment, see Michael Kavey, The Unprotected Class (work in progress).
Most obviously, there is no constitutional impediment to an asymmetrical statute in the disability context. For better and worse, disability does not have the constitutional problem presented by race and sex, both of which are subject to heightened scrutiny, which the Court has applied (nearly) symmetrically. But why would this explicit anti-reverse-discrimination provision not raise hackles, sink the statute, or even get publicity? Why is no one worried about, for example, the non-deaf person denied a job at a Deaf institution?

I think the answer lies in the highly negative social status of disability, in at least three ways. First, it has something to do with the still unmarked status of those who are not disabled. To some extent, we have come to see men and whites as having a sex and a race, respectively. True, those who are not men and who are not white are marked to a greater degree; they are still not the norm for many purposes. But it no longer seems strange that a white person could claim he was discriminated against based on his whiteness.

But the opposite of disability does not register as anything other than fortunate, lucky, or normal, I think. (Or as “citizens” or just “us,” in Justice Kennedy’s language.) To refer to people as “disabled” and “nondisabled” still sounds strange to many. I doubt many nondisabled people think of themselves as “nondisabled”; if they were asked to list the identity categories they fall into, nondisabled would not come high on the list, if it appeared at all. So to deny people claims on the basis of this identity does not seem to violate any aspect of someone's being.

Second, disability is still so widely regarded as an inferior status that giving something to this group that no one else gets can go largely unchallenged. A nondisabled person who tried to claim the benefits of a statute designed for people with disabilities would likely face some stigma or opprobrium. True, some people complain that...

104. Cf. Susan Kinzie, Nelson Hernandez & David A. Fahrenthold, Gallaudet Board Ousts Fernandes, WASH. POST, Oct. 30, 2006 (describing the controversy over Gallaudet’s attempt to appoint a president who was, to some, not Deaf enough, because she learned ASL in her twenties, and the governing board’s ultimate decision to revoke her appointment).
105. See, e.g., Michael Bérubé, Afterword: If I Should Live So Long, in DISABILITY STUDIES: ENABLING THE HUMANITIES 337, 337 (Sharon L. Snyder, Brenda Jo Bruegeman & Rosemarie Garland-Thomson eds., 2002) (noting that the “default position” is “to see people without disabilities as normal and to see that category of the normal, like the category of whiteness, as unmarked”).
106. From the poetic to the satiric, see, for example, ROBERT BLY, IRON JOHN: A BOOK ABOUT MEN (2004), and CHRISTIAN LANDER, STUFF WHITE PEOPLE LIKE (2008).
108. See supra note 78 (quoting Garrett).
109. These moves to fake subordinated status to claim associated goodies are the stuff of film comedies. Compare THE RINGER (20th Century Fox, 2006) (depicting Johnny Knoxville as a cash-starved man who fakes an intellectual disability in order...
parents seek diagnoses to get goodies for their children in the educational context,110 but even if true, I think little of that has made it into the adult world, in part because of the degree of stigma. So to ban such claims does not injure any as-yet-identified group of claimants.

Third, and relatedly, the degree of inferiority society assigns to disability allows the category to escape the anxieties about a world upside down that animate racial discourse. Discussions of race discrimination are haunted by the spectre of a someday or somewhere world where the subordinated race(s) become dominant and begin to persecute whites.111 I think the assumption that disability truly signals inferiority means that (almost) no one expects disabled people to take over society and subordinate nondisabled people.112 And even in such a takeover, the unconscious logic goes, the disabled people in power would still see the superior job-related capacities of disabled people, so disabled people wouldn’t face much discrimination.

Observing the ease of banning reverse discrimination claims in the ADAAA highlights other manifestations of these resolutely negative attitudes to disability. For instance, the persistence of a clear hierarchy of nondisabled over disabled also contributes to the frequent omission of disability from corporate and academic “diversity” initiatives. Some recent work makes the so-called business case for hiring disabled workers and advertising to people with disabilities.113 And some of us have written about the benefits to workplace and society of some accommodations requested by individual disabled people.114 But however obvious they may be to disability “insid-
ers.”

People who run diversity initiatives are (anecdotally) uncomfortable and awkward when asked why they have omitted disability (as these initiatives often do). There is sometimes a general reluctance to focus affirmative action efforts on anything other than race—a concern that bringing in other groups waters down the attention that needs to be bestowed on race. But even where diversity initiatives go further than race, they usually skip disability.

Lennard Davis has recently argued that the era of the normal is over, and diversity is the new normal, except for disability. He says that disability is not part of our new cultural celebration of diversity—that impairment is the area where we still cling to a medical model and denigrate difference. I am skeptical that our cultural affinity for normality is ending—by way of example, I might ask, what fraction of America, particularly outside academia but even within it, would consider it a compliment to be called “weird”? But I agree with Davis that a thin conception of diversity circulates in the contemporary United States as part of an affirmative vision of identity and humanity, and I agree that that affirmative vision largely excludes disability.

Diversity conceives integration as affirming difference. In contrast to our standard antisubordination story of integration, which focuses on the harms to certain groups of historical exclusion and denigration, a diversity story focuses on the future gains to society of the rich cultural contributions of those with varied identities. A range of work could be cited on the various benefits of various disabilities. One colorful example comes from Temple Grandin: “If you got rid of all the autism genetics, you’d get rid of scientists, musicians, mathematicians. Some guy with high-functioning Asperger’s developed the first stone spear; it wasn’t developed by the social ones yakking around the campfire.” See Andrew Solomon, The Autism Rights Movement, N.Y. MAG., May 25, 2008, available at http://nymag.com/news/features/47225/ (quoting Temple Grandin); see also Kevin M. Barry, Gray Matters: Autism, Impairment, and the End of Binaries, 49 SAN DIEGO L. REV. (forthcoming 2012) (discussing, inter alia, the growing neurodiversity movement); see also Daniela Caruso, Autism in the U.S.: Social Movement and Legal Change, 36 AM. J.L. & MED. 483.
The diversity narrative can of course be criticized on numerous grounds—for instance, for stereotyping or reifying certain notions of identity, or for viewing some people as “more diverse” than others and treating those diverse others as valuable more for the way they make classrooms and workplaces colorful for the real (e.g., white, normal) participants than for the pursuit of their own interests.

While these debates over the merits of a diversity approach to discrimination are interesting, they are tangential to this essay. My aim here is not to argue for (or against) a diversity agenda, but rather to use disability’s relative absence from that agenda to help limn contemporary U.S. conceptions of disability.

At a talk I gave recently, a student raised an example that helps to illustrate disability’s position in relation to diversity thinking. The student had apparently not thought much about disability in the past, but our discussion that day made her think about the cultural houses at her undergraduate college. These residential sites were organized around people’s interests in, for instance, the environment or music. The African-American House was somewhat controversial, but it was framed around a focus on African-American history, which opened it up to people who were not themselves African-American, although most residents were. The student posited the possibility of a “Disability House,” and immediately concluded that such a house would be even more controversial than the African-American House, though she was not entirely sure why.

I think the reaction the student anticipated to a Disability House—and the absence of Disability Houses—is related to the neglect of disability in diversity initiatives, and to the ADAAA’s easy inclusion of a ban on reverse discrimination suits. Disability is rarely understood as a positive state or identity with social or cultural benefits to its bearers or those around them. This perspective lacks any appreciation of the idea of crip culture or the recent explosion of disability-related arts. We are still close enough to an era of widespread institutionalization of people with physical as well as mental disabilities, such that a house for people with disabilities could hardly be understood as anything other than the product of exclusion or even warehousing. (And as another student rightly


120. Discussion with the Columbia Law Women’s Association on Intimate Discrimination (Mar. 23, 2011).
122. One might say that the problem with Disability House is that disabilities are so diverse; they are indeed diverse, but a Blind House seems just as likely to raise these concerns.
pointed out, “disability houses” of course occur all the time on campuses and elsewhere, when only one building or part of an institution is accessible.) But the reason a Disability House sounds troubling to most is not just historical associations. Rather, the Disability House is inconceivable as an affirmative story because mainstream culture has so little sense that people with disabilities could want to be together—much less that nondisabled people could affirmatively seek out a disability-centered context.

U.S. law on integration in the context of “special education” and of community-based living for people with mental disabilities reflects and reinforces this understanding. Statutes and cases in these areas explicitly focus on the extent to which people with disabilities are interacting with people without disabilities.¹²³ That is, environments are better or worse depending on how much contact they offer with nondisabled people.¹²⁴ There are important historical reasons for this focus—even if some of the normative presuppositions are being debated in particular areas¹²⁵—but the language in these cases is jarring if one begins to question, even for a moment, the presumed desirability of interacting with nondisabled people.¹²⁶ Imagine a similar discussion about racial integration rather than disability integration—for instance, a case that repeatedly and explicitly stressed how one environment was superior because of how much contact it offered with white people. (Of course this has effectively

¹²³. See, e.g., Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, 20 U.S.C. § 1412(a)(5) (requiring that participating states establish “procedures to assure that[,] . . . [t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled”); Disability Advocates, Inc. v. Paterson, 653 F.Supp.2d 184, 208 (E.D.N.Y. 2009) (saying repeatedly, in a judgment that adult homes run by the state of New York violate the integration mandate of Title II of the ADA and Olmstead, that these “Adult Homes limit the development of relationships with people who do not have disabilities”).

¹²⁴. Id.


¹²⁶. Although parents of nondisabled children do sometimes want their children in special classroom settings with disabled children, this seems to be because of the enhanced resources and better student-teacher ratios, rather than a sense that interacting with disabled children will benefit their nondisabled children. See, e.g., Ruth Colker, Anti-Subordination Above All: A Disability Perspective, 82 NOTRE DAME L. REV. 1415, 1462 n.264 (2007); Emens, supra note 14, at 866 n.69. Relatedly, for an incisive theoretical take on the difference between inclusion and access, see Tobin Siebers, Disability Studies and the Future of Identity Politics, in DISABILITY THEORY 70, 93–94 (2008) (“How might disability studies revise, for instance, the concept of exclusion? . . . Enlightenment philosophy was eager to right the wrong of exclusionary behavior, and its objective, inherited by every subsequent age, involves naming who is being excluded by whom and insisting on inclusion . . . . Here is where disability studies might a sea change by asking that the inclusion-exclusion binary be reconceived in terms of accessibility and inaccessibility . . . . In short, all worlds should be accessible to everyone, but it is up to individuals to decide whether they will enter those worlds.”).
been the implication of some of our racial integration efforts and decisions.

What is striking, I think, once one considers the possibility of disability as something that people (disabled or nondisabled) could be drawn to—for community, culture, or concepts—is that the discussions of integration in the disability context are not framed, even superficially, in terms of what nondisabled and disabled offer each other. Rather, benefits are almost always seen as traveling one way—from nondisabled to disabled. In this light, why would voluntary efforts to diversify an institution incorporate disability? Why would an institution choose to seek out people who would bring costs and no benefits? And how could a university have a Disability House that students—disabled and even nondisabled—would choose to join? They wouldn't. No one would seek to affiliate with this group, the story goes, and so eliminating the possibility of lawsuits brought by nondisabled people who feel they were discriminated against for not being disabled raises no hackles, and passed into law unnoticed.

**CONCLUSION**

> every built thing has its unmeant purpose . . .
> [e]very built thing with its unmeant meaning unmet purpose
> every unbuilt thing

—Adrienne Rich

When I heard Adrienne Rich read these lines in October of 2007, I was finishing an article on the unintended benefits of workplace accommodations under the ADA. “Unmeant purpose” resonated deeply with my sense of benefits developed for one use and exapted to another. The built world was my frequent focus in that article, in fact and metaphor.

These lines now reach further. The “unmet purpose” of the ADA has been my subject here; indeed, it is the subject of the ADAAA. Metaphors of the built environment circulate always in discussions of the ADA, both challenging and constraining our thinking about disa-

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128. Emens, *supra* note 14 (identifying ways that changes to the workplace to accommodate individual workers with disabilities can benefit other workers, disabled and nondisabled, depending upon their design, and tracing the courts’ lack of appreciation of these potential benefits); cf. 76 Fed. Reg. 16997-98 (Mar. 25, 2011) (acknowledging these and other direct and indirect benefits of accommodation).

129. See Emens, *supra* note 14, at 855 (explaining that the “broader uses of disability-related innovations might be analogized to what evolutionary theorists call exaptations, which are traits (i.e., aptations, the progress-neutral variation on the term adaptation) that emerge for one purpose and then turn out to be useful for another purpose” (citation omitted)).
bility. And in this Essay the broader benefits at issue extend beyond the workplace and beyond accommodations. Our inquiry now reaches towards the benefits of disability per se, for diversity efforts or antidiscrimination concepts, through the possibility of shifting attitudes. What lies ahead, in law and theory, is only every unbuilt thing.
national human rights institutions; and has brought landmark disability rights litigation globally. Professor Stein has received numerous awards in recognition of his transformative work, including the inaugural Morton E. Ruderman Prize for Inclusion; the inaugural Henry Viscardi Achievement Award; and the ABA Paul G. Hearne Award. His authoritative and path-breaking scholarship has been published worldwide by leading journals and academic presses, and has been supported by fellowships and awards from the American Council of Learned Societies, the National Endowment for the Humanities, and the National Institute on Disability Rehabilitation and Research, among others. Dr. Stein teaches at the Harvard Kennedy School of Government and Harvard Medical School, holds an Extraordinary Professorship at the University of Pretoria Faculty of Law’s Centre for Human Rights, and is a visiting professor at the Free University of Amsterdam Faculty of Earth and Life Sciences’ Athena Institute. He earned a J.D. from Harvard Law School (where he became the first known person with a disability to be a member of the Harvard Law Review), and a Ph.D. from Cambridge University (funded by a W.M. Tapp Studentship). Professor Stein previously was Professor (and Cabell Professor) at William & Mary Law School, taught at New York University and Stanford law schools, and was appointed by President Obama to the United States Holocaust Memorial Council.

**Selma Sulejman**  
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My name is Selma Sulejman, and I am a 31-year-old completely blind young woman. I along with my loved ones originate from a country titled Macedonia. My family structure consists of a remarkable mother, outstanding sister, adoring nephew, and wonderful brother-in-law. Currently I am in my final academic semester at the CUNY School of Professional Studies, completing my Masters of Arts in Disability Studies. Thus, as disability and chronic illness have shaped my life in countless ways, I always find myself partaking within advocacy platforms to assist others and improve existing mechanisms. Through experiential internships and pro-bono work, I have strived to be a voice for the voiceless in areas such as disability and employment, disability and chronic illness, inclusion and diversity, intersectionality, and much more. Some of the organizations I have had the honor of working with include, Weil, Gotshal & Manges LLP, Hunter College, Suffering the Silence, Disability Rights New York, and Link20. I have a true passion to listen to others, help in any possible way with my given skillsets, and raising awareness for needed areas that lack acknowledgment. My interests include, creative writing, attending and planning informative events, public speaking, conducting research revolving around the field of disability, reading for leisure, listening to music, and most of all spending time with my family. My scholarly experiences from a social justice stand point, only drive me to create equality, innovation, and inclusion.
The ADA and City Governments: Common Problems

Introduction
Access to civic life by people with disabilities is a fundamental goal of the Americans with Disabilities Act (ADA). To ensure that this goal is met, Title II of the ADA requires State and local governments to make their programs and services accessible to persons with disabilities. This requirement extends not only to physical access at government facilities, programs, and events — but also to policy changes that governmental entities must make to ensure that all people with disabilities can take part in, and benefit from, the programs and services of State and local governments. In addition, governmental entities must ensure effective communication — including the provision of necessary auxiliary aids and services — so that individuals with disabilities can participate in civic life.

This document contains a sampling of common problems shared by city governments of all sizes that have been identified through the Department of Justice’s ongoing enforcement efforts. The document provides examples of common deficiencies and explains how these problems affect persons with disabilities. The document is not intended to be comprehensive or exhaustive.

City programs held in this municipal gazebo are covered by the ADA.

For additional information about the Americans with Disabilities Act’s Title II requirements, please contact the Department of Justice ADA Information Line. This free service provides answers to general and technical questions about ADA requirements and free ADA documents, such as Commonly Asked Questions about Title II of the Americans with Disabilities Act (ADA), Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement, Title II Highlights, Access for 9-1-1 and Telephone Emergency Services, the ADA Guide for Small Towns, and the ADA Standards for Accessible Design. You may reach the ADA Information Line at:

800-514-0301 (voice) or 800-514-0383 (TTY)

ADA information is also available on the Department’s ADA Home Page on the World Wide Web at:

(www.usdoj.gov/crt/ada/adahom1.htm)

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Issue: “Grandfather” Clause or Small Entity Exemption

Common Problem:
City governments may believe that their existing programs and facilities are protected by a “grandfather” clause from having to comply with the requirements of Title II of the ADA. Small municipalities may also believe that they are exempt from complying with Title II because of their size.

Result:
Because city governments wrongly believe that a “grandfather” clause or a small entity exemption shields them from complying with Title II of the ADA, they fail to take steps to provide program access or to make modifications to policies, practices, and procedures that are required by law. People with disabilities are unable to gain access to city facilities, programs, services, or activities because of a public entity’s reliance on these common misconceptions.

Requirement:
There is no “grandfather” clause in the ADA. However, the law is flexible. City governments must comply with Title II of the ADA, and must provide program access for people with disabilities to the whole range of city services and programs. In providing program access, city governments are not required to take any action that would result in a fundamental alteration to the nature of the service, program, or activity in question or that would result in undue financial and administrative burdens. This determination can only be made by the head of the public entity or a designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The determination that undue burden would result must be based on all resources available for use in a program. If an action would result in such an alteration or such burdens, a city government must take any other action that it can to ensure that people with disabilities receive the benefits and services of the program or activity. 28 C.F.R. § 35.150(a)(3).

Similarly, there is no exemption from Title II requirements for small municipalities. While public entities that have less than 50 employees are not required to comply with limited sections of the Department of Justice’s regulations, such as maintaining self-evaluations on file for three years and designating a grievance procedure for ADA complaints, no general exemption applies. All public entities, regardless of size, must comply with Title II’s requirements. 28 C.F.R. § 35.104.
**Issue: Program Accessibility**

**Common Problem:**
City governments often have failed to ensure that the whole range of the city’s services, municipal buildings, and programs meet Title II’s program access requirements.

**Result:**
People with disabilities are unable to participate in the activities of city government, such as public meetings, unable to attend city functions, and unable to gain access to the city’s various programs and services. If a municipal building such as a courthouse is inaccessible, people with disabilities who use wheelchairs are unable to participate in jury duty, attend hearings, and gain access to other services, because doorways are too narrow, restroom facilities are inaccessible, and steps are the only way to get to all or portions of a facility.

**Requirement:**
Title II requires city governments to ensure that all of their programs, services, and activities, when viewed in their entirety, are accessible to people with disabilities. Program access is intended to remove physical barriers to city services, programs, and activities, but it generally does not require that a city government make each facility, or each part of a facility, accessible. For example, each restroom in a facility need not be made accessible. However, signage directing people with disabilities to the accessible features and spaces in a facility should be provided. Program accessibility may be achieved in a variety of ways. City governments may choose to make structural changes to existing facilities to achieve access. But city governments can also pursue alternatives to structural changes to achieve program accessibility. For example, city governments can move public meetings to accessible buildings and can relocate services for individuals with disabilities to accessible levels or parts of buildings. When choosing between possible methods of program accessibility, however, city governments must give priority to the choices that offer services, programs, and activities in the most integrated setting appropriate. In addition, all newly constructed city facilities must be fully accessible to people with disabilities. 28 C.F.R. §§ 35.149, 35.150, 35.151, 35.163.
Issue: Historically Significant Facilities

Common Problem:
City governments may believe that they have no duty to make changes to historically significant buildings and facilities to improve accessibility for people with disabilities.

Result:
Many city programs, services, and activities are conducted in buildings that are historically significant. In addition, many cities operate historic preservation programs at historic sites for educational and cultural purposes. If no accessibility changes are made at these facilities and locations, individuals with disabilities are unable to visit and participate in the programs offered. For example, people who use wheelchairs would not be able to reach the courtroom or clerk’s office located in a historic nineteenth-century courthouse if no physical changes are made to achieve access.

Requirement:
Historically significant facilities are those facilities or properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under State or local law. Structural changes to these facilities that would threaten or destroy the historical significance of the property or would fundamentally change the program being offered at the historic facility need not be undertaken. Nevertheless, a city must consider alternatives to structural changes in these instances — including using audio-visual materials to depict the inaccessible portions of the facility and other innovative solutions.

If alterations are being made to a historically significant property, however, these changes must be made in conformance with the ADA Standards for Accessible Design, (“the Standards”), 28 C.F.R. Part 36, § 4.1.7, or the Uniform Federal Accessibility Standards, (“UFAS”) § 4.1.7, to the maximum extent feasible. If following either set of standards would threaten or destroy the historical significance of the property, alternative standards, which provide a minimal level of access, may be used. This decision must be made in consultation with the appropriate historic advisory board designated in the Standards or UFAS, and interested persons should be invited to participate in the decision-making process. 28 C.F.R. §§ 35.150(b)(2); 35.151(d); Standards § 4.1.7; UFAS § 4.1.7. If these lesser standards would threaten or destroy historically significant features, then the programs or services conducted in the facility must be offered in an alternative accessible manner or location.

An accessible side entrance was added to this historic facility.
Issue: Curb Ramps

Common Problem:
City governments often do not provide necessary curb ramps to ensure that people with disabilities can travel throughout the city in a safe and convenient manner.

Result:
Without the required curb ramps, sidewalk travel in urban areas is dangerous, difficult, and in some cases impossible for people who use wheelchairs, scooters, and other mobility aids. Curb ramps allow people with mobility impairments to gain access to the sidewalks and to pass through center islands in streets. Otherwise, these individuals are forced to travel in streets and roadways and are put in danger or are prevented from reaching their destination.

Requirement:
When streets and roads are newly built or altered, they must have ramps wherever there are curbs or other barriers to entry from a pedestrian walkway. Likewise, when new sidewalks or walkways are built or altered, they must contain curb ramps or sloped areas wherever they intersect with streets or roads. While resurfacing a street or sidewalk is considered an alteration for these purposes, filling in potholes alone will not trigger the alterations requirements. At existing roads and sidewalks that have not been altered, however, city governments may choose to construct curb ramps at every point where a pedestrian walkway intersects a curb, but they are not necessarily required to do so. Under program access, alternative routes to buildings that make use of existing curb ramps may be acceptable where people with disabilities must only travel a marginally longer route.

One way to ensure the proper integration of curb ramps throughout a city is to set a series of milestones for curb ramp compliance in the city’s transition plan. Milestones are progress dates for meeting curb ramp compliance throughout the municipality. Milestones should occur on a regular basis throughout the course of the transition plan and must reflect a priority to walkways serving government buildings and facilities, bus stops and other transportation services, places of public accommodation, and business districts, followed by walkways serving residential areas. It also may be appropriate for a city government to establish an ongoing procedure for installing curb ramps upon request in both residential and nonresidential areas frequented by individuals with disabilities. 28 C.F.R. §§ 35.150(d)(2); 35.151(e). In setting milestones and in implementing a curb cut transition plan for existing sidewalks, the actual number of curb cuts installed in any given year may be limited by the fundamental alteration and undue burden limitations.
Issue: Effective Communication

Common Problem:
City governments often fail to provide qualified interpreters or assistive listening devices for individuals who are deaf or hard of hearing at public events or meetings. In addition, city governments often fail to provide materials in alternate formats (Braille, large print, or audio cassettes) to individuals who are blind or have low vision.

Result:
Individuals who are deaf or hard of hearing are unable to participate in government-sponsored events or public meetings and unable to benefit from city programs and services when they are not provided with appropriate auxiliary aids and services. Likewise, people who are blind or have low vision are unable to benefit from city government services when printed materials are the only means of communication available.

Requirement:
Title II requires that city governments ensure that communications with individuals with disabilities are as effective as communications with others. Thus, city governments must provide appropriate auxiliary aids and services for people with disabilities (e.g., qualified interpreters, notetakers, computer-aided transcription services, assistive listening systems, written materials, audio recordings, computer disks, large print, and Braille materials) to ensure that individuals with disabilities will be able to participate in the range of city services and programs. City governments must give primary consideration to the type of auxiliary aid or service that an individual with a disability requests. The final decision is the government’s.

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved and the needs of the individual. For example, sign language interpreters are not required for all interactions with people who are deaf or hard of hearing. Employees can often communicate effectively with individuals who are deaf or hard of hearing through standard written materials and exchange of written notes. For simple transactions like paying bills or filing applications, these methods may be sufficient. For more complex or extensive communications, however, such as court hearings, public meetings, and interrogation by police officers, interpreters or assistive listening systems are likely to be necessary.

City governments should ensure that auxiliary aids and services are also provided for individuals who are blind or have low vision. Alternate formats, such as Braille or large print materials, qualified readers, computer disks, or audio recordings are examples of appropriate auxiliary aids.

City governments are not required to take any actions that will result in a fundamental alteration or in undue financial and administrative burdens. 28 C.F.R. §§ 35.160-35.164.
Issue: Local Laws, Ordinances, and Regulations

Common Problem:
City governments may fail to consider reasonable modifications in local laws, ordinances, and regulations that would avoid discrimination against individuals with disabilities.

Result:
Laws, ordinances, and regulations that appear to be neutral often adversely impact individuals with disabilities. For example, where a municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district, installing a ramp to ensure access for people who use wheelchairs may be impermissible without a variance from the city. People with disabilities are therefore unable to gain access to businesses in the city.

Requirement:
City governments are required to make reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of disability. Reasonable modifications can include modifications to local laws, ordinances, and regulations that adversely impact people with disabilities. For example, it may be a reasonable modification to grant a variance for zoning requirements and setbacks. In addition, city governments may consider granting exceptions to the enforcement of certain laws as a form of reasonable modification. For example, a municipal ordinance banning animals from city health clinics may need to be modified to allow a blind individual who uses a service animal to bring the animal to a mental health counseling session. 28 C.F.R. § 35.130(b)(7).

Issue: 9-1-1 Systems

Common Problem:
City governments do not provide direct and equal access to 9-1-1 systems, or similar emergency response systems, for individuals who are deaf or hard of hearing and use TTY’s (TDD’s or text telephones) or computer modems.

Result:
People who are deaf or hard of hearing, or those who have speech impairments, and use TTY’s or computer modems for telephone communication are unable to access emergency services (police, fire and ambulance) that are necessary for health and safety. When direct emergency services are not available, emergency calls for individuals with disabilities are not responded to appropriately, or in a timely manner, and in some instances, not at all.
9-1-1 Systems (continued)

Requirement:
City governments that provide emergency telephone services must provide direct access to TTY calls. This means that emergency telephone services can directly receive calls from TTY’s and computer modem users without relying on state relay services or third parties. A TTY must be located at each individual operator station. City governments must ensure that emergency operators are trained to use the TTY not only when they recognize the tones of a TTY at the other end of the line, but also when they receive a “silent call.” 28 C.F.R. §§ 35.161, 35.162. (See Access for 9-1-1 and Telephone Emergency Services).

Issue: Law Enforcement Policies, Practices, and Procedures

Common Problem:
When dealing with persons with disabilities, law enforcement agencies often fail to modify policies, practices, or procedures in a variety of law enforcement settings — including citizen interaction, detention, and arrest procedures.

Result:
When interacting with police and other law enforcement officers, people with disabilities are often placed in unsafe situations or are unable to communicate with officers because standard police practices and policies are not appropriately modified. For example, individuals who are deaf or have hearing impairments and use sign language may be unable to communicate with law enforcement officers if they are taken into custody and handcuffed behind their backs. Similarly, individuals with epilepsy or diabetes may be placed at great risk if they are not permitted access to their medications.

Requirement:
Title II of the ADA requires law enforcement agencies to make reasonable modifications in their policies, practices, or procedures that are necessary to ensure accessibility for individuals with disabilities, unless making such modifications would fundamentally alter the program or service involved. Law enforcement officers should be prepared to make reasonable modifications, for example, by allowing, in appropriate circumstances, arrestees who are deaf to be handcuffed in front of their bodies so that they can communicate with others and by allowing detainees access to their medication. 28 C.F.R. § 35.150(b)(7). (See Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement).
Issue: Self-Evaluation and Transition Plans

Common Problem:
City governments often have not conducted thorough self-evaluations of their current facilities, programs, policies, and practices to determine what changes are necessary to meet the ADA’s requirements, and have not developed transition plans to implement these changes.

Result:
When self-evaluations are not conducted and transition plans not developed, city governments are ill-equipped to implement accessibility changes required by the ADA. Without a complete assessment of a city’s various facilities, services, and programs, it is difficult to plan or budget for necessary changes, and the city can only react to problems rather than anticipate and correct them in advance. As a result, people with disabilities cannot participate in or benefit from the city’s services, programs, and activities.

Requirement:
All city governments were required to complete a self-evaluation of their facilities, programs, policies, and practices by January 26, 1993. The self-evaluation identifies and corrects those policies and practices that are inconsistent with Title II’s requirements. Self-evaluations should consider all of a city’s programs, activities, and services, as well as the policies and practices that a city has put in place to implement its various programs and services. Remedial measures necessary to bring the programs, policies, and services into compliance with Title II should be specified — including, but not limited to: (1) relocation of programs to accessible facilities; (2) offering programs in an alternative accessible manner; (3) structural changes to provide program access; (4) policy modifications to ensure nondiscrimination; and (5) auxiliary aids needed to provide effective communication.

If a city that employs 50 or more persons decides to make structural changes to achieve program access, it must develop a transition plan that identifies those changes and sets a schedule for implementing them. Both the self-evaluation and transition plans must be available to the public. 28 C.F.R. §§ 35.105, 35.150(d).
The Americans with Disabilities Act authorizes the Department of Justice (the Department) to provide technical assistance to individuals and entities that have rights or responsibilities under the Act. This document provides informal guidance to assist you in understanding the ADA and the Department's regulations.

This guidance document is not intended to be a final agency action, has no legally binding effect, and may be rescinded or modified in the Department's complete discretion, in accordance with applicable laws. The Department's guidance documents, including this guidance, do not establish legally enforceable responsibilities beyond what is required by the terms of the applicable statutes, regulations, or binding judicial precedent.
Developing a Common Narrative on Urban Accessibility:
An Urban Planning Perspective

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Table of Contents

Executive summary .......................................................... 3

1. Introduction .................................................................... 5

2. Transportation and housing context ................................. 7

3. Setting the scene: urban development and urban travel .................. 9

3.1 A simple framework (or perhaps already not so simple) ................................................. 9

3.2 Firms also decide where to locate .................................. 10

3.3 Another complication: Urban resident and firms are different ........................................... 11

3.4 Adding realism: Travel is not only to work ....................... 12

3.5 Adding realism: the transportation system ....................... 12

3.6 Adding realism: land use is heavily regulated ................. 14

3.7 Urban structures last forever ......................................... 15

3.8 Thinking about developing cities requires adding even more moving parts .......................... 15

4. Defining and measuring accessibility in an urban setting ............................................... 18

4.1 Defining accessibility ..................................................... 18

4.2 Measuring accessibility .................................................. 19

4.3 Accessibility, travel behavior, and urban form ................. 21

4.4 Transportation supply and accessibility .......................... 22

5. Some policy challenges and implications .......................... 23

5.1 Challenges to adopting accessibility ............................... 23

5.2 Providing appropriate space for transportation .................. 24

5.3 Investing in transit ..................................................... 25

5.4 Measuring the transportation impacts of new development ................................................. 26

5.5 Spatial mismatch / jobs-housing imbalance ....................... 26

5.6 Dealing with congestion: the ideal and feasible .................. 28

6. Conclusion .................................................................... 29

References ........................................................................ 31

Endnotes ........................................................................... 36
Executive summary

Drawing on examples from poor, rich, and middle-income cities, this paper examines the importance, theoretical understanding, and empirical measurement of urban accessibility. We argue that accessibility is the main quantity to consider from an urban resource allocation standpoint, since it links land use and transportation, the two primary urban consumption goods. But despite the importance of accessibility, a sparsity of empirical knowledge and a disconnect between policymaking and accessibility outcomes have led many researchers to retreat into narrow areas of expertise—such as land use, housing, or transportation treated in isolation—and many urban policymakers to ignore accessibility altogether. Even when data are good, the politics of land use and transportation decisions rarely favor accessibility as an important policy outcome. As a result, urban policies often fail to allocate land use or transportation either efficiently or equitably.

Throughout this paper we make two basic recommendations. The first is to put accessibility more squarely at the center of the study of urban development. The second is to focus urban policymaking more directly on specific problems, such as congestion, pollution, and traffic fatalities. Though there is certainly a need for better knowledge and practice, we argue for a modest change of course, rather than a radical shift in how cities are studied and managed. The externalities associated with transportation and urban development are subtle and interact with each other through many feedback mechanisms. Doing nothing to improve urban accessibility is not a desirable option, but doing something is hard. Nevertheless, we are hopeful that a better balance for research and a better balance for policy practice will bring urban research and practice closer together.

Our examination of the importance of accessibility, and understanding of it, and the measurement challenges proceeds as follows.

The time, cost, and effort of urban transportation and housing

Urban accessibility matters. In the United States, Latin America, and Europe, urban residents dedicate nearly half of their spending to housing and transportation. They also dedicate a substantial proportion of their waking hours to travel, particularly in large cities like New York and Mexico City. But while the general finding that households spend a large portion of their income on housing and transportation holds in most places, including many poor parts of the world, aggregate figures hide considerable heterogeneity and systematic differences by age, gender, and city size in time spent traveling. In poorer cities, for example, the poorest households sometimes spend substantially less on housing and transportation, but they often do so by consuming extremely little housing and living on lands with uncertain legal title that are also vulnerable to natural disasters like flooding or mudslides. These poor residents are willing to pay an extremely high non-monetary price for accessibility.

Urban development and urban travel: the models meet the real world

The trade-off between housing and transportation costs is central to the earliest models of urban form in idealized cities and to the most recent integrated transportation and land use models of actual cities. Although both types of models provide useful frameworks for understanding development patterns and the potential effects of land use and transportation policies, there are numerous challenges to incorporating real-world complexities into these modeling frameworks. In particular, it is difficult to model accurately the simultaneous location of firms and households, the relative importance of different types of land uses in firm and household decisions,
the variety of transportation options, the heterogeneity in firm and household preferences, the role of land use regulation, the effect of new infrastructure, or the legacy of older infrastructure and building forms. There may also be differences between developed and developing cities that vary in nature and not only in degree. Each additional element of real-world complexity adds more nuance to the models but obscures the nature of the trade-offs between transportation costs, housing, and other land uses.

Efforts to measure accessibility
Using this framework, measuring accessibility—which we define simply as the ease of reaching destinations—becomes conceptually as well as empirically challenging. At its simplest, a labor market measure of accessibility might count the total number of jobs accessible to a place or person within a fixed time and by a fixed mode under typical travel conditions. More complicated measures weigh accessibility indices by job type, time of day, and distance. However, at its heart, accessibility is an individual concept. To take an extreme example, proximity to a butcher shop does not factor into accessibility for vegetarian households. It is also a relative concept. People rarely go to the closest restaurant, attend the closest religious institution, or work at the closest job. While ad hoc measures of accessibility such as walk scores are fast becoming more available and may be informative, they still constitute deeply unsatisfactory measures. Yet more theoretically and empirically robust measures that incorporate multiple trip purposes, travel modes, and user preferences are still out of reach and unlikely to be commonly used anytime soon. Because accessibility is a hard concept that is often poorly understood and always poorly measured, it is an obvious obstacle to sound urban development policies. As a result, different people mean different things when they talk about accessibility and end up talking past each other.

Policy challenges and implications
Partially as a result of the challenges with the concept, accessibility plays little role in day-to-day investment or policy decisions. The complexity of defining and measuring accessibility makes it a difficult metric for assessing policy and makes it somewhat abstract and hardly pressing. Voters and policymakers have a much more personal connection to whether they have an easy time finding parking, whether housing is too expensive, and whether the trains come on time. Furthermore, different pieces of the accessibility puzzle resonate differently with different groups of people and individuals. While it is tempting to suggest that planning for accessibility requires a holistic approach that can accommodate this conceptual and empirical complexity, a holistic approach would likely backfire since it is difficult, perhaps impossible, to decide on an optimal accessibility level, let alone measure it. Instead, by looking at the examples of providing appropriate space for transportation, investing in transit, evaluating the transportation impacts of new land uses, providing affordable housing, and dealing with congestion, we argue that policymakers should consider whether policies, plans, investments, and regulations will tend to increase or decrease accessibility at the margin.
1. Introduction

From a resource allocation standpoint, the main urban quantity to consider is accessibility, since it links the two primary urban consumption goods: land use and transportation. As we document below, households in many countries devote about half of their spending to housing and transportation. Unfortunately, conceptualizing and measuring urban accessibility is difficult and depends on limited data. Even when data are good, the politics of land use and transportation decisions rarely favor accessibility as an important policy outcome. In particular, a limited understanding of the accessibility impacts of land use or transportation policy and a failure to acknowledge the importance of these impacts lead to poor urban policies that fail to allocate the two primary urban consumption goods either efficiently or equitably.

Urban transportation infrastructure is a congestible public good, and commercial development, firm location, and household location decisions are subject to externalities. A household's decision to move to a neighborhood directly affects the well-being of neighbors through social interactions, peer effects, or investments that the household may or may not make in its house. Household location decisions have equally real but less direct implications on the household's neighbors through the schooling system or because of the influence of these decisions on public services. The fiscal impacts of new construction depend on the cost of providing new services offset by new revenues. Whether the net fiscal impact is positive depends almost entirely on the presence of school-age children, the assessed property value, and any fees that may be charged upfront for new developments.

While the fiscal impacts of new residents often lead to heated debates, they are only a part of the net economic impact. New residents also influence the character of a place. Households often select neighborhoods to be closer to like-minded people and may resent changes in the ethnic, racial, or political composition of where they live. At its worst, this desire leads to explicit, but more commonly implicit, regulations to keep out other types of people. Finally, location decisions also affect road congestion and, in some instances, the quality and quantity of public transport provision. These political forces and economic externalities lead to suboptimal and often inequitable outcomes, which in turn call for corrective policies that we refer to broadly as urban planning. As the situation of some developing cities shows, the absence of urban planning can lead to disastrous outcomes.

While doing nothing is not a desirable option, doing something that is worthwhile is hard. The externalities associated with transportation and urban development are subtle and interact with each other through many feedback mechanisms. A new road will influence household and firm location decisions that may in turn affect the demand for travel and further road investment decisions. Each urban policy will have multiple direct and indirect effects on accessibility. For instance, we expect that an increase in fuel taxes will decrease property values in the periphery, increase central density, decrease driving rates, and increase transit use. How much and precisely where these changes will happen and what secondary effects they will have—like pushing poorer and more transit-reliant households out of the center—are uncertain and difficult to quantify.

The sparsity of our empirical knowledge on many of these interactions has led many researchers, not to mention practitioners, to retreat into narrow areas of expertise. To caricature only slightly, land use specialists deal exclusively with land use, transportation planners focus only on transportation, and housing specialists think only about shelter. Without much integrated understanding and knowledge to rely on, urban planners also often make far-reaching decisions based on esthetic and ideological grounds rather than evidence.
based rules of thumb, where they exist, may give an air of credibility but often lack a serious empirical foundation or a clear understanding of the likely effects of the policy. For example, minimum parking requirements and front-yard setbacks have far-reaching impacts on transportation and land use, but are neither empirically justified nor well understood. The effects of esthetically based rules, such as all houses should have front porches or back-entrance parking, are equally poorly understood. Knowledge about urban development is piecemeal and disjointed, whereas the practice of urban planning is either overly precise—as with number of required parking spaces per chair in a barbershop vs. a beauty salon—or holistic and all-encompassing—as with movements like new urbanism, or, before that, modernism.²

We would like to change this balance. In what follows, we make two recommendations. The first is to put accessibility at the center of our thinking about urban development. Because it links land use, housing, and transportation, a greater focus in urban research on accessibility will help avoid the balkanization of urban knowledge. Quite obviously, we do not negate the importance of specialist knowledge, but researchers often take the path of least resistance, which has led connected subfields of investigation to become disconnected. We do not propose that research on urban development should always consider land use, housing, and transportation together. Instead, we would like the cursor to shift back toward a better middle, where integrated and specialist knowledge would interact more fruitfully.³

Our second recommendation is a more direct approach to urban policymaking that focuses on specific problems. For instance, we fully accept that transportation by private motorized vehicles generates large social costs in cities through congestion, pollution, and traffic fatalities. To curb these costs, the best solution is not to affect mobility indirectly through land use policies—whether minimum lot sizes or density bonuses—or transportation investments—whether in roads, transit, or bike lanes—but directly by focusing more specifically on the harm caused. If the problem is congestion, congestion should be addressed directly, as we discuss below.

Of course, it must be acknowledged that improvements along one dimension or geographic scale may cause harm along another. For example, traffic-calming will tend to improve traffic safety, but will likely increase congestion and probably also pollution if slower speeds are not offset by shifts from cars to walking or biking. Minimum lot sizes and neighborhood cul-de-sacs may improve local congestion, air quality, neighborhood safety, and property values, but almost certainly increase total driving and worsen metropolitan congestion, air quality, safety, and housing affordability. We also recognize that the support and opposition for specific policies often come from a wide array of different types of people with a wide variety of interests and motivations. It is unrealistic to assume that metropolitan accessibility is ever going to matter more to local voters than local school quality.

Nevertheless, moves to focus planning solutions more directly on planning problems will tend to improve planning quality at the margin. Hence, we advocate an approach where urban planning should use direct instruments to focus on the main distortions in transportation and land use markets. We do not, however, defend or advocate a complete reversal of current, somewhat holistic, policy practices. Not only is this politically unrealistic, but the blind application of one instrument (like a tax for vehicle-kilometers traveled or land use deregulation) to solve one problem (like congestion or housing affordability) may worsen other problems. Again, we want to shift the cursor, not swing the pendulum to another undesirable extreme. A better balance for research and a better balance for policy practice will also bring the research and practice closer together and enable them to inform each other.
This paper proceeds as follows. We first provide some facts about housing, transportation, and accessibility to highlight that accessibility is an issue of first-order importance. We then highlight the basic urban trade-off between proximity and housing prices and show how adding further realism to our theoretical framework generates a lot of complexity. In section 4, we present the difficulties of making the notion of accessibility operational and the complications associated with empirically defining and measuring accessibility. In section 5, we show how policymakers often ignore, misuse, and misunderstand accessibility. The result is the inequitable and inefficient misallocation of the two most important urban consumption goods, housing and transportation.

2. Transportation and housing context

Although complicated to measure, accessibility matters. Urban households devote considerable time, money, and effort to housing and transportation. According to the U.S. Bureau of Transportation Statistics, American households devote 32.8 percent of their expenditure to housing and 17.5 percent to transportation. American households are not unique in this regard. Combes et al. report that French homeowners and renters devote 33.4 percent of their expenditure to housing and 13.5 percent to transportation. Similar magnitudes can be found for both housing and transportation in Colombian cities and in Mexico City. Many countries also appear to devote between a quarter and a third of household expenditure to housing. Dasgupta et al. show that it is only in countries with gross domestic product (GDP) per capita below $3,000 that housing investment represents a significantly lower fraction of expenditure.

Besides devoting a considerable share of their earnings to transportation, households also spend a lot of time traveling. The average American spends about 80 minutes traveling per day, and again the United States is not unique. The 2011 Bogota transportation survey indicates that Bogotans spend about 100 minutes traveling every day. In Mexico’s largest cities, roughly two-thirds of workers reported on the 2015 Intercensus one-way commutes that were 30 minutes or more—a figure that is not very far from what we observe in the United States. In Mexico City, where commutes are most onerous, nearly a quarter of workers have one-way commutes that exceed an hour, not very different from New York City. More generally, people tend to travel on average above an hour per day in the more developed and developing cities alike.

While the general finding is that households spend a large portion of income on housing and transportation in most places, including many poor parts of the world, these aggregate figures for housing and travel hide considerable heterogeneity and interesting though systematic differences in the amount of time spent traveling by age, gender, and city size. There is first some evidence that richer households travel more. For instance, Duranton and Turner estimate that the elasticity of distance traveled by private vehicles with respect to household income is about 0.25. At the same time poor households appear to devote greater financial and time resources to transportation and housing than do richer households. Data from Mexico’s national statistical agency (INEGI) suggest that the poorest fifth of households spend almost a quarter of their income on transit in Mexico City. These figures are consistent with comparable calculations performed for Bogota by Gallego and Ramírez. Poor commuters in developing cities, however, often travel less by choosing informal jobs that are closer to their homes than do wealthier households. At the lowest income levels, households rely more on walking and biking to reduce expenditures further.

Similar results appear to hold for housing. For French urban areas, Combes et al. estimate an income elasticity of the demand for housing slightly below 0.80, suggesting that a 10 percent increase in income is associated with a 2 to 3 percentage point lower
share for housing in household expenditure. Housing and transportation are thus essentially normal goods, except perhaps at very low levels of development. Looking across cities, we also find that the cost of both transportation and housing increase with city population, as do expenditure shares. For housing in France, Combes et al. estimate that the share of housing in expenditure is about 22 percent for a city with 100,000 inhabitants and about 37 percent in a city with 12 million inhabitants, like Paris. There are fewer available figures for transportation, but they appear to point in the same direction.

There is also substantial variation within cities. Unsurprisingly and consistent with the theoretical framework we highlight below, housing costs are lower in suburbs, but households travel more. There are crucial differences across countries in how much housing households consume in the center of cities relative to suburbs. Glaeser and Kahn report that housing units are about 25 percent larger in the suburbs of large American cities than at their center. This pattern is far from universal. Rather than moving to suburban locations to consume more housing, suburban households in Mexico generally live in dense informal or publicly subsidized suburban settlements of small houses, packed densely together on small lots. This arrangement allows access to homeownership, but neither reduces travel expenses nor likely increases land consumption. A similarly dense suburban fringe is the norm in cities as diverse as Dakar, Senegal; Lima, Peru; Surakarta, Indonesia; Chennai, India; and Yerevan, Armenia.

There are also large differences within and across countries in how people travel. In the United States, most travel is by car, and it represents nearly 90 percent of commutes, compared to about 6 percent for public transit and 4 percent for walking. Transit is used disproportionately by poorer households and in the largest cities. Results from the 2009 National Household Travel Survey indicate that the share of public transit in all trips in New York City is slightly below 50 percent. It then hovers around 20 percent for a number of large metropolitan areas, and is essentially less than 5 percent (and sometimes much less) nearly everywhere else. In large European cities, the car is far less dominant while transit, walking, and, in some countries like the Netherlands or Denmark, cycling are much more important. In Mexico, using data from the 2015 Intercensus, we find that cars are used for between 20 and 30 percent of commutes in urban areas in central Mexico, including Mexico City, and the poorer southern regions, but between 40 and 50 percent in northern cities. In Bogota, the share of car trips is less than 20 percent, including taxi rides for all types of journeys. The share of transit (formal and informal) is about 30 percent. Walking represents 46 percent of all trips, including nearly 30 percent of trips longer than 15 minutes. Overall, the finding is that poor households economize on transportation costs by relying on transit and non-motorized modes. This substitution is perhaps less easy in the United States, where trip distances are often long, transit service is sparse, and wide roadways with long signal times often discourage walking.

While lack of easy comparisons preclude us from dwelling on this closely, we note that there are sizeable differences in housing consumption. With an elasticity of housing prices with respect to city population of about 0.20 estimated by Combes et al. and a price elasticity of demand of about -0.75 implicitly estimated by the same authors, the elasticity of housing consumption with respect to city population in France is about -0.10. An income elasticity of demand of about 0.80 will also imply large differences in housing consumption between rich and poor households. Differences across countries are perhaps even larger. With a median occupied housing size of 150 square meters and an average household size of 2.5, American households appear to consume much larger housing quantities than does the rest of world.
Developing a Common Narrative on Urban Accessibility:
An Urban Planning Perspective

There are also large variations in the speed of travel. First, the rich appear to travel faster than the poor nearly everywhere. Even for car travel, Couture et al. find that U.S. households with above median income travel by car about 10 percent faster than the poorest households. In the most recent National Household Travel Survey, the average transit commute lasted 59.0 minutes, compared to 22.9 minutes for the average car commute. Given that in the United States transit is disproportionately used by the poor, that will make their travel all the slower. Further, given higher incomes in the suburbs, the wealthy are more likely to use freeways when they do drive. The Bogota Department of Transportation reports that average trip duration for motorized trips is nearly 80 minutes for the poorest households and only about 40 minutes for the richest households. As we will argue below, these differences are caused by the use of different modes of transportation but also accessibility, in particular accessibility to jobs.

There are also differences across cities. Correcting for a number of measurement issues, Couture et al. find sizeable differences in travel speed across different U.S. metropolitan areas. The slowest U.S. metropolitan area is Miami-Fort Lauderdale (followed by Portland, Ore.; Seattle; Los Angeles; and New York), which is about 30 percent slower than the fastest Southern and Midwestern metropolitan areas of Kansas City, Mo.; Greensboro, N.C.; Louisville, Ky.; and Grand Rapids, Mich. There are also differences within cities. Duranton and Turner estimate an elasticity of travel speed with respect to the density of residents and jobs of about -0.10. Put differently, a 10 percent higher density is associated with a 1 percent lower speed of travel. Obviously, these differences measure only differences in mobility, not what residents can access. A 10 percent higher population density in a U.S. metropolitan area is also associated with 1.5 percent shorter trips (and an increase of 0.15 percent in the number of trips).

The cross-country differences are also striking. On average, residents of large American metropolitan areas travel at about 40 kilometers per hour. Again, this is not true everywhere, as travel is slower in the more central parts. Even in the largest U.S. metropolitan areas, however, travel speeds are well above 30 kilometers per hour. Akbar and Duranton estimate travel speeds by car at about 20 kilometers per hour in Bogota. Guerra estimates an average door-to-door travel time of 11.4 kilometers per hour in Mexico City by all motorized modes and 10.8 kilometers per hour by transit. Obviously, some caution is needed here when performing such a comparison. Even though households in Bogota, Mexico City, and the United States appear to devote the same share of resources to transportation, they travel substantially different amounts. Relative to Bogotan households, residents of large American metropolitan areas take about 50 percent more trips that are about twice as long. Most of these trips are by car, whereas a plurality of trips in Bogota involve walking (ahead of informal transit). Even car trips are much faster in the United States. Understanding the welfare implications of these figures is not easy, as the rest of this paper will show.

Now that we have demonstrated the quantitative importance of housing and transportation, our next step is to provide a conceptualization of these issues and show that accessibility is the central concept that links them.

3. Setting the scene: urban development and urban travel

3.1 A simple framework (or perhaps already not so simple)

Thinking about urban travel and accessibility presents considerable conceptual challenges. To appreciate the difficulty of these issues, let us start with the simple model of urban structure that is taught in introductory
classes and has been used by economists for many years. Despite its extreme stylization, this model is fairly subtle, as this subsection will show. The following subsections will show that adding greater realism and relaxing some of its most extreme assumptions generates further complexity.

Let us assume that jobs are all located in the same place, the central business district, and residents need to commute to work daily, say at a constant cost per unit of distance. Residents choose where to live, how much land to consume, and how intensively to develop it for residential housing. Land is sold to the highest bidder, and housing is competitively provided.

To minimize commuting costs, residents would ideally live as close as possible to the jobs, but not everyone can be accommodated. As a result, residential areas will develop around the job locations. Land closer to the center will fetch a higher price, and so it will be advantageous to develop it more intensively. As we move away from the center, we thus expect land prices, house prices, and the intensity of housing development to decline. Because of cheaper prices, the consumption of housing will increase with distance to the center and population density will thus decline.

This simple model is highly stylized, but it provides a reasonable description of many cities throughout the world with a concentration of jobs in the center and gradients of declining land and housing price, declining intensity of development, and increasing parcel size as one moves away from the center.

While this framework is the simplest we can think of to link land use, housing, and transportation, it is already fairly involved and difficult. To appreciate this point, think about two households with identical preferences but different incomes. Which one will live closer to the center? As it turns out, the answer will depend on how strongly rising income affects the demand for land versus how strongly it relates to the cost of commuting (i.e., the magnitude of the income elasticity of the demand for land relative to the income elasticity of the cost of commuting). The intuition behind this result is that richer households will live further away from the center where land and housing are cheaper, provided their desire to consume more land and housing is high enough relative to the higher commuting costs that they face to reach more remote locations.

It is also important to note that in this simple model, we have assumed that the process of bidding for land and developing it is efficient. More precisely, the socially efficient amount of land is used, and each parcel is developed at its optimal intensity. Furthermore, transportation costs per distance of travel are uniform, and the infrastructure is not explicitly modeled. In other words, there is no need for urban planning at this point. Order will emerge for the uncoordinated decisions of residents, and no centralized intervention can improve upon the outcome.

Although we will soon show that introducing important features of cities, like congestion and firms, will change this conclusion, the basic framework is often unpopular with the planners and policymakers who deal daily with urban complexity. There is also something of a debate within the planning academy about how much current urban form is the result of market forces and how much the result of land use regulation and investment decisions.

Nevertheless, the monocentric model provides a useful framework for considering the implications of urban planning decisions in a systematic and rigorous way. It also remains the foundational basis of the most popular land use and integrated land use and transportation models.

### 3.2 Firms also decide where to locate

The next step to improving the monocentric model is to introduce a more realistic theory of firm location. The monocentric model—and similar models that introduce different job distributions, transportation costs, and geographic features—essentially presents
Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective

a theory of residential location, given the location of employment. A better model would incorporate a theory of both residential and employment location. Such a theory would be immensely more complicated, since it would have residents competing for the best locations in terms of access to jobs and firms competing for the best locations in terms of access to employment and arguably access to each other. The best locations are no longer given, since where firms choose to locate determines what the best locations are for residents and vice-versa. There is a broader lesson here. In the simplest theory with fixed job locations, accessibility is essentially given. With endogenously determined locations for jobs, accessibility emerges instead as an outcome of the choices made by everyone (firms and residents at this point of the argument). Unfortunately, after 40 years of research by economists and geographers, a workable theory of urban locations where both residents and firms would choose their locations remains elusive.

There is a fundamental point here. We often consider extremely stylized models, and these models often yield stark results. While useful to develop our understanding of the situation at hand, these models are often too far from reality for many policy issues. To make the representation of the simplest models more realistic, researchers often relax the more extreme assumptions of these models and add important frictions that we observe in reality. These changes in many cases make the initial model more complicated and its results less stark but without altering the fundamental nature of the mechanisms at play. To go back to the analogy proposed by Sutton, some economic problems are akin to Newton's apple falling on the ground. We can model the fall of objects to the ground using the gravity formula. In the real world, this formula will not be exact and, for a light ball, it will work even less well. Considering the frictions from the air will complicate the calculation but yield more realistic predictions and allow an understanding of why a lighter ball does not fall like an apple of the same size. At the same time, considering the frictions from the atmosphere do not alter the core of the gravity model.

When we model cities, things are different. There is a basic trade-off, but adding greater realism does not only make the basic model more complicated and its results less stark. The additions we consider here, like the ones that follow, often alter the nature of the model. While some economic problems are like Newton's apple, others are more like the complicated and messy prediction of tides, for which the movement of the planets will interact in subtle ways with the local geography and weather conditions to determine the movements of the sea. Predicting tides using only the positions of the sun and the moon is not enough, as tides can be profoundly altered by a variety of other forces. Unfortunately, dealing with urban accessibility is more like the prediction of tides rather than the modeling of the fall of an apple.

3.3 Another complication: Urban resident and firms are different

We can further appreciate the conceptual difficulties of accessibility by exploring further limitations of our baseline framework. First, the model so far assumes that residents are interested only in jobs and firms are interested only in workers. While the location of jobs clearly plays an important role in residential location choices, many other factors also matter, including the quality of local schools, noise, crime, pollution, the type of neighbors, and the ease of conducting other daily errands. In short, a myriad of accessibility-related factors drive households’ location decisions.

An appropriate model also needs to acknowledge the great variety of residents in cities and differences in their preferences. To understand where different socioeconomic groups locate in the city, the simple framework outlined above highlights that—under
certain conditions—richer households want to consume more housing and thus are willing to live further away from the center where land is less expensive but commuting costs are higher. Empirically, for richer people, their higher commuting costs, which pull them to the center, nearly offset their greater demand for land, which pushes them to the suburbs.39 As a result, other forces may come to dominate this weak trade-off and explain observed patterns of residential location by income. Brueckner, Thisse, and Zenou argue that the location, distribution, and value of urban amenities and dis-amenities vary across cities, regions, and countries. European cities have arguably strong amenities at their center, which is not the case of many American cities. In turn, richer households may seek to live close to amenities. This may be, as the authors’ title asks, why central Paris is rich and downtown Detroit poor.40 Obviously, income is not the only heterogeneous factor that matters; so do ethnicity, household size, preferences, and so on. The extremely high costs of travel in many developing cities may also explain why richer households are more centrally located in these cities.41

We also need to acknowledge the prominence of firm heterogeneity. Some firms may be mostly interested in locating close to their workforce, but others, like retailers, will want to locate close to their customers. Some firms, like large trucking companies, will need to be close to highways and distribution facilities. Others, like advertising agencies in Manhattan, will want to locate close to other firms in the same activity. This is a fundamental point. Accessibility is never absolute but always relative and conditional on one’s needs and preferences. Consequently, any change in land use patterns or in the transportation infrastructure will be positive for some and negative for others. Accessibility is inherently a source of conflict.42

3.4 Adding realism: Travel is not only to work

Another limitation of our model of residential location choice is the assumption that every resident travels to work every morning and comes back every evening. There is some justification for this assumption (albeit not absolute), since it is true that many of us are actually required to go to work every weekday, and we (mostly) do not get to choose where work is taking place. This assumption is nonetheless extremely limiting, since non-work trips account for three-quarters of all travel in the United States.43 The role of non-work accessibility in housing choice is thus almost certainly more than an academic curiosity.

More generally, the amount of travel is endogenous to accessibility, and there may not be an obvious relationship between how much a household’s members travel and how accessible their neighborhood is. Improving accessibility may reduce travel as each errand is now shorter.44 But with better accessibility, more trips may be undertaken. Overall, the total amount of travel may go up or down with accessibility.45 Adding a further complication, although most workers commute longer than they would like, few people want a commute shorter than 10 minutes.46

Hence, thinking meaningfully about accessibility for households requires knowing about their travel decisions, the choice sets they face in terms of destinations, the prices of both travel and housing, and the preferences, size, income, wealth, and composition of the households in question. Even when we know all this, accessibility is hard to measure, as households are expected to sort across locations depending on their travel preferences. We return to this point below.

3.5 Adding realism: the transportation system

There are two further important complications to consider about transportation. Travelers’ decisions to travel also affect the cost of mobility of other travelers, and governments provide two key inputs for transportation: the roadway and transit.

In our baseline model, we have considered that city
Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective

residents could travel at a constant cost per unit of distance. While this simplification was useful to avoid overwhelming complexity right from the start, it is unwarranted. Understanding how travel costs are determined is actually key to understanding issues of surrounding accessibility and urban travel. The first issue is that, for a given road capacity, an increase in the number of travelers slows down travel. Travelers pay only the average cost of travel, not the marginal social cost, which includes the congestion costs they impose on others. This congestion externality and failure to pay the full social cost of travel results in too much traveling relative to what would be efficient.

As we argue below in our discussion of road provision, integrating roads and congestion explicitly into the stylized framework we have considered so far is extremely challenging. Obviously, one can always resort to numerical methods, but they no longer allow for crisp and transparent results. One may also worry about the robustness of results obtained with numerical methods.

If we forego the analytical tractability of stylized models, an alternative is to model real cities instead of idealized cities. There is a long tradition of land use models for actual cities. When it comes to transportation, the delay functions on individual roadways and intersections can be incorporated into the urban modeling framework. At this point, however, the model needs to be integrated into a transportation model, and the complexity begins to increase exponentially. Even running on high-powered servers, integrated transportation and land use models based on individual and firm choices can take weeks to converge. Unlike stylized models, these more practical models rely on many shortcuts and ad hoc assumptions.

Adding to this complexity, road supply has substantial impacts on when and how people travel. The main issue is that an increase in roadway capacity will most certainly lower travel costs, all else equal. All else does not remain equal, however, and the lower travel costs of new road capacity elicit more travel. In the end, a roadway increase either through adding lanes or creating new roads appears to do very little to improve travel conditions.

People also travel by a variety of different modes like transit, walking, and biking. Not only does the cost of travel vary based on the supply of roadway and the aggregate volume of travel on roadway segments by time of day, it also varies substantially by mode. Transit costs, in particular, can be complicated to model given the complexity of transit travel and the importance of transfers, wait time, and certainty to the costs that travelers perceive; perceptions of these costs also vary by observable and unobservable heterogeneity in a given population. For example, it holds true on average that wealthier households prefer to drive, but there are plenty of wealthy individuals with a preference for transit.

The challenges run even deeper than this. Because the number of transit lines is limited, transit cities are expected to be more monocentric than car cities. Transit can reduce the cost of travel but it is inherently less flexible than the car. Transit technologies also change the balance of the inputs that enter into the production of travel. Because of economies of scale, transit can be cheaper in monetary terms but it is more intensive in time. Commuting by transit typically takes longer than commuting by car, and the time costs of transit greatly increase with each connection. A lower monetary cost and a higher time cost make transit more attractive to the poor. This may in turn explain why the poor disproportionately elect to live where transit is available, although it should be noted that most poor people in the United States still do not use
Transit. The dense cities where transit gets used most frequently are also the places where parking is most expensive and difficult to find—adding substantially to the time and monetary costs of driving.

Incorporating bicycling into the mix adds a further wrinkle, since perceptions of comfort and safety play a larger role in the costs of cycling than travel time or cost. Put simply, cycling is the fastest and least expensive (after walking) mode for door-to-door travel for many trips. Yet, without substantial traffic-separated cycling facilities, cycling mode share generally remains low.

We have so far described a setting in which households and firms make complex location decisions, which are interdependent and influenced by a range of factors. Beyond this, these location decisions and these interactions do not occur in a void. Land use in most places is, for better or worse, highly regulated. Within their urban fringe, cities are also mostly built up. Location choices are thus also constrained by structures that are extremely long-lived and were sometimes developed many years ago. Let us discuss these two issues next.

3.6 Adding realism: land use is heavily regulated

Land use in American cities is highly regulated and land use regulations are ubiquitous. Regulations like zoning designations, minimum and maximum floor-to-area ratios, required setbacks, minimum lot sizes, and other limitations on land use all affect accessibility. Sometimes the explicit purpose of a regulation is to improve accessibility. The claim is often made regarding regulations that promote mixed land use, for instance. For other regulations, this outcome is often more of a side effect. Although unintentionally in most cases, strict “Euclidian” zoning arguably increases travel needs for shopping purposes by restricting commercial activity in residential areas. Minimum lot sizes also increase travel by making development less dense than it would otherwise be. Minimum parking requirements constrain density and encourage firms and households to rely more on cars than they might otherwise.

One can think of at least five reasons why land use is regulated. First, land development is rife with market failures. A manufacturer may find it advantageous to open a polluting facility in the middle of a residential area, but the cost for local residents would be high. Preventing non-conforming uses of that type has a strong rationale. Second, land use regulations might seek to address market failures elsewhere. For instance, California’s Senate Bill 375 from 2006 asserts, “it will be necessary to achieve significant additional greenhouse gas reductions from changed land use patterns and improved transportation.” Third, local residents may also restrict land use because they stand to profit from increased scarcity if their neighborhood is in high demand. They may also want to prevent the arrival of undesired or fiscally costly neighbors through exclusionary zoning. One of the first instances of zoning was specifically designed to remove Chinese laundries in Modesto, Calif., in the 1880s. Fourth, local residents may simply dislike change and prefer to keep their neighborhoods relatively static.

Finally, some zoning regulations may simply be misguided. As should be clear by now, land use planners are confronted with complicated decisions, and as a result they may not always fully understand the implications of individual land use decisions. In his book the High Cost of Free Parking, Donald Shoup makes a convincing argument that minimum parking requirements stem from a misguided pseudo-scientific approach to measuring parking needs. These regulations have in turn generated a host of environmental, economic, and social problems that he characterizes as a great American planning disaster.
3.7 Urban structures last forever

The last important modification to our initial framework regards the durability of housing, roadways, and other urban structures. The structure of current cities does not reflect current economic fundamentals—it reflects the economic fundamentals at the time they were developed and perhaps the expectations that people had then. While we expect developers of new buildings and urban planners of new infrastructure to be forward-looking, no one has perfect foresight. For instance, urban investments 50 years ago in the city of Philadelphia were based on a projected long-term population of about 3 million, about twice the current size. In 1970 the population of metropolitan Las Vegas was about 300,000; although some growth was expected, probably few thought it would be 2.1 million today.

When cities grow in population, we expect them to become denser and grow in height. In our baseline model, growth in population, height, and footprint are all concomitant and happen continuously. In reality, changes in buildings happen, but only slowly. The adjustment of the roadway and other infrastructure is slow as well. Many of the subway tunnels that benefit present day residents of a city like New York are a century-old legacy. The basic layout of streets in a historic center may be as old as a city itself.

More generally, there is a lot of permanence in cities. For instance, the two main commercial arteries in Cologne, Germany, Hohe Strasse and Schildergasse, can be traced back to the two main streets, the “cardo” and “decumanus,” traced by their Roman founders in 50 AD. To take another example, Brooks and Lutz show that in Los Angeles the influence of the streetcar on patterns of urban density within the city remains conspicuous to this day, even though the streetcar started its decline as the dominant mode of transport after 1920 and the last piece of streetcar track was dismantled in 1963. These two examples, while extreme, should not be dismissed as carefully chosen anecdotes. They are revealing of a broader trend. Examples of fast large-scale urban change are not that many. One can mention the great Boston fire of 1872 or the 1906 San Francisco earthquake, but it is often difficult to find much long-term implications of large shocks on the structure of cities. For instance, the 9/11 terrorist attack in New York did not appear to affect the city much beyond a slight acceleration of the decline of Lower Manhattan and the rise of Midtown.

The durability of urban structure and the persistence of patterns within cities have a number of important implications for our theory of accessibility. First and fairly obviously, urban policies do not take place in a void, and most of them will not have a major impact. We return to this issue below when we discuss transit policies. Slightly less obviously, the durability of urban structures implies that the decline of a city or neighborhood is very persistent. Consider for instance a new highway that cuts through a neighborhood and makes it less attractive. Residents will start leaving, but the exodus will be limited in the short run as property prices decrease. Low prices will then induce some residents to remain, in particular the poorest ones and those least likely to leave due to discriminatory housing practices or other restrictions. Low prices will also tend to reduce and even eliminate investment in new construction. In the end, the adjustment will essentially take place through the slow decline of properties. Hence, a shock like that of the highway considered here can take many decades to be fully absorbed by a neighborhood, and the decline in population will mirror that of residential structures.

3.8 Thinking about developing cities requires adding even more moving parts

In most of our exposition so far, we have implicitly (or explicitly with most of our examples) referred to cities in developed economies. We often think about developing cities like Ernest Hemingway’s apocryphal answer to Scott Fitzgerald’s assertion that the rich are
different from the rest of us: “yes, they have more money,” Hemingway quipped. Here, we actually side with Fitzgerald. Developing cities have some features that make them different in nature and not only in degree. Importantly, these features do not come in replacement to what we have mentioned so far. They come in addition.

In our initial framework, cities are essentially labor markets. Although we subsequently enriched this framework to account for urban consumption and amenities, access to jobs remains fundamental. It may be uniquely important in poorer cities. These poor cities are also characterized by their dual labor market with a formal and an informal sector. While defining labor market informality and measuring it is challenging, labor market informality is important everywhere in the developing world. It is useful to keep in mind that even in the cities of more advanced developing countries like Colombia, the rate of informality is roughly 50 percent. In the cities of less-advanced countries in Africa or in India, it is 80 percent or more.

Following Harris and Todaro, urbanization was long viewed as somewhat perverse. The prospects of a few formal public-sector jobs would attract rural dwellers to cities even though most of them would not succeed and end up worse off in the informal sector. More modern approaches to urbanization take a less dim view of the informal sector and view it as a potential stepping-stone. The duality of urban labor markets is also due to the outcome of the over-regulation of labor combined with weak enforcement. While we agree that dysfunctional labor market institutions play a large role in explaining informality, we also conjecture that formal-sector jobs require more travel on average than informal-sector jobs. Poor urban transportation conditions in developing cities as documented above might play an important role as well.

The second defining feature of developing cities is high rates of housing informality, often referred to as informal settlements or, more crudely, slums. If duality is hard to measure in the labor market, it is even harder in the housing sector. Using satellite imagery and detailed local records, Henderson et al. find that informal housing occupies about 20 percent of the built area of Nairobi, Kenya. This represents about 50 percent of the extant floor space and hosts a disproportionate share of the population. By some estimates, the residential density of Kibera, Nairobi’s largest slum, may reach 2,000 residents per hectare. This is in contrast with a population density of 150 across all residential areas of Nairobi (including Kagera and other slums).

Importantly, Henderson et al. document that about a third of buildings get redeveloped in the core of Nairobi over a 12-year period. There are also a lot of new in-fills in more central areas. At the same time, they observe only minimal slum redevelopment or conversions of slum areas into non-slums.

Just like labor market informality, housing informality is, to a large extent, the product of inappropriate land use regulations and weak enforcement. In Nairobi, for instance, minimum lot size in most residential areas is 500 square meters. Even if we generously assume that households have four members and that the share of land for residential purposes is 30 percent, this type of regulation would limit population density to less than 25 persons per hectare. This is less than half the density of Philadelphia and even less than the density of Los Angeles. Obviously, compliance is very low, and most new developments are informal.

How can we explain the presence of such regulation? Mistaken policy is arguably the first explanation here. Kenyan urban planning regulations are a legacy of Kenya’s former colonial power, the United Kingdom, where such regulations have been used for many years. Large minimum lot sizes are viewed as part of the development process. This is of course a case of mistakenly putting the carriage before the horse. In addition, inefficient regulations may occur by design.
as an exclusionary device, just like they occur in U.S. suburbs. After pushing people into housing informality, the cities and their taxpayers no longer need to provide them with costly local public goods like water, sewers, and electricity. This reduces current expenses on local public goods as well as future expenses, as low-quality informal housing will reduce incentives to move into the city.

While regulations, intentionally or not, push newcomers into informality, other forces keep them there. The persistence of informal housing occurs for two main interrelated reasons. Slums are often controlled by a small number of agents (often referred to as slumlords) who derive very large rents from their slums. Slumlords either make slum dwellers pay them directly through a rent or fee or indirectly through some public services like a water truck that they provide at a high price. In many developing cities, property rights are also poorly defined and weakly enforced. A functioning land registry is lacking in most places. Establishing one is a real challenge because each piece of land is typically claimed by several “owners.” Many countries, like India, also lack a clear-cut notion of ownership, as tenants and even subtenants have strong customary rights. Though necessary, a functioning land registry will not serve much of a purpose if courts are unable to uphold property rights and protect owners from being evicted by powerful parties. In many countries, the causes of housing informality will not be going away any time soon.

Housing informality has a number of negative implications. As already mentioned, slums dwellers are often denied basic public services. The implications are many and usually negative. Substitutes to water and police services are costly. The lack of sewers is unhealthy and has severe public health consequences. Informality may also weaken incentives to invest in housing and reduces access to the formal banking system. This results in construction that is substandard in quality and quantity (informal construction is rarely more than one to two stories). More generally with poorly defined property rights, land is inefficiently used and, as already argued, does not adjust to changing economic conditions as it does in the formal sector. Poor regulations also have direct detrimental effects. For instance, large minimum lot sizes like in Nairobi lead the city to sprawl and increase transportation requirements. For Bangalore in India, Bertaud and Brueckner estimate that the cost of suboptimal population density resulting from restrictions that are arguably much less extreme than in Nairobi (if they were enforced) represents about 3 percent of household income.

The last feature we want to mention here is the duality of the transportation sector. A lot of work has been devoted to dual labor markets in developing countries, much less to dual housing markets, and even less to dual transportation markets. This is not because informal travel modes are a small part of the transportation sector. In Bogota, the richest city of a middle-income country, informal buses still represent about 43 percent of all motorized trips. Formal transit and taxis account for only 14 and 7 percent of all motorized trips, respectively. Informal transit is most likely even more prevalent in poorer cities. Across a score of large African cities, 36 percent to 100 percent of public transit travel is on informal paratransit. In two-thirds of these cities, more than 80 percent of public transit is on informal paratransit.

Informal transportation has a number of virtues. It mainly provides transportation services and mobility to people who cannot afford a private vehicle and for whom formal transit may be inexistent or too expensive. But then, informal transit is far from an ideal solution to the urban transportation problems of poor cities. It plays a disproportionate role in terms of pollution and, most likely, traffic fatalities. Although it is sometimes more affordable than formal transit when it exists, its pricing is deeply inefficient.
Because informal transit is highly fragmented, each leg of a journey must be paid separately, and the cost increases linearly with the number of connections. A journey with two legs in Bogota, costs nearly an hour of work at the basic salary (which is above what many informal sector jobs will pay). Going back and forth from work may thus easily cost nearly a quarter of someone's wage. Not surprisingly, many slum dwellers will work within walking distance of where they live even though their jobs pay extremely little.

Finally, we want to highlight that there are also some important differences in urban spatial structure and the geography of wealth between developing cities and more mature cities of the developed world. Over the past half century, suburbanization, car ownership rates, and GDP per capita have increased rapidly in many developing cities. Given these trends and the early models of spatial structure presented above, it is easy to assume that the demand for suburban living is driving the developing world's rapid increase in car ownership rates. This is not always the case, and the average suburban expansion in a developing city bears little physical or socioeconomic resemblance to a typical U.S. suburb. In Mexico City—which is wealthier, more suburbanized, and more reliant on private cars than most developing-world cities—neither aggregate car ownership trends by geography nor a joint model of residential location and car ownership decisions suggest that car ownership and suburbanization are strongly related. A lack of accessibility is instead characterized by a paucity of destinations, long distances, and high transportation costs per unit of distance.

Three important comments about this definition are in order. First, although our definition of accessibility is extremely straightforward, it is not the only one. In many U.S. planning circles, accessibility has become shorthand for improvements to pedestrian, bicycle, and transit infrastructure. These two definitions are not consistent with each other. From a definitional standpoint, all things being equal, faster car speeds mean greater, not lesser, accessibility. A bike lane may be desirable for many reasons, but it does not change the destinations that are available (at least in the short run), does not make destinations closer, and, in many cases, does not make travel any faster.

Second, the notion of accessibility that we define is place-based; it applies to a household that resides at a given location. Accessibility is often understood as a measure of the ease of accessing other places from a given location. Because households differ in their

4. Defining and measuring accessibility in an urban setting

Now that the notion of accessibility has been discussed and many of the subtleties associated with it have been highlighted, we turn to the empirical measurement of urban accessibility.

4.1 Defining accessibility

Defining and measuring accessibility has empirical as well as conceptual challenges. In the spirit of the theoretical framework described above, we define accessibility as the ease of reaching destinations. This is a conventional definition. Accessibility is high where households can reach a wide variety of destinations, which are physically close and for which the cost of travel per unit of distance is low. A lack of accessibility is instead characterized by a paucity of destinations, long distances, and high transportation costs per unit of distance.
Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective

tastes and in their travel needs, however, accessibility is—to repeat—a relative concept, not an absolute one and, for the same location, will vary across households. To take an extreme example, proximity to a butcher shop does not factor into accessibility for vegetarian households. Easy access to many destinations means a lot to households with a high propensity to travel; it means far less to households with a low propensity to travel. Accessibility thus means different things to different people with respect to both the type and number of destinations that can be reached and the number of trips to be taken.

Pushing this argument further, we then expect households to choose their place of residence depending, at least in part, on their travel needs (as described above in our theoretical framework). We observe that households in denser residential areas take shorter trips. Is it because greater density increases accessibility and reduces the need for travel, or because household who dislike traveling long distances elect to live in denser neighborhoods where more destinations are available within a short distance? The answer is in principle ambiguous and much debated in the literature on self-selection.

Third, the definition given above for accessibility implies that maximum accessibility occurs when maximizing the number of destinations, minimizing the distance to these destinations, and maximizing the speed of travel. In practice, a larger number of destinations within a short distance is also associated with slower travel. More specifically, we expect urban density to increase the number of destinations, reduce their distances, and reduce travel speed. Whether greater residential density reduces or increases accessibility is theoretically unclear, but observation indicates density is positively correlated with accessibility. Couture shows that for restaurants in the United States maximum accessibility is in Manhattan, where travel is extremely slow.82

4.2 Measuring accessibility

There is a large literature that attempts to measure urban accessibility, and much of it focuses on job accessibility. Although there is something uniquely important about being able to access jobs and commute to work, recall that commutes represent less than a quarter of all trips in large U.S. metropolitan areas. The simplest labor market measures of accessibility count the total number of jobs accessible to a place or person within a fixed time and by a fixed mode under typical travel conditions. More complicated measures weigh accessibility indices by job type, time of day, and distance.

Alternative measures of accessibility consider a number of errands and estimate the travel time needed to run these errands from a given place of residence. More sophisticated measures provide weights for these trips and allow for imperfect substitutability between them.

While these measures are informative and can be readily computed with modern mapping technology, they remain unsatisfactory in light of how we defined accessibility above. To see why, consider an index that would measure travel time to a number of different locations from a given place of residence including, for instance, the nearest supermarket, doctor, school, and church. This index is essentially a price index: we consider the time cost of a bundle of trips rather than the monetary cost of a bundle of goods. Thinking of accessibility as a price index is consistent with our definition above, which relies on the ease of reaching destinations. However, summing across destinations like this does not make for a good price index, even if we allow for some substitutions across trips and weigh them. As argued below, different households value destinations differently. Hence, the accessibility price index should ideally be specific to each household. The second weakness of simple indices is that we often elect not to go to the closest possible destination. Churches differ, and worshipers will typically not go to...
Couture shows that restaurant-goers in the United States barely ever go to the restaurant closest to their house and typically pass many eating places before reaching their destination for a meal. Hence, a good measure of accessibility should not only measure the cost to reach broad categories of destinations but also consider the variety of possible destinations within each category.

In turn, to consider the variety of destinations and provide a valuation for them requires knowing about households’ travel patterns. These patterns can then reveal households’ travel preferences. Making some assumptions about traveler preferences, we can then recover a “true” measure of accessibility and provide an implicit valuation for it. As already stated, knowing only about possible destinations is not enough, but knowing only about travel behavior is not enough either. The amount of travel that a household undertakes tells us nothing about accessibility. From ad hoc measures of accessibility, it is tempting to conclude that greater accessibility should lead to less travel. This need not be so, as cheaper travel should lead to more travel, although higher expenditures on travel remain questionable. The quantity of travel will depend on both its price and its demand elasticity. Simply put, a household may choose to travel more when accessibility is high and less when accessibility is low.

Aside from the ad hoc accessibility indices just discussed, there is a more promising tradition that defines accessibility consistently in models of travel demand. As noted by Ben-Akiva and Lerman, we can measure the accessibility enjoyed by a resident by taking the estimated value of each destination obtained from estimation of travel demand, discounting by its distance to this resident, and summing across all destinations. This approach was first implemented by Niemeier in a model of mode choice and commutes to different types of jobs.

While this is theoretically and empirically robust, measuring accessibility along these dimensions is an extremely difficult endeavor since it requires information about all locations and the choices made by lots of travelers in an area. Couture develops this approach further by reducing information requirements to only the location of destinations and the choice made by travelers. His index is also directly interpretable in monetary terms. He focuses exclusively on restaurants. Though travel to restaurants represents a small fraction of travel, the results are nonetheless extremely interesting. He finds that in a U.S. metropolitan area, the accessibility price index of restaurants falls by about 20 percent between the outskirts of the metropolitan area and its center. For an average household that represents about $600 per year. Importantly, more than half of these gains are about the availability of a greater variety of restaurants. Albeit taken at a lower speed, shorter trips represent the remainder of this accessibility gain. These findings raise a number of interesting questions, including the possibility that faster mobility may actually correlate negatively with accessibility.

While this type of approach represents in our opinion a big step forward, it is still very partial. Restaurants are only a small part of household travel. Other errands like shopping could be added using a similar methodology. Commutes are arguably more complicated because we do not patronize jobs like we patronize restaurants. Instead, households often choose their place of residence depending on their job. Then, about 7 percent of trips in large U.S. metropolitan areas are visits to friends and relatives. This will be even more difficult to handle. We also note that this type of approach does not explicitly deal with heterogeneous preferences by households and their potential sorting across space depending on their preferences and the destinations available around them.
We draw a number of lessons from these considerations. While ad hoc measures of accessibility such as walk scores are fast becoming more available and may be informative, they still constitute incomplete measures of accessibility. On the other hand, more theoretically and empirically robust measures that incorporate multiple trip purposes, travel modes, and user preferences are still out of reach, are complicated to explain and difficult to understand, and unlikely to be commonly used anytime soon. That accessibility is a hard concept that is often poorly understood and incompletely measured is an obvious obstacle to sound urban development policies. As a result, different people end up meaning different things when they talk about accessibility and end up talking past each other. There may be something to the anecdote about the transportation engineer, who by accessibility understands the maximization of vehicle throughput at intersections, and the urban planner, who equates accessibility with pedestrianization, the exact opposite of what the transportation engineer had in mind.

In many cities of the developing world, the challenges of measuring accessibility are even more daunting because many of the costs paid by residents are extremely hard to measure. In Mumbai, for example, hundreds of thousands of pavement dwellers sleep outside in central districts. This allows them to minimize transportation costs and take advantage of informal jobs opportunities, while also circumventing central Mumbai’s astronomical central real estate prices. Sleeping on the streets, of course, has other associated costs in terms of health, comfort, safety, and sense of belonging. While the example of pavement dwellers in Mumbai is extreme, poor households and small landlords often construct housing in central locations that are otherwise undesirable to formal real estate markets due to high slopes, proximity to hazards like trash dumps, and vulnerability to floods, mudslides, or other hazards. These precarious land conditions—as well as the uncertainty of land titles—facilitate a minimization of housing and transportation costs, but often at a high cost of physical and legal uncertainty. This type of result suggests that if we do not observe nearly as much travel in developing cities, especially among their poorest residents, this is not for a lack of demand. These poor residents are willing to pay an extremely high price for accessibility.

Accessibility and measures of accessibility also feature prominently in the number of bodies of academic work. We emphasize three of these below. Our intent is neither to offer a comprehensive list of all the bodies of literature related to accessibility, nor to cover anything close to the full range of work on any of the topics. Instead, we wish to demonstrate how fundamental accessibility is to our empirical understanding of how cities work. For each area, we mention key ideas and results, but refer the reader to additional full-length literature reviews where appropriate.

### 4.3 Accessibility, travel behavior, and urban form

Accessibility features heavily in the large and growing body of literature on how urban form influences mode choice, vehicle kilometers traveled, and other travel outcomes. A key problem in that literature is the extent to which residential self-selection biases empirical estimates as residents sort into neighborhoods that favor their travel behavior and the extent to which unobserved local attributes may explain both urban form and travel outcomes.

The main point of agreement is that population density has a small but statistically significant relationship with how and how much people travel. Recent work by Duranton and Turner, which tackles both the possibility of unobserved individual characteristics and unobserved local characteristics that are correlated with urban form and travel behavior, estimate an elasticity of kilometers traveled with respect to density of about -0.07—right in the range of Ewing and Cervero’s meta-analysis. As described above, greater
Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective

Density is also associated with modestly more frequent travel, shorter trips, and slower speeds.

To assess what changes in urban forms would do to kilometers traveled in the United States, Duranton and Turner conduct a series of quantitative thought experiments. Concentrating the 10 percent of Americans who live at the lowest densities and occupy 83 percent of the territory into an area of about 1,500 square kilometers—taking them to the 90th decile of residential density in the United States—would reduce aggregate driving by about 5 percent. A slightly less drastic experiment relocating half of the population from the bottom two density deciles would achieve much smaller results because those who are left in low(er) density areas would have to drive more, offsetting most of the gains. It is only by bringing people to Manhattan levels of density and closing down the rural parts of the country that significant gains in terms of driving reductions can be achieved. This does not appear politically feasible.

There are two points of contention. Much of the literature, following Cervero and Kockelman, argues that urban form cannot be easily characterized and that a range of dimensions matter—density of course, but also diversity (through for instance mixed land use) and design. In a horse race between these variables, Duranton and Turner fail to find evidence for anything but population and employment densities as a robust predictor of vehicle kilometers traveled. A caveat here is that they miss measures of the quality of the pedestrian environment.

Finally, much of the literature argues that measures of metropolitan accessibility have a much stronger relationship with travel behavior than do local measures like neighborhood density, generally measured at the census tract level. Duranton and Turner find robust evidence only for the number of jobs and residents located in a 5 to 10 kilometer radius, a scale in between the purely local and the metropolitan that coincides with the typical distances urban residents travel. Once the effects of the “local” environment within this 5 to 10 kilometer radius have been conditioned out, they fail to find robust evidence of any effect of other metropolitan characteristics.

4.4 Transportation supply and accessibility

One of the primary hopes of transportation investments is that they will substantially influence accessibility. There is evidence that the accessibility benefits of rail stations often get capitalized into land and increase property values. Similarly, new freeways and interchanges often increase land values and spark new highway-oriented commercial development. However, the accessibility impacts of a new roadway or rail depend not only on the quality of the investment but also on the relative importance of the new investment and the existing network. For example, the first north-south freeway in Austin, Texas, substantially shaped the future of urban development, while the impacts of the latest freeway on urban form will barely register since the road adds so little to metropolitan accessibility. The first streetcar lines in the United States sparked a suburban real estate boom, since the lines opened up previously unavailable land and housing types during a time when the slow speeds and relative discomfort of horse-drawn trolleys limited urban expansion. Early operators made money, not by selling fares, but by selling properties around the lines. Even today, the few profitable subway companies balance their books by owning the valuable property around rail stations. Similarly, the construction of the U.S. interstate highway network was a major factor in the suburbanization of cities. New fast radial connections allowed workers to move to suburban settings, leading the central part of American cities to hollow out. The physical destruction of hundreds of thousands of homes to make way for highways and urban renewal also contributed.

The relative attractiveness of travel alternatives also influences the accessibility impacts of specific investments. For example, in a sprawling city where...
bus ridership is low, a new investment in light rail that doubles transit speeds along a specific corridor will be unlikely to attract many new riders or increase surrounding property values substantially. Relative to the bus, the new light rail line is a boon to accessibility, but relative to the car on most point-to-point trips transit will remain uncompetitive. Similarly, a new elevated freeway in Mumbai, where most people walk or take the regional rail, will have only a small impact on aggregate accessibility.

Whether any new improvements in accessibility result in changes in form is another question. For this to happen, the marginal benefits of the added accessibility need to be higher than the marginal costs of redeveloping a parcel or constructing a new building. As a result, changes in land use around new transportation investments—even when they do produce substantial accessibility benefits—can be slow to materialize, as already discussed.

Finally, it is worth noting that transportation investments may increase accessibility without influencing either travel times or congestion. In fact, congestion in particular is rather stubborn in responding to changes in transportation supply. There is considerable latent demand for travel. Not only do people adjust when, where, or how they travel—what Downs refers to as triple convergence—but firms and households move to new locations to take advantage of marginally changed accessibility levels while tending to maintain fairly constant rates of daily travel. Duranton and Turner decompose the proportional increase in vehicle-kilometers traveled associated with increases in roadway capacity. About half of it is either completely new traffic or traffic shifting to newly expanded highways and major roads from local streets. The remainder of the increase in traffic is due to changes in commercial traffic, which is extremely reactive to travel conditions, and newcomers moving to places with more roadway. Based on this type of observation, Metz argues that using travel time savings as the basic measure of consumer surplus for transportation investments is fundamentally flawed.

To sum up our discussion in this section, accessibility is a difficult theoretical concept, and it does not come as a surprise that defining it empirically and measuring it raises considerable challenges. Unfortunately, these difficulties are not only weaknesses in the academic literature, they also have direct ramifications for policymaking, as we show next.

5. Some policy challenges and implications

5.1 Challenges to adopting accessibility

For all the emphasis on the importance of accessibility in planning and economics, accessibility plays little role in day-to-day investment or policy decisions. There are several reasons this happens. First, as already emphasized, accessibility is conceptually and empirically complicated. As a result, advocates and policymakers rarely promote new investments based on accessibility. Instead, projects are pitched based on their purported—and generally misstated—ability to reduce congestion, shorten travel times, or meet projected increases in vehicle travel. The most common measure of the road transportation system, Level of Service (LOS), is often used to the detriment of accessibility. LOS ranges from A to F based on the volume and spacing of vehicles on a freeway or the amount of delay at a local intersection. New development projects are frequently blocked, delayed, or altered because of potential impacts of the LOS scale. Land use and human activities are treated as impediments, rather than key elements of the accessibility equation. Worse, the scores do not even relate to any sort of efficient use of space, since LOS D—a failing grade—is actually the point of maximum throughput on a freeway.

Rail transit investments offer a notable exception to the difficulty of measuring and promoting accessibility
as a policy outcome. Supporters often tout transit’s ability to capitalize increased accessibility into higher property values and new development around transit stations.\textsuperscript{106} Since higher property values mean higher rents, however, even this indirect measure of accessibility is not without conflict. Many advocates and policymakers worry about housing affordability and gentrification—particularly when a new line opens in a poorer neighborhood.

The second reason accessibility plays a small role in investment and policy decisions is that, compared to other competing land use and transportation objectives, accessibility is abstract and hardly pressing. People have a much more personal connection to whether they have an easy time finding parking, whether housing is too expensive, whether a new housing development will strain local school finances, or whether the trains come on time. Hence, the focus will be on the fiscal aspects and some components of accessibility while others, such as the closeness and diversity of destinations, are less salient. Voters and policymakers unsurprisingly are likely to gravitate to policies, programs, and investments that touch on these more concrete and visceral outcomes.

Third, different pieces of the accessibility puzzle resonate quite differently with different groups of people. As a result, a person may favor policies that increase accessibility by increasing regional rail investments, but strongly oppose relaxed land use regulation that would allow marginally denser housing development in suburban areas—including those near regional rail. Job boosters rarely focus on whether a new firm is best located in terms of accessibility to the workforce. Instead, they emphasize the number of jobs attracted and the impacts on the local tax base. While some affordable housing advocates prefer to locate new housing developments in places that have good access to transit systems and jobs opportunities, others emphasize building developments in wealthier neighborhoods with better access to schools and harder-to-quantify economic opportunities.\textsuperscript{107}

Given these challenges, it is hardly surprising that planners and policymakers tend to interact with the component pieces of accessibility separately and in an often contradictory fashion. Yet there is a need to implement better policies, particularly in fast-growing developing cities where poor accessibility may hinder economic growth. The United Nations predicts that the number of people living in cities in low-income countries with populations over 5 million (e.g., Afghanistan, Nepal, and Senegal) will more than triple from 34 million in 2015 to 109 million by 2030.\textsuperscript{108} The number in lower-middle-income countries (e.g., Honduras, India, and Vietnam) and upper-middle-income countries (e.g., Brazil, China, and Mexico) will increase from 517 million to 798 million.

It is tempting to argue that planning for accessibility requires a holistic approach, since accessibility is conceptually and empirically complex. However, this approach—were it ever to gain traction—would likely backfire. Specifically, it is difficult, perhaps impossible to decide on an optimal accessibility level, let alone measure it. As a result, policymakers would tend to set arbitrary accessibility goals that are somewhat ill defined and perhaps even poorly related to land use and transportation accessibility. Recall that, in some planning circles, accessibility has become shorthand for transit, pedestrian, and bicycle planning—the opposite of mobility planning, which focuses on highways.

We argue instead that policy makers consider whether policies, plans, investments, and regulations will tend to increase or decrease accessibility at the margin. To elaborate on this recommendation, we consider its relationship to several urban public policy topics and related questions.

### 5.2 Providing appropriate space for transportation

Given the importance of the concept to transportation planning, it is somewhat surprising how little research or public policy considers whether cities
have too much or too little roadway at the margin. Theoretically, this is an extremely challenging problem that economists essentially gave up on after early attempts by Solow and Vickrey. One of the greatest minds and mathematically gifted members of the economics profession, Solow writes in the opening paragraph: “This enquiry began as an attempt to work out a fairly general (though abstract) theory of land use. I was soon driven by the complexity of the theoretical problem, to a series of drastic simplifying assumptions. In the end, I am left with the analysis of a single austere example, based on assumptions chosen mainly to avoid complications.”

Empirically, and although it is relatively simple to obtain data on kilometers or even lane-kilometers of roadway by road type in many parts of the world, researchers and policymakers tend not to know how much urban land is dedicated to transportation within or across metropolitan areas. While many cities have this information in geographic information system (GIS) files, the data are not always centralized and easily accessible for economists. Shoup traces the origins of a claim that cars consume half of urban space in most cities and as much as two-thirds in Los Angeles back through several cited publications to an uncited and unsupported statement that the car consumes a precise 62 percent of urban space in Los Angeles. A widely cited World Bank transport paper by Gwilliam reports that with 10 percent to 12 percent of land devoted to transportation, Asian cities have far less than the 20 percent to 30 percent in U.S. cities. Again, the report provides no citations or methodologies.

In more advanced countries, transportation authorities keep a precise record of all road segments. But they usually count lane-kilometers of roadway, not the paved area. Lane width in the United States typically varies between 2.7 to 4.6 meters. Even for interstate highways, there is significant variation, depending on the exact highway.

Given the uncertainty and, seemingly, the wide variation in the amount of urban space dedicated to roadway both within and across cities and the somewhat arbitrary way that road investment occurs, it is extremely unlikely that most or even many urban areas allocate space to urban transportation efficiently. Instead, most cities probably have too much or too little roadway. If there is too much space dedicated to roads, then a policy to reduce road widths and give over more space to other urban land uses would tend to increase accessibility. If not, road widenings and new investments would likely improve accessibility. While precisely how much roadway is too much or too little is likely not answerable, whether there is too much or too little along specified dimensions (like economic output per worker, equitable distribution of income, average travel times, or traffic fatalities) is at least researchable. Instead, in practice, road widening and contraction investments happen with almost no consideration whether a city or neighborhood has too much or too little road capacity.

5.3 Investing in transit

Another way to increase travel capacity is to increase the provision of transit. Again, more capacity is desirable in some cases even if it does little to reduce congestion and travel costs. Transit is nonetheless more than just a capacity issue. It is a set of technologies (trains, subways, light rail, bus rapid transit, and regular buses) that differs from individual motorized transportations in several dimensions. Transit technologies exhibit increasing returns to scale because of their high fixed costs and low marginal costs. Hence, because of increasing returns, transit technologies become advantageous only at a high enough population density. Unsurprisingly, transit represents a larger share of travel in larger cities. Among transit technologies, the higher fixed costs of subways relative to buses make subways attractive only for the densest parts of the largest cities.

Following Bertaud, it is possible to imagine two
different urban equilibria: an “Atlanta” type of equilibrium with low density and a preponderance of car-based travel vs. a “Barcelona” equilibrium with a much denser city with a high share of transit in travel. Though it had about the same population as Barcelona in 1990, the built-up area of metropolitan Atlanta was more than 25 times that of Barcelona. These are very different cities indeed. But whether one is more efficient than the other from an accessibility perspective remains an open question. Atlanta’s equilibrium favors easy parking, long trips, fast travel in cars, and more dispersed development. Barcelona’s favors transit, congested sidewalks, and more concentrated development. While the Atlanta model consumes substantially more land and produces substantially more pollution than the Barcelona model, new investments will not turn Atlanta into Barcelona or Barcelona into Atlanta. Recall, however, that cities are extremely durable, and where they are built up, they change very slowly. When a new urban infrastructure requires a large change in local density to make economic sense or destroys substantial parts of the urban fabric, skepticism is in order. Transportation policies must adapt to their cities and not the other way round.

5.4 Measuring the transportation impacts of new development

One of the primary ways that local municipalities determine whether a developer should pay a development fee or whether a project should be blocked or hindered is through a traffic impact analysis. These analyses typically estimate the number of trips that a development is likely to generate by car, the time of day of the trip, and the direction of the trip. As an example, a suburban single-family home in a simplified monocentric model of the city would generate one to two morning-peak trips in the direction of the central business district and one to two afternoon-peak trips in the direction from the central business district. The predicted new trips are then added to a queuing model of the local transportation network to see if the additional trips will increase delays. If a project increases delay in such a way as to change the level of service, from say LOS B to LOS C, then the developer may be asked to improve the affected intersection or even halt the project. Until recently, the California state environmental review process required this type of analysis for all projects using public funding or requiring discretionary approval from a public agency. (The process now seeks to mitigate increases in net vehicle travel, based on the environmental impacts of that travel.)

The focus of the local traffic analysis is entirely on road delay and ignores whether a development increases accessibility by bringing more jobs, households, or activities in closer proximity with other jobs, households, or activities. In aggregate, the policy tends to discourage denser urban projects, where accessibility and delay are likely highest. A much better approach would consider land use accessibility as well as this delay. If a project increases accessibility, it should be greenlit. If it decreases accessibility, then perhaps there is a case to discourage it. However, since it can be difficult to define specific accessibility measures, it can also be challenging to determine related decreases or increases in accessibility; researchers and practitioners should continue to engage in an ongoing exploratory process to better define these issues.

5.5 Spatial mismatch / jobs-housing imbalance

In the 1960s, riots in predominantly black neighborhoods in United States cities prompted state and federal governments to commission a series of studies into the causes of the riots. Along with other explanations, John Kain’s spatial mismatch hypothesis—that the suburbanization of jobs, low access to private cars, and discriminatory housing markets had created and perpetuated high levels of unemployment—played a prominent role in explaining
Although the nature of the problem has changed substantially—most black households in America have cars, for example—discrimination in housing markets continues to play a substantial role in reducing accessibility in American cities. As the suburbanization of jobs has continued since the 1960s, many suburban cities have developed a large mismatch between the number of jobs and the number of workers, particularly low-income workers. The jobs-housing imbalance increases the amount and percentage of travel by car and puts a particular burden on lower-income households.

As already highlighted, minimum lot sizes and restrictive zoning, whether in Palo Alto, Calif. or Nairobi, Kenya, drive up housing prices, reduce density, and force many households to live further from work than they would prefer and could otherwise afford. Similarly, this type of restriction severely hinders households’ ability to access to high-quality public schools. Kleinbard reports that the United States is one of the few countries in the Organization for Economic Cooperation and Development (the others are Israel, Slovenia, and Turkey) to spend more public money on wealthy students than poor. From an accessibility perspective, reducing restrictive zoning requirements would substantially improve metropolitan accessibility by making it easier for firms and households to locate near each other. As previously discussed, however, reducing restrictive requirements even at the margin is often an uphill battle.

As a result, urban policy often tackles those issues indirectly either through a range of housing policies, often referred to as “fair housing” policies, or, to a lesser extent, transportation policies. Unfortunately, housing policies that attempt to deal with accessibility and spatial mismatch do not pay attention to transportation and vice-versa. As a result, these policies often do no more than scratch the surface.

For example, affordable housing policies frequently encourage the creation of subsidized housing in suburban as well as downtown neighborhoods. Affordable housing initiatives are often implemented as inclusive zoning policies that reserve a fraction of new developments to lower-income families. In many areas where the demand for housing is strong and its supply restricted, these policies are clearly far from optimal. We can identify a range of drawbacks. First, new housing construction is expensive, and building subsidized low-density housing is unlikely to produce enough units to offset the jobs-housing mismatch. Because these subsidies are paid for by the “full-price” buyers and the developers, they slow down development even further. In some circumstances affordable housing units may also depreciate the value of the market-rate units. Finally, providing access to the subsidized units by lottery and based on income means that those who most value the accessibility benefits are similarly likely to get a unit as those who are indifferent to the accessibility benefits. In any case, in more expensive areas, it is highly unlikely that lottery winners come anywhere close to valuing the housing subsidy that they receive compared to how much they cost.

More concretely, in areas where demand is strong and new construction is limited to, say, six stories, the efficient solution would be to allow for more and taller buildings. The issue is that building more or higher is often politically unfeasible. Tinkering with height exemptions that allow for two more stories when providing affordable housing units is a suboptimal way to increase supply. However, these policies are often politically more broadly acceptable and may be better than no new construction at all. In many wealthy suburban communities, furthermore, construction is limited to such a point that only the wealthiest households can afford to live there. This creates an accessibility problem, particularly when these same communities are major employment centers. It also creates social problems by reducing poor and middle-income households’ ability to choose their optimal housing and transportation bundles. Resigning
Developing a Common Narrative on Urban Accessibility: 
An Urban Planning Perspective

from her position from the Palo Alto Planning and Transportation Commission, Kate Downing recently wrote that, despite two professional salaries, her family could not afford to live in the city and that the local government had repeatedly rejected even modest proposals to reduce land use regulations and increase housing supply.\textsuperscript{123}

In this situation and many others where regulation reduces supply, increased affordable units—particularly when coupled with density bonuses that would not otherwise be permitted—almost certainly improve metropolitan accessibility. Whether and to what extent affordable housing policy increases or decreases accessibility is an empirical rather than a theoretical question, and the answer depends substantially not only on the specific policy, existing urban form, and regulations, but also on the next best politically acceptable policy counterfactual.

The record of reverse-commuting programs to increase accessibility to suburban jobs for low-income workers—programs given particular attention during reforms to the U.S. welfare system in the 1990s—have not been much more successful than affordable housing programs. On the one hand, better reverse commuting programs—particularly subsidized car loans—have likely helped welfare-to-work program participants maintain employment at the margin. On the other hand, the programs are costly per worker served\textsuperscript{124} and insufficient to the larger task of reducing poverty or improving metropolitan accessibility.\textsuperscript{125}

5.6 Dealing with congestion: 
the ideal and feasible

Given our call to focus on transportation and land use policies that improve accessibility at the margin, reducing congestion likely sounds like a good idea. Congestion, however, is somewhat tricky. Not only will laypersons, economists, and engineers have different definitions, but the spatial and temporal nature of congestion makes it fairly resistant to blunt policies to alleviate it by increasing supply or decreasing demand. Perhaps the simplest way to discuss congestion is to first acknowledge that not all of it is bad. Congestion is a sign of economic and social vitality. It reflects a high demand for travel. No one wants to go to empty restaurants. A city with no congestion is more likely a sign of a poor economy than good traffic management. Congestion is part and parcel of what allows people to be in the same place at the same time and participate in the activities that are the outcome of good accessibility. The most accessible places in the world are almost always among the most congested.

There is, of course, the bad part of congestion. Sitting in traffic is not fun. Unpredictable travel times—whether resulting from a freeway delay or a late bus—are generally considered more onerous than predictable travel times of the same duration. Even if predictable, a 30-minute drive on a congested freeway is probably less pleasant than a 30-minute drive on an uncongested one. Furthermore, in many cities the economic costs of congestion outweigh the other external costs of driving.\textsuperscript{126} This cost, however, differs substantially from popular estimates of the costs of congestion. For example, the Texas A&M Transportation Institute's annual congestion report looks at the difference between free-flow and peak travel times and calculates the lost time and fuel. This conflates all congestion as bad congestion.\textsuperscript{127} The top five metropolitan areas with the most wasteful congestion—Washington, Los Angeles, San Francisco, New York, and San Jose—consistently rank well as attractive places to live and in terms of economic productivity. Stated perhaps most simply, economically harmful congestion occurs when the delay that an additional driver imposes on all other drivers outweighs the benefits that the driver gets from making the trip in the first place. This harmful congestion is endemic. Addressing it, however, has proven to be quite challenging. For all of the popular discontent about congestion, drivers in most
Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective

Since at least 1920, when Pigou proposed one, economists have advocated the use of a congestion tax. If the price of travel set by the market is not right, a tax or subsidy can be used to make it right. This is of course easier said than done. Making users pay for roads that have been so far free is politically challenging. The seemingly successful introduction of congestion taxes in Singapore, London, and Stockholm has not been broadly imitated. As the London experience teaches us, there are also technological challenges, which turn out to be costly to resolve. Taxing traffic is easy in theory but complicated and often costly in practice. If a congestion tax is not available, recent research suggests that an appropriate pricing policy for downtown parking might achieve some desirable results. Unfortunately, this alternative is not popular either, and the full force of this idea has yet to penetrate the mind of decision makers on these issues.

Instead of dealing with excessive travel directly by taxing congestion, cities all over the world have experimented with a variety of alternatives, including quantitative restrictions that bar access to certain areas to vehicles based on plate numbers, traffic-calming, or increases in roadway or transit capacity. While the jury is yet to reach a final verdict on quantitative restrictions, the effects are somewhat mixed. Attempting to curb congestion by discouraging traffic is self-defeating in our opinion, as congestion is replaced by some other costs that are perhaps worse.

Conclusion

Cities are also physical environments where people live and must travel to interact with others. Unfortunately, understanding the physical environment of cities is nearly as difficult as understanding the human interactions taking place in cities. There are many components to this physical environment, and they interact in a complex manner. We have tried to provide a sketch of these components and their main interactions. This was intended as both a roadmap and an illustration of the conceptual difficulties that arise when we try to think about the physical environment of cities. As a result of this complexity, we have identified a number of problems. The first is the tendency of urban specialists to retreat into their area of specialism and treat it in isolation. This implies that the central issue of accessibility, which is about how the main activities we choose to undertake in different locations can be conducted at the lowest possible cost to us and to society, is often neglected. Land use, residential and commercial development, and transportation are all intimately connected. Another tendency is to rely on holistic solutions, but these holistic solutions are often hollow, if not harmful, and one fad replaces another. The emphasis of planning cities around the car has led to some disastrous outcomes. Replacing this emphasis by an anti-mobility outlook and viewing travel as a nuisance unless it takes place on a bicycle or in a tramway is no better.

We believe that accessibility planning should focus on key urban problems: the supply of housing, congestion, and amenity provision. As suggested above, dealing with urban congestion seriously may require a focus on the pricing and management of parking as well, yet current parking policies are often a compromise between residents who want to pay little and park easily and the mayor who wants to raise revenues.

There are unfortunately a number of inevitable conflicts between the stakeholders of the physical environment of cities. Related to this, we fully...
recognize that there is no single optimal way to organize a city. Cities have different geographic and historical circumstances, as well as different populations with varying preferences. Furthermore, some types of city structures or investments will tend to improve accessibility by one mode, such as transit, while disadvantaging another.

There are also important trade-offs between land use, transportation, and other public amenities like open space or the quality and character of a place. We understand that one city’s residents may favor economic development when another’s favor historical character and amenities. A wide variety of types of cities and the possibility for people to move between them is likely positive. We also recognize that technocratic approaches to planning and urban management created or exacerbated many of today’s challenges. As stated in the previous section, we generally recommend an approach that focuses on improving policy at the margin rather than determining an ideal and setting policies to resolve it.

There is a need for research that informs how policies affect metropolitan accessibility at the margin. For example, whether, where, and to what extent new roadway will tend to increase accessibility are open questions. As is the question of what kind of transit investment is most likely to improve access. There is also a need for better understanding and measurement of accessibility in general. New data and better computing power may help but, as we emphasize in the introduction, policymakers cannot afford to wait.

There are also several examples where there are clear benefits to substantial changes in urban public policy. For example, we lament the ubiquitous persistence of urban travel congestion when the solutions are known and the likely benefits to deploying them are large. Perhaps most importantly, restricting housing development far below what the market would otherwise supply produces substantially suboptimal economic, social, and environmental outcomes.136 Creative ideas will be needed. To our knowledge, Ahmedabad in India is the only case we know of a city that has managed to escape restrictive land use regulations through transferable development rights and a range of other policies.137 While the process is still ongoing, it has increased the built-up density of the central part of the city from a floor-to-area ratio slightly above 1 to eventually more than 5 while also allowing for more roadway and more public spaces. Although the example of Ahmedabad is rather unlikely to sway an angry homeowner in Palo Alto, we nevertheless choose to conclude on a positive note. The current land use regime is so inefficient in places like the San Francisco Bay Area, Mumbai, Nairobi, and New York City, that (1) small policy changes could have large economic and social benefits, and (2) the reduction of restrictions there will produce more than enough surplus to compensate losers.
Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective

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Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective


Endnotes

1  We are grateful to Robin Lindsey for comments and his help with some of the references, to Tanner Regan for producing new figures for Nairobi, and to Jeff Guttman for some feedback on an earlier version.

2  For instance, see Donald Shoup, “The Trouble With Minimum Parking Requirements” (Transportation Research Part A, 1999).

3  We are doing our best here by having an economist and an urban planner joining force.


5  The U.S. Bureau of Labor Statistics (2014) reports that American households devote 27 percent of pre-tax income on housing and 14 percent on transportation. This is another way to present essentially the same data given that American households face an average tax rate of about 21 percent.


7  Juan Miguel Gallego and Manuel Ramirez, “Informe de Recomendaciones Sobre la Capacidad de Pago de los Hogares en las Ciudades Colombianas” (Bogota: Dirección de Desarrollo Urbano, Departamento Nacional de Planeación, 2012).


10  By our calculation using the 2001 and 2009 National Household Travel Surveys.

11  Bogota Department of Transportation 2013; see also Akbarand Duranton 2016.


14  INEGI 2007.

15  Gallego and Ramirez 2012. Complicating matters, there is evidence that poorer households report fewer trips than wealthier households (relative to the number of trips that they actually undertake). In its 2012 household travel survey, the Delaware Valley Regional Planning Commission fitted a subset of respondents with GPS devices to check the quality of reporting. The agency provides a weighting factor that accounts for these differences for estimating Philadelphians’ aggregate metropolitan travel behavior.

16  Manuel Suárez, Masanori Murata, and Javier Delgado, “Why Do the Poor Travel Less? Urban Structure, Commuting and Economic Informality in Mexico City” (Urban Studies, August 2015).

17  Again, we seem to observe very low levels of housing consumption and travel at very low levels of development. A key question for both types of expenditure is how much of these very low consumptions is demand vs. supply. Housing may be a luxury good at extremely low levels of development (be it only because food is even more important). Alternatively, for housing, tenure uncertainty and the absence of financing mechanisms may play an important role on the supply side.


19  Combes et al. 2016. For transportation in Mexico, our computations using the 2015 Intercensus data are also supportive of longer commutes in larger cities. Gallego and Ramirez (2012) also find larger shares of transportation in expenditure across Colombian cities and a roughly constant share of expenditure for housing.

20  For housing costs, see Glaeser and Kahn (2004) for the United States and Combes et al. (2016) for France. For vehicle-kilometer traveled in the United States, see Duranton and Turner (2016).


22  Erik Guerra, “Mexico City’s Suburban Land Use and Transit Connection: The Effects of the Line B Metro Expansion” (Transport Policy, 2014). For more, see Monkonen 2011.


24  Combes et al. 2016.


27  Bogota Department of Transportation 2013.


29  Duranton and Turner 2016.
30 Prottoy Akbar and Gilles Duranton, “Measuring Congestion in a Highly Congested City: Bogotá” (Wharton School, University of Pennsylvania, manuscript in progress, 2016.)

31 Erik Guerra, “Mexico City’s Suburban Land Use and Transit Connection: The Effects of the Line B Metro Expansion” (Transport Policy, 2014).

32 Here, we add the important caveat that there is substantial variation in how many trips get reported based on the design of the travel survey. For example, after the U.S. household travel survey changed methodologies from 1990 to 1995, the change had such a profound impact on survey results—a 40 percent increase in total trips per capita—that the survey designers referred to their methodological understanding as naïve and applied a 1.33 adjustment factor to aggregated non-work travel reported from the 1990 survey (Hu and Reuscher 2004; Liss 1997).

33 It is usually referred to as the monocentric urban model. It was originally developed by Alonso (1964), Mills (1967), and Muth (1969) and led to the development of a large formal literature, culminating with Fujita’s (1989) book. See Duranton and Puga (2015) for a recent review of this literature.

34 These gradients, particularly the price and density gradients, have received a lot of attention since Clark’s (1951) pioneering work. See, again, Duranton and Puga (2015) for a recent assessment. The two known exceptions of positive density gradients are Russian and South African cities. Given the extremely particular institutional settings of these two countries during most of the 20th century, these are arguably the exceptions that confirm the rule.

35 For an overview of this longstanding debate, see Gordon and Richardson (1997)”container-title”: “Journal of the American Planning Association, “page”: “95-106” volume”: “63” issue”: “1” source”: “Taylor & Francis” abstract”: “Abstract This paper considers some key issues that help to evaluate whether or not the promotion of compact cities is a worthwhile planning goal. These are: the pressures on prime agricultural land; residential density preferences; energy resource savings; the potential for expanding transit use and promoting TODs (transit-oriented developments and response by Ewing (1997).”

36 In this respect, we note that the monocentric model is often dismissed as an intellectual curiosity with an extreme (and irrelevant) geography. This criticism is beside the point. It is easy to propose alternative distributions of jobs. Instead of assuming that all jobs are located at the center, we can impose any pattern of job location. Solving the model becomes messy but, conceptually, the same economic forces remain at play and they lead to the same trade-off between job accessibility and housing prices. The real problem is that the distribution of jobs remains exogenously imposed.

37 The first effort to model such situations dates back to Ogawa and Fujita (1980). Duranton and Puga (2015) review this class of models.


40 Historical factors clearly also play an important role, and a historian would likely note the intentional removal of poor central Parisians under Baron von Haussmann and the many car-oriented planning decisions that helped hollow out the motor city’s center.


42 In the long run, we expect households (and firms) to sort and choose their preferred location depending on their preferences and the constraints they face. Even though one’s preferred location subject to constraints (including budget) may not be one’s ideal location, being able to choose will attenuate the problem. In the short run, however, residential mobility is extremely costly, and it is difficult to imagine unanimity for most planning decisions.

43 The U.S. Department of Transportation 2013.

44 Duranton and Turner (2016) find that a 10 percent increase in nearby density is associated with households driving about 1.3 percent fewer kilometers at a speed 1.1 percent lower for trips that are 1.5 percent shorter and 0.1 percent more numerous. Much of the effect of local density on kilometers traveled appears to be causal. See below for further discussion of the empirical literature.

45 The relationship may not be monotonic. The same person may undertake very little travel when located in rural Montana if there is no place to go to, may travel a lot in the exurbs of a metropolitan area since the places to go to are far, and again travel little in mid-town Manhattan since everything is so close.


47 See Lee (1973) for an early perspective and Waddell (2011) for a recent review.

48 For instance, transportation models routinely implement for all roads the speed-density curves estimated on one particular road. Recent evidence by Akbar and Duranton (2016) suggests that the aggregation is not as straightforward. The speed-density curve for an entire city (or a part of it) looks nothing like the speed-density curve of individual road segments. See also Daganzo and Geroliminis (2008) and Geroliminis and Daganzo (2008) for more on “macroscopic” approaches to traffic congestion.

49 Three land use and transportation integrated models (LUTI) derived from Anas (2013), De Palma and Marchal (2002), and Waddell (2002) were used for the ex ante evaluation of a large subway project in Paris. While the aggregate conclusions of these models were in the same ballpark, locally they could diverge. Understanding the sources of these differences is near impossible given the complexity of these models and their proprietary nature (Marc Gaudry, personal communication).


51 For a review, see TCRP Report 95, 2004.
Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective

54 Although Houston, is famous for its lack of zoning ordinances, it still regulates land use heavily directly through minimum lot sizes, setbacks from the street, and buffer zones for development, among others. The city of Houston also regulates land use indirectly through private covenants, which are often more restrictive than what most local governments would impose in the United States (Festa 2013).
55 This naming for the strict separation of users refers back to the 1926 decision of the U.S. Supreme Court in the case Euclid vs. Ambler, opposing the Euclid community in Ohio to a manufacturing developer, Ambler Realty (Fischel 2004).
56 Unless locations are perfect substitutes, the demand curve for a particular location will be downward sloping and local suppliers (the landowners) will have incentives to restrict supply and behave as a monopoly. Within each community, there is then a tension between owners of less-developed land who would like to develop it more and owners of developed land who would like to limit new development. Restricting development also requires costly collective action, which may not be worthwhile when demand for a location is low. These two features explain, at least in part, why land use is not equally restricted everywhere.
57 Primary and secondary education in the United States is largely funded through property taxation. Richer communities with well-funded schools often imposed binding minimum lot size requirements to prevent the arrival of poor households willing to consume only a tiny amount of land and contribute little to the funding of local schools while benefiting from them. It is hard to imagine how this situation might evolve as changing school funding formulas is often met with extremely strong resistance and moving from property taxation to a head taxation is simply not going to happen (notwithstanding the fact that it would create other issues).
59 In a recent survey of long-range planners, Guerra (2016) found that uncertainty about the timing and impacts of driverless cars (and a political disconnect between planning and investment decisions) prevented planners from considering driverless cars in long-range transportation plans, despite believing that these impacts were likely to occur and likely to be significant within the planning horizon.
60 For interstate highways in U.S. metropolitan areas, Duranton and Turner (2012) show that planned kilometers of highways in 1947 were roughly proportional to population at the time. The elasticity of actual kilometers of interstate highways today with respect to current population is much below 1, at about 0.7. New highways appear to be provided to metropolitan areas when they do poorly, not to accompany their growth. This is either because land is cheap or the construction creates work.
65 See for instance Kanbur 2014.
67 The prospects of urban living, furthermore, are (realistically) considered in relation to rural living. A worsening of rural outcomes will thus bring more residents to cities even though most of them will end up in the informal sector. This is often referred to as the “push” factor for urbanization.
70 Vernon J. Henderson, Tanner Regan, and Anthony J. Venables, “Building the City: Sunk Capital, Sequencing, and Institutional Frictions” (London School of Economics, 2016).
71 Ibid.
72 Nairobi is not even a particularly pathological case. Minimum lot size in large sections of Dar Es Salaam in Tanzania is 1,000 square meters.
73 Using a 2010 land use map from the Center for Sustainable Development at Columbia University (http://nairobigismaps.wikischolars.columbia.edu/home), the share of land occupied by residential areas is 33 percent. From this, we would need to exclude roads and parks. A different source that relies on older data, Oyugi and K’Akumu (2007), attributes again slightly more than 30 percent of land in Nairobi to residential areas. Taking away the roadway and other non-directly residential uses will surely make the figure less than 30 percent. In the 2008 Kenyan Census, the average household size in the Nairobi administrative area is 3.17 (2.90 for slums and 3.37 in the formal sector). This is consistent with the Kenya Demographic and Health Survey (KDHS) for 2008-2009, which reckons that average household size in Nairobi is just below three. We are extremely grateful to Tanner Regan for his help with this matter.
Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective

75 The conjecture is associated with de Soto (2000). Using large-scale legalization episodes, more systematic studies have failed to find much of an effect (Galiani and Schargrodsky 2010).


77 For a recent treatment, see Cervero 2011 and Golub.

78 Bogota Transportation Survey 2011.


81 The literature usually speaks of mobility when the focus is solely on the ease of travel.


83 Susan Handy, and Debbie A. Niemeier, “Measuring Accessibility: An Exploration of Issues and Alternatives—Environment and Planning” (1997). See also Anas et al. 1998 or Venter 2016 for more complete reviews.

84 Ibid.

85 Using an activity-based travel model within a random utility framework, a given person’s potential utility—which may include both observed and unobserved preferences—is a measure of the highest value of the suite of activities and travel alternatives from which the person chooses. See Handy and Niemeier (1997) for a more precise description of how to use this type of framework to derive an accessibility index.


87 Couture 2015. Those estimates rely on a utility function that exhibits a constant elasticity of substitution (which is closely connected to the logit framework as noted many years by Anderson et al. 1992). Couture (2015) provides corroborating evidence to that effect.

88 Trips to restaurants are shorter and slower in denser areas. However, the first effect dominates so that the time cost of going to the closest or the nth closest restaurant is less. In denser areas, restaurant goers also pass more restaurants before reaching their preferred one. However, the total duration of trip remains equal or slightly less than in less dense areas. This finding is consistent with an observation by Metz (2008) that commutes get longer in areas with a greater density of jobs. This type of feature needs to be related with the old observation that workers commute much more than they would if they were to occupy the job closest to their home (Hamilton 1982). This is often referred to as “wasteful commuting” (inappropriately in our opinion). This literature is surveyed by Ma and Banister (2006).

89 With current mapping technology, it is easy to know about the number of restaurants or supermarkets close to a location. It is much harder to know about the number of potential friends (for now at least; data from social networks will likely alleviate this constraint in the future).


92 Duranton and Turner 2016.

93 Ibid.


95 Duranton and Turner 2016.

96 Ewing and Cervero 2010. See also Bento et al. 2005.

97 Duranton and Turner 2016.

98 Nathaniel Baum-Snow and Matthew Kahn, “The Effects of New Public Projects to Expand Urban Rail Transit” (*Journal of Public Economics*, 2000). See also Gibbons and Machin 2005; Hess and Almeida 2007; Chalermpong 2007; Rodriguez and Targa 2004; Cervero and Landis 1997; New York; “source”: “Highwire 2.0”, “abstract”: “This study assesses the impact of proximity to light rail transit stations on residential property values in Buffalo, New York, where light rail has been in service for 20 years, but population is declining and ridership is decreasing. Hedonic models are constructed of assessed value for residential properties within half a mile of 14 light rail stations and independent variables are included that describe property characteristics, neighbourhood characteristics and locational amenities. The model suggests that, for homes located in the study area, every foot closer to a light rail station increases average property values by $2.31 (using geographical straight-line distance).

99 Because land use is heavily regulated, the occurrence of these developments is often conditional on changes in land use regulations allowing for such developments. In some situations, local governments may create some uncertainty on this subject, which may discourage development. See for instance Bula (2016) regarding the recent anticipated subway line along the Broadway corridor in Vancouver and previous transit developments that did not lead to higher densities despite very large capitalization effects into local property values.


Developing a Common Narrative on Urban Accessibility: An Urban Planning Perspective

102 Robert Cervero and Mark Hansen, “Induced Travel Demand and Induced Road Investment: A Simultaneous Equation Analysis” (Journal of Transport Economics and Policy, 2002). See also Duranton and Turner 2011.


104 Duranton and Turner 2011.

105 David Metz, “The Myth of Travel Time Saving” (Transport Reviews, 2008).

106 The total increase in land values associated with a new infrastructure project will indicate the economic surplus created by this project only under some assumptions that will not always be met in practice (Kanemoto 1988).

107 We note here that the economic and sociological literature that studied the effect of the Moving To Opportunity experiment in Boston found very little positive effects for most movers to better neighborhoods (Katz et al. 2001). Recent evidence from Chetty et al. (2016) points to positive long-term effects for young children. To make relocation policies cost effective, they would need to be narrowly targeted. We also note that vouchers for rents would be enough, as the social benefits from homeownership are still subject to considerable debate.


109 As we argue below, there is an important issue of data availability behind the paucity of research.


114 The report argues that this contributes to a problem later identified as premature congestion—a state of low motorization rates together with high congestion levels. This is perhaps true but no more than a conjecture.

115 We also note that, following the work of Herbert Mohring (Mohring 1961 and Mohring and Harwitz 1962), a number of important results were derived regarding the desirability of self-financing roads (see Small and Verhoef 2007 for an overview). These results, although neglected in practice, should be more than theoretical curiosities and be investigated further. Similarly, there are solid theoretical “golden rules” for the provision of local public goods. They find their origin in the work of social reformer Henry George (1884). See Behrens et al. (2015) for recent developments and references.


119 On local roads, the amount of delay at an intersection is used to determine level of service. For example, LOS B means that there is 10-20 seconds of delay with occasional full use of a traffic light cycle. LOS C means that there is 20-35 seconds of delay with regular use of the full cycle. Drivers rarely wait a light cycle in either condition.


124 Robert Cervero and Yu-Hsin Tsai, “Job Access and Reverse Commuting Initiatives in California: Review and Assessment” (Transportation Research Record: Journal of the Transportation Research Board, 2003).

125 Sutton 2002. See also see Wachs et al. 1998.


127 More specifically, they compute the “cost of congestion” in American cities by valuing the time gain associated with being able to conduct all existing trips at “free-flow speed” This obviously neglects the fact that free flow travel would elicit a very large demand response. Beyond this, it also ignores that free-flow travel at 8 am or 5 pm in large American cities would mean that something would have gone terribly wrong regarding the demand for travel or that travellers have been insufficiently priced out of the road. There are too many cars on the roads of San Francisco and New York City at peak hours, but optimal conditions would still entail a lot of traffic to accommodate demand. This is what we mean by “good congestion.”


130 See for instance Inci 2015.
Good ideas do not immediately strike most decision makers as being good ideas. The slow diffusion of one-way vs. two-way tolls for bridges in the United States may be a case in point. When there is no easy substitute for a bridge, a one-way toll is an obvious proposition as it reduces waiting times and collection costs relative to two-way tolls. One-way tolls started in the late 1960s in California. New Yorkers had to wait until 2012 before one-way tolling was systematically implemented there (Spock 1998, http://en.wikipedia.org/wiki/Verrazano%E2%80%93Narrows_Bridge). Of course, electronic tolling collection now makes two-way tolls attractive again.

See Carillo et al. (2016) for a recent assessment for Quito in Ecuador and a discussion of past literature.

Remy Prud’homme and Pierre Kopp, “Worse Than a Congestion Charge: Paris Traffic Restraint Policy,” Road Congestion Pricing in Europe: Implications for the United States (Cheltenham, England: Edward Elgar, 2008). Of course, curbing congestion is just one objective of the transportation system. For example, traffic-calming measures often discourage traffic but are, first and foremost, intended to reduce traffic speeds and improve safety and pedestrian comfort. Reducing speeds may also improve the number and quality of social interactions in neighborhoods and encourage local retail. Also, transit is often viewed as a response to road congestion. While it is true that, when provided efficiently, transit can carry more travelers than cars, we must keep in mind that transit may also create congestion and be itself subject to congestion. See de Palma et al. (2016) for a derivation of an optimal investment rule and fare system when transit creates congestion.


Given congestion and agglomeration effects, we may actually expect the market to provide too much density and cities that are too large (Duranton and Puage 2015). While this may need to be curbed, in many places extant policies arguably lead to outcomes that are socially much less desirable.

About Moving to Access

The Moving to Access Initiative aims to inform and promote a more socially focused, access-first approach to urban transportation policy, planning, investment, and services. Facing a number of economic, demographic, fiscal, and environmental challenges, cities and metropolitan areas globally are looking to adopt new, actionable metrics to guide more purposeful initiatives to improve accessibility for people of all incomes. The Initiative looks to move beyond theory and accelerate the adoption of these innovative efforts, exploring new tools, techniques, and performance measures across the developing and developed world.

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INTEGRATING ACCOMMODATION

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† Associate Professor, Columbia Law School. My thanks to the following for helpful conversations and comments on earlier versions: Jill Anderson, Samuel Bagenstos, Michelle Ballan, Mark Barenberg, Vincent Blasi, Richard Brooks, Mary Anne Case, Martha Chamallas, Kathleen Clausen, Ruth Colker, Kimberlé Crenshaw, Ariela Dubler, Richard Emens, Dick Fallon, Robert Ferguson, Lauren Gates, Heather Gerken, Phillip Atiba Goff, Suzanne Goldberg, Tristin Green, Kent Greenawalt, Bernard Harcourt, Seth Harris, Scott Hemphill, Olati Johnson, Andy Koppelman, Sarah Lawsky, Simi Linton, Gillian Metzger, Martha Minow, Eben Moglen, Martha Nussbaum, Marilyn Reiss, Shael Polakow-Suransky, Michael Rembis, Charles Sabel, Elizabeth Scott, Catherine Sharkey, William Simon, Joseph Singer, Rachel Smith, Sandra Sperino, Richard Squire, Michael Ashley Stein, Geoffrey Stone, Susan Sturm, Cass Sunstein, David Weisbach, John Witt, and Tim Wu. For opportunities to present and discuss some of these ideas, I also thank the organizers of, and participants in, the Society for Disability Studies 20th Annual Conference, the Harvard Law School Public Law Workshop, the Columbia Law School faculty and summer 10-10 workshops, the Columbia University Seminar on Disability Studies, the first annual Colloquium on Labor and Employment Law at Marquette Law School, the University of Chicago Law and Philosophy Workshop, the Seton Hall Employment & Labor Law Scholars’ Forum, and the AALS Section on Law and Mental Disability. Joya Banerjee, Becca von Behren,
Courts and agencies interpreting the Americans with Disabilities Act (ADA) generally assume that workplace accommodations benefit individual employees with disabilities and impose costs on employers and, at times, coworkers. This belief reflects a failure to recognize a key feature of ADA accommodations: their benefits to third parties. Numerous accommodations—from ramps to ergonomic furniture to telecommuting initiatives—can create benefits for coworkers, both disabled and nondisabled, as well as for the growing group of employees with impairments that are not limiting enough to constitute disabilities under the ADA. Much attention has been paid to how the integration of diverse groups of people helps to ameliorate discriminatory attitudes through “contact.” But integrating people with disabilities also means integrating accommodations. These accommodations affect and benefit third parties in the workplace and thus shape attitudes toward both disability and the ADA. An understanding of third-party benefits is crucial to designing and disclosing accommodations in ways that will best promote the aims of the statute and the prospects of disabled people.

INTRODUCTION......................................................................................841
I. IDENTIFYING THIRD-PARTY BENEFITS.............................................845
   A. A Basic Spectrum of Third-Party Benefits..............................846
   B. Usage Versus Attitudinal Benefits ........................................848
   C. Second- Versus Third-Party Benefits......................................848
   D. Types of Third-Party Usage Benefits ......................................850
   E. Why Haven’t They Done It Already? ......................................859
   F. Designing Accommodations: A Broader Spectrum of Costs and Benefits...........................................861
II. NEGLECTED BENEFITS....................................................................866
   A. Overlooking the Benefits ........................................................867
   B. Why Benefits Are Not Salient ..................................................876
III. INTEGRATING ACCOMMODATION...................................................883
   A. Desegregating Accommodation .............................................884
   B. The Example of Telecommuting..............................................890
   C. Tradeoffs and Definitions: The Meaning of Disability and Accommodation .............................................893

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INTRODUCTION

Consider the following scenario:

At an academic conference, a speaker puts up a diagram on an overhead projector. The image that appears on the screen is exceedingly complicated—with arrows and circles and tiny print—and the audience members squint at it, trying to make some sense of what they see. After a moment, a man in the front row raises his hand, and, apparently requesting an accommodation for his vision impairment, asks the speaker to “please describe the diagram.” The rest of the audience sighs in relief at the prospect of having this inscrutable diagram glossed by its creator.

This moment captures an oft-overlooked feature of disability accommodations: the simple request for an accommodation by a disabled person often benefits other people. The accommodation of describing the diagram, provided because only one disabled person needs it and requests it, redounds to the benefit of others, both disabled and nondisabled.

This academic scenario points us toward more conventional workplace examples of accommodations that have benefits for third parties. An elevator or a ramp can be used by many people, particularly those on wheels or toting objects on wheels. Ergonomic furniture reduces strain for employees generally. An air-filtering system for an employee with asthma can improve air quality for everyone.

Design matters. An employee whose disability requires her to work from home for periods of time could be accommodated by periodically reassigning her tasks to a coworker, creating added burdens for the coworker. Or, alternatively, her accommodation request could lead her employer to create a broad-based telecommuting initiative that benefits multiple employees who wish to work from home. Likewise, an employee whose psychiatric impairment leads him to request...
more concrete work assignments and more measured and constructive feedback could consume more of a supervisor’s time, to the detriment of other workers. Or the process of designing this employee’s accommodation could lead an employer to rethink and improve its supervisory practices more generally. These few examples gesture toward the many ways that accommodations can benefit third parties.

Yet courts and administrative agencies charged with overseeing the implementation of the Americans with Disabilities Act (ADA) have failed even to see these third-party benefits, much less to take them into account. Key decisions about which accommodations are required by law have defined the crucial concepts of “reasonableness” and “undue hardship” in terms of costs and benefits, yet they have neglected the possibility of third-party benefits, even when recognizing third-party costs. The U.S. Equal Employment Opportunity Commission (EEOC), in providing formal guidance to employers trying to understand and comply with the ADA’s accommodation requirement, has discussed costs to third parties without making mention of benefits to third parties. Moreover, neither courts nor the EEOC has recognized the significance for third parties of how accommodations are designed.

This oversight obscures a crucial feature of integration—of contact—under the ADA. Much scholarly attention has been paid to the interpersonal effects of integrating diverse groups of individuals through “contact.” Though the potency of contact is sometimes overplayed, contact studies do show that working together, side-by-side, on cooperative rather than competitive tasks, can alter attitudes and stereotypes. Contact studies have focused principally on race, but the few studies that have looked at the integration of disabled persons into the workplace have found similar benefits. These discussions of contact have overlooked its unique feature under the ADA: integrating people with disabilities also means integrating accommodations. Those accommodations interact with other people in the workplace in varied ways, yet little attention has been paid to such interactions. And to the extent that accommodations have been understood to have effects on third parties, those effects have typically been seen as costs.

Yet accommodations, while rightly designed to benefit people with disabilities, have more benefits and more kinds of benefits for others than are typically recognized. Accommodations may benefit not only other disabled workers, but nondisabled coworkers, as well as the ever-growing group of the sub-ADA disabled—that is, those individuals who have impairments that are not substantially limiting enough to qualify
them for protection under the ADA.\footnote{Cheryl Anderson has called this group the “‘not impaired enough’ plaintiffs.” 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, 85 (2000).} One aim of this Article is to rectify this oversight by identifying third-party benefits across a range of accommodations and discussing ways that design and disclosure of accommodations affect the extent of their benefits to third parties.

Accommodations can, of course, impose costs on third parties, as well as conferring benefits on them, as the anecdote about the conference presentation suggests. The request for a description of the diagram helped audience members understand the diagram, but it may also have burdened some audience members who already understood the diagram (if any did) or who simply wanted the talk to move along more quickly (as some surely did). As an empirical matter, it is difficult to know whether the overall benefits of the accommodation outweigh the costs. This Article therefore remains agnostic on the question of whether particular accommodations, or even accommodations in general, are ultimately more beneficial—to people with disabilities or to the overall society—than they are costly. The findings of the ADA embrace multiple goals, including broad integrationist aims as well as efficiency aims, and courts have made clear that the benefits of accommodations need not exceed the costs.\footnote{See infra Part II.A (discussing the courts’ interpretation of the reasonableness requirement and undue hardship defense as not requiring that benefits exceed costs); infra note 143 and accompanying text (discussing the multiple purposes, and particularly the integrative purpose, set forth in the statutory findings of the ADA).} Thus, the ADA does not require accommodations to be cost justified, for the employer or for society. Nonetheless, courts have relied on the language of costs and benefits when interpreting the ADA’s accommodation requirement, and this Article therefore uses that language to identify a broad swath of considerations that have been previously overlooked in the analysis of accommodations.

The inattention to third-party benefits means they have been undertheorized. This Article thus provides a series of analytic tools to help scholars, policymakers, and employers recognize these benefits and analyze accommodations with such benefits in mind. It distinguishes between benefits that promote the general welfare and those that promote favorable attitudes toward disability and the ADA, emphasizing how the design and disclosure of accommodations can particularly help to promote the latter type. This analytical clarification...
leads to several proposals for policy and doctrine on accommodation. Administrative agencies charged with facilitating implementation of the ADA should try to encourage employers to recognize and promote these benefits, not simply because they are good for society at large, but because they are good for the success of the ADA and the integration of disabled people into the workplace. The EEOC should therefore revise its guidance on accommodations to encourage thoughtful disclosure of accommodations—subject to employee consent—and to highlight third-party benefits. The Job Accommodation Network (JAN) should encourage employers to think about third-party benefits when designing accommodations. Courts, when using cost-benefit comparisons to decide whether accommodations are reasonable or impose an undue hardship, should also recognize that accommodations can have third-party (and second-party) benefits, as well as first-party benefits and costs and third-party costs. Finally, institutional policymakers should appreciate the possibility of third-party benefits when deciding whether to include disability in their diversity initiatives alongside race and sex.

This Article has five parts. Part I creates a framework for recognizing third-party benefits. This Part uses categories, diagrams, and examples to provide tools for seeing and enhancing such benefits. Part II shows that, although courts have interpreted the accommodation requirement to require a comparison of costs and benefits, courts and other entities have nonetheless overlooked the third-party benefits of accommodations in surprising ways. It then suggests some legal, political, and cultural reasons that benefits may be less salient than costs in discussions of the ADA. Part III considers whether third-party benefits should matter to discussions and decisions about accommodation. I argue that, while accommodations should be designed principally to facilitate the integration of people with disabilities, attending to the third-party benefits of accommodation furthers the ADA’s integrationist project by promoting positive attitudes toward disabled people. Part IV discusses the implications of this analysis, highlighting ways that an appreciation of third-party benefits can affect legal analysis, agency guidance, and institutional policy on the implementation of the ADA. Finally, Part V identifies some concerns about focusing on third-party benefits—most importantly, that attending to third-
party benefits could mislead employers and courts into thinking that the aim of the ADA is to improve welfare for everyone, rather than to prohibit discrimination and encourage integration of disabled people. Though this concern is important, the success of the ADA will ultimately depend upon the attitudes of those who implement and live with the statute. Therefore, recognition of third-party benefits is critical to achieving the aims of the statute.

I. IDENTIFYING THIRD-PARTY BENEFITS

Whenever Dad started to do a new motion study project at a factory, he'd always begin by announcing he wanted to photograph the motions of the laziest man on the job.

*Cheaper by the Dozen*

Accommodations prompt changes. They introduce different ways of doing things, which sometimes alter and improve the environment for many people. The father in *Cheaper by the Dozen*, an efficiency expert, studied the “laziest man in the factory” because the laziest man had reason to develop efficient ways to perform each task; similarly, we do well to study accommodations, not because of any link to laziness, but because disability creates a reason for innovative technologies and practices that can produce efficiencies and other types of benefits.

Courts and agencies interpreting the ADA have ignored the third-party benefits of accommodations, as I discuss in the next Part. Thus, these benefits have generally been overlooked and undertheorized. This Part therefore uses examples of workplace accommodations to identify types of third-party benefits and aspects of accommodations that create such benefits. Third parties include other disabled people, nondisabled people, and what I call the sub-ADA disabled. After distinguishing between usage and attitudinal benefits of accommodation, I then expand the discussion to consider the various categories of usage benefits that accrue to third parties from accommodations, including material, physical, hedonic, relational, and, perhaps most interestingly, experimentation benefits. Some but not all of these third-party benefits can be internalized by employers, as I will discuss.

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4 Frank B. Gilbreth, Jr. & Ernestine Gilbreth Carey, *Cheaper by the Dozen* 126 (1948).
5 See supra text accompanying note 1.
conclude this Part by discussing how the design of accommodations affects whether they create benefits to third parties.

A. A Basic Spectrum of Third-Party Benefits

We can imagine a spectrum with, on the right-hand side, accommodations with more third-party benefits, and on the left-hand side, those with fewer third-party benefits (if any). A ramp, for example, might go on the far right side of the spectrum, because it can be used, currently and in the future, by both disabled and nondisabled people (e.g., for suitcases and strollers). On the far left, we might place a reader hired to read to a blind employee, because this accommodation’s benefits are, at first glance, completely coterminous with that disabled individual’s use of them. Somewhere in the middle is perhaps the purchase of a reading machine that magnifies print or turns printed text into speech, which can be used by only one employee at a time but also can be used by other employees, now and in the future, when the person accommodated is not using the machine.

Figure 1: Basic Spectrum of Third-Party Benefits

<table>
<thead>
<tr>
<th>Fewer Benefits</th>
<th>More Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reader</td>
<td>Reading Machine</td>
</tr>
<tr>
<td>Reading Machine</td>
<td>Ramp</td>
</tr>
</tbody>
</table>

These examples suggest three factors that affect the extent to which different accommodations produce third-party benefits: (1) generalizability (whether others can benefit from the accommodation in the present); (2) durability (whether others can benefit from the accommodation in the future); and (3) visibility or notoriety (whether the

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6 Cf. 42 U.S.C. § 12111(9)(A) (2000) (defining “reasonable accommodation” to include “making existing facilities used by employees readily accessible to and usable by individuals with disabilities”); Michael Ashley Stein, The Law and Economics of Disability Accommodations, 53 DUKE L.J. 79, 88 (2003) (describing one category of accommodations as including those that “require[] the alteration or provision of a physical plant, such as ramping a stair to accommodate the needs of an employee who uses a wheelchair” (footnote omitted)).


8 Cf. 42 U.S.C. § 12111(9)(B) (defining “reasonable accommodation” to include the “acquisition or modification of equipment or devices”).
accommodation can be seen or known about by others, to whom it may signal something positive). 9

We can now talk about the above examples in terms of these three factors, starting on the right side of the spectrum in Figure 1. The ramp is generalizable, because it can be used by others; it is durable, because it can be used now and in the future; and it is visible, because it can be seen (or otherwise known about) by those inside and outside the workplace (depending on where it is positioned), who may infer from the ramp’s presence that the workplace is open to people with disabilities. These signals might help to defeat (mal)adaptive preferences among disabled people who otherwise feel unemployable in certain places or unable to accomplish certain tasks. 10 (These examples of course involve diverse kinds of benefits, affecting different groups of people, a complication that I will address in Sections B and C.)

The reading machine may be used by others when the accommodated employee is not using it, so it may be generalizable, and it can be used by others in the future, so it is durable. Note that the reading machine’s generalizability is partially limited by its being rivalrous, in the sense that only one (or possibly a few) can use it at the same time. (The ramp is also somewhat rivalrous, though much less so, because many could use it without interfering meaningfully with anyone else’s use.) The reading machine may not be very visible or notorious, in contrast to the ramp, because it is less likely to be seen by third parties.

Finally, the reader for the blind employee appears, at least superficially, to be neither generalizable, nor durable, nor especially visible.

These factors quickly become more complicated, particularly the visibility/notoriety factor, when a bit of pressure is applied. For example, a reader for a blind employee may talk to people inside or outside the workplace about her job. Or the reader might come to serve other functions, by gaining knowledge about the content of what she reads and lending that perspective, or, in a school setting, by becoming an additional adult in the classroom who can help other children

9 Cf. Stein, supra note 6, at 106-07 (including among the broad social benefits of accommodations “placing people with disabilities in a position to exercise the responsibilities of citizenship, acknowledging that capable individuals have either a ‘right’ or an imperative to work, permitting the disabled to achieve dignity through labor and productivity, and realizing the values of a diverse society” (footnotes omitted)).

or improve overall supervision. Or a business might include in its advertising the fact that it provides a reader for a blind employee. Perhaps, then, it is hard to imagine an accommodation that could never have a third-party benefit, at least of an expressive sort. Moreover, a highly visible ramp may create benefits for some, but costs for others, such as those who find it aesthetically unappealing or resent its presence for other reasons. Such costs are always possible and make Pareto-optimality hard to achieve in this context. As noted, though, the aim here is not to show that benefits exceed costs, but rather to say that there are benefits that are not fully recognized or realized.

B. Usage Versus Attitudinal Benefits

This discussion of factors points us toward an important distinction between types of third-party benefits: the difference between usage benefits and attitudinal benefits. Usage benefits are those benefits that accrue to third parties through their use of the accommodations, directly or indirectly. Thus, an accommodation’s generalizability principally concerns the extent of its usage benefits to third parties. Attitudinal benefits are the benefits that involve changes in attitudes—toward disability, accommodation, and the ADA. An accommodation’s visibility or notoriety affects the extent to which it can create attitudinal benefits. Attitudinal benefits may or may not be considered benefits by the relevant third parties. Rather, they are benefits from the perspective of the statutory aim of integrating people with disabilities into the community and the workplace. Part III focuses on attitudinal benefits, and Part IV elaborates on the relation between attitudinal and usage benefits. The remainder of this Part discusses usage benefits. But first, one further distinction.

C. Second-Versus Third-Party Benefits

We can distinguish between second-party benefits, those that are internalized by the employer, and third-party benefits, those that redound to coworkers or people outside the workplace but do not ultimately benefit the employer. Many or even most third-party benefits

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11 Anecdotal reports suggest that some parents prefer their children to be in classes with a disabled child who is assisted by an aide, who can help out in other ways and improve the child-teacher ratio.

may also be second-party benefits. Indeed, as Michael Stein and others have pointed out, effective accommodations have a number of second-party benefits, such as reduced job turnover and absenteeism. Moreover, if an accommodation increases morale or productivity for coworkers, then an employer may internalize those benefits. In theory at least, employers should be able to pay employees less (or charge customers more) to the extent that their jobs (or products) offer more benefits. Even if transaction costs prevent immediate renegotiation of wages or prices, later pay raises or pricing might well adjust to reflect such benefits.

Even in a frictionless world, though, not all third-party benefits will be internalized, including some that are particularly relevant to the subject of this Article. For instance, improved attitudes toward people with disabilities or the ADA, the subject of Part III, are unlikely to be internalized by the employer. Thus, as with public goods more generally, employers may not have an incentive to create such benefits. Note also that the line between second- and third-party benefits is

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13 See Stein, supra note 6, at 104 (“One federal agency, for example, found that, on average, for every dollar spent on accommodation, companies saved $50 in net benefits. Thus, although more than one-half of accommodations cost less than $500, in two-thirds of those cases companies enjoyed net benefits exceeding $5000.” (footnotes omitted)). For the claim that accommodations may also turn out to be good investments for the employer—by increasing productivity for that worker or other workers, or by attracting new customers—see Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 DUKE L.J. 1, 23 (1996) (“The cost of reasonable accommodation may pay for itself in the greater productivity of the disabled worker.”); J.H. Verkerke, Is the ADA Efficient?, 50 UCLA L. REV. 903, passim (2003) (arguing that the statutory requirement of reasonable accommodation promotes labor market efficiencies by combating scarring and churning). On the overlooked second-party benefits that would have accrued from giving Barnett the accommodation of keeping his mailroom job, see Seth D. Harris, Re-Thinking the Economics of Discrimination: U.S. Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory, 89 IOWA L. REV. 123, 178-79 (2003), and infra note 78 (discussing Harris on this point). On the business case for accommodation and integrating disabled people into diversity initiatives more generally, see CHARLES A. RILEY II, DISABILITY AND BUSINESS: BEST PRACTICES AND STRATEGIES FOR INCLUSION (2006).

14 These fall into the category of the less calculable “ripple effects,” identified by Peter Blanck and discussed by Stein, that include “purported higher productivity, greater dedication, and better identification of qualified candidates for promotion”; “employers may also enjoy fewer insurance claims, reduced post-injury rehabilitation costs, [and] an improved corporate culture.” Stein, supra note 6, at 105 (footnotes omitted) (discussing PETER DAVID BLANCK, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT: TRANSCENDING COMPLIANCE: A CASE REPORT ON SEARS ROEBUCK AND CO. (1994), available at http://www.annenberg.northwestern.edu/pubs/sears/).

15 However, improved attitudes toward people with disabilities might improve teamwork or morale, and thus increase productivity.
not always easy to draw. For example, as Stein observes, the benefits to society of integrating people with disabilities—such as a societal culture of productivity encouraged by increased employment levels and self-sufficiency among people with disabilities generally—can help to create better labor pools, which may ultimately benefit employers.  These are benefits that arise from effective accommodations in general, rather than from any particular accommodations. For the purposes of this Part, it is not important to determine which third-party benefits will be internalized. The aim here is to identify the ways that accommodations can have third-party benefits and to outline key categories of such benefits.

D. Types of Third-Party Usage Benefits

Accommodations positively affect workplaces and other environments in a variety of ways, as several commentators have noted. This Part outlines specific types of usage benefits in order to help make visible their range and significance: (1) material benefits, (2) physical benefits, (3) hedonic benefits, (4) relational benefits, and (5) experimentation benefits. I will briefly discuss the first three categories, which are relatively self-explanatory and continuous with the preceding discussion, before turning to the last two categories. These five categories are not discrete, but overlapping.

(1) Material. Accommodations may materially benefit others in the workplace by making them more productive or reducing their workload. New equipment or an office redesign that makes lifting
easier for an employee with a disability may make lifting easier for everyone.\textsuperscript{18} Taller dividers on office cubicles to help one employee with a cognitive or psychiatric disability to concentrate may have the same benefit for others, more or less disabled.\textsuperscript{19} And, of course, ramps and elevators make it easier for anyone to move heavy objects or objects on wheels.

(2) Physical. Some accommodations may have health benefits for others in the workplace. An employee whose asthma requires special air filtering or a smoke-free environment may improve the air quality for others.\textsuperscript{20} Lifting equipment designed or purchased for the employee with a back injury may not only increase productivity but may also ease back strain for others—including those who currently have no back problems or only minor back problems. Note here that the sub-ADA population may include anyone in the workplace who has

\textsuperscript{18} Cf. Penny v. UPS, 128 F.3d 408, 415-17 (6th Cir. 1997) (discussing an employee’s request for, inter alia, new equipment to help delivery of heavy packages despite a back impairment, and ultimately dismissing the claim on the basis that his back impairment was not substantially limiting enough).

\textsuperscript{19} Cf. EEOC, EEOC NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997) [hereinafter EEOC, ENFORCEMENT GUIDANCE ON PSYCHIATRIC DISABILITIES], available at http://www.eeoc.gov/policy/docs/psych.html ("[R]oom dividers, partitions, or other sound-proofing or visual barriers between workspaces may accommodate individuals who have disability-related limitations in concentration."); cf. also JAN, Accommodation Examples: Psychiatric Impairments, http://www.jan.wvu.edu/soar/psych/psychex.html (last visited Feb. 15, 2008) (discussing other accommodations for concentration difficulties caused by psychiatric disabilities, such as quiet time away from other tasks to work toward goals uninterrupted, headphones to listen to music for relaxation during some tasks, weekly goal meetings with supervisors that are recorded for later review and recall, and a more flexible schedule to make time for counseling and exercise).

\textsuperscript{20} Cf. Webb v. Clyde L. Choate Mental Health & Dev. Ctr., 230 F.3d 991, 994, 998-99 (7th Cir. 2000) (discussing requests by an asthmatic employee for, inter alia, a ventilated office and prior notice of use of chemicals, and ultimately dismissing the case on the basis that, inter alia, the plaintiff is not substantially limited in the major life activity of working); Hendler v. Intelecom USA, Inc., 963 F. Supp. 200, 207, 209 (E.D.N.Y. 1997) (declining to award summary judgment to an employer, on the grounds of lack of disability or insufficient evidence of a hostile work environment, in a case involving an asthmatic plaintiff who had been promised a smoke-free work environment). By contrast, in a move that is relevant to the upcoming Section on designing accommodations, an accommodation that involves merely transferring the asthmatic employee to another work space with less allergens may create third-party costs by requiring another coworker to work in the more allergenic space. Cf. Cassidy v. Detroit Edison Co., 138 F.3d 629, 634-35 (6th Cir. 1998) (discussing an employee’s request for a transfer to an allergen-free work area and rejecting this request as too vague to be reasonable or as unavailable). Also, of course, a no-smoking rule may be a health benefit to all, but it is nonetheless a hedonic cost to those who wish to smoke, as the allegedly harassing comments in the Hendler case reflect. See 963 F. Supp. at 202.
minor pain or difficulty with particular activities; there may also be a
disproportionate benefit to certain groups, such as older workers, who
are more likely to develop disabilities and who may also be more likely
to fall into this sub-ADA grouping.\(^{21}\) Ergonomic furniture and office
design also benefit coworkers by easing strain and preventing inju-
ries.\(^{22}\) This is well known to the many academics who have sought assis-
tive devices to prevent the worsening of mild forms of repetitive
stress injuries, which, under \textit{Toyota Motor Manufacturing, Kentucky, Inc. v. Williams}, are unlikely to constitute ADA disabilities even if they become more serious.\(^{23}\)

\textbf{(3) Hedonic.} Some accommodations involve changes to the
workplace that make some workers happier in their jobs. For in-
stance, if early morning team meetings are moved later in the day to
accommodate an employee whose psychotropic medications make it
difficult to get up in the morning, coworkers who are not early risers
may benefit.\(^ {24}\) (This accommodation, like others, could also create
costs for some third parties—for example, a coworker who prefers
early morning meetings.\(^ {25}\) ) Accommodations for employees with
mental illness sometimes involve the development of new workplace

\(^{21}\) \textit{See, e.g.,} RILEY, supra note 13, at 82. Riley notes that “one-fourth of all disabili-
ties are incurred by those who are sixty-five and older.” \textit{Id.} Riley is not specifically re-
ferring to the ADA’s narrow definition of disability (as interpreted by the courts), so
surely many older folks are also among the sub-ADA disabled. They may constitute an
even greater fraction of the sub-ADA group, to the extent that many of their disabilities
develop gradually with age.

\(^{22}\) According to Beth Loy and John Greer,

\begin{quote}
Ergonomics is the science of fitting jobs to people. The discipline encom-
passes a body of knowledge about physical abilities and limitations as well as
other human characteristics that are relevant to job design. Essentially, ergo-
nomics is the relationship between the worker and the job and focuses on the
design of work areas to enhance job performance. Ergonomics can help pre-
vent injuries and limit secondary injuries as well as accommodate individuals
with various disabilities, including those with musculoskeletal disorders . . . .
\end{quote}


\(^{23}\) \textit{See} 534 U.S. 184, 202-03 (2002) (reversing the lower court decision that the
plaintiff’s carpal tunnel syndrome was a disability and remanding for a reevaluation of
the facts under a standard requiring that her impairment substantially limit her in
tasks that are of central importance to most people’s daily lives).

\(^{24}\) Interview with Lauren B. Gates, Senior Research Scientist \& Research Dir., Ctr.
for Soc. Pol’y \& Practice in the Workplace, Columbia Univ. Sch. of Soc. Work, in N.Y.,
N.Y. (Nov. 21, 2006).

\(^{25}\) \textit{See infra} Part I.F (discussing how the design of accommodations can affect the
extent of third-party benefits as opposed to costs).
policies and practices: training in management skills for supervisors, better clarification of work-team members’ talents and responsibilities, or the creation of clearer and more thoughtful policies about violence in the workplace.\textsuperscript{26} Accommodations for concentration problems—such as quiet, uninterrupted time to complete tasks, or the option to wear music headphones while doing noninteractive work—may also be useful to nondisabled (and to sub-ADA-disabled) employees. Changes such as these may make employees not only more productive, but more content.

\textbf{(4) Relational.} Accommodations may also have relational benefits. That is, an accommodation may create benefits for third parties by permitting a particular disabled person’s presence in the workplace. Relational benefits are generally attitudinal benefits, which are the subject of the next Part, rather than usage benefits. But there are several kinds of relational benefits that fall more within the domain of usage benefits, in the sense that they directly improve the work or lives of third parties. Most simply, relational benefits include the benefits of having a particular individual, with her particular skills and talents, in the workplace; these benefits are due to the accommodation because the accommodation makes it possible for the accommodated worker to enter or remain in the workplace. People with disabilities may develop distinct skills or talents, or more efficient ways of doing things, to compensate for their impairments or the challenges pre-

\textsuperscript{26} See, e.g., Interview with Lauren B. Gates, \textit{supra} note 24; see also Susan Sturm & Howard Gadlin, \textit{Conflict Resolution and Systemic Change}, 2007 J. DISP. RESOL. 1, 22-27 (discussing, in an empirical study of the work of the Ombudsman’s Office at the NIH, systemic interventions in response to individual conflicts surrounding mental illness). On improved interactions with coworkers and other indirect benefits of accommodations, see Helen A. Schartz, D.J. Hendricks & Peter Blanck, \textit{Workplace Accommodations: Evidence Based Outcomes}, 27 WORK 345 (2006), who find the following:

The most frequently reported indirect benefits were improved interactions with co-workers (69.3%), increased overall company morale (60.7%), and increased overall company productivity (57.0%). Other reported indirect benefits included improved interactions with customers (42%), increased workplace safety (42.3%), and increased overall company attendance (36.0%). Increased profitability was reported by more than a quarter of the respondents (29.4%). Increased customer base (15.5%) and other indirect benefits (9.0%) were reported.

\textit{Id.} at 349. See also Helen A. Schartz et al., \textit{Workplace Accommodations: Empirical Study of Current Employees}, 75 Miss. L.J. 917, 943 (2006) (concluding from an empirical study that although most accommodation costs are low, the resultant benefits are relatively high).
sented by a disabling environment.\textsuperscript{27} There is also research that suggests potential cost savings to retaining an employee rather than going through the process of finding and training a new employee.\textsuperscript{28} Accommodations may help retention by allowing a particular employee to remain in the workplace, and, some have argued, may create particularly loyal employees.\textsuperscript{29} The administrative burdens of hiring new employees translate not only into costs to employers, but also create potential burdens that fall directly on other employees who must help to find, train, and build relationships with new employees.\textsuperscript{30} Retaining an employee by accommodating her can avoid such costs to coworkers.

\textbf{(5) Experimentation.} Necessity inspires invention, in the realm of disability as elsewhere. Experimentation benefits include both new technologies and improved processes.

\textit{(a) Technologies.} Experimentation is a general theme of disability accommodation, inside and outside the workplace. Many technologies developed for people with particular disabilities are also useful for nondisabled people, including closed captioning, voice-to-text tech-

\textsuperscript{27} See, e.g., Harlan Hahn, \textit{New Trends in Disability Studies: Implications for Educational Policy}, in \textit{INCLUSION AND SCHOOL REFORM: TRANSFORMING AMERICA’S CLASSROOMS} 315, 327 (Dorothy Kerzner Lipsky & Alan Gartner eds., 1997) (“Many young people with disabilities have displayed capacities to respond successfully to unusually difficult challenges that are similar to the traits educators have increasingly identified as the hallmark of students who are perceived as especially talented or gifted. People with disabilities also may acquire unusual adaptation skills as a result of their continuous efforts to cope with an inhospitable environment.”).

\textsuperscript{28} See, e.g., Schartz, Hendricks & Blanck, \textit{supra} note 26, at 349 (“The vast majority of employers reported that the accommodation allowed the company to retain (87.1%), hire (16.7%), or promote (11.5%) a qualified or valued employee. Almost three-quarters (73.8%) reported that the accommodation increased the affected employee’s productivity. More than half (55.4%) reported that the accommodation eliminated the cost of training a new employee. More than half (50.5%) reported it increased the accommodated employee’s attendance. Other common direct benefits reported include saving on workers’ compensation and other insurance (41.8%), and increased diversity of the company (43.8%).”); Stein, \textit{supra} note 6, at 104-05 (discussing research indicating that “the provision of accommodations [is] often profitable for employers”); see also Verkerke, \textit{supra} note 13, at 935 (contemplating the conditions where the ADA’s accommodation requirements may help to avoid the costs associated with churning and scarring).

\textsuperscript{29} See, e.g., RILEY, \textit{supra} note 13, at 126 (quoting a publicist for Sears on the “element of loyalty” that can be created by accommodating new or existing employees); see also \textit{supra} note 28 (quoting relevant findings by Schartz, Hendricks & Blanck).

\textsuperscript{30} See generally \textit{supra} note 28 and accompanying text.
nologies, scanners, large print books and readers, books on tape, sock sorters, and the phonograph. 31

These broader uses of disability-related innovations might be analogized to what evolutionary theorists call exaptations, which are traits (i.e., aptations, the progress-neutral variation on the term adaptation) that emerge for one purpose and then turn out to be useful for another purpose. 32 For example, in certain species of birds, evolutionary evidence suggests that wings and feathers were adapted for insulation or for catching prey, and then later exapted for flying. 33 Likewise, closed captioning was developed for deaf watchers of television, and then exapted for the public in airports or sports clubs where the sound of the television would be inaudible or aggravating. 34 (Apparently, closed captioning is also used on national television in China, where the variety of dialects means that no single version of the spoken language would be comprehensible to much of the population. 35) Similarly, “baby sign language,” an exaptation of American Sign Language, has recently become popular among parents in the United States, because children can learn to communicate by signing before they are able to talk. 36

(b) Processes. Disability accommodations can lead not only to innovative technology, but also to innovative processes. For instance, various educational techniques devised for students with disabilities help many other kinds of students learn more effectively. Some educators

31 See, e.g., Riley, supra note 13, at 81; Eric A. Taub, The Blind Leading the Sighted, N.Y. Times, Oct. 28, 1999, at G1. For an entertaining example, see A Small, Belated Step for Grammarians, N.Y. Times, Oct. 3, 2006, at A19, which recounts how a computer programmer found evidence that Neil Armstrong said “one small step for a man” rather than “one small step for man,” resolving a longstanding dispute, by using software designed to allow people with certain disabilities to communicate through computers using nerve impulses.


33 Id. at 8.

34 Like the example in the Introduction, closed captioning is another accommodation that may be useful to many audience members at conferences and in other learning environments. Only a fraction of people learn well aurally; others learn better in other ways, such as visually. On this basis, one author has argued that disability accommodations in law school classrooms—which sometimes involve professors changing their teaching methods—can benefit many students. Jennifer Jolly-Ryan, Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and the Law Teacher as a Learner, 6 Nev. L.J. 116, 146-55 (2005).

35 Thanks to Ben Liebman for this point.

have formalized this approach as Universal Instructional Design (UID), a term that piggybacks on the general principle of Universal Design.\(^{37}\) (Universal Design is a systematic approach to designing environments and products so that all people can use them without modification.\(^{38}\) Others have characterized disability mainstreaming as a crucial design feature of the so-called third wave of educational reform, which views differences as strengths, emphasizes active learning, and aims to prevent learning disabilities by improving the overall educational program.\(^{39}\)

In the workplace, accommodations may lead to changed policies and practices that have wider applicability. For instance, accommodation...
tions for employees with psychiatric disabilities often involve modifications of schedules or workplace practices or policies, as opposed to changes in the physical environment. These modifications operate as experiments in what is possible or desirable in the workplace. For instance, giving a disabled employee the option of flextime—to work late one day in order to leave work early the next day for a therapy appointment—may reveal flextime to be feasible for many. In addition, as noted earlier, the presence of mental disability may require better management, which can lead to improved institutional processes.

Note that experimenting with processes may also challenge established conventions or norms. For instance, in a context far from the workplace, Simi Linton tells of a blind friend who is permitted to touch works of art at the Museum of Modern Art, wearing rubber gloves—a practice that is at once controversial among curators and yet linked to larger trends in conceptual art and curatorial practices that emphasize experiential appreciation of art.

It is difficult to determine precisely which types of accommodation for psychiatric disabilities are most common, since, as others have noted, there is no consistent mode of categorization of accommodations for psychiatric disabilities, making it difficult to compare studies of these accommodations to one another. See Kim L. MacDonald-Wilson et al., An Investigation of Reasonable Workplace Accommodations for People with Psychiatric Disabilities: Quantitative Findings from a Multi-Site Study, 38 COMMUNITY MENTAL HEALTH J. 35, 36 (2002). But it seems fair to say that accommodations for people with mental illness more often involve changes to policies or practices. Cf. 42 U.S.C. § 12111(9)(B) (2000) (defining “reasonable accommodation” as including “job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . appropriate adjustment or modifications of examinations, training materials or policies, . . . and other similar accommodations for individuals with disabilities”); Stein, supra note 6, at 88 (noting that “[r]easonable accommodations” can involve not only the physical alteration of the workplace, but also “the alteration of the way in which a job is performed”). For instance, three representative accommodations requested for psychiatric disabilities are (1) modifying an employee’s schedule—e.g., allowing an employee to leave one hour early one day a week for therapy; (2) changing supervisory practices—e.g., allowing a job coach to participate in meetings with supervisors, or modifying how a supervisor gives criticism or assignments; and (3) changing where or how an employee works—e.g., allowing an employee to telecommute.

See supra note 26 and accompanying text (discussing relevant findings by Sturm and Gadlin, among others); see also infra Part IV.B (discussing Gates’s work on this topic in more detail).
(c) Contingent Versus Automatic Benefits. Experimentation benefits highlight an interesting wrinkle to the third-party benefits of some accommodations: these benefits may not automatically accrue to third parties. Rather, third-party benefits are often contingent on intervening steps—on the success of the experiment and an employer’s (or sometimes a coworker’s) recognition of that success. If accommodation experiments are successful from the employer’s perspective—because, for example, the accommodations reduce costs or increase productivity—the employer may permit other employees (disabled, nondisabled, or sub-ADA-disabled) to avail themselves of these modified arrangements. For instance, a telecommuting initiative—an accommodation that will be discussed in more detail later—can reduce the costs of office space and give employers and employees efficiency gains by reducing time spent commuting.

Alternatively, experiments prompted by accommodation may benefit third parties if the experiments give information to coworkers about what is possible in the workplace. This is akin to an argument made by Ruth O’Brien that the ADA has significant potential to make the workplace far more tailored to individuals, in part because the interactive process for disabled people will reveal information about how workplaces can or could operate. This additional information may give coworkers ideas for improvements or leverage to negotiate

to touch the dancers. The dancers themselves were involved in the proposal, as the owner of the club explained in his letter to the council seeking the variance:

I have conducted a “straw poll,” and eleven of the fifteen dancers consulted would possibly agree to controlled touching in special circumstances. The consensus among the eleven was that any touching should be voluntary, restricted to the breasts, and should occur only when the dancer is wearing a bra (i.e., not topless). Furthermore, it would be acceptable only where the dancer had full control, and the proposal is that she would take one hand/arm of the blind customer and place it on her breast(s), whilst dancing, for an agreed time.

Letter from Kenneth McGrath, *Dancer in the Dark*, Harper’s Mag., Oct. 1, 2001, at 19, 22. To some, a reconsideration of no-touch policies in museums, or in strip clubs, may be a cost—threatening whatever those rules were meant to protect—while for others this rethinking may be an instance of disability creating welcome pressure to reconsider path-dependent practices that may or may not be well justified. As Linton puts the latter view, “Maybe, though, blind people are forcing the rest of us to reconsider the social conventions and rules that govern breast touching, bronze and otherwise.” Linton, supra, at 218.

43 See Stein, supra note 6, at 105-06 (citing Blanck, supra note 14).
44 See infra Part III.B.
45 See Ruth O’Brien, BODIES IN REVOLT 2, 135 (2005) (arguing that the ADA’s employment provisions “create a model for interjecting a notion of workplace need that is based on our individuality”).
with employers. The current EEOC guidelines on disclosure of accommodations inhibit this kind of information transmission, however, as I discuss in Part IV.

The distinction between contingent and automatic benefits helps to sort accommodations with reference to whether their third-party benefits are predictable or unpredictable, immediate or long-term. As we shall see later in relation to telecommuting, though, what could be a contingent benefit—if an employer decides on a case-by-case basis whether to allow others to telecommute—can become effectively automatic if the employer takes the occasion of accommodating the person with a disability to devise a broader structural or policy change to the workplace.

E. Why Haven’t They Done It Already?

One might ask: if telecommuting or some other accommodation is so broadly beneficial, then why doesn’t our hypothetical employer already permit it? This is an intriguing question, and one that could be asked about any of the examples discussed in this Part, though it is particularly suggested by the experimentation examples. The first answer is that, as I have noted, nothing in this analysis requires that the benefits exceed the costs, particularly to the employer, so employers simply may not have incentives to create these initiatives in the absence of accommodation demands. 46

The more interesting answer concerns those situations in which employers may not take certain steps, even if the benefits the employer can internalize would ultimately outweigh the costs. In short, workplace rules and practices may be subject to inertia or otherwise self-reinforcing. Though markets certainly encourage much innovation, market forces do not reveal all effective practices, particularly those involving workplace rules, for a number of reasons.

Status quo bias and system justification may support existing workplace practices. 47 In Martha Minow’s words, we tend to assume

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46 In addition, there may be greater up-front costs in a systemwide change.

47 See, e.g., Gary Blasi & John T. Jost, System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice, 94 CAL. L. REV. 1119, 1119 (2006) (discussing, as the focus of “system justification theory,” “the motive to defend and justify the social status quo, even among those who are seemingly most disadvantaged by it”); Russell Korobkin, The Endowment Effect and Legal Analysis, 97 NW. U. L. REV. 1227, 1228-29 (2003) (explaining “status quo bias” as the tendency of “individuals . . . to prefer the present state of the world to alternative states, all other things being equal”); Michelle A. Travis, Recapturing the Transformative Potential of Employment Discrimination Law, 62
that “the status quo [is] good, natural, and freely chosen.” Individual cognitive shortcomings can be magnified rather than corrected by firm structure, and a firm’s mechanisms for coping with individual shortcomings can lead to pathologies of their own. Organizations may develop routines to facilitate smooth operations, but these useful structures can have a “dark side”: for instance, they may lead decision makers to approach problems with a particular decision frame in mind, and thus cause them to ignore new or unfamiliar information and to underestimate risks. Changes prompted by disability may well involve changes to the basic environment or assumptions of a workplace, changes that might not otherwise come readily to mind. As John Donohue has observed, responding in another context to the claim that if a practice is efficient, it would have been adopted already, “The human mind finds it far easier to make the best out of the current state of the world than it does trying to conceive all of the ways in which the state of the world itself can be altered.”

The meaning of this of course depends on what it means to “make the best out of the current state of the world” as opposed to reimagining the state of the world. But it makes sense that disability would help us see possible ways to improve the state of the world for everyone. Disabilities vary widely, and disability is also typically on a spectrum with nondisability, and so disability occurs when some interaction between a person’s body or mind and the environment is so costly that it substantially limits that person. But many other people may be experiencing costs along those lines as well; those costs just don’t rise to a level that causes people to take notice or find solutions.

\[\text{WASH. \\& LEE L. REV. 3, 19-21 (2005) (using “system justification theory” to explain the “workplace essentialism” that prompts courts to treat the status quo in the workplace—especially the “full-time face-time norm”—as essential and thus impervious to ADA and Title VII claims that would involve considering alternative ways to do the same jobs).}\]


\[\text{See generally Diane Vaughan, The Dark Side of Organizations: Mistake, Misconduct, and Disaster, 25 ANN. REV. SOC. 271 (1999).}\]

\[\text{See Bamberger, supra note 49, at 420-23.}\]

\[\text{John J. Donohue III, Commentary, Opting for the British Rule, or If Posner and Shavell Can’t Remember the Coase Theorem, Who Will?, 104 HARM. L. REV. 1093, 1115 (1991). For some examples of where markets fail to produce benefits that would be internalized in the environmental context, see generally RICHARD H. THALER \\& CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (forthcoming 2008).}\]
For example, think of curbs, which, in the absence of curb cuts, require everyone to step up. This is a cost for people with minimally bad knees; in fact, it is some cost for everyone. But society may notice the cost, and devise the solution of curb cuts, only when faced with people for whom the costs are truly significant.

F. Designing Accommodations: A Broader Spectrum of Costs and Benefits

Different accommodations can create more or fewer benefits to third parties; they can also create third-party costs or benefits. This Section therefore returns to the spectrum introduced in Section A and broadens it to include costs as well as benefits. This broader spectrum shows the significance of the design and choice of accommodations, as well as the rules or conventions surrounding them.

If a disabled employee is unable to perform certain marginal functions of her job, then her coworkers may have to perform those functions instead. If those tasks are unappealing or add to a busy co-worker’s set of tasks, then they simply create costs. By contrast, if an employee’s disability prompts a change to the workplace—to its physical structure or to the structure of jobs—then that accommodation may create a variety of benefits or costs for other workers.

Think in the public accommodations context of the difference between disabled parking spaces and curb cuts. Both benefit wheelchair users, but parking spaces are apparently zero-sum, while curb cuts can be used by everyone and, once constructed, create costs for few. In the language of public goods, parking spaces are rivalrous while curb cuts are (relatively) nonrivalrous. Similarly, writing about parent-centered policies, Mary Anne Case contrasts those initiatives that benefit many with those that favor parents to the detriment of nonparents:

Compare two different ways of arguing that greater access to public space be afforded to parents and their children: Joan Tronto laments on behalf of parents “the absence of viable forms of social support that range from adequate public transportation to ‘safe’ public spaces such as neighborhood streets on which children play.” Hewlett and West, by contrast, propose that “[s]uburban communities could offer priority

53 See also infra Part I.F (discussing curb cuts as an example from the public accommodations context).

54 Many people have made the point about curb cuts, including, for example, Mashaw, supra note 17, at 223-24. On the other hand, curb cuts may create costs for people with vision impairments, who cannot feel where the curb ends (though ridges can help with this); they may also invite the nuisance of cyclists cycling on sidewalks (though the curb cuts are surely a boon to the cyclists).
parking in shopping malls for pregnant women and parents with small children (a few do already), and the federal government could offer free or discounted admission to national parks, monuments, and museums so that moms and dads could always afford to accompany their children.\textsuperscript{55}

“Not only,” Case observes, “does the former proposal sound like an equal right and the latter like a special right, the former is coalition building, the latter has real zero-sum potential.”\textsuperscript{56}

We can extend our spectrum from Figure 1 to take into account that an accommodation may create costs as well as benefits for third parties. Curb cuts, like improved public transportation, are available for use by everyone; disabled parking spaces, like priority parking for parents, are for use only by the designated group, although they were formerly available to everyone.\textsuperscript{57}

\begin{figure}[h]
\centering
\begin{tabular}{lll}
\hline

\textbf{More Costs} & \textbf{(Context)} & \textbf{More Benefits} \\

\textbf{Disabled Parking Spaces} & \textbf{(Disability)} & \textbf{Curb Cuts} \\

\textbf{Priority Parents Parking} & \textbf{(Parents)} & \textbf{Improved Public Transportation} \\
\hline
\end{tabular}
\caption{An Expanded Spectrum from Third-Party Costs to Benefits}
\end{figure}

Disabled restrooms occupy a middle (or uncertain) ground, depending largely on how they are understood and used, which varies by local norms. In Britain, the use of accessible toilets by those who are not disabled is apparently a source of significant debate and animosity. These tensions have led to complaints by less visibly disabled people who may encounter interpersonal obstacles in trying to use accessible toilets.\textsuperscript{58} By contrast, in the United States, the issue seems


\textsuperscript{56} \textit{Id}.

\textsuperscript{57} For an interesting discussion of reports on how the broader public informally enforces the rules restricting designated parking spaces to people with disabilities, see Geoffrey P. Miller, \textit{Norm Enforcement in the Public Sphere: The Case of Handicapped Parking}, 71 GEO. WASH. L. REV. 895 (2003).

relatively less fraught, though a measure of uncertainty surrounds the question—as indicated, for instance, by an episode of Randy Cohen’s call-in radio program, The Ethicist, dedicated to the topic. The norm seems contested in the United States, but generally more favorable toward nondisabled people using accessible stalls than in Britain.

Figure 3: A Spectrum of Public Accommodations Examples

<table>
<thead>
<tr>
<th>More Costs</th>
<th>More Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disabled Parking Spaces</td>
<td>(Accessible Toilets)</td>
</tr>
</tbody>
</table>

If norms invite everyone to use these toilets, then nondisabled people may benefit from roomier stalls, particularly if they have luggage or children in tow. But if these toilets are used only by people with disabilities, their presence may mean fewer available restrooms, longer waits, and possibly even smaller (inaccessible) stalls. One difficult question, though, is whether use of these stalls by the broader public interferes with their use by people with disabilities. Though in principle most people would presumably defer to a person with a dis-
ability who wanted to use an accessible stall first, people do not always behave in a principled manner, and not all relevant disabilities are visible. Moreover, once a nondisabled person is in the stall, it is then temporarily unavailable to disabled users. The Article will return to the question of tradeoffs, but the important point here is that the example of accessible toilets shows that the social meaning given to the accommodation—or the rules that dictate how it is used—can determine whether it has costs or benefits to third parties. Accessible toilets therefore belong on the spectrum somewhere between disabled parking spaces, which are convenient spots that third parties are legally prohibited from using, and curb cuts, which everyone can use.

The design of accommodations—not only the rules about their use—can affect whether accommodations have third-party benefits or costs. Turning to the workplace, we can see this through the example of accommodations for impairments that limit lifting. An employer faced with a request for accommodation from an employee whose back pain prevents her from lifting heavy objects has several options, as depicted in Figure 4.

<table>
<thead>
<tr>
<th>More Costs</th>
<th>More Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rotate heavy lifting to coworkers</td>
<td>Limited-use equipment</td>
</tr>
<tr>
<td></td>
<td>Redesign workplace to minimize lifting for all</td>
</tr>
</tbody>
</table>

On the left (costs) side of our spectrum, an employer could redistribute all the heavy lifting to coworkers. This is likely reasonable if heavy lifting is a marginal, rather than an essential, function of the job, and the redistribution does not create an undue hardship by preventing

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61 This norm was, for instance, agreed upon both by the questioner and by Cohen in the episode of *The Ethicist* referred to above. See supra notes 59-60.

62 See infra Part III.C.

63 For cases discussing some of these options, see, for example, Mays v. Principi, 301 F.3d 866, 868 (7th Cir. 2002) (accommodating a nurse’s back injury by reassigning her to positions (first the temporary position of light-duty nurse and then to a clerical position) where no heavy lifting is required); Deane v. Pocono Med. Ctr., 142 F.3d 138, 141 (3d Cir. 1998) (discussing a nurse’s request for light-duty work to accommodate a cartilage tear in her wrist); Penny v. UPS, 128 F.3d 408, 410 (6th Cir. 1997) (involving a UPS employee who requested, as accommodations for back and shoulder injuries, a shorter route with fewer boxes to deliver, a truck with power steering, and “rollers and ‘two wheelers,’” described as “aids” to help “handle heavy packages”).
coworkers from performing the essential functions of their jobs.\textsuperscript{64} Because coworkers would have additional burdens, this accommodation presumably creates third-party costs.

On the right (benefits) side of the spectrum, an employer could instead purchase equipment and redesign stock rooms so that no employees have to lift heavy objects. For certain jobs, movable shelves and automated trolleys could replace employee lifting, or at least shift all lifting to the less straining waist-height level. Ergonomic design of workplace keyboards and other facilities has a similar effect.\textsuperscript{65} Reducing physical strain for all employees creates physical third-party benefits. These benefits may also be internalized by employers through reduced injuries and workers’ compensation costs.\textsuperscript{66} Because the accommodations are both durable and generalizable, their benefits could be substantial.\textsuperscript{67}

Somewhere in the middle of the spectrum, the employer could purchase a limited amount of assistive equipment that could be used by the disabled employee as needed, and used by others when that employee is not present or does not need it. The equipment could at least prevent third-party costs, because it would eliminate the need for coworkers to take on extra lifting. In addition, the rules concerning the distribution of this equipment would dictate the extent to which it benefits third parties. Thus, where the accommodation falls on the spectrum of third-party costs to benefits depends, in part, upon its design.

This point about the design of accommodations also further highlights a distinction between types of accommodations that benefit third parties. That is the distinction, mentioned briefly above, between those accommodations that are universally designed (nonrivalrous) and those that are zero-sum or somehow limited in supply (rivalrous). The redesigned stock room is an example of Universal Design, whereas lifting equipment can be used by only one person at a time and thus is limited in supply. Where feasible, Universal Design can be expected to benefit

\textsuperscript{64} See supra note 182 and accompanying text (discussing relevant agency guidance on third-party costs and undue hardship). Compare Deane, 142 F.3d at 147-48 (concluding that lifting is not an essential function of a nurse’s job), with Mays, 301 F.3d at 869, 871 (concluding that lifting more than ten pounds is an essential function of a nurse’s job, and noting, in dicta, that being able to lift more than ten pounds is probably not a major life activity).

\textsuperscript{65} See supra note 22 (discussing how ergonomics not only accommodates individuals with disabilities, but also helps prevent primary and secondary injuries).

\textsuperscript{66} See supra note 28 (quoting relevant findings by Schartz, Hendricks & Blanck).

\textsuperscript{67} See supra Part I.A (discussing the terms generalizability and durability).
more people than zero-sum accommodations. But even apparently zero-sum accommodations can benefit third parties. As discussed, their use can be allocated to give priority to employees with disabilities, while also permitting other users to benefit when the accommodations are not being used by those who require them. One interesting question that deserves empirical study is whether instances of reverse integration—such as including nondisabled people in contexts principally populated by people with disabilities, or allowing nondisabled people some limited access to the scarce resources of unusually beneficial disability accommodations (such as touching art in museums)—could counteract any of the stigma of disability.

This Part has discussed a few of the many ways accommodations can create benefits to third parties. Surprisingly, as the next Part shows, courts and other entities have utterly failed to see, much less to account for, these benefits.

II. NEGLECTED BENEFITS

[T]he word “reasonable” in the term “reasonable accommodations” . . . means that an employer would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.

Vande Zande v. Wisconsin Department of Administration

68 See supra note 38 and accompanying text (explaining Universal Design); see also Mace, supra note 38 (“Universal design broadly defines the user. . . . Its focus is not specifically on people with disabilities, but all people.” (emphasis omitted)).

69 Indeed, permitting or inviting nondisabled people to use apparently zero-sum accommodations in a limited way might even create cachet or desire in place of stigma. Exclusive or limited access to something can make people want to join it; one might think here of exclusive clubs or roped-off VIP sections. Ruth Colker, in criticizing Kelman and Lester for assuming that separate classrooms for disabled students must be stigmatizing, tells a story that might suggest some of the kinds of accommodations that could create these effects. She describes a special education classroom called the “Teddy Bear” room, which a few nondisabled students were routinely invited to join, and which the select nondisabled students volunteered to join, presumably because of its name and atmosphere. Ruth Colker, Anti-Subordination Above All: A Disability Perspective, 82 Notre Dame L. Rev. 1415, 1462 n.264 (2007) (discussing MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (1997)). Colker, however, does not see the “Teddy Bear” room as having positive effects on attitudes toward disability since the students were unaware that the room had anything to do with disability: id. at 1463 n.264. But if the disability connection were known, then perhaps something like the “Teddy Bear” room (i.e., with its intensive resources and appealing connotations) could help to create positive attitudes toward disability.

70 44 F.3d 538, 542-43 (7th Cir. 1995) (emphasis added).
One of the oft-stated aims of the ADA is to remedy “benign neglect.” Judge Calabresi draws upon this idea in the classic accommodation case of Borkowski v. Valley Central School District: “To avoid unfounded reliance on uninformed assumptions,” Calabresi observes, judges cannot simply “rely on intuition” about what are essential functions of a job or (un)reasonable accommodations. Whether disability discrimination consists principally of benign neglect, animus, stereotyping, or something else, is a contested point. For my purposes, the phrase benign neglect gestures toward a different point altogether.

What the ADA does not remedy—and indeed may even aggravate—is the problem of neglected benefits. By this I mean that courts and agencies frequently fail to notice the benefits of disability accommodation—beyond those to the individual for whom they were designed. Accommodations can have many and varied benefits to third parties, as the previous Part illustrated, and yet those entities that oversee the implementation of the ADA neglect to include such benefits in their analyses. This Part identifies some contexts in which these benefits are neglected and considers reasons for this neglect.

A. Overlooking the Benefits

The ADA requires employers to make “reasonable accommodations” for employees with disabilities, unless those accommodations “would impose an undue hardship” on the employer. As this Part will

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71 See, e.g., Alexander v. Choate, 469 U.S. 287, 295 (1985) (“Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”).

72 63 F.3d 131, 140 (2d Cir. 1995).

73 42 U.S.C. § 12112(b)(5)(A) (2000). The employment title of the ADA prohibits “discriminat[ing] against a qualified individual with a disability because of the disability of such individual.” Id. § 12112(a). The definition of disability under the statute is as follows:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

Id. § 12102(2). To fail to accommodate a disability is to “discriminate,” under the fifth prong of the statutory definition of that term:

[T]he term “discriminate” includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered
show, although key court decisions have interpreted “reasonable[ness]” and “undue hardship” in terms of costs and benefits, these decisions—as well as important agency documents and resources—have overlooked the third-party benefits of accommodations in striking ways.

Accommodations are not nearly as costly as one might expect. Work by Peter Blanck, Helen Schartz, and others indicates that most accommodations cost little or nothing. In addition, though employers may expect accommodations to be costly, follow-up interviews have revealed that, in hindsight, employers often thought that the benefits of accommodations exceeded their costs. (And of course many employees with disabilities do not require accommodation at all.)

Nonetheless, courts and other entities frequently characterize accommodations as costly to employers (and sometimes to coworkers) and beneficial only to the disabled employee for whom they are designed. entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . .

Id. § 12112(b), (b)(5)(A).

74 Blanck’s early work on accommodations at Sears from 1978 to 1997 indicated that most accommodations (72%) cost nothing, and that average accommodation costs ranged from $45 to $121. Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 902 & n.122 (1997). As Michael Stein notes, these results probably did not adequately reflect the potential costs of all accommodations, since they do not include “soft” costs, nor do they include the costs of accommodations that were not granted (which may have been especially costly). Stein, supra note 6, at 108-09. More recently, Blanck, Helen Schartz, and D.J. Hendricks have done further work interviewing the varied employers who contact JAN to seek advice about accommodations. They have found that the employers deem nearly half (49.4%) of the accommodations to have no direct costs, and employers estimate that most (74.1%) cost less than $500 in the first year. Schartz, Hendricks & Blanck, supra note 26, at 348.

75 See, e.g., Kevin Schartz et al., *Employment of Persons with Disabilities in Information Technology Jobs: A Literature Review for “IT Works,”* 20 BEHAV. SCI. & L. 637, 645 (2002) (reporting on studies suggesting that employer concerns about the cost of accommodations are a barrier to employment for disabled people).

76 See Schartz, Hendricks & Blanck, supra note 26, at 350. The authors report that, for those employers for whom net calendar-year effect could be calculated, the mean benefit was $11,335 and the median $1000. The net effect was positive for more than half of this group (59.8%); a wash for just over one-fifth (21.8%); and negative for just under one-fifth (18.4%). The authors do not report whether these results are significant. Id.

77 See id. at 348 (“In almost half of the cases . . . employers reported that there was zero direct cost associated with the accommodation.”).

78 *See infra* notes 80-112 and accompanying text (discussing key cases). Seth Harris has rightly noted the emphasis on costs in *Barnett*, before going on to show the potential first- and second-party benefits of accommodating in that case. See Harris, supra
(1) Courts. What makes an accommodation “reasonable” and not an “undue hardship” is murky business. The courts have given some content to these terms, almost entirely overlooking third-party benefits in the process.

Key circuit-court cases provide the foundation for the legal parameters of the accommodation requirement by proposing some kind of comparison of costs and benefits. But they do not specify which benefits matter to the analysis of whether a particular accommodation is required. In so doing, they entirely disregard the possibility of benefits to nondisabled others and largely overlook the possibility even of benefits to other disabled individuals. 79

The opinion in the foundational accommodation case Vande Zande v. Wisconsin Department of Administration 80 slips between discussing the benefits of accommodation as if they accrue to just one individual.

note 13, at 178-79 (observing that in Barnett Justice Breyer neglects to discuss “the costs of failing to accommodate” Barnett, such as the benefits to the employer as well as Barnett of accommodation (emphasis added)). Harris further notes that reading Barnett’s silence to suggest that the benefits of an accommodation are not relevant would amount to treating Robert Barnett and, by extension, all workers with disabilities as costs to be avoided rather than economic contributors to be valued. The desire to change this stereotype was an important motivation when Congress enacted the ADA.

Id. As Harris points out, broader benefits were imagined by the statute’s supporters in Congress:

The ADA is a major step in the elimination of the barriers that limit full participation.

Indeed, elimination of barriers is not always without cost to businesses. But, it is a cost that I believe that should be incurred, considering the benefit to those with disabilities, the benefit to business, and the benefit to our entire society.

135 CONG. REC. S11,718 (1989) (statement of Sen. Harkin), quoted in Harris, supra note 13, at 178. Michael Stein and Peter Blanck also discuss forms of third-party benefits that will not be completely internalized by employers. See supra notes 13-16, 28.

79 I know of only one case that explicitly incorporates third-party benefits into its reasoning; it is not an employment case, but a schools case, in which the court noted that an accommodation of sensitivity training could have benefits to other disabled students. Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1402 (9th Cir. 1994). Even that case made no mention of the possibility that an accommodation could benefit nondisabled others.

vidual, and discussing benefits as if they could redound to multiple disabled people. Vande Zande was a program assistant to the state’s housing division, a job involving mostly clerical duties.\(^{81}\) She was paralyzed from the waist down, causing her to suffer pressure ulcers that sometimes required her to stay at home for several-week periods.\(^{82}\) The state had provided several accommodations, including supplying backup so she could leave for medical appointments, paying to have the bathrooms modified so she could use them, and buying adjustable furniture for her.\(^{85}\) The two disputed accommodation issues in the case were the employer’s failure to permit her to telecommute and to provide computer equipment to enable her to do so, and the employer’s refusal, while the office building was still under construction, to alter the design of the kitchenette on her floor to install the counter two inches lower than planned (at a cost of $150) so that she could use it rather than using the bathroom sink for activities such as washing out her coffee cup.\(^{82}\) In an opinion by Judge Posner, the Seventh Circuit concluded that a telecommuting accommodation was per se unreasonable because it interfered with teamwork and direct supervision, and that the harm involved in using the different sink was merely stigmatic and therefore too insignificant to warrant mandatory accommodation.\(^{85}\)

The opinion is best known for its role in defining two key terms associated with the ADA’s accommodation requirement: “reasonable” (as in “reasonable accommodations”)\(^{86}\) and “undue hardship” (as in the employer defense that a requested accommodation is not required if it would impose an “undue hardship” on the employer).\(^{87}\) Neither the statute nor the regulations define reasonableness; the question for the court was whether “reasonable” simply meant “effective,” or whether it imposed an independent limitation on the kinds of accommodations that were required.\(^{88}\) Posner concluded that the

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\(^{81}\) Vande Zande, 44 F.3d at 544.

\(^{82}\) Id. at 543.

\(^{83}\) Id. at 544.

\(^{84}\) Id. at 544-46.

\(^{85}\) Id. at 545-46.

\(^{86}\) See 42 U.S.C. § 12112(b)(5)(A) (2000) (defining “discriminate” to mean “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee”).

\(^{87}\) See id. § 12111(10)(A) (“The term ‘undue hardship’ means an action requiring significant difficulty or expense, when considered in light of [several enumerated factors]”).

\(^{88}\) Vande Zande, 44 F.3d at 542.
term would be superfluous if it meant only “effective,”

an interpretation the Supreme Court subsequently endorsed. Though he thought quantifying costs and benefits would not always be necessary, and the cost “slightly” exceeding the benefit did not make an accommodation unreasonable, he said, “at the very least, the cost could not be disproportionate to the benefit.”

For undue hardship, the statute provides a definition—“an action requiring significant difficulty or expense”—but, unsurprisingly, offers incomplete guidance on its application. Posner noted that the “financial condition of the employer is only one consideration” under the statute, and thus concluded that “undue” must be interpreted to mean that the expense is undue in relation to the resulting benefit, as well as to the employer’s resources.

Thus, Posner essentially read some degree of cost-benefit balancing into both terms. He combined the two in a burden-shifting formulation:

So it seems that costs enter at two points in the analysis of claims to an accommodation for a disability. The employee must show that the accommodation is reasonable in the sense that it is both efficacious and proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer’s financial survival or health.

Posner’s emphasis is thus on the costs—which “enter at two points in the analysis of claims to an accommodation.”

Reading the opinion with benefits in mind, however, exposes a striking oversight in Posner’s explanations of reasonableness and undue hardship. He typically speaks in terms of balancing the costs to the employer against the benefits only to the individual disabled employee. For example, when speaking about the proportionality requirement of reasonableness, he says that an employer “would not be

89 Id.
91 Vande Zande, 44 F.3d at 542.
93 See infra Part IV.C (discussing the relevance of third-party benefits to the undue-hardship analysis).
94 Vande Zande, 44 F.3d at 543 (interpreting 42 U.S.C. § 12111(10)(B)(ii)–(iii)).
95 Id.
96 Id. (emphasis added).
required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.” 97 And when he first introduces the topic of undue hardship, he also speaks in terms of a single employee benefiting from accommodation: “We must ask, ‘undue’ in relation to what? Presumably . . . in relation to the benefits of the accommodation to the disabled worker as well as to the employer’s resources.” 98 But elsewhere in the opinion, he speaks as if benefits might accrue to many disabled employees: “[T]he function of the ‘undue hardship’ safe harbor . . . is to excuse compliance by a firm that is financially distressed, even though the cost of the accommodation to the firm might be less than the benefit to disabled employees.” 99

This slippage between one disabled employee and multiple disabled employees shows an ambiguity surrounding—and a marked inattention to the issue of—whether to count the benefits of an accommodation that accrue to other disabled people in the workplace.

Moreover, Posner wholly neglects the possibility of any benefits to nondisabled employees; he simply does not mention them. Perhaps it should not surprise us that he fails to consider the possibility of benefits to third parties outside the workplace, since such benefits would generally be expressive (in order to reach those outside the workplace), and, as noted, the opinion declares expressive harms to be insignificant. 100 But it is striking that he fails to notice the possibility of benefits to third parties inside the workplace (i.e., to coworkers).

In the other foundational circuit-court case defining reasonable accommodation, Borkowski v. Valley Central School District, 101 Judge Calabresi also fails to address whether third-party benefits matter.

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97 Id. at 542-43 (emphasis added). The full context for this passage is as follows:

It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit. Even if an employer is so large or wealthy—or, like the principal defendant in this case, is a state, which can raise taxes in order to finance any accommodations that it must make to disabled employees—that it may not be able to plead “undue hardship,” it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.

Id. at 542-43.

98 Id. at 543 (emphasis added).

99 Id. (emphasis added).

100 Id. at 546.

101 63 F.3d 131 (2d Cir. 1995).
Borkowski involved an elementary-school library teacher who was de-
nied tenure because she had difficulties maintaining classroom disci-
pline. As a result of neurological damage sustained during an
automobile accident, Borkowski had trouble with multiple stimuli due
to concentration and memory problems. Her proposed accommo-
dation was a teacher’s aide to help with classroom discipline. The
Second Circuit held that such an accommodation was not necessarily
unreasonable.

Calabresi’s opinion shows a more nuanced attention to benefits
than Posner’s. For one thing, Calabresi pauses to note the obvious
point that benefits to the disabled employee who requested the ac-
commodation (first-party benefits), and not just benefits to the em-
ployer (second-party benefits), are relevant to the cost-benefit analy-
sis. That is, he emphasizes that accommodations do not need to be
cost-justified from the employer’s perspective.

In addition, at one point in the opinion, Calabresi seems implicit-
ly to acknowledge the possibility of benefits to multiple individuals.
In describing undue hardship as a “relational” term, like reasonable
accommodation, Calabresi explains that undue hardship “looks not
merely to the costs that the employer is asked to assume, but also to
the benefits to others that will result,” perhaps implying that more
than one employee could benefit from an accommodation, and thus
suggesting that benefits to others could matter to the analysis of rea-
sonableness or undue hardship.

102 Id. at 134.
103 Id.
104 Id. at 140.
105 Id. at 141.
106 See id. at 138 n.3 (“In evaluating the costs and benefits of a proposed accom-
modation, it must be noted that Section 504 does not require that the employer receive
a benefit commensurate with the cost of the accommodation.”).
107 Id. at 139 (emphasis added).
108 Judge Newman, in his concurrence, also speaks in terms of “many disabled per-
sons” benefiting from accommodation, but read in context he does not seem to be ad-
dressing the possibility of a single accommodation benefiting more than one employee.
Newman interprets Posner’s position in Vande Zande as saying that an accommodation is
not reasonable, even if it enable many disabled persons to become employed, if the
aggregate cost of making it at numerous installations exceeds the costs that would result
if these disabled persons were not employed.” Id. at 146 (Newman, J., concurring) (em-
phasis added). Here, Newman is speaking about Posner’s comment that the statute aims
to save public money by reducing welfare dependency (and interpreting it incorrectly, I
think, though not without basis); his reference to “many disabled persons” might seem to
suggest the possibility of an accommodation helping more than one person, but his
phrase “numerous installations” perhaps qualifies that, suggesting that he means only
But like Vande Zande, Borkowski does not actually take third-party benefits into account when analyzing reasonableness or undue hardship. Nor do cases in other circuits that follow their reasoning.\textsuperscript{109} Calabresi’s oversight in this regard may be most surprising, given his more careful discussion of types of benefits. It is especially notable, then, that he does not engage the issue of which (or whose) benefits matter.

Nor, however, do Vande Zande or Borkowski discuss third-party costs. It might therefore seem that the neglect of third-party benefits is merely because such benefits concern third parties rather than first or second parties. But two features of the neglect of benefits make it more noteworthy than the omission of third-party costs. First, Posner does not merely fail to include third-party benefits in his analysis; rather, he is so impervious or indifferent to the possibility of third-party benefits that he slips between, at times, treating the benefits side of the balance as including only first-party benefits and, at other times, treating it as including both first- and third-party benefits. Second, even though both Posner and Calabresi sometimes seem to recognize implicitly the possibility of benefits to both first and third parties—where third parties are other disabled people—neither judge acknowledges possible benefits to nondisabled people. This is a different kind of oversight than merely not mentioning third-party costs. Both Posner and Calabresi, having already ventured into third-party terrain on the benefits side, nonetheless failed to see the possible benefits beyond the population of disabled people.

Moreover, since Vande Zande and Borkowski, the Supreme Court has spoken directly to the issue of third-party costs—determining that they can be relevant to the reasonableness of an accommodation—without any acknowledgement of the possibility of third-party benefits. In \textit{US Airways, Inc. v. Barnett}, the Court concluded that an accommodation that would upset settled seniority interests is presumptively unreasonable.\textsuperscript{110} The Court was concerned that an employer may not

\textsuperscript{109} See, e.g., Walton v. Mental Health Ass’n of Se. Pa., 168 F.3d 661, 670 (3d Cir. 1999) (quoting Borkowski, 63 F.3d at 139, for the proposition that “[o]n the issue of reasonable accommodation, the plaintiff bears only the burden of identifying an accommodation, the costs of which, facially, do not clearly exceed its benefits”); Stewart v. Happy Herman’s Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86 (11th Cir. 1997) (citing Vande Zande for the point that an employee is not entitled to any accommodation, but is limited to a reasonable accommodation).

\textsuperscript{110} 535 U.S. 391, 403 (2002).
always internalize costs to coworkers, and therefore thought that the reasonableness requirement must take them into account:

[A] demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say, because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.\(^\text{111}\)

The Court reached this conclusion without even acknowledging the possibility that an accommodation could have second-party benefits, as Seth Harris has noted, or that it could have third-party benefits, for disabled or nondisabled others.\(^\text{112}\)

(2) Other entities. Perhaps even more surprisingly, the EEOC, in its Enforcement Guidance on Reasonable Accommodation (the Guidance), discusses third-party costs while neglecting to mention third-party benefits. The Guidance addresses the questions of whether negative effects on coworker morale can constitute an undue hardship (no) and whether negative effects on coworker productivity can constitute an undue hardship (possibly, if the negative effects are substantial enough to interfere with the coworkers’ ability to perform their jobs). Yet third-party benefits are nowhere to be seen.\(^\text{113}\)

Other guides for employers about accommodation, whether published by governmental or nongovernmental entities, similarly fail to point out the potential benefits to anyone other than the individual worker with a disability requesting the accommodation.\(^\text{114}\) Even the EEOC’s memo on telecommuting, which begins with broad language about how employers are discovering the benefits of telecommuting, says nothing in its main text about anyone other than the one em-

\(^{111}\) Id. at 400-01.
\(^{112}\) See supra note 78 (discussing Harris’s commentary on Barnett).
employee requesting accommodation. Any exceptions highlight the possible benefits to employers alone. Nothing that I have found recognizes that certain accommodations have third-party benefits that are not benefits to employers. Nor do these resources mention that accommodations may be designed to have more or fewer third-party benefits.

B. Why Benefits Are Not Salient

Posner emphasizes that “costs enter at two points” while neglecting the many points at which benefits might enter. Various legal and nonlegal conversations about the ADA replicate this move. This Section briefly speculates on possible reasons—legal, political, and cultural—that costs overshadow benefits in discussions of the ADA.

(1) Legal. The structure of the ADA may make costs salient in two ways: by expressly requiring accommodation, and by asymmetrically protecting part, but not all, of the population.

First, only the ADA imposes on employers an express obligation to “accommodate” and, through the regulations, requires them to discuss such accommodations with employees. Since its passage, the ADA has been the subject of a debate over whether it is different from other antidiscrimination legislation—in particular, Title VII’s protection of race and sex.

For examples of those who argue that the ADA is different because it goes beyond the antidiscrimination requirement of Title VII to mandate a distinctive form of affirmative action, see Samuel Issacharoff & Justin Nelson, Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?, 79 N.C. L. REV. 307 (2001); Karlan & Rutherglen, supra note 13; Mark Kelman, Market Discrimination and Groups, 53 STAN. L. REV. 833 (2001); S. Elizabeth Wilborn Malloy,
portant point about the social meaning of the statute. Whether or not the ADA actually imposes distinct substantive obligations on employers, only the ADA explicitly requires employers to “accommodate” a class of employees.

Unlike Title VII, the ADA defines discrimination in terms of accommodation: “[T]he term ‘discriminate’ includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . .” Naming the accommodation requirement is not a superficial difference. The fact that the ADA names this category of obligations “accommodations,” and expressly requires them as part of the definition of the duty not to discriminate, makes the ADA appear different from other statutes. (While Title VII’s protection of religion also includes a duty to accommodate, that duty was folded into the definition of “religion,” rather than into “discriminate,” and has been interpreted narrowly.) And only the ADA’s regulations require employers and em-

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118 42 U.S.C. § 12112(b)(5)(A) (2000); cf. infra note 119 (comparing the accommodation requirement for religion under Title VII with accommodations under the ADA). The ADA’s duty to accommodate was lifted from the EEOC’s regulations implementing the Rehabilitation Act of 1973, codified in scattered sections of 29 U.S.C., which applied only to federal agencies and contractors. See 29 C.F.R. § 32.13 (2007); S. REP. NO. 101-116, at 31 (1989).

119 See 42 U.S.C. § 2000e(j) (2000) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”); see also H.R. REP. NO. 101-485, pt. 3, at 40 (1989) (distinguishing the “significant” duty to accommodate under the ADA from the lesser duty for religion under Title VII as interpreted by the Supreme Court in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), to extend only to those accommodations that impose no more than a de minimis cost on the employer); Karlan & Rutherglen, supra note 13, at 6-7 (commenting on the different treatment of “accommodation” in Title VII and the ADA); Malloy, supra note 117, at 627-28 (noting that Congress intended for accommodation to have a broader meaning in the ADA than in Title VII). One could certainly analyze the third-party effects of accommodations in the religion context in in-
ployees to engage in an “interactive process” to determine whether and what accommodations are appropriate.\textsuperscript{120} Disability law thus appears to flip the assimilationist demand on its head. That is, instead of demanding that employees assimilate,\textsuperscript{121} disability law seems to require the environment, rather than the individual, to change. Of course, all antidiscrimination statutes change the work environment, but the fact that the ADA requires such changes more explicitly than Title VII is likely to make the costs of the ADA more obvious.

Because of the explicit accommodation requirement, the ADA is likely to be understood as imposing different obligations on employers from those imposed by other antidiscrimination statutes. The nature and extent of this perception is, of course, an empirical question, one that has not been studied directly. There are data, however, suggesting that, to the extent that the ADA has had disemployment effects, those effects have clustered in the states for which the statute’s

\footnotesize{\textsuperscript{120} The regulations state the need for the interactive process permissively: “To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation.” 29 C.F.R. § 1630.2(o)(3) (2007). The EEOC’s Enforcement Guidance on Reasonable Accommodation is more adamant: “The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.” Id. § 1630.9 app.; EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, supra note 113.

\textsuperscript{121} Cf. Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,” 108 YALE L.J. 485 (1998); Kenji Yoshino, Covering, 111 YALE L.J. 769 (2002) [hereinafter Yoshino, Covering]. Yoshino in fact argues that the assimilationist demand persists in the disability context, asserting that the statute also requires people with disabilities to mitigate their disability as a prerequisite of obtaining coverage and accommodation under the statute. KENJI YOSHINO, COVERING 175 (2006). This overlaps with the argument, made by Jill Hasday, that Sutton’s holding that employees should be considered in their post-mitigation state to determine if they are ADA disabled, implies that employees must mitigate in order to be protected under the statute. See Jill Elaine Hasday, Mitigation and the Americans with Disabilities Act, 103 MICH. L. REV. 217, 250-54 (2004). This is a contested claim about the statute, as Hasday appreciates, and one with which I disagree, for reasons too lengthy to set out here. Note, though, that even if mitigation were required of those with the capacity to mitigate, this would not change the fact that the statute still requires accommodation by the workplace where mitigation is not possible or has already been completed. That said, my claim is not that the ADA makes no assimilation demands—it surely does—but only that the ADA seems different from Title VII in how it allocates the pressure to change.}
accompmodation requirement was new. That is, in states where the accommodation requirement, but not antidiscrimination protection, for disability was new, employers hired fewer people with disabilities after the passage of the ADA—apparently suggesting that fear of having to pay for accommodations animated any disemployment effects. This suggests that the perception of accommodation, at least at the time of enactment, was one of cost. Even more notably, the disemployment effects appear to be temporary, suggesting that employers overestimated the costs—or, perhaps, underestimated the benefits—that accommodations would create.

To make this point is not to resolve the question of whether the ADA is in fact more costly, or imposes greater demands on workplaces, than other antidiscrimination statutes. But it does highlight a meaningful difference in categorization and terminology that may have implications for how the statute is understood.

Second, the costs of the ADA may be more salient than the costs of Title VII because of the ADA’s asymmetrical structure. The ADA protects only a subgroup of the population—those who are disabled—rather than protecting everyone along an axis of his or her identity (as Title VII does for race or sex) or even protecting the most able and the least able. (On the latter, note that one could not bring a claim...
under the ADA for being denied a job because of being “overqualified” or too able.) This asymmetrical structure has various interesting implications, but for purposes of this discussion, the asymmetry is important because it limits the group of people who are likely to see themselves as benefiting from the statute. That is, only people who consider themselves to have disabilities are likely to see this statute as having been enacted for them. For everyone else, the statute is either irrelevant or a potential cost to them, as employers or as coworkers to whom costs may be shifted.

Relatedly, this statutory structure shapes the parties and arguments that arise in litigation. Title VII cases can be brought by men and whites, who therefore appear before courts as plaintiffs seeking the benefits they feel are their due under the statute and articulating those benefits to the courts. In contrast, the only people coming to court under the ADA are people who consider themselves to have (or to have a record of having or to be regarded as having) disabilities. Courts may, and often do, disagree about a plaintiff’s disability status, leading to the many grants of summary judgment on the basis that the plaintiff is not impaired enough. But the point is that the arguments in court are made exclusively by plaintiffs from one part of the

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Of course, nondisabled people could in theory see the statute as a potential benefit to them if they ever became disabled, creating a feeling of what we might call “existential insurance”—a kind of counterforce to what Harlan Hahn calls the “existential anxiety” that disabled people can inspire in nondisabled people. See Harlan Hahn, The Politics of Physical Differences: Disability and Discrimination, 44 J. SOC. ISSUES 39, 43-44 (1988) (defining “existential anxiety” for nondisabled people as “the perceived threat that a disability could interfere with the functional capacities deemed necessary to the pursuit of a satisfactory life,” a feeling resulting from “a sense of personal identification with the position of a disabled person”). But the number of people who are likely to make such a prediction about themselves is questionable; and regardless, the effect on a nondisabled person of seeing the statute as really a benefit to herself is still likely to be different than if she had the present-day ability to bring a claim under it.

See, e.g., McDonald, 427 U.S. at 286-87 (holding that Title VII protects white persons).

42 U.S.C. § 12102(2). The record-of and regarded-as prongs broaden the protected group and help to soften the statute’s asymmetrical structure without fundamentally altering it.

See infra note 229.
population. This frames the courts’ consideration of these issues in terms of the statute’s benefits to only a subset of the population.

(2) Political. Both employers and employees have political reasons not to raise the issue of third-party benefits. Most obviously, employers may not always see these benefits, and they have nothing to gain, at least in the litigation context, from mentioning that accommodations have additional benefits. If an employer wishes not to provide an accommodation, her interest is, of course, in highlighting costs, not benefits.

Less obviously, disabled people and disability advocates may also have reasons not to highlight third-party benefits. Disabled individuals and advocates may be more likely than others to see disabled bodies as extraordinary rather than flawed, and thus may best be able to perceive that the environmental changes required by those bodies can be beneficial, rather than costly, to others. But those who advocate for disabled people may be inclined to focus on individual rights, and thus to argue that individuals with disabilities should be provided with accommodations as a matter of right. This focus may lead advocates not to acknowledge or emphasize second- and third-party benefits. Moreover, for reasons discussed later, advocates might be concerned that any attention to third-party benefits could, through a kind of doctrinal drift, become a limiting principle on accommodations required by the ADA. These concerns about undue attention to third-party benefits are the focus of Part V.

(3) Cultural. Finally, broader ideas about disability might make costs more visible than benefits. A prevailing assumption about disability is that it means loss or lack. Indeed, the etymology of “disability” suggests that something is missing that needs to be made up for,

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133 This is particularly true of third-party benefits that can be internalized by the employer (i.e., second-party benefits), explained earlier. See supra notes 13-14.

134 In addition, as discussed in relation to disclosure in Part IV.B, an employer may have an incentive not to credit the ADA for improvements to workplace life for third parties.

135 See generally ROSEMARIE GARLAND THOMSON, EXTRAORDINARY BODIES (1997).

136 See supra Part V.B.
Disability studies has challenged this idea and instead urged the adoption of a social model of disability. The traditional understanding of disability—the so-called medical model—views disability as a medical problem requiring a medical solution. By contrast, the social model says that someone is disabled by the interaction between her body (or mind) and the disabling environment that is built for one kind of body (or mind) rather than another. By contrast, the social model says that someone is disabled by the interaction between her body (or mind) and the disabling environment that is built for one kind of body (or mind) rather than another. To introduce the distinction between the models, the writer Simi Linton, who uses a wheelchair, asks her students, “If I want to go to vote or use the library, and these places are inaccessible, do I need a doctor or a lawyer?"  

Few disability scholars or activists embrace a pure social model. Most recognize that not all disability is culturally constructed, but that culture still creates much of the disability associated with what we consider impairments. This middle-ground position recognizes that there can be pain or difficulty associated with disability, and that sometimes disability does require more resources or more support than other states of being, but still emphasizes that much of what makes disability disabling is the way the world is currently constructed.

Despite the efforts by advocates and scholars to promote the social model, the medical model arguably prevails in the broader culture, as does the sense that a disability is a lack that requires costly filling. It seems plausible that this understanding of disability primes courts, commentators, and others to see the accommodations made for disability as beneficial to those for whom they are designed, and costly for others, particularly for those others who are not disabled.

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137 As a prefix, “dis” denotes “the lack or absence” of the thing that follows it. 3 THE OXFORD ENGLISH DICTIONARY, at 391 (2d prtg. 1961).

138 Though disability is particularly associated with lack, note that there are other legal contexts in which costs, but not benefits, are salient, as part of our legal culture’s tendency to focus on remedying harms more than recognizing benefits. Cf. Douglas G. Lichtman, Irreparable Benefits 16 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 305, 2006), available at http://ssrn.com/abstract_id=928907.

139 LINTON, supra note 42, at 120.
III. INTEGRATING ACCOMMODATION

[A]ccessible areas [must] not [be] restricted to use by people with disabilities.

DOJ Regulations on Title III of the ADA

Should third-party benefits matter to the choice or design of accommodations? A simple social-welfare calculus suggests that they should. As between two equally effective accommodations or accommodation designs, it seems sensible to choose the one that creates more benefits, rather than more costs, for third parties. But the ADA is not a statute aimed at promoting everyone’s welfare; it is not the Americans Act. It is a statute that outlaws discrimination against individuals with disabilities. Nonetheless, as this Part explains, an attention to third-party benefits, including nondisabled third parties, is consistent with the ADA.

A key purpose of the ADA is to integrate people with disabilities into the workplace and the broader community. Though the statute’s findings set out several areas of concern, the aim of replacing exclusion with full participation features prominently and pervasively.

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141 I thank Adam Samaha for this turn of phrase. Concerns that attending to third-party benefits will shift the focus of the statute away from disabled people are discussed directly in Part V.


143 See 42 U.S.C. § 12101(a)(2) (2000) (“[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem. . . .” (emphasis added)); id. § 12101(a)(5) (“[I]ndividuals 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 . . . .” (emphasis added)); id. § 12101(a)(7) (“[I]ndividuals with disabilities [have faced] restrictions, limitations, and other forms of discrimination], based on characteristics that are
ing to third-party benefits, it is consistent with the statute’s inclusion-
ary aims to try to integrate accommodations, as well as the individuals
they accommodate, in ways that create third-party benefits. Designing
accommodations in this way has the potential to improve attitudes to-
ward disability and toward the ADA, and thus to further these integra-
tive goals.

A. Desegregating Accommodation

What would it mean to have segregated accommodations? The
DOJ’s regulations for the implementation of Title III, the public ac-
commodations title, explain that restaurants should make all parts of a
restaurant accessible. If that is not feasible, however, then the “accessible
areas [must] not [be] restricted to use by people with disabilities.” As the ADA Guide for Small Businesses explains: “It is illegal to
segregate people with disabilities in one area by designating it as an
accessible area to be used only by people with disabilities.”

Beyond the control of such individuals and resulting from stereotypic assumptions not
truly indicative of the individual ability of such individuals to participate in, and contribute
to, society . . . .” (emphasis added); id. § 12101(a)(8) (“[T]he Nation’s proper goals
regarding individuals with disabilities are to assure equality of opportunity, full partici-
pation, independent living, and economic self-sufficiency for such individuals . . . .”
(emphasis added)). On the multiple goals of the statute more generally, see Emens,
supra note 127, at 481-82.


5.4 Dining Areas. In new construction, all dining areas, including raised or
sunken dining areas, loggias, and outdoor seating areas, shall be accessible.
In non-elevator buildings, an accessible means of vertical access to the mezza-
nine is not required under the following conditions: 1) the area of the mezz-
nine seating measures no more than 33 percent of the area of the total ac-
cessible seating area; 2) the same services and decor are provided in an
accessible space usable by the general public; and, 3) the accessible areas are
not restricted to use by people with disabilities. In alterations, accessibility to
raised or sunken dining areas, or to all parts of outdoor seating areas is not
required provided that the same services and decor are provided in an acces-
sible space usable by the general public and are not restricted to use by people
with disabilities.

Id.

OFFICE OF ENTREPRENEURIAL DEV., U.S. SMALL BUS. ADMIN., ADA GUIDE FOR
full context for this quote is as follows:

If it is not readily achievable to provide the minimal number of accessible ta-
bles in all areas where fixed tables are provided, then the services must be
provided in another accessible location, if doing so is readily achievable.
However, these alternate location(s) must be available for all customers and
not just people with disabilities. It is illegal to segregate people with disabili-
INTEGRATING ACCOMMODATION

Why are “segregated” accommodations illegal? Most obviously, a separate seating section for people with disabilities isolates people with disabilities. Indeed, it smacks of the kind of segregation—separate lunch counters, separate water fountains—characteristic of race relations in the Jim Crow South. The problem is not with segregating the accommodations, but with segregating the individuals who use them.

But Title III’s prohibition of segregated accommodations also points us toward another idea: integrating not only people with disabilities, but also disability accommodations, can change the culture in ways that are consistent with the inclusionary purposes of the ADA. In particular, designing accommodations with an eye to their benefits for third parties may help improve attitudes toward disability and the ADA. These attitudinal benefits may arise through three routes: (1) improved “contact,” (2) positive associations, and (3) increased uptake of the social model.

(1) Improved contact. To work and live using overlapping tools and facilities may promote an additional kind of working together. Cynthia Estlund has characterized the workplace as the contemporary site of adult integration—the place where we meet and become tolerant of diverse others. This raises the question of what role accommodations play in that integrative endeavor. Accommodations surely assist with integration to the extent that they enable people with disabilities to participate in workplace communities, but the design of accommodations could affect the form that participation takes. Put starkly, a special sink or special bathroom could be akin to the segregation Title III prohibits in the restaurant. (The plaintiff’s expressive-harm claim in Vande Zande might be read in this light. Separate stalls may work


147 See infra notes 151-152 (citing literature showing the positive effects of “contact” between disabled and nondisabled persons).

148 The Seventh Circuit rejected the relevance of these expressive considerations. The relevant passage in Judge Posner’s opinion is this:

Her argument rather is that forcing her to use the bathroom sink for activities (such as washing out her coffee cup) for which the other employees could use the kitchenette sink stigmatized her as different and inferior; she seeks an award of compensatory damages for the resulting emotional distress. We may assume without having to decide that emotional as well as physical barriers to
like separate drinking fountains, to reinforce the stigmatic divide between groups. Perhaps separate equipment or rules could operate similarly. The extent to which stigmatic attitudes are shaped by separate facilities or tools in the disability context is an empirical question that no current research answers directly.

Research in management studies indicates, however, that “coworker attitudes have a profound impact on the employment experiences of people with disabilities.” Further work suggests that co-

the integration of disabled persons into the workforce are relevant in determining the reasonableness of an accommodation. But we do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions “stigmatizing.” That is merely an epithet.

Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 546 (7th Cir. 1995). The plaintiff’s claim might be read to rest principally on the fact that the sink she was to use for food and drink purposes was in the bathroom, which might seem problematic because the bathroom is less sanitary or salubrious than the kitchen. But her claim as described in the district court further emphasizes the separateness as independently problematic: “Plaintiff argues that the failure to make the entire kitchen accessible violates the ADA because forcing her to use the bathroom sink amounts to a ‘separate but equal’ facility that cannot rise to [the] level of a reasonable accommodation and violates the ADA’s prohibition against classifying or segregating disabled employees in a manner that would ‘affect’ their ‘employment opportunities or status.’” Vande Zande v. Wis. Dep’t of Admin., 851 F. Supp. 353, 362 (W.D. Wis. 1994) (quoting 29 C.F.R. § 1630.5 (1994)). Title I defines “discriminate” to include “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.” 42 U.S.C. § 12112(b).

149 Lisa Schur et al., Corporate Culture and the Employment of Persons with Disabilities, 23 BEHAV. SCI. & L. 1, 3-20 (2005) (citing Adrienne Colella, Organizational Socialization of Newcomers with Disabilities: A Framework for Future Research, 14 RES. PERSONNEL & HU-

MAN RESOURCES MGMT. 351 (1996) and Dianna L. Stone & Adrienne Colella, A Model of Factors Affecting the Treatment of Disabled Individuals in Organizations, 21 ACAD. MGMT. REV. 352 (1996)); see Peter David Blanck & Mollie Weighner Marti, Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act, 42 VILL. L. REV. 345 (1997); Adrienne Colella, Coworker Distributive Fairness Judgments of the Workplace Accom-

modation of Employees with Disabilities, 26 ACAD. MGMT. REV. 100 (2001); Adrienne Colella et al., The Impact of Ratee’s Disability on Performance Judgments and Choice as Partner: The Role of Disability—Job Fit Stereotypes and Interdependence of Rewards, 83 J. APPLIED PSYCHOL. 102 (1998); see also DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLU-

SION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 244-45 (2003) (observing, in a qualitative study of employees with disabilities and the ADA, that most were not inclined to assert their rights directly, but, rather, “depended almost exclusively on rights becoming active in some other way—through the support of coworkers, through the unilateral actions of their supervisors, through corporate deci-

sions to alter workplace environments or practices, or through more diffuse attitudinal changes or cultural and discursive shifts”).
worker attitudes will be affected, inter alia, by whether coworkers expect that the presence of people with disabilities will make their own jobs harder or less desirable.\footnote{150}

Moreover, research indicates that nondisabled people’s attitudes toward disability can be improved through contact with people with disabilities.\footnote{151} And the contact literature generally suggests that those ameliorative effects are limited to certain kinds of contact—notably, contact between individuals of equal status working cooperatively and not just superficially.\footnote{152} Working together using the same tools, equipment, or rules—some of which have been provided by virtue of the person with a disability—could have greater destigmatizing effects than working with separate equipment or having one person’s accommodation be the other person’s burden.

\textbf{(2) Positive associations.} Relatedly, if attitudes toward coworkers with disabilities can be affected by whether accommodations increase the burdens on coworkers,\footnote{153} then merely knowing that improved working conditions are due to a coworker’s disability could improve attitudes toward disability or the ADA. As discussed in Part I, accommodations can create benefits for coworkers or customers that in-

\footnotesize\begin{itemize}
\item See Stone & Colella, \textit{supra} note 149, at 372.
\end{itemize}
crease productivity, improve health, increase happiness, or prompt experimentation. Coworkers' or customers' associating these benefits with the presence of employees with disabilities could improve attitudes toward disability even if these coworkers or customers have no direct “contact” with people with disabilities. In addition, and more speculatively, perhaps permitting nondisabled coworkers limited access to rivalrous accommodations could create affirmative cachet for those for whom the accommodations are designed.\footnote{Cf. supra note 69 and accompanying text (distinguishing Universal-Design accommodations from apparently zero-sum accommodations and discussing Ruth Colker's story of the “Teddy Bear” room).} These suggestions are, of course, only theories, albeit plausible ones, and they raise empirical questions that merit further study. Such empirical work should investigate, among other questions, precisely how the benefits of accommodations become salient, and to what extent salient benefits translate into favorable attitudes toward the person who requested the accommodation and that person’s group.

(3) Uptake of the social model. Accommodations that benefit third parties could also promote a conceptual shift that facilitates integration: when accommodations designed for disabled people benefit those who are not disabled, appreciation of that fact may alter the assumed structure of social distribution. That is, if disability accommodations improve the work environment both for the nondisabled majority and for people with disabilities, then integrating people with disabilities cannot be understood as a kind of charitable gift from majority to minority. Rather, the minority, as well as the majority, contributes to the improvement of the shared environment. This is true both in a material sense—that disability improves nondisabled people’s environments—and in a rhetorical sense—that nondisabled people understand that disability has improved their environments.

One approach to thinking about the conceptual potential of third-party benefits is to ask how people come to appreciate the social model of disability—the idea, discussed in Part II, that disability inheres in the interaction between impairment and the social world.\footnote{See supra text accompanying note 139 (comparing the medical and social models of disability).} Saying that there is nothing natural or necessary about stairs, for example, may persuade some people. Or pointing out that the setup of a room makes it accessible to nondisabled people (through chairs and lights and other features) may help illuminate the social model for
some.\footnote{Susan Daniels, a former Social Security Commissioner for Disability, was apparently fond of pointing out that only those with disabilities bring their own chairs, and that lights, microphones, and loudspeakers are accommodations for people who get their sensory input that way. See Adrienne Asch, \textit{Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity}, 62 OHIO ST. L.J. 391, 402 (2001) (citing Susan Daniels, Address at the Conference of the Association for Higher Education and Disability (July 14, 1999)).} Or seeing a disabled coworker perform effectively because of an accommodation may help someone see how the world without the accommodation was structured to disadvantage that person.\footnote{Or, alternatively, others may be persuaded by the point that being able to lift more than ten pounds is likely to be a major life activity in some contexts and milieus (e.g., in communities of laborers) and not in others (e.g., among judges and law professors), making an impairment in lifting a disability in one world and not in the other. \textit{Cf.} Mays v. Principi, 301 F.3d 866, 869 (7th Cir. 2002) (noting, in dicta, that “[w]e doubt whether lifting more than 10 pounds is [a major life] activity”).}

But to show that the world we inhabit is less than ideal for everyone, not just for people with disabilities, seems like a particularly potent way to denaturalize the current structure of our environment. If people can see that the disability of some people prompts improvements in the environment that benefit everyone, then they are hard pressed, I think, to claim that there is something natural and better about the status quo. They may be more likely to consider the possibility that the current way of doing things is not always best, not only because it excludes some people—disabled people—but also because this way of doing things has been disabling us all.\footnote{I agree with Adam Samaha that the social model—as a descriptive account of how disability is created—does not necessarily require any normative prescriptions. \textit{See} Adam M. Samaha, \textit{What Good Is the Social Model of Disability?}, 74 U. CHI. L. REV. 1251, 1253 (2007) (“The social model . . . has essentially nothing to say about which [normative] framework to use.”). But the social model does, I believe, have real rhetorical and imaginative power to challenge assumptions about disability—and the radical social model possibly even more so. For further discussion, see Elizabeth F. Emens, \textit{Against Nature}, NOMOS (forthcoming 2008).} We might think of this as the “radical social model.”

Appreciating the radical social model leads to questioning the merits of many aspects of our current environment, with disability serving as the lens through which to gain insights into the ways in which our current environment can be improved.\footnote{\textit{Cf.} LANI GUINIER & GERALD TORRES, \textit{The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy} (2002) (discussing race as a lens through which to identify broader societal problems).} As discussed in Part I, disability may be a particularly helpful lens for these purposes because, while disabled people bear costs shared by many nondisabled people, for the former those costs rise to a level that they become dis-
abling and require solutions. This necessity may therefore inspire solutions that then diminish costs for others who have been absorbing those costs in a nondisabling way. Once these broader ameliorating effects are recognized, then the social model becomes hard to deny, at least as a plausible theory worth considering with regard to any given aspect of the world.

B. *The Example of Telecommuting*

The accommodation of telecommuting helps to illustrate the implications of thinking about third-party benefits as promoting integrative goals. Telecommuting has not received a very favorable reception from courts as an ADA-required accommodation, but it has been embraced by a substantial number of employers and the EEOC, as well as by President Bush’s New Freedom Initiative (NFI). Employ-

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160 See supra text accompanying note 53.

161 See, e.g., Kvorjak v. Maine, 259 F.3d 48, 58 (1st Cir. 2001) (concluding that “the essential functions of a claims adjudicator cannot be performed at an individual employee’s home”); Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 544 (7th Cir. 1995) (citing teamwork and supervision concerns as rationales for concluding that “[g]enerally . . . an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home”); Misek-Falkoff v. Int’l Bus. Machs. Corp., 854 F. Supp. 215, 228 (S.D.N.Y. 1994) (citing the inability to train the plaintiff at home as a rationale for rejecting telecommuting as a “reasonable accommodation”); aff’d, 60 F.3d 811 (2d Cir. 1995); Kristen M. Ludgate, Note, Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?, 81 MINN. L. REV. 1309, 1325-30 & nn. 104-34 (1997) (collecting and summarizing cases that presume that telecommuting is not a “reasonable accommodation”). But see, e.g., Langon v. Dep’t of Health & Human Servs., 959 F.2d 1053, 1061-62 (D.C. Cir. 1992) (acknowledging that not allowing an employee to work from home may constitute a failure to reasonably accommodate).


163 See EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, supra note 113 (indicating that, in some instances, telecommuting is a “reasonable accommodation” that employers must allow).

164 Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (June 18, 2001). President Bush’s New Freedom Initiative for People with Disabilities includes the Telework Program, which provides federal funds to twenty states to guarantee low-interest loans for people with disabilities to purchase computers and other equipment so that they may work from home. See Press Release, Office of Press Sec’y, White House, President Bush Highlights Commitment to Americans with Disabilities (June 19, 2001), available at http://www.whitehouse.gov/news/releases/2001/06/20011620.html (announcing a $20 million budget for the Access to Telework Fund); see also RESNA NAT’L ASSISTIVE
ers have reportedly found that telecommuting reduces overhead costs, and benefits various types of employees, including those with family responsibilities and long commutes, in addition to those with certain disabilities.\textsuperscript{165}

Revisiting our extended spectrum of accommodation design from Part I,\textsuperscript{166} we can see in Figure 5 that a telecommuting accommodation, like an accommodation for an impairment in lifting, can be designed in multiple ways. A telecommuting accommodation might be designed in a way that creates many costs for coworkers and few or no offsetting benefits. If one worker is working from home, then employees who are on-site may need to locate materials and prepare faxes or mailings, in addition to taking over any parts of the distant worker’s job that require face time.\textsuperscript{167} If assuming such tasks makes it impossible for coworkers to perform the essential functions of their
jobs, then an employer could claim an undue hardship.\textsuperscript{168} Otherwise, coworkers would merely need to absorb the additional work. This sort of accommodation is best placed on the far left of the spectrum.

In the middle of the spectrum, employers could purchase equipment, such as laptops or fax machines, that could be used at home by any employee, though presumably with priority given to the worker with a disability.\textsuperscript{169}

Finally, a telecommuting accommodation could be designed to provide many benefits and few costs to third parties. For example, a workplace could be redesigned to enable many employees to telecommute. Cost savings from reduced office space could perhaps be reinvested in portable equipment or in administrative staff to prepare mailings and otherwise support the at-home workers. A variety of employees might prefer this arrangement, since it eliminates commuting time, and can create more flexible or more comfortable working conditions.

**Figure 5: A Spectrum of Telecommuting Accommodations**

<table>
<thead>
<tr>
<th>More Costs</th>
<th>More Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Redistribute office-based tasks to coworkers</td>
<td>Redesign workplace so many can telecommute</td>
</tr>
<tr>
<td>Limited-use equipment</td>
<td></td>
</tr>
</tbody>
</table>

How does telecommuting look from an integrationist perspective? Under the standard integration story, telecommuting seems far from ideal. Rather than creating contact by bringing people together—to work side by side, to get to know each other, and to eliminate stereotypes and animus—telecommuting seems to isolate the disabled employee at home. Certainly, an employer’s requiring a disabled employee to work from home because of coworker animus would constitute problematic segregation.\textsuperscript{170} But an accommodation that

\textsuperscript{168} See infra note 182 and accompanying text.

\textsuperscript{169} President Bush’s NFI Telework Program could help support the purchase of such equipment, though it provides little incentive for employers, as opposed to employees or entrepreneurs, to apply for the loans, because employers who apply must do so in the name of a particular employee who retains legal title to the equipment. Letter from Joya Banerjee to author (Oct. 4, 2006) (on file with the University of Pennsylvania Law Review) (reporting on a conversation with Nancy Meidenbauer of the Rehabilitation Engineering & Assistive Technology Society of North America (RESNA) Technical Assistance Project).

\textsuperscript{170} Cf. Duda v. Bd. of Educ., 133 F.3d 1054, 1056, 1059-60 (7th Cir. 1998) (finding that the employer violated the ADA because it “segregated [Duda] from others at the school” by forcing him to transfer to another site).
permits a worker with a disability to work from home might seem less than ideal even when requested by the employee. We might think that it is normatively acceptable only as a last resort, when other, in-office accommodations are inadequate to permit that employee to work, or when virtual communication is standard in the workplace such that contact continues remotely.\footnote{On the latter, see, for example, Jerry Kang, \textit{Cyber-Race}, 113 HARV. L. REV. 1130, 1186-1205 (2000).}

From the perspective of integrating accommodations discussed here, however, telecommuting perhaps looks more appealing—that is, if the telecommuting accommodation is designed in the high-benefits version on the right side of the spectrum. If an office redesign or policy change in favor of telecommuting for many is prompted by an accommodation request from an employee with a disability, then coworkers who are also happily working from home may develop more favorable attitudes toward disability or may begin to see the virtues of the social model of disability, as discussed above. The accommodation thus brings about a sort of integration by indirection.

As this example suggests, the inclusionary benefits I am emphasizing depend largely on coworker knowledge that the beneficial change in the environment results from the person with a disability. This invites some important observations about disclosure and publicity, which are the subject of the next Part. First, though, we turn to some difficult questions about tradeoffs and the meaning of disability and accommodation.

\section*{C. Tradeoffs and Definitions: The Meaning of Disability and Accommodation

Looking at accommodation through the lens of third-party benefits helps to deepen the concepts of accommodation and of disability. Third-party benefits help us see that the idea of accommodation actually encompasses two distinct models, which work together to effect both narrow and broad changes to the environment. This conceptual point can be usefully explained by responding to a series of questions, both practical and definitional, that arise out of this analysis:

\begin{itemize}
  \item Doesn’t an attention to third-party benefits create a further set of problems involving tradeoffs between benefits to third parties and benefits to disabled employees? How do we balance these competing interests?
\end{itemize}
• Does viewing accommodation from the perspective of third-party benefits affect our understanding of the definition of disability?
• Is an accommodation still properly termed an “accommodation” once it is integrated into the environment and redounds to the benefits of the many rather than the few?

These three questions are interrelated, and my answers to them begin with an observation about the meaning of accommodation.

The final question highlights the fact that we can understand accommodation in two distinct ways, which are somewhat in tension. The static model of accommodation understands accommodation as a special thing done for one or a few individuals, for a subset of the population, to make it possible for those different individuals to participate in, for example, the workplace. In contrast, the dynamic model of accommodation understands accommodation as a process of interrogating the existing baseline, by focusing on part of the population that was neglected in the creation of that baseline, to make changes to that baseline that may affect everyone. Both ideas are encompassed by the term of accommodation, though they are in tension.

The tension between these two models of accommodation relates to what Martha Minow calls “the dilemma of difference.” She writes, “when does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that basis?” Under the static model, difference is reified. A small subset of the population is the target of an intervention, designed and implemented for those individuals’ benefit, because they are different. Under the dynamic model, we risk ignoring difference. Because the model treats disability as a lens through which to see the need for universal improvements, disabled people and their particular needs risk being lost in the mix. The whole idea of accommodation risks dissolving into a general social welfare program in which disabled people’s needs matter no more and no less than anyone else’s.

The tension between the two models of accommodation could seem a weakness or a flaw. But recognizing the importance and contours of third-party benefits allows us to see how the tension between the two models is, instead, a vital and productive part of accommoda-

172 MINOW, supra note 17, at 20.
tion, as answers to the three questions help demonstrate. First, when dilemmas arise about which interests should matter more—the workplace needs of the disabled employee or the third-party benefits to the nondisabled coworker—then the needs of the disabled employee should take priority. This conclusion requires no new legislation or amendment. It comports with the statute’s “individual” focus.\(^{173}\) Accommodating particular individuals with disabilities to make workplace participation possible is the aim of the statute. This is the static model at work. Yet, as this Article shows, introducing accommodations will sometimes involve a beneficial change in the workplace for everyone. And careful attention to the design of accommodations involves an inquiry into the value of existing baselines that may alter the workplace structure or practices for everyone: the dynamic model.

Relatedly, using these two models can help us understand why, as a practical and legal matter, a change that restructures the workplace in a way that benefits everyone, nondisabled as well as disabled, can still properly be called “an accommodation.” The ADA remains in place, with no sunset provision, no expected time of obsolescence. So a change that is needed by disabled employees, but that provides widespread benefits, may fade into the background and no longer be recognized as an accommodation. But if an employer wanted to withdraw that change, the disabled employee’s legal entitlement to accommodation would reemerge as a stopgap to the elimination of that accommodation. The accommodation could be replaced with another effective accommodation, but it could not simply be removed; its salience as an accommodation for disabled employees would come back into focus at this point.

Finally, these two models show why the third-party benefits analysis is significant to our social understanding of disability, although it should not change the legal definition. Samuel Bagenstos has argued persuasively that the ADA has an antisubordination purpose, concerned with the subset of the population subject to systematic “impairment-based subordination.”\(^{174}\) While Bagenstos rightly observes that courts have gone too far in the direction of limiting the Act’s coverage to a narrow category of the “truly disabled” on a medical model, he also properly concludes that the statute should not be extended to


protect everyone along a universalizing axis of ability/disability. This seems exactly right, and nothing in the third-party benefits analysis suggests otherwise.

But even though this Article’s analysis should not alter the legal definition of who is protected by the statute, it should affect our cultural conception of disability and the ADA. As noted in Part II, the societal understanding of disability as lack, as something missing, leads to a view of the statute as a one-way redistribution. The ADA, under this view, involves a kind of employer (and, to some extent, coworker) largesse. Employers and coworkers expend their resources to help this different, and lesser, group participate. In a sense, this is the static model. The significance of third-party benefits comes, however, in the interplay between the static model and the dynamic model.

Disability is what requires a change to the structural environment or the processes of the workplace, to ensure that an employee with a disability can participate (the static model). But recognizing that these changes may bring about third-party benefits, automatically or through careful design, invites a process that interrogates the baseline and its potential improvement for many (the dynamic model). The aim is not ultimately to untether these two versions of accommodation so that only the second persists. On the contrary, disability is the necessary lens through which we constantly interrogate the world as it is currently structured; as the world changes, so will disability, and thus the feedback loop between the static model and the dynamic model will continue. That is, we must continue to come back to the static model, both because the statute’s individualized, antisubordination project requires it, and because the fact of disability is what continues to inspire the more broadly useful inquiry of the dynamic model.

Once we see the vitality of this process, disability itself looks different. No longer merely a site of public and private largesse, disability is instead a crucial instigator of changes that can be more broadly beneficial. The changes need not be a net gain to employers or to society, though they sometimes will be. What matters for a subtle shift in our conception of disability is only that we see that the gains are greater and broader than they are currently understood to be.

Of course, hard questions and difficult tradeoffs remain. For instance, what should be done if the disabled employee’s preferred accommodation—the one that allows him to do his job even better—has fewer third-party benefits than one that merely allows him to do his job

\footnote{Id. at 466-84.}
effectively? Under current interpretation, the decision about which to provide would be up to the employer. I would hope the interactive process might result in constructive dialogue about the overall workplace and the different interests at stake, and some mutually satisfying solution might be reached. But that won’t always be the case, and I do not purport in this Article to answer the question of how such conflicts are best resolved. This Article takes the step of identifying the fact that interests converge in ways that have gone unrecognized. It shows how recognizing these convergences can lead to more such benefits through careful design and can help to shift our conception of disability and the ADA. The next Part provides a framework for thinking about which changes matter to this project and for analyzing the legal and policy contexts in which this analysis can be applied.

IV. DESIGNING INTERVENTIONS TO INTEGRATE ACCOMMODATION

This Article thus far has provided a set of tools for thinking about accommodation, both individually and structurally. Because third-party benefits have largely gone unnoticed, their role in the design and implementation of accommodations has not been analyzed. Part I of this Article therefore provided a spectrum for comparing alternative accommodations in terms of their potential costs and benefits to third parties. It showed how the design of an accommodation determines where it falls on this spectrum. Part III explained how these third-party benefits are relevant to the integrative aims of the ADA. It showed how attending to third-party benefits can help us effectively to use two models of accommodation in tandem: the static model of accommodation—with its attention to individual needs—and the dynamic model of accommodation—with its potential for questioning and altering the baseline to everyone’s benefit.

I hope these ideas are of conceptual use to scholars. But I also hope that they might be of conceptual, and even practical, use to employers and other institutional designers. Any individual need for an accommodation can be analyzed in terms of its location on the spectrum of third-party costs and benefits, and alternative designs for an accommodation may be compared on the spectrum. As the discussion of the two models of accommodations demonstrated, any such analysis must keep the disabled individual’s need foremost in mind, even while that need prompts a broader inquiry into the status quo for the workplace more generally. As Part III also discussed, the primary reason that third-party benefits matter is that they may improve attitudes toward disability and the ADA. Thus, this analysis requires one further set of tools: a framework for dis-
The third-party benefits discussed in this Article can be divided into two groups: those that increase attitudinal benefits to third parties and those that increase usage benefits to third parties. As noted in Part I, attitudinal benefits are improvements in attitudes toward people with disabilities or the ADA. Usage benefits are those benefits (e.g., material, physical, hedonic) that directly accrue to the third party who uses or is affected by the accommodation. The distinction
between these types of benefits—and the means of creating attitudinal benefits in particular—requires further elaboration.

Chart A categorizes different types of accommodations—or different designs for the same accommodation—based on whether they create usage benefits or attitudinal benefits:

**Chart A: Attitudinal Versus Usage Benefits to Third Parties**

<table>
<thead>
<tr>
<th>Attitudinal benefits to third parties</th>
<th>No usage benefits to third parties</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Box I</strong></td>
<td><strong>Box II</strong></td>
</tr>
<tr>
<td>Accommodations with usage benefits and attitudinal benefits to third parties—i.e., accommodations used by coworkers that are known to be due to disability.</td>
<td>Accommodations with attitudinal benefits, but no usage benefits—i.e., accommodations used only by the individual disabled worker but known about by coworkers.</td>
</tr>
<tr>
<td><strong>Examples:</strong> office redesign to reduce lifting strain; broad-based telecommuting initiative.</td>
<td><strong>Example:</strong> a typing stick for a quadriplegic employee, which coworkers can see but would not use.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>No attitudinal benefits to third parties</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Box III</strong></td>
<td><strong>Box IV</strong></td>
</tr>
<tr>
<td>Accommodations with usage benefits to third parties, but no attitudinal benefits—i.e., accommodations used by coworkers but not known to be due to disability.</td>
<td>Accommodations with no usage benefits and no attitudinal benefits—i.e., accommodations not used beneficially by coworkers and either not known about or known about only in terms of their burden on coworkers.</td>
</tr>
<tr>
<td><strong>Examples:</strong> those noted in Box I, but without coworkers knowing that disability is the source of the benefit.</td>
<td><strong>Examples:</strong> ergonomic office furniture not known about or shared with any other worker; or heavy lifting redistributed to coworkers.</td>
</tr>
</tbody>
</table>

Box I has been the principal emphasis of this Article: situations in which an accommodation has third-party usage benefits that translate into attitudinal benefits, whether through improved contact, positive associations, or the radical social model. Box II contains those accommodations that lack usage benefits for others—because the accommodation will not be used by anyone else—but may still have attitudinal benefits. For instance, seeing a disabled coworker enabled by an ac-
commodation may help coworkers appreciate the social model of disability.\footnote{176 See supra Part III.}

By contrast to the accommodations in the first row, those in the second row have no attitudinal benefits. Box III includes those accommodations that have usage benefits to third parties—i.e., they improve the work or lives of coworkers—but do not improve attitudes. The key examples of these accommodations are those that have usage benefits but are not disclosed (to coworkers) as having been prompted by disability or the ADA. That is, they would seem to coworkers just to be general workplace improvements, with no connection to disability.

Those in Box IV have neither usage nor attitudinal benefits. These are harder to picture, at least in part because all accommodations permitting a disabled employee to remain in the job presumably have the potential for some attitudinal benefits—simply through “contact.” But bracketing those generalized relational benefits, we can see two main types of accommodations that would fall into Box IV: first, those that have no usage benefits to third parties and are unknown to coworkers (such as ergonomic furniture or office design that no one else would use or notice), and second, those that are known to coworkers but only through the burden they create (such as redistributing undesirable marginal tasks to coworkers).

These distinctions help to identify two different types of interventions: first, those that move accommodations upward into the top row by creating more attitudinal benefits (Chart B), and second, those that move them leftward by creating more usage benefits (Chart C).

\begin{center}
\begin{tabular}{|c|c|c|}
\hline
& Usage benefits to third parties & No usage benefits to third parties \\
\hline
Attitudinal benefits to third parties & Box I & Box II \\
\hline
No attitudinal benefits to third parties & Box III & Box IV \\
\hline
\end{tabular}
\end{center}
Interventions to increase or improve disclosure and publicity surrounding accommodations have the potential to increase attitudinal benefits. Not everyone would agree, however, that publicizing accommodations is a good idea. There are legitimate concerns about employee privacy issues, discussed in the next Section. In addition, Charles Riley has argued that accommodations should be as discreet as possible. This is a surprising statement in a book focused on the benefits to employers of hiring and accommodating disabled people. Riley nonetheless writes,

The paragon [of Universal Design] is not just a “barrier-free environment” but one that hides its accessibility features, making it more comfortable for both the person with a disability and the person without. For architects, this is license to make the building beautiful as well as functional. . . . Architecture that screams “accessibility” is for a hospital or nursing home, not the office. . . . Because it will be decades if ever before a wheelchair, hearing aid, or cane does not set off at least a mild sense of alarm in the minds of coworkers or customers, the corporate environment is better off concealing the ramp, literally and metaphorically.

Riley seems to view the stigma of disability as unavoidable. And he seems therefore to think that accommodations can be aesthetically pleasing and fully integrated only if their association with disability is concealed or minimized. But as we have learned from the gay rights movement, there is power in openness. Perhaps coming out about accommodation can improve attitudes—both toward disabled people and toward accommodations. Moreover, coming out about accommodation seems a particularly promising way to improve attitudes where the accommodations have positive effects on the workplace and coworkers.

Creating more attitudinal benefits (as in Chart B) thus seems the easiest form of intervention to embrace. It maintains the focus on accommodating people with disabilities, while raising awareness of exist-

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177 RILEY, supra note 13, at 110-11.  
178 Riley seems to be talking about passing, to the extent that he wants the accommodations to be concealed. His reference to “screaming,” however, implies an interest in that milder sister of passing—covering. Covering involves not concealing an identity, but making it possible for others to disattend that identity. See generally Yoshino, Covering, supra note 121 (developing a theory of covering building on ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 102-04 (1963)). What effect covering, or declining to cover, has on others’ attitudes would be an interesting topic for empirical study. But it seems reasonable to think that making others aware of positive changes to the environment due to disability would help encourage favorable attitudes toward disability. See supra Part III.
ing third-party benefits, and thus improving attitudes toward both people with disabilities and the ADA. Interventions aimed at upward movement are therefore less likely to raise the concerns discussed in Part V, about distracting attention from disabled people, because these interventions do not advocate redesigning accommodations to benefit third parties. As noted earlier, the statute is called the “Americans with Disabilities Act,” not the “Americans Act,” and this Article does not aim to change that focus.

That said, the existence of third-party usage benefits of accommodations may also contribute to those attitudinal shifts—through improved contact, positive associations, or the radical social model, as discussed in Part III. And appealing or not, coalition building (i.e., interest convergence) may be necessary, as discussed in Part V. Thus, designing accommodations to move them leftward on the chart (see Chart C) may also be useful to disabled people and to the ADA’s integrative aims, at least where that leftward shift can be done without interfering with the accommodations’ effectiveness for individual people with disabilities.

### Chart C: Creating More Usage Benefits Through Choice and Design of Accommodations

<table>
<thead>
<tr>
<th>Attitudinal benefits to third parties</th>
<th>Usage benefits to third parties</th>
<th>No usage benefits to third parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Box I</td>
<td>No attitudinal benefits to third parties</td>
<td>Box II</td>
</tr>
<tr>
<td>Box III</td>
<td>No attitudinal benefits to third parties</td>
<td>Box IV</td>
</tr>
</tbody>
</table>

The next Section focuses principally on an intervention that seems most appealing for its emphasis on upward movement—toward more attitudinal benefits—through increased and improved disclosure of accommodations within the workplace. The other interventions discussed involve a combination of increasing usage and attitudinal benefits.
B. Disclosure

Integrating accommodations can improve attitudes toward disability and the ADA only if coworkers know that disability prompted the positive changes to the workplace. The EEOC’s policy on disclosing accommodations runs directly counter to this insight.

The EEOC has interpreted the narrow medical-nondisclosure requirement in the ADA as a broad prohibition on an employer’s disclosing any information about an employee’s disability or accommodation. The statutory language does not require such a conclusion. The relevant language prohibiting disclosure appears only in the clause on “[e]mployment entrance examination,” where the statute reads, “information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record” subject to exceptions for those who need to know because they implement the accommodation, such as supervisors.\(^{179}\) The EEOC has interpreted this to suggest that employers may not disclose an employee’s disability or accommodation to coworkers under any circumstances.\(^{180}\)

An employer might worry that the inability to explain accommodations to coworkers could lead to morale problems.\(^{181}\) As noted earlier, the EEOC has also made clear its view that coworker morale is not an adequate basis for a claim of undue hardship, and rightly so; the only direct relevance of coworkers’ experience to a finding of undue hardship is if accommodating a person with a disability makes coworkers unable to perform the essential functions of their jobs (e.g., because they are performing so many additional tasks as part of the disabled coworker’s accommodation).\(^{182}\) To help employers deal with


\(^{180}\) The EEOC’s Guidance on Reasonable Accommodation and Guidance on Psychiatric Disabilities contain similar, though slightly different, discussions of the issue. In addition, because the EEOC Guidance on Reasonable Accommodation specifically states merely that the employee can disclose, so long as there is no coercion by the employer, a cautious employer could reasonably infer that it may not disclose even if the employee gives permission. See infra notes 182-183, 189.


\(^{182}\) EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, supra note 113 (“An employer cannot claim undue hardship based on employees’ (or customers’) fears or prejudices toward the individual’s disability. Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be able to
morale-related concerns, though, the EEOC has done an awkward dance, suggesting that employers can engage in a kind of generalized double-talk about protecting workers’ privacy and complying with federal law, which effectively says without saying so directly that the employer is accommodating a disability. \(^{183}\)

Though perhaps an understandable compromise on a difficult issue, the EEOC’s position is flawed. It fails to protect employee privacy, and it also may send the message that disability is a source of embarrassment or shame. Moreover, as I have urged, where accommodations have third-party benefits and the disabled employee approves it would be far better if employers disclosed the impetus for those accommodations in a way that promotes the integrative purposes discussed earlier. Some work suggests that carefully designed disclosure of the disability and the accommodation can have important effects not only on work-group morale but also on coworkers’ attitudes toward the accommodated employee. \(^{184}\) Designing disclosure to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees’ ability to work.” (footnote omitted)). Of course, one may also read Barnett as articulating a broader notion of undue hardship based on coworker morale, where job entitlements are at stake. See supra text accompanying notes 110-111 (discussing US Airways, Inc. v. Barnett, 535 U.S. 391 (2002)).

For instance, the Guidance on Psychiatric Disabilities says that, while an employer may not disclose medical information or the fact that an accommodation has been provided (because it implies that there is a disability), the employer may respond to coworker questions by explaining “that it is acting for legitimate business reasons or in compliance with federal law.” EEOC, ENFORCEMENT GUIDANCE ON PSYCHIATRIC DISABILITIES, supra note 19. The Guidance on Reasonable Accommodation goes further, saying that

[a]n employer may certainly respond to a question from an employee about why a coworker is receiving what is perceived as “different” or “special” treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer’s policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that his/her privacy would similarly be respected if s/he found it necessary to ask the employer for some kind of workplace change for personal reasons.

EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, supra note 113.

See, e.g., Lauren B. Gates, Workplace Accommodation as a Social Process, 10 J. OCCUPATIONAL REHABILITATION 85, 85 (2000) (arguing that a carefully designed disclosure plan can help disclosure lose “its status as a taboo topic”); see also Rose A. Daly-Rooney, Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act, 8 J.L. & HEATH 89 (1993) (suggesting that a “group brainstorming approach” to designing reasonable accommodations, which would require disclosure to coworkers, can lead to
emphasize any potential benefits to coworkers could help to facilitate more positive attitudes.

For example, Lauren Gates and her colleagues report positive results from carefully designed disclosure planning—to employers and to work groups—for employees with mental health conditions. In their program, the decision whether to disclose, first to the employer, and then, as a separate decision, to coworkers, is left to the employee. But if an employee does decide to disclose her condition to the broader workplace, then the employer and employee discuss how best to reveal the information to other employees. Gates and her colleagues have seen particularly positive results for work groups in which disclosure has occurred in a group meeting led by a trained facilitator (whether a human resources person, a union representative, or an Employee Assistance Program counselor), in which the accommodation is announced, and then each group member talks about how it will likely affect her work. In such settings, sometimes the employee with the mental-health condition reveals her disability and the accommodation to the work group herself, but sometimes the employer does the actual disclosing (if, for instance, the employee is not comfortable doing so).

Under the EEOC guidances, however, a particularly cautious employer could reasonably decline to disclose the employee’s condition, even if the employee actually requested that the employer do so.

The EEOC’s prohibition on disclosure by the employer, although not required by the statutory language, is motivated by important policy considerations. Particularly for highly stigmatizing impairments, such as psychiatric disabilities or HIV, protection of employee privacy can be very important. Research on disclosure of stigmatized identities suggests that such employees face a complicated calculus, since either disclosing or concealing a stigmatized trait can have negative consequences.

better accommodations, increased focus on the disabled employee’s abilities rather than limitations, and improved communication with coworkers).

See Gates, supra note 184, at 91-95; see also Interview with Lauren B. Gates, supra note 24 (providing the detailed observations that follow).

For any number of reasons, people with disabilities, physical or mental, may sometimes prefer not to have to tell their own stories. Cf. Elizabeth F. Emens, Shape Stops Story, 15 NARRATIVE 124, 130-31 (2007). This may mean a desire not to have their stories told at all, or it may sometimes mean a desire not to have to be the one doing the telling.

See, e.g., Manuela Barreto, Naomi Ellemers & Serena Banal, Working Under Cover: Performance-Related Self-Confidence Among Members of Contextually Devalued Groups
may be a necessary condition for employees to speak up and request accommodations at all. For these reasons, the employee should have the last word on whether her disability is disclosed in her workplace—much as the employer has the last word as between two effective accommodations. However, to say this is merely to set a floor.

The EEOC should revise its recommendations on this issue not only to set a floor ensuring the employee’s right to control disclosure, but also to urge employers to rise above it. In particular, the EEOC should do three things to promote disclosure that, where acceptable to the employee, could help promote the integrative purposes discussed: (1) encourage a dialogue between employer and employee about whether the employee wants disclosure of the accommodation and, if so, in what manner; (2) make clear that an employee can give the employer permission to disclose the accommodation, and not merely that the employee can tell her coworkers about it herself (because, inter alia, claims that an accommodation is benefiting coworkers may be more plausible coming from the employer); and (3) provide guidelines for disclosing accommodations to work groups in a constructive manner that particularly emphasizes third-party benefits.

In addition, because nondisclosure (or the half-disclosure that the EEOC favors) of disability and accommodation might actually increase stigma, the EEOC should articulate some of the benefits of careful and constructive disclosure. Gates has found that employees

Who Try To Pass, 37 EUR. J. SOC. PSYCH. 337, 349 (2006) (reporting on a study of an invisible, contextually devalued trait and showing that concealers thought their partners had more positive expectations of their ability to perform while the concealers themselves had lower performance-related self-confidence); John E. Pachankis, The Psychological Implications of Concealing a Stigma: A Cognitive-Affective-Behavioral Model, 133 PSYCH. BULL. 328, 328-29 (2007) (discussing researchers’ recent development of a more nuanced view of concealable stigmatized traits, from a view that bearers of such traits escaped the negative consequences of stigma to a view that appreciates the potentially negative consequences of concealing the traits); Belle Rose Ragins, Romila Singh & John M. Cornwell, Making the Invisible Visible: Fear and Disclosure of Sexual Orientation at Work, 92 J. APPLIED PSYCH. 1103, 1114 (2007) (reporting that fear of disclosure of gay identity at work, among those who had not disclosed or fully disclosed their sexual orientation, “had an overwhelmingly negative relationship with their career and workplace experiences and their psychological well-being” but finding little relationship between range of disclosure and outcome variables).

See EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, supra note 113.

The EEOC Enforcement Guidance on Reasonable Accommodation says merely that “[a]s long as there is no coercion by an employer, an employee with a disability may voluntarily choose to disclose to coworkers his/her disability and/or the fact that s/he is receiving a reasonable accommodation.” Id.
with mental health conditions and other stigmatized disabilities tend to be aware of the risks of disclosure, but less aware of the potential benefits.\footnote{See Interview with Lauren B. Gates, supra note 24. According to Gates, disclosure can have the following benefits for a person with a mental health condition: it allows her to be protected by the ADA and to request accommodation; it relieves her of the burden that can come from hiding this aspect of herself; and since others at work can usually tell that there is a problem, disclosure prevents them from making up an explanation for the problem (such as substance abuse or incompetence) that is probably worse for the person. Id.}

Disclosure can of course be a complicated business with potential for missteps—or worse. An employer particularly hostile to the ADA could disclose in a way that fostered negative attitudes by, for instance, emphasizing third-party costs. Thus, one useful feature of permitting the relevant employee to prevent disclosure—in addition to protecting employee privacy—is that the employee may be better positioned than anyone else to know, from interaction and discussion, if an employer’s disclosure would be hostile. Though employee knowledge will not be perfect, allowing the employee to use her sense of the employer and the situation to decide if disclosure is best seems a context-sensitive approach better suited to these complexities than a blanket rule precluding disclosure. In addition, employees may be particularly attuned to whether a particular accommodation—through necessity or design—will create more third-party costs than benefits. In such circumstances, an employee might decide that she prefers nondisclosure.

Interestingly, this discussion of third-party benefits shows that nondisclosure may sometimes benefit employers. Most of the work on disclosure requirements has focused on the disadvantage that nondisclosure imposes on employers, who may want to disclose that an employee is disabled and being accommodated in order to avoid morale problems caused by coworkers who think someone else is getting special treatment.\footnote{See, e.g., Key, supra note 181, at 1009-11 (discussing how employers often deal with complaints from employees regarding the special treatment of a coworker with a disability); see also Jessica Zeldin, Note, Disabling Employers: Problems with the ADA’s Confidentiality Requirement in Unionized Workplaces, 73 WASH. U. L.Q. 737, 741 n.20 (1995) (asserting that favoritism shown to the disabled employee may damage employee morale).} If, however, an employer designs an accommodation that \textit{benefits} many employees—such as a broad-based telecommuting initiative—the employer may have an incentive \textit{not} to mention the role that disability or legal compliance has played in this change in the workplace. The employer may be better able to reap the benefits...
of these alterations (and even to internalize the benefits directly by lowering wages) if coworkers are unaware of the (disability and regulatory) origins of the change. Thus, in an effort to protect employees with disabilities by broadly interpreting the nondisclosure requirements, the EEOC may be helping employers at the expense of both employees with disabilities and the broader purposes of the ADA.

Directing attitudinal benefits of such accommodations toward disabled people depends instead on coworkers’ knowledge of the role of disability in the change. For coworker attitudes toward disability or the ADA to improve by virtue of third-party benefits, the coworker needs to know about the role that disability or the ADA played in the change that created those benefits. Without that knowledge, coworkers would presumably credit the employer for the changes. Thus, rather than discouraging disclosure, the EEOC should encourage careful and constructive disclosure of accommodations, with the consent and input of the accommodated employee.

C. Reasonableness and Undue Hardship

Courts have elided the question of what role third-party benefits should play in determinations of reasonableness or undue hardship. Employers might nonetheless have incentives to take some third-party benefits into account when choosing between effective accommodations (as the statute permits them to do), as noted in Part I, to the extent that those third-party benefits can be internalized by the employer through more productive employees or more contented customers. But not all third-party benefits accrue to employees or customers. In addition to the problem transaction costs might pose to

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192 The fact that employers should be able to adjust wages and prices in response to such benefits parallels the point that, to the extent that accommodations cost money, the employers would presumably pass these costs on to employees or customers in the form of lower wages or higher prices. See Christine Jolls, Accommodation Mandates, 53 STAN. L. REV. 223, 230-33 (2001) (observing that the costs of accommodation mandates tend to affect wages generally, rather than just those of the accommodated group); Lawrence H. Summers, Some Simple Economics of Mandated Benefits, 79 AM. ECON. REV. 177, 179-82 (1989) (describing the effect of mandated benefits on wages and prices); Cass R. Sunstein, Human Behavior and the Law of Work, 87 VA. L. REV. 205, 236-40 (2001) (describing how the burden imposed by various employment measures can be offset by lower wages). Thus, while accommodations designed for individuals may have positive externalities for third parties, they may simultaneously create costs for those or other third parties. That said, this can be true for any accommodation—whether or not it creates benefits for third parties—so this does not diminish (and in fact may increase) the impetus to consider the potential third-party benefits of different accommodations.
adjusting wages, some kinds of benefits—such as expressive benefits (discussed in Part I) or improved attitudes toward disability or the ADA (elaborated in Part III)—are public goods that employers would have little reason to create.

Where, then, might third-party benefits be relevant to the legal requirement of accommodation? Perhaps under the ill-defined analysis of either undue hardship or reasonableness. As discussed in Part I, key decisions have not explained whether third-party benefits are relevant to this analysis and, at times, have seemed to overlook the existence of third-party benefits altogether. Because courts have drawn the contours of reasonable accommodation using the language of costs and benefits, courts should consider third-party benefits before rejecting accommodations as unreasonable or an undue hardship.\(^\text{193}\)

This is not the place for a full discussion or critique of the doctrine of reasonableness or undue hardship, but as those concepts have been articulated by key decisions, third-party benefits should be part of the analysis. If reasonableness means that “at the very least, the cost could not be disproportionate to the benefit,” then the fact that an accommodation will bring benefits to many employees—disabled, nondisabled, or sub-ADA disabled—could render the accommodation reasonable even if it would only “bring about a trivial improvement in the life of a disabled employee.”\(^\text{194}\) And if the undue hardship defense gives the employer a chance to argue, as to an otherwise reasonable accommodation, that “upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer’s financial survival or health,”\(^\text{195}\) then the defense should fail if the employer’s showing did not adequately take account of third-party benefits generally (on the first prong) or of second-party benefits (those internalized by the employer) that undercut the claim that the burden was undue.\(^\text{196}\) Though the (nonexhaustive) statutory factors relevant to undue hardship do not include this numerosity dimension, legislative history notes the potential relevance of multiple

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\(^{193}\) I am bracketing in this Article the question of whether the courts’ cost-benefit approach to reasonableness and undue hardship is sound as a matter of statutory interpretation or social policy. What I argue requires no fundamental change in the statute or the broad doctrinal contours of its interpretation by courts.

\(^{194}\) Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995).

\(^{195}\) Id. at 543.

\(^{196}\) Barkowski seems to open the door to this by referring to multiple employees in its undue hardship discussion, as discussed in Part II.A, supra, though I have found no cases that follow this through.
disabled users of an accommodation as a factor weighing against a finding of undue hardship. 197

For instance, Vande Zande’s rejection of telecommuting as unreasonable has been criticized on empirical grounds—through demonstrations that supervision and administration of such regimes are not only feasible but often cost effective. 198 The fact that telecommuting could be designed as an improvement to the entire workplace—in ways that would make work easier, rather than harder, for coworkers, as discussed earlier 199—could further support a finding of reasonableness and a rejection of an undue hardship defense. 200 Yet Vande Zande entirely overlooks this possibility.

The court’s cost-benefit approach to reasonableness and undue hardship might thus require a consideration of third-party benefits. As discussed in the next Part, disability advocates may reasonably worry that urging courts to consider third-party benefits relevant to determinations of reasonableness or undue hardship would lead

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197 In addition, the House Report accompanying the ADA includes the following passage:

The Committee also intends that the factors set forth in 101(9)(B) are not exclusive and that in appropriate circumstances courts and the administrative agencies may use other relevant factors . . . . For example, the number of employees or applicants potentially benefiting from an accommodation may be a relevant consideration in determining undue hardship where use by more than one person with a disability would reduce the relative financial impact of an accommodation. For example, a ramp installed for a new employee who uses a wheelchair not only benefits that employee but will also benefit mobility-impaired applicants and employees in the future. Assistive devices for hearing and visually-impaired persons may be shared by more than one employee so long as each employee is not denied a meaningful equal employment opportunity caused by limited access to the needed accommodation. On the other hand, the Committee wishes to make clear that the fact that an accommodation is used by only one employee should not be used as a negative factor counting in favor of finding an undue hardship. By its very nature, an accommodation should respond to a particular individual’s needs in relation to performance of a specific job at a specific location. It is not the Committee’s intent that the individualized nature of the accommodation process be undermined when considering whether other employees may be benefited by the accommodation requested by a single individual.


198 See, e.g., Ludgate, supra note 161, at 1322 n.82, 1333-34 (citing research studies suggesting that telecommuting may actually increase worker productivity).

199 See supra Part III.B.

200 But cf. Kvorjuk v. Maine, 259 F.3d 48, 57 (1st Cir. 2001) (claiming that one worker’s telecommuting would pose an undue burden on coworkers).
courts to begin to consider third-party benefits as necessary to reasonable accommodations—or as an important factor in determining undue hardship—or prompt more attention to third-party costs. This is a legitimate concern.

Nonetheless, as noted earlier, the Supreme Court has already indicated in Barnett that third-party costs could lead to a determination that an accommodation is unreasonable. And the courts’ cost-benefit analysis of accommodations is far from an exact science. To the extent that courts are simply eyeballing the costs and benefits, and are considering third-party costs relevant to that assessment, they should also consider third-party benefits.

In order to rationalize the current doctrine, courts following Vande Zande should therefore take account of potential third-party benefits before rejecting accommodations as either unreasonable or an undue hardship. This is most plainly true of the reasonableness inquiry, both because the Court has already stated the relevance of third-party costs in this domain, and because reasonableness involves a more general balancing of benefits and costs, including those that will not be internalized by the employer. The undue hardship analysis places greater emphasis on the burden to employers. Therefore, it may be sensible to assume that, given the complexities of assessing third-party benefits and costs, employers—not courts—are best situated to assess the ones that they will internalize. Or it might seem that only usage benefits, but not attitudinal benefits, are relevant to the undue hardship analysis. However, Vande Zande does generally fold “the benefits of the accommodation” into the “undue” part of the undue hardship inquiry; accordingly, though reasonableness seems the more obvious place for considering third-party benefits, particularly attitudinal benefits, courts should consider such benefits relevant to undue hardship as well.

Opinions that explicitly took account of third-party benefits could increase attitudinal benefits by raising awareness of third-party benefits, and could also create incentives for employees to propose accommodations that have third-party benefits. But I do not imagine that courts will be major instruments of social change in this regard, for several reasons. First, so many cases fail at the stage of determin-

201 See infra Part V.
203 See, e.g., Sunstein, supra note 80.
204 See supra text accompanying note 195.
ing whether the plaintiff falls within the scope of the statute that the accommodation question is often not even reached. Second, the accommodation requests that make it to court are less likely to be ones involving many third-party benefits, particularly once employers are made more aware of the possibility of such benefits. Third, some aspects of third-party benefits will be difficult or impossible for courts to assess. Most obviously, experimentation benefits depend on the contingent fact of whether the experiment succeeds, as discussed earlier. Courts may therefore be unable to take into account all the potential third-party benefits, even under the ad hoc form of cost-benefit analysis of accommodations set forth in Vande Zande.

Nonetheless, courts should take these benefits into account for a simple doctrinal reason: existing doctrine articulates these tests in terms of costs and benefits, so courts should consider the full range of such benefits, as well as the costs, when deciding whether accommodations are reasonable or whether they present an undue hardship to employers.

D. Promotion and Publicity

Attention to third-party benefits should prompt new approaches to public and private administration and publicity surrounding the statute. Public entities charged with facilitating the statute’s implementation should work to make third-party benefits visible and to promote their development.

For instance, the Job Accommodation Network (JAN) provides advice to employers about how to accommodate employees with disabilities. Its current website, which contains a great deal of information about particular disabilities and possible accommodations, makes no reference to third-party benefits. With some textual revisions and

\[\text{See infra note 229 (discussing the narrowing effect of the statutory definition of disability). For example, an employee’s request for better ventilation in a workplace involving chemical fumes would look more promising if other workers’ health were taken into account. But the case on this point that came before the Seventh Circuit failed because the asthmatic plaintiff was determined not to be substantially limited in a major life activity. See Webb v. Clyde L. Choate Mental Health & Dev. Ctr., 230 F.3d 991 (7th Cir. 2000).}\]

\[\text{See supra Part I.D.5.c.}\]

\[\text{See, e.g., Sunstein, supra note 80.}\]

\[\text{The JAN is a free service of the Office of Disability Employment Policy, U.S. Department of Labor. See JAN Homepage, http://www.jan.wvu.edu (last visited Feb. 15, 2008).}\]
additional training, its promotional materials and individual consulting could encourage employers to see how some accommodations could have such benefits.\textsuperscript{209} For reasons I will discuss shortly, one might worry that employers could be so attracted to accommodations with third-party benefits, especially those that can be internalized, that they might become more reluctant to grant necessary accommodations that do not have such benefits. But the JAN could make clear that an employer is required by law to grant a necessary accommodation that does not impose an undue hardship, even if the only available reasonable accommodation has no third-party benefits. Moreover, following the revisions to the EEOC guidance on disclosure suggested in Part IV.B, the JAN could encourage employers to give due credit to employees with disabilities for prompting the redesign that led to the third-party benefits—thus promoting the integrating accommodation idea—subject to the employee’s consent. This could help engender both greater attitudinal and greater usage benefits.

More generally, other public and private entities could do more to emphasize the third-party benefits of disability accommodations. Right now—perhaps because of the concerns discussed earlier about potentially diminishing the individualized focus of the statute—the EEOC and other entities that provide information to employers about accommodations do not mention, much less highlight, third-party benefits.\textsuperscript{210} This approach should be reconsidered. Relevant government agencies and public-interest organizations should revise their educational literature and promotional materials to emphasize that accommodations can create second- and third-party benefits and, more importantly, that accommodations can be designed to create more benefits and to minimize costs, in ways that help to improve workplace morale and productivity and to promote favorable attitudes toward disability and the ADA.

\section*{E. Implications for Diversity Initiatives}

Recognizing that disability accommodations have multiple beneficiaries could also affect the way institutions think about their diversity initiatives. Diversity initiatives—programs or policies to promote diversity
within a particular institution—less often include disability than race and sex. There could be many reasons for this “disability gap,” including the fact that disability was a relative latecomer to the civil rights movements, or a reasoned judgment that the problems of discrimination with regard to race and sex are deeper, more invidious, or more pressing. Whether or not these explanations are valid, the analysis in this Article points to another factor that likely contributes to the disability gap: the perceived costs, and neglected benefits, of accommodation.

Since courts and agencies charged with administering the ADA seem to view it principally in terms of costs to employers and third parties, it should not surprise us if businesses and educational institutions consider integrating disabled people a costly prospect. Leaders of such institutions may reason that they will comply with the law and aim to evaluate fairly any disabled people who apply, including providing accommodations if necessary, but they are not going to take affirmative steps to encourage more people with disabilities to enter their doors. Such affirmative steps could well seem like a foolish courting of costs.

Appreciating the third-party benefits of accommodations could alter that calculus. To see that accommodation is not only costly, but can offer broader benefits, could tip the balance for some institutional actors in favor of including disability in a diversity initiative. Recognizing that requests for accommodation could prompt technological innovations, or salubrious modifications to the physical plant, or experiments in managerial approach or flexible working arrangements, could be enough to make disability look more appealing. The third-party benefits need not outweigh the costs; diversity initiatives entertain multiple goals, which may be worth some degree of cost. But to see that disability accommodations are, on balance, not as costly as they at first appear, because of the potential for broader benefits, creates the potential to help close the disability gap for some institutions’ diversity initiatives.

Moreover, this analysis shows how including disability could help a diversity initiative with its broader project of institutional inclusion.

211 There are few studies of which groups are included in diversity initiatives, but what I have found supports what anecdotal observation suggests—the existence of a disability gap. See, e.g., William Erickson et al., Web-Based Student Processes at Community Colleges: Removing Barriers to Access 2 (2007), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1241&context=edicollect (reporting that “slightly over half of the schools (57%) [responding to the survey] had a student diversity plan and about half (48%) of those with a plan included students with disabilities in the plan”).

212 See supra Part II.
2008] INTEGRATING ACCOMMODATION 915

The perspective of integrating accommodation provides a conceptual and practical framework that productively utilizes the tension inherent in the dilemma of difference. This analysis provides tools for thinking about interventions in a way that both meets individual needs and, where possible through design and implementation, promotes broader welfare (usage benefits) and integrative goodwill (attitudinal benefits). Thus, this way of thinking about accommodation begins to show how integrating disability can help to concretize the metaphors of inclusion—of “structural” change, institutional “architecture,” and “barriers” to integration—and thus to provide conceptual and practical tools for facilitating diversity.

There are signs that some institutions are taking affirmative steps on behalf of disability diversity. A broader recognition of accommodation’s third-party benefits could help to accelerate this movement.

V. CONCERNS: INTEREST CONVERGENCE AND DRIFT

I’m concerned by the abuse of the disabled toilet[.] I’m not talking about vandalism . . . but the use of our toilets by able bodied people.

Alan, British wheelchair user

Calling attention to the third-party benefits of accommodations raises two related concerns. First, considering the benefits to third parties may shift the focus of the ADA from its proper place: the rights of individuals with disabilities. Second, and more specifically, discussing third-party benefits before courts may provide a further ground for courts to narrow the scope of the ADA. This Part discusses each concern in turn and concludes that while each has merit, neither warrants disregard of the third-party benefits of accommodations.

213 See supra Part III.C.
215 See generally RILEY, supra note 13.
216 This quote is provided in Jo-Anne Bichard, Our Toilets: Access Dilemmas in U.K. Public Washrooms, Presentation at the Association of American Geographers Annual Meeting (Mar. 9, 2006) (on file with author).
A. Interest Convergence Versus Coalition Building

Not everyone thinks that the third-party benefits of accommodation are especially neglected in our society. Adrienne Asch, in an article using lessons of critical race theory to analyze disability, writes,

How often, for example, are the proliferation of curb cuts, ramped entrances, and widened doorways hailed as a benefit for people who push shopping carts, or for parents wheeling baby strollers? I applaud the fact that nondisabled persons may discover the convenience of these architectural changes, but they should not be justified as worthwhile because nondisabled people can enjoy them.\footnote{Asch, \textit{supra} note 156, at 401.}

Asch sees attention to third-party benefits (to nondisabled people, rather than to other disabled people) as an instance of Derrick Bell’s “interest convergence” principle. In Bell’s words, “The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”\footnote{Derrick A. Bell, Jr., \textit{Brown v. Board of Education and the Interest Convergence Dilemma}, in \textit{CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT} 20, 22 (Kimberlé Crenshaw et al. eds., 1995). Bell continues by observing that “the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle- and upper-class whites.” \textit{Id.}; see also Richard Delgado, \textit{Introduction to CRITICAL RACE THEORY: THE CUTTING EDGE}, at xiii, xiv (Richard Delgado ed., 1995) (“Because racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture. . . . [W]hite elites will tolerate and encourage racial advances for blacks only when they also promote white self-interest.”).}

Asch is surely right that we should require no further justification for curb cuts and ramps than that they “benefit a portion of the population otherwise disenfranchised from our streets and public facilities”; they are “worthwhile even if no substantial benefit accrues to the shopper or the parent and child using the stroller.”\footnote{Asch, \textit{supra} note 156, at 401.} There is something deeply disheartening about the idea that the majority’s self-interest alone would determine social policy about disability. A similar concern animates debates over the diversity rationale in the context of racial integration. When diversity is understood to benefit all students, this can drift into the view that the purpose of integration is to make classrooms more colorful for whites. Similarly, Asch criticizes the celebration of third-party benefits of ramps and curb cuts, and the epigraph to this Part expresses outrage at the use of “disabled toilets”
by nondisabled people (in Britain, where such use is more contested than in the United States).  

But even if accommodations should ideally be granted solely because of their benefits to disabled individuals, that may not in fact be sufficient as a political or institutional matter, as Asch acknowledges. Because employment discrimination law in general—and disability accommodations in particular—are increasingly understood by many as costly interventions that need to be justified on welfarist grounds, it may be politically necessary to identify and make salient the third-party benefits of accommodations. Moreover, for workplace environments to change effectively for people with disabilities, it may be necessary for the institutional structure and underlying attitudes to change.

Even if the benefit to disabled people is sufficient to get the accommodations put in place, it may nonetheless be constructive to build coalitions among people with diverse interests. Such coalitions may be useful both politically and conceptually—to generate political support

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220 See supra notes 58-61 and accompanying text (discussing disputes over accessible-toilet usage in the United States and Britain).
221 Asch, supra note 156, at 401.
222 See generally Tristin K. Green, A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong, 60 VAND. L. REV. 849, 851-52 (2007) (describing “a growing sense in America that employment discrimination laws have become little more than employer-funded subsidies” and arguing that while this may be true for disability accommodation in many cases, the conflation of accommodation and antidiscrimination elides the notion of employer wrongdoing that justifies a broader scope for antidiscrimination efforts).
223 See supra Part III. For an example of how attitudes can themselves affect the successful implementation of accommodations, consider the following hypothetical, like the one that opens this Article, from a disability studies conference:

At one panel, three filmmakers present visual work related to disability. As is typical at disability studies conferences, the speakers were asked to make their presentations in a manner accessible to all audience participants, including those who are visually impaired. One panelist begins her talk by presenting her visuals, with no narration or description, until an audience member asks if she would provide description. The panelist seems startled and frustrated. From then on, she occasionally provides intrusive and distracting words that inadequately convey the visual representations. By contrast, the other two filmmaker-panelists have created films with a thoughtful attention to accessibility. Their films integrate carefully crafted voice-overs, which elegantly yet sparely describe the visual images. Their films use words, tone, and cadence to create an effect that enhances the overall experience for all audience members, both those who can, and those who cannot, see the visuals.

Third-party benefits, or third-party costs, it seems, can thus be created, depending in part on the attitude of the person implementing the accommodation.
for rigorous implementation of existing laws, and to develop new approaches to thinking about current problems. As Samuel Bagenstos points out in a different context, “bringing together individuals with a variety of interests and focusing them on localized efforts to address aspects of a particular social problem . . . holds the promise of creating a new politics in which people see beyond their initial interests and come to understand problems in new ways.”

224 More starkly, Richard Ford writes, “To make real progress on any of these issues we need people from outside the canonical groups of identity politics; we need their ideas and we need their cooperation.”

Promoting broader benefits seems more appealing when understood as coalition building rather than interest convergence. This might merely be a shift in rhetoric. A more optimistic account would suggest that thinking about the role that accommodation plays in the workplace more generally not only could help satisfy a broader range of preexisting interests, but could also be the best tool for improving structural features of that workplace for both people with disabilities and a broader range of workers.

Moreover, it is worth emphasizing that third-party benefits can accrue not only to nondisabled people, but also to other disabled people as well as people with impairments that do not rise to the increasingly high ADA threshold. As courts continue to narrow the definition of who counts as disabled—by raising the bar on “substantially limited,” declining to find certain activities to be “major life activities,” or following Sutton’s holding on mitigation to the conclusion that plaintiffs who can mitigate must do so—workers who are impaired but not ADA-disabled are a growing group in need of attention.

227 Attending to third-party benefits in the design of accommodations can there-

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226 Cf. GUINIER & TORRES, supra note 159, at 117 (“Those who focus on changing particular first-dimension outcomes within the existing hierarchy produce very real short-term gains, especially to the immediate beneficiaries. But they often limit themselves to challenging outcomes only as they affect women and people of color. They do not mount a sustained critique of the rules that shape those outcomes for everyone, and they fail to imagine a larger—rather than merely reallocated—quantum of benefits.” (emphasis added)).
227 See infra note 229 (providing sources that discuss the effects of the ever-narrowing definition of “disability”); supra note 121 (discussing the argument that the ADA requires mitigation).
FORE benefit people who fall within a broader idea of ADA beneficiaries than the current Court accepts.

Finally, the fact is that many accommodations do affect third parties. They may impose costs, or create benefits, or produce some combination of the two. These effects help to shape attitudes toward disability and the ADA. Therefore, even an approach focused exclusively on the interests of people with disabilities has reason to attend to these third-party effects. And to the extent that costs are generally more salient than benefits, such an approach has reason to identify and promote benefits.

B. Doctrinal Drift

Another significant concern is that if courts recognize third-party benefits as relevant to discussions of accommodation, they may use these benefits to narrow the protections of the ADA. In other words, those concerned about disabled people may worry that courts’ recognizing that some accommodations may benefit third parties will transform into a doctrinal requirement that all accommodations must benefit more than one individual employee.

There is no analytic reason why a drift toward narrowing must occur. In theory, courts could take third-party benefits into account in making reasonableness and undue hardship determinations without saying that such benefits are required. But there are nonetheless two reasons to be concerned.

First, the statutory narrowing in other areas of the ADA makes it easy to imagine a several-step process through which a lack of third-party benefits is held against an accommodation. In schematic form, the scenario is this: In Case #1, the court decides that an accommodation that costs $500 is not unreasonable because, although

Indeed, the legislative history indicates that the fact that an accommodation assists only one person should not support a finding of undue hardship. See supra note 197; see also Steven B. Epstein, In Search of a Bright Line: Determining When an Employer’s Financial Hardship Becomes “Undue” Under the Americans with Disabilities Act, 48 VAND. L. REV. 391, 403 (1995) (“[T]he fact that an accommodation benefits only one person does not weigh in favor of a finding of undue hardship.”).

For discussions of the ways courts have narrowed the scope of the ADA, see Anderson, supra note 1, at 91-109; Bagenstos, supra note 174; and 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).

I call this a “schematic” version because courts are so rarely comparing actual dollar estimates on one or both sides of the balance. See Sunstein, supra note 80.
the benefits to the employee with a disability who requested it are worth only $50, the third-party benefits to coworkers and customers are worth an additional $300. Thus, even though costs still exceed benefits, the cost is not "disproportionate to the benefit."

In Case #2, a year later, the court is then confronted with an accommodation request that costs $500, and has benefits to the requesting employee of $300. Is the cost disproportionate to the benefit? There is no formula in the statute or doctrine. But with Case #1 on the books, the court might be more inclined to say that this accommodation is unreasonable because it has fewer overall benefits ($50 less)—and no benefits to third parties—in contrast to the accommodation in Case #1. Had the court in Case #1 not based its decision partly on third-party benefits, Case #2 might be more likely to result in a finding of reasonableness. This is very speculative, but far from impossible in light of the reception of the ADA in the courts over the last seventeen years.

Second, courts that account for third-party benefits might also focus more on third-party costs. As noted earlier, some decisions already discuss third-party costs, and the EEOC has concluded that while morale costs are not sufficient reason to refuse an accommodation, an accommodation that interfered sufficiently with others' productivity could create an undue hardship. And the Supreme Court has concluded that the third-party costs of unsettling a seniority system are enough to create a presumption of unreasonableness. If third-party benefits entered the doctrinal analysis, one would expect defense-side litigators, as well as courts, to pay even more attention to these third-party costs. Moreover, if there is any validity to the point that costs are more salient than benefits under the statute, then we might expect the third-party costs to outshine the third-party benefits, no matter the underlying reality, in the eyes of courts.

All that said, under the statute and key decisions, benefits need not outweigh costs for an accommodation to be reasonable and not an undue hardship. And the statute’s individualized focus should help to bolster it against undue narrowing through the mechanism of

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231 Vande Zande v. State of Wis. Dep’t of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995).
233 See supra Part II.
234 See supra Part II.A.
third-party benefits. Moreover, the legislative history asserts that an accommodation cannot be an undue hardship just because it cannot be used by multiple disabled employees. To be sure, the risk of doctrinal drift cannot be ruled out in the abstract. But ultimately, regardless of the outcomes, third-party benefits should be considered under the current doctrine on reasonableness and undue hardship because that doctrine requires a comparison of costs and benefits, with third-party costs already considered part of the mix.

CONCLUSION

Integration under the ADA means more than integrating people with disabilities; it also means integrating accommodations. By the statute’s mandate, workplaces must confront physical or procedural changes called “accommodations.” Such changes are important first and foremost because they enable the work and participation of disabled people. Accommodations thus facilitate “contact” between disabled people and nondisabled people in the workplace. However, these changes are also important because the accommodations themselves interact with third parties—disabled, nondisabled, and sub-ADA disabled.

Courts and other entities administering the ADA have recognized that accommodations may create third-party costs, but they have overlooked the potential for third-party benefits. Third-party benefits can lead to a form of contact between accommodations and coworkers that improves attitudes toward disability and the ADA. In this way, third-party benefits can facilitate a kind of integration by indirection.

Because these third-party benefits have largely been overlooked, they have not been adequately theorized or analyzed. This Article provides conceptual and practical tools for identifying potential third-party benefits and for analyzing accommodations in terms of their third-party effects. The spectra sketched in Parts I and III supply a way of thinking about how accommodation design can determine whether accommodations have third-party costs or benefits or both. The analysis in Part III shows how third-party benefits can further the integrative aims of the ADA, and demonstrates how the two distinct models of accommodation—static and dynamic—work together to make the ADA a potent force for institutional change. Finally, maintaining the focus on pro-

See supra note 173 and accompanying text.
See supra note 197 and accompanying text.
moting integration of people with disabilities requires the disaggregation of two types of third-party benefits: general welfare improvements (usage benefits) and disability-related attitude improvements (attitudinal benefits). Part IV provides a framework for analyzing accommodations in terms of their design and disclosure, to promote attitudinal benefits and, secondarily, usage benefits. The hope is that these tools can be of conceptual and practical use to scholars, policymakers, and employers.

Disability is often understood as principally entailing lack or loss, and the ADA as requiring redistributive largesse by employers and co-workers. Nothing in this Article’s analysis—or in the text or doctrinal interpretation of the ADA—requires the repudiation of these views. Benefits need not exceed costs under the statute. But disability and accommodation provide a unique lens through which to challenge and improve our workplaces and beyond. The fact of third-party benefits should help us to see the ways that disability—and accommodation—give something back to our integrative projects across categories and to society in general.
A Note from AT&T

At AT&T, we continuously look for ways we can use the power of our network to build a better tomorrow. It’s part of our credo, Connect to Good. One way we bring that to life is through our smart cities solutions — powerful innovations in the Internet of Things (IoT) that will help transform our cities and enhance our lives as citizens.

We are committed to bringing smart city benefits to all citizens — including those who are aging and living with disabilities. From next-generation 9-1-1 systems and smart energy grids to digital information kiosks and intelligent lighting, we’re linking people and city infrastructure to reduce energy use, enhance environmental resilience, and improve quality of life — all while making cities safer and more efficient.

Our commitment to make our products and our company better for people who are aging and people living with disabilities is a long standing one. We have a Corporate Accessibility Technology Office (CATO) that leads our efforts to make products and services accessible to persons with disabilities. We also regularly convene an Advisory Panel on Access & Aging (APAA) comprised of national leaders in assistive technology, aging and cross-disability issues. AT&T is also a dedicated supporter of the Global Initiative for Inclusive ICTs (G3ICT), an advocacy initiative launched in December 2006 through the United Nations.

These efforts have demonstrated the importance of listening, learning and collaboration to fulfill the promise of new technology that puts all people first. The private and public sectors must work together to champion, design, fund and sustain smart infrastructure and municipal services. We must collaborate with civil society organizations and community groups from the very beginning to empower citizens and communities without compromising values such as accessibility and privacy. We must incubate social entrepreneurs to develop next-generation civic technology devices, applications, and services that are of, by and for their communities. This collaboration will help us construct smart cities with improved utilities, infrastructure, transportation, public safety and citizen engagement that are accessible to all.

We are proud of our work to-date, and we also know we have a lot of work left to do. AT&T is looking forward to learning from and engaging with a broad coalition to build smart city technologies that benefit and empower people who are aging, people living with disabilities, and the greater city population. We hope this paper will enrich and expand the conversation on smart cities, and highlight the opportunities that our company and our communities can seize to help everyone Connect to Good.

Chris Penrose
President
IoT Solutions
AT&T Business

Charlene Lake
Senior Vice President – Corporate Social Responsibility
and Chief Sustainability Officer
AT&T
A Note from BSR

BSR believes that it is vital for business to collaborate with the public sector and civil society to create a just and sustainable economy in a fast-changing world. As governments embark on a new era of urban development and infrastructure upgrades, we encourage businesses, the public sector, and civil society to seize the moment in creating smart cities that leverage technological advancements to create environmental, social, and economic benefits for all.

We see inclusive smart cities as an important opportunity to advance three particular aspects of a just and sustainable world. Smart cities making investments in new infrastructure should focus on models that create economic benefits for all, with a particular focus on communities most in need of economic opportunity. Smart cities also can advance essential rights, including decent work opportunities, an adequate standard of living, and opportunities to participate in cultural life. In addition, 21st century urban development should be designed with a view to reducing harmful climate emissions, and building resilience into the built environment, transportation systems, and communities, to enable cities to remain vibrant amidst shifting weather patterns.

Cities can be the foundation of truly sustainable economic growth. Cities account for more than half of the world's population, 70% of global greenhouse gas emissions, and 80% of global GDP. Creating inclusive smart cities will therefore be an essential element of the global effort to achieve the Sustainable Development Goals. A coordinated effort to build low carbon, resilient cities will also help us achieve the ambitions of the Paris Climate Agreement. With new smart technologies capable of unlocking energy efficiency in housing and transport, smart cities can be instrumental to keeping global temperature rise this century well below the Paris Agreement's 2°C threshold.

BSR is proud to partner with AT&T to highlight smart city technologies that advance environmental, social, and economic benefits for all. This white paper, Smart Cities for All: A Vision for an Inclusive, Accessible Urban Future, identifies ways that smart city technologies can adopt a people-first approach to benefit people who are aging and people living with disabilities. We hope this paper highlights that potential and illuminates a path toward achieving it. We look forward to working with AT&T, other corporations, and a range of other stakeholders on the journey ahead.

Aron Cramer
President and Chief Executive Officer
BSR
About this Report

This report was written by David Korngold, Martin Lemos and Michael Rohwer of BSR, with funding and input from AT&T.

The purpose of this paper is to highlight the potential for smart city technology to enable benefits for people who are aging and people who are living with disabilities, and to indicate suggested practices for building more inclusive smart cities. The report focuses on North America, though it includes global examples and technologies.

The examples of applications in this paper are drawn from AT&T technologies as well as products, services and research from other companies and organizations. The applications included are not meant to be exhaustive or universal; rather, they represent a selection of current smart city technologies that are advancing benefits for the aging and persons with disabilities.

The findings of the paper are based on:

- A review of public research, including academic, corporate and non-governmental organization sources
- Interviews and engagement with select AT&T team members involved in fields such as smart cities, health, citizenship and sustainability, and accessibility
- Direct engagement with stakeholders and experts through the AT&T Advisory Panel on Access and Aging, including an in-person workshop and follow-up engagement

About AT&T

AT&T Inc. (NYSE: T) helps millions around the globe connect with leading entertainment, business, mobile and high speed internet services. We offer the nation's best data network and the best global coverage of any U.S. wireless provider. We're one of the world’s largest providers of pay TV. We have TV customers in the U.S. and 11 Latin American countries. Nearly 35 million companies, from small to large businesses around the globe, turn to AT&T for our highly secure smart solutions.

About BSR

BSR is a global nonprofit organization that works with its network of more than 250 member companies and other partners to build a just and sustainable world. From its offices in Asia, Europe, and North America, BSR develops sustainable business strategies and solutions through consulting, research, and cross-sector collaboration. Learn more about BSR’s 25 years of leadership in sustainability.

BSR publishes occasional papers as a contribution to the understanding of the role of business in society and the trends related to corporate social responsibility and responsible business practices. It sometimes does so with partnership and financial support from particular BSR members. BSR maintains a policy of not acting as a representative of its membership, nor does it endorse specific policies, standards, products and services, or corporations. The views expressed in this publication do not reflect those of BSR members.
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Introduction

Smart cities aspire to use technology to put people first. In an era of connected technologies, our cities have the potential to be built to respond to our needs and smooth the path as we lead our lives. This smoother path will help all citizens, especially those across a range of ages and physical or cognitive abilities. Imagine a city where a person in a wheelchair or pushing a stroller can chart a route to the local park using curb cuts and avoiding barriers. There she will wirelessly log onto the park itself and receive notifications of upcoming park events, and perhaps even participate in an interactive lesson on the trees and flowers currently in bloom. Imagine a city where refrigerators will provide alerts of any diminishing essentials so that caregivers can adjust their grocery list before they visit their parents’ home. Smart cities offer a new vision for daily living where the world around us is conducive to making life easier, and lets us focus on the personal connections that make city life vibrant and full of purpose.

The global smart city market is expected to grow to $1.565 trillion by 2020\(^1\), and this growing economic opportunity inherently involves the opportunity to engage, inform and improve the lives of citizens. For the 25% of people in U.S. cities who are aging or living with disabilities, these technologies must be built to deliver on better access and fuller participation in the life of their cities\(^2\). New interconnected solutions will enable improved mobility solutions, increased opportunity for aging-in-place, and other technologies that will support independent living and transform cities into more enabling environments. The ecosystem of impacts goes beyond any one community: this new connectivity will support millions of families and caretakers, and provide a platform for citizen entrepreneurs to craft unique civil tech solutions.

Smart city technologies make cities more manageable and more personal by deploying sensing and monitoring capabilities along with adopting data-driven approaches. They take the pocket-sized solutions that help us manage our homes from our phones and apply them at the city-scale to provide officials with detailed dashboards to understand their communities block by city block. They allow citizens to seamlessly integrate their daily lives with the urban space by connecting our personal devices with city services upon which we rely. Whether alerting emergency services when our smartwatches detect a fall, or using real-time data to manage traffic flows to keep citizens crossing the street safe in a busy city corridor, smart city technologies bring an unprecedented level of connectivity to city living.

From civic kiosks that incorporate Universal Design to the latest cloud-based accessibility features and health-tech innovations, AT&T seeks to advance an inclusive vision for information and communications technology

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1 \[http://www.eegr.msu.edu/~aesc310-web/resources/SmartCities/Smart%20City%20Market%20Report%202.pdf\]
(ICT) to integrate aging and accessibility considerations from the ground up. AT&T is developing new solutions to benefit people who are aging and people living with disabilities, and helping to create the conditions for a new wave of citizen-driven innovation. As these innovations proliferate and smart city technologies become more widely available, there is a clear and urgent imperative to ensure smart cities do not perpetuate digital divides that have historically prevented community access to new advances. AT&T is committed to creating smart cities where the benefits of these technologies are equally distributed and empower all communities.

This paper, *Smart Cities for All: A Vision for an Inclusive, Accessible Urban Future*, is the result of AT&T exploring the revolution of smart city technology and its enormous potential to have a positive impact on people with disabilities and the aging. AT&T convened BSR and the AT&T Advisory Panel on Access & Aging (AAPAA) to conduct research and gather insights from the diverse panel of external experts in October 2016. The paper maps the opportunities for smart city technologies to benefit all communities, as well as the keys to success to ensure these technologies advance more equitable and positive outcomes for people who are aging and people living with disabilities.

**Executive Summary**

*Figure 1: A Framework for Smart City Solutions for Aging & Accessibility. The identified “smart city capabilities” reflect AT&T’s categories of smart city products and services.*

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**Smart Cities Capabilities**

<table>
<thead>
<tr>
<th>Energy &amp; Utilities</th>
<th>Infrastructure</th>
<th>Transportation</th>
<th>Public Safety</th>
<th>Citizen Engagement</th>
</tr>
</thead>
</table>

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**Solutions for Aging & Accessibility**

<table>
<thead>
<tr>
<th>Economic</th>
<th>Health</th>
<th>Quality of Life</th>
<th>Education</th>
<th>Housing</th>
<th>Emergency Services</th>
</tr>
</thead>
</table>

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In the 100 largest metropolitan areas of the United States, nearly 25% of citizens are currently over the age of 65 or living with disabilities. By 2050, however, the population older than 65 is projected to more than double. Though not defined by their challenges, these individuals may have physical or cognitive conditions that limit or prevent them from conducting major life activities such as walking, talking, hearing, seeing, learning, performing manual tasks or caring for oneself.

Smart city technology should be defined not just as a means to improve existing infrastructure but also as an unprecedented opportunity to improve the lives of all citizens. For aging communities and those living with disabilities, these technologies present the prospect of an empowering and more human city that provides a host of economic, health and wellness, quality of life, housing, educational, civic engagement and emergency services benefits. In doing so, smart cities also enhance the resilience of cities and communities. While case-studies are still emerging for these technologies, in many instances AT&T and others have developed viable and tested solutions that provide inclusive and accessible city services.

Just as curb cuts have proven beneficial to more than just wheelchair users, creating livable cities for people who are aging and people living with disabilities will benefit a majority of city residents. There's an equally sizeable population — nearly 17% of Americans — who annually serve as unpaid caregivers in the U.S. In addition, the fastest growing workforce in the U.S. is that of healthcare professionals serving the needs of these individuals and their families. Furthermore, measures to make technology more inclusive often have broad effects on usability and quality that accrue to all users. Improving the quality of life for people who are aging and people living with disabilities will have a significant benefit across all demographics.

Cities should enhance livability for citizens as a matter of civic responsibility and compliance. Livability also provides economic opportunities for cities to attract and empower Americans over the age of 50, one of the largest growing and financially empowered segments in the U.S. population.

Smart city technologies offer the opportunity for systems solutions to updating infrastructure and revitalizing city services. These technologies enable city officials to take a strategic approach to sustainability, cost reduction, citizen wellbeing, and economic development through innovations that span across multiple sectors.

Smart city technologies will fundamentally alter city infrastructure and the ways city services are deployed. As these technologies are only now being tested and implemented, city officials will now have a critical opportunity to ensure the considerations of aging communities and communities living with disabilities are respected from the outset. City officials and their partners should use the following keys to success to ensure that smart cities are inclusive:

**Design for Inclusion:** To quote the guiding principles of a recent framework for state governments: “Disability is a natural part of the human experience that in no way diminishes one’s right to fully participate in all aspects of community life.” Universal Design and protections against privacy abuses should be front and center as cities consider deploying these technologies. Universal Design criteria will ensure technologies are usable by all citizens. Additionally, there are opportunities for cities to embed smart city solutions that will leapfrog

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barriers to adoption. Enhanced digital security and privacy protections will be a fundamental requirement as these new technologies will play a vital role in the lives of citizens – and may be directly responsible for the health and wellbeing of the most vulnerable communities. With proper planning, system designs for smart city infrastructure can ideally detect security concerns and have alerting and remediation capabilities for the broader public.

**Engage Partners and Stakeholders:** Smart city technologies must adopt a multi-stakeholder engagement process to ensure sustainable financing of these innovations and citizens’ full participation in any projects. Partnerships with the private-sector will help co-create cost-effective and viable solutions that leverage companies’ expertise in designing for inclusivity. Engaging aging communities and those living with disabilities in the planning of smart cities is critical to ensuring these solutions align with citizen needs and expectations.

**Promote Adoption of Technology:** City officials must work to bridge the digital divide that often prevents people who are aging or living with disabilities to access the full benefits of technology. Officials must work to empower these communities to participate in smart cities by increasing access both to broadband connectivity and connected devices, as well as the necessary technology education to fully utilize these benefits. Without addressing these issues, cities risk perpetuating disparities that keep these communities from accessing smart technologies.

**Foster the Entrepreneur Ecosystem:** Many of the applications and solutions that will benefit these communities will arise from social entrepreneurs and innovators of all ages. Beyond enhancing the accessibility of city infrastructure and services, a key role for city government is to enable this social innovation to flourish and direct entrepreneurship to benefit these communities. Publicly funded incubators and open data portals are some of the many ways city governments can foster citizen solutions.

**Inclusive Smart Cities Built on Connectivity**

> Smart cities are human-centered cities. Sensors, networks, data analytics and visualizations, and so on are cutting-edge, 21st century tools. But those tools must serve us, not the other way around. Smart cities technology enables citizens and civil servants alike to achieve the goal of making a city that truly serves the needs and reflects the values of the entire community.”

Aaron Bangor, **AT&T Lead Accessible Technology Architect**

By providing the connectivity that enables big data analytics and other applications, smart cities empower a network of citizen innovation and public solutions. While smart city technologies are often presented as large-scale efforts that connect an entire transportation or energy grid, they can also enable community and individual solutions. Innovators will have access to a world of data and tools to develop the innovations that
communities need. At the same time, businesses and city officials will use this same technology to make cities more efficient than ever. These twin promises of smart cities — to enable citizen solutions and make city services more efficient and effective — comprise the promise of these technologies.

But what makes a smart city smart? Essentially, smart cities deploy Internet of Things (IoT) solutions to large-scale problems. Simply put, IoT solutions connect devices and technologies that were never connected before, and enable communication between them to enable benefits for users. AT&T has created a framework to help cities better serve their citizens.

Introduced in January 2016, the framework, which is initially rolling out in select spotlight cities and universities, is based on four pillars—highly secure connectivity including Wi-Fi and 4G LTE, strategic alliances comprised of key technology leaders and industry organizations, AT&T’s vast array of technology platforms and vertically integrated solutions such as public safety, transportation, aging infrastructure and more. Using this framework as a guide, we are able to help cities develop and deploy solutions that will address critical issues facing their communities and citizens.

The framework reflects how AT&T is using IoT innovations to create impactful solutions for cities and forming alliances with technology leaders and industry organizations. Within the home, an IoT solution may be a connected thermometer that can now be controlled remotely. At the city-scale these solutions can look like an infrastructure sensor that connects with a city control panel to detect snowed-over streets that need plowing. The benefits of increased connectivity and communication are clear: cities will be able to integrate technologies with a strategic approach to sustainability, cost reduction, citizen wellbeing and economic development.

Smart cities make connections among personal devices (like smartphones and thermostats) and city networks and assets (like power grids and snow plows), providing opportunities for citizens to seamlessly navigate the economic and social life of their cities. Sometimes these technologies are highly visible in everyday life (like bus countdown timers); other times they operate in the background to improve city functions (like smart bus routing systems). Ultimately, the connectivity afforded by smart city technologies enables a dynamic network of solutions that function between sectors and scales to provide both a granular and high-level look at community conditions.

Through increased connectivity, real-time monitoring of utilities and public services, and machine-to-machine communication, cities can now address system-wide issues with system-wide solutions. The benefits of smart city technologies comes from a network effect — linking millions of sensors, connected devices and data points, and turning a set of undetected, atomized data points into a coherent digital whole.

Smart cities are more than specific products or improved municipal services — the technologies contained within them facilitate a new and more beneficial interaction between citizens and their environment. Smart city technologies enable new increased citizen involvement and provide a suite of benefits available to all. These technologies will play a vital role in the development of sustainable cities by helping manage energy resources, conserve water, and unlock efficiencies that will reduce the environmental footprint and increase the resilience of our cities. These technologies will also help meet the social dimensions of sustainable development by pushing for more inclusive and equitable cities. As the global community looks to achieve the Sustainable Development Goals (SDGs), smart city technologies will help progress a broad range of targets. In particular, smart cities will advance the SDG 11 on Sustainable Cities and Communities and SDG 9 on Industry, Innovation, and Infrastructure, as well as a host of other SDG impact areas.
As smart city technologies begin to take hold, there’s an opportunity for AT&T and others to work toward making smart city technologies synonymous with inclusive innovation and the empowerment of all citizens. Smart cities must provide benefits that are inclusive of its entire population and enable the inclusive participation of all its citizens to ensure the benefits of technology are equally distributed. The promise of smart cities is founded on the inter-connectivity of all aspects of the city and the potential for technologies that offer solutions for entire systems rather than isolated municipal services or city populations.

Smart city technologies should help empower all people to do what they want to do in a familiar and conducive environment. Instead of resolving to patch inequities in later versions, AT&T and others will commit to ensuring that these technologies provide these benefits from the moment they are launched. This will require AT&T and others to adopt a stakeholder-informed design process that helps test and develop new technologies. There is no better opportunity to demonstrate the transformational nature of these technologies than by designing smart cities to meet the needs of citizens who are aging and people living with disabilities.

A Focus on People: Why Aging and Accessibility?

Cities are networks of individuals — and people who are aging and living with disabilities are integral to these networks, along with their families, neighbors and caregivers. Today more than 46 million Americans are over the age of 65 and 57 million Americans live with disabilities. In the largest 100 metropolitan areas in the U.S. nearly 50M or 25% of residents are currently over the age of 65 or living with disabilities. With the size of the aging community expected to double by 2060, there is an imperative social responsibility to all citizens to make future cities more accommodating and supportive of these communities.

Nearly 17% of Americans have provided unpaid care for their parents in the past year — spending an average of 25 hours a week caring for loved ones. With an average age of 49 and mostly residing in urban or suburban U.S., a new “middle generation” of caregivers simultaneously balances caring for parents with raising children. Improving the quality of life and technology opportunities for people who are aging and people living with disabilities is essential to supporting another strong contingent of the American population.

Healthcare professionals are projected to be the fastest growing workforce in the U.S. and should be considered another valuable constituency of smart cities. In particular, the health occupation is projected to grow the most in the next 10 years. By 2024, over two million Americans will find work supporting families as personal care aides, registered nurses, home health aides and nursing assistants. Traditionally these roles are performed by a diverse group of workers: 89% of home care workers are women, and nearly half are African-American or Latino. As this workforce grows in the coming years, millions of young workers from all demographics will join a vital profession that supports people who are aging and people living with disabilities.

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Cities also have a powerful economic interest in keeping these communities in their cities. Cities that appeal to these communities will reap significant economic benefits: according to a Nielsen study, in 2017 the U.S. population over the age of 50 will control a full 70% of disposable income\(^{11}\). Cities are facing increased pressure to entice these communities to stay past retirement by demonstrating infrastructure and city services attuned to the needs and demands of these residents. The AARP’s “Livability Index” and Milken Institute’s “Best Cities for Successful Aging” annual reports are just two prominent examples of the public scrutiny cities should expect to face as Americans decide where to retire.

**The Challenges of Aging and Accessibility**

Smart city technologies offer an opportunity to make cities more hospitable by enabling new opportunities for all communities. These opportunities will be needlessly limited if they do not integrate with assistive technologies — for example, the screen readers, hearing aids, braille displays and technologies used by people with challenges.

For people who are aging and people living with disabilities, smart city technologies will assist individuals to overcome daily obstacles and address the systematic inequalities that can sometimes challenge quality of life. These challenges can be very significant:

**Economic:** Almost half of the American population over the age of 65 is classified as “economically vulnerable”\(^{11}\) and our population living with disabilities faces systemic challenges that have led to disproportionate unemployment rates. With one-third of Americans entering retirement with no savings, the challenges of making ends meet will only become more pronounced\(^{12}\).

**Health:** Nearly 80% of older adults have a chronic disease like Alzheimer’s and 68% have more than one\(^{13}\). Though public benefits ameliorate the cost of health for these communities the personal and family expenditure on health is significant. Nearly 15% of older Americans’ spending is health related\(^{14}\) and researchers have calculated the direct and indirect costs to families of children living with disabilities to an annual average of $30,500\(^{15}\).

**Quality of Life:** American life can be isolating to some people who are aging or living with disabilities. The AARP Foundation reports that loneliness has the health equivalent of smoking 15 cigarettes per day\(^{16}\). Obstructed access to community events, limited accessible transportation options, and limited social interaction are barriers to quality of life that have proven negative impacts on individuals’ health and sense of wellbeing.

**Housing:** Aging communities and communities living with disabilities are significantly concerned with housing accessibility and affordability, as well as the opportunity to live independently. Some of these concerns stem from limited resources to maintain independence, while other concerns arise from difficulties of accessing housing environments that support independent living, including aging-in-place. For communities living with disabilities the ability to access housing is a significant challenge — currently more than 40% of people who are homeless are living with disabilities\(^{17}\).

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\(^{13}\) [https://www.ncoa.org/healthy-aging/chronic-disease/](https://www.ncoa.org/healthy-aging/chronic-disease/)


\(^{16}\) [https://stayingsharp.aarp.org/art/connect/15/loneliness-dementia.html](https://stayingsharp.aarp.org/art/connect/15/loneliness-dementia.html)

Emergency Services: Hurricane Katrina serves as a somber reminder of the unequal risk borne by people who are aging and living with disabilities in times of disaster. While next-generation 911 services are beginning to incorporate assistive technologies to serve these populations, adoption has been slow, and more can be done to ensure city emergency services and systems account for these communities.

These challenges do not solely affect aging communities and communities living with disabilities. These are shared societal challenges that impact nearly all segments of city populations. Moreover, these challenges can interact and amplify — transportation impacts quality of life, quality of life impacts health, and so forth. The promise of smart cities lies precisely in how these technology solutions function across sectors and municipal services to provide system-wide improvements through connectivity. These technologies serve to create smart and enabling environments where people will find themselves empowered in an environment that is familiar and more conducive to tasks they want to execute18.

The Inclusive Smart Cities Framework

In our work at the Shepherd Center we constantly push the limits of technology to help our patients return to their community, school, work and recreation. Their goals. A well-developed Smart City will greatly enhance not only what is possible but also improve existing capabilities for each individual. It will improve people’s lives.”

John Anschutz, Manager-Assistive Technology Center, Shepherd Center

Stakeholders must collaborate to realize this inclusive vision for smart cities. Through insights informed by AT&T’s Advisory Panel on Access & Aging (APAA), BSR and AT&T have identified opportunities for smart city technologies to positively impact aging communities and communities living with disabilities. Instead of classifying technologies according to the municipal departments or functions, this paper re-frames the capabilities of smart cities according to the benefits they provide to main dimensions of city life: economic, health, quality of life, educational, housing and emergency services. Across all of these factors, smart cities also enhance the resilience of individuals, communities and cities, in responding to and recovering from acute challenges such as storms, public health crises and financial downturns.

Economic

“...It is critical that the plans for the workforce in ten to thirty years from now are being supported by the instruction and curriculum from the secondary and post-secondary educational system. Those who are older or have a disability are often not the issue themselves, they are simply not adequately trained for jobs they seek to apply for.”

Claude Stout, Telecommunications for the Deaf & Hard of Hearing (TDI)

The Challenge: Currently 48% of the aging population is classified as “economically vulnerable” with incomes that are less than twice the poverty threshold19. Likewise, nearly 35% of working-age people with disabilities are below the poverty rate and face unemployment rates twice that of the general population20. These impacts are devastating for communities that often facing additional significant costs that may not be covered by health or government benefits. Expenses such as home modifications, personal care, and assistive and adaptive technologies can significantly increase the cost of living for already economically vulnerable communities. In one study on European individuals, depending on the severity of disability, the additional cost of living for these communities compared to those without disabilities range from 14% to 78% for a single adult to almost 136% for couples both living with disabilities21. As an additional affront, U.S. aging communities are targets of financial exploitation at annual cost of over $37B22.

The Opportunity: Smart city technologies present an opportunity to expand the economic empowerment and wellbeing of aging communities and communities living with disabilities. Smart Cities can support these communities by providing digital and integrated payment services that simplify financial transactions while also enhancing financial management. These technologies can also enable fuller and safer participation in the economic life of cities by providing these communities with new employment opportunities, as well as access to new digital portals for city benefits. These opportunities may serve to improve the welfare of these individuals while also counteracting some of the economic disadvantages that burden these communities.

22 True Link Report on Elder Financial Abuse 2015
Example — Seamless Financial Payment Services: Smart city technologies allow for cities to integrate public services with social benefits. This integration allows for an interconnected payment system that increases convenience for citizens and allow for greater financial inclusion by making it easier for people with visual and other physical challenges to navigate cities and their services.

Transport of London’s Oyster Card exemplifies the benefits of the cross-cutting capabilities of smart city technology. By connecting London’s multiple transport options, Transport for London — which manages this transport network — was able to launch a pre-loaded contactless smart card as its ticketless payment system. In addition to cutting costs for the transport agency, the contactless payment system — supported by MasterCard technology — reduces the transaction time for riders and simplifies the experience by eliminating the need for special registration at each link in the transportation chain. In surveys of riders across demographic groups the transport agency found the benefits of the card reaffirmed, “it saves time, saves money, is easy to use and eliminates the need to repeatedly load money onto another card.” Seamless and secured by offline data authentication, a similar system in U.S. cities can smooth the transportation frictions often encountered by aging communities and people living with disabilities — such as obstacles of interfacing with point-of-sale touch screens — by reducing or eliminating the challenges with repeated transactions.

Example — Integrated City Benefits: Overlaying payment services over city services newly integrated by smart technologies also allows for greater efficiency and security of benefits payments. With nearly nine-out-of-ten individuals aged 65 and older receiving Social Security benefits, there is an opportunity for cities to better integrate these and other benefits with other city services and thereby eliminate the need for financial transfers that may make these communities liable to fraud23.

Example — Increase Access to Employment Opportunities: Communities living with disabilities face significant barriers to employment; the unemployment rate for those individuals currently in the job-market is twice the national average, while the labor participation rate is three times higher for individuals without a disability24. While smart city technologies offer increased connectivity to allow for greater telecommuting opportunities, these technologies are increasingly capable of creating new applications that enable this community to access existing work. For those living with chronic health conditions or compromised immune systems, being able to “bring the workplace anywhere” can make the difference between new or continued employment and unemployment.

In Spain, the Vodafone Foundation designed custom mobile applications with an augmented reality platform provided by Qualcomm to help “overlay digital material onto physical environments.” The result was a series of applications that greatly support people living with disabilities to interact with their work environment. One application, Easy Use, offers an interactive instruction guide to help operate equipment like printers, phones and washing machines to those with cognitive disabilities. Another application, Who is Who, provides a visual directory of employees superimposed over the physical office space. Using a tablet computer, the employee can now identify who is sitting at each work station and more easily locate their colleagues. A third app, Follow my Steps, uses location based augmented reality technology to deliver step by step audio and 3D graphics to help people commute to work. These assistive technologies may contribute to a future of extended employment opportunities for people living with disabilities25.

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24 http://www.bls.gov/news.release/disabl.nr0.htm
Other Potential Smart City Solutions — Economic

• **Inclusive Automation** – The American workplace will be transformed by automation\(^26\). While this transformation can pose serious challenges to overall employment, automation and robotics may likewise yield a future of workplaces of machines that augment rather than supplant human labor. For those living with disabilities this transformation may open new opportunities for employment. Already, many tasks are not eliminated by robotics but rather refigured through tools that provide better ergonomics and allow for remote management. These technologies may ultimately level the opportunities for people living with disabilities to apply their unique skills.

• **Big Data for Economic Development** – City policymakers could leverage the data analytic capabilities of smart city technologies to better plan urban economic zones. By layering health, transport and demographic information over projected economic development plans, for example, cities can ensure that new opportunities are equally available to those workers living with disabilities.

**Health & Wellness**

> Smart cities have the potential to transform the way we support families and individuals touched by Alzheimer’s by providing real time data, alerts, and educational content tailored to communities and integrated into health systems.”

Jason Resendez, Executive Director of LatinosAgainstAlzheimer’s Network & Coalition

**The Challenge:** For aging communities and people living with disabilities, maintaining good health is a top priority\(^27\). Yet these populations face significant challenges to not only improved health outcomes but also maintaining independence. While specific health difficulties vary, the size of the challenge cannot be exaggerated: nearly 80% of older adults have a chronic disease and 85% of people with cognitive disabilities live at home and receive care from a family caregiver\(^28\). Minimizing the impact on families who play a significant, and often, unpaid caregiver role is particularly important. According to AARP the value of unpaid caregiving for older adults was calculated at $470B in 2013 alone — exceeding the value of paid home care and Medicaid spending combined\(^29\).

**The Opportunity:** Smart technologies can improve health outcomes and reduce hardships on caregivers through both individual-scale connected devices and city-wide public health interventions. Smart mobile health technologies are expected to continue their boom with an expected 36 million units of monitoring devices used

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\(^{29}\) [https://www.caregiver.org/caregiver-statistics-demographics](https://www.caregiver.org/caregiver-statistics-demographics)
in 2017 compared to just 3 million units in 2011\textsuperscript{30}. For example, cities can support adoption of these devices by collaborating to allow for greater integration of individual devices with city services. Smart city technologies can also support the creation of “health dashboards” that use willingly provided data to offer cities public health perspectives at the city-, community- and even building-level. A real-time and dynamic health dashboard would provide cities with increased information on all demographics in their city — and better map the health needs of aging communities and communities living with disabilities. Smart city technologies allow officials to overlay environmental data with demographic information — allowing for city officials to adopt health considerations, particularly for these vulnerable communities, when deciding issues of urban planning. This type of data could be leveraged by health professionals and entrepreneurs to address pressing health challenges, including the lack of diversity in clinical trials.

**Example — New Connected Health Devices:** The increasing availability of health tech and connected health devices signals a new era of healthcare. Citizens have unprecedented access to understand their personal health. These new devices automate health delivery and can relay real-time health information to medical professionals, as well as family members and caregivers. Devices like Medtronic’s Continuous Glucose monitoring allow for constant reading of blood glucose levels through a “wearable” electrode inserted under the skin. Cellular enabled mPERS (mobile personal emergency response service) devices provide emergency notification and peace of mind using a small wearable device that can detect when older users fall, and quickly identify location to alert emergency services. Given that at least one-third of adults over 65 in North America suffer a serious fall each year\textsuperscript{31}, this technology can protect the health of aging communities and extend the opportunities for independent home living.

Smart cities create opportunities for more of these personal health devices by providing innovators with access to large sets of data and new opportunities to connect with broader public service systems. One such innovation center, **AT&T’s Foundry for Connected Health**, uses its base on the Texas Medical Center’s campus to support entrepreneurs developing digital health innovations that benefit those in a clinical care environment — helping caregivers and patients bridge the gap between a clinical setting and the home.

**The AT&T Foundries are fast-paced and collaborative environments spanned across 6 global locations where AT&T connects with cutting-edge innovators and technologies that will deliver new valuable products and services to our customers.**

**Example — Transforming In-Home Health Services:** These new connected technologies can augment caregiving and develop new models for in-home health services that will benefit aging communities and communities living with disabilities.

In Japan, a new partnership between Apple, IBM and Japan Post has built on Japan Post’s already impressive health offering to integrate new health monitoring capabilities. The Japan Post Group, which operates post offices, banks and other services in Japan, had previously also launched a “Watch Over” program where aging communities could subscribe for a service in which mail carriers would check-in with elderly adults periodically.


\textsuperscript{31} Center for Disease Control and Prevention - Older Adult Falls
to provide assistance and update their families. This year, Apple and IBM partnered with Japan Post to pilot a program that would provide iPads, software and necessary training to older adults. These devices would be equipped with health monitoring information to alert these communities to take medication, connect them with information on exercise and diet, as well as offer new opportunities to communicate with distant family members. The program is set to reach 4 million customers by 202032.

Likewise, the University of California Irvine has piloted a similar program of providing aging communities with iPads for remote health monitoring. As part of California Delivery System Reform Incentive Program (DSRIP), a pay-for-performance initiative for public health care systems, the Irvine experiment integrated health monitoring technology with educational and home visits. To date among the targeted group the usage of emergency services has fallen by 27% since the launch of the program33.

**Example — Public Health Improvements:** The deployment of environmental sensors and more efficiently managed transportation also provides significant health benefits for these communities. For example, at a community level, multiple studies have shown the higher levels of air pollution and particulates in U.S. urban areas and the outsized impact on health outcomes. Studies have also demonstrated that exposure to air pollution and traffic noise was positively associated with mild cognitive impairment (an “intermediary state between typical cognitive aging and dementia”). Smart cities can yield significant health benefits for people living with disabilities by ameliorating the pollution issues that worsen their conditions. This type of innovation will directly impact communities of color who are on average exposed to 38% higher levels of outdoor NO234.

Cities are already deploying these environmental sensors to improve quality of life for their citizens. Ericsson has deployed an environmental sensor solution within the recently launched Dallas Innovation Alliance (DIA) Smart Cities Living Lab. The solution measures four different types of pollutants, as well as temperature, humidity, atmospheric pressure and particulates (allergen levels). Additionally, Ericsson will provide the DIA the ability to monitor environmental data via a web application that is powered by the Ericsson AppIoT Platform. Environmental monitoring requires analyzing high volumes of time-coded data that is generated by numerous sources. It is important to have a highly secure platform that can ingest the data, apply common logic, and then make this data available to the city, the developer community and all local stakeholders35. San Diego and Atlanta are also already working to transform their cities with intelligent nodes that capture air quality through a partnership between Current by GE and AT&T36.

In Atlanta, the adoption of smart city technologies has already yielded impressive results. The Atlanta Smart Corridor project resulted in an adaptive traffic control system that uses real-time data to best manage traffic flows in a previously congested city area. This “smart” transportation system provides clear efficiency benefits for the city and reduced driving time by as much as 40% in some instances. Environmental sensors also captured emissions and have also shown that there are significant health benefits from smart technology: NOx and VOC vehicle emissions have reduced by 1% and 8.5%, respectively37.

Another public health benefit of smart cities relates to efficient management of energy and loss of power. Life sustaining equipment such as respirators relies on access to power. Being able to monitor and restore energy by prioritizing people for whom power is critical to survival, can ensure that people with disabilities have access to the equipment they need to survive power outages.

The City of Atlanta’s Information Management department in collaboration with its newly formed SMART ATL office has made great strides in being in the forefront of the implementation of the Internet of Things or IOT throughout the city. IOT has the ability to bridge gaps and connect all of the residents and visitors in a more effective and efficient way.”

Torri Martin, Director SmartATL Office City of Atlanta

Quality of Life

The Challenge: Multiple studies have shown that these communities disproportionately experience loneliness — in an extreme example, 28% of young adults with autism were reported to have no social contact at all. One study found that adults over the age of 60 who “identified themselves as lonely were 59% more likely to experience decline in their ability to perform daily activities and had a 45% higher likelihood of dying.” There are severe costs to lack of community engagement and social connection. These risks sometimes extend to family caregivers who take care of more than 60% of the U.S. aging community: these caregivers are at “increased risk for negative health consequences, including stress and depression, and need increased support to preserve their own health.” These impacts are exacerbated by these communities’ sometimes limited options to mobility and social environments.

The Opportunity: Technological enhancements of infrastructure and transportation have a definite and positive impact on how city residents enjoy a city, and there are specific ways that smart cities increase access to social and cultural resources to ameliorate the isolation often challenging these communities. These technologies would benefit said communities by increasing opportunities to engage in the life of their city. Cities can facilitate that interaction by improving the walkability and accessibility of their city. Additional resources are needed to allow for better navigation of U.S. cities and to provide up-to-date information.

Example — Mapping for Access: Fundamental to improving the quality of life for all communities is the ability to access cultural and social resources. From visiting parks and attending a concert to even enjoying the opportunity to tour one’s neighborhood, satisfactorily engaging with the life of a city requires transportation. In Seattle, the OpenSidewalks Project has launched AccessMap, a trip planning tool that supports those with

38 https://www.disabilityscoop.com/2013/05/08/study-socially-isolated/17905/
39 http://jamanetwork.com/journals/jamainternalmedicine/fullarticle/1188033
40 https://www.healthypeople.gov/2020/topics-objectives/topic/older-adults
41 http://www.ioaaging.org/aging-in-america
limited mobility. While many solutions are available for car-sharing and public transit options, Access Map provides trip planning support on pedestrian ways by gathering and maintaining open data about sidewalks, curb ramps, construction information and other data that maps the specific challenges and nuances of navigating city walkways. Beyond knowing how to find a location, AccessMap marks where there are sidewalks, the elevation of these pathways, and whether conditions are favorable for wheelchair access. The effort, set to be expanded to other major cities, presents one solution of aggregating city data, sensor information, and crowd-sourcing to generate a real-time map that can help aging communities and communities living with disabilities to better plan and therefore enjoy their city.

**Example — Interactive Civic Information:** Cities are also capitalizing on the integration offered by smart technologies to provide interactive platforms that provide citizens with real-time information on their cities.

New York City’s City24/7 Collaboration with Cisco leverages information from open government programs, local businesses and citizens to provide public information in public spaces. Smart Screen locations throughout the city incorporate touch, voice and audio technology to deliver “hyper-local information” and services in real-time. Aging communities and communities living with disabilities were front-and-center in these considerations as these smart screens were “designed to deliver ‘access for all’” through several design elements. Screens include headphone jacks for users who are hard-of-hearing, a high-contrast screen mode for those with visual disabilities, visual recognition for people with guide dogs, and features to support blind communities and those who use wheelchairs. Cisco intends to help expand into Los Angeles before rolling out to new cities where these smart screens will be adapted to local context. Information kiosks provide city information and alerts that can play a pivotal role in helping to support aging communities and people living with disabilities to interact with their city.

AT&T Smart Cities in Chicago, building off a similar system in Dallas, is partnering with Civiq Smartscales to install five interactive Civiq Waypoint touchscreen kiosks throughout the city’s busy commercial avenues. These kiosks provide free Wi-Fi and announce information about city attractions, activities and points of interest. AT&T and Civiq applied Universal Design features to ensure these new kiosks were accessible to a greater number of citizens.

**Other Potential Smart City Solutions:**

- **Beacon Technology** – Cities are using beacon technology to help people who are blind navigate airports. Patrons can use an app to help them reach their destination, but also explore the other amenities around them. One such example is EnLight, one of the winners of AT&T’s ConnectAbility challenge. Further, in the spirit of Universal Design, other uses for these same beacons are possible, such as augmented reality and targeted advertising.

- **Connected and Automated Vehicles** – Paving the way for autonomous vehicles will make smart cities more accessible for these communities, as well. Research has found that access to transportation is a limiting factor twice as often for people with disabilities compared to those without for everyday activities such as

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42 [https://opensidewalks.com/](https://opensidewalks.com/)
45 [https://devpost.com/software/enlight](https://devpost.com/software/enlight)
commuting to/from work, running household errands, visiting the doctor, and participating in social activities. The potential of providing more available and accessible mobility options to individuals who cannot drive can dramatically increase quality of life for the aging community and people living with disabilities in numerous areas, such as health, education, employment and social interaction.

Technology is essential in our daily lives. As a result of perpetual inventions and innovations, we expect to see self-driving or autonomous cars in the market very soon. Integrating this technology would be a blessing for our seniors, their caregivers and people with limited mobility. In a survey conducted by the National Hispanic Council on Aging (NHCOA), 70% of Hispanic seniors were in favor of autonomous cars if proven affordable, safe and available. Although, many of the survey participants indicated that they drove, the majority lived in large urban areas with congested traffic, raising their concerns about increased risks being involved in car accidents. Autonomous cars represent an opportunity to improve the quality of life for our seniors through the acquisition of a once lost independence.

Dr. Yanira Cruz, President & CEO,
National Hispanic Council on Aging

Education

The Challenge: For aging communities and people living with disabilities, accessing the benefits of education can be a challenge. People living with disabilities face significant educational inequalities — at 63%, the high school graduation rate for students living with disabilities is 20% lower than the national average. While health studies continue to affirm that life-long education plays a significantly beneficial role in preserving mental health, aging communities face lower adoption rates for internet usage that hinder their ability to capitalize on the explosion of learning opportunities, courses and programs now available online. A 2015 report published by Pew Research found that only 58% of adults over the age of 65 use the internet.

The Opportunity: Smart city technology offers the prospect of integrated life-long learning and improved educational outcomes for younger citizens. These technologies are enabling new devices that bring educational opportunities home and allowing for young students living with disabilities to more fully participate in their classes through virtual platforms. It is critical that the plans for the workforce in 10-30 years are being supported by the instruction and curriculum from the secondary and post-secondary educational system.

**Example — Assistive Technologies:** Twenty-first century education requires computers and internet devices, so innovations that facilitate students with disabilities to better manage these tools are essential. Assistive technologies like head and face tracking features allow for greater range of communication and interactivity. AT&T has long worked to launch and support the development of these assistive technologies. In addition to pioneering services like text-to-speech and speech recognition applications that allow students to more fully engage in their classrooms, the company has supported the innovation of cutting-edge assistive technologies. In New York, the AT&T’s ConnectAbility Challenge sought to spur innovation like the Kinesic Mouse, the grand prize winner of the challenge. The software solution uses a 3D camera to detect facial expressions and head rotation to allow for hands-free use of personal computers. For successful education outcomes, it is imperative that education programs and facilities plan for and include compatibility with these types of assistive technologies, rather than approaching this challenge with a series of one-off solutions.

“The American Foundation for the Blind (AFB) supports fully inclusive, accessible Smart City Initiatives, where people who are blind or visually impaired can learn, work, and live independently.”

Lee Huffman, AccessWorld and Technology Information Editor, American Foundation for the Blind

**Example — Virtual Classroom:** Virtual reality technologies are increasingly geared toward improving education, including for communities with disabilities. A project at the University of Georgia is developing a “virtual classroom” located in the virtual world Second Life. According to researchers this virtual classroom would “let students with disabilities — ranging from blindness and low vision to learning challenges — connect with a hand-picked mentor within a digital space.” In the virtual classroom, students can meet their mentors as an avatar (a virtual embodiment), set up meeting times, and freely roam around the virtual world to engage in several learning environments. The implications for STEM education are particularly important as this virtual classroom will allow students living with disabilities to participate in science labs and activities that may be unavailable in a traditional classroom. Virtual reality technologies are helping de-stigmatize health conditions like Alzheimer’s and have the potential to assist in vital public education efforts.

**Example — Virtual Senior Center:** In New York, the nonprofit Selfhelp Community Services has partnered with Microsoft and the City of New York to develop a Virtual Senior Center that offers “some 30 online classes to homebound clients, from tai chi and exercise to contemporary history discussions and gallery talks with museum curators, as well as music appreciation and singing — even Mandarin.” Participants log-in to the virtual center through touchscreen computers, often paired with assistive technologies, and select opportunities from a menu of course schedules. The classroom environment can handle up to 20 video streams/participants.

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52 [http://www.nextavenue.org/the-online-classes-that-help-the-homebound-connect/](http://www.nextavenue.org/the-online-classes-that-help-the-homebound-connect/)
who participate in active discussion with an additional “spectators” area where they can “audit” the course in session. The courses take advantage of the virtual world by allowing for museum tours and interactive science workshops. In addition, the courses can also serve as informational portals providing seniors with important civic and health information.

**Housing**

**The Challenge:** Housing is a priority and common concern for aging populations and communities living with disabilities. They want to maintain independent living that is affordable and comfortable. According to AARP, nearly 90% of people over age 65 prefer “aging in place” but only 43% of those over 70 find living independently “very easy.” Affordability remains a concern as older adults are more likely than younger adults to spend more than half their income on housing. These costs are not always spent on rent or mortgage payments. Aging communities and those living with disabilities must often retrofit their homes to assist independent living — and it is calculated that that approximately 80% of home modifications and retrofits are paid out-of-pocket by the residents.

**The Opportunity:** Between urban planning solutions and individual home devices, smart city technologies can ameliorate the challenges of housing on these communities by enabling independent living, minimizing housing costs, and supporting city officials to better plan for inclusive housing. Building efficiencies afforded by smart energy technologies can provide “savings in the range of 10% to 25% when implementing” these measures. These savings can be significant for homeowners and their caregivers and equally significant for community organizations developing assistive and senior housing projects. New IoT devices will allow for greater ease of independent living by automating difficult tasks and provide safeguards against potential health and security risks. Finally, big data and analytics capabilities will improve city planning to ensure assistive housing is located with considerations to health impacts and other factors.

**Example — Independent Living Solutions:** The range of connected products designed to make home life more efficient, safe and comfortable have skyrocketed with the proliferation of IoT. Given that nearly 90% of people over age 65 want to stay in their home for as long as possible, these devices have clear benefits for aging communities and people living with disabilities. These web-enabled devices can serve a wide range of functions: they contribute to better security through automated locking systems, and motion sensors like Microsoft Kinect have applications that allow them to recognize gestures and perform everyday tasks like adjusting lights or opening doors.

**Example — Caregiver Assistance:** Solutions are also being developed that help caregivers and healthcare professionals to serve people who are aging or living with disabilities. Often the most useful tools for the communities and their caregivers are fairly simple health management tools – for example, electronic alerts and...
devices that set reminders to take prescriptions and connect with pharmacies to automatically fill orders. But there are other potential connected applications that help caregivers, such as scheduling apps to track doctor’s appointments and programs that can automate tasks like reading and shopping for common household items. In addition to supporting caregivers to provide the best service, these new solutions should also be designed in an accessible manner to ensure that caregivers who also have a disability may fully take advantage of these advances.

Example — Urban Planning Solutions: Just as new devices enable personal and home automation, cities will have community-wide solutions to automate city services and improve the quality of life for residents. In Chicago, the Array of Things project (the connectivity for which AT&T provides) was designed as a “fitness tracker” for the city — collating the disparate data a city gathers. At the city-scale these devices are — in essence — city sensors and monitors that measure environmental metrics to help improve urban planning. With new data on flood zones, air quality and traffic, city planners can better develop resilient and healthy housing for new and existing residents. To offset concerns around data privacy the city will make all data available through a Data Portal.

Emergency Services

The Challenge: Cities will face increasing risks of public health disasters and must ensure their emergency services are accessible and available to the 25% of city residents who are perhaps most vulnerable during disasters. Historically aging populations have been gravely at risk during these crisis scenarios. As an example, nearly 71% of those who died as a result of Hurricane Katrina were older than 60. And the CDC acknowledges natural disasters present a “real challenge” to people with disabilities who will need additional assistance to obtain the services required to be safe during emergencies.

The Opportunity: Smart city solutions can support governments to better integrate alert systems and significantly improve delivery of emergency services. Smart 911 and other next-generation systems can provide first responders with important, useful information during calls, as well as during large emergency management situations. Smart city technologies will also enable governments to centralize control of their monitoring and alert systems for more efficient deployment of emergency responders. Cities will detect more issues more quickly by integrating data from various city departments with new information provided through citizen alerts and sensor detections. Smart detection connected with next generation response systems will greatly improve the safety of all city residents.

Example — Emergency Response Efficiency: Smart cities can increase the efficiency of emergency responses by rolling out next generation 911 systems, increasing access to these systems, and providing first responders with technologies to help them serve citizens more effectively.

The smart corridor transportation systems installed in Atlanta and elsewhere could potentially be integrated with emergency systems to significantly reduce response times. A study by the University of Zaragoza in Spain found that integrating dedicated short range communications (DSRC) along roads to allow for vehicle-to-

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60 http://www.aarp.org/content/dam/aarp/home-and-family/personal-technology/2016/04/Caregivers-and-Technology-AARP.pdf
62 https://arrayofthings.github.io/
64 https://www.cdc.gov/features/emergencypreparedness/
65 https://www.cdc.gov/features/emergencypreparedness/
vehicle and vehicle-to-infrastructure communications would drastically reduce arrival times. The researchers calculated that such a system would reduce emergency response arrival time by an average of 48%.

**Example — Integrated Command Centers**: One clear opportunity is to create smart response systems that integrate information from existing public systems, as well as new smart surveillance systems. City officials will be able to monitor emerging crisis in real-time with an unprecedented level of visibility. As these technologies develop, it’s imperative that these public dashboards and command centers are themselves built with a consideration toward accessibility that enables a diverse set of candidates to work in city government. In Rio de Janeiro, IBM worked with city government to develop a data-driven control center. In Rio, information from over 30 city agencies was centralized and integrated with sensors and live video feeds to map potential public safety interventions. According to IBM, this effort has improved emergency response times by 30% since the launch of the program.

AT&T is developing a series of Smart Surveillance systems that employ cutting edge detection technology to provide real-time analytics and streamline emergency responses. Through predictive policing technologies, heat mapping and facial recognition software, AT&T’s government partners can detect situations before they escalate and provide the real-time information that hastens response times.

**Other Potential Smart City Solutions:**

- **EMS and Wearables**: As health IoT devices and wearables propagate, there is a clear opportunity to integrate these technologies with EMS services. One potential challenge faced by people living with disabilities is the ability to communicate with EMS during critical moments. Those with speech, hearing or visual conditions often encounter EMS who are not trained to provide adequate service. Video technologies that allow for EMS interpretation or wearables that automatically transmit health data to EMS providers could greatly increase the efficiency of EMS for these communities.

**Keys to Success**

The opportunity for aging communities and communities living with disabilities to optimally benefit from these new technologies depends on several keys to success. Technologies must support adoption within a community that is already challenged by a digital divide that disproportionally excludes these communities from participating in new technologies. Additionally, these technologies should be designed for inclusive benefits by integrating Universal Design principles and providing safeguards against privacy and security concerns. Connected to the adoption and design considerations, smart city technologies must conduct a multi-stakeholder engagement process to ensure sustainable financing of these innovations and guarantee that citizens’ voices are central to any city modifications. Finally, these technologies must foster an entrepreneurial ecosystem that democratizes innovation and enables the citizen solutions that will define inclusive smart cities.

**Supporting Adoption**

James Thurston of the Global Initiative for Inclusive Information and Communication Technologies (G3ict) offers some important perspective regarding smart cities: “If we look at smart cities through the lens of accessibility...
we have the tremendous opportunity to address a digital divide that today prevents the full benefits of the
digital revolution from reaching all citizens, including those with disabilities and age-related impairments.” Not
until 2012 did more than half of all adults over the age of 65 report using the internet68. To date only 54% of
adults living with a disability use the internet compared to 81% of other adults69. These statistics only serve to
underline the fundamental starting point for all smart city technologies: increased connectivity and inclusive
access to broadband internet in all U.S. cities.

Yet usage of internet technologies is not limited to a question of access but also involves a question of adoption.
Among aging populations who have access to these technologies, only 13% would feel comfortable attempting
to use a new technology device without assistance70. There is a risk that the benefits of smart city technologies
will be limited due to barriers to adoption — and not only for our focus communities – but also their caregivers
and family members. As a result, the reach and benefits of smart city technologies can be enhanced with
attention to programs aimed at adoption by these communities.

Many cities with smart city initiatives are already training these populations as an essential component to
deploying new technologies. Computer and digital training, as well as access to connected devices, are central to
extending to aging communities the myriad available connected education and virtual classroom opportunities.
AT&T’s Digital You training program specifically includes targeted training for people who are aging and people
living with disabilities, as well as caregivers. Built on a collaboration with prominent national organizations like
Common Sense, AARP, The Oasis Institute and the Rehabilitation Engineering Research Center for Wireless
Inclusive Technologies, the program serves to increase digital literacy and promote online safety information.
Digital You helps teach beginners of all ages the basics of using a smartphone or tablet, keeping online
information private and secure and activating accessibility features to support users with disabilities through
training resources and tip sheets71.

“AT&T’s Digital You website is a helpful resource for people who have a device and a level of comfort using the internet. Last mile adopters also need numerous opportunities for in-person instruction that builds confidence and proficiency with their device and conducting online searches before they can be expected to use web-based instruction. It’s not that they are unwilling to use such services. Without exposure to and practice with online resources, people do not think of them as a source of help.”

Amy VanDeVelde, National Connections
Program Manager, The OASIS Institute

Aging communities have been shown to lag on technology adoption but also report having fewer skills and
are less confident in their ability to use these technologies72. In Chicago, a partnership between Microsoft,
the city government and Connect Chicago helped develop DigiSeniors, a new training curriculum for aging communities. This example of civic tech collaboration helped create a lesson plan for in-class learning to introduce senior citizens to Windows and also train these new users to access the internet and beware of safety and security considerations. In Westchester County in New York, the Telehealth Intervention Programs for Seniors (TIPS) program brings telehealth solutions closer to aging communities by coupling remote health monitoring with personalized assistance by local university students.

In New York City, the Older Adults Technology Services (OATS), a nonprofit organization, has built the country’s largest and most comprehensive municipal technology program for seniors, serving over 20,000 people each year and sustaining 24 technology labs across the city. Through trainings provided in on-site tech labs in the city, OATS engages, trains and supports aging communities in using technology to improve their health, finances and civic and social engagement. The measured impacts of these trainings has been overwhelming positive: six months after the OATS training 93% of the participants were still using their computers and 89% reported they had maintained their skills and were still able to do what they had learned in the course. In addition, AT&T is making wireline home internet service more affordable for low-income households through Access from AT&T.

These solutions succeed in adoption of new technologies by acknowledging that innovative solutions cannot succeed without “analog” methods to promote adoption. Those launching smart city technologies must anticipate barriers to adoption by bearing in mind the current digital divide. Instructions and education services that are online or only available via smartphones will not necessarily work for aging communities and communities with disabilities, especially if they are not usable by people with disabilities or compatible with assistive technologies.

Designing for Inclusion and Privacy

“If we look at smart cities through the lens of accessibility, we have the tremendous opportunity to address a digital divide that today prevents the full benefits of the digital revolution from reaching all citizens, including those with disabilities and age-related impairments.”

James Thurston, VP-Global Strategy & Development, G3ict

Universal Design principles and protections against privacy abuses should be front and center as smart city technologies begin deployment and new citizen innovations emerge to support aging communities and communities. While Universal Design is often considered a criterion for consumer product and service design, the fundamental principles remain relevant to smart city technologies launched by municipalities.

G3ict has long advocated to ensure that “digital services of smart cities can be more accessible.” In 2016, G3ict partnered with World Enabled to launch the global Smart Cities for All initiative. Working with AT&T to promote accessibility of mobile equipment and services, G3ict has done extensive work to demonstrate how Universal Design can be implemented across an organization and how innovation can be leveraged to develop services dedicated to persons with disabilities and seniors. G3ict has collaborated with AT&T to define guidelines that ensure “content can be made available in multiple formats and languages, services can be offered remotely to home-bound or geographically isolated citizens, digital formats can serve multiple disabilities, and interact with a broad range of assistive technologies used by persons with different types of disabilities.” Writ large these considerations can extend to how walkways are developed and emergency services are delivered to ensure they equitably assist all populations.

“We are delighted to work with AT&T and other partners to address the digital divide and expand opportunities for persons with disabilities and older persons. These efforts make our cities more innovative and more inclusive.”

Dr. Victor Pineda, President & Founder, World Enabled

As cities build smart infrastructures, serious thinking about the citizen experience with all of the various touch points with the city and the community must take place. How will people with disabilities and aging citizens interact with web sites, mobile apps, self-service kiosks, smart meters and other emerging devices? How will the needs of an individual who is blind be supported as equitably as a 93 year-old with Parkinson’s? One strategy is to go beyond Universal Design to instill new technologies with the capabilities to adapt to each user based on their own needs and, further, to know these needs based on global preferences available in the cloud, such as the Global Public Inclusive Infrastructure (GPII) project has proposed.

Another important user consideration is the privacy and security of services offered by smart city technologies that often rely on the absorption and real-time analytics of personal data. Likewise, many of the benefits of these technologies rest on the automation of necessary functions. The sensitivity of the data and the safety of these automated functions require that these technologies prioritize privacy and security concerns. As researchers investigating the intersection of privacy and smart city technologies concluded: “Comprehensive architecture with security built in from the beginning is necessary. In order to achieve user consent, trust in, and acceptance of Smart Cities, integration of security and privacy-preserving mechanisms must be a key concern.”

Ensuring security is not only a back-end technical issue. There is also a need to inform and engage with the communities that will receive these benefits to ensure that communities agree to releasing data in exchange for the offered technological benefit. Attention to digital rights extends to the application of data, ensuring that data is not used in any way (even unintentionally) that discriminates or marginalizes individuals or populations.

75 https://www.att.com/Common/merge/files/pdf/Accessibility_Innovation_and_Sustainability_at_ATT.pdf
76 http://g3ict.org/resource_center/g3ict_smart_cities_initiative#sthash.63SeGqZv.dpuf
77 http://smartcitiescouncil.com/resources/security-and-privacy-your-smart-city
Engaging Partners and Stakeholders

The overall goal of implementing the Internet of Things or IOT is to connect all of the residents and visitors in with the City of Atlanta, and keep them informed about all of the great improvements that we are making. Without truly investing in citizen’s needs, and equipping them with access to what the city has to offer, there is no forward progression. Atlanta is a great city and has potential to be a leader in this effort, not just locally but globally.

Denitra Gober, Public and Community Engagement Specialist SmartATL Office City of Atlanta

As smart city technologies offer systems-wide solutions the deployment of these technologies require participation by all of the city’s sectors and communities. These stakeholder partnerships and engagements are not about acquiescence on new technology nor are they informational opportunities to share upcoming changes, rather these are partnerships that bring all the diverse resources a city has to bear in order to facilitate the deployment of these solutions. This includes working with the financial sector to support sustainable financing of new technologies, as well as academics and university institutions to measure impact and scale successful trials.

In Europe, several models for this partnership are already enacted. The European Innovation Partnership on Smart Cities and Communities (EIP-SCC) is an initiative supported by the European Commission bringing together cities, industry, SMEs, banks, research and other smart city actors to develop and implement smart city solutions. The EIP created a stakeholder engagement framework that includes a high-level group with representatives from cities, research and industry to help define how smart cities concepts are enacted.

In the U.S., similar models are emerging with even more citizen participation. In Dallas, AT&T and other founding partners created the DIA — a coalition of stakeholders from the City of Dallas, corporations, Civic and NGO organizations, academia and private individuals who are invested in Dallas’ continued evolution as a forward-thinking, innovative ‘smart’ global city. The Smart Chicago Collaborative (Smart Chicago) is a civic organization “devoted to improving lives in Chicago through technology” that brings together municipal, philanthropic and corporate investments in civic innovation. In 2013, the city released its Chicago Tech Plan outlining the city’s approach to deploying smart technologies. Smart Chicago along with Local Initiative Support Corporation (LISC) and the MacArthur Foundation have devised a plan and funding strategy to make “every community a smart community.”

Fostering the Entrepreneur Ecosystem

There’s probably an important role for AT&T or stakeholder groups to train and integrate private-sector startups in a way that promotes accessibility. There may be a way for AT&T and others to say “if you want to use these data, if you want to have access to the platform, let’s talk about how we design this system in your individual technology to allow for accessibility.”

Alfred Moye, Ph.D, Director of University Affairs, Retired, Hewlett-Packard

Smart cities technology will benefit aging communities and communities living with disabilities to the extent they engage citizens in the process of developing and deploying these solutions. Smart technologies can equitably distribute benefits and enable democratized innovation where citizens can develop peer solutions that are specific to cities, communities and even individual city buildings. Opportunities for “civic technology” also allow for a multi-generational approach to technology solutions by allowing young innovators to collaborate with aging communities and people living with disabilities to co-create devices, services and programs. As one of many examples, in 2015 AT&T partnered with New York University to launch the ConnectAbility Challenge, a three-month global software development competition leveraging mobile and wireless technologies to improve the lives of people living with disabilities.

Globally and in the U.S., cities have made civic technology a cornerstone of their smart city strategy. Cities are releasing APIs to allow for greater transparency but also to multiply the benefits of smart technology by encouraging civic-tech or “civic hacking.” In New York City, the government has eight APIs available through a developer portal — allowing developers to access all publicly available data sets. This preponderance of rich data encourages new devices or apps and allows for new data visualizations and insights that can guide citizen engagement on wide array of issues. New York City has also launched a Big Apps competition that serves as a hackathon to inspire civic tech. In 2015, the solutions awarded grand prizes include a tool that assists tenants with housing issues to facilitate getting apartment repairs as well as a benefit screening tool that allows low-income residents to better assess their benefits options. San Francisco also features an OpenData portal and clarifies the theory of change for such open access: “open data portals enable a data driven ecosystem, which supports a range of positive outcomes.”

One extraordinary example of entrepreneurship is Aira — a startup technology company that is using wearable smart glasses to improve the lives of people living with vision loss. Aira connects individuals with diminished vision to a network of “certified agents” who literally serve as the wearer’s eyes — relaying what they see back to

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81 https://connectability.devpost.com/
83 http://bigapps.nyc/p/
the wearer. AT&T is providing wireless connectivity to Aira to support their innovative technology platform. With the help of the AT&T’s Dynamic Traffic Management, the company can prioritize data traffic to provide a more predictable experience, especially in times of network congestion85.

The enablement of civic technologies and public-private partnerships opens a new frontier of opportunities for people who are aging and people living with disabilities. New data means researchers and community organizations have greater resource to identify needs in their cities. Public sector support for entrepreneurs developing these solutions means smart city technologies will not be limited to large-scale systems. Instead, smart city technologies will proliferate by harnessing the innovation and energy of millennials and baby boomers committed to social impact.

Conclusion

With the promise of major infrastructure investment, Americans once more ponder the future of their cities. Will our imagination conform to ideas of repaved landscapes dotted with more gleaming buildings and railways? Or will we instead reimagine cities founded on vibrant principles of innovation and community — built to welcome new populations without trading on the human connections and personal comforts of city-living? Smart city technologies hold the potential to deliver on this uncompromising vision for new cities by connecting citizens, governments and the private sector in a united effort to improve our communities.

AT&T is committed to the shared responsibility of making inclusive smart cities. Fundamental to this vision of advanced – yet human – cities is meeting the keys of success outlined above: supporting adoption, designing for inclusion and privacy, engaging partners and stakeholders, and fostering the entrepreneur ecosystem. More than technology and connectivity is essential to making smart cities a reality — a renewed sense of community and civic participation will ensure that our smart cities are both technological marvels while remaining accommodating, enjoyable and deeply human.

85 http://about.att.com/story/aira_to_use_att_wireless_connectivity.html
Disability in Smart Cities: Assessing assistive technologies and urban accessibility

SHARON CHANG · JANUARY 11, 2019

While assistive technologies have proliferated, researchers and developers have yet to
develop sufficient standards for assessing these technologies and their socio-urban implications. This article reviews uni-disciplinary attempts made thus far and provides four interdisciplinary principles for moving forward. The principles are: (1) The Principle of Disabled-Centred Technological Development (2) The Principle of Disabled Diversity (3) The Principle of Expanding Disabled Independence and (4) The Principle of Mixed-methods Discourse.

Note: This piece was adapted from a dissertation for the Architectural and Interdisciplinary Studies program at University College London’s Bartlett School of Architecture.

GPS and other technologies have dramatically transformed contemporary urban experiences. With such technologies in the palm of our hand, trial-and-error travels are rare, and ‘trust-your-instincts’ wanders are even rarer. At unknown destinations, we turn to a suite of travel apps and accept the quickest or shortest possible routes readily available to us. Yet, there still are occasions where we struggle to find convenient routes and draw upon others’ help.
For disabled people, the stakes are much higher. They heavily rely on the availability of human and technological assistance to decide on the feasibility of their travel. While various technologies demonstrate the potential to offer urban accessibility to the disabled, such potential has yet to be fully realised.

Despite growth in assistive technologies, parallel development in standards to assess their effectiveness and socio-urban implications has not taken place. This is likely due to a lack of academic and commercial attention to assistive technologies. In an attempt to fill this gap, I propose four principles for evaluating assistive technologies.

Before presenting these principles, I first demonstrate the hitherto limited and fragmented attempts at studying (assistive) technologies in three different academic fields: architecture, computer science and engineering, and social sciences.

Architecture

In Architecture, disability studies and technology have often been dealt with separately, mostly under the theme of accessible/universal design (see Bloomer and Moore, 1997; Boys, 2014; Goldsmith, 2000; Hall and Imrie, 2001) and digital
architecture/urbanism (see Carpo, 2017; Lynn, 1998, Mitchell, 1996). Recently, architects and architectural historians have turned to the sociological concept of care (see Mol et al., 2010; Schillmeier and Domènech, 2010; Till, 2012), as a potential area where human frailty and its supporting technologies can be simultaneously studied within architecture. Yet, the research is in its embryonic stages and much focus is on designing "care-full" architecture, often belittling the experiences of users as those of the technologically unknowledgeable (Boys, 2017). In assessing assistive technologies, this institutional perspective is problematic. Disabled users often require specific needs of which so-called superior design experts and theorists are unaware.

**Computer Science and Engineering**

In Computer Science and Engineering, discussions on the potential for assistive technologies to enhance mobility of the disabled (see Chib and Jiang, 2014; Rashid et al., 2016) have been fruitful yet isolated, neglecting some social repercussions. Incorporating the emerging Internet of Things (IoT), researchers have experimented with Bluetooth Low Energy (BLE) beacons and radio-frequency identification (RFID) tags to
create accessible solutions 
(for examples, see 
Swobodzinski and Raubal, 
2008; Chen et al., 2015). At 
present, the signalling 
between BLE/RFID and their 
corresponding readers are 
unstable and thus limited to a 
circumscribed, often indoor, 
environment. But in the 
‘smart’ future, when 5G-based 
wireless broadband network 
and computerised sensors 
replace the BLE/RFID 
systems, almost everything 
from large-scale 
infrastructure (like street and 
traffic lights) to domestic 
appliances (such as remote-
controlled fridges and heating 
systems) will be connected to 
some part of the IoT 
(Wainwright, 2014).

Many proponents of the 
‘smart city’ argue that 
ubiquitous signal detection 
and transmission will bring 
about efficiency, allegedly a 
panacea to contemporary 
urban ills. However, such 
rhetoric is precarious and 
prone to perplexing questions. 
One of these is: in assessing 
the successfulness of 
assistive technology, is 
efficiency the ultimate goal? 
Or is the ultimate goal utility? 
If the former, can we define 
disabled efficiency?

Social Sciences and Urban 
Studies

On the contrary, social 
science researchers (Amin, 
2012; Coutard and Guy, 2007; 
Graham and Marvin, 2001) and
urban practitioners (Dixon, 2013; Rogers, Capra and Schöening, 2013; Vaughan, 2013) have remained unduly conservative and censorious of technological development and resulting techno-philic enthusiasm. The work of Amin (2012), for instance, questions the role of technology, together with material infrastructure, in forming healthy interpersonal relations and a new ‘politics of togetherness’ in urban settings. He argues that such politics are often absent in urban life today, and technology creates alienation and oppression, which are opposite of the desired effects.

“In other words, although researchers in architecture, computer science and engineering, and social sciences are interconnected
in their attention to the concept of assistive technologies, they are carrying out their research in unproductive isolation.”

Similarly, Vaughan (2013) raises concerns over virtual connectivity and formation of specialised groups which hinder urban co-existence and integration. Coutard and Guy (2007) explain this through surveillance technologies, such as CCTVs that create information and power asymmetry. Graham and Davis’ Splintering Urbanism (2001) furthers this view by linking the mis-management and monopolisation of technology to urban fragmentation. The book points to the harmfulness of technological advances, including their potential to intensify socioeconomic imbalances. These views are
equally contentious, as they
generalise the mechanism of
technologies and overlook
specialised technological
tools.

Altogether, there lacks a
holistic and impartial review
of technologies – assistive
ones in particular – across
disciplines. In other words,
although researchers in
architecture, computer
science and engineering, and
social sciences are
interconnected in their
attention to the concept of
assistive technologies, they
are carrying out their research
in unproductive isolation.

It is vital that assistive
technologies be evaluated
under an ‘umbrella’
methodology that includes
different theoretical and
technical understandings.
Below, I propose four
principles which constitute a
framework for evaluating
issues specific to current and
future assistive technologies.

With the advance of artificial
intelligence and virtual reality,
new types of assistive
technologies will appear.
Novel human-technology
interaction methods, such as
speech or haptic systems and
motion sensors will facilitate
technology’s social inclusion.
But while this development
inspires more inclusive and
egalitarian forms of urban
collectiveness, the
personalisation of such
interactive options and the
handling of personal data must be questioned. Policy makers, designers, and developers can use the four principles I discuss to move discussions forward and optimize their efforts to facilitate accessibility for the disabled.

(1) The Principle of Disabled-Centred Technological Development

The fundamental necessities of disabled-centred technology are to enhance disabled people's capabilities and to remove restrictions and injustice related to their use of technology. These fundamental necessities reject the idea that technologies are intrinsically or universally valuable, as well as the notion that usability is a quality that exists in any absolute sense. In other words, the usability of any technological tool or system must be viewed in terms of the context in which it is used and its appropriateness to that context (Brooke, 1996).

As a result, we should applaud context-aware assistive technology that makes effective use of accessible and widespread tools. An accessible and well-established platform with which to implement technology maximises the potential reach of technologies and permits developers a guaranteed platform for their solutions.
Smartphones, particularly iPhones, are one of the items that are frequently owned and used by many disabled people. The smartphone platform can offer wayfinding technology to a wide audience in the form of competitive smartphone-based applications.

**iPhone Accessibility: accessible and personal.** (Source: Apple iPhone and iPad Accessibility Support)
Since its first release in 2007, the iPhone has been playing a key role in disabled users’ lives. iPhone accessibility support features include ‘VoiceOver’ (a gesture-based screen reader), Braille displays, font adjustment, iPhone-specific sound processors, visible/vibrating alerts, ‘Type to Siri’ and closed captions (for hearing loss), and ‘Switch Control’ and ‘AssistiveTouch’ (for physical motor limitations). (Source: Apple iPhone and iPad Accessibility Support)

(2) The Principle of Disabled Diversity

As a consequence of the contextual nature of technology, it is very difficult to compare and measure usability across different types of assistive technology. One should avoid comparing the usability of different technologies intended for different purposes wherever possible. It may also be misleading to generalise design features and experience across technological systems. For
example, the fact that a particular design feature has proven useful in one system does not necessarily mean that it will be useful in another system with a different group of users doing different tasks in different environments. Technologies must be developed on the basis that people are endowed with various physical and mental characteristics and live in diverse environments under varied socio-economic conditions. All of these factors affect the opportunities a person can realistically enjoy from the adoption of a particular piece of technology.
Le Corbusier invented Le Modulor in an attempt to create an anthropometric scale that is universally applicable to architecture. The Modulor man is based on a healthy male figure – ignoring the relevance of child, female, disabled or any other ‘non-standard’ bodies. In stark contrast to this ‘arbitrary’ representation, Thomas Carpentier’s men thoroughly defy the last century’s modernist ideals: “the body is not standard,” he writes. “It is sometimes tall, sometimes small, fat, thin, wizened, deformed, twisted, scalped... Such a variety of feelings [are what] the norm cannot and do not want to report” (2016).

(3) The Principle of Expanding Disabled Independence

If there is an area in which it is possible to assess usability in a way that can bear cross-
system comparison, it is in subjective assessments of independence. While different assistive technologies serve different groups of disabled users, their universal aim is to increase disabled independence. The ends of technology are to address disabled people’s lack of freedom by enabling them to travel on their own and carry out their daily activities without anyone’s help. Yet part of the environment into which technology enters is the social environment, which includes the ways in which disabled people are perceived by the society. In order to facilitate independence, one must carefully consider these social norms and continuously adapt the technologies to them.

In measuring disabled independence, it is therefore also crucial to observe whether technology is resistant to reification. Reification refers to the act of perceiving technology as merely material artefact with inscribed, unequivocal characteristics, independent from social practices. Technology has the flexibility to incorporate a wide range of hegemonic functions and shape the political agenda. However, unless technology is lucrative and mainstream, technology developers hold little influence over policymaking. As such, developers must be adaptive,
context-aware, and proactive.
When assessing a disabled-centred technology, its context-awareness and flexibility should be incorporated and valued, in addition to its direct impact on enabling independence.
Losing Myself, Venice Biennale Architecttura 2016. (Source: Niall McLaughlin Architects)

Niall Mclaughlin and Yeoryia Manolopoulou’s ‘Losing Myself’ is an exemplary work that raises questions on disabling architecture and disabled independence. The architects’ drawings depict the experiences of people suffering from dementia at Alzheimer’s Respite Centre. In such care homes, patients are restricted from fully engaging with their built environment.

(4) The Principle of Mixed-methods Discourse

Developers and researchers must measure the extent to which technology expands independence both quantitatively and qualitatively. To address critical socio-urban problems, such as accessibility for disabled people, either quantitative or qualitative data alone is insufficient. These problems are far “more dynamic and complex because of the number of stakeholders involved and the numerous feedback loops among inter-related [disciplines]” (Desouza and Smith, 2014). Especially when the problems are associated with social minorities, perspectives are often disregarded, hindering
Mixed methods approaches are therefore imperative for achieving socio-urban innovation. Similarly, user-inclusive research approaches should be encouraged. In addition to researchers’ well-thought-out designs and hypotheses, the direct opinions of disabled population are equally important to shaping the course of emerging assistive technologies.

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of Geographical Information


Ability or disability – design for whom?

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The dilemma addressed is how private homes and their residents change when the home becomes a hybrid of both workspace and private space. When assistive technologies designed for institutions enter the home, the everyday practices of disabled persons and their relatives change in interaction with both the institutionalized artefacts and with the multiple actors involved in domiciliary care. Based on ethnographic research of two implementations of assistive technologies in Denmark, the article discusses this dilemma and how it provides the opportunity to rethink how assistive technologies are shaped in the interplay with everyday life in private homes. Through an emphasis on embodiment, script and domestication, the authors illustrate how relations are developed or not developed – between the disabled person and the non-human artefacts.

Keywords: disability; assistive technology; script; design; domestication

Introduction

Sophie is no longer able to climb the stairs in her home, and Alice faces a situation where she is unable to turn over in her bed at night . . . .

The narratives told in this article concern Sophie and Alice. Sophie is diagnosed with multiple sclerosis and after living with the disease for nine years, she realized that she was no longer able to manage the stairs leading to the first floor in her house. Alice is diagnosed with Parkinson's disease but is very self-sufficient and has a minimum of assistive technology in her home (Lindegaard and Brodersen 2010). Sophie and Alice are 10 out of 10 disabled people we have followed during the research project ‘Home space or Workspace’. The two narratives are based on analysis of our anthropological field notes and records and reflect the two persons’ own descriptions of what happened. To secure their anonymity, we have changed their names and do not use pictures.

We analyse how the two ‘disabled’ relate or do not relate to the domiciliary care systems through asking one research question: assistive technology – who does it assist and for whom is it designed? The domiciliary care systems discussed are governed by the perception that disabled people are ‘clients’ whose ‘needs’ are to be met through existing assistive technologies.

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†Both authors of this article contributed equally to its content and have therefore been listed in alphabetic order.
The dilemma addressed is how private homes and their residents change when the home becomes a hybrid of both workspace and private space. The dilemma contains two conflicting aspects: the assistive technologies offered by the Danish welfare system have either been ‘borrowed’ from the hospital setting or they have been designed with the caregiver’s well-being in mind.

How to understand ‘disability’ – discussions among disability scholars
Exploring the dense amount of writings related to how disability is to be understood, it is apparent that two disciplinary standpoints dominate, that is, disability studies and medical sociology. The discussion among the two disciplines is whether disability is to be perceived as social oppression, exclusion and unequal rights (Finkelstein 2001a, 2001b; Oliver 2004) or as being caused by impairment and illness (Williams 1999; Bury 2000). Analysing the two disciplinary standpoints, Thomas (2004) argues for a combination: ‘Disability is a form of social oppression involving the social imposition of restrictions of activity on people with impairments and the socially engendered undermining of their psycho-emotional wellbeing’ (Thomas 1999, 60). Accepting this definition, Thomas (2004) further argues that:

In this social relational definition, disability only comes into play when the restrictions of activity experienced by people with impairment are socially imposed, that is, when they are wholly social in origin. This means that it is entirely possible to acknowledge that impairments and chronic illness directly cause some restrictions of activity. (581)

Our argument for drawing attention to these discussions is that in the two narratives, it seems that the Danish welfare systems interpret disabled persons as ill patients; for example, Alice is made a patient and provided with a trapeze even though her only problem is to turn around in bed, and Sophie is made ‘potential more disabled’ (a patient) when a lift system in her bedroom was suggested even though she was not supposed to be that disabled for the next 10 years. In fact, the majority of people we have studied see themselves as persons who are disabled or have troubles in some situations but ‘able’ in all other situations. Thus, our point and understanding of ‘disability’ lies close to the definition suggested by Thomas (1999, 2004).

Focus in this article is on the multiple relations between the disabled persons, the assistive technologies, the caregivers in the private homes, the relatives, the routines and how all these human and non-human artefacts try to coexist. We acknowledge that effort has been made by among others Oliver and Hasler (1987) and Zola (1991), in their work related to self-controlled rehabilitation, self-help and independence as the goal and their continual use of nouns and adjectives, for example, invalid, disability etc., that tend to taint the whole person. The points made are to be understood as a contribution to the field and an attempt to raise a discussion about whom assistive technologies are designed for.

Danish care policy – designed for whom?
In Denmark, disabled and elderly people are entitled to receive domiciliary care and assistive technologies from the municipality. In 2007, Denmark spent 40 million Euros on assistive technology, a figure that is expected to increase in coming years because of an ageing population. ‘This implies a growing need for technological
solutions to enable people with disabilities to be active participants in society and maximize their quality of life’ (hmi 2011).

The UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities state that ‘States should ensure the development and supply of support services, including assistive devices for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights’ (United Nations 2006).

In Denmark, the Danish Center for Assistive Technology improves the quality of assistive technology by helping to ensure that standardized technological solutions are designed, developed and applied in a way that benefits all users: ‘Assistive technology should do more than assist. It must be a natural part of everyday life and meet users’ needs and preferences both aesthetically and functionally’ (hmi 2011).

Even though the assistive technology aims to help people with disabilities to be more independent in their daily lives, observations from our study indicate that many assistive technologies are developed to assist caregivers in their care practices and optimize their workspace. Since 1975, working environment rules were integrated into the Danish Working Environment Act, which applies to all work performed for an employer. The central aspect of this legislation is the extended safety and health concept, which means that all factors causing accidents, sickness and attrition must be taken into consideration in prevention work. The legislation covers such areas as work performance, workplace design, technical equipment etc. Floor space, room height and room capacity have to be adapted to the nature of the work, the technical equipment, materials and furniture in the working area. The legislation applies to all employers, also the people working in private homes. Thus, this legislation causes a conflict, since the domiciliary care system ends up focusing on safety and attrition of the workforce rather than on maintaining a feeling of home and domesticating the assistive technologies for disabled people. Another dilemma is that the municipal care system is not trained to analyse disabled people’s socio-material networks. Instead, the care system is trained to refer to a prefabricated list of assistive technology, called ‘Assistive Technology Data – Denmark’. The procedure is for the staff to suggest and provide the ‘best’ solution for the disabled that they find on the list of possible artefacts. The list is characterized as follows:

The Assistive Technology Data - Denmark (AssistData) contains information about 49194 assistive devices and 927 Danish suppliers of assistive devices. In AssistData, you will find descriptions of the assistive devices, information on technical specifications, test information, prices and the supplier’s contact information. (hmi 2011)

There are pictures of most devices, and there are an increasing number of brochures, video clips and manuals. All product series are classified by their primary function in accordance with the international standard (ISO classification). It is the care system who is responsible for finding solutions from the list and choosing the non-human actors in accordance with the specific lack of ‘function’. Based on talks and observations with care people and disabled people, it seems that the care system tend to take into consideration the isolated lack of function and projection of future needs, and not the actual socio-material network related to the disabled people and their relatives. The focus is on what the disabled cannot do, and not on enabling them to stay independent of help from others. Thus, the system’s perspective is formed by
disabled peoples' disabilities rather than the disabled as individuals with families, dreams and hopes for the future.

So what are the consequences of this for Sophie and Alice? For Sophie, a tight relationship was created between her and her wheel chair, whereas for Alice, the assistive technologies created an even deeper gap between her wish to remain self-sufficient and receiving help from assistive technologies. Sophie succeeded in changing the existing practice of the domiciliary care system in relation to assistive technologies, while Alice simply refused the assistive technologies suggested by the domiciliary care system. In the following, we explain what contributed to these two very different situations. First, however, we introduce the research project in which the empirical work was researched, along with the theoretical approach behind our analysis.

**The research project and theoretical inspiration**

The article is based on the anthropologic research project ‘Home space or Workspace?’ initiated by the authors in 2008. The project analysed the socio-material relations in the use and distribution of assistive technology in Denmark. The focus was to understand how different users integrate, refuse or negotiate such assistance and artefacts and how ‘human’ and ‘non-human’ actors entered the homes. Do the artefacts remain necessary intruders or are they accepted and domesticated as part of everyday living? Another purpose of the research was to show that a socio-material analysis is able to provide the product developers and designers with a precise and useful analysis.

In the research, we used field studies and interviews with multiple informants from the Danish Sclerosis Society, the municipality, the domiciliary care system, disabled people and the relatives. We visited 10 households, applying a combination of qualitative methods, such as ethnographic observations and qualitative interviews. The research was conducted in the homes, where observations and interviews regarding daily duties and practices were in focus (Shove et al. 2007). We observed how and when the disabled, their families and the domiciliary caregivers used or did not use assistive technologies, and whom the technologies actually assisted. We used camera and video techniques to ensure we gained a detailed understanding of the interaction between the actors and the assistive technology. The qualitative interviews gave us insight about how the informants perceived their assistive technologies as well as their own accounts for when and how they felt ‘abled’ or ‘disabled’. To ensure our informants remain anonyms, they have been given new names; Sophie and Alice are names given by us. The two narratives discussed illustrates two different dilemmas: (1) an example of a disabled person’s refusal to accept the proposed assistive technologies offered of the municipality, that would make her ‘disable’ rather than ‘able’ and (2) an example of a disabled person staying disabled since no assistive technology help her to be ‘able’.

In the research, we included historical documents, documents containing information about health care and design practices, as well as material about a new Danish concept in social welfare: ‘Welfare Technology’. This concept covers a range of new technological solutions (remote-controlled door/window openers, toilets with douche and drying, robots to assist eating etc.). The strategy behind the concept is to explore whether these technologies enhance the independence of the severely physically and cognitively disabled in their homes.
In our analysis we use the concepts of embodiment, script and domestication. The use of embodiment is inspired by Moser’s (2009) idea of embodiment in practice, and how the body and the subject of the disabled people are decomposed and recomposed in different settings and practices. In describing a man’s life after a traffic accident, Moser (2009) argues that new heterogeneous networks are created and demolished depending on new practices. Moser describes how two different networks assume different values for the patient and his body, one in which his body is degraded and another in which his body is recomposed to something new. Interestingly, Moser do not put much emphasis on the role of non-human artefacts in these heterogeneous networks. Our point is that the script of the non-human artefacts is developed due to the disabled peoples’ relations to these non-human artefacts, and therefore it becomes crucial to understand the materiality. Mol and Law (2004, 51) emphasize that we all have and are a body but that this dichotomous twosome can be challenged by inquiring into the body we do, which refers to particular actions and activities in the day-to-day practice of acting bodies. Thus, the body is not a well-defined whole; it is not black-boxed, but has semi-permeable boundaries. In our research, we see several examples where the semi-permeable boundaries constitute a challenge in relation to the assistive technologies as non-human actors.

We examine the private home and how continual optimisation of professional health care practices involving multiple assistive technologies often collides with the disabled’s expectations and practices. This concerns both the number of non-human actors in the home, the ‘functionality’ in-scripted in the assistive technology, and also how the design (visual, style, semiotic) influences whether the home feels homely or like an institution. The notion of script (Akrich 1992) is relevant, since it conceptualizes the connection between design and use. Some assistive technologies are designed to assist the caregivers in their work (often in an institutional setting), while others are designed to assist the disabled. This means that the designer has not only in-scripted the user but the whole network, including workspace, safety, longevity, etc. as representations. Oudshoorn, Brouns, and Oost (2005) draw attention to the fact that the inscription in artefacts of representations of user and use results in technologies that contain a script and therefore delegate responsibilities. Artefacts are not neutral actors in the socio-material configurations; they are active and worth examining in a symmetric analysis of human and non-human actors.

But how is it possible to analyse such heterogeneous networks in which the multiple human and non-human actors interact in both dynamic and more irreversible networks? According to Latour (1999), relations between actors and artefacts are not stable but dynamic relations between complexes of material artefacts, conventions and competences. Inspired by Latour and Domestication Theory (Silverstone et al. 1989; Lie and Sørensen 1996), the analysis in this article focuses on how collections of artefacts co-evolve, and how the different actors have different expectations concerning how, where and whom the artefacts are meant to assist.

According to Silverstone et al. (1989) and Lie and Sørensen (1996), a domestication analysis goes beyond function and use and draws attention to what is happening after the artefacts leave the designers or the domiciliary care system. The analysis seeks to explore whether the actors integrate the assistive technologies provided by the domiciliary care system into their homes and everyday lives, and how this process
occurs. It is not a linear progress, but conflicts, dilemmas and negotiations can be identified. Thus, domestication covers both the processes in which the technology is adapted to everyday life and the processes that involve everyday life’s adaptation to the technology. The analysis emphasizes micro-relations in everyday settings, and focuses on how the general symbolism of the artefacts’ codes can be converted into something personal that is connected to the individual’s identity and social relations. A domestication analysis operates with four phases: appropriation, objectification, incorporation and conversion. The appropriation phase occurs when the artefact, for example, the assistive technology, is provided to the disabled person – both physically and mentally. Through objectification, the assistive technology is given its place and made visible. In the third phase, the artefact is incorporated into the daily routines. Through conversion, the user also shows to the outside world the strong artefact-actor relation in identity and values. Thus, a domestication analysis examines the cultural integration – or disintegration – of artefacts, and perceives this as a process that affects technology, actors and space.

Sophie rebuilds her house – but for whom?

Sophie and her husband are living in a house they bought 20 years ago, in a suburb north of Copenhagen. Ten years after they bought the house, Sophie was diagnosed with multiple sclerosis. After living with the disease for nine years, Sophie realized that she was no longer able to manage the stairs leading to the first floor. They decided to rebuild their house by adding a new bedroom and bathroom to the ground floor construction. Due to her disabilities, as part of the domiciliary care system, the family was entitled to receive assistance and advice from the municipality’s architect. When Sophie and her husband saw the architect’s proposal for their rebuild house, they were shocked. They had expected solutions that would meet Sophie present needs and her wish to be more self-sufficient in her home, but instead the proposal was based on her presumed future needs for intensive assistive care. The proposal described a house with ceilings prepared for a track hoist system for lifts, a bedroom prepared for a hospital bed, and a bathroom three times larger than normal size. The house would be transformed from a home for Sophie and her family into a potential workspace for future caregivers.

When we visited Sophie, she met us outside her house sitting in her electric wheelchair. The entrance did not differ from other houses, and nothing indicated that this was a home for a disabled. Sophie gave us a guided tour, starting in the kitchen, dining room, living room and utility room. She then told us to go upstairs to the first floor without her. Here we saw two bedrooms and a bathroom. Until last year, Sophie had been sleeping in one of the bedrooms together with her husband. Now her multiple sclerosis had intensified and she was unable to climb the stairs, so a new bedroom and bathroom had been added to the ground floor. When we came downstairs, Sophie guided us to the newer part of the house. Sophie seemed very happy and proud; she said that the addition was now quite as she liked it. The ceiling had a dormer with a remote controlled window in the sleeping area, and there were sliding doors to a terrace, where Sophie could go out herself. The bathroom is:

\[
\ldots\text{twice the size that I need, but I was not able to convince the municipality consultant about this argument. He told me that in a few years I would be happy that there was lots of room for my disabled care} \ldots\text{that stung.}
\]
Two points can be drawn from this. First, it seems that a sort of domestication has been achieved between Sophie and her new bedroom, and that this succeeded when she was able to negotiate the design of the bedroom with the municipality architect. She had a window in the roof that was not just a standard window but a new ‘welfare technology’, a ‘remote-controlled’ window. Sophie had told the architect that one of her friends from the sclerosis network had implemented this new technology in her house, and the architect agreed that this could be a good solution. It seems that the negotiation phase succeeded because Sophie herself had been able to take part in the inscription process by enrolling both her disabled friend and also the non-human actor – the ‘remote-controlled’ window. This new non-human actor was very relevant, because the domiciliary care system’s strategy was to identify places where ‘welfare technology’ could be implemented to enable citizens to be more self-sufficient while also minimizing for domiciliary care costs. By making a connection between the domiciliary care system and its wider strategies for implementing new ‘welfare technologies’, the architect and Sophie succeeded in negotiating a solution that allowed Sophie to relate to her new bedroom. And it was the materiality of the functions of the remote control and the sliding doors that contributed to this domestication. The second point is that the same kind of domestication does not seem to characterize Sophie’s relationship with the bathroom. When this room was designed, the architect seemed to have decomposed Sophie’s body to a possible future situation in which it is assumed that Sophie, or rather her caregivers, will need more room to care for her. This means domestication of the new bathroom failed for Sophie.

After the guided tour, we sat in the dining room. Sophie explained how the planning process had occurred. She did not hide the fact that she had been very upset when she saw the architect’s first proposal. The ceilings were flat so that it would be easier to install a lift later. The idea was that her home should be prepared for the future course of Sophie’s illness, so that she could receive the care and the means of assistance that her disability demanded. Sophie said:

…but I couldn’t live with those ceilings. Think that during the next maybe ten years I was supposed to lie there and look up and think that I would surely get worse and finally have to be hoisted with a crane from my bedroom to my bathroom – that was impossible.

Thus, the ceiling in the bedroom was redesigned to its present design. Sophie explained that the architect admitted that he also found this solution the most appropriate, but the municipality officers had advised him to design a flat ceiling to prepare for a lift. The architect told Sophie that the argument for preparing for the lift system now was that it would be much cheaper than to wait until it had to be installed sometime in the future when she needed it.

From Sophie’s description, we see that the domiciliary care system, due to their focus on caregivers’ work environment, failed to understand the meanings and functions of the non-human actors that might affect the disabled. They also failed to understand the scripts of the lift system and the flat ceiling. In the planning and design phase of the addition to her home, Sophie was part of a multiple user group, where the experts and professionals were spokespersons who represented her. Sophie became a ‘silent voice’, marginalized or misunderstood in the process in which the
domiciliary care system represented instead the silent voice of another ‘silent voice’ group – for example, the caregivers (Oudshoorn, Brouns, and Oost 2005, 87).

During the visit and interview with Sophie, it became clear that she sees herself as a self-sufficient woman and not as a patient who needs lots of help from the domiciliary care system. Sophie can carry out most of her daily routines herself, with the help of her electric wheelchair, which she really appreciates. For Sophie, the wheelchair is a non-human artefact that is domesticated for most of her everyday routines. It assists her in her daily routines, provides self-help that allows her to maneuver inside and outside the house in her everyday practice. Thus, Sophie has incorporated the assistive technology and she and her wheelchair seem to be embodied. As a spokesperson for the Danish Sclerosis Society, she expresses this strong relationship to everybody, and she describes her identity and status as ‘wheelchair user’.

Sophie’s relation to the new bathroom is quite different, since the new bathroom symbolizes her possible future need for help, and it is designed for the caregivers’ practice. The plans for the house were designed for her as disabled and not for Sophie as a self-sufficient woman. She looked forward to a new bathroom where she herself and her wheelchair would be the main users, and it was alright to have a sink that was height adjustable and space for a chair to assist her when taking a bath. But the super-size bathroom with the mechanical lifting system was built as a workspace viewed from the domiciliary care system’s perspective. The objective was to allow room for lifts in order to prevent occupational injuries to the future professional caregivers. It was designed for multiple-use practices involving many human and non-human actors. This became a dilemma that was a major challenge to architects and designers – to design a home that was both workspace and home space. For Sophie, an institutionalized setting was proposed where she and her family could hardly feel at home.

This is a huge dilemma. Home care aims to make it possible for people to remain in their homes rather than move to institutional settings. Both assistive technologies and the caregivers are supposed to help people bath, dress, move etc. To do the job, the caregivers often need assistive technologies in their daily work practices to avoid work-related injuries.

In Denmark, caregivers do not bring assistive technology with them. Home care is performed by caregivers who transport themselves from client to client on bicycles and assistive technologies are stored in the clients’ homes. Sophie’s home was supposed to be rebuilt as to provide room for all the future assistive technologies and allow the caregivers to maneuver with lifts. It should also allow room for a freestanding hospital bed, which it was assumed would later be installed.

It is not only the design of home spaces and the role of non-human actors that are interesting to analyse. The processes of designing the individual assistive technologies are also of interest and need some attention in order to ensure that the design is suited to the users, with respect to who will use them, how they will be used, and in which settings it is assumed they will be placed. We illustrate this in the following section, with the example of how the mobile lift was designed.

**Designing assistive technologies – the mobile patient lift**

Since the first mobile lift for moving patients was developed, it has been domesticated in hospitals and nursing homes as the way to move all patients and
reduce work-related injuries. In Denmark, caregivers are not allowed to move patients without using lifts due to health regulations. However, the mobile lift for moving patients reflects two dilemmas: (1) who are the user? – The patient being lifted or the caregivers lifting the patient? and (2) the scripts embedded in the assistive technology. Focusing on (2), the scripts embedded in the mobile lift for moving patients are related to lifts used in automobile repair shops ‘to lift engines and other heavy parts’ (US Patent 2706120). Inspired by this lift, the first lift for moving patients was patented in 1955 with the title, ‘Floor Crane with Adjustable Legs’ (US Patent 2706120). Modern mobile patient lifts still have the basic elements of the original 1955 design and this raises a dilemma, since the socio-material networks are very different both in context and practice.

It is clear that the context of the two lifts differ; one lifts patients (assisted by caregivers) and the other lifts objects (car engines) – an important and obvious difference that can be understood by analysing the socio-material practice. The practice of using the patient lift is that the patient hangs in a sling made of textile fabric while being lifted between the bed and the wheelchair, the wheelchair and the toilet or while turning over the patient in bed. To use the lift, the patient must lie on a couch or bed so that the caregiver can place a net underneath the patient’s back. Metal rings are fixed to each of the four corners of the rectangular net. To lift the patient, the crane’s arm raises the corners of the net to lift the patient. The patient hangs in the net without being able to help the lifting process, which often makes the patient uncomfortable. Interviews with patients indicate that the script of the lift means that the patients are made to be passive objects that are not allowed to be actively involved in the process of being lifted. Thus, one challenge for designers is to design a lift, where the person being lifted can be in a more comfortable position and is not transformed into a passive ‘object’.

In interviews with domiciliary caregivers, they often mentioned that some disabled people cannot understand what the technology can do for them, and meet the assistive technologies with scepticism. For the caregivers, the lift has become a domesticated artefact that they use in their daily work routines. For the domiciliary care system, it has become an artefact they distribute to disabled people at home. Patient lifts are therefore stored in private homes, bedrooms, bathrooms, or even in living rooms, waiting for the caregivers to come and use them.

Through our research, we identified a new mobile lift design – the LikoLight, which is a portable mobile lift ‘developed for people in need of a light, mobile lift that folds away easily’ (Progressive Mobility and Medical Assistance 2011). The lift makes it possible for the caregivers to bring the lift with them, instead of storing it in the ‘patients’ home. This raises an issue of ownership of the assistive technologies: is it the responsibility of the ‘patients’ to provide access to the assistive technologies, or is the domiciliary care system responsible for providing the service and thus also space for storing the assistive technologies? The introduction of portable assistive technologies such as the LikoLight mobile lift could change the practice of the domiciliary care system, and thus also the practice of the caregivers.

It is clear from Sophie’s descriptions that portable assistive technologies are not yet domesticated within the domiciliary care system and in Sophie’s home the recommendation was to implement a solution in which the lift system was built into the house. Thus, it seems that the domiciliary care system had already decomposed Sophie's body to a future state. Interestingly, Sophie seems to have accepted this, despite the fact that she did not perceive that her body was decomposed yet. The...
description of the mobile patient lift suggests that in the process of re-designing the
engine lift to a patient lift, the patient was not considered the user, and the patient’s
‘comfort’ was not considered a design criterion; and the designers have not inscribed
the complex socio-material context into the lift.

ALICE – disabled, but still a woman
During our research, we also met Alice, who lives in a house with her two children.
Alice is one of about 5% of Parkinson’s patients who were diagnosed before the age
of 40. Alice is very self-sufficient and has a minimum of assistive technology in her
home. When we asked her to list them, she mentioned her bathing chair, which
enables her to sit down while taking a shower, a trolley to help her serve food in the
dining room and crutches and a wheelchair to use when she goes to the shopping
centre with her children. The day we visited Alice, she had just received a tele-care
device from the domiciliary care system. This device enables her to call for assistance
at night. Due to her illness, Alice has muscular rigidity, and she sometimes has
trouble turning over and changing positions in bed.

Before receiving the tele-care device, she used a Bariatric Trapeze, a triangular
device hanging above her bed (Figure 1), but as Alice said, ‘...but the Bariatric
Trapeze was scaring away my new boyfriend. He peeled it off and I have not mounted
it again.’

Alice has a double bed in her bedroom, and she told us that the trapeze helped
her change positions at night. The design and script reminded her of a hospital or
nursing home, and her children did not like it either. After the trapeze was removed,
Alice explored the assistive technology market to find an alternative, but she could
not find any sort of hanger that did not look like a gallows. The gallows was meant to
help Alice when she had trouble changing position in bed. ‘A little lost bodily
function’, she called it. But instead of helping, the trapeze became an artefact that

Figure 1. A trapeze over a standard double bed.
decomposed her body to be disabled and changed her relation to her boyfriend and children. Actually, it changed her daily practice and her identity. She discussed the problem with a professional therapist:

  The occupational therapist told me to ask the municipality for a hospital bed with guard rail... but I am not that disabled. I love my bed and do not want to sleep alone for the rest of my life.

  It is obvious that there is a conflict between how the domiciliary care system perceives the problem and how Alice and her relatives perceive the problem. The artefact offered does not suit Alice’s situation and her daily practice. Embodiment between Alice and the trapeze has not developed and Alice stays disabled in the sense that she will rather have trouble turning in bed at night than have to install the trapeze again.

  The domiciliary care system seems to be designed to function through lists of available assistive technologies. In Alice’s case, the lists did not include a double bed with a handle. The only solution the lists contained was a single bed designed to function in a whole different setting (e.g. hospital settings) than a home space setting that included a boyfriend and children. Since the care system failed to provide Alice with a bed and a handle that met her needs, embodiment between her and the assistive technology failed – it became a stranger to her. For Alice, having a Bariatric Trapeze or a hospital bed in her home did not improve her quality of life or make her more ‘able’. It reminded her of her handicap and visualized it, and frightened her boyfriend. The trapeze was originally designed for hospitals and does not fit into traditional homes – either in size or style, and required Alice to reorganize both her home and her identity. The script of the trapeze and the hospital bed is so domesticated into the hospital context that it is very difficult to bring it into a private sphere. Although it has many functional properties, the script is not open. Hospital beds are made for hospitalized patients and are compatible with non-human actors like bed tables, hygiene standards, long corridors, longevity etc.

  In introducing the hospital bed as the sole solution to Alice, the professional therapist assumed that Alice’s whole body was disabled. But it was only a small part of Alice that ‘does not work’. Suggesting a hospital bed is like saying that it is the ‘whole Alice’ that does not function. The care system and the bed enact Alice as disabled in a much broader sense. She is a mother and a girlfriend, and in these ‘relations’ a hospital bed does not work.

  Alice’s case brings forward the issue of ‘able’ or ‘disable’, since a functional tool that she could grab to turn over at night would assist her to be ‘able’ to help herself, whereas the script and institutional look of the Bariatric Trapeze ‘disabled’. Furthermore, the hospital bed, which is a single bed, ‘disabled’ her in relation to her boyfriend, and as a result, this assistive artefact failed to be domesticated in Alice’s everyday life and practice.

  Thus, Alice’s case illustrates that the design of the assistive technologies is important, especially when it embeds particular expectations in relation to purposes and practices. The concept of scripting highlights the range of contextual, practical, material and semiotic factors and needs to be taken into account when analysing actual practice. Even though an artefact is prescribed, the scripts remain open when exposed to the hybrid use practice (Akrich 1992).
**Concluding remarks**

In this article, we have discussed the use and design of assistive technologies. We identified a dilemma between what is perceived as home space and what is perceived as workspace, and thus a dilemma concerning whom designers are designing for when they develop assistive technologies. Is it disabled people in their homes or the caregivers who assist them? The narrative of Sophie illustrates that it requires the adoption of new perspectives and approaches by the domiciliary care system – for example, understanding the practice and everyday lives of disabled people.

Based on the two narratives of Alice and Sophie, it is obvious that the domiciliary care system is too eager to find already existing assistive technologies that can assist disabled rather than understand the everyday practice in which the assistive technologies must become embedded. Our research emphasizes that ‘staying self-sufficient’ is very important for the disabled. For Sophie, her electric wheelchair, her adjustable sink and her bathing chair maximized her self-sufficiency and her staying ‘able’. Some of the other assistive technologies were never domesticated, because she felt that they ‘disabled’ her rather than ‘enabled’ her. An important lesson to be learnt is that assistive technologies should ‘enable’ disabled and not ‘disable’ them. This may seem to be a simple conclusion, but as our research illustrates, the emphasis on the caregivers’ work environment seems to have become the focal issue when (re)designing disabled people’s homes.

The Danish policy of staying as long as possible in one’s own home has caused a conflict between two sets of regulations: those related to disabled people’s rights to assistive technologies and those protecting the caregivers’ work environment. In this conflicting ‘space’, regulations protecting the work environment have overruled the rights of disabled people.

Based on our ethnographic study and the analytical concepts used, we argue for conclusions that designers and the domiciliary care system have to consider when designing and selecting assistive technologies for disabled. Artefacts that are to assist the caregivers could be designed so they are easier to bring or hide when not in use. Assistive technology design embeds particular expectations concerning purpose, context, practice and use. The scripting of the assistive technology is most obvious when artefact designs configure the user in specific and practical ways. Although an artefact is prescribed, the scripts remain open when it is exposed to a multiple-use practice.

The two narratives illustrate that providing assistive technologies to disabled does not automatically mean that the artefacts become domesticated. Domestication does not mean merely that the domiciliary system provides the assistive technology, as done to Alice. The domestication process stopped at the objectification phase, since Alice did not incorporate the artefact into her daily practice. Domestication of an artefact means that the disabled person shows the world outside a strong artefact-actor relationship with regard to identity and values, as seen in the case of Sophie and her wheelchair. Therefore, in order to analyse how disabled domesticate assistive technology, the whole socio-material network must be analysed – e.g. built through the disabled’s active development of relations to non-human artefacts. Through such analysis, we gain an understanding of why some assistive technologies are domesticated while others are not.

Our research has caused us to ask why nobody has designed a comfortable double bed for disabled living in their private homes with relatives? Why is it difficult to re-think and re-design new assistive technology to assist all the human and non-human actors in the socio-material network? Design for disabilities in home space
could be a major future design possibility. The hybrid space between humans/non-
humans and home space/workspace opens up for new lines of enquiry regarding the
role of artefacts in the domiciliary care system. Designing assistive technologies
demands that developers, designers, care providers and politicians acknowledge the
complexity within which assistive technologies are to be used. This requires an
understanding of who is to use which assistive technology and where.

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## Introduction
- 2017 Annual Disability Status Report 2
- ACS Disability Questions 3
- Notes 4

## Summary
- New York Summary 5
- Prevalence by State: Ages 21 to 64 7
- Employment by State: Ages 21 to 64 8

## Demographics
- Prevalence: All Ages 9
- Prevalence: Ages 4 and under 11
- Prevalence: Ages 5 to 15 13
- Prevalence: Ages 16 to 20 15
- Prevalence: Ages 21 to 64 (Working-Age) 17
- Prevalence: Ages 65 to 74 19
- Prevalence: Ages 75 and Older 21
- Prevalence: Gender and Age 23
- Prevalence: Hispanic / Latino Origin and Age 26
- Prevalence: Race 29

## Outcomes
- Employment 29
- Not Working but Actively Looking for Work 33
- Full-Time / Full-Year Employment 35
- Annual Earnings (Full-Time / Full-Year Workers) 37
- Annual Household Income 39
- Poverty 41
- Supplemental Security Income (SSI) 43
- Education: High School Diploma / Equivalent 45
- Education: Some College / Associate's Degree 47
- Education: Bachelor's Degree or More 49
- Veterans Service-Connected Disability 51
- Health Insurance Coverage 53
- Type of Health Insurance Coverage 55

## Glossary
- 58

## About the Disability Status Report
- 64
The 2017 Annual Disability Status Report

The Annual Disability Status Reports provide policy makers, disability advocates, reporters, and the public with a summary of the most recent demographic and economic statistics on the non-institutionalized population with disabilities. They contain information on the population size and disability prevalence for various demographic subpopulations, as well as statistics related to employment, earnings, household income, veterans' service-connected disability and health insurance. Comparisons are made to people without disabilities and across disability types. Disability Status Reports and other statistics are available for the United States overall, each state, the District of Columbia, and Puerto Rico at www.disabilitystatistics.org.

The Status Reports primarily look at the working-age population because the employment gap between people with and without disabilities is a major focus of government programs and advocacy efforts. Employment is also a key factor in the social integration and economic self-sufficiency of working-age people with disabilities.

The information in this report is based on data from the US Census Bureau's American Community Survey (ACS) - a survey sent each year to a random sample of over 3.5 million households. For more information see the Census Bureau's ACS website http://www.census.gov/acs/www/ and our Guide to Disability Statistics from the American Community Survey (2008 Forward): http://disabilitystatistics.org/sources.cfm.

The estimates in these reports are based on responses from a sample of the population and may differ from actual population values because of sampling variability and other factors. Differences observed between the estimates for two or more groups may not be statistically significant.

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ACS Disability Questions

There is no single accepted definition of disability. Different definitions and disability questions may identify different populations with disabilities and result in larger or smaller estimates.

Below are the six questions used in the ACS to identify persons with disabilities. Note that the Census Bureau refers to each of the individual types as "difficulty" while in this report the term "disability" is used.

**Hearing Disability** (asked of all ages):
- Is this person deaf or does he/she have serious difficulty hearing?

**Visual Disability** (asked of all ages):
- Is this person blind or does he/she have serious difficulty seeing even when wearing glasses?

**Cognitive Disability** (asked of persons ages 5 or older):
- Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions?

**Ambulatory Disability** (asked of persons ages 5 or older):
- Does this person have serious difficulty walking or climbing stairs?

**Self-Care Disability** (asked of persons ages 5 or older):
- Does this person have difficulty dressing or bathing?

**Independent Living Disability** (asked of persons ages 15 or older):
- Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a doctor's office or shopping?

**Note:**
- The "Any Disability" category used in this report includes persons who reported one or more of the individual disability types.
- Respondents could report more than one disability type.
- Some disability questions were not asked of children.
- A separate set of survey questions identify veterans with service-connected disabilities. Based on a separate set of survey questions, this report includes estimates related to veterans' service-connected disability (see page 51).
Notes

**Spanish Language Reports:** Spanish language versions of the Annual Disability Status Reports for the US, all 50 states, Puerto Rico, and Washington D.C. can be downloaded at the same location as the English Status Reports. The Spanish translation was made possible through funding from the Northeast ADA Center through a grant from NIDILRR National Institute on Disability, Independent Living, and Rehabilitation Research.

**Puerto Rico:** A Puerto Rico Disability Status Report, based on the parallel 2017 Puerto Rico Community Survey (PRCS), is available again this year in English as well as Spanish. However, please note that the Puerto Rico sample is not included in any U.S. population estimates included in these reports.

**Group Quarters:** In 2006, the ACS began surveying the group quarters population. We include the non-institutionalized group quarters population, but due to small state level sample sizes exclude the institutionalized group quarters population (see glossary) in the Disability Status Reports.

**Margin of Error (MOE):** As in previous years' reports we provide the 90% MOE to better illustrate sampling variability. See the glossary entry for more information on this topic.

**Glossary:** As in previous years, we provide a comprehensive glossary at the back of this report defining the terms used in the Disability Status Report.

Note: According to the Census Bureau, estimates based on the ACS Public Use Microdata Sample (PUMS) file such as those included in this report may differ slightly from the ACS summary tables produced by the Census Bureau, because they are subject to additional sampling error and further data processing operations. Please see http://www.disabilitystatistics.org/faq.cfm#Q4 for further information.
New York Summary

These statistics indicate the social and economic status of non-institutionalized people with disabilities in New York, using data from the 2017 American Community Survey (ACS).

Age: In 2017, the prevalence of disability in NY was:

- 11.6 percent for persons of all ages
- 0.7 percent for persons ages 4 and under
- 5.4 percent for persons ages 5 to 15
- 5.9 percent for persons ages 16 to 20
- 9.1 percent for persons ages 21 to 64
- 21.8 percent for persons ages 65 to 74
- 46.9 percent for persons ages 75+

Disability Type: In 2017, the prevalence of the six disability types among persons of all ages in NY was:

- 2.1% reported a Visual Disability
- 2.8% reported a Hearing Disability
- 6.6% reported an Ambulatory Disability
- 4.5% reported a Cognitive Disability
- 2.8% reported a Self-Care Disability
- 5.5% reported an Independent Living Disability

Gender: In 2017, 12.2 percent of females of all ages and 11.0 percent of males of all ages in NY reported a disability.

Hispanic/Latino: In 2017, the prevalence of disability among persons of all ages of Hispanic or Latino origin in NY was 11.3 percent.

Race: In NY in 2017, the prevalence of disability for working-age people (ages 21 to 64) was:

- 8.9 percent among Whites
- 11.6 percent among Black / African Americans
- 4.0 percent among Asians
- 18.1 percent among Native Americans
- 10.4 percent among persons of some other race(s)

Employment: In 2017, the employment rate of working-age people (ages 21 to 64) with disabilities in NY was 34.9 percent.

Looking for Work: In NY in 2017, the percentage actively looking for work among people with disabilities who were not working was 8.0 percent.
**Full-Time/Full-Year Employment:** In NY in 2017, the percentage of working-age people with disabilities working full-time/full-year was 21.8 percent.

**Annual Earnings:** In 2017, the median annual earnings of working-age people with disabilities working full-time/full-year in NY was $47,500.

**Annual Household Income:** In NY in 2017, the median annual income of households with working-age people with disabilities was $45,500.

**Poverty:** In NY in 2017, the poverty rate of working-age people with disabilities was 29.6 percent.

**Supplemental Security Income:** In 2017, the percentage of working-age people with disabilities receiving SSI payments in NY was 22.7 percent.

**Educational Attainment:** In 2017, the percentage of working-age people with disabilities in NY:

- with only a high school diploma or equivalent was 32.8 percent
- with only some college or an associate degree was 27.7 percent
- with a bachelor's degree or more was 17.3 percent.

**Veterans Service-Connected Disability:** In 2017, the percentage of working-age civilian veterans with a VA determined Service-Connected Disability was 17.9 percent in NY.

**Health Insurance Coverage:** In 2017 in NY, 95.2 percent of working-age people with disabilities had health insurance.
Prevalence: Ages 21 - 64

This summary lists percentages by state of non-institutionalized working-age (ages 21 to 64) people with disabilities using data from the 2017 American Community Survey (ACS). The US disability prevalence rate for this population was 10.6%.

<table>
<thead>
<tr>
<th>Location</th>
<th>2017 (%)</th>
<th>Location</th>
<th>2017 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>14.9</td>
<td>Montana</td>
<td>11.2</td>
</tr>
<tr>
<td>Alaska</td>
<td>12.4</td>
<td>Nebraska</td>
<td>10.4</td>
</tr>
<tr>
<td>Arizona</td>
<td>10.7</td>
<td>Nevada</td>
<td>10.5</td>
</tr>
<tr>
<td>Arkansas</td>
<td>16.5</td>
<td>New Hampshire</td>
<td>10.0</td>
</tr>
<tr>
<td>California</td>
<td>8.3</td>
<td>New Jersey</td>
<td>7.9</td>
</tr>
<tr>
<td>Colorado</td>
<td>9.0</td>
<td>New Mexico</td>
<td>14.7</td>
</tr>
<tr>
<td>Connecticut</td>
<td>8.4</td>
<td>New York</td>
<td>9.1</td>
</tr>
<tr>
<td>Delaware</td>
<td>8.8</td>
<td>North Carolina</td>
<td>11.3</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>11.3</td>
<td>North Dakota</td>
<td>7.7</td>
</tr>
<tr>
<td>Florida</td>
<td>10.5</td>
<td>Ohio</td>
<td>12.3</td>
</tr>
<tr>
<td>Georgia</td>
<td>10.7</td>
<td>Oklahoma</td>
<td>15.3</td>
</tr>
<tr>
<td>Hawaii</td>
<td>7.4</td>
<td>Oregon</td>
<td>11.6</td>
</tr>
<tr>
<td>Idaho</td>
<td>13.0</td>
<td>Pennsylvania</td>
<td>11.8</td>
</tr>
<tr>
<td>Illinois</td>
<td>9.0</td>
<td>Puerto Rico</td>
<td>17.9</td>
</tr>
<tr>
<td>Indiana</td>
<td>12.1</td>
<td>Rhode Island</td>
<td>11.8</td>
</tr>
<tr>
<td>Iowa</td>
<td>9.0</td>
<td>South Carolina</td>
<td>13.0</td>
</tr>
<tr>
<td>Kansas</td>
<td>11.5</td>
<td>South Dakota</td>
<td>9.0</td>
</tr>
<tr>
<td>Kentucky</td>
<td>16.7</td>
<td>Tennessee</td>
<td>13.7</td>
</tr>
<tr>
<td>Louisiana</td>
<td>13.3</td>
<td>Texas</td>
<td>9.7</td>
</tr>
<tr>
<td>Maine</td>
<td>14.1</td>
<td>Utah</td>
<td>8.7</td>
</tr>
<tr>
<td>Maryland</td>
<td>9.0</td>
<td>Vermont</td>
<td>12.0</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>9.4</td>
<td>Virginia</td>
<td>9.7</td>
</tr>
<tr>
<td>Michigan</td>
<td>12.3</td>
<td>Washington</td>
<td>10.6</td>
</tr>
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<td>Minnesota</td>
<td>9.2</td>
<td>West Virginia</td>
<td>19.0</td>
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<td>Mississippi</td>
<td>15.7</td>
<td>Wisconsin</td>
<td>9.6</td>
</tr>
<tr>
<td>Missouri</td>
<td>13.1</td>
<td>Wyoming</td>
<td>12.3</td>
</tr>
</tbody>
</table>
Employment: Ages 21 - 64

This summary lists employment rates by state of non-institutionalized working-age (ages 21 to 64) people with disabilities using data from the 2017 American Community Survey (ACS). The employment rate in the US for this population was 37.3% for people with disabilities and 79.4% for people without disabilities.

<table>
<thead>
<tr>
<th>Location</th>
<th>People with Disabilities 2017</th>
<th>People without Disabilities 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>27.0</td>
<td>74.9</td>
</tr>
<tr>
<td>Alaska</td>
<td>40.3</td>
<td>79.5</td>
</tr>
<tr>
<td>Arizona</td>
<td>36.9</td>
<td>77.2</td>
</tr>
<tr>
<td>Arkansas</td>
<td>31.8</td>
<td>78.3</td>
</tr>
<tr>
<td>California</td>
<td>36.8</td>
<td>77.3</td>
</tr>
<tr>
<td>Colorado</td>
<td>45.7</td>
<td>82.4</td>
</tr>
<tr>
<td>Connecticut</td>
<td>40.4</td>
<td>80.4</td>
</tr>
<tr>
<td>Delaware</td>
<td>37.0</td>
<td>76.5</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>44.8</td>
<td>81.9</td>
</tr>
<tr>
<td>Florida</td>
<td>34.2</td>
<td>77.6</td>
</tr>
<tr>
<td>Georgia</td>
<td>34.9</td>
<td>78.4</td>
</tr>
<tr>
<td>Hawaii</td>
<td>41.3</td>
<td>81.4</td>
</tr>
<tr>
<td>Idaho</td>
<td>43.5</td>
<td>78.7</td>
</tr>
<tr>
<td>Illinois</td>
<td>38.8</td>
<td>79.7</td>
</tr>
<tr>
<td>Indiana</td>
<td>38.3</td>
<td>80.6</td>
</tr>
<tr>
<td>Iowa</td>
<td>46.0</td>
<td>85.0</td>
</tr>
<tr>
<td>Kansas</td>
<td>46.1</td>
<td>82.7</td>
</tr>
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<td>78.0</td>
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<td>Maine</td>
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<td>81.9</td>
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<td>Maryland</td>
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<td>82.4</td>
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<tr>
<td>Massachusetts</td>
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<td>82.7</td>
</tr>
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<td>Michigan</td>
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<td>78.5</td>
</tr>
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<td>Minnesota</td>
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<td>85.7</td>
</tr>
<tr>
<td>Mississippi</td>
<td>28.8</td>
<td>75.3</td>
</tr>
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<td>Missouri</td>
<td>35.9</td>
<td>81.7</td>
</tr>
<tr>
<td>Montana</td>
<td>43.8</td>
<td>81.8</td>
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<td>Nebraska</td>
<td>51.8</td>
<td>86.4</td>
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<td>Nevada</td>
<td>41.1</td>
<td>78.6</td>
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<td>85.1</td>
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<td>New Jersey</td>
<td>39.2</td>
<td>80.9</td>
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<td>New Mexico</td>
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<td>73.6</td>
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<td>78.3</td>
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<tr>
<td>Oregon</td>
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<td>79.8</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>37.1</td>
<td>80.4</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>23.7</td>
<td>57.1</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>42.1</td>
<td>81.8</td>
</tr>
<tr>
<td>South Carolina</td>
<td>33.0</td>
<td>78.5</td>
</tr>
<tr>
<td>South Dakota</td>
<td>53.2</td>
<td>85.1</td>
</tr>
<tr>
<td>Tennessee</td>
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<td>79.4</td>
</tr>
<tr>
<td>Texas</td>
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<td>78.3</td>
</tr>
<tr>
<td>Utah</td>
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<td>81.1</td>
</tr>
<tr>
<td>Vermont</td>
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<td>81.5</td>
</tr>
<tr>
<td>Virginia</td>
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<td>81.8</td>
</tr>
<tr>
<td>Washington</td>
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<td>80.2</td>
</tr>
<tr>
<td>West Virginia</td>
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<td>73.1</td>
</tr>
<tr>
<td>Wisconsin</td>
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<td>84.3</td>
</tr>
<tr>
<td>Wyoming</td>
<td>51.3</td>
<td>82.3</td>
</tr>
</tbody>
</table>
Prevalence

All Ages

Introduction

This section addresses the prevalence of disability among non-institutionalized people of all ages in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of people with a disability of all ages in NY was 11.6 percent.
- In other words, in 2017, 2,274,400 of the 19,633,500 individuals of all ages in NY reported one or more disabilities.
- In NY in 2017, among the six types of disabilities identified in the ACS, the highest prevalence rate was for "Ambulatory Disability," 6.6 percent. The lowest prevalence rate was for "Visual Disability," 2.1 percent.
Prevalence of disability among non-institutionalized people of all ages in New York in 2017*

*Note: Children under the age of five were only asked about Vision and Hearing disabilities. The Independent Living disability question was only asked of persons aged 16 years old and older.
Prevalence

Ages 4 years and under

Introduction

This section focuses on the prevalence of disability among non-institutionalized children ages 4 and under in New York, using data from the 2017 American Community Survey (ACS). Only the two sensory disability questions were asked of this population. For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of children with a visual and/or hearing disability ages 0 to 4 in NY was 0.7 percent.
- In other words, in 2017, 8,400 of the 1,152,200 children ages 0 to 4 in NY reported one or more disabilities.
- In NY in 2017, 0.3 percent reported a "Visual Disability"
- In NY in 2017, 0.5 percent reported a "Hearing Disability"
Prevalence of disability among non-institutionalized people ages 4 and under in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>0.7</td>
<td>3.29</td>
<td>8,400</td>
<td>2,090</td>
<td>1,152,200</td>
<td>9,572</td>
</tr>
<tr>
<td>Visual</td>
<td>0.3</td>
<td>3.29</td>
<td>4,000</td>
<td>1,450</td>
<td>1,152,200</td>
<td>9,572</td>
</tr>
<tr>
<td>Hearing</td>
<td>0.5</td>
<td>3.29</td>
<td>6,100</td>
<td>1,780</td>
<td>1,152,200</td>
<td>9,572</td>
</tr>
</tbody>
</table>
Prevalence

Ages 5 to 15 years

Introduction

This section focuses on the prevalence of disability among non-institutionalized children ages 5 to 15 in New York, using data from the 2017 American Community Survey (ACS)*. For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of children with a disability ages 5 to 15 in NY was 5.4 percent.
- In other words, in 2017, 136,700 of the 2,511,100 individuals ages 5 to 15 in NY reported one or more disabilities.
- In NY in 2017, among the five types of disabilities* identified in the ACS, the highest prevalence rate was for "Cognitive Disability," 4.1 percent. The lowest prevalence rate was for "Hearing Disability," 0.6 percent.

* Note: The "Independent Living Disability" question was not asked of children ages 15 years and younger.
Prevalence of disability* among non-institutionalized people ages 5 to 15 in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>5.4</td>
<td>0.33</td>
<td>136,700</td>
<td>8,440</td>
<td>2,511,100</td>
<td>23,701</td>
</tr>
<tr>
<td>Visual</td>
<td>1.0</td>
<td>3.29</td>
<td>24,800</td>
<td>3,600</td>
<td>2,511,100</td>
<td>23,701</td>
</tr>
<tr>
<td>Hearing</td>
<td>0.6</td>
<td>3.29</td>
<td>13,800</td>
<td>2,690</td>
<td>2,511,100</td>
<td>23,701</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>0.6</td>
<td>3.29</td>
<td>16,100</td>
<td>2,900</td>
<td>2,511,100</td>
<td>23,701</td>
</tr>
<tr>
<td>Cognitive</td>
<td>4.1</td>
<td>0.29</td>
<td>103,600</td>
<td>7,360</td>
<td>2,511,100</td>
<td>23,701</td>
</tr>
<tr>
<td>Self-Care</td>
<td>1.2</td>
<td>3.29</td>
<td>28,900</td>
<td>3,890</td>
<td>2,511,100</td>
<td>23,701</td>
</tr>
</tbody>
</table>

* Note: The "Independent Living Disability" question was not asked of children ages 15 years and younger.
Prevalence
Ages 16 to 20 years

Introduction

This section focuses on the prevalence of disability among non-institutionalized people ages 16 to 20 in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of people with a disability ages 16 to 20 in NY was 5.9 percent.
- In other words, in 2017, 74,600 of the 1,265,000 individuals ages 16 to 20 in NY reported one or more disabilities.
- In NY in 2017, among the six types of disabilities identified in the ACS, the highest prevalence rate was for "Cognitive Disability," 4.0 percent. The lowest prevalence rate was for "Hearing Disability," 0.6 percent.
Prevalence of disability among non-institutionalized people ages 16 to 20 in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>5.9</td>
<td>0.48</td>
<td>74,600</td>
<td>6,250</td>
<td>1,265,000</td>
<td>12,905</td>
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<tr>
<td>Visual</td>
<td>1.1</td>
<td>3.29</td>
<td>14,300</td>
<td>2,740</td>
<td>1,265,000</td>
<td>12,905</td>
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<tr>
<td>Hearing</td>
<td>0.6</td>
<td>3.29</td>
<td>7,700</td>
<td>2,020</td>
<td>1,265,000</td>
<td>12,905</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>0.7</td>
<td>3.29</td>
<td>8,700</td>
<td>2,140</td>
<td>1,265,000</td>
<td>12,905</td>
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<tr>
<td>Cognitive</td>
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<td>0.40</td>
<td>51,100</td>
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<td>1,265,000</td>
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<tr>
<td>Self-Care</td>
<td>0.7</td>
<td>3.29</td>
<td>9,200</td>
<td>2,200</td>
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<td>Independent Living</td>
<td>2.1</td>
<td>0.30</td>
<td>27,100</td>
<td>3,770</td>
<td>1,265,000</td>
<td>12,905</td>
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Prevalence
Ages 21 to 64 years

Introduction

This section focuses on the prevalence of disability among non-institutionalized working-age people (ages 21 to 64) in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of working age people (ages 21 to 64) with a disability in NY was 9.1 percent.
- In other words, in 2017, 1,057,000 of the 11,632,400 individuals ages 21 to 64 in NY reported one or more disabilities.
- In NY in 2017, among the six types of disabilities identified in the ACS, the highest prevalence rate was for "Ambulatory Disability," 4.5 percent. The lowest prevalence rate was "Hearing Disability," 1.5 percent.
### Prevalence of disability among non-institutionalized people ages 21 to 64 in New York in 2017

#### Prevalence Rates: Age 21 to 64 years (%)

![Bar chart showing prevalence rates for different types of disabilities.]

#### Table: Prevalence of Disability

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>9.1</td>
<td>0.19</td>
<td>1,057,000</td>
<td>22,920</td>
<td>11,632,400</td>
<td>111,186</td>
</tr>
<tr>
<td>Visual</td>
<td>1.6</td>
<td>3.29</td>
<td>190,300</td>
<td>9,950</td>
<td>11,632,400</td>
<td>111,186</td>
</tr>
<tr>
<td>Hearing</td>
<td>1.5</td>
<td>3.29</td>
<td>171,900</td>
<td>9,460</td>
<td>11,632,400</td>
<td>111,186</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>4.5</td>
<td>0.14</td>
<td>527,200</td>
<td>16,420</td>
<td>11,632,400</td>
<td>111,186</td>
</tr>
<tr>
<td>Cognitive</td>
<td>3.7</td>
<td>0.13</td>
<td>429,500</td>
<td>14,850</td>
<td>11,632,400</td>
<td>111,186</td>
</tr>
<tr>
<td>Self-Care</td>
<td>1.7</td>
<td>3.29</td>
<td>200,300</td>
<td>10,200</td>
<td>11,632,400</td>
<td>111,186</td>
</tr>
<tr>
<td>Independent Living</td>
<td>3.4</td>
<td>0.12</td>
<td>391,400</td>
<td>14,190</td>
<td>11,632,400</td>
<td>111,186</td>
</tr>
</tbody>
</table>
Prevalence
Ages 65 to 74 years

Introduction

This section explores the prevalence of disability among non-institutionalized people ages 65 to 74 in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of people with a disability ages 65 to 74 in NY was 21.8 percent.
- In other words, in 2017, 385,700 of the 1,766,900 individuals ages 65 to 74 in NY reported one or more disabilities.
- In NY in 2017, among the six types of disabilities identified in the ACS, the highest prevalence rate was for "Ambulatory Disability," 14.3 percent. The lowest prevalence rate was for "Visual Disability," 3.5 percent.
Prevalence of disability among non-institutionalized people ages 65 to 74 in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>21.8</td>
<td>0.71</td>
<td>385,700</td>
<td>14,090</td>
<td>1,766,900</td>
<td>20,971</td>
</tr>
<tr>
<td>Visual</td>
<td>3.5</td>
<td>0.32</td>
<td>61,500</td>
<td>5,680</td>
<td>1,766,900</td>
<td>20,971</td>
</tr>
<tr>
<td>Hearing</td>
<td>6.2</td>
<td>0.42</td>
<td>110,400</td>
<td>7,590</td>
<td>1,766,900</td>
<td>20,971</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>14.3</td>
<td>0.60</td>
<td>253,500</td>
<td>11,460</td>
<td>1,766,900</td>
<td>20,971</td>
</tr>
<tr>
<td>Cognitive</td>
<td>4.7</td>
<td>0.37</td>
<td>83,600</td>
<td>6,610</td>
<td>1,766,900</td>
<td>20,971</td>
</tr>
<tr>
<td>Self-Care</td>
<td>4.3</td>
<td>0.35</td>
<td>75,400</td>
<td>6,280</td>
<td>1,766,900</td>
<td>20,971</td>
</tr>
<tr>
<td>Independent Living</td>
<td>7.6</td>
<td>0.46</td>
<td>134,300</td>
<td>8,370</td>
<td>1,766,900</td>
<td>20,971</td>
</tr>
</tbody>
</table>
Prevalence
Ages 75 and Older

Introduction

This section focuses on the prevalence of disability among non-institutionalized people ages 75 and older in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of people with a disability ages 75 and older in NY was 46.9 percent.
- In other words, in 2017, 612,000 of the 1,306,000 individuals ages 75 and older in NY reported one or more disabilities.
- In NY in 2017, among the six types of disabilities identified in the ACS, the highest prevalence rate was for "Ambulatory Disability," 32.4 percent. The lowest prevalence rate was for "Visual Disability," 8.5 percent.
Prevalence of disability among non-institutionalized people ages 75 and older in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>46.9</td>
<td>1.00</td>
<td>612,000</td>
<td>17,650</td>
<td>1,306,000</td>
<td>14,578</td>
</tr>
<tr>
<td>Visual</td>
<td>8.5</td>
<td>0.56</td>
<td>111,100</td>
<td>7,610</td>
<td>1,306,000</td>
<td>14,578</td>
</tr>
<tr>
<td>Hearing</td>
<td>18.7</td>
<td>0.78</td>
<td>243,700</td>
<td>11,240</td>
<td>1,306,000</td>
<td>14,578</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>32.4</td>
<td>0.94</td>
<td>423,100</td>
<td>14,750</td>
<td>1,306,000</td>
<td>14,578</td>
</tr>
<tr>
<td>Cognitive</td>
<td>12.8</td>
<td>0.67</td>
<td>166,900</td>
<td>9,320</td>
<td>1,306,000</td>
<td>14,578</td>
</tr>
<tr>
<td>Self-Care</td>
<td>15.2</td>
<td>0.72</td>
<td>198,300</td>
<td>10,150</td>
<td>1,306,000</td>
<td>14,578</td>
</tr>
<tr>
<td>Independent Living</td>
<td>25.7</td>
<td>0.88</td>
<td>336,200</td>
<td>13,170</td>
<td>1,306,000</td>
<td>14,578</td>
</tr>
</tbody>
</table>
Prevalence

Gender and Age

Introduction

This section examines the prevalence of disability among people by gender and age group in New York, using data from the 2017 American Community Survey (ACS)*. For definitions of terms, see Glossary.

Quick Statistics

- In NY in 2017, the overall percentage (prevalence rate) of males with a disability of all ages was 11.0 percent.
- In other words, in 2017, 1,043,400 of the 9,508,000 males of all ages in NY reported one or more disabilities.
- In NY in 2017, the overall percentage (prevalence rate) of females with a disability of all ages was 12.2 percent.
- In other words, in 2017, 1,230,900 of the 10,125,400 females of all ages in NY reported one or more disabilities.

* Note: Children ages 0-4 were only asked about visual and hearing disabilities, children ages 5-15 were not asked the "Independent Living Disability" question.
Prevalence of disability among non-institutionalized people by gender and age group in New York in 2017

![Prevalence Rates: Gender and Age (%)](image)

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Males</th>
<th>Females</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Ages</td>
<td>11</td>
<td>12.2</td>
</tr>
<tr>
<td>Ages 4 and under</td>
<td>0.7</td>
<td>0.7</td>
</tr>
<tr>
<td>Ages 5-15</td>
<td>6.8</td>
<td></td>
</tr>
<tr>
<td>Ages 16-20</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Ages 21-64</td>
<td>6.7</td>
<td>9</td>
</tr>
<tr>
<td>Ages 65-74</td>
<td>9.1</td>
<td>21</td>
</tr>
<tr>
<td>Ages 75+</td>
<td>22.5</td>
<td>44.1</td>
</tr>
<tr>
<td>Ages 75+</td>
<td>48.7</td>
<td></td>
</tr>
<tr>
<td>Gender &amp; Age</td>
<td>%</td>
<td>MOE</td>
</tr>
<tr>
<td>-------------------</td>
<td>----</td>
<td>-----</td>
</tr>
<tr>
<td><strong>Males</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Males: All Ages</td>
<td>11.0</td>
<td>0.23</td>
</tr>
<tr>
<td>Males: Ages 4 and under</td>
<td>0.7</td>
<td>3.29</td>
</tr>
<tr>
<td>Males: Ages 5-15</td>
<td>6.8</td>
<td>0.51</td>
</tr>
<tr>
<td>Males: Ages 16-20</td>
<td>6.7</td>
<td>0.72</td>
</tr>
<tr>
<td>Males: Ages 21-64</td>
<td>9.0</td>
<td>0.28</td>
</tr>
<tr>
<td>Males: Ages 65-74</td>
<td>21.0</td>
<td>1.04</td>
</tr>
<tr>
<td>Males: Ages 75+</td>
<td>44.1</td>
<td>1.58</td>
</tr>
<tr>
<td><strong>Females</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Females: All Ages</td>
<td>12.2</td>
<td>0.24</td>
</tr>
<tr>
<td>Females: Ages 4 and under</td>
<td>0.7</td>
<td>3.29</td>
</tr>
<tr>
<td>Females: Ages 5-15</td>
<td>4.0</td>
<td>0.41</td>
</tr>
<tr>
<td>Females: Ages 16-20</td>
<td>5.0</td>
<td>0.63</td>
</tr>
<tr>
<td>Females: Ages 21-64</td>
<td>9.1</td>
<td>0.27</td>
</tr>
<tr>
<td>Females: Ages 65-74</td>
<td>22.5</td>
<td>0.98</td>
</tr>
<tr>
<td>Females: Ages 75+</td>
<td>48.7</td>
<td>1.29</td>
</tr>
</tbody>
</table>

*Note:* Children ages 0-4 were only asked about visual and hearing disabilities, children ages 5-15 were not asked the "Independent Living Disability" question.
Prevalence

Hispanic/Latino Origin and Age

Introduction

This section examines the prevalence of disability among people by Hispanic/Latino origin and age group in New York, using data from the 2017 American Community Survey (ACS)*. For definitions of terms, see Glossary.

Quick Statistics

- In NY in 2017, the overall percentage (prevalence rate) of disability among people of Hispanic/Latino origin of all ages was 11.3 percent.
- In other words, in 2017, 427,100 of the 3,773,800 people of Hispanic/Latino origin of all ages in NY reported one or more disabilities.
- In NY in 2017, the overall percentage (prevalence rate) of disability among people of non-Hispanic/Latino origin of all ages was 11.6 percent.
- In other words, in 2017, 1,847,300 of the 15,859,600 people of non-Hispanic/Latino origin of all ages in NY reported one or more disabilities.

* Note: Children ages 0-4 were only asked about visual and hearing disabilities, children age 5-15 were not asked the "Independent Living Disability" question.
Prevalence of disability among non-institutionalized people by Hispanic / Latino origin and age group in New York in 2017

Prevalence Rates: Hispanic/Latino Origin and Age (%)

- All: 11.3 Hispanic, 11.6 Non-Hispanic
- 4 and under: 1.4 Hispanic, 0.5 Non-Hispanic
- 5-15: 7.2 Hispanic, 4.9 Non-Hispanic
- 16-20: 5.9 Hispanic, 5.9 Non-Hispanic
- 21-64: 10.1 Hispanic, 8.8 Non-Hispanic
- 65-74: 30 Hispanic, 20.7 Non-Hispanic
- 75+: 54.1 Hispanic, 46 Non-Hispanic
<table>
<thead>
<tr>
<th>Hispanic/Latino Origin &amp; Age</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hispanic</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hispanic - All Ages</td>
<td>11.3</td>
<td>0.37</td>
<td>427,100</td>
<td>14,810</td>
<td>3,773,800</td>
<td>26,696</td>
</tr>
<tr>
<td>Hispanic - Ages 4 and under</td>
<td>1.4</td>
<td>3.29</td>
<td>4,200</td>
<td>1,480</td>
<td>300,600</td>
<td>1,705</td>
</tr>
<tr>
<td>Hispanic - Ages 5-15</td>
<td>7.2</td>
<td>0.75</td>
<td>44,800</td>
<td>4,840</td>
<td>621,200</td>
<td>4,327</td>
</tr>
<tr>
<td>Hispanic - Ages 16-20</td>
<td>5.9</td>
<td>1.01</td>
<td>16,800</td>
<td>2,970</td>
<td>286,900</td>
<td>2,256</td>
</tr>
<tr>
<td>Hispanic - Ages 21-64</td>
<td>10.1</td>
<td>0.46</td>
<td>223,900</td>
<td>10,780</td>
<td>2,216,400</td>
<td>15,645</td>
</tr>
<tr>
<td>Hispanic - Ages 65-74</td>
<td>30.0</td>
<td>2.28</td>
<td>63,900</td>
<td>5,780</td>
<td>212,800</td>
<td>1,710</td>
</tr>
<tr>
<td>Hispanic - Ages 75+</td>
<td>54.1</td>
<td>3.10</td>
<td>73,500</td>
<td>6,200</td>
<td>135,900</td>
<td>1,053</td>
</tr>
<tr>
<td><strong>Non-Hispanic</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-Hispanic - All Ages</td>
<td>11.6</td>
<td>0.18</td>
<td>1,847,300</td>
<td>29,660</td>
<td>15,859,600</td>
<td>166,217</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 4 and under</td>
<td>0.5</td>
<td>3.29</td>
<td>4,200</td>
<td>1,490</td>
<td>851,600</td>
<td>7,867</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 5-15</td>
<td>4.9</td>
<td>0.36</td>
<td>91,900</td>
<td>6,930</td>
<td>1,889,900</td>
<td>19,374</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 16-20</td>
<td>5.9</td>
<td>0.55</td>
<td>57,800</td>
<td>5,500</td>
<td>978,100</td>
<td>10,649</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 21-64</td>
<td>8.8</td>
<td>0.21</td>
<td>833,100</td>
<td>20,470</td>
<td>9,415,900</td>
<td>95,541</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 65-74</td>
<td>20.7</td>
<td>0.74</td>
<td>321,800</td>
<td>12,890</td>
<td>1,554,100</td>
<td>19,261</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 75+</td>
<td>46.0</td>
<td>1.06</td>
<td>538,500</td>
<td>16,590</td>
<td>1,170,100</td>
<td>13,525</td>
</tr>
</tbody>
</table>

*Note:* Children ages 0-4 were only asked about visual and hearing disabilities, children ages 5-15 were *not* asked the "Independent Living Disability" question.
Prevalence

Race

Introduction

This section presents the disability prevalence rate among non-institutionalized working-age people (ages 21 to 64) by race category in NY, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

In 2017, among working-age people in NY:

- 8.9 percent of persons who were White reported a disability.
- 11.6 percent of persons who were Black/African American reported a disability.
- 18.1 percent of persons who were Native American reported a disability.
- 4.0 percent of persons who were Asian reported a disability.
- 10.4 percent of persons who were some other race(s) reported a disability.
Prevalence of disability among non-institutionalized working-age people (ages 21 to 64) by race in New York in 2017

<table>
<thead>
<tr>
<th>Race</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>8.9</td>
<td>0.24</td>
<td>650,200</td>
<td>18,170</td>
<td>7,279,400</td>
<td>76,895</td>
</tr>
<tr>
<td>Black/African American</td>
<td>11.6</td>
<td>0.54</td>
<td>212,800</td>
<td>10,510</td>
<td>1,829,300</td>
<td>13,761</td>
</tr>
<tr>
<td>Native American or Alaska Native</td>
<td>18.1</td>
<td>4.11</td>
<td>8,300</td>
<td>2,090</td>
<td>45,900</td>
<td>451</td>
</tr>
<tr>
<td>Asian</td>
<td>4.0</td>
<td>0.42</td>
<td>45,100</td>
<td>4,860</td>
<td>1,126,400</td>
<td>10,782</td>
</tr>
<tr>
<td>Some other race(s)</td>
<td>10.4</td>
<td>0.60</td>
<td>140,700</td>
<td>8,560</td>
<td>1,351,400</td>
<td>9,297</td>
</tr>
</tbody>
</table>
Employment

Introduction

This section examines the employment rates of non-institutionalized working-age people (ages 21 to 64) with disabilities in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the employment rate of working-age people with disabilities in NY was 34.9 percent.
- In 2017, the employment rate of working-age people without disabilities in NY was 78.8 percent.
- The gap between the employment rates of working-age people with and without disabilities was 43.9 percentage points.
- Among the six types of disabilities identified in the ACS, the highest employment rate was for people with a "Hearing Disability," 52.4 percent. The lowest employment rate was for people with a "Self-Care Disability," 14.8 percent.
### Employment of non-institutionalized working-age people (ages 21 to 64) by disability status in New York in 2017

#### Employment Rates (%)

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>78.8</td>
<td>0.29</td>
<td>8,337,200</td>
<td>50,190</td>
<td>10,575,400</td>
<td>100,033</td>
</tr>
<tr>
<td>Any Disability</td>
<td>34.9</td>
<td>1.06</td>
<td>368,700</td>
<td>13,780</td>
<td>1,057,000</td>
<td>11,153</td>
</tr>
<tr>
<td>Visual</td>
<td>47.3</td>
<td>2.62</td>
<td>90,000</td>
<td>6,860</td>
<td>190,300</td>
<td>1,780</td>
</tr>
<tr>
<td>Hearing</td>
<td>52.4</td>
<td>2.76</td>
<td>90,100</td>
<td>6,860</td>
<td>171,900</td>
<td>1,892</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>24.0</td>
<td>1.35</td>
<td>126,700</td>
<td>8,130</td>
<td>527,200</td>
<td>5,417</td>
</tr>
<tr>
<td>Cognitive</td>
<td>24.7</td>
<td>1.51</td>
<td>106,100</td>
<td>7,440</td>
<td>429,500</td>
<td>4,681</td>
</tr>
<tr>
<td>Self-Care</td>
<td>14.8</td>
<td>1.82</td>
<td>29,600</td>
<td>3,940</td>
<td>200,300</td>
<td>2,288</td>
</tr>
<tr>
<td>Independent Living</td>
<td>16.3</td>
<td>1.35</td>
<td>63,800</td>
<td>5,780</td>
<td>391,400</td>
<td>4,388</td>
</tr>
</tbody>
</table>
Not Working but Actively Looking for Work

Introduction

This section focuses on the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities in New York who are not working but actively looking for work, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017 in NY, the percentage of working-age people with disabilities who were not working but actively looking for work was 8.0 percent.
- In 2017 in NY, the percentage of working-age people without disabilities who were not working but actively looking for work was 18.0 percent.
- The difference in the percentage of not working but actively looking for work between working-age people with and without disabilities was 10 percentage points.
- Among the six types of disabilities identified in the ACS, the highest percentage of not working but actively looking for work was for people with a "Visual Disability," 11.9 percent. The lowest percentage was for people with a "Self-Care Disability," 3.4 percent.
Percentage who are not working but actively looking for work among non-institutionalized working-age people (ages 21 to 64) in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>18.0</td>
<td>0.59</td>
<td>402,700</td>
<td>14,390</td>
<td>2,238,200</td>
<td>21,067</td>
</tr>
<tr>
<td>Any Disability</td>
<td>8.0</td>
<td>0.75</td>
<td>55,400</td>
<td>5,390</td>
<td>688,300</td>
<td>7,310</td>
</tr>
<tr>
<td>Visual</td>
<td>11.9</td>
<td>2.34</td>
<td>11,900</td>
<td>2,500</td>
<td>100,400</td>
<td>916</td>
</tr>
<tr>
<td>Hearing</td>
<td>10.5</td>
<td>2.46</td>
<td>8,600</td>
<td>2,120</td>
<td>81,800</td>
<td>879</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>5.1</td>
<td>0.80</td>
<td>20,300</td>
<td>3,270</td>
<td>400,500</td>
<td>4,163</td>
</tr>
<tr>
<td>Cognitive</td>
<td>8.5</td>
<td>1.12</td>
<td>27,300</td>
<td>3,790</td>
<td>323,400</td>
<td>3,572</td>
</tr>
<tr>
<td>Self-Care</td>
<td>3.4</td>
<td>1.01</td>
<td>5,900</td>
<td>1,760</td>
<td>170,700</td>
<td>1,993</td>
</tr>
<tr>
<td>Independent Living</td>
<td>4.4</td>
<td>0.82</td>
<td>14,400</td>
<td>2,750</td>
<td>327,600</td>
<td>3,696</td>
</tr>
</tbody>
</table>
Full-Time / Full-Year Employment

Introduction

This section presents the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities working full-time/full-year in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

| FT / FY Employment: with disability | 21.8% |
| FT / FY Employment: without disability | 59.1% |

- In 2017, the percentage of working-age people with disabilities working full-time/full-year in NY was 21.8 percent.
- In 2017, the percentage of working-age people without disabilities working full-time/full-year in NY was 59.1 percent.
- The difference in the percentage working full-time/full-year between working-age people with and without disabilities was 37.3 percentage points.
- Among the six types of disabilities identified in the ACS, the highest full-time/full-year employment rate was for people with "Hearing Disability," 37.2 percent. The lowest full-time/full-year employment rate was for people with "Independent Living Disability," 7.7 percent.
Full-Time/Full-Year employment of non-institutionalized working-age people (ages 21 to 64) by disability status in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>59.1</td>
<td>0.35</td>
<td>6,252,100</td>
<td>47,420</td>
<td>10,575,400</td>
<td>100,033</td>
</tr>
<tr>
<td>Any Disability</td>
<td>21.8</td>
<td>0.92</td>
<td>229,900</td>
<td>10,920</td>
<td>1,057,000</td>
<td>11,153</td>
</tr>
<tr>
<td>Visual</td>
<td>31.1</td>
<td>2.43</td>
<td>59,300</td>
<td>5,570</td>
<td>190,300</td>
<td>1,780</td>
</tr>
<tr>
<td>Hearing</td>
<td>37.2</td>
<td>2.67</td>
<td>64,000</td>
<td>5,790</td>
<td>171,900</td>
<td>1,892</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>14.4</td>
<td>1.11</td>
<td>76,100</td>
<td>6,310</td>
<td>527,200</td>
<td>5,417</td>
</tr>
<tr>
<td>Cognitive</td>
<td>12.3</td>
<td>1.15</td>
<td>53,000</td>
<td>5,270</td>
<td>429,500</td>
<td>4,681</td>
</tr>
<tr>
<td>Self-Care</td>
<td>8.5</td>
<td>1.43</td>
<td>17,100</td>
<td>2,990</td>
<td>200,300</td>
<td>2,288</td>
</tr>
<tr>
<td>Independent Living</td>
<td>7.7</td>
<td>0.98</td>
<td>30,000</td>
<td>3,970</td>
<td>391,400</td>
<td>4,388</td>
</tr>
</tbody>
</table>
Annual Earnings (Full-Time / Full-Year Workers)

Introduction

This section examines the median annual earnings of non-institutionalized working-age people (ages 21 to 64) with disabilities who work full-time/full-year in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the median earnings of working-age people with disabilities who worked full-time/full-year in NY was $47,500.
- In 2017, the median earnings of working-age people without disabilities who worked full-time/full-year in NY was $50,600.
- The difference in the median earnings between working-age people with and without disabilities who worked full-time/full-year was $3,100.
- Among the six types of disabilities identified in the ACS, the highest annual earnings was for people with "Hearing Disability," $50,600. The lowest annual earnings was for people with "Cognitive Disability," $38,400.
Median annual earnings of non-institutionalized working-age people (ages 21 to 64) who work full-time/full-year by disability status in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>Median Earnings</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>$50,600</td>
<td>$520</td>
<td>6,252,000</td>
<td>58,528</td>
</tr>
<tr>
<td>Any Disability</td>
<td>$47,500</td>
<td>$2,330</td>
<td>230,000</td>
<td>2,387</td>
</tr>
<tr>
<td>Visual</td>
<td>$44,500</td>
<td>$4,590</td>
<td>59,000</td>
<td>573</td>
</tr>
<tr>
<td>Hearing</td>
<td>$50,600</td>
<td>$5,150</td>
<td>64,000</td>
<td>732</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>$45,500</td>
<td>$3,600</td>
<td>76,000</td>
<td>778</td>
</tr>
<tr>
<td>Cognitive</td>
<td>$38,400</td>
<td>$4,100</td>
<td>53,000</td>
<td>532</td>
</tr>
<tr>
<td>Self-Care</td>
<td>$42,500</td>
<td>$5,750</td>
<td>17,000</td>
<td>166</td>
</tr>
<tr>
<td>Independent Living</td>
<td>$39,400</td>
<td>$4,730</td>
<td>30,000</td>
<td>302</td>
</tr>
</tbody>
</table>

Median Earnings

![Bar chart showing median earnings by disability type in New York in 2017](chart.png)
Annual Household Income

Introduction

This section illustrates the median annual income* of households that include any working-age people (ages 21 to 64) with disabilities in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the median income of households that include any working-age people with disabilities in NY was $45,500.
- In 2017, the median income of households that do not include any working-age people with disabilities in NY was $79,900.
- The difference in the median income between households including and not including working-age people with disabilities was $34,400.
- Among the six types of disabilities identified in the ACS, the highest median income was for households including persons with a "Hearing Disability," $60,700. The lowest median income was for households containing persons with a "Cognitive Disability" $36,700.

* Note: Household income is not available for persons living in group quarters.
Median annual income* of households including any working-age people (ages 21 to 64) by disability status in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>Median H.H. Income</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>$79,900</td>
<td>$1,190</td>
<td>5,016,000</td>
<td>49,417</td>
</tr>
<tr>
<td>Any Disability</td>
<td>$45,500</td>
<td>2,260</td>
<td>839,000</td>
<td>8,789</td>
</tr>
<tr>
<td>Visual</td>
<td>$46,000</td>
<td>5,290</td>
<td>158,000</td>
<td>1,528</td>
</tr>
<tr>
<td>Hearing</td>
<td>$60,700</td>
<td>6,490</td>
<td>152,000</td>
<td>1,726</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>$38,400</td>
<td>2,740</td>
<td>450,000</td>
<td>4,615</td>
</tr>
<tr>
<td>Cognitive</td>
<td>$36,700</td>
<td>3,250</td>
<td>328,000</td>
<td>3,429</td>
</tr>
<tr>
<td>Self-Care</td>
<td>$40,400</td>
<td>4,600</td>
<td>160,000</td>
<td>1,648</td>
</tr>
<tr>
<td>Independent Living</td>
<td>$39,100</td>
<td>3,230</td>
<td>309,000</td>
<td>3,243</td>
</tr>
</tbody>
</table>

* Note: Household income is not available for persons living in group quarters.
Introduction

This section examines the poverty rates* of non-institutionalized working-age people (ages 21 to 64) with disabilities in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the poverty rate of working-age people with disabilities in NY was 29.6 percent.
- In 2017, the poverty rate of working-age people without disabilities in NY was 10.6 percent.
- The difference in the poverty rate between working-age people with and without disabilities was 19 percentage points.
- Among the six types of disabilities identified in the ACS, the highest poverty rate was for people with "Cognitive Disability," 36.3 percent. The lowest poverty rate was for people with "Hearing Disability," 24.2 percent.

* Note: The Census Bureau does not calculate poverty status for those people living in military group quarters or college dormitories.
Poverty rates* of non-institutionalized working-age people (ages 21 to 64) by disability status in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>10.6</td>
<td>0.33</td>
<td>1,116,600</td>
<td>35.28</td>
<td>10,525,100</td>
<td>99,203</td>
</tr>
<tr>
<td>Any Disability</td>
<td>29.6</td>
<td>1.53</td>
<td>311,800</td>
<td>19.04</td>
<td>1,055,000</td>
<td>11,119</td>
</tr>
<tr>
<td>Visual</td>
<td>28.6</td>
<td>3.56</td>
<td>54,400</td>
<td>8.00</td>
<td>190,300</td>
<td>1,779</td>
</tr>
<tr>
<td>Hearing</td>
<td>24.2</td>
<td>3.56</td>
<td>41,500</td>
<td>6.99</td>
<td>171,500</td>
<td>1,886</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>33.1</td>
<td>2.23</td>
<td>174,600</td>
<td>14.30</td>
<td>527,200</td>
<td>5,417</td>
</tr>
<tr>
<td>Cognitive</td>
<td>36.3</td>
<td>2.53</td>
<td>155,100</td>
<td>13.49</td>
<td>427,900</td>
<td>4,654</td>
</tr>
<tr>
<td>Self-Care</td>
<td>35.3</td>
<td>3.67</td>
<td>70,700</td>
<td>9.12</td>
<td>200,300</td>
<td>2,288</td>
</tr>
<tr>
<td>Independent Living</td>
<td>34.3</td>
<td>2.61</td>
<td>134,200</td>
<td>12.55</td>
<td>390,900</td>
<td>4,379</td>
</tr>
</tbody>
</table>

*Note: The Census Bureau does not calculate poverty status for those people living in military group quarters or college dormitories.
Supplemental Security Income (SSI)

Introduction

This section focuses on the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities who receive Supplemental Security Income (SSI) payments in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary. Please note that these results will differ from official Social Security Administration reports for several reasons. For additional information, please email DisabilityStatistics@cornell.edu.

Quick Statistics

- In 2017, the percentage of working-age people with disabilities receiving Supplemental Security Income payments in NY was 22.7 percent.
- In 2017, the number of working-age people with disabilities receiving Supplemental Security Income payments in NY was 239,900.
- Among the six types of disabilities identified in the ACS, the highest percentage that received SSI was people with "Independent Living Disability," 33.2 percent. The lowest percentage that received SSI was people with "Hearing Disability," 15.4 percent.
Percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities who receive Supplemental Security Income (SSI) payments in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>22.7</td>
<td>0.93</td>
<td>239,900</td>
<td>11,150</td>
<td>1,057,000</td>
<td>11,153</td>
</tr>
<tr>
<td>Visual</td>
<td>19.8</td>
<td>2.09</td>
<td>37,700</td>
<td>4,450</td>
<td>190,300</td>
<td>1,780</td>
</tr>
<tr>
<td>Hearing</td>
<td>15.4</td>
<td>1.99</td>
<td>26,400</td>
<td>3,720</td>
<td>171,900</td>
<td>1,892</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>25.0</td>
<td>1.37</td>
<td>131,900</td>
<td>8,290</td>
<td>527,200</td>
<td>5,417</td>
</tr>
<tr>
<td>Cognitive</td>
<td>31.7</td>
<td>1.63</td>
<td>136,300</td>
<td>8,430</td>
<td>429,500</td>
<td>4,681</td>
</tr>
<tr>
<td>Self-Care</td>
<td>32.1</td>
<td>2.39</td>
<td>64,300</td>
<td>5,800</td>
<td>200,300</td>
<td>2,288</td>
</tr>
<tr>
<td>Independent Living</td>
<td>33.2</td>
<td>1.72</td>
<td>129,800</td>
<td>8,230</td>
<td>391,400</td>
<td>4,388</td>
</tr>
</tbody>
</table>
**Education**

**High School Diploma/Equivalent**

**Introduction**

This section explores the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities with only a high school diploma or equivalent in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

**Quick Statistics**

| High School Only: with disability | 32.8% |
| High School Only: without disability | 23.4% |

- In 2017, the percentage of working-age people with disabilities with only a high school diploma or equivalent in NY was 32.8 percent.
- In 2017, the percentage of working-age people without disabilities with only a high school diploma or equivalent in NY was 23.4 percent.
- The difference in the percentage with only a high school diploma or equivalent between working-age people with and without disabilities was 9.4 percentage points.
- Among the six types of disabilities identified in the ACS, the highest percentage with only a high school diploma or equivalent was for people with "Independent Living Disability," 34.5 percent. The lowest percentage with only a high school diploma or equivalent was for people with "Visual Disability," 27.6 percent.
Percentage of non-institutionalized working-age people (ages 21 to 64) with only a high school diploma or equivalent by disability status in NY in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>23.4</td>
<td>0.30</td>
<td>2,477,000</td>
<td>33,740</td>
<td>10,575,400</td>
<td>100,033</td>
</tr>
<tr>
<td>Any Disability</td>
<td>32.8</td>
<td>1.05</td>
<td>346,900</td>
<td>13,380</td>
<td>1,057,000</td>
<td>11,153</td>
</tr>
<tr>
<td>Visual</td>
<td>27.6</td>
<td>2.35</td>
<td>52,600</td>
<td>5,250</td>
<td>190,300</td>
<td>1,780</td>
</tr>
<tr>
<td>Hearing</td>
<td>32.7</td>
<td>2.59</td>
<td>56,100</td>
<td>5,420</td>
<td>171,900</td>
<td>1,892</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>33.7</td>
<td>1.49</td>
<td>177,700</td>
<td>9,620</td>
<td>527,200</td>
<td>5,417</td>
</tr>
<tr>
<td>Cognitive</td>
<td>34.4</td>
<td>1.66</td>
<td>147,700</td>
<td>8,770</td>
<td>429,500</td>
<td>4,681</td>
</tr>
<tr>
<td>Self-Care</td>
<td>32.5</td>
<td>2.40</td>
<td>65,100</td>
<td>5,840</td>
<td>200,300</td>
<td>2,288</td>
</tr>
<tr>
<td>Independent Living</td>
<td>34.5</td>
<td>1.74</td>
<td>135,000</td>
<td>8,390</td>
<td>391,400</td>
<td>4,388</td>
</tr>
</tbody>
</table>
Education

Some College/Associate's Degree

Introduction

This section examines the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities with only some college or an Associate's degree in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the percentage of working-age people with disabilities with only some college or an Associate's degree in NY was 27.7 percent.
- In 2017, the percentage of working-age people without disabilities with only some college or an Associate's degree in NY was 26.7 percent.
- The difference in the percentage with only some college or an Associate's degree between working-age people with and without disabilities was -1 percentage points.
- Among the six types of disabilities identified in the ACS, the highest percentage with only some college or an Associate's degree was for people with "Ambulatory Disability," 28.7 percent. The lowest percentage with only some college or Associate's degree was for people with "Cognitive Disability," 24.6 percent.
Percentage of non-institutionalized working-age people (ages 21 to 64) with only some college or an Associate's degree by disability status in New York in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>26.7</td>
<td>0.31</td>
<td>2,821,000</td>
<td>35,650</td>
<td>10,575,400</td>
<td>100,033</td>
</tr>
<tr>
<td>Any Disability</td>
<td>27.7</td>
<td>1.00</td>
<td>292,500</td>
<td>12,300</td>
<td>1,057,000</td>
<td>11,153</td>
</tr>
<tr>
<td>Visual</td>
<td>27.7</td>
<td>2.35</td>
<td>52,800</td>
<td>5,260</td>
<td>190,300</td>
<td>1,780</td>
</tr>
<tr>
<td>Hearing</td>
<td>26.2</td>
<td>2.43</td>
<td>45,000</td>
<td>4,860</td>
<td>171,900</td>
<td>1,892</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>28.7</td>
<td>1.43</td>
<td>151,300</td>
<td>8,880</td>
<td>527,200</td>
<td>5,417</td>
</tr>
<tr>
<td>Cognitive</td>
<td>24.6</td>
<td>1.51</td>
<td>105,600</td>
<td>7,430</td>
<td>429,500</td>
<td>4,681</td>
</tr>
<tr>
<td>Self-Care</td>
<td>26.6</td>
<td>2.26</td>
<td>53,300</td>
<td>5,280</td>
<td>200,300</td>
<td>2,288</td>
</tr>
<tr>
<td>Independent Living</td>
<td>25.3</td>
<td>1.59</td>
<td>99,000</td>
<td>7,190</td>
<td>391,400</td>
<td>4,388</td>
</tr>
</tbody>
</table>
Education

Bachelor's Degree or More

Introduction

This section presents the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities with a Bachelor's degree or more in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the percentage of working-age people with disabilities with a Bachelor's degree or more in NY was 17.3 percent.
- In 2017, the percentage of working-age people without disabilities with a Bachelor's degree or more in NY was 40.0 percent.
- The difference in the percentage with a Bachelor's degree or more between working-age people with and without disabilities was 22.7 percentage points.
- Among the six types of disabilities identified in the ACS, the highest percentage with a Bachelor's degree or more was for people with "Hearing Disability," 23.5 percent. The lowest percentage with a Bachelor's degree or more was for people with "Self-Care Disability," 12.0 percent.
Percentage of non-institutionalized working-age people (ages 21 to 64) with a Bachelor's degree or more by disability status in New York in 2017

**Education: Bachelor's Degree or More (%)**

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>40.0</td>
<td>0.35</td>
<td>4,232,900</td>
<td>41,820</td>
<td>10,575,400</td>
<td>100,033</td>
</tr>
<tr>
<td>Any Disability</td>
<td>17.3</td>
<td>0.84</td>
<td>182,700</td>
<td>9,750</td>
<td>1,057,000</td>
<td>11,153</td>
</tr>
<tr>
<td>Visual</td>
<td>18.7</td>
<td>2.05</td>
<td>35,700</td>
<td>4,320</td>
<td>190,300</td>
<td>1,780</td>
</tr>
<tr>
<td>Hearing</td>
<td>23.5</td>
<td>2.34</td>
<td>40,400</td>
<td>4,600</td>
<td>171,900</td>
<td>1,892</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>14.0</td>
<td>1.10</td>
<td>73,800</td>
<td>6,210</td>
<td>527,200</td>
<td>5,417</td>
</tr>
<tr>
<td>Cognitive</td>
<td>13.2</td>
<td>1.18</td>
<td>56,600</td>
<td>5,440</td>
<td>429,500</td>
<td>4,681</td>
</tr>
<tr>
<td>Self-Care</td>
<td>12.0</td>
<td>1.66</td>
<td>24,000</td>
<td>3,550</td>
<td>200,300</td>
<td>2,288</td>
</tr>
<tr>
<td>Independent Living</td>
<td>12.5</td>
<td>1.21</td>
<td>48,800</td>
<td>5,050</td>
<td>391,400</td>
<td>4,388</td>
</tr>
</tbody>
</table>
Veterans Service-Connected Disability Rating

Introduction

This section presents the percentage of non-institutionalized working-age (ages 21 to 64) civilian veterans reporting a service-connected disability rating in New York. The 2017 American Community Survey (ACS) asks if the veteran has a service-connected disability, and if so, what their rating is (0-100%). A "service-connected" disability is one that has been determined by the Department of Veterans Affairs (VA) as being a result of disease or injury incurred or aggravated during military service. Note that a veteran can receive disability compensation for a wide range of conditions, and a veteran with a service-connected disability may not report having one of the six ACS functional or activity limitation disabilities. For definitions of terms, see Glossary.

Quick Statistics

Veterans with a Service-Connected Disability

17.9%

- In 2017, there were 294,600 working-age civilian veterans in NY, of whom 52,800 had a VA service-connected disability.
- In 2017, the percentage of working-age civilian veterans in NY with a VA service-connected disability was 17.9 percent.
- In 2017, 17,300 working-age civilian veterans in NY had the most severe service-connected disability rating (70 percent or above).
- In 2017, 32.8 percent of the working-age civilian veterans in NY who had a service-connected disability had a service-connected disability rating of 70 percent or above.
Disability rating of working-age civilian veterans (ages 21 to 64) with a service-connected disability in New York in 2017

Service-Connected Disability | %  | MOE | Number | MOE | Base Pop. | Sample Size
---|---|---|---|---|---|---
Has a service-connected disability rating (0-100%) | 17.9 | 1.62 | 52,800 | 5,260 | 294,600 | 3,308

Disability rating of veterans with a service connected-disability

<table>
<thead>
<tr>
<th>Service-Connected Disability</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 percent</td>
<td>3.4</td>
<td>1.81</td>
<td>1,800</td>
<td>970</td>
<td>52,800</td>
<td>626</td>
</tr>
<tr>
<td>10 or 20 percent</td>
<td>23.1</td>
<td>4.20</td>
<td>12,200</td>
<td>2,530</td>
<td>52,800</td>
<td>626</td>
</tr>
<tr>
<td>30 or 40 percent</td>
<td>21.7</td>
<td>4.11</td>
<td>11,500</td>
<td>2,450</td>
<td>52,800</td>
<td>626</td>
</tr>
<tr>
<td>50 or 60 percent</td>
<td>12.6</td>
<td>3.31</td>
<td>6,700</td>
<td>1,870</td>
<td>52,800</td>
<td>626</td>
</tr>
<tr>
<td>70 percent or higher</td>
<td>32.8</td>
<td>4.68</td>
<td>17,300</td>
<td>3,010</td>
<td>52,800</td>
<td>626</td>
</tr>
<tr>
<td>Rating not reported</td>
<td>6.3</td>
<td>2.42</td>
<td>3,300</td>
<td>1,320</td>
<td>52,800</td>
<td>626</td>
</tr>
</tbody>
</table>
Health Insurance Coverage

Introduction

This section examines the health insurance coverage of non-institutionalized working-age people (ages 21 to 64) with disabilities in New York, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, 95.2 percent of working-age people with disabilities in NY had some type of health insurance coverage.
- In 2017, 91.6 percent of working-age people without disabilities in NY had some type of health insurance coverage.
- The difference in the health insurance coverage rate between working-age people with and without disabilities was 3.6 percentage points.
- Among the six types of disabilities identified in the ACS, the highest health insurance coverage rate was for people with "Independent Living Disability," 96.6 percent. The lowest health insurance coverage rate was for people with "Visual Disability," 93.7 percent.
## Health Insurance Coverage - By Disability Type (%)

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>91.6</td>
<td>0.20</td>
<td>9,689,500</td>
<td>51,030</td>
<td>10,575,400</td>
<td>100,033</td>
</tr>
<tr>
<td>Any Disability</td>
<td>95.2</td>
<td>0.48</td>
<td>1,005,800</td>
<td>22,390</td>
<td>1,057,000</td>
<td>11,153</td>
</tr>
<tr>
<td>Visual</td>
<td>93.7</td>
<td>1.28</td>
<td>178,200</td>
<td>9,630</td>
<td>190,300</td>
<td>1,780</td>
</tr>
<tr>
<td>Hearing</td>
<td>93.8</td>
<td>1.33</td>
<td>161,300</td>
<td>9,170</td>
<td>171,900</td>
<td>1,892</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>96.4</td>
<td>0.59</td>
<td>508,100</td>
<td>16,120</td>
<td>527,200</td>
<td>5,417</td>
</tr>
<tr>
<td>Cognitive</td>
<td>96.0</td>
<td>0.69</td>
<td>412,300</td>
<td>14,560</td>
<td>429,500</td>
<td>4,681</td>
</tr>
<tr>
<td>Self-Care</td>
<td>95.9</td>
<td>1.02</td>
<td>192,100</td>
<td>9,990</td>
<td>200,300</td>
<td>2,288</td>
</tr>
<tr>
<td>Independent Living</td>
<td>96.6</td>
<td>0.66</td>
<td>377,900</td>
<td>13,950</td>
<td>391,400</td>
<td>4,388</td>
</tr>
</tbody>
</table>
Type of Health Insurance Coverage

Introduction

This section examines the type of health insurance coverage for non-institutionalized working-age people (ages 21 to 64) with disabilities in New York, using data from the 2017 American Community Survey (ACS). Note that people can report more than one type of insurance coverage. For definitions of terms, see Glossary.

Quick Statistics

- In 2017, 34.7 percent of working-age people with disabilities in NY reported health insurance coverage through a current or former employer or union (theirs or another family member).
- In 2017, 64.7 percent of working-age people without disabilities in NY reported health insurance coverage through a current or former employer or union (theirs or another family member).
- In 2017, 10.8 percent of working-age people with disabilities in NY reported purchasing health insurance coverage directly from an insurance company (by themselves or another family member).
- In 2017, 23.4 percent of working-age people with disabilities in NY reported Medicare coverage and 53.9 percent reported Medicaid coverage (or other government-assistance plan for those with low incomes or a disability).
Type of health insurance coverage of non-institutionalized working-age people (ages 21 to 64) by disability status in New York in 2017

<table>
<thead>
<tr>
<th>Type of Health Insurance Coverage (%)</th>
<th>Any Disability</th>
<th>No Disability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uninsured</td>
<td>4.8</td>
<td>8.4</td>
</tr>
<tr>
<td>Employer/Union</td>
<td>34.7</td>
<td></td>
</tr>
<tr>
<td>Purchased</td>
<td>10.8</td>
<td>10.7</td>
</tr>
<tr>
<td>Medicare</td>
<td>23.4</td>
<td>1.7</td>
</tr>
<tr>
<td>Medicaid</td>
<td>53.9</td>
<td>19.1</td>
</tr>
<tr>
<td>Military/VA</td>
<td>3.1</td>
<td>1.3</td>
</tr>
<tr>
<td>Indian HS</td>
<td>0.4</td>
<td>0.1</td>
</tr>
<tr>
<td>Disability Status/Insurance Type</td>
<td>%</td>
<td>MOE</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>-----</td>
<td>-----</td>
</tr>
<tr>
<td><strong>Any Disability</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uninsured</td>
<td>4.8</td>
<td>0.48</td>
</tr>
<tr>
<td>Employer/Union</td>
<td>34.7</td>
<td>1.06</td>
</tr>
<tr>
<td>Purchased</td>
<td>10.8</td>
<td>0.69</td>
</tr>
<tr>
<td>Medicare</td>
<td>23.4</td>
<td>0.94</td>
</tr>
<tr>
<td>Medicaid</td>
<td>53.9</td>
<td>1.11</td>
</tr>
<tr>
<td>Military/VA</td>
<td>3.1</td>
<td>0.39</td>
</tr>
<tr>
<td>Indian Health Service</td>
<td>0.4</td>
<td>3.29</td>
</tr>
<tr>
<td><strong>No Disability</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uninsured</td>
<td>8.4</td>
<td>0.20</td>
</tr>
<tr>
<td>Employer/Union</td>
<td>64.7</td>
<td>0.34</td>
</tr>
<tr>
<td>Purchased</td>
<td>10.7</td>
<td>0.22</td>
</tr>
<tr>
<td>Medicare</td>
<td>1.7</td>
<td>3.29</td>
</tr>
<tr>
<td>Medicaid</td>
<td>19.1</td>
<td>0.28</td>
</tr>
<tr>
<td>Military/VA</td>
<td>1.3</td>
<td>3.29</td>
</tr>
<tr>
<td>Indian Health Service</td>
<td>0.1</td>
<td>3.29</td>
</tr>
</tbody>
</table>
Glossary

**Actively Looking for Work**

A person is defined as ACTIVELY looking for work if he or she reports looking for work during the last four weeks.

**Ambulatory Disability**

This disability type is based on the question (asked of persons ages 5 or older): Does this person have serious difficulty walking or climbing stairs?

**Base Population (Base Pop.)**

The estimated number of individuals upon which the calculation is based. (For percentages, this is the denominator).

**Cognitive Disability**

This disability type is based on the question (asked of persons ages 5 or older): Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions?

**Disability and Disability Types**

The ACS definition of disability is based on six questions. A person is coded as having a disability if he or she or a proxy respondent answers affirmatively for one or more of these six categories.

- **Hearing Disability** (asked of all ages): Is this person deaf or does he/she have serious difficulty hearing?
- **Visual Disability** (asked of all ages): Is this person blind or does he/she have serious difficulty seeing even when wearing glasses?
- **Cognitive Disability** (asked of persons ages 5 or older): Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions?
- **Ambulatory Disability** (asked of persons ages 5 or older): Does this person have serious difficulty walking or climbing stairs?
- **Self-care Disability** (asked of persons ages 5 or older): Does this person have difficulty dressing or bathing?
- **Independent Living Disability** (asked of persons ages 15 or older): Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a doctor’s office or shopping?

**Earnings**

Earnings are defined as wages, salary, commissions, bonuses, or tips from all jobs including self-employment income (NET income after business expenses) from own nonfarm businesses or farm businesses, including proprietorships and partnerships.
Education

Our definition is based on the responses to the question: "What is the highest degree or level of school this person has completed? If currently enrolled, mark the previous grade or highest degree received." Our category "high school diploma/equivalent" includes those marking the ACS option "Regular high school diploma — GED or alternative credential." Our category "Some college/Associate's degree" includes those marking the ACS options: some college credit, but less than 1 year of college credit; one or more years of college credit but no degree, or "Associate's degree (for example: AA, AS)." Our category "a Bachelor's or more" includes those marking the ACS options: "Bachelor's degree (for example: BA, BS)"; "Master's degree (for example: MA, MS, MEng, MEd, MSW, MBA)"; "Professional degree (for example: MD, DDS, DVM, LLB, JD)"; or "Doctorate degree (for example: PhD, EdD)." Note in 2008 changes were made to some of the response categories and the layout of this question.

Employment

A person is considered employed if he or she is either

a. "at work": those who did any work at all during the reference week as a paid employee (worked in his or her own business or profession, worked on his or her own farm, or worked 15 or more hours as an unpaid worker on a family farm or business) or

b. "with a job but not at work": had a job but temporarily did not work at that job during the reference week due to illness, bad weather, industrial dispute, vacation or other personal reasons. The reference week is defined as the week preceding the date the questionnaire was completed.

Employment Rate

The employment rate is calculated by dividing the number of persons employed by the number of persons in that population.

** Note that the unemployment rate cannot be calculated using the employment rate:

- The employment rate is the percentage of all persons who have a job.
- The unemployment rate is the percentage of persons in the labor force who do not have a job but are actively looking for work. The labor force includes people who have a job, are on layoff, or who actively searched for work in the last four weeks.

Please see http://www.disabilitystatistics.org/faq.cfm#Q6 for more information on unemployment rate calculation and its implications.

Full-Time/Full-Year Employment

A person is considered employed full-time/full-year if he or she worked 35 hours or more per week (full-time) and 50 or more weeks per year (full-year). The reference period is defined as the year preceding the date the questionnaire was completed. Note: this does not signify whether a person is eligible for fringe benefits. The question and response categories regarding weeks worked per year was changed in 2008.
Group Quarters (GQ)

A GQ is a place where people live or stay that is normally owned or managed by an entity or organization providing housing and/or services for the residents. These services may include custodial or medical care as well as other types of assistance, and residency is commonly restricted to those receiving these services. People living in group quarters are usually not related to each other. Group quarters include such places as college residence halls, residential treatment centers, skilled nursing facilities, group homes, military barracks, correctional facilities, and workers' dormitories. See the definitions of institutional GQs and non-institutional GQs for more information. In addition, a description of the types of group quarters included in the 2008 ACS is located on the U.S. Census Bureau's Web site at www.census.gov/acs/www/Downloads/2008_ACS_GQ_Definitions.pdf.

Health Insurance Coverage

Is based on the following question: Is this person CURRENTLY covered by any of the following types of health insurance or health coverage plans? Mark "Yes" or "No" for EACH type of coverage in items a – h.

a. Insurance through a current or former employer or union (of this person or another family member)
b. Insurance purchased directly from an insurance company (by this person or another family member)
c. Medicare, for people 65 and older, or people with certain disabilities
d. Medicaid, Medical Assistance, or any kind of government-assistance plan for those with low incomes or a disability
e. VA (including those who have ever used or enrolled for VA health care)
f. TRICARE or other military health care
g. Indian Health Service
h. Any other type of health insurance or health coverage plan – Specify (Note: “Other type” were recoded into one of the categories a-g by the Census Bureau)

Hearing Disability

This disability type is based on the question (asked of all ages): Is this person deaf or does he/she have serious difficulty hearing?

Hispanic or Latino Origin

People of Hispanic or Latino origin are those who classify themselves in a specific Hispanic or Latino category in response to the question, "Is this person Spanish/Hispanic/Latino?" Specifically, those of Hispanic or Latino origin are those who are Cuban; Mexican, Mexican American, Chicano; Puerto Rican; or other Spanish/Hispanic/Latino. Origin may be the heritage, nationality group, lineage, or country of birth of the person or the person's parents or ancestors before their arrival in the United States. People who identify their origin as Spanish, Hispanic, or Latino may be of any race.
Household Income

Household Income is defined as the total income of a household including: wages, salary, commissions, bonuses, or tips from all jobs; self-employment income (NET income after business expenses) from own non-farm or farm businesses, including proprietorships and partnerships; interest, dividends, net rental income, royalty income, or income from real estates and trusts; Social Security or Railroad Retirement; Supplemental Security Income; any public assistance or welfare payments from the state or local welfare office; retirement, survivor or disability pensions; and any other regularly received income (e.g., Veterans' payments, unemployment compensation, child support or alimony). Median household income is calculated with the household as the unit of analysis, using household weights without adjusting for household size.

Independent Living Disability

This disability type is based on the question *(asked of persons ages 15 or older)*: Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a doctors office or shopping?

Institutional Group Quarters (GQs)

Includes facilities for people under formally authorized, supervised care or custody at the time of enumeration. Generally, restricted to the institution, under the care or supervision of trained staff, and classified as "patients" or "inmates." Includes: correctional, nursing, and in-patient hospice facilities, psychiatric hospitals, juvenile group homes and residential treatment centers.

Margin of Error (MOE)

Data, such as data from the American Community Survey, is based on a sample, and therefore statistics derived from this data are subject to sampling variability. The margin of error (MOE) is a measure of the degree of sampling variability. In a random sample, the degree of sampling variation is determined by the underlying variability of the phenomena being estimated (e.g., income) and the size of the sample (i.e., the number of survey participants used to calculate the statistic). The smaller the margin of error, the lower the sampling variability and the more "precise" the estimate. A margin of error is the difference between an estimate and its upper or lower confidence bounds. Confidence bounds are calculated by adding the MOE to the estimate (upper bound) and subtracting the MOE from the estimate (lower bound). All margins of error in this report are based on a 90 percent confidence level. This means that there is a 90% certainty that the actual value lies somewhere between the upper and lower confidence bounds.

Non-Institutional Group Quarters (GQs)

Includes facilities that are not classified as institutional quarters; such as...
Includes facilities that are not classified as institutional group quarters; such as college/university housing, group homes intended for adults, residential treatment facilities for adults, workers' group living quarters and Job Corps centers and religious group quarters.

**Not Working but Actively Looking for Work**

A person is defined as not working but actively looking for work if he or she reports not being employed, but has been looking for work during the last four weeks.

**Number**

This term appears in the tables; it refers to estimated number of people in the category. (for percentages, this is the numerator).

**Poverty**

The poverty measure is computed based upon the standards defined in Directive 14 from the Office of Management and Budget. These standards use poverty thresholds created in 1982 and index these thresholds to 2008 dollars using poverty factors based upon the Consumer Price Index. They use the family as the income sharing unit and family income is the sum of total income from each family member living in the household. The poverty threshold depends upon the size of the family; the age of the householder; and the number of related children under the age of 18.

**Race**

Race categories are based on the question, "[w]hat is this person's race? Mark (X) one or more races to indicate what this person considers himself/herself to be." Responses include the following: White; Black or African-American; American Indian or Alaska Native (print name of enrolled or principal tribe); Asian Indian; Chinese; Filipino; Japanese; Korean; Vietnamese; Other Asian (Print Race); Native Hawaiian; Guamanian or Chamorro; Samoan; Other Pacific Islander (Print Race Below); Some other race (print race below). "Other race" also contains people who report more than one race.

**Sample Size**

The number of survey participants used to calculate the statistic.

**Self-care Disability**

This disability type is based on the question *(asked of persons ages 5 or older):* 17c. Does this person have difficulty dressing or bathing?

**Supplemental Security Income (SSI)**
A person is defined as receiving SSI payments if he or she reports receiving (SSI) income in the 12 months prior to the survey.

**Note:** The Supplemental Security Income (SSI) does not apply to Puerto Rico. SSI is a federal cash assistance program that provides monthly payments to low-income aged, blind, or disabled persons in the 50 states, the District of Columbia, and the Northern Mariana Islands.

**Veteran Service-Connected Disability**

A disease or injury determined to have occurred in or to have been aggravated by military service. A disability is evaluated according to the VA Schedule for Rating Disabilities in Title 38, CFR, and Part 4. Extent of disability is expressed as a percentage from 0% (for conditions that exist but are not disabling to a compensable degree) to 100%, in increments of 10%. This information was determined by the following two part question:

a. **Does this person have a VA service-connected disability rating?**
   - Yes (such as 0%, 10%, 20%, ..., 100%)
   - No **SKIP** to question 28a

b. **What is this person’s service-connected disability rating?”**
   - Responses included: 0 percent; 10 or 20 percent; 30 or 40 percent; 50 or 60 percent; 70 percent or higher

**Visual Disability**

This disability type is based on the question: *(asked of all ages)*: Is this person blind or does he/she have serious difficulty seeing even when wearing glasses?
About the Disability Status Reports

The Cornell University Disability Status Reports is produced and funded by the Yang-Tan Institute at the Cornell University ILR School. This effort originated as a product of the Rehabilitation Research and Training Center on Disability Demographics and Statistics (StatsRRTC) funded to the Yang-Tan Institute in the ILR School at Cornell University by the U.S. Department of Education, National Institute on Disability and Rehabilitation Research (grant No. H133B031111).

The contents of this report do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government (Edgar, 75.620 (b)).

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Contents

Introduction
2017 Annual Disability Status Report 2
ACS Disability Questions 3
Notes 4

Summary
United States Summary 5
Prevalence by State: Ages 21 to 64 7
Employment by State: Ages 21 to 64 8

Demographics
Prevalence: All Ages 9
Prevalence: Ages 4 and under 11
Prevalence: Ages 5 to 15 13
Prevalence: Ages 16 to 20 15
Prevalence: Ages 21 to 64 (Working-Age) 17
Prevalence: Ages 65 to 74 19
Prevalence: Ages 75 and Older 21
Prevalence: Gender and Age 23
Prevalence: Hispanic / Latino Origin and Age 26
Prevalence: Race 29

Outcomes
Employment 29
Not Working but Actively Looking for Work 33
Full-Time / Full-Year Employment 35
Annual Earnings (Full-Time / Full-Year Workers) 37
Annual Household Income 39
Poverty 41
Supplemental Security Income (SSI) 43
Education: High School Diploma / Equivalent 45
Education: Some College / Associate’s Degree 47
Education: Bachelor’s Degree or More 49
Veterans Service-Connected Disability 51
Health Insurance Coverage 53
Type of Health Insurance Coverage 55

Glossary 58

About the Disability Status Report 64
The Annual Disability Status Reports provide policy makers, disability advocates, reporters, and the public with a summary of the most recent demographic and economic statistics on the non-institutionalized population with disabilities. They contain information on the population size and disability prevalence for various demographic subpopulations, as well as statistics related to employment, earnings, household income, veterans' service-connected disability and health insurance. Comparisons are made to people without disabilities and across disability types. Disability Status Reports and other statistics are available for the United States overall, each state, the District of Columbia, and Puerto Rico at www.disabilitystatistics.org.

The Status Reports primarily look at the working-age population because the employment gap between people with and without disabilities is a major focus of government programs and advocacy efforts. Employment is also a key factor in the social integration and economic self-sufficiency of working-age people with disabilities.

The information in this report is based on data from the US Census Bureau's American Community Survey (ACS) - a survey sent each year to a random sample of over 3.5 million households. For more information see the Census Bureau's ACS website http://www.census.gov/acs/www/ and our Guide to Disability Statistics from the American Community Survey (2008 Forward): http://disabilitystatistics.org/sources.cfm.

The estimates in these reports are based on responses from a sample of the population and may differ from actual population values because of sampling variability and other factors. Differences observed between the estimates for two or more groups may not be statistically significant.

**Suggested Citation**


We would like to thank Sara VanLooy, Jason Criss, and Joe Williams for their assistance with editing and production of this document.
ACS Disability Questions

There is no single accepted definition of disability. Different definitions and disability questions may identify different populations with disabilities and result in larger or smaller estimates.

Below are the six questions used in the ACS to identify persons with disabilities. Note that the Census Bureau refers to each of the individual types as "difficulty" while in this report the term "disability" is used.

**Hearing Disability** (asked of all ages):
- Is this person deaf or does he/she have serious difficulty hearing?

**Visual Disability** (asked of all ages):
- Is this person blind or does he/she have serious difficulty seeing even when wearing glasses?

**Cognitive Disability** (asked of persons ages 5 or older):
- Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions?

**Ambulatory Disability** (asked of persons ages 5 or older):
- Does this person have serious difficulty walking or climbing stairs?

**Self-Care Disability** (asked of persons ages 5 or older):
- Does this person have difficulty dressing or bathing?

**Independent Living Disability** (asked of persons ages 15 or older):
- Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a doctor's office or shopping?

**Note:**
- The "Any Disability" category used in this report includes persons who reported one or more of the individual disability types.
- Respondents could report more than one disability type.
- Some disability questions were not asked of children.
- A separate set of survey questions identify veterans with service-connected disabilities. Based on a separate set of survey questions, this report includes estimates related to veterans' service-connected disability (see page 51).
Notes

**Spanish Language Reports:** Spanish language versions of the Annual Disability Status Reports for the US, all 50 states, Puerto Rico, and Washington D.C. can be downloaded at the same location as the English Status Reports. The Spanish translation was made possible through funding from the Northeast ADA Center through a grant from NIDILRR National Institute on Disability, Independent Living, and Rehabilitation Research.

**Puerto Rico:** A Puerto Rico Disability Status Report, based on the parallel 2017 Puerto Rico Community Survey (PRCS), is available again this year in English as well as Spanish. However, please note that the Puerto Rico sample is not included in any U.S. population estimates included in these reports.

**Group Quarters:** In 2006, the ACS began surveying the group quarters population. We include the non-institutionalized group quarters population, but due to small state level sample sizes exclude the institutionalized group quarters population (see glossary) in the Disability Status Reports.

**Margin of Error (MOE):** As in previous years' reports we provide the 90% MOE to better illustrate sampling variability. See the glossary entry for more information on this topic.

**Glossary:** As in previous years, we provide a comprehensive glossary at the back of this report defining the terms used in the Disability Status Report.

Note: According to the Census Bureau, estimates based on the ACS Public Use Microdata Sample (PUMS) file such as those included in this report may differ slightly from the ACS summary tables produced by the Census Bureau, because they are subject to additional sampling error and further data processing operations. Please see http://www.disabilitystatistics.org/faq.cfm#Q4 for further information.
United States Summary

These statistics indicate the social and economic status of non-institutionalized people with disabilities in the United States, using data from the 2017 American Community Survey (ACS).

Age: In 2017, the prevalence of disability in the US was:

- 12.7 percent for persons of all ages
- 0.8 percent for persons ages 4 and under
- 5.4 percent for persons ages 5 to 15
- 6.2 percent for persons ages 16 to 20
- 10.6 percent for persons ages 21 to 64
- 25.1 percent for persons ages 65 to 74
- 48.7 percent for persons ages 75+

Disability Type: In 2017, the prevalence of the six disability types among persons of all ages in the US was:

- 2.3% reported a Visual Disability
- 3.6% reported a Hearing Disability
- 6.9% reported an Ambulatory Disability
- 5.1% reported a Cognitive Disability
- 2.6% reported a Self-Care Disability
- 5.6% reported an Independent Living Disability

Gender: In 2017, 12.8 percent of females of all ages and 12.5 percent of males of all ages in the US reported a disability.

Hispanic/Latino: In 2017, the prevalence of disability among persons of all ages of Hispanic or Latino origin in the US was 8.9 percent.

Race: In the US in 2017, the prevalence of disability for working-age people (ages 21 to 64) was:

- 10.6 percent among Whites
- 13.6 percent among Black / African Americans
- 4.4 percent among Asians
- 18.1 percent among Native Americans
- 9.5 percent among persons of some other race(s)

Employment: In 2017, the employment rate of working-age people (ages 21 to 64) with disabilities in the US was 37.3 percent.

Looking for Work: In the US in 2017, the percentage actively looking for work among people with disabilities who were not working was 7.4 percent.
**Full-Time/Full-Year Employment:** In the US in 2017, the percentage of working-age people with disabilities working full-time/full-year was 23.9 percent.

**Annual Earnings:** In 2017, the median annual earnings of working-age people with disabilities working full-time/full-year in the US was $40,400.

**Annual Household Income:** In the US in 2017, the median annual income of households with working-age people with disabilities was $45,500.

**Poverty:** In the US in 2017, the poverty rate of working-age people with disabilities was 26.1 percent.

**Supplemental Security Income:** In 2017, the percentage of working-age people with disabilities receiving SSI payments in the US was 18.9 percent.

**Educational Attainment:** In 2017, the percentage of working-age people with disabilities in the US:

- with only a high school diploma or equivalent was 34.4 percent
- with only some college or an associate degree was 31.7 percent
- with a bachelor's degree or more was 14.8 percent.

**Veterans Service-Connected Disability:** In 2017, the percentage of working-age civilian veterans with a VA determined Service-Connected Disability was 26.3 percent in the US.

**Health Insurance Coverage:** In 2017 in the US, 90.2 percent of working-age people with disabilities had health insurance.
Prevalence: Ages 21 - 64

This summary lists percentages by state of non-institutionalized working-age (ages 21 to 64) people with disabilities using data from the 2017 American Community Survey (ACS). The US disability prevalence rate for this population was 10.6%

<table>
<thead>
<tr>
<th>Location</th>
<th>2017 (%)</th>
<th>Location</th>
<th>2017 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>14.9</td>
<td>Montana</td>
<td>11.2</td>
</tr>
<tr>
<td>Alaska</td>
<td>12.4</td>
<td>Nebraska</td>
<td>10.4</td>
</tr>
<tr>
<td>Arizona</td>
<td>10.7</td>
<td>Nevada</td>
<td>10.5</td>
</tr>
<tr>
<td>Arkansas</td>
<td>16.5</td>
<td>New Hampshire</td>
<td>10.0</td>
</tr>
<tr>
<td>California</td>
<td>8.3</td>
<td>New Jersey</td>
<td>7.9</td>
</tr>
<tr>
<td>Colorado</td>
<td>9.0</td>
<td>New Mexico</td>
<td>14.7</td>
</tr>
<tr>
<td>Connecticut</td>
<td>8.4</td>
<td>New York</td>
<td>9.1</td>
</tr>
<tr>
<td>Delaware</td>
<td>8.8</td>
<td>North Carolina</td>
<td>11.3</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>11.3</td>
<td>North Dakota</td>
<td>7.7</td>
</tr>
<tr>
<td>Florida</td>
<td>10.5</td>
<td>Ohio</td>
<td>12.3</td>
</tr>
<tr>
<td>Georgia</td>
<td>10.7</td>
<td>Oklahoma</td>
<td>15.3</td>
</tr>
<tr>
<td>Hawaii</td>
<td>7.4</td>
<td>Oregon</td>
<td>11.6</td>
</tr>
<tr>
<td>Idaho</td>
<td>13.0</td>
<td>Pennsylvania</td>
<td>11.8</td>
</tr>
<tr>
<td>Illinois</td>
<td>9.0</td>
<td>Puerto Rico</td>
<td>17.9</td>
</tr>
<tr>
<td>Indiana</td>
<td>12.1</td>
<td>Rhode Island</td>
<td>11.8</td>
</tr>
<tr>
<td>Iowa</td>
<td>9.0</td>
<td>South Carolina</td>
<td>13.0</td>
</tr>
<tr>
<td>Kansas</td>
<td>11.5</td>
<td>South Dakota</td>
<td>9.0</td>
</tr>
<tr>
<td>Kentucky</td>
<td>16.7</td>
<td>Tennessee</td>
<td>13.7</td>
</tr>
<tr>
<td>Louisiana</td>
<td>13.3</td>
<td>Texas</td>
<td>9.7</td>
</tr>
<tr>
<td>Maine</td>
<td>14.1</td>
<td>Utah</td>
<td>8.7</td>
</tr>
<tr>
<td>Maryland</td>
<td>9.0</td>
<td>Vermont</td>
<td>12.0</td>
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<td>Massachusetts</td>
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<td>Virginia</td>
<td>9.7</td>
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<td>12.3</td>
<td>Washington</td>
<td>10.6</td>
</tr>
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<td>Minnesota</td>
<td>9.2</td>
<td>West Virginia</td>
<td>19.0</td>
</tr>
<tr>
<td>Mississippi</td>
<td>15.7</td>
<td>Wisconsin</td>
<td>9.6</td>
</tr>
<tr>
<td>Missouri</td>
<td>13.1</td>
<td>Wyoming</td>
<td>12.3</td>
</tr>
</tbody>
</table>
Employment: Ages 21 - 64

This summary lists employment rates by state of non-institutionalized working-age (ages 21 to 64) people with disabilities using data from the 2017 American Community Survey (ACS). The employment rate in the US for this population was 37.3% for people with disabilities and 79.4% for people without disabilities.

<table>
<thead>
<tr>
<th>Location</th>
<th>People with Disabilities 2017</th>
<th>People without Disabilities 2017</th>
<th>Location</th>
<th>People with Disabilities 2017</th>
<th>People without Disabilities 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
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<td>74.9</td>
<td>Montana</td>
<td>43.8</td>
<td>81.8</td>
</tr>
<tr>
<td>Alaska</td>
<td>40.3</td>
<td>79.5</td>
<td>Nebraska</td>
<td>51.8</td>
<td>86.4</td>
</tr>
<tr>
<td>Arizona</td>
<td>36.9</td>
<td>77.2</td>
<td>Nevada</td>
<td>41.1</td>
<td>78.6</td>
</tr>
<tr>
<td>Arkansas</td>
<td>31.8</td>
<td>78.3</td>
<td>New Hampshire</td>
<td>45.0</td>
<td>85.1</td>
</tr>
<tr>
<td>California</td>
<td>36.8</td>
<td>77.3</td>
<td>New Jersey</td>
<td>39.2</td>
<td>80.9</td>
</tr>
<tr>
<td>Colorado</td>
<td>45.7</td>
<td>82.4</td>
<td>New Mexico</td>
<td>33.1</td>
<td>73.6</td>
</tr>
<tr>
<td>Connecticut</td>
<td>40.4</td>
<td>80.4</td>
<td>New York</td>
<td>34.9</td>
<td>78.8</td>
</tr>
<tr>
<td>Delaware</td>
<td>37.0</td>
<td>76.5</td>
<td>North Carolina</td>
<td>34.6</td>
<td>79.2</td>
</tr>
<tr>
<td>District of Columbia</td>
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<td>81.9</td>
<td>North Dakota</td>
<td>56.1</td>
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<td>Florida</td>
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<td>77.6</td>
<td>Ohio</td>
<td>37.0</td>
<td>80.7</td>
</tr>
<tr>
<td>Georgia</td>
<td>34.9</td>
<td>78.4</td>
<td>Oklahoma</td>
<td>36.6</td>
<td>78.3</td>
</tr>
<tr>
<td>Hawaii</td>
<td>41.3</td>
<td>81.4</td>
<td>Oregon</td>
<td>37.0</td>
<td>79.8</td>
</tr>
<tr>
<td>Idaho</td>
<td>43.5</td>
<td>78.7</td>
<td>Pennsylvania</td>
<td>37.1</td>
<td>80.4</td>
</tr>
<tr>
<td>Illinois</td>
<td>38.8</td>
<td>79.7</td>
<td>Puerto Rico</td>
<td>23.7</td>
<td>57.1</td>
</tr>
<tr>
<td>Indiana</td>
<td>38.3</td>
<td>80.6</td>
<td>Rhode Island</td>
<td>42.1</td>
<td>81.8</td>
</tr>
<tr>
<td>Iowa</td>
<td>46.0</td>
<td>85.0</td>
<td>South Carolina</td>
<td>33.0</td>
<td>78.5</td>
</tr>
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<td>Kansas</td>
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<td>South Dakota</td>
<td>53.2</td>
<td>85.1</td>
</tr>
<tr>
<td>Kentucky</td>
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<td>78.0</td>
<td>Tennessee</td>
<td>34.5</td>
<td>79.4</td>
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</tr>
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<td>Utah</td>
<td>49.4</td>
<td>81.1</td>
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<td>82.4</td>
<td>Vermont</td>
<td>45.9</td>
<td>81.5</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>37.6</td>
<td>82.7</td>
<td>Virginia</td>
<td>41.3</td>
<td>81.8</td>
</tr>
<tr>
<td>Michigan</td>
<td>33.5</td>
<td>78.5</td>
<td>Washington</td>
<td>41.7</td>
<td>80.2</td>
</tr>
<tr>
<td>Minnesota</td>
<td>49.0</td>
<td>85.7</td>
<td>West Virginia</td>
<td>25.0</td>
<td>73.1</td>
</tr>
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<td>Mississippi</td>
<td>28.8</td>
<td>75.3</td>
<td>Wisconsin</td>
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<td>84.3</td>
</tr>
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<td>Missouri</td>
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<td>81.7</td>
<td>Wyoming</td>
<td>51.3</td>
<td>82.3</td>
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</tbody>
</table>
Prevalence

All Ages

Introduction

This section addresses the prevalence of disability among non-institutionalized people of all ages in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of people with a disability of all ages in the US was 12.7 percent.
- In other words, in 2017, 40,714,800 of the 321,823,700 individuals of all ages in the US reported one or more disabilities.
- In the US in 2017, among the six types of disabilities identified in the ACS, the highest prevalence rate was for "Ambulatory Disability," 6.9 percent. The lowest prevalence rate was for "Visual Disability," 2.3 percent.
Prevalence of disability among non-institutionalized people of all ages in the United States in 2017*

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>12.7</td>
<td>0.05</td>
<td>40,714,800</td>
<td>156,310</td>
<td>321,823,700</td>
<td>3,118,647</td>
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<tr>
<td>Visual</td>
<td>2.3</td>
<td>0.02</td>
<td>7,543,000</td>
<td>71,090</td>
<td>321,823,700</td>
<td>3,118,647</td>
</tr>
<tr>
<td>Hearing</td>
<td>3.6</td>
<td>0.03</td>
<td>11,524,400</td>
<td>87,320</td>
<td>321,823,700</td>
<td>3,118,647</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>6.9</td>
<td>0.04</td>
<td>20,898,200</td>
<td>115,810</td>
<td>302,104,600</td>
<td>2,955,036</td>
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<tr>
<td>Cognitive</td>
<td>5.1</td>
<td>0.03</td>
<td>15,391,000</td>
<td>100,280</td>
<td>302,104,600</td>
<td>2,955,036</td>
</tr>
<tr>
<td>Self-Care</td>
<td>2.6</td>
<td>0.02</td>
<td>7,935,500</td>
<td>72,870</td>
<td>302,104,600</td>
<td>2,955,036</td>
</tr>
<tr>
<td>Independent Living</td>
<td>5.6</td>
<td>0.04</td>
<td>14,592,000</td>
<td>97,770</td>
<td>260,869,300</td>
<td>2,581,685</td>
</tr>
</tbody>
</table>

* Note: Children under the age of five were only asked about Vision and Hearing disabilities. The Independent Living disability question was only asked of persons aged 16 years old and older.
Prevalence

Ages 4 years and under

Introduction

This section focuses on the prevalence of disability among non-institutionalized children ages 4 and under in the United States, using data from the 2017 American Community Survey (ACS). Only the two sensory disability questions were asked of this population. For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of children with a visual and/or hearing disability ages 0 to 4 in the US was 0.8 percent.
- In other words, in 2017, 148,300 of the 19,719,100 children ages 0 to 4 in the US reported one or more disabilities.
- In the US in 2017, 0.4 percent reported a "Visual Disability"
- In the US in 2017, 0.5 percent reported a "Hearing Disability"
### Prevalence of disability among non-institutionalized people ages 4 and under in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>0.8</td>
<td>3.29</td>
<td>148,300</td>
<td>10,080</td>
<td>19,719,100</td>
<td>163,611</td>
</tr>
<tr>
<td>Visual</td>
<td>0.4</td>
<td>3.29</td>
<td>88,700</td>
<td>7,800</td>
<td>19,719,100</td>
<td>163,611</td>
</tr>
<tr>
<td>Hearing</td>
<td>0.5</td>
<td>3.29</td>
<td>99,800</td>
<td>8,270</td>
<td>19,719,100</td>
<td>163,611</td>
</tr>
</tbody>
</table>
Prevalence

Ages 5 to 15 years

Introduction

This section focuses on the prevalence of disability among non-institutionalized children ages 5 to 15 in the United States, using data from the 2017 American Community Survey (ACS)*. For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of children with a disability ages 5 to 15 in the US was 5.4 percent.
- In other words, in 2017, 2,427,700 of the 45,320,000 individuals ages 5 to 15 in the US reported one or more disabilities.
- In the US in 2017, among the five types of disabilities* identified in the ACS, the highest prevalence rate was for "Cognitive Disability," 4.2 percent. The lowest prevalence rate was for "Hearing Disability," 0.6 percent.

* Note: The "Independent Living Disability" question was not asked of children ages 15 years and younger.
Prevalence of disability* among non-institutionalized people ages 5 to 15 in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>5.4</td>
<td>0.09</td>
<td>2,427,700</td>
<td>40,650</td>
<td>45,320,000</td>
<td>411,951</td>
</tr>
<tr>
<td>Visual</td>
<td>0.9</td>
<td>3.29</td>
<td>387,300</td>
<td>16,290</td>
<td>45,320,000</td>
<td>411,951</td>
</tr>
<tr>
<td>Hearing</td>
<td>0.6</td>
<td>3.29</td>
<td>262,700</td>
<td>13,420</td>
<td>45,320,000</td>
<td>411,951</td>
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<tr>
<td>Ambulatory</td>
<td>0.6</td>
<td>3.29</td>
<td>270,300</td>
<td>13,610</td>
<td>45,320,000</td>
<td>411,951</td>
</tr>
<tr>
<td>Cognitive</td>
<td>4.2</td>
<td>0.08</td>
<td>1,901,600</td>
<td>36,010</td>
<td>45,320,000</td>
<td>411,951</td>
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<tr>
<td>Self-Care</td>
<td>1.0</td>
<td>3.29</td>
<td>462,300</td>
<td>17,790</td>
<td>45,320,000</td>
<td>411,951</td>
</tr>
</tbody>
</table>

* Note: The "Independent Living Disability" question was not asked of children ages 15 years and younger.
Prevalence

Ages 16 to 20 years

Introduction

This section focuses on the prevalence of disability among non-institutionalized people ages 16 to 20 in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of people with a disability ages 16 to 20 in the US was 6.2 percent.
- In other words, in 2017, 1,348,800 of the 21,674,500 individuals ages 16 to 20 in the US reported one or more disabilities.
- In the US in 2017, among the six types of disabilities identified in the ACS, the highest prevalence rate was for "Cognitive Disability," 4.4 percent. The lowest prevalence rate was for "Hearing Disability," 0.7 percent.
Prevalence of disability among non-institutionalized people ages 16 to 20 in the United States in 2017

### Prevalence Rates: Age 16 to 20 years (%)

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>6.2</td>
<td>0.14</td>
<td>1,348,800</td>
<td>30,350</td>
<td>21,674,500</td>
<td>207,022</td>
</tr>
<tr>
<td>Visual</td>
<td>1.1</td>
<td>3.29</td>
<td>239,700</td>
<td>12,820</td>
<td>21,674,500</td>
<td>207,022</td>
</tr>
<tr>
<td>Hearing</td>
<td>0.7</td>
<td>3.29</td>
<td>148,200</td>
<td>10,080</td>
<td>21,674,500</td>
<td>207,022</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>0.8</td>
<td>3.29</td>
<td>174,100</td>
<td>10,930</td>
<td>21,674,500</td>
<td>207,022</td>
</tr>
<tr>
<td>Cognitive</td>
<td>4.4</td>
<td>0.12</td>
<td>951,500</td>
<td>25,510</td>
<td>21,674,500</td>
<td>207,022</td>
</tr>
<tr>
<td>Self-Care</td>
<td>0.8</td>
<td>3.29</td>
<td>165,000</td>
<td>10,640</td>
<td>21,674,500</td>
<td>207,022</td>
</tr>
<tr>
<td>Independent Living</td>
<td>2.4</td>
<td>0.09</td>
<td>527,100</td>
<td>19,000</td>
<td>21,674,500</td>
<td>207,022</td>
</tr>
</tbody>
</table>
Prevalence

Ages 21 to 64 years

Introduction

This section focuses on the prevalence of disability among non-institutionalized working-age people (ages 21 to 64) in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of working age people (ages 21 to 64) with a disability in the US was 10.6 percent.
- In other words, in 2017, 19,637,200 of the 185,624,500 individuals ages 21 to 64 in the US reported one or more disabilities.
- In the US in 2017, among the six types of disabilities identified in the ACS, the highest prevalence rate was for "Ambulatory Disability," 5.2 percent. The lowest prevalence rate was "Self-Care Disability," 1.9 percent.
Prevalence of disability among non-institutionalized people ages 21 to 64 in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>10.6</td>
<td>0.06</td>
<td>19,637,200</td>
<td>112,500</td>
<td>185,624,500</td>
<td>1,752,088</td>
</tr>
<tr>
<td>Visual</td>
<td>2.0</td>
<td>0.03</td>
<td>3,714,400</td>
<td>50,180</td>
<td>185,624,500</td>
<td>1,752,088</td>
</tr>
<tr>
<td>Hearing</td>
<td>2.1</td>
<td>0.03</td>
<td>3,847,000</td>
<td>51,060</td>
<td>185,624,500</td>
<td>1,752,088</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>5.2</td>
<td>0.04</td>
<td>9,604,200</td>
<td>79,950</td>
<td>185,624,500</td>
<td>1,752,088</td>
</tr>
<tr>
<td>Cognitive</td>
<td>4.4</td>
<td>0.04</td>
<td>8,253,300</td>
<td>74,280</td>
<td>185,624,500</td>
<td>1,752,088</td>
</tr>
<tr>
<td>Self-Care</td>
<td>1.9</td>
<td>3.29</td>
<td>3,442,300</td>
<td>48,330</td>
<td>185,624,500</td>
<td>1,752,088</td>
</tr>
<tr>
<td>Independent Living</td>
<td>3.8</td>
<td>0.04</td>
<td>6,961,300</td>
<td>68,350</td>
<td>185,624,500</td>
<td>1,752,088</td>
</tr>
</tbody>
</table>
Prevalence
Ages 65 to 74 years

Introduction

This section explores the prevalence of disability among non-institutionalized people ages 65 to 74 in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of people with a disability ages 65 to 74 in the US was 25.1 percent.
- In other words, in 2017, 7,368,100 of the 29,401,800 individuals ages 65 to 74 in the US reported one or more disabilities.
- In the US in 2017, among the six types of disabilities identified in the ACS, the highest prevalence rate was for "Ambulatory Disability," 15.2 percent. The lowest prevalence rate was for "Self-Care Disability," 4.2 percent.
Prevalence of disability among non-institutionalized people ages 65 to 74 in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>25.1</td>
<td>0.21</td>
<td>7,368,100</td>
<td>70,280</td>
<td>29,401,800</td>
<td>350,782</td>
</tr>
<tr>
<td>Visual</td>
<td>4.3</td>
<td>0.10</td>
<td>1,250,200</td>
<td>29,220</td>
<td>29,401,800</td>
<td>350,782</td>
</tr>
<tr>
<td>Hearing</td>
<td>9.1</td>
<td>0.14</td>
<td>2,686,700</td>
<td>42,750</td>
<td>29,401,800</td>
<td>350,782</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>15.2</td>
<td>0.17</td>
<td>4,461,200</td>
<td>54,930</td>
<td>29,401,800</td>
<td>350,782</td>
</tr>
<tr>
<td>Cognitive</td>
<td>5.4</td>
<td>0.11</td>
<td>1,579,300</td>
<td>32,830</td>
<td>29,401,800</td>
<td>350,782</td>
</tr>
<tr>
<td>Self-Care</td>
<td>4.2</td>
<td>0.10</td>
<td>1,230,300</td>
<td>28,990</td>
<td>29,401,800</td>
<td>350,782</td>
</tr>
<tr>
<td>Independent Living</td>
<td>7.5</td>
<td>0.13</td>
<td>2,210,900</td>
<td>38,810</td>
<td>29,401,800</td>
<td>350,782</td>
</tr>
</tbody>
</table>
Introduction

This section focuses on the prevalence of disability among non-institutionalized people ages 75 and older in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the overall percentage (prevalence rate) of people with a disability ages 75 and older in the US was 48.7 percent.
- In other words, in 2017, 9,784,600 of the 20,083,700 individuals ages 75 and older in the US reported one or more disabilities.
- In the US in 2017, among the six types of disabilities identified in the ACS, the highest prevalence rate was for "Ambulatory Disability," 31.8 percent. The lowest prevalence rate was for "Visual Disability," 9.3 percent.
### Prevalence of disability among non-institutionalized people ages 75 and older in the United States in 2017

#### Prevalence Rates: Age 75 and older (%)

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>48.7</td>
<td>0.29</td>
<td>9,784,600</td>
<td>80,680</td>
<td>20,083,700</td>
<td>233,193</td>
</tr>
<tr>
<td>Visual</td>
<td>9.3</td>
<td>0.17</td>
<td>1,862,700</td>
<td>35,640</td>
<td>20,083,700</td>
<td>233,193</td>
</tr>
<tr>
<td>Hearing</td>
<td>22.3</td>
<td>0.24</td>
<td>4,480,100</td>
<td>55,050</td>
<td>20,083,700</td>
<td>233,193</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>31.8</td>
<td>0.27</td>
<td>6,388,500</td>
<td>65,540</td>
<td>20,083,700</td>
<td>233,193</td>
</tr>
<tr>
<td>Cognitive</td>
<td>13.5</td>
<td>0.20</td>
<td>2,705,400</td>
<td>42,900</td>
<td>20,083,700</td>
<td>233,193</td>
</tr>
<tr>
<td>Self-Care</td>
<td>13.1</td>
<td>0.20</td>
<td>2,635,500</td>
<td>42,340</td>
<td>20,083,700</td>
<td>233,193</td>
</tr>
<tr>
<td>Independent Living</td>
<td>23.9</td>
<td>0.25</td>
<td>4,798,300</td>
<td>56,940</td>
<td>20,083,700</td>
<td>233,193</td>
</tr>
</tbody>
</table>
Prevalence

Gender and Age

Introduction

This section examines the prevalence of disability among people by gender and age group in the United States, using data from the 2017 American Community Survey (ACS)*. For definitions of terms, see Glossary.

Quick Statistics

- In the US in 2017, the overall percentage (prevalence rate) of males with a disability of all ages was 12.5 percent.
- In other words, in 2017, 19,782,700 of the 157,688,600 males of all ages in the US reported one or more disabilities.
- In the US in 2017, the overall percentage (prevalence rate) of females with a disability of all ages was 12.8 percent.
- In other words, in 2017, 20,932,100 of the 164,135,100 females of all ages in the US reported one or more disabilities.

* Note: Children ages 0-4 were only asked about visual and hearing disabilities, children ages 5-15 were not asked the "Independent Living Disability" question.
Prevalence of disability among non-institutionalized people by gender and age group in the United States in 2017

Prevalence Rates: Gender and Age (%)

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Males</th>
<th>Females</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ages 4 and under</td>
<td>0.8</td>
<td>0.7</td>
</tr>
<tr>
<td>Ages 5-15</td>
<td>6.7</td>
<td>4</td>
</tr>
<tr>
<td>Ages 16-20</td>
<td>6.8</td>
<td>5.7</td>
</tr>
<tr>
<td>Ages 21-64</td>
<td>10.7</td>
<td>10.4</td>
</tr>
<tr>
<td>Ages 65-74</td>
<td>26.7</td>
<td>23.6</td>
</tr>
<tr>
<td>Ages 75+</td>
<td>47.3</td>
<td>49.7</td>
</tr>
</tbody>
</table>

All Ages            | 12.5  | 12.8    |
<table>
<thead>
<tr>
<th>Gender &amp; Age</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Males</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Males: All Ages</td>
<td>12.5</td>
<td>0.07</td>
<td>19,782,700</td>
<td>112,890</td>
<td>157,688,600</td>
<td>1,514,265</td>
</tr>
<tr>
<td>Males: Ages 4 and under</td>
<td>0.8</td>
<td>3.29</td>
<td>78,500</td>
<td>7,340</td>
<td>10,105,300</td>
<td>83,684</td>
</tr>
<tr>
<td>Males: Ages 5-15</td>
<td>6.7</td>
<td>0.14</td>
<td>1,548,300</td>
<td>32,510</td>
<td>23,157,500</td>
<td>210,051</td>
</tr>
<tr>
<td>Males: Ages 16-20</td>
<td>6.8</td>
<td>0.20</td>
<td>748,500</td>
<td>22,630</td>
<td>11,071,000</td>
<td>104,937</td>
</tr>
<tr>
<td>Males: Ages 21-64</td>
<td>10.7</td>
<td>0.08</td>
<td>9,806,600</td>
<td>80,770</td>
<td>91,306,600</td>
<td>851,079</td>
</tr>
<tr>
<td>Males: Ages 65-74</td>
<td>26.7</td>
<td>0.31</td>
<td>3,660,700</td>
<td>49,820</td>
<td>13,715,600</td>
<td>165,227</td>
</tr>
<tr>
<td>Males: Ages 75+</td>
<td>47.3</td>
<td>0.45</td>
<td>3,940,100</td>
<td>51,670</td>
<td>8,332,600</td>
<td>99,287</td>
</tr>
<tr>
<td><strong>Females</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Females: All Ages</td>
<td>12.8</td>
<td>0.07</td>
<td>20,932,100</td>
<td>115,900</td>
<td>164,135,100</td>
<td>1,604,382</td>
</tr>
<tr>
<td>Females: Ages 4 and under</td>
<td>0.7</td>
<td>3.29</td>
<td>69,800</td>
<td>6,920</td>
<td>9,613,800</td>
<td>79,927</td>
</tr>
<tr>
<td>Females: Ages 5-15</td>
<td>4.0</td>
<td>0.11</td>
<td>879,400</td>
<td>24,520</td>
<td>22,162,500</td>
<td>201,900</td>
</tr>
<tr>
<td>Females: Ages 16-20</td>
<td>5.7</td>
<td>0.19</td>
<td>600,300</td>
<td>20,270</td>
<td>10,603,500</td>
<td>102,085</td>
</tr>
<tr>
<td>Females: Ages 21-64</td>
<td>10.4</td>
<td>0.08</td>
<td>9,830,700</td>
<td>80,860</td>
<td>94,317,900</td>
<td>901,009</td>
</tr>
<tr>
<td>Females: Ages 65-74</td>
<td>23.6</td>
<td>0.28</td>
<td>3,707,400</td>
<td>50,140</td>
<td>15,686,200</td>
<td>185,555</td>
</tr>
<tr>
<td>Females: Ages 75+</td>
<td>49.7</td>
<td>0.38</td>
<td>5,844,500</td>
<td>62,740</td>
<td>11,751,100</td>
<td>133,906</td>
</tr>
</tbody>
</table>

*Note:* Children ages 0-4 were only asked about visual and hearing disabilities, children ages 5-15 were not asked the "Independent Living Disability" question.
Prevalence

Hispanic/Latino Origin and Age

Introduction

This section examines the prevalence of disability among people by Hispanic/Latino origin and age group in the United States, using data from the 2017 American Community Survey (ACS)*. For definitions of terms, see Glossary.

Quick Statistics

- In the US in 2017, the overall percentage (prevalence rate) of disability among people of Hispanic/Latino origin of all ages was 8.9 percent.
- In other words, in 2017, 5,200,900 of the 58,263,600 people of Hispanic/Latino origin of all ages in the US reported one or more disabilities.
- In the US in 2017, the overall percentage (prevalence rate) of disability among people of non-Hispanic/Latino origin of all ages was 13.5 percent.
- In other words, in 2017, 35,513,800 of the 263,560,100 people of non-Hispanic/Latino origin of all ages in the US reported one or more disabilities.

* Note: Children ages 0-4 were only asked about visual and hearing disabilities, children age 5-15 were not asked the "Independent Living Disability" question.
Prevalence of disability among non-institutionalized people by Hispanic / Latino origin and age group in the United States in 2017

Prevalence Rates: Hispanic/Latino Origin and Age (%)

- All: Hispanic 8.9%, Non-Hispanic 13.5%
- 4 and under: Hispanic 0.9%, Non-Hispanic 0.7%
- 5-15: Hispanic 5.1%, Non-Hispanic 5.4%
- 16-20: Hispanic 5.5%, Non-Hispanic 6.4%
- 21-64: Hispanic 8.4%, Non-Hispanic 11%
- 65-74: Hispanic 28.5%, Non-Hispanic 24.7%
- 75+: Hispanic 53.2%, Non-Hispanic 48.3%

Source: 2017 Disability Status Report - United States | © 2019 Cornell University
<table>
<thead>
<tr>
<th>Hispanic/Latino Origin &amp; Age</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hispanic - All Ages</td>
<td>8.9</td>
<td>0.10</td>
<td>5,200,900</td>
<td>59,240</td>
<td>58,263,600</td>
<td>453,459</td>
</tr>
<tr>
<td>Hispanic - Ages 4 and under</td>
<td>0.9</td>
<td>3.29</td>
<td>45,000</td>
<td>5,550</td>
<td>5,085,900</td>
<td>33,873</td>
</tr>
<tr>
<td>Hispanic - Ages 5-15</td>
<td>5.1</td>
<td>0.17</td>
<td>587,200</td>
<td>20,050</td>
<td>11,458,100</td>
<td>87,176</td>
</tr>
<tr>
<td>Hispanic - Ages 16-20</td>
<td>5.5</td>
<td>0.27</td>
<td>272,400</td>
<td>13,660</td>
<td>4,958,500</td>
<td>40,504</td>
</tr>
<tr>
<td>Hispanic - Ages 21-64</td>
<td>8.4</td>
<td>0.13</td>
<td>2,735,900</td>
<td>43,130</td>
<td>32,656,300</td>
<td>252,335</td>
</tr>
<tr>
<td>Hispanic - Ages 65-74</td>
<td>28.5</td>
<td>0.74</td>
<td>717,500</td>
<td>22,160</td>
<td>2,520,300</td>
<td>24,269</td>
</tr>
<tr>
<td>Hispanic - Ages 75+</td>
<td>53.2</td>
<td>1.04</td>
<td>842,900</td>
<td>24,010</td>
<td>1,584,500</td>
<td>15,302</td>
</tr>
<tr>
<td>Non-Hispanic - All Ages</td>
<td>13.5</td>
<td>0.06</td>
<td>35,513,800</td>
<td>147,310</td>
<td>263,560,100</td>
<td>2,665,188</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 4 and under</td>
<td>0.7</td>
<td>3.29</td>
<td>103,300</td>
<td>8,420</td>
<td>14,633,300</td>
<td>129,738</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 5-15</td>
<td>5.4</td>
<td>0.10</td>
<td>1,840,500</td>
<td>35,430</td>
<td>33,861,900</td>
<td>324,775</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 16-20</td>
<td>6.4</td>
<td>0.16</td>
<td>1,076,400</td>
<td>27,120</td>
<td>16,716,000</td>
<td>166,518</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 21-64</td>
<td>11.0</td>
<td>0.07</td>
<td>16,901,300</td>
<td>104,830</td>
<td>152,968,300</td>
<td>1,499,753</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 65-74</td>
<td>24.7</td>
<td>0.22</td>
<td>6,650,600</td>
<td>66,840</td>
<td>26,881,500</td>
<td>326,513</td>
</tr>
<tr>
<td>Non-Hispanic - Ages 75+</td>
<td>48.3</td>
<td>0.30</td>
<td>8,941,700</td>
<td>77,230</td>
<td>18,499,200</td>
<td>217,891</td>
</tr>
</tbody>
</table>

*Note: Children ages 0-4 were only asked about visual and hearing disabilities, children ages 5-15 were *not* asked the "Independent Living Disability" question.*
**Prevalence**

**Race**

**Introduction**

This section presents the disability prevalence rate among non-institutionalized working-age people (ages 21 to 64) by race category in the US, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

**Quick Statistics**

In 2017, among working-age people in the US:

- 10.6 percent of persons who were White reported a disability.
- 13.6 percent of persons who were Black/African American reported a disability.
- 18.1 percent of persons who were Native American reported a disability.
- 4.4 percent of persons who were Asian reported a disability.
- 9.5 percent of persons who were some other race(s) reported a disability.
Prevalence of disability among non-institutionalized working-age people (ages 21 to 64) by race in the United States in 2017

<table>
<thead>
<tr>
<th>Race</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>10.6</td>
<td>0.07</td>
<td>14,234,200</td>
<td>96,620</td>
<td>134,218,100</td>
<td>1,339,033</td>
</tr>
<tr>
<td>Black/African American</td>
<td>13.6</td>
<td>0.18</td>
<td>3,218,200</td>
<td>46,750</td>
<td>23,608,100</td>
<td>170,465</td>
</tr>
<tr>
<td>Native American or Alaska Native</td>
<td>18.1</td>
<td>0.82</td>
<td>274,400</td>
<td>13,710</td>
<td>1,517,400</td>
<td>19,358</td>
</tr>
<tr>
<td>Asian</td>
<td>4.4</td>
<td>0.16</td>
<td>515,400</td>
<td>18,790</td>
<td>11,655,400</td>
<td>107,868</td>
</tr>
<tr>
<td>Some other race(s)</td>
<td>9.5</td>
<td>0.20</td>
<td>1,395,100</td>
<td>30,870</td>
<td>14,625,600</td>
<td>115,364</td>
</tr>
</tbody>
</table>
Employment

Introduction

This section examines the employment rates of non-institutionalized working-age people (ages 21 to 64) with disabilities in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the employment rate of working-age people with disabilities in the US was 37.3 percent.
- In 2017, the employment rate of working-age people without disabilities in the US was 79.4 percent.
- The gap between the employment rates of working-age people with and without disabilities was 42.1 percentage points.
- Among the six types of disabilities identified in the ACS, the highest employment rate was for people with a "Hearing Disability," 53.4 percent. The lowest employment rate was for people with a "Self-Care Disability," 16.3 percent.
# Employment of non-institutionalized working-age people (ages 21 to 64) by disability status in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>79.4</td>
<td>0.08</td>
<td>131,789,000</td>
<td>231,020</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Any Disability</td>
<td>37.3</td>
<td>0.29</td>
<td>7,318,000</td>
<td>70,030</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Visual</td>
<td>44.2</td>
<td>0.67</td>
<td>1,643,100</td>
<td>33,480</td>
<td>3,714,400</td>
<td>35,356</td>
</tr>
<tr>
<td>Hearing</td>
<td>53.4</td>
<td>0.67</td>
<td>2,055,300</td>
<td>37,420</td>
<td>3,847,000</td>
<td>38,791</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>25.4</td>
<td>0.37</td>
<td>2,442,800</td>
<td>40,770</td>
<td>9,604,200</td>
<td>95,270</td>
</tr>
<tr>
<td>Cognitive</td>
<td>27.9</td>
<td>0.41</td>
<td>2,298,900</td>
<td>39,560</td>
<td>8,253,300</td>
<td>81,575</td>
</tr>
<tr>
<td>Self-Care</td>
<td>16.3</td>
<td>0.52</td>
<td>561,400</td>
<td>19,610</td>
<td>3,442,300</td>
<td>34,887</td>
</tr>
<tr>
<td>Independent Living</td>
<td>17.8</td>
<td>0.38</td>
<td>1,237,500</td>
<td>29,080</td>
<td>6,961,300</td>
<td>70,302</td>
</tr>
</tbody>
</table>
Not Working but Actively Looking for Work

Introduction

This section focuses on the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities in the United States who are not working but actively looking for work, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017 in the US, the percentage of working-age people with disabilities who were not working but actively looking for work was 7.4 percent.
- In 2017 in the US, the percentage of working-age people without disabilities who were not working but actively looking for work was 17.4 percent.
- The difference in the percentage of not working but actively looking for work between working-age people with and without disabilities was 10 percentage points.
- Among the six types of disabilities identified in the ACS, the highest percentage of not working but actively looking for work was for people with a "Visual Disability," 8.7 percent. The lowest percentage was for people with a "Self-Care Disability," 3.0 percent.
Percentage who are not working but actively looking for work among non-institutionalized working-age people (ages 21 to 64) in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>17.4</td>
<td>0.17</td>
<td>5,944,600</td>
<td>63,270</td>
<td>34,198,300</td>
<td>321,869</td>
</tr>
<tr>
<td>Any Disability</td>
<td>7.4</td>
<td>0.20</td>
<td>913,500</td>
<td>24,990</td>
<td>12,319,300</td>
<td>122,966</td>
</tr>
<tr>
<td>Visual</td>
<td>8.7</td>
<td>0.51</td>
<td>180,400</td>
<td>11,120</td>
<td>2,071,200</td>
<td>19,362</td>
</tr>
<tr>
<td>Hearing</td>
<td>8.5</td>
<td>0.55</td>
<td>152,700</td>
<td>10,230</td>
<td>1,791,600</td>
<td>17,829</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>4.6</td>
<td>0.21</td>
<td>326,500</td>
<td>14,960</td>
<td>7,161,400</td>
<td>71,265</td>
</tr>
<tr>
<td>Cognitive</td>
<td>8.0</td>
<td>0.29</td>
<td>478,600</td>
<td>18,100</td>
<td>5,954,400</td>
<td>59,517</td>
</tr>
<tr>
<td>Self-Care</td>
<td>3.0</td>
<td>0.26</td>
<td>87,400</td>
<td>7,740</td>
<td>2,880,900</td>
<td>29,377</td>
</tr>
<tr>
<td>Independent Living</td>
<td>4.4</td>
<td>0.22</td>
<td>249,200</td>
<td>13,070</td>
<td>5,723,800</td>
<td>57,870</td>
</tr>
</tbody>
</table>
Full-Time / Full-Year Employment

Introduction

This section presents the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities working full-time/full-year in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the percentage of working-age people with disabilities working full-time/full-year in the US was 23.9 percent.
- In 2017, the percentage of working-age people without disabilities working full-time/full-year in the US was 60.3 percent.
- The difference in the percentage working full-time/full-year between working-age people with and without disabilities was 36.4 percentage points.
- Among the six types of disabilities identified in the ACS, the highest full-time/full-year employment rate was for people with "Hearing Disability," 39.0 percent. The lowest full-time/full-year employment rate was for people with "Independent Living Disability," 8.4 percent.
Full-Time/Full-Year employment of non-institutionalized working-age people (ages 21 to 64) by disability status in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>60.3</td>
<td>0.10</td>
<td>100,076,900</td>
<td>218,050</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Any Disability</td>
<td>23.9</td>
<td>0.25</td>
<td>4,687,900</td>
<td>56,290</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Visual</td>
<td>30.5</td>
<td>0.63</td>
<td>1,133,700</td>
<td>27,840</td>
<td>3,714,400</td>
<td>35,356</td>
</tr>
<tr>
<td>Hearing</td>
<td>39.0</td>
<td>0.65</td>
<td>1,499,400</td>
<td>31,990</td>
<td>3,847,000</td>
<td>38,791</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>16.0</td>
<td>0.31</td>
<td>1,534,500</td>
<td>32,360</td>
<td>9,604,200</td>
<td>95,270</td>
</tr>
<tr>
<td>Cognitive</td>
<td>14.2</td>
<td>0.32</td>
<td>1,175,000</td>
<td>28,340</td>
<td>8,253,300</td>
<td>81,575</td>
</tr>
<tr>
<td>Self-Care</td>
<td>9.4</td>
<td>0.41</td>
<td>321,900</td>
<td>14,850</td>
<td>3,442,300</td>
<td>34,887</td>
</tr>
<tr>
<td>Independent Living</td>
<td>8.4</td>
<td>0.28</td>
<td>583,100</td>
<td>19,980</td>
<td>6,961,300</td>
<td>70,302</td>
</tr>
</tbody>
</table>
Annual Earnings (Full-Time / Full-Year Workers)

Introduction

This section examines the median annual earnings of non-institutionalized working-age people (ages 21 to 64) with disabilities who work full-time/full-year in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the median earnings of working-age people with disabilities who worked full-time/full-year in the US was $40,400.
- In 2017, the median earnings of working-age people without disabilities who worked full-time/full-year in the US was $47,500.
- The difference in the median earnings between working-age people with and without disabilities who worked full-time/full-year was $7,100.
- Among the six types of disabilities identified in the ACS, the highest annual earnings was for people with "Hearing Disability," $48,500. The lowest annual earnings was for people with "Cognitive Disability," $35,400.
Median annual earnings of non-institutionalized working-age people (ages 21 to 64) who work full-time/full-year by disability status in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>Median Earnings</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>$47,500</td>
<td>$120</td>
<td>100,077,000</td>
<td>934,843</td>
</tr>
<tr>
<td>Any Disability</td>
<td>$40,400</td>
<td>$450</td>
<td>4,688,000</td>
<td>46,815</td>
</tr>
<tr>
<td>Visual</td>
<td>$39,700</td>
<td>$870</td>
<td>1,134,000</td>
<td>11,116</td>
</tr>
<tr>
<td>Hearing</td>
<td>$48,500</td>
<td>$890</td>
<td>1,499,000</td>
<td>15,408</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>$40,400</td>
<td>$730</td>
<td>1,534,000</td>
<td>15,088</td>
</tr>
<tr>
<td>Cognitive</td>
<td>$35,400</td>
<td>$780</td>
<td>1,175,000</td>
<td>11,178</td>
</tr>
<tr>
<td>Self-Care</td>
<td>$40,400</td>
<td>$1,630</td>
<td>322,000</td>
<td>2,998</td>
</tr>
<tr>
<td>Independent Living</td>
<td>$35,500</td>
<td>$1,080</td>
<td>583,000</td>
<td>5,660</td>
</tr>
</tbody>
</table>
Annual Household Income

Introduction

This section illustrates the median annual income* of households that include any working-age people (ages 21 to 64) with disabilities in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the median income of households that include any working-age people with disabilities in the US was $45,500.
- In 2017, the median income of households that do not include any working-age people with disabilities in the US was $71,000.
- The difference in the median income between households including and not including working-age people with disabilities was $25,500.
- Among the six types of disabilities identified in the ACS, the highest median income was for households including persons with a "Hearing Disability," $56,800. The lowest median income was for households containing persons with a "Self-Care Disability" $38,400.

* Note: Household income is not available for persons living in group quarters.
Median annual income* of households including any working-age people (ages 21 to 64) by disability status in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>Median H.H. Income</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>$71,000</td>
<td>$270</td>
<td>80,724,000</td>
<td>796,528</td>
</tr>
<tr>
<td>Any Disability</td>
<td>$45,500</td>
<td>490</td>
<td>15,439,000</td>
<td>161,580</td>
</tr>
<tr>
<td>Visual</td>
<td>$43,500</td>
<td>1,060</td>
<td>3,123,000</td>
<td>31,443</td>
</tr>
<tr>
<td>Hearing</td>
<td>$56,800</td>
<td>1,190</td>
<td>3,440,000</td>
<td>36,260</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>$39,100</td>
<td>600</td>
<td>8,104,000</td>
<td>84,140</td>
</tr>
<tr>
<td>Cognitive</td>
<td>$38,800</td>
<td>690</td>
<td>6,414,000</td>
<td>66,448</td>
</tr>
<tr>
<td>Self-Care</td>
<td>$38,400</td>
<td>990</td>
<td>2,832,000</td>
<td>29,481</td>
</tr>
<tr>
<td>Independent Living</td>
<td>$39,300</td>
<td>730</td>
<td>5,539,000</td>
<td>58,758</td>
</tr>
</tbody>
</table>

* Note: Household income is not available for persons living in group quarters.
Poverty

Introduction

This section examines the poverty rates* of non-institutionalized working-age people (ages 21 to 64) with disabilities in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the poverty rate of working-age people with disabilities in the US was 26.1 percent.
- In 2017, the poverty rate of working-age people without disabilities in the US was 10.4 percent.
- The difference in the poverty rate between working-age people with and without disabilities was 15.7 percentage points.
- Among the six types of disabilities identified in the ACS, the highest poverty rate was for people with "Cognitive Disability," 31.5 percent. The lowest poverty rate was for people with "Hearing Disability," 19.8 percent.

* Note: The Census Bureau does not calculate poverty status for those people living in military group quarters or college dormitories.
**Poverty rates* of non-institutionalized working-age people (ages 21 to 64) by disability status in the United States in 2017**

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>10.4</td>
<td>0.07</td>
<td>17,128,500</td>
<td>125,280</td>
<td>165,249,600</td>
<td>1,544,390</td>
</tr>
<tr>
<td>Any Disability</td>
<td>26.1</td>
<td>0.31</td>
<td>5,111,300</td>
<td>69,750</td>
<td>19,607,800</td>
<td>195,113</td>
</tr>
<tr>
<td>Visual</td>
<td>27.0</td>
<td>0.72</td>
<td>1,000,300</td>
<td>31,060</td>
<td>3,709,700</td>
<td>35,275</td>
</tr>
<tr>
<td>Hearing</td>
<td>19.8</td>
<td>0.63</td>
<td>762,300</td>
<td>27,120</td>
<td>3,843,300</td>
<td>38,727</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>29.1</td>
<td>0.46</td>
<td>2,795,200</td>
<td>51,770</td>
<td>9,600,500</td>
<td>95,200</td>
</tr>
<tr>
<td>Cognitive</td>
<td>31.5</td>
<td>0.50</td>
<td>2,592,900</td>
<td>49,880</td>
<td>8,233,700</td>
<td>81,220</td>
</tr>
<tr>
<td>Self-Care</td>
<td>31.1</td>
<td>0.78</td>
<td>1,070,000</td>
<td>32,120</td>
<td>3,441,300</td>
<td>34,869</td>
</tr>
<tr>
<td>Independent Living</td>
<td>31.0</td>
<td>0.55</td>
<td>2,159,700</td>
<td>45,550</td>
<td>6,957,700</td>
<td>70,234</td>
</tr>
</tbody>
</table>

*Note:* The Census Bureau does not calculate poverty status for those people living in military group quarters or college dormitories.
Supplemental Security Income (SSI)

Introduction

This section focuses on the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities who receive Supplemental Security Income (SSI) payments in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary. Please note that these results will differ from official Social Security Administration reports for several reasons. For additional information, please email DisabilityStatistics@cornell.edu.

Quick Statistics

- In 2017, the percentage of working-age people with disabilities receiving Supplemental Security Income payments in the US was 18.9 percent.
- In 2017, the number of working-age people with disabilities receiving Supplemental Security Income payments in the US was 3,718,700.
- Among the six types of disabilities identified in the ACS, the highest percentage that received SSI was people with "Self-Care Disability," 29.8 percent. The lowest percentage that received SSI was people with "Hearing Disability," 12.1 percent.
Percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities who receive Supplemental Security Income (SSI) payments in the United States in 2017

SSI Recipients (%)

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any Disability</td>
<td>18.9</td>
<td>0.23</td>
<td>3,718,700</td>
<td>50,210</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Visual</td>
<td>16.9</td>
<td>0.51</td>
<td>627,700</td>
<td>20,730</td>
<td>3,714,400</td>
<td>35,356</td>
</tr>
<tr>
<td>Hearing</td>
<td>12.1</td>
<td>0.44</td>
<td>466,100</td>
<td>17,870</td>
<td>3,847,000</td>
<td>38,791</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>22.2</td>
<td>0.35</td>
<td>2,128,500</td>
<td>38,080</td>
<td>9,604,200</td>
<td>95,270</td>
</tr>
<tr>
<td>Cognitive</td>
<td>25.8</td>
<td>0.40</td>
<td>2,129,400</td>
<td>38,090</td>
<td>8,253,300</td>
<td>81,575</td>
</tr>
<tr>
<td>Self-Care</td>
<td>29.8</td>
<td>0.65</td>
<td>1,024,800</td>
<td>26,470</td>
<td>3,442,300</td>
<td>34,887</td>
</tr>
<tr>
<td>Independent Living</td>
<td>29.6</td>
<td>0.45</td>
<td>2,059,400</td>
<td>37,460</td>
<td>6,961,300</td>
<td>70,302</td>
</tr>
</tbody>
</table>
Education

High School Diploma/Equivalent

Introduction

This section explores the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities with only a high school diploma or equivalent in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the percentage of working-age people with disabilities with only a high school diploma or equivalent in the US was 34.4 percent.
- In 2017, the percentage of working-age people without disabilities with only a high school diploma or equivalent in the US was 25.0 percent.
- The difference in the percentage with only a high school diploma or equivalent between working-age people with and without disabilities was 9.4 percentage points.
- Among the six types of disabilities identified in the ACS, the highest percentage with only a high school diploma or equivalent was for people with "Independent Living Disability," 37.3 percent. The lowest percentage with only a high school diploma or equivalent was for people with "Visual Disability," 31.9 percent.
Percentage of non-institutionalized working-age people (ages 21 to 64) with only a high school diploma or equivalent by disability status in the US in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>25.0</td>
<td>0.09</td>
<td>41,490,900</td>
<td>157,580</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Any Disability</td>
<td>34.4</td>
<td>0.28</td>
<td>6,749,600</td>
<td>67,330</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Visual</td>
<td>31.9</td>
<td>0.63</td>
<td>1,185,200</td>
<td>28,460</td>
<td>3,714,400</td>
<td>35,356</td>
</tr>
<tr>
<td>Hearing</td>
<td>32.5</td>
<td>0.63</td>
<td>1,251,900</td>
<td>29,240</td>
<td>3,847,000</td>
<td>38,791</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>34.9</td>
<td>0.40</td>
<td>3,355,700</td>
<td>47,720</td>
<td>9,604,200</td>
<td>95,270</td>
</tr>
<tr>
<td>Cognitive</td>
<td>36.0</td>
<td>0.44</td>
<td>2,970,700</td>
<td>44,930</td>
<td>8,253,300</td>
<td>81,575</td>
</tr>
<tr>
<td>Self-Care</td>
<td>35.5</td>
<td>0.68</td>
<td>1,220,700</td>
<td>28,880</td>
<td>3,442,300</td>
<td>34,887</td>
</tr>
<tr>
<td>Independent Living</td>
<td>37.3</td>
<td>0.48</td>
<td>2,593,200</td>
<td>42,000</td>
<td>6,961,300</td>
<td>70,302</td>
</tr>
</tbody>
</table>
Education

Some College/Associate's Degree

Introduction

This section examines the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities with only some college or an Associate's degree in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the percentage of working-age people with disabilities with only some college or an Associate's degree in the US was 31.7 percent.
- In 2017, the percentage of working-age people without disabilities with only some college or an Associate's degree in the US was 31.2 percent.
- The difference in the percentage with only some college or an Associate's degree between working-age people with and without disabilities was -0.5 percentage points.
- Among the six types of disabilities identified in the ACS, the highest percentage with only some college or an Associate's degree was for people with "Hearing Disability," 32.7 percent. The lowest percentage with only some college or Associate's degree was for people with "Independent Living Disability," 28.0 percent.
Percentage of non-institutionalized working-age people (ages 21 to 64) with only some college or an Associate's degree by disability status in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>31.2</td>
<td>0.09</td>
<td>51,865,100</td>
<td>172,930</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Any Disability</td>
<td>31.7</td>
<td>0.27</td>
<td>6,219,000</td>
<td>64,680</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Visual</td>
<td>30.7</td>
<td>0.63</td>
<td>1,141,600</td>
<td>27,930</td>
<td>3,714,400</td>
<td>35,356</td>
</tr>
<tr>
<td>Hearing</td>
<td>32.7</td>
<td>0.63</td>
<td>1,258,400</td>
<td>29,320</td>
<td>3,847,000</td>
<td>38,791</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>31.9</td>
<td>0.39</td>
<td>3,061,000</td>
<td>45,600</td>
<td>9,604,200</td>
<td>95,270</td>
</tr>
<tr>
<td>Cognitive</td>
<td>29.3</td>
<td>0.41</td>
<td>2,417,100</td>
<td>40,560</td>
<td>8,253,300</td>
<td>81,575</td>
</tr>
<tr>
<td>Self-Care</td>
<td>28.3</td>
<td>0.64</td>
<td>975,800</td>
<td>25,830</td>
<td>3,442,300</td>
<td>34,887</td>
</tr>
<tr>
<td>Independent Living</td>
<td>28.0</td>
<td>0.45</td>
<td>1,947,600</td>
<td>36,440</td>
<td>6,961,300</td>
<td>70,302</td>
</tr>
</tbody>
</table>
Education

Bachelor's Degree or More

Introduction

This section presents the percentage of non-institutionalized working-age people (ages 21 to 64) with disabilities with a Bachelor's degree or more in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, the percentage of working-age people with disabilities with a Bachelor's degree or more in the US was 14.8 percent.
- In 2017, the percentage of working-age people without disabilities with a Bachelor's degree or more in the US was 34.5 percent.
- The difference in the percentage with a Bachelor's degree or more between working-age people with and without disabilities was 19.7 percentage points.
- Among the six types of disabilities identified in the ACS, the highest percentage with a Bachelor's degree or more was for people with "Hearing Disability," 18.5 percent. The lowest percentage with a Bachelor's degree or more was for people with "Independent Living Disability," 10.9 percent.
Percentage of non-institutionalized working-age people (ages 21 to 64) with a Bachelor's degree or more by disability status in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>34.5</td>
<td>0.10</td>
<td>57,190,300</td>
<td>179,820</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Any Disability</td>
<td>14.8</td>
<td>0.21</td>
<td>2,915,100</td>
<td>44,510</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Visual</td>
<td>15.9</td>
<td>0.50</td>
<td>589,500</td>
<td>20,090</td>
<td>3,714,400</td>
<td>35,356</td>
</tr>
<tr>
<td>Hearing</td>
<td>18.5</td>
<td>0.52</td>
<td>713,600</td>
<td>22,100</td>
<td>3,847,000</td>
<td>38,791</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>12.5</td>
<td>0.28</td>
<td>1,197,200</td>
<td>28,600</td>
<td>9,604,200</td>
<td>95,270</td>
</tr>
<tr>
<td>Cognitive</td>
<td>11.7</td>
<td>0.29</td>
<td>964,600</td>
<td>25,680</td>
<td>8,253,300</td>
<td>81,575</td>
</tr>
<tr>
<td>Self-Care</td>
<td>11.5</td>
<td>0.45</td>
<td>397,300</td>
<td>16,500</td>
<td>3,442,300</td>
<td>34,887</td>
</tr>
<tr>
<td>Independent Living</td>
<td>10.9</td>
<td>0.31</td>
<td>758,700</td>
<td>22,780</td>
<td>6,961,300</td>
<td>70,302</td>
</tr>
</tbody>
</table>
Veterans Service-Connected Disability Rating

Introduction

This section presents the percentage of non-institutionalized working-age (ages 21 to 64) civilian veterans reporting a service-connected disability rating in the United States. The 2017 American Community Survey (ACS) asks if the veteran has a service-connected disability, and if so, what their rating is (0-100%). A "service-connected" disability is one that has been determined by the Department of Veterans Affairs (VA) as being a result of disease or injury incurred or aggravated during military service. Note that a veteran can receive disability compensation for a wide range of conditions, and a veteran with a service-connected disability may not report having one of the six ACS functional or activity limitation disabilities. For definitions of terms, see Glossary.

Quick Statistics

Veterans with a Service-Connected Disability

26.3%

- In 2017, there were 8,958,400 working-age civilian veterans in the US, of whom 2,354,700 had a VA service-connected disability.
- In 2017, the percentage of working-age civilian veterans in the US with a VA service-connected disability was 26.3 percent.
- In 2017, 764,100 working-age civilian veterans in the US had the most severe service-connected disability rating (70 percent or above).
- In 2017, 32.5 percent of the working-age civilian veterans in the US who had a service-connected disability had a service-connected disability rating of 70 percent or above.
Disability rating of working-age civilian veterans (ages 21 to 64) with a service-connected disability in the United States in 2017

### Veteran Disability Rating (%)

<table>
<thead>
<tr>
<th>Service-Connected Disability</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has a service-connected disability rating (0-100%)</td>
<td>26.3</td>
<td>0.39</td>
<td>2,354,700</td>
<td>40,040</td>
<td>8,958,400</td>
<td>89,397</td>
</tr>
</tbody>
</table>

### Disability rating of veterans with a service connected-disability

<table>
<thead>
<tr>
<th>Rating</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 percent</td>
<td>4.7</td>
<td>0.36</td>
<td>110,100</td>
<td>8,690</td>
<td>2,354,700</td>
<td>23,456</td>
</tr>
<tr>
<td>10 or 20 percent</td>
<td>25.8</td>
<td>0.75</td>
<td>608,400</td>
<td>20,410</td>
<td>2,354,700</td>
<td>23,456</td>
</tr>
<tr>
<td>30 or 40 percent</td>
<td>17.4</td>
<td>0.65</td>
<td>409,000</td>
<td>16,740</td>
<td>2,354,700</td>
<td>23,456</td>
</tr>
<tr>
<td>50 or 60 percent</td>
<td>14.3</td>
<td>0.60</td>
<td>337,700</td>
<td>15,210</td>
<td>2,354,700</td>
<td>23,456</td>
</tr>
<tr>
<td>70 percent or higher</td>
<td>32.5</td>
<td>0.80</td>
<td>764,100</td>
<td>22,860</td>
<td>2,354,700</td>
<td>23,456</td>
</tr>
<tr>
<td>Rating not reported</td>
<td>5.3</td>
<td>0.38</td>
<td>125,400</td>
<td>9,270</td>
<td>2,354,700</td>
<td>23,456</td>
</tr>
</tbody>
</table>
Health Insurance Coverage

Introduction

This section examines the health insurance coverage of non-institutionalized working-age people (ages 21 to 64) with disabilities in the United States, using data from the 2017 American Community Survey (ACS). For definitions of terms, see Glossary.

Quick Statistics

- In 2017, 90.2 percent of working-age people with disabilities in the US had some type of health insurance coverage.
- In 2017, 87.6 percent of working-age people without disabilities in the US had some type of health insurance coverage.
- The difference in the health insurance coverage rate between working-age people with and without disabilities was 2.6 percentage points.
- Among the six types of disabilities identified in the ACS, the highest health insurance coverage rate was for people with "Self-Care Disability," 93.2 percent. The lowest health insurance coverage rate was for people with "Visual Disability," 87.5 percent.
Health insurance coverage of non-institutionalized working-age people (ages 21 to 64) by disability status in the United States in 2017

<table>
<thead>
<tr>
<th>Disability Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Disability</td>
<td>87.6</td>
<td>0.07</td>
<td>145,400,200</td>
<td>234,960</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Any Disability</td>
<td>90.2</td>
<td>0.18</td>
<td>17,704,000</td>
<td>107,150</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Visual</td>
<td>87.5</td>
<td>0.45</td>
<td>3,248,400</td>
<td>46,960</td>
<td>3,714,400</td>
<td>35,356</td>
</tr>
<tr>
<td>Hearing</td>
<td>90.2</td>
<td>0.40</td>
<td>3,468,500</td>
<td>48,510</td>
<td>3,847,000</td>
<td>38,791</td>
</tr>
<tr>
<td>Ambulatory</td>
<td>91.7</td>
<td>0.23</td>
<td>8,804,700</td>
<td>76,650</td>
<td>9,604,200</td>
<td>95,270</td>
</tr>
<tr>
<td>Cognitive</td>
<td>90.4</td>
<td>0.27</td>
<td>7,461,900</td>
<td>70,710</td>
<td>8,253,300</td>
<td>81,575</td>
</tr>
<tr>
<td>Self-Care</td>
<td>93.2</td>
<td>0.36</td>
<td>3,206,800</td>
<td>46,660</td>
<td>3,442,300</td>
<td>34,887</td>
</tr>
<tr>
<td>Independent Living</td>
<td>92.6</td>
<td>0.26</td>
<td>6,447,500</td>
<td>65,840</td>
<td>6,961,300</td>
<td>70,302</td>
</tr>
</tbody>
</table>
Type of Health Insurance Coverage

Introduction

This section examines the type of health insurance coverage for non-institutionalized working-age people (ages 21 to 64) with disabilities in the United States, using data from the 2017 American Community Survey (ACS). Note that people can report more than one type of insurance coverage. For definitions of terms, see Glossary.

Quick Statistics

- In 2017, 34.7 percent of working-age people with disabilities in the US reported health insurance coverage through a current or former employer or union (theirs or another family member).
- In 2017, 65.4 percent of working-age people without disabilities in the US reported health insurance coverage through a current or former employer or union (theirs or another family member).
- In 2017, 10.6 percent of working-age people with disabilities in the US reported purchasing health insurance coverage directly from an insurance company (by themselves or another family member).
- In 2017, 23.8 percent of working-age people with disabilities in the US reported Medicare coverage and 42.1 percent reported Medicaid coverage (or other government-assistance plan for those with low incomes or a disability).
Type of health insurance coverage of non-institutionalized working-age people (ages 21 to 64) by disability status in the United States in 2017

Type of Health Insurance Coverage (%)

- Any Disability
- No Disability

<table>
<thead>
<tr>
<th>Type of Coverage</th>
<th>Any Disability</th>
<th>No Disability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uninsured</td>
<td>9.8</td>
<td>12.4</td>
</tr>
<tr>
<td>Employer/Union</td>
<td>34.7</td>
<td>65.4</td>
</tr>
<tr>
<td>Purchased</td>
<td>10.6</td>
<td>11.4</td>
</tr>
<tr>
<td>Medicare</td>
<td>23.8</td>
<td>1.7</td>
</tr>
<tr>
<td>Medicaid</td>
<td>42.1</td>
<td>11.6</td>
</tr>
<tr>
<td>Military/VA</td>
<td>6.9</td>
<td>3.3</td>
</tr>
<tr>
<td>Indian HS</td>
<td>0.8</td>
<td>0.4</td>
</tr>
</tbody>
</table>

---

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<table>
<thead>
<tr>
<th>Disability Status/Insurance Type</th>
<th>%</th>
<th>MOE</th>
<th>Number</th>
<th>MOE</th>
<th>Base Pop.</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Any Disability</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uninsured</td>
<td>9.8</td>
<td>0.18</td>
<td>1,933,300</td>
<td>36,300</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Employer/Union</td>
<td>34.7</td>
<td>0.28</td>
<td>6,806,200</td>
<td>67,600</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Purchased</td>
<td>10.6</td>
<td>0.18</td>
<td>2,081,900</td>
<td>37,670</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Medicare</td>
<td>23.8</td>
<td>0.25</td>
<td>4,664,900</td>
<td>56,160</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Medicaid</td>
<td>42.1</td>
<td>0.29</td>
<td>8,266,600</td>
<td>74,330</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Military/VA</td>
<td>6.9</td>
<td>0.15</td>
<td>1,348,700</td>
<td>30,350</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td>Indian Health Service</td>
<td>0.8</td>
<td>3.29</td>
<td>152,900</td>
<td>10,240</td>
<td>19,637,200</td>
<td>195,644</td>
</tr>
<tr>
<td><strong>No Disability</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uninsured</td>
<td>12.4</td>
<td>0.07</td>
<td>20,587,100</td>
<td>115,010</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Employer/Union</td>
<td>65.4</td>
<td>0.10</td>
<td>108,631,700</td>
<td>222,830</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Purchased</td>
<td>11.4</td>
<td>0.06</td>
<td>18,931,500</td>
<td>110,580</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Medicare</td>
<td>1.7</td>
<td>3.29</td>
<td>2,798,000</td>
<td>43,620</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Medicaid</td>
<td>11.6</td>
<td>0.07</td>
<td>19,304,500</td>
<td>111,600</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Military/VA</td>
<td>3.3</td>
<td>0.04</td>
<td>5,552,800</td>
<td>61,180</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
<tr>
<td>Indian Health Service</td>
<td>0.4</td>
<td>3.29</td>
<td>726,700</td>
<td>22,300</td>
<td>165,987,300</td>
<td>1,556,444</td>
</tr>
</tbody>
</table>
Glossary

Actively Looking for Work

A person is defined as **ACTIVELY** looking for work if he or she reports looking for work during the last four weeks.

Ambulatory Disability

This disability type is based on the question *(asked of persons ages 5 or older)*: Does this person have serious difficulty walking or climbing stairs?

Base Population (Base Pop.)

The estimated number of individuals upon which the calculation is based. (For percentages, this is the denominator).

Cognitive Disability

This disability type is based on the question *(asked of persons ages 5 or older)*: Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions?

Disability and Disability Types

The ACS definition of disability is based on six questions. A person is coded as having a disability if he or she or a proxy respondent answers affirmatively for one or more of these six categories.

- **Hearing Disability** *(asked of all ages)*: Is this person deaf or does he/she have serious difficulty hearing?
- **Visual Disability** *(asked of all ages)*: Is this person blind or does he/she have serious difficulty seeing even when wearing glasses?
- **Cognitive Disability** *(asked of persons ages 5 or older)*: Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions?
- **Ambulatory Disability** *(asked of persons ages 5 or older)*: Does this person have serious difficulty walking or climbing stairs?
- **Self-care Disability** *(asked of persons ages 5 or older)*: Does this person have difficulty dressing or bathing?
- **Independent Living Disability** *(asked of persons ages 15 or older)*: Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a doctor’s office or shopping?

Earnings

Earnings are defined as wages, salary, commissions, bonuses, or tips from all jobs including self-employment income (NET income after business expenses) from own nonfarm businesses or farm businesses, including proprietorships and partnerships.
Education

Our definition is based on the responses to the question: "What is the highest degree or level of school this person has completed? If currently enrolled, mark the previous grade or highest degree received." Our category "high school diploma/equivalent" includes those marking the ACS option "Regular high school diploma — GED or alternative credential." Our category "Some college/Associate's degree" includes those marking the ACS options: some college credit, but less than 1 year of college credit; one or more years of college credit but no degree, or "Associate's degree (for example: AA, AS)." Our category "a Bachelor's or more" includes those marking the ACS options: "Bachelor's degree (for example: BA, BS)"; "Master's degree (for example: MA, MS, MEng, MEd, MSW, MBA)"; "Professional degree (for example: MD, DDS, DVM, LLB, JD)"; or "Doctorate degree (for example: PhD, EdD)." Note in 2008 changes were made to some of the response categories and the layout of this question.

Employment

A person is considered employed if he or she is either

- a. "at work": those who did any work at all during the reference week as a paid employee (worked in his or her own business or profession, worked on his or her own farm, or worked 15 or more hours as an unpaid worker on a family farm or business) or
- b. "with a job but not at work": had a job but temporarily did not work at that job during the reference week due to illness, bad weather, industrial dispute, vacation or other personal reasons. The reference week is defined as the week preceding the date the questionnaire was completed.

Employment Rate

The employment rate is calculated by dividing the number of persons employed by the number of persons in that population.

** Note that the unemployment rate cannot be calculated using the employment rate:

- The employment rate is the percentage of all persons who have a job.
- The unemployment rate is the percentage of persons in the labor force who do not have a job but are actively looking for work. The labor force includes people who have a job, are on layoff, or who actively searched for work in the last four weeks.

Please see http://www.disabilitystatistics.org/faq.cfm#Q6 for more information on unemployment rate calculation and its implications.

Full-Time/Full-Year Employment

A person is considered employed full-time/full-year if he or she worked 35 hours or more per week (full-time) and 50 or more weeks per year (full-year). The reference period is defined as the year preceding the date the questionnaire was completed. Note: this does not signify whether a person is eligible for fringe benefits. The question and response categories regarding weeks worked per year was changed in 2008.
**Group Quarters (GQ)**

A GQ is a place where people live or stay that is normally owned or managed by an entity or organization providing housing and/or services for the residents. These services may include custodial or medical care as well as other types of assistance, and residency is commonly restricted to those receiving these services. People living in group quarters are usually not related to each other. Group quarters include such places as college residence halls, residential treatment centers, skilled nursing facilities, group homes, military barracks, correctional facilities, and workers' dormitories. See the definitions of institutional GQs and non-institutional GQs for more information. In addition, a description of the types of group quarters included in the 2008 ACS is located on the U.S. Census Bureau's Web site at www.census.gov/acs/www/Downloads/2008_ACS_GQ_Definitions.pdf.

**Health Insurance Coverage**

Is based on the following question: Is this person CURRENTLY covered by any of the following types of health insurance or health coverage plans? Mark "Yes" or "No" for EACH type of coverage in items a – h.

a. Insurance through a current or former employer or union (of this person or another family member)
b. Insurance purchased directly from an insurance company (by this person or another family member)
c. Medicare, for people 65 and older, or people with certain disabilities
d. Medicaid, Medical Assistance, or any kind of government-assistance plan for those with low incomes or a disability
e. VA (including those who have ever used or enrolled for VA health care)
f. TRICARE or other military health care
g. Indian Health Service
h. Any other type of health insurance or health coverage plan – Specify (Note: "Other type" were recoded into one of the categories a-g by the Census Bureau)

**Hearing Disability**

This disability type is based on the question *(asked of all ages)*: Is this person deaf or does he/she have serious difficulty hearing?

**Hispanic or Latino Origin**

People of Hispanic or Latino origin are those who classify themselves in a specific Hispanic or Latino category in response to the question, "Is this person Spanish/Hispanic/Latino?" Specifically, those of Hispanic or Latino origin are those who are Cuban; Mexican, Mexican American, Chicano; Puerto Rican; or other Spanish/Hispanic/Latino. Origin may be the heritage, nationality group, lineage, or country of birth of the person or the person's parents or ancestors before their arrival in the United States. People who identify their origin as Spanish, Hispanic, or Latino may be of any race.
**Household Income**

Household Income is defined as the total income of a household including: wages, salary, commissions, bonuses, or tips from all jobs; self-employment income (NET income after business expenses) from own non-farm or farm businesses, including proprietorships and partnerships; interest, dividends, net rental income, royalty income, or income from real estates and trusts; Social Security or Railroad Retirement; Supplemental Security Income; any public assistance or welfare payments from the state or local welfare office; retirement, survivor or disability pensions; and any other regularly received income (e.g., Veterans' payments, unemployment compensation, child support or alimony). Median household income is calculated with the household as the unit of analysis, using household weights without adjusting for household size.

**Independent Living Disability**

This disability type is based on the question *(asked of persons ages 15 or older)*: Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a doctor's office or shopping?

**Institutional Group Quarters (GQs)**

Includes facilities for people under formally authorized, supervised care or custody at the time of enumeration. Generally, restricted to the institution, under the care or supervision of trained staff, and classified as "patients" or "inmates." Includes: correctional, nursing, and in-patient hospice facilities, psychiatric hospitals, juvenile group homes and residential treatment centers.

**Margin of Error (MOE)**

Data, such as data from the American Community Survey, is based on a sample, and therefore statistics derived from this data are subject to sampling variability. The margin of error (MOE) is a measure of the degree of sampling variability. In a random sample, the degree of sampling variation is determined by the underlying variability of the phenomena being estimated (e.g., income) and the size of the sample (i.e., the number of survey participants used to calculate the statistic). The smaller the margin of error, the lower the sampling variability and the more "precise" the estimate. A margin of error is the difference between an estimate and its upper or lower confidence bounds. Confidence bounds are calculated by adding the MOE to the estimate (upper bound) and subtracting the MOE from the estimate (lower bound). All margins of error in this report are based on a 90 percent confidence level. This means that there is a 90% certainty that the actual value lies somewhere between the upper and lower confidence bounds.

**Non-Institutional Group Quarters (GQs)**

Includes facilities that are not classified as institutional group quarters.
Includes facilities that are not classified as institutional group quarters; such as college/university housing, group homes intended for adults, residential treatment facilities for adults, workers' group living quarters and Job Corps centers and religious group quarters.

**Not Working but Actively Looking for Work**

A person is defined as not working but actively looking for work if he or she reports not being employed, but has been looking for work during the last four weeks.

**Number**

This term appears in the tables; it refers to estimated number of people in the category. (for percentages, this is the numerator).

**Poverty**

The poverty measure is computed based upon the standards defined in Directive 14 from the Office of Management and Budget. These standards use poverty thresholds created in 1982 and index these thresholds to 2008 dollars using poverty factors based upon the Consumer Price Index. They use the family as the income sharing unit and family income is the sum of total income from each family member living in the household. The poverty threshold depends upon the size of the family; the age of the householder; and the number of related children under the age of 18.

**Race**

Race categories are based on the question, "[w]hat is this person's race? Mark (X) one or more races to indicate what this person considers himself/herself to be." Responses include the following: White; Black or African-American; American Indian or Alaska Native (print name of enrolled or principal tribe); Asian Indian; Chinese; Filipino; Japanese; Korean; Vietnamese; Other Asian (Print Race); Native Hawaiian; Guamanian or Chamorro; Samoan; Other Pacific Islander (Print Race Below); Some other race (print race below). "Other race" also contains people who report more than one race.

**Sample Size**

The number of survey participants used to calculate the statistic.

**Self-care Disability**

This disability type is based on the question (asked of persons ages 5 or older): 17c. Does this person have difficulty dressing or bathing?

**Supplemental Security Income (SSI)**
A person is defined as receiving SSI payments if he or she reports receiving (SSI) income in the 12 months prior to the survey.

**Note:** The Supplemental Security Income (SSI) does not apply to Puerto Rico. SSI is a federal cash assistance program that provides monthly payments to low-income aged, blind, or disabled persons in the 50 states, the District of Columbia, and the Northern Mariana Islands.

**Veteran Service-Connected Disability**

A disease or injury determined to have occurred in or to have been aggravated by military service. A disability is evaluated according to the VA Schedule for Rating Disabilities in Title 38, CFR, and Part 4. Extent of disability is expressed as a percentage from 0% (for conditions that exist but are not disabling to a compensable degree) to 100%, in increments of 10%. This information was determined by the following two part question:

a. **Does this person have a VA service-connected disability rating?**
   - Yes (such as 0%, 10%, 20%, ... , 100%)
   - No *SKIP* to question 28a

b. **What is this person’s service-connected disability rating?**
   - Responses included: 0 percent; 10 or 20 percent; 30 or 40 percent; 50 or 60 percent; 70 percent or higher

**Visual Disability**

This disability type is based on the question: *(asked of all ages):* Is this person blind or does he/she have serious difficulty seeing even when wearing glasses?
About the Disability Status Reports

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New York City’s Inaccessible Subway System

Despite the delays, despite the deferred maintenance, despite the growing frustration, the New York City subway system remains the most expansive in the country and among the most impressive in the world. Its reach is extraordinary, with 472 stations connecting 122 of the city’s 189 neighborhoods. In total, 6.3 million New Yorkers—or 75 percent of the city’s population—have access to a subway station within their neighborhood.

That is, unless, those New Yorkers are mobility-impaired.

For those with disabilities… or with young children… or immobilized by an injury…or the elderly… For all of these New Yorkers, the vast majority of subway stations provide little access to transit in neighborhoods across the city. For all of these New Yorkers, the city’s “transit deserts” begin to resemble the Sahara.

One only needs to look at a map of the neighborhoods with a subway station and compare it to one showing all neighborhoods without a single accessible station (see Chart 1)—the difference is profound, and underscores just how limiting the system is for too many New Yorkers.

Chart 1: Neighborhoods without an Accessible Station

Indeed, of the 122 New York City neighborhoods served by the subway system, 62 do not have a single accessible station. Of these 62 “ADA transit deserts,” 55 are in the Bronx, Brooklyn, and Queens (see Chart 2).

**Chart 2: Subway Accessibility and New York City Neighborhoods**

<table>
<thead>
<tr>
<th>Borough</th>
<th>Neighborhoods served by the subway</th>
<th>Neighborhoods without a single accessible station</th>
<th>Share Inaccessible</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bronx</td>
<td>28</td>
<td>19</td>
<td>59%</td>
</tr>
<tr>
<td>Brooklyn</td>
<td>44</td>
<td>26</td>
<td>68%</td>
</tr>
<tr>
<td>Manhattan</td>
<td>27</td>
<td>7</td>
<td>26%</td>
</tr>
<tr>
<td>Queens</td>
<td>23</td>
<td>10</td>
<td>43%</td>
</tr>
<tr>
<td>Total</td>
<td>122</td>
<td>62</td>
<td>51%</td>
</tr>
</tbody>
</table>


Taking a step back, New York City’s “ADA transit deserts” are home to 199,242 mobility-impaired residents, 341,447 seniors above the age of 65, and 203,466 children below the age of five (see Chart 3). Aggregating these three groups—and eliminating overlap and redundancy—a total of 640,000 New Yorkers are confined to neighborhoods that are severely restricted from accessing the city’s vast subway network.

**Chart 3: Subway Accessibility and Neighborhood Demographics**

<table>
<thead>
<tr>
<th>At Least One Accessible Subway Station</th>
<th>Only Inaccessible Subway Stations</th>
<th>No Subway Stations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Neighborhoods</td>
<td>60</td>
<td>62</td>
</tr>
<tr>
<td>Mobility-Impaired Residents</td>
<td>204,697</td>
<td>199,242</td>
</tr>
<tr>
<td>Age 65+ Residents</td>
<td>447,261</td>
<td>341,447</td>
</tr>
<tr>
<td>Under Age 5 Residents</td>
<td>220,916</td>
<td>203,466</td>
</tr>
<tr>
<td>Seniors + Children Under Age 5 + Mobility-Impaired Under Age 65</td>
<td>759,733</td>
<td>638,246</td>
</tr>
</tbody>
</table>


**The Effects of an Inaccessible System**

Inaccessible subway stations place a severe strain on the lives of New York families, seniors, and the mobility-impaired. Lack of accessibility effects their choice of residence, their access to jobs, and their cost of living. It is responsible for countless compromises, sacrifices, and inconveniences, depreciating the quality-of-life of hundreds of thousands of New Yorkers.

For those mobility-impaired riders and their families who wish to live closer to an accessible station, local housing costs can be a serious deterrent. Median rents in neighborhoods with at least one accessible station are over $100 higher than in neighborhoods with only inaccessible stations ($1,310/month versus
$1,205/month). Given that the disabled, injured, elderly, and families with young children already bear heavy expenses for medical care and other services, these higher rents can be prohibitive.

Chart 4: Subway Accessibility and Residential and Employment Prospects

<table>
<thead>
<tr>
<th></th>
<th>At Least One Accessible Subway Station</th>
<th>Only Inaccessible Subway Stations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Neighborhoods</td>
<td>60</td>
<td>62</td>
</tr>
<tr>
<td>Median Rent</td>
<td>$1,310</td>
<td>$1,205</td>
</tr>
<tr>
<td>Number of Local Jobs</td>
<td>2,701,190</td>
<td>608,258</td>
</tr>
</tbody>
</table>


For those seeking employment, meanwhile, accessibility gaps can severely restrict opportunities for the mobility-impaired. Those living in areas without accessible stations will struggle to reach the 2.7 million jobs in areas that are accessible by subway, while the 608,258 jobs in neighborhoods without subway accessibility are even more challenging to access.

These barriers to the labor market exacerbate the high rates of unemployment and low rates of workforce participation among the disabled. In New York City, only 23 percent of the mobility-impaired are employed or actively looking for work – compared to 74 percent of the non-disabled population (aged 25-65). And for those who are participating in the labor force, unemployment rates are a disturbing 16 percent for the mobility-impaired versus only 7 percent among the non-disabled. These disparities were equally dramatic among the college educated—12 percent unemployment versus 4 percent.

Chart 5: Employment Outcomes for New Yorkers with and without a Mobility-Impairment


These mobility-impaired residents have been left in the lurch by the MTA; victims of decades of underinvestment. Today, only 24 percent of the subway’s 472 stations are accessible, by far the lowest share among the country’s metropolitan rail systems. And while some of these systems were built after ADA legislation was introduced and were pre-engineered for accessibility, both Boston and Chicago are nearly as old (or older) than the New York City subway system, but are far more accessible.
Only in New York are 640,000 residents being deprived of access to a rail system that is already built in their neighborhoods. Only in New York is the utility and reach of the subway system being systematically squandered.

Viewed in this light, it is clear that ADA upgrades are not just an ethical measure towards greater inclusivity or a regulatory measure towards legal compliance, but also an essential expansion effort to increase the reach of the subway system and relieve overcrowding at the handful of “key” stations that serve a disproportionate share of mobility-impaired riders.

The impact of these investments, in fact, would rival the MTA’s recent cluster of system expansion projects. The 34th Street-Hudson Yards terminus of the $2.5 billion 7 Train extension, for instance, served only 10,082 riders on average per day in 2017. The four stations along the Second Avenue Subway line currently serve 190,000 riders per day. This first phase of the Second Avenue line cost $4.5 billion while the second phase, which is expected to add 100,000 new riders, is budgeted for $6 billion. The East Side Access project connecting the LIRR to Grand Central station, meanwhile, will serve approximately 162,000 customers at a cost of over $11 billion.

Together, this totals nearly $25 billion for projects that add (or divert) less than 500,000 riders. This is significantly fewer than the 640,000 riders who are severely restricted from using subway lines that are already built in their neighborhoods, but are not accessible to them.

**Fast Forward and Funding**

The New York City transit network—and by extension, the city itself—is facing an existential crisis. Infrastructure is failing, ridership is falling, delays are mounting, and construction costs are out of control.

Fortunately, new leadership at New York City Transit has advanced an ambitious Fast Forward plan to rescue and modernize local transit and sparked some much-needed optimism. Central to the Fast Forward plan is a promise to make 50 new stations ADA accessible in the next five years. These upgrades will be scattered throughout the five boroughs, so that no rider is more than two stops away from an accessible station.

Actually implementing these plans, however, will depend on significant external funding—along with a dramatic overhaul of contracting and procurement.

As a first step, the state legislature should introduce an $8 billion Transit Bond Act in the next session and bring it to referendum. When a transit bond act was last placed on the ballot in 2005, it was approved by 56 percent of New York State voters. The measure generated $2.9 billion, divided fairly between upstate and downstate needs.

In this iteration, downstate investments must include significant investment for ADA upgrades. With these dollars in place, the MTA can dramatically enhance the reach of the subway system and improve the lives of hundreds of thousands of New Yorkers.

**Endnotes**

1 Note: The Census ACS collects unemployment data in a different manner than the Department of Labor. As a result, Census figures are often slightly higher than the DOL.
Note: Ridership for the 7 Train extension, includes only riders entering the 34 St-Hudson Yards station. The other three ridership figures and projections include both entries and exits.

References:

Online Essay

HOUSING, HEALTHISM, AND THE HUD SMOKE-FREE POLICY†

Dave Fagundes & Jessica L. Roberts

ABSTRACT—On July 30, 2018, the U.S. Department of Housing and Urban Development (HUD) rule prohibiting residents of public housing from smoking within twenty-five feet of any housing project took effect. These new regulations—HUD’s “smoke-free policy”—received near-universal acclaim as a means to improve public health, in particular by reducing vulnerable populations’ exposure to secondhand smoke. This Essay analyzes the smoke-free policy from the perspective of healthism—discrimination on the basis of health status. We argue that banning public housing residents from smoking is unfairly discriminatory for a variety of reasons. To start, the rule may not achieve its desired effects. Because a violation could lead to eviction, the policy may well push many public housing residents out onto the street, ironically worsening health outcomes. The rule also intrudes into the private lives of smokers in public housing by forbidding them from engaging in lawful conduct in the sanctity of their homes. It singles out smokers for regulation in a way that validates stigma. Finally, HUD’s smoke-free policy poses unappreciated distributional concerns, with the heaviest burdens falling on historically disadvantaged populations like the elderly, people with disabilities, certain racial and ethnic minorities, and the poor. The Essay concludes by attempting to salvage the rule by reflecting on how HUD might modify its policy to improve compliance and avoid discrimination, including smoking shelters, smoking cessation support, and incentive structures.

AUTHORS—Dave Fagundes, Baker Botts LLP Professor of Law and Assistant Dean for Faculty Development, University of Houston Law Center. Thanks to Shelley Cavallieri, Lee Ann Fennell, Doug Harris, Christine Klein, Lorna Fox O’Mahony, Jim Smith, and participants at the

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INTRODUCTION

On July 23, 2018, six smokers sued the Department of Housing and Urban Development (HUD) and HUD Secretary Ben Carson. The plaintiffs are challenging HUD’s recent smoke-free policy, a rule that requires public housing authorities (PHAs) to restrict residents from smoking in all indoor areas—including private residences—and within twenty-five feet of any PHA-owned building. Among other claims, the lawsuit alleges that the regulations are unconstitutional, violating key provisions of the Tenth, Fourth, Fifth, and Fourteenth Amendments. This Essay lodges yet another set of critiques at HUD’s smoke-free policy: it is discriminatory and imposes overlooked distributional concerns. Consequently, instead of improving

2 A public housing authority is an entity that owns and manages low income housing. Michael H. Schill, Distressed Public Housing: Where Do We Go from Here?, 60 U. Chi. L. Rev. 497, 499 (1993). These entities are either state agencies or not-for-profit entities that work closely with the state to allocate public housing to qualified individuals and to regulate public housing in accordance with applicable federal, state, and local law.
4 See Complaint, supra note 1, at 44-48.
public health, the new rule threatens to disadvantage and jeopardize the health of already vulnerable populations.

This Essay analyzes the new rule through the lens of “healthism,” or discrimination on the basis of health status.® Healthism as a theory considers when the law should regulate policies that disadvantage people who are considered unhealthy. It uses four guiding principles to discern whether a given intervention is healthist: (1) health welfare, (2) health liberty, (3) health equality, and (4) health justice.® This framework acknowledges the necessity of making some distinctions based on health status, such as risk rating in private health insurance. Yet it argues that some distinctions are unduly burdensome, like bans on hiring overweight workers.

The HUD smoke-free policy provides an ideal case study for healthism. Society generally regards smokers as unhealthy, and they face fairly widespread social stigma as a result. They are frequently the target of health policies, such as sin taxes, insurance surcharges, and anti-smoking ordinances. In short, interventions that disadvantage smokers are ubiquitous. However, there are good reasons for encouraging people to quit smoking. Tobacco use generally and smoking specifically are linked to a variety of ailments, including mouth, throat, and lung cancers, coronary artery disease, high blood pressure, emphysema, and stroke. Secondhand exposure to smoke has its own deleterious effects, especially on small children, including increased risks of asthma, bronchitis, ear and respiratory

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6 See ROBERTS & WEEKS, supra note 5, at 24–52.

7 See id.

8 See id. at 181–83.


10 For example, an excise tax may be levied on items considered harmful or undesirable such as cigarettes, liquor, unhealthy food, or gambling.


infections, cancer, and even sudden infant death syndrome (SIDS).\textsuperscript{13} Hence, reducing smoking can have positive health effects for individuals and their families. So the question emerges—Is HUD’s smoke-free policy discriminatory or is it sound public policy?

We ultimately conclude the former. The smoke-free policy implicates all four of healthism’s guiding principles. With respect to health welfare, noncompliance risks eviction. Ironically, then, the policy could reduce net social welfare. Pushing smokers—and their families—onto the streets will harm public health because homelessness poses even more immediate health risks than smoking. Next, singling out smokers while leaving other legal, health-risky behavior untouched raises health equality concerns. Regulating private, lawful conduct within the home also violates health liberty because the American property tradition has long afforded the home special status as a sanctuary against paternalist regulation. Finally, the smoke-free policy raises the kinds of distributional concerns captured by health justice. Historically disadvantaged groups such as people with disabilities, the elderly, and the poor are more likely to smoke, and are also more likely to live in public housing. Thus, the smoke-free rule uniquely burdens these populations. Moreover, quitting smoking is no easy task. It may take up to thirty attempts to successfully quit smoking.\textsuperscript{14} Making matters worse, members of historically disadvantaged groups are also more likely to lack access to the kind of resources and support that would enable them to successfully overcome a serious addiction.\textsuperscript{15} We therefore assert that HUD’s smoke-free policy in its current iteration is healthist.

However, healthism exists on a continuum. As noted, reducing smoking and secondhand smoke in public housing is a commendable goal, especially where children are concerned. We therefore attempt to rehabilitate the HUD smoke-free policy by offering some alternative, non-discriminatory pathways to reduce smoking in public housing, such as giving non-smokers a small but visible rent reduction, or providing support groups, access to “quit lines,” and other cessation tools.

This Essay proceeds in three Parts. First, it outlines both the smoke-free policy and healthism’s theoretical framework. Second, it applies healthism to the HUD smoke-free policy, concluding that the policy discriminates unfairly. And finally, it explores some nondiscriminatory policy interventions to encourage public housing residents not to smoke.

\textsuperscript{13} Id.

\textsuperscript{14} Michael Chaiton et al., Estimating the Number of Quit Attempts It Takes to Quit Smoking Successfully in a Longitudinal Cohort of Smokers, BMJ OPEN (June 9, 2016), https://bmjopen.bmj.com/content/bmjopen/6/6/e011045.full.pdf [https://perma.cc/C6MW-AFUV].

\textsuperscript{15} See infra Section II.D.
I. THE SMOKE-FREE POLICY AND THE HEALTHISM FRAMEWORK

Anti-smoking regulations typically make good public policy. Such measures have a longstanding history in the United States and frequently enjoy widespread, bipartisan support. The HUD smoke-free policy has been no exception. Even in a time of political strife when almost no Obama-era regulations have survived into the Trump Presidency, the smoke-free policy is the rare regulation to persist into the new administration. This Part briefly summarizes the HUD smoke-free policy, including the recent lawsuit by smokers against HUD and Secretary Carson. It then turns to the theoretical framework for healthism, laying the grounds for our analysis in Part II.

A. HUD’s Smoke-Free Policy

Smoking has declined in popularity over the last forty years since the Surgeon General publicly announced the connection between smoking and lung cancer in 1964.16 Still, around the turn of the last century, smokers numbered about one quarter of all adult Americans.17 These numbers started decreasing sharply in the early 2000s when major cities including New York City and Los Angeles passed laws banning smoking in private establishments, like bars and restaurants, and in public areas, like parks and train stations.18 As the social consensus against smoking gathered momentum, the federal government got into the act when, in 2009, the new Obama-era HUD issued a statement encouraging PHAs to restrict smoking


17 See Trends in Current Cigarette Smoking Among High School Students and Adults, United States, 1965-2014, CRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/tables/trends/cig_smoking/index.htm [https://perma.cc/SZU6-UD58] (showing that around 24.7% of adult Americans were reported smokers in the late 1990s).

in private as well as public areas of their buildings.\textsuperscript{19} Some PHAs, in cities such as Boston and Detroit, voluntarily instituted such restrictions, though most did not.\textsuperscript{20}

Then, in 2015, HUD issued a Notice of Proposed Rulemaking that would require all PHAs subject to federal funding to prohibit residents from smoking in any private or public areas of any housing development, or within twenty-five feet of the housing.\textsuperscript{21} Significantly, the policy does not ban leasing to smokers, or even smoking per se. Instead, it just requires that residents smoke off-site. In November 2016, it presented a proposed rule in substantially the same form as originally proposed a year prior.\textsuperscript{22} While HUD’s smoke-free policy became effective February 3, 2017,\textsuperscript{23} the rule included an eighteen-month implementation period, which gave PHAs until July 31, 2018 to comply.\textsuperscript{24}

The newly minted regulations have been widely celebrated. Medical associations praised the rule’s potential to cut down on smoking and reducing exposure of secondhand smoke to vulnerable groups like children, thereby generating positive health outcomes.\textsuperscript{25} And despite grumbling from PHAs that the rule represented an unfunded mandate,\textsuperscript{26} HUD emphasized the policy’s potential to reduce maintenance costs by eliminating the expense of


\textsuperscript{24} Id.


\textsuperscript{26} See Navarro, supra note 25 (“The rule is an unfunded mandate which adds considerable burden, financially and administratively, to programs that have consistently received wholly inadequate funding,” wrote Timothy G. Kaiser, the [Public Housing Authorities Directors Association]’s executive director.”)
renovating smokers’ units and by decreasing the risk of smoking-related fires.\footnote{Instituting Smoke-Free Housing, 81 Fed. Reg. at 87,430–32 (extolling the policy upsides of the smoke-free policy in terms of resident health and lower cost to PHAs). Many public housing residents welcomed the change as well. Lesli Lino, a resident of Melrose Houses in the Bronx, complained that the odor of smoking in her building is “horrible,” and that HUD’s policy would be “a plus to [her].” Mireya Navarro, Public Housing Nationwide May Be Subject to Smoking Ban, N.Y. TIMES (Nov. 12, 2015), https://www.nytimes.com/2015/11/12/nyregion/public-housing-nationwide-may-be-subject-to-smoking-ban.html [https://perma.cc/D67W-28UB].} Perhaps the most telling indication of the smoke-free policy’s broad appeal is that despite originating during Obama’s presidency, the Trump Administration has not sought to rescind it.\footnote{The Trump Administration, by way of HUD Secretary Ben Carson, ultimately endorsed the smoke-free rule. See Ben Carson (@SecretaryCarson), TWITTER (July 31, 2018, 1:57 PM), https://twitter.com/secretarycarson/status/1024398660749197319 [https://perma.cc/8HYF-LDE4] (“Today, our smoke free rule went into full effect for public housing authorities nationwide. This means public housing agencies will save $153M every year in repairs & preventable fires, and our residents will be healthier as a result[.]”).}

However, the rule has not been without its critics. Commentators expressed various concerns, including with respect to the rule’s enforcement. After a phase-in period, PHAs must enforce the smoke-free policy by means of lease enforcement actions (LEAs).\footnote{Instituting Smoke-Free Housing, 81 Fed. Reg. at 87,437.} LEAs include a variety of enforcement options, from written warnings to fines to eviction.\footnote{See id. at 87,436–40.} Significantly, the regulations explicitly reserve discretion for PHAs to choose which LEAs to use.\footnote{See Smoke-Free Public Housing, 24 C.F.R §§ 965.653–55 (2018); see also Instituting Smoke-Free Public Housing, 81 Fed. Reg. at 87,437 (stating that “HUD has not included enforcement provisions in this rulemaking because lease enforcement policies are typically at the discretion of PHAs, and it is appropriate for local agencies to ensure fairness and consistency with other policies”).} The possibility of eviction led to particular concern during the comment period. Opponents of the rule stressed the harshness of inflicting possible homelessness on vulnerable individuals who engaged in legal behavior within their homes.\footnote{Instituting Smoke-Free Housing, 81 Fed. Reg. at 87,437 (cataloguing various objections to eviction as a remedy for violating the smoke-free policy).} HUD, however, declined to revise its rule to take eviction off the table, instead stressing that the agency “believes that allowing a PHA to enforce its smoke-free policy through lease enforcement actions”—including eviction—“is the best way to ensure compliance with such policies.”\footnote{Id. HUD did make some suggestions aimed at softening the impact of potential eviction, such as discouraging eviction as a remedy for first-time violators, but declined to revise the rule to eliminate eviction as a possible consequence of repeatedly violating the smoke-free policy. Id.}

Strong criticism has also come directly from smokers living in public housing. On July 23, 2018, just one week before the implementation period ended, a group of litigants sued HUD and Secretary Carson in federal district
The seven plaintiffs include a New York-based nonprofit smoker’s advocacy group and six smokers who currently live in public housing. Of those plaintiffs, four are non-white, all are age forty and over, and two have disabilities that require them to rely on Social Security benefits. The fifty-five page complaint challenges the smoke-free policy across a variety of metrics. The plaintiffs allege that (1) the smoke-free policy violates the Tenth Amendment, including the anti-commandeering doctrine; (2) the policy violates the Fourth Amendment by allowing PHAs to conduct unlawful searches and seizures in residents’ homes; (3) the policy violates both Fifth and Fourteenth Amendment due process rights to be free from government intrusion in the home; (4) the policy conditions government benefits in exchange for giving up Fourth Amendment rights; (5) HUD lacks the legal authority and the jurisdiction to issue the rule because it involves activities that do not impact interstate commerce; (6) HUD lacks the legal authority and the jurisdiction to issue the rule because federal agencies cannot regulate tobacco use in private locations without executive or congressional authorization; (7) HUD lacks the legal authority and the jurisdiction to issue the rule because federal agencies cannot regulate indoor air quality on a national basis without executive or congressional authorization; (8) HUD lacks the legal authority and the jurisdiction to issue the rule because federal agencies cannot regulate tobacco use in any location without executive or congressional authorization; and (9) the policy is arbitrary, capricious, and an abuse of discretion.

While our analysis includes similar points regarding privacy and the right to be free from government intrusion, we attack the new rule from a different vantage, arguing it discriminates unfairly against low-income minority smokers.

B. Healthism Theory

Discrimination is a necessary and inevitable feature of our legal system. Law cannot function without making some distinctions. Our Constitution mandates that only those above thirty-five years of age can become President. Public universities typically offer lower tuition to in-state residents. Citizens of closed-primary states may vote only for candidates of
the political party for which the voter has registered. These distinctions favor some groups over others but pose no legitimate legal problems. Other distinctions are not so innocuous. Jim Crow laws in the American South systematically excluded racial minorities from public places and public participation. Laws used to limit the voting franchise and eligibility for jury service based on gender, race, and property-owner status. And recent presidential executive orders have restricted foreign travel on the basis of an individual’s status as a resident of a Muslim-majority nation. These laws raise normative objections and have duly been invalidated by U.S. courts.

Healthism introduces a novel category of potentially adverse social discrimination into the antidiscrimination canon: health status. As a theory, healthism maintains that, on certain occasions, policies that differentiate based on health status pose the kind of normative problems that warrant independent legal protection. That said, many distinctions on the basis of health status are desirable and should be encouraged. For example, distinguishing based on health-related behaviors and attributes is essential to certain interventions, like tobacco cessation programs. By contrast, workplace programs that disfavor or even bar obese people from employment may raise serious normative problems. While such programs are nominally about avoiding insurance costs associated with unhealthy workers, there is evidence that they may actually be rooted in irrational

43 See Roberts, “Healthism,” supra note 5, at 1159; Roberts & Weeks, supra note 9, at 484; Roberts & Weeks Leonard, supra note 5.
44 See Roberts & Weeks Leonard, supra note 5, at 856–58.
45 Smoking cessation programs span a range of methods to help smokers quit, from self-help to individual or group counseling to medical treatment with over the counter or prescription drugs. See How to Quit: Explore Quit Methods, SMOKEFREE.GOV, https://smokefree.gov/tools-tips/how-to-quit/explore-quit-methods. These methods can be used in combination, and are more effective when they are. Id.

46 In 2012, the Citizens Medical Center, a county-run hospital, instituted a policy that barred hiring anyone with a body-mass index of thirty-five or more. Emily Ramshaw, At Victoria Hospital, Obese Job Candidates Need Not Apply, TEX. TRIB. (Mar. 26, 2012), https://www.texastribune.org/2012/03/26/victoria-hospital-wont-hire-very-obese-workers.
animus toward certain body types. The healthism framework thus distinguishes beneficial health-based distinctions from those that are unfairly discriminatory.

Four guiding principles are at the heart of the framework: (1) health welfare, (2) health liberty, (3) health equality, and (4) health justice. Health welfare looks to utilitarian considerations, raising the possibility that targeting health status may actually reduce social welfare. Its primary concern is the efficient allocation of resources. Health liberty considers the importance of personal freedom and warns that regulating based on health status may threaten our right to be free from excessive state control. Autonomy is therefore essential to health liberty. Health equality calls on the American legal tradition of equal treatment before the law and examines health-status regulations and policies for impermissible motivations like animus or social stereotypes. Here, basic human dignity is key. Finally, health justice looks at the distributional effects of health-status distinctions, making distributive justice its underlying concern. Health justice may also implicate concerns related to welfare, liberty, and equality. As an antidiscrimination theory, healthism is value pluralist. No single guiding principle reigns supreme.

We now turn to the question of whether the HUD smoke-free policy is healthist.

II. APPLYING HEALTHISM TO THE SMOKE-FREE POLICY

HUD casts its smoke-free policy as a straightforward way to increase health and lower costs in public housing. It is also a law that overtly regulates and burdens a group based on its health status. HUD argues that the desirable effects of the policy outweigh these burdens. The healthism framework, though, casts the policy in a new light. It questions whether these new restrictions cross the line from the licit distinctions law must always draw to impermissible and harmful discrimination. This Part elucidates this argument in four steps, showing how the smoke-free policy, particularly because of its regulation of conduct within homes, raises concerns with all four parts of the healthism framework: (1) health welfare, (2) health liberty, (3) health equality, and (4) health justice.

48 See Roberts & Weeks, supra note 5, at 24.
49 See id. at 179.
50 See id.
51 See id. at 179–80.
52 See id. at 180; see also infra Section II.D.
A. Health Welfare

Public health policies typically seek to increase population health. That is, they seek to promote welfare. The notion of health welfare is rooted in the Benthamite utilitarian perspective that law and policymakers should evaluate their actions based on the net good or bad effects. In other words, the benefits should outweigh the costs. Improving welfare via promoting health is HUD’s leading justification for the smoke-free policy. Throughout the final rule, the agency emphasized that the policy’s downsides were outweighed by its advantages, particular in terms of public health. HUD therefore maintains the smoke-free policy will result in net welfare gains.

A closer look at the smoke-free policy, though, casts doubt on the conclusion that it will enhance net welfare. HUD’s claims about the benefits of the policy assume it will achieve widespread compliance. For any given policy to actually increase welfare, it must be followed. However, public housing residents will have difficulty complying for a variety of reasons.

First, structural barriers will prevent many public housing residents from complying. Unlike most other place-based smoking restrictions, such as those banning smoking in restaurants or parks, public housing residents cannot comply by retreating to the privacy of their homes to smoke. Compliance requires quite the opposite: One must leave one’s home, and indeed the building in which that home is located, to not breach the HUD rule. For some—say, an able-bodied thirty-year-old man—complying by smoking in more remote locations may present a simple solution.

For others, though, this will not prove so easy. Consider the elderly or people with disabilities. For members of these groups, getting out of their homes and into the approved smoking zone may be much more difficult, especially when inclement weather makes it even harder and threatens illness. Moreover, many PHAs are located in higher crime areas. Requiring that residents leave the premises—and indeed move some distance away from their building—to smoke thus exposes them to a higher risk of crime, particularly at night. This safety threat is heightened for certain groups that

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are statistically more likely to be crime victims, such as people with disabilities and women. In light of these concerns, public housing residents may not comply with the smoke-free policy either because they are physically unable to do so, or because they reasonably prefer to risk sanctions rather than expose themselves to danger. Those individuals that do attempt to comply and risk their safety could experience significant welfare losses.

Of course, residents have another available option: quit smoking. Yet this alternative path to compliance is complicated by the chemical and psychological persistence of nicotine addiction. The existence of a multi-million dollar industry devoted to smoking cessation (transdermal patches, therapy programs, etc.) attests to the difficulty of kicking a smoking habit. And while there are now more ex-smokers than current smokers in America, 85% of smokers have tried and failed to quit at least once. In fact, while some smokers in public housing applauded the new HUD regulations in theory, others insisted that even a federal law would not stop them from smoking in their homes. Seventy-seven-year-old Juan Manuel Cabrera explained that he had been smoking for sixty-seven years, and that no federal edict could get him to kick the habit.60


Second, compliance may be more unlikely because the smoking ban operates within the home. Smokers may be able to comply with workplace restrictions on smoking because they still retain the freedom to smoke within the intimate space of their residences. The smoke-free policy, however, forecloses this option for public housing residents, forcing them into a deceptively difficult choice between the costs of smoking off-site and the long shot of overcoming a persistent addictive behavior.

Smokers in public housing may not comply with the policy for a third reason: symbolic refusal to obey a policy that they feel wrongly impinges on their personal liberty. Without compliance, the HUD policy could have several possible consequences for health welfare. At a minimum, the policy will have no effect on welfare. However, the new rule could also significantly reduce welfare, which is far more troubling. Recall that the smoke-free policy grants PHAs broad authority to enforce the smoke-free policy through LEAs. An LEA can range from an informal verbal admonition to stop smoking, to a written warning, to a fine, to eviction. While many groups have asked that HUD restrict enforcement of the smoke-free policy to fines and other less extreme remedies, HUD refused to take eviction off the table. On the contrary, HUD’s final rule even gave PHAs discretion to evict residents who permit third parties such as guests to smoke in their homes. In addition, a single resident’s noncompliance with the smoke-free policy could result in eviction of all residents within that unit, including non-smokers and/or small children. And the early reaction of PHA managers indicates that they are eager rather than reluctant to use this remedy in the event of violations of the smoke-free policy. “The clock starts today,” said Ed Cabrera, a HUD spokesman in San Francisco, and “[t]enants who don’t comply and continue to smoke could face possible eviction.”

61 We explain in more detail below why the sense that the smoke-free policy infringes on liberty will lead to non-compliance. See infra Section II.B.
62 See supra notes 29–31 and accompanying text.
63 See Instituting Smoke-Free Housing, 81 Fed. Reg. 87,430, 87,440 (Dec. 5, 2016) (to be codified at 24 C.F.R. pts. 965–66) (stating in response to comments criticizing the use of eviction that HUD “encourages PHAs to use a graduated enforcement approach that includes written warnings for repeated policy violations before pursuing lease termination or eviction”).
64 Id. at 87,444 (extending the restriction to guests under 24 C.F.R. § 966.4(f)(12)(i)(B)). The HUD policy not only applies to an individual smoking in their own dwelling, but also enables PHAs to engage in LEAs for any smoking that takes place there. See id. This could, in turn, lead to an even more extreme scenario where a resident is evicted because a guest smoked in their home without permission.
65 Evictions by PHAs apply to leaseholders. See id. If, for example, a family of two parents and two children occupied a unit in public housing that had only the father’s name on the lease, eviction would result under the policy even if it were only the mother who smoked. Under those circumstances, all four family members would be evicted, even though the offending smoker was not a leaseholder.
66 Martin & Kerr, supra note 59.
The final twist from the perspective of health welfare is that the difficulty of compliance combined with the possibility of eviction could turn the public health advantages of the smoke-free policy on its head. PHA residents typically have nowhere else to go when evicted, so the smoke-free policy could land entire families on the street. And the public health effects of homelessness dwarf those of smoking. Lack of shelter alone predicts poorer health, less access to health care, and higher risk of mortality. In particular, homelessness has proven to lead to drug addiction, mental illness, and deadly health conditions including pneumonia, hypertension, and HIV infection. People who are homeless also disproportionately tend to be victims of violence, and homeless women suffer a much higher rate of sexual assault. The health costs of smoking are far from trivial, but the direct and immediate mortal threats raised by homelessness eclipse the increased systemic risk of cancer and pulmonary disease due to tobacco use. And especially given recent research that the health costs of secondhand smoke may be overstated, this analysis suggests that the unappreciated health costs of the smoke-free policy may be greater than the much-touted health benefits.

B. Health Liberty

The next principle of the healthism framework to apply to the smoke-free policy is health liberty. HUD’s policy plainly limits personal freedom by prohibiting PHA residents from smoking within their homes. This limitation represents a particularly striking impingement on personal freedom for two reasons.

First, it operates inside the home. Law traditionally regards the home as a bulwark of personal liberty that is safe from state control, and people have

67 See generally Ann Elizabeth Montgomery et al., Homelessness, Unsheltered Status, and Risk Factors for Mortality: Findings from the 100,000 Homes Campaign, 131 PUB. HEALTH REP. 765 (2016) (statistical study showing a causal relationship between sheltered status and significantly worse health outcomes).

68 Lisa Rosenbaum, Liberty Versus Need—Our Struggle to Care for People with Serious Mental Illness, 375 NEW ENG. J. MED. 1490, 1490 (2016).


70 Even in light of these harms to members of marginalized groups, one might respond that the overall benefits of the smoke-free policy remain positive. This may be the case. But the point of distributive justice analysis is to question whether certain groups should bear disproportionate costs in order to generate net social welfare.

71 See, e.g., Jacob Grier, We Used Terrible Science to Justify Smoking Bans, SLATE (Feb. 13, 2017), http://www.slate.com/articles/health_and_science/medical_examiner/2017/02/secondhand_smoke_isn_t_as_bad_as_we_thought.html [https://perma.cc/G2FZ-GJMZ] (citing and discussing this research).
very strong feelings of personal freedom when it comes to their homes. Many
PHA residents—smokers and non-smokers alike—expressed the concern
that the smoke-free policy represented an ominous instance of state
intervention in private affairs within intimate space. The notion that this
opposition may lead residents to refuse to comply with HUD’s policy is not
merely hypothetical. For example, a Cincinnati public housing resident,
eighty-nine-year-old grandmother Beulah Toombs, insisted “I think you can
do whatever you want to in your home.” Toombs continued to smoke until
her PHA kicked her out, even though she had nowhere else to go.

Second, the policy bans an activity in the home that is otherwise legal.
It is uncontroversial that the state may reach into people’s homes to prevent
illegal activities like illicit drug use. By contrast, the smoke-free policy
represents a uniquely paternalistic incursion on PHA residents’ freedom by
prohibiting licit conduct within the private sphere. Restricting residents’
conduct by reference to generally applicable criminal or civil prohibitions
sets some intelligible limit on how far into one’s home the state may reach,
and subjects them to no different standards of conduct than they must comply
with outside the home. But restricting residents’ legal conduct inside the
home sets no such limit, and it raises the possibility that PHAs may regulate
even trivial or intimate areas of residents’ lives.

One may respond, though, that public housing is subsidized, so by
footing the bill, PHAs reserve the right to regulate how their public housing
is used. But residents typically pay some amount of money to live in public
housing, and regardless of receiving subsidies, residents regard their public
housing apartments as homes in the same way that the owner or tenant of a
private dwelling would. And while private landlords may restrict conduct—
including, often, smoking—by tenants, the functional equivalent of the
landlord in the public housing context is the PHA, an agent of the state. State
actors have many more coercive powers at their disposal in enforcing rules,
and for that reason pose a greater threat to liberty and are subject to more
regulation than private actors even in similar contexts.

Smoking and non-smoking PHA residents alike shared the reaction that
the smoke-free policy harms individual liberty by reaching into private
homes. For example, non-smoker Devante Barrett remarked, “I think it is
completely bogus[.] . . . You might as well have us all chained up in bondage

See Martin & Kerr, supra note 59.
89-Year-Old Woman Chooses Eviction Over Quitting Smoking, CBS CLEVELAND (Apr. 21, 2014,
2:01 PM), http://cleveland.cbslocal.com/2014/04/21/89-year-old-ohio-woman-chooses-eviction-over-
quitting-smoking [https://perma.cc/Z7J3-WWYZ].
Id.
A particular concern many residents raised is that the smoke-free policy sets a dangerous precedent for other ways that PHAs could police residents’ conduct inside their homes. Luis Torres complained, “That’s private. You can do everything you want in your apartment. Not what the government say[.] . . . If you get sex with your wife, they’re going to check your sex too? No way.”

Baltimore PHA resident Shebra Johnson expressed the same concern: “What we do in our homes is private, that’s what I think[.] . . . Nobody should tell us what to do or not to do. If they get that passed, then they’ll be telling us other things we can and cannot do in our home.”

**C. Health Equality**

Just as the smoke-free policy challenges the health liberty of smokers living in PHAs, the smoke-free policy also implicates health equality. As of June 2018, smoking hit an all-time low in the United States, with only 14% of adults identifying as smokers. While U.S. law does not regard smokers as a protected class for antidiscrimination purposes, the healthism framework cautions against embracing health-status distinctions that may be partially rooted in bias against the regulated group. HUD’s final rule does not, of course, evince explicit bias toward smokers. But it is possible that the policy was animated by implicit bias against this group. Fully 25% of Americans report having less respect for a person upon learning that they smoke. These attitudes often translate into implicit bias in harmful ways, such as in health professionals’ decisions to spend more treatment resources on non-smokers because they perceive smokers to have been responsible for their own health problems.

This evidence suggests a very real possibility that the smoke-free policy was animated, or at least facilitated, by anti-smoking implicit bias, which would render it suspect as a matter of health equality. And independently, HUD’s policy stigmatizes smokers by forcing them outside...
their living spaces, and even their residential buildings, in order to engage in an activity that is increasingly socially marginalized. This policy renders their conduct both isolated and visible, and explicitly expresses that it is so undesirable that it cannot occur even near their homes.

D. Health Justice

Viewing the smoke-free policy through the lens of the healthism framework reveals that it poses unappreciated problems in terms of health welfare, health liberty, and health equality. The final perspective—health justice—draws on each of these notions to ask whether a health status distinction creates distributional problems as well. In particular, when a policy burdens historically disadvantaged or otherwise vulnerable groups, the policy raises distinct ethical concerns with respect to distributive justice.

First, certain historically disadvantaged groups are overrepresented among smokers.\footnote{As a background fact, as of 2016, about 15% of all U.S. adults (eighteen years or older) smoked regularly. CDC. FOR DISEASE CONTROL & PREVENTION, CURRENT CIGARETTE SMOKING AMONG ADULTS IN THE UNITED STATES (2016), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm [https://perma.cc/Z3PG-PWKB].} Not all racial and ethnic groups smoke at the same rate. Two racial groups in particular smoke at a significantly higher rate than the general U.S. population: Native Americans and self-identified biracial people.\footnote{These are the only two racial or ethnic groups that smoke at a greater than 20% rate. See id. (reporting that 32% of Native Americans and 25% of biracial people smoke).} Of particular concern from an equality perspective, these groups are both less numerous and less visible, and therefore particularly disadvantaged at making their voices heard in the democratic process.\footnote{Native Americans in particular are vulnerable to discrimination because they comprise such a small percentage of the population and tend to live in concentrated, isolated places away from major population centers. See Matt Saccaro, This Is What Modern Day Discrimination Against Native Americans Looks Like, Mic (Oct. 20, 2014), https://mic.com/articles/101804/this-is-what-modern-day-discrimination-against-native-americans-looks-like#.lyJ2wk1HT [https://perma.cc/45L6-ZRT9] (discussing unique discriminatory burdens faced by Native American populations).} Other vulnerable groups also smoke at higher rates and are therefore disproportionately burdened by the smoking ban. Over 25% percent of Americans with disabilities smoke, and 21.6% of veterans of the U.S. Armed
Forces smoke. People with mental health issues smoke at the highest rate of all, 33%.85

Second, this policy does not affect all smokers, but only those who live in public housing. It exclusively affects smokers at or around the poverty level, another group that smokes at a disproportionately high rate. Those living below the poverty level smoke at a rate of 25%.86 And while those affected by the HUD regulations could theoretically avoid this problem by quitting smoking, this solution is hardly as simple as one may assume. As noted, physiological, psychological, and socioeconomic barriers may stand in the way of smoking cessation, especially for those affected by the HUD smoke-free policy who lack the necessary economic resources to successfully quit.87

The poor and near-poor smokers who reside in PHAs are at a unique disadvantage in relation to their wealthier counterparts. A wealthy smoker can simply buy a house and smoke there as much as they want, even as that activity becomes increasingly socially marginal and even illegal in many public places. But poorer smokers who reside in PHAs have no such recourse, and must run the gauntlet of compliance, quitting, or eviction for engaging in an entirely legal activity. And while smokers themselves may not amount to a historically disadvantaged group, we have also seen that other traditionally disadvantaged groups are overrepresented among the smoking population. This means that the burden of HUD’s policy falls on the shoulders of Native American and biracial people as well as veterans, the

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87 See supra Section II.A.
elderly, and people with disabilities. And particularly because the result of the smoke-free policy is often eviction, the net effect of the HUD policy may be to inflict homelessness disproportionately on some of society’s most traditionally disadvantaged and vulnerable groups. This outcome frustrates, rather than advances, the cause of health justice.

To sum up, HUD’s smoke-free housing policy as written violates all four tenets of healthism. We therefore conclude that it unfairly discriminates on the basis of health status.

III. SALVAGING THE SMOKE-FREE POLICY

In concluding that HUD’s smoke-free policy is healthist, the question remains as to what the best response to these objections would be. One option would be to rescind the regulations completely. However, simply eliminating the policy would forfeit the significant upsides of improved health and reduced costs.

Some have suggested that the best way forward would be to enforce the policy but to remove eviction as an enforcement mechanism in favor of fines. This option would ameliorate the worst impacts of the rule by reducing the risk that violations will lead to homelessness for smokers and their families. But even then, the policy may not have much impact. Fines for smoking could be unenforceable, since many PHA residents live paycheck-to-paycheck and simply cannot pay any meaningful amount. And even for those PHA residents who can afford them, fines may backfire because residents may regard them not as a deterrent, but merely as a price on smoking that they can factor into their rent payments.

A less invasive option is to post signs around buildings to remind residents of the policy and of the serious health risks of smoking to themselves and others. But there is little evidence that these kinds of low-level interventions work, especially for a persistent addictive activity like

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88 A judicial approach could arrive at roughly the same outcome. The Supreme Court’s 2015 decision in Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. upheld a violation of the Fair Housing Act (FHA) under disparate impact theory, so even a facially neutral housing policy that disproportionately burdens FHA-protected groups could be construed as invalid. 135 S. Ct. 2507, 2525 (2015) (“The Court holds that disparate-impact claims are cognizable under the Fair Housing Act . . . .”). Several parties who objected to the smoke-free policy raised this concern. Instituting Smoke-Free Housing, 81 Fed. Reg. 87,430, 87,436 (Dec. 5, 2016) (to be codified at 24 C.F.R. pts. 965–66) (“[I]f families who are evicted as a result of this rule tend to fall into a protected class, there might be a disparate impact claim against the PHA or HUD.”).

89 Instituting Smoke-Free Housing, 81 Fed. Reg. at 87,436.

90 One famous study found that when parents were fined for picking up their children late from daycare, late pickups increased because parents regarded the fine as a price they were willing to pay in order to have more time to pick up their children. Uri Gneezy & Aldo Rustichini, A Fine Is a Price, 29 J. LEGAL STUD. 1, 14 (2000).
smoking. Other LEAs like written warnings and in-person admonitions from PHA officials are similarly unlikely to have much effect other than increasing resentment and generating stigma.

Smoking is a deeply ingrained habit, the reduction of which calls for more sophisticated strategies than eviction, fines, or finger-wagging signage. In this Part, we offer ways that HUD could enforce the smoke-free policy without engaging in healthism. The first seeks to facilitate compliance by helping individuals overcome barriers, both internal and external, by partnering with residents to encourage compliance. The second leverages insights from behavioral psychology that could improve compliance.

A. Partnering with Residents for Compliance

The problem with an enforcement strategy focused only on the coercive power of LEAs is that it does not fully account for the stickiness of smoking as a behavior. As noted, some 85% of Americans who still smoke have tried to quit. Given the inelasticity of this behavior, effective enforcement will need to provide ways to facilitate residents’ compliance, not just punishment for failure to comply.

One way to facilitate compliance is to reduce external barriers to compliance with HUD’s smoke-free policy. For example, PHAs could allow those with limited mobility—the elderly or people with disabilities—to live in units on the first floor and closer to entrances to make it easier for them to comply with the mandated twenty-five-foot radius. Similarly, PHAs could provide heated, well-lit smoking shelters just outside the required twenty-five-foot radius. Smoking shelters would give smokers—especially those with physical impairments—a comfortable place to smoke. Assuring that the shelter is well-lit would also provide some degree of security from crime, as would monitoring it with conspicuous surveillance cameras and security personnel. These strategies would increase the likelihood of compliance without jeopardizing the health and safety of smokers.

Another strategy would be to reduce the internal barriers to compliance with HUD’s smoke-free policy. For example, there is some evidence that quit lines, which provide smokers with a person to talk to when tempted to

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91 In fact, what evidence there is suggests that such warnings may increase smoking. One study found that dire warnings about the health effects of tobacco caused some smokers to be more likely to smoke because the practice calmed them when confronted by fear for their own mortality. Jochim Hansen et al., *When the Death Makes You Smoke: A Terror Management Perspective on the Effectiveness of Cigarette On-Pack Warnings*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 226, 228 (2010).

92 See Newport, *supra* note 58.
smoke, are effective in helping smokers resist temptation.93 PHAs could provide a dedicated quit line for their residents who are trying to stop or reduce smoking, which could be publicized around the building to create a widespread understanding of their availability. Cessation programs that lead smokers through a curriculum designed to reduce tobacco use can also be helpful. PHAs could provide such programs to interested residents, which would have particular promise because the programs could be conveniently located in the participants’ residence and could allow participants more easily to support each other’s efforts to quit.94

These interventions would encourage residents of public housing to quit smoking without offending healthism’s four guiding principles. Removing external and internal barriers to compliance increases the likelihood the policy will have the desired welfare impacts. With respect to health liberty, although public housing residents are not able to smoke unencumbered, these suggestions give smokers more choices regarding how to react to the smoke-free policy. In terms of health equality, the policy itself still targets smokers. However, the smoking shelters and cessation programs are theoretically available to all and do not single out residents who smoke. Moreover, these strategies treat smokers with dignity, avoiding animus and stigma. Finally, by providing additional resources and support, these strategies avoid the distributional concerns associated with health justice.

B. Using Behavioral Psychology for Cessation

In addition to partnering with residents for compliance, behavioral psychology techniques could also provide effective enforcement mechanisms as alternatives to the LEAs proposed by the smoke-free policy. Although attempts to simply pay people not to smoke have not proved effective,95 there is evidence that framing payments as rewards which vest depending on meeting a condition can have more success in changing

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94 HUD acknowledged the importance of these measures, but declined to provide any support for either in its final rule, noting merely that Medicaid provides some support for smoking cessation. Instituting Smoke-Free Housing, 81 Fed. Reg. at 87,435.
95 One study found that most smokers promised $100 not to smoke for thirty days were able to abstain for the month, but typically started smoking again soon after. See Kevin G. Volpp et al., A Randomized Controlled Trial of Financial Incentives for Smoking Cessation, 15 CANCER EPIDEMIOLOGY, BIOMARKERS, & PREVENTION 12, 15 (2006). But see Kevin G. Volpp et al., A Randomized, Controlled Trial of Financial Incentives for Smoking Cessation, 360 NEW ENG. J. MED. 699, 699 (2009) (finding an increased rate of smoking cessation when smokers were paid not to smoke for nine to twelve months).
behavior. This option in the public housing context would thus be to offer all residents in a given PHA a cash reward at the end of each lease term if they had abstained from smoking throughout the term. This would have several upsides compared to traditional approaches. First, it would apply broadly to all residents, rather than singling out and stigmatizing smokers. Second, it would frame non-smoking as an achievement worthy of a prize rather than casting smoking as an undesirable behavior worthy of punishment, thereby operating as a more effective incentive.

Another option would be to require smoking PHA residents to put the amount of money they would normally spend toward tobacco products into a bank account earning modest interest. If after the lease term they had not been cited for violating the smoke-free policy, they would receive the money back with interest. Otherwise, they would forfeit the amount. To make the incentive even greater, the program could require them to name a political or social cause they do not agree with, and then donate the money to that cause if they violated the policy during the lease term. This strategy is promising for two reasons. First, it avoids the distributional concerns that have been raised about some behavioral psychology-inspired policy approaches. Such a plan would cost smoking PHA residents no more than they would otherwise spend on tobacco products, and in the event they succeeded in complying, it would actually provide them with a reasonable return on that

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96 But see Uri Gneezy et al., When and Why Incentives (Don’t) Work to Modify Behavior, 25 J. ECON. PERSP. 191, 204 (2011) (noting that studies that measure the long-term effects of reward programs to incentivize smoking cessation yield disappointing results).

97 Verifying this would not, of course, be costless. A low-cost but less effective approach would be to give the reward to all PHA residents who had not been cited under the policy during the lease term. A higher cost but more effective approach would be to test residents regularly to see if they had been smoking during the lease term.

98 Such a program is uniquely feasible in the lease setting. Tenants often give landlords money up front to hold in escrow in the form of a security deposit. This option would require only asking for an amount in addition to the security deposit as a precommitment device to discourage smoking.

99 This is the strategy encouraged by the website stickk.com, FAQ-Commitment Contracts-Charities, https://www.stickk.com/faq/charities/Commitment+Contracts [https://perma.cc/ZK53-BGTZ], and has much evidence to support it. See, e.g., Scott D. Halpern et al., Commitment Contracts as a Way to Health, 344 BMJ e522 (Jan. 30, 2012) (“[T]here is great conceptual strength to the idea that commitment contracts can provide a way to health for the millions of people struggling to modify health behaviours . . . .”); Todd Rogers et al., Commitment Devices: Using Initiatives to Change Behavior, 311 J. AM. MED. ASS’N 2065, 2066 (2014) (“Patients are more successful at achieving their health goals when they have access to commitment devices . . . .”); see also Dan Ariely & Klaus Wertenbroch, Procrastination, Deadlines, and Performance: Self-Control by Precommitment, 13 PSYCHOL. SCI. 219, 224 (2002) (finding that procrastinators respond better to externally imposed deadlines than self-imposed ones).

amount. Second, there is evidence that this approach is effective against the notoriously inelastic activity of smoking.101

These incentives are also desirable from a healthism perspective. They both increase the likelihood of compliance and remove the possibility of eviction, raising the chance that the smoke-free policy will have its desired welfare impacts. Additionally, these options are more desirable in terms of health liberty. Instead of outright punishing residents with LEAs in ways that decrease their autonomy and limit their choices, these enforcement mechanisms give residents who comply access to additional options and resources to choose from. Moreover, the cash reward is particularly appealing from a health equality perspective, as it would apply universally to all residents. That said, the savings plan targets smokers. However, healthism as a theory is value pluralist, so simply implicating one of the four guiding principles does not render a given intervention healthist. Finally, these approaches steer clear of the distributive justice concerns associated with smoking and could actually have positive distributional effects by reallocating some resources toward smokers.

In Part II, we demonstrated that the HUD smoke-free policy is healthist on its face. Yet wholesale abandonment of the new rule would throw the baby out with the bathwater. These alternatives to the traditional LEAs in the policy’s current form would allow PHAs to reap the benefits of the smoke-free policy without discriminating against their smoking residents.

CONCLUSION

Until the recent legal challenge, HUD’s smoke-free policy has been almost above reproach. It received widespread support when it was developed during the Obama Administration and continues to wend its way toward full implementation under President Trump. This Essay questions the widespread acceptance of the smoke-free policy by analyzing it through the lens of healthism. Applying the notion of healthism raises concerns about the policy along four different metrics: health welfare, health liberty, health equality, and health justice. The policy is problematic across all four of these metrics. These objections should give PHAs pause before enforcing the policy with penalties ranging from fines to eviction. However, we do not argue that HUD should simply abandon the smoke-free policy. On the contrary, we implore PHAs to adopt a more creative and nuanced approach to enforcement, one that takes into account residents’ dignity and the

uniquely persistent character of smoking. While the HUD smoke-free policy may be healthist on its face, PHAs are capable of enforcing the rule in a positive, non-discriminatory way to achieve the laudable goal of decreasing smoking in public housing.
Intimate Discrimination: The State’s Role in the Accidents of Sex and Love

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INTIMATE DISCRIMINATION: THE STATE’S ROLE IN THE ACCIDENTS OF SEX AND LOVE

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TABLE OF CONTENTS

INTRODUCTION .......................................................................................................................... 1309
I. THREE NORMS INSCRIBED IN LAW AND CULTURE ............................................................. 1315
   A. Law’s Express Role ........................................................................................................ 1315
   B. Homogamy: Race ........................................................................................................ 1318
   C. Desexualization: Disability ........................................................................................ 1325
   D. Heterogamy: Sex ......................................................................................................... 1330
   E. Intimate Norms Beyond the Intimate Sphere .............................................................. 1334
II. ON INDIVIDUAL DIFFERENTIATION .................................................................................. 1339
   A. The Individual Lover’s Discourse ................................................................................ 1340
   B. Abandoning the Individual Bad Actor ........................................................................ 1356
   C. Functionalism As an Individual Ethical Inquiry .......................................................... 1357
III. ON STRUCTURAL DISCRIMINATION ................................................................................. 1366
   A. The State’s Role: Of Accidents and Calculations ........................................................ 1366
   B. Why Intimate Discrimination Matters ........................................................................ 1374
IV. THE ROLES THE STATE SHOULD PLAY ............................................................................ 1379
   A. What Not To Do: Preliminary Ideas, Mostly Ill-Advised ........................................... 1382
   B. Toolkit: A Range of Plausible Structural Interventions ............................................. 1385
   C. Sex: Lifting Explicit Restrictions and Eliminating Penalties .................................... 1388
   D. Disability: Removing Barriers to Entry and Encouraging Intimacy .......................... 1390
   E. Race: Unburdening Existing Relationships ............................................................... 1396
CONCLUSION ............................................................................................................................ 1400
INTIMATE DISCRIMINATION: THE STATE’S ROLE IN THE ACCIDENTS OF SEX AND LOVE

Elizabeth F. Emens*

This is a challenging moment for the law of discrimination. The state’s role in discrimination has largely shifted from requiring discrimination — through official policies such as segregation — to prohibiting discrimination — through federal laws covering areas such as employment, housing, education, and public accommodations. Yet the problem of discrimination persists, often in forms that are hard to regulate or even to recognize.

At this challenging moment, the intimate domain presents a vital terrain for study in two main ways. First, conceptually, studying the intimate domain permits new insights into discrimination and the law’s identity categories, because people are more willing to be explicit about identity-based preferences in this domain than in others (such as employment). Second, practically, examining the intimate domain reveals the ways that relationships in this sphere affect hierarchies and opportunities in more public domains, and the role the state plays in those relationships.

This Article therefore examines intimate discrimination, focusing on race, sex, and disability, and identifies key norms for each category. For race, the norm is homogamy, or pairing with one’s own type; for sex, by contrast, the norm is heterogamy, pairing outside one’s type; and for disability, the norm is desexualization, rather than pairing with one group or another. The Article does not assume that intimate discrimination is necessarily bad. On the contrary, examining the nuanced landscape of discrimination in this realm is one of the Article’s main purposes. Ultimately, the Article concludes that,

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at the level of individual interaction, intimate differentiation based on these identity traits can be good, bad, or neutral, depending on context. For this and other reasons, legal regulation targeting individual differentiation on these bases would be woefully misguided.

Nonetheless, the state plays important roles in intimate discrimination at a structural level. By creating the infrastructure of society, the state shapes the accidents of who meets whom and how. In addition, the state plays a role in the hierarchy of intimate opportunities by shaping social capital and relative advantages. The state therefore should reform its laws and policies to attend to its structural role in intimate discrimination. For sex, the most obvious next step is to cease to restrict marriage according to sex. For disability, the state should help to encourage opportunities for intimate affiliation by, among other things, attending to the architecture of intimacy, by which I mean the ways that structures of accommodation operate to help or hinder not only access, but also closeness. For race, the state’s goal should not be to encourage race mixing, but rather to lift burdens on existing relationships, such as residential segregation. Recognizing how intimate affiliations affect opportunities and status hierarchies, both in the intimate sphere and beyond, points us toward new ways to intervene in the persistent problem of discrimination.

INTRODUCTION

There is a separation, as it were, between the bedroom and the boardroom. You don’t want the government or its laws meddling in your private life, what you do behind closed doors is your own personal matter, etc. But, of course, this does not mean that there isn’t a relationship between whom I desire and whom I hire, or between whom I want my children to desire and whom I hire.

— David Mura

The problem of combating discrimination faces a difficult juncture. Law has largely shifted from permitting or requiring discrimination (think segregated schools) to prohibiting discrimination (think employment discrimination law). At the same time, law has pushed discrimination underground. Most institutional decisionmakers — public and private — no longer say overtly discriminatory things. Discrimination is therefore harder to find and to regulate, because it has become less acceptable, legally and socially, to speak its language. Yet some groups in our society, such as people of color and disabled people, are still subject to systematic disadvantage. As many scholars have noted, this combination presents a difficult challenge for law and policies that address discrimination.

This challenge requires us to look into less obvious domains to understand the phenomenon of discrimination and to evaluate the proper

role of the state in its elimination. One such domain is the intimate. Because we do not police the intimate domain for discrimination, people are more explicit here about the distinctions they draw along lines of race, disability, and sex. By looking at our attitudes toward race, disability, and sex in the intimate realm, we can therefore learn about the condition and contours of our attitudes toward these categories more generally.

Intimate discrimination also has practical significance. As David Mura elegantly portrays in the epigraph, to speak of intimacy and discrimination together is to join two spheres that we tend to, and like to, consider distinct. Yet the intimate realm is central to our lives; families and other close relationships structure our communities and our selves. Intimacy is considered by many to be a valuable social good, so exclusion from intimacy has welfare consequences. Moreover, intimate affiliations and norms in turn affect our interactions in other domains, such as employment, as Mura suggests. Marriages involve not only private sharing, but also public networking. The intimate is thus a vital area for study as we confront the challenge of understanding and eliminating discrimination.

Discrimination in intimate relationships can of course occur along many axes, from class to geography to religion to age to musicality. This project is focused on a particular subset of those categories that constitute legally protected classifications when the domain shifts from the bedroom to the workplace: disability and race, and, to a lesser extent, sex and gender.2

Even if one accepts that people discriminate in their intimate relationships, one might wonder what this sort of discrimination has to do with law. In a way, our intimate exclusions might be understood simply as a form of discrimination that the law does not recognize. Unlike prospective employees, prospective lovers cannot sue if you refuse them based on race or sex or disability. We might conclude that there is nothing unusual about law’s nonintervention in intimate discrimination — in this discrimination in contact, rather than in contract, to use Glenn Loury’s terms.3 Perhaps intimate discrimination simply involves a private domain with no connection to law.

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2 The Article uses the terms sex and gender to denote biology (maleness and femaleness) and culture (masculinity and femininity) respectively, in keeping with most scholarship in this area, even though they may not be so separable in practice. Sex, rather confusingly, also refers to sexual activity; I therefore try to make clear which I mean when.

3 Contrasting it with “discrimination in contract,” Loury says that “discrimination in contact” refers to the unequal treatment of persons on the basis of race in the associations and relationships that are formed among individuals in social life, including the choice of social intimates, neighbors, friends, heroes, and villains. It involves discrimination in the informal, private spheres of life.” GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 95–96 (2002) (footnote omitted).
Yet law goes further than not permitting suits for intimate discrimination: law sometimes actually requires intimate discrimination. In addition to the most obvious historical example — antimiscegenation laws — the law has required intimate discrimination with regard to sex and disability. Moreover, even aside from its express requirements, law shapes whom we meet and how. It determines the accidents of sex and love, because it controls the infrastructure of our lives — our neighborhoods, schools, workplaces, public spaces, and more — in ways that affect affiliations along the lines of race, disability, and sex. The state also affects rational calculations in the dating market through social policies that contribute to social hierarchies and wealth distribution.

Does this mean the state should treat intimate discrimination the same way it treats employment discrimination? The issue will be discussed in greater depth in the Article, but the short answer is no. Intimate discrimination should remain a litigation-free zone. But this does not mean it should be, or could be, a law-free zone. On the contrary, law should take account of its role in intimate discrimination at a structural level and work to eliminate burdens and biases that currently shape who has access to intimate relationships and on what terms.

Studying intimate discrimination thus serves two purposes, one conceptual and one regulatory. Conceptually, this inquiry limns key categories for the antidiscrimination project — race, disability, and sex — to help us understand better what those categories mean and how they operate in our society. And practically, studying intimate discrimination allows us to make conscious choices about how our regulatory interventions affect the fact and significance of intimate discrimination.

Before beginning, I should note that in this Article I use the term discrimination advisedly. To discriminate means, among other things, to differentiate. Beyond this neutral denotation, the term’s connotations vary from the pejorative, in the sense of invidious stereotyping (discriminatory hiring policies), to the laudatory, in the sense of possessing taste or appreciation of quality (a discriminating palate). In this Article, I assume no negative connotation to the term “intimate

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discrimination”; rather, a key aim of the project is to understand whether any such connotation, negative or positive, is warranted. Moreover, as a term of art in the field of antidiscrimination law, “discrimination” refers both to differentiation at an individual level and to differential effects of structural features of institutions, both typically with a pejorative connotation. That is, in the language of doctrine, discrimination includes both disparate treatment and disparate impact. Similarly, the term discrimination in this Article encompasses both individual differentiation and structural impact. The Article will progress from examining individual differentiation and rejecting the idea of legal intervention targeting individual choice to focusing on systemic impact and crafting appropriate structural interventions.

By the term intimate, I mean to denote sexual, romantic, or marital relations. Leaving out friendship and other ostensibly nonsexual relations opens me to the critique that has been lodged against work that privileges erotic affiliation. But that critique, though powerful as a normative matter, also implicitly highlights, as a descriptive matter, the significant meaning law and culture attach to the erotic realm, as distinct from other realms; whether ascribed or inherent, this distinction is undoubtedly a meaningful one in present day and time. Thus, discrimination means something different in the realm of erotic intimacy. In addition, marriage, dating, and sex are distinct, sometimes nonoverlapping, forms of intimacy; yet because identity-related norms of discrimination often traverse the boundaries between these intimate forms, I discuss them together, attending at times to points of departure among them.

A few caveats are in order. There are complicated subjects and types of intimate relations that this Article does not systematically address. Two in particular should be noted here. First, the question of capacity to consent in the context of mental disability raises important and difficult questions that this Article discusses only briefly — questions about the tension between autonomy and a right to sexual expression on the one hand, and concerns about coercion and abuse on

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6 See sources cited infra notes 232, 432.
7 Intimacy is a far more complicated subject than my instrumental definition of intimate here allows. For instance, one can speak of sex or marriage without intimacy, and intimacy without a sexual component. For recent work elaborating some of intimacy’s complexities, see, for example, INTIMACY (Lauren Berlant ed. 2000); LEO BERSANI & ADAM PHILLIPS, INTIMACIES (2008); and ELIZABETH BERNSTEIN, TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX (2007).
8 See, for example, Laura A. Rosenbury & Jennifer E. Rothman, Beyond Intimacy 2 (Sept. 8, 2008) (unpublished manuscript, on file with the Harvard Law School Library); and Brenda Cosman, Beyond Marriage, in MARY LYNDON SHANLEY, JUST MARRIAGE 93 (Joshua Cohen & Deborah Chasman eds., 2004).
the other.\footnote{I discuss the problem of abuse as it relates to the norm of desexualization and the need for legal reform, see infra section IV.D.1, p. 1390, but for an in-depth discussion of these issues, readers should see, for example, Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, and Martha A. Field & Valerie A. Sanchez, *Equal Treatment for People with Mental Retardation* (1999).} Second, the Article generally does not discuss vertical, as opposed to horizontal, relationships. Adoption policy, for instance, raises intriguing and important issues at the intersection of discrimination and the intimate. Though I allude to the issues of race surrounding adoption, I do not purport to fold this difficult issue into an already expansive discussion of horizontal intimate relationships. Several scholars have written thoughtful accounts of the issue, and the extent of their disagreement helps to show the challenges it presents.\footnote{See, e.g., Elizabeth Bartholet, *Nobody’s Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (1999); Randall Kennedy, *Interracial Intimacies* 386–479 (2003); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998); Elizabeth Bartholet, *Correspondence, Private Race Preferences in Family Formation*, 107 YALE L.J. 2351 (1998). In the context of disability, the topic of vertical relationships also raises important issues such as selective abortion — see, for example, Adrienne Asch, *Why I Haven’t Changed My Mind About Prenatal Diagnosis: Reflections and Refinements*, in *Prenatal Testing and Disability Rights* 234 (Erik Parens & Adrienne Asch eds., 2000) — and the reproductive autonomy and decisionmaking of people with disabilities, especially mental disabilities — see, for example, Field & Sanchez, supra note 9.} Finaly, this Article focuses on the categories of race, sex, and disability, rather than other categories, many of which are surely important to intimate decisions. This selection is not meant to imply that these three categories are necessarily the most important axes of intimate decisionmaking.\footnote{Were this an argument about the most significant determinants of intimate choices, there would be other key contenders, such as religion, class, and personal appearance. These other categories warrant further inquiry as they pertain to intimate choices, but do not feature prominently in this discussion of intimate discrimination as a lens through which to examine antidiscrimination laws and norms. Religion is commonly understood in this country, from constitutional rights to cultural values, as an affirmative basis for affiliation, in a way that distinguishes it from other categories. Class and personal appearance per se, by contrast, are hardly recognized by law, and so do not offer the same opportunities for thinking about the relation between the operation of the category in highly regulated domains such as employment and the relatively less regulated domain of the intimate.} Rather, these categories are the Article’s focus because they are salient in antidiscrimination law and they provide rich material for considering discrimination in the intimate sphere relative to one another. Race is arguably our primary category of antidiscrimination analysis under U.S. law, making it important in its own right and as a comparator for other categories. By contrast, disability has been relatively understudied in antidiscrimination law and theory. The role of sex in our intimate choices is more obvious, and the state’s ongoing role in regulating these choices is also more obvious, so I say less about it. But sex serves a useful conversation-forcing function,
because it tends to frustrate the generalized assertion that desire in its ideal form would operate independently of “superficial” identity traits and instead would track something “deeper” in the self. Most people would, of course, not make the same assertion about the role of sex in their desire. And so including sex forces the recognition that some of these traits make a difference for many or most of us, and not necessarily in ways that are readily described as morally problematic.  

The Article has four Parts. The first Part describes how the law has expressly required intimate discrimination, then sets out three key norms that characterize our social regulation in this area: for race, homogamy (pairing with one’s own group); for sex, heterogamy (pairing with the other); and for disability, desexualization (exclusion from the sexual realm). This Part concludes by discussing how these intimate norms affect the domain of employment and underpin problematic practices of employment discrimination. Part II maps the terrain of individual intimate discrimination, that is, of one person differentiating among prospective lovers on the basis of race, sex, or disability. The discussion considers the meanings that such differentiation can have, whether positive, negative, or neutral, and ultimately concludes that the state should not intervene in this realm at the individual level. Nonetheless, society would be better off if individuals engaged in an ethical self-interrogation about intimate discrimination, framed by the legal concept of functionalism, as explained herein.

Part III outlines the significance of intimate discrimination at a structural level and describes how law and policy create hierarchies of subordination both within the intimate realm and beyond it. Specifically, the state shapes who meets whom and how, and also frames the conditions within which individuals evaluate each other as prospective partners, whether for sex or for love. Thus, whether we think of love and relationships romantically or rationally, the state plays a meaningful role in our intimate lives, affecting our ostensibly autonomous choices as well as our social hierarchies. This Part concludes with a discussion of why intimate discrimination matters, including its effects on the problem of discrimination writ large.

Part IV outlines what role the state should play in intimate discrimination. After rejecting interventions that target individual decisions in the intimate realm, the discussion turns to key steps the state should take with regard to each identity category. For sex, the state’s next steps are obvious: the state should not expressly regulate who can

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But see Ian Ayres & Jennifer Gerarda Brown, Straightforward: How To Mobilize Heterosexual Support For Gay Rights 30–37 (2005) (arguing that discriminating on the basis of sex in one’s dating choices is immoral, at least where it lacks an antisubordination purpose, and that it is akin to racial discrimination in dating). I return to Ayres and Brown’s argument. See infra section II.B, pp. 1356–57.
marry whom on the basis of sex. For disability, the state should reduce barriers to entry to intimate relationships for people with disabilities, including reframing accessibility projects to take into account what I term the architecture of intimacy. And for race, legal interventions should lift burdens on existing interracial relationships, an approach that would challenge social policies relating to housing discrimination and residential segregation.

I. THREE NORMS INSCRIBED IN LAW AND CULTURE

A. Law’s Express Role

U.S. law has historically required rather than prohibited discrimination in the intimate realm — most obviously, by saying certain people cannot pair with certain other people. Antimiscegenation laws prevented sex and marriage across race in this country until, in *McLaughlin v. Florida* and *Loving v. Virginia*, the Supreme Court abruptly completed the gradual process of state-by-state elimination of such laws. In addition, until *Lawrence v. Texas*, laws prohibited, on their face or in differential prosecution, same-sex sex. Restrictions on who pairs with whom continue in the different-sex requirement of marriage under federal law and the laws of every state but Massachusetts and Connecticut.

Law discriminates not just about who can pair with whom, but about who can have sex or marry at all. Here, disability becomes im-

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13 A comparative study would be very interesting, as there are various countries that have also had express restrictions (such as South Africa) and other countries with no such history of race-based requirements for marriage (such as New Zealand). See, e.g., *SOUTH AFRICA: A COUNTRY STUDY 54–58* (Rita M. Byrnes ed., 3d ed. 1997); Victoria Freeman, *Attitudes Toward “Miscegenation” in Canada, the United States, New Zealand, and Australia, 1860–1914*, 16 NATIVE STUD. REV. 41, 54 (2005). This particular Article, however, looks only at U.S. law.

14 *379 U.S. 184* (1964) (declaring unconstitutional Florida’s law banning interracial cohabitation but not same-race cohabitation).

15 *388 U.S. 1* (1967) (declaring unconstitutional Virginia’s ban on interracial marriage).


18 See, e.g., *Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419* (1996) (codified in scattered sections of 28 U.S.C. and 1 U.S.C.); Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407 (Conn. 2008); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003). The status of marriage is currently in flux in California. After the California Supreme Court ruled that the state constitution required that same-sex couples be allowed to marry, *see In re Marriage Cases, 183 P.3d 384* (Cal. 2008), the constitution was amended by referendum to ban same-sex marriage, *CAL. CONST. art. I, § 7.5* (codifying Proposition 8, passed Nov. 4, 2008). The (state) constitutionality of this amendment was before the California Supreme Court at the time this Article went to press.
important. Those below a certain mental capacity cannot legally consent to sexual or marital relations in many states. Eugenic sterilization, upheld by the Supreme Court in *Buck v. Bell* with the infamous conclusion that “[t]hree generations of imbeciles are enough,” has operated alongside institutionalization to restrict the intimate possibilities of people with mental disabilities, casting them as both vulnerable victims and sexual predators. The history of eugenic restrictions on marriage has also prohibited people with some physical as well as mental disabilities from marrying.

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19 Age is also relevant here, under the rubric of restrictions on who can have sex or marry at all (although most people age out of such restrictions), *Moe v. Dinkins*, 533 F. Supp. 623 (S.D.N.Y. 1981), as well as under the rubric of restrictions on which individuals can marry which particular others (think statutory rape laws). Age raises challenging issues of its own, which, though interesting, are not a focus of this Article.

20 See, e.g., Denno, supra note 9, at 397–434 (cataloguing the relevant laws); sources cited infra note 24 (quoting examples).

21 274 U.S. 200 (1927).

22 *Id.* at 207; see also, e.g., N.C. GEN. STAT. § 35-36 (repealed 2003) (providing for involuntary sterilization of “mentally retarded” persons).

23 See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 463 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (“Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the ‘basic civil rights of man’ — the right to marry and procreate. Marriages of the retarded were made, and in some States continue to be, not only voidable but also often a criminal offense. The purpose of such limitations, which frequently applied only to women of child-bearing age, was unabashedly eugenic: to prevent the retarded from propagating. To assure this end, 29 States enacted compulsory eugenic sterilization laws between 1907 and 1931.” (footnotes and citation omitted)); FIELD & SANCHEZ, supra note 9, at 55–92; Denno, supra note 9; Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860–1920*, 23 LAW & SOC. INQUIRY 541 (1998); Michael A. Rembis, Disabling Sex (Aug. 2008) (unpublished manuscript, on file with the Harvard Law School Library). *Skinner v. Oklahoma*, 316 U.S. 535 (1942), is sometimes thought to have overruled *Buck v. Bell*, but *Skinner* was about sterilization of criminals, and thus did not directly overrule the eugenic agenda of sterilization of people with mental disabilities. *Skinner* created legal uncertainty, however, and anything associated with the term eugenics — at least at the level of rhetoric — fell out of favor after World War II. On the rise and fall of the discourse of eugenics as it has shaped the history of miscegenation, see RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 81–99 (2001).

24 For some laws that have been repealed or struck down, see, for example, CONN. GEN. STAT. § 1354 (1958) (repealed 1969) (“Every man and woman, either of whom is epileptic, imbecile, or feeble-minded, who shall intermarry, or live together as husband and wife, when the woman is under forty-five years of age, shall be imprisoned not more than three years.”); UTAH CODE ANN. § 30-1-2(1) (1980) (amended 1987) (prohibiting and voiding any marriage with “a person afflicted with acquired immune deficiency syndrome”), invalidated by T.E.P. v. Leavitt, 840 F. Supp. 110 (D. Utah 1993). For some laws remaining on the books, see, for example, D.C. CODE ANN. § 46-403 (LexisNexis 2001) (declaring as illegal and void any “marriage of an idiot or of a person adjudged to be a lunatic”); 23 PA. CONS. STAT. ANN. § 1304(c) (West 2001) (“No marriage license may be issued if either of the applicants for a license is weak minded, insane, of unsound mind or is under guardianship as a person of unsound mind unless the court decides that it is for the best interest of the applicant and the general public to issue the license and authorizes the issuance of the license.”) (repealed as to “epilepsy”). For further discussion, see Denno, supra note 9; Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and...*
These explicit legal interventions in intimate discrimination suggest three types of norms. First, in the context of race, law inscribed a norm of *homogamy* (pairing with members of the same group\(^{25}\)): particularly across the black/white color line,\(^{26}\) people could only legally partner — in sex or marriage — with people of their own race.

Second, the norm surrounding sex/gender runs directly contrary to that surrounding race. Rather than requiring pairs of the same type, the norm surrounding sex/gender requires pairing with a different type. In other words, the norm is of *heterogamy*. And unlike the race norm of homogamy, which has been purged from (explicit) law,\(^{27}\) the sex norm of heterogamy remains inscribed in law.\(^{28}\)

Third, while law and norms play matchmaker when it comes to sex and race, the norm surrounding disability has typically been one of utter isolation, or *desexualization*: by express legal mandate, some people with disabilities have been excluded from the realm of sex and marriage altogether.\(^{29}\) Some of these laws are consigned to history, while others remain on the books.\(^{30}\)

The next three sections will elaborate the extralegal life of these norms, through material drawn from statistics, dating websites, and literature. This combination of sources complements the preceding account of law by offering breadth and depth to our understanding of the norms of intimate discrimination. Statistics provide a broad empirical snapshot of intimate relations. Analyzing the structure of dating websites shows how these norms shape a national dating arena of tremendous and increasing popularity.\(^{31}\) And examining one fictional

\(^{25}\) The root “-gamy” refers specifically to marriage, but like “monogamy,” the term “homogamy” embraces a wider set of relational practices than just those associated with marriage.

\(^{26}\) The race-related norms and laws have been far more complicated than the black/white line would suggest, embracing and proscribing various color combinations with widespread local variations. For an excellent and evocative discussion of these complexities, among others, see Moran, supra note 23.

\(^{27}\) Though explicit race-based restrictions on sex and marriage are a thing of the past, fears of miscegenation have shaped the incomplete project of desegregation. See infra notes 330–33 and accompanying text.

\(^{28}\) The norm is still actively inscribed in the civil law of marriage in most states, though it has been eliminated from the criminal law of sexual behavior. See supra notes 16–18 and accompanying text.

\(^{29}\) See sources cited supra notes 20–24.

\(^{30}\) See sources cited supra note 24.

\(^{31}\) See, e.g., Mary Madden & Amanda Lenhart, Online Dating 1 (2006), http://www.pewinternet.org/pdfs/PIP_Online_Dating.pdf (reporting that “among the relatively small and active cohort of 10 million internet users who say they are currently single and looking for romantic partners, 74% say they have used the internet in one way or another to further their romantic interests” and that “there is relatively broad public contact with the online dating world because significant numbers of Americans personally know others who have tried and succeeded at online dating”); Rufus Griscom, Why Are Online Personals so Hot?, Wired, Nov. 2002, at 135, 135,
text for each category allows a sustained and textured encounter with what are ultimately highly contextualized attitudes and behaviors. The order of the categories discussed will loosely track the chronology of repeal of express marital restrictions, from race, to disability, to sex. The Part will conclude by examining the ways these intimate norms filter into the employment domain and skew courts' perception of illegal discrimination.

B. Homogamy: Race

The norm surrounding race is homogamy: within-group pairing. Our cultural platitudes in general include competing theories of attraction: “opposites attract,” but “birds of a feather flock together” and “like attracts like.” Richard Epstein uses the last of these phrases — “[l]ike attracts like” — to argue that homogeneity is desirable in the workplace, because people like to be around those who are like them. At least in the intimate domain, Epstein has the right catchphrase for the pervasive understanding of race. Mary Becker, though writing from a very different normative position than Epstein, similarly asserts that “[w]e all empathize best with those most like ourselves.” This section portrays the norm of homogamy through statistics on interracial dating and marriage, an examination of the structure of mainstream dating websites, and a discussion of a short story by Derrick Bell.

1. Statistics. — The homogamy norm for race is reflected in statistics on rates of interracial marriage and dating. I briefly review a few of these figures, which show that rates of interracial marriage and dating, though on the rise, are well below what would be expected from random matching. In addition, the interesting variations in the data across gender and race point toward an explanation that is at least partly cultural.

(a) Rates of Interracial Marriage and Dating Are Rising. — In 2000, just over 5% of all married couples included spouses of different

available at http://www.wired.com/wired/archive/10.11/view.html?pg=2 (noting that “one in five singles looks for love on the web” and predicting that “[t]wenty years from now, the idea that someone looking for love won’t look for it online will be silly, akin to skipping the card catalog to instead wander the stacks because ‘the right books are found only by accident’”).

32 Although marital restrictions remain in effect for some disabilities in some states, see sources cited supra note 24, the sex-based restrictions on marriage remain more widespread, see supra p. 1315; indeed, the latter are nearly universal.

33 RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 68 (1992) (internal quotation marks omitted). For further discussion, see infra p. 1337–38.

34 Mary E. Becker, Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment, 79 GEO. L.J. 1659, 1671 (1991). Her different normative position is evident in the rest of her sentence, which is “but we live in a society in which white men disproportionately hold positions of power.” Id.
2009 | INTIMATE DISCRIMINATION | 1319

races, whereas in 1970 that figure was less than 1%. Rates for dating are much higher, particularly among young people. According to a 2005 Gallup poll, 60% of 18- to 29-year-olds have dated interracially, compared with 53% of 30- to 49-year-olds, 46% of 50- to 64-year olds, and 28% of those 65 and older. Favorable attitudes have risen faster and higher than interracial dating behavior, even among the youngest group. In a 2007 Pew research poll, 83% of Americans agreed with the statement, “I think it’s alright for blacks and whites to date each other.” This is up from 48% in a 1987 poll.

(b) Rates of Interracial Marriage Are Still Well Below What Would Be Expected from Random Pairing. — By one calculation, 44% of all U.S. marriages would be interracial under random matching weighted by the size of the relevant groups, a figure far higher than the marriage rates cited above. In their study of speed dating among Columbia University graduate students, Raymond Fisman and colleagues reported a level of cross-race interest that was closer to what randomness would predict: 47% of the matches were cross-race, which was a statistically significant difference from the 53% that the authors say random matching would predict, yet much closer than for the general population figures. The closeness of Fisman’s figures to random matching may reflect both the fact that higher education levels are a

37 Id.
38 Raymond Fisman et al., Racial Preferences in Dating, 75 REV. ECON. STUD. 117, 117 (2008) (calculating this figure based on the U.S. population regardless of age, but asserting that “alternative measures that restrict the calculation to ‘marriageable’ populations yield a similar figure.” id. at 117 n.1).
39 Of course, the marriage rates encompass people who entered their marriages at different historical moments.
40 Fisman et al., supra note 39, at 123. The authors also report that women more than men showed racially homogamous preferences; I look forward to further study of this result, because there seem to be so many possible explanations, prominent among them that the women were more interested in relationships and the men more in sex. The authors discount this explanation on the basis that their older participants showed more heterogamous preferences, despite being more interested in relationships. Id. at 4. This triangulation via older subjects does not seem an adequate basis for rejecting the different-dating-aims theory for women’s homogamous choices. (The triangulation might seem a particular problem if the older subjects were old enough that they were past the age of thinking about creating biological children, but apparently even the older subjects in this study were nearly all too young for that point to apply. Conversation between Raymond Fisman and author (Sept. 10, 2008)).
predictor of willingness to date interracially and the fact that people are generally more open to interracial dating than marriage.  

(c) Rates of Interracial Marriage and Dating Vary by Race and Gender. — Gallup reports that as of 2005, 69% of Hispanics, 52% of blacks, and 45% of whites had dated interracially at some point. Another study, using data from 1999–2000, found the following percentages of interracial dating among these groups: 57.1% of Asian Americans, 56.5% of African Americans, 55.4% of Hispanic Americans, and 35.7% of European Americans. This study reports that while African Americans are as likely to date interracially as other minority groups, they are less likely to marry interracially.

With regard to gender and race, African American men are much more likely to marry white women than white men are to marry African American women. From 1970 to 2000, black men increased their rate of marrying white women almost sixfold, so that by 2007, nearly 6% of black men were married to white women. Fewer than half as many — approximately 2.9% of — black women were married to white men. The opposite gender effect occurs among Asian American and white pairings. As one recent analysis reports, “Until 1960, Asian men were more likely than Asian women to intermarry with whites. By the 2000 census, however, this trend had reversed. Asian women are almost twice as likely to marry a white person as Asian men.”

The vastly different rates of interracial relationships for African American men as opposed to women, and Asian American women as opposed to men, unsettle any simple conclusion of a general preference for partners of the same race (that is, homogamous mating, also called “(positive) assortative mating”). Sociobiologists have spilt much ink explaining the potential benefits of endogamy — often with an assumption that this just is what people tend to do, and so we need an

42 See Fisman et al., supra note 39, at 123; infra note 169 and accompanying text.
43 Jones, supra note 36.
44 George Yancey, Who Intercially Dates: An Examination of the Characteristics of Those Who Have Interracially Dated, 33 J. COMP. FAM. STUD. 179, 183 (2002). These generalizations do not reflect variations in intermarriage rates across different Asian American groups.
45 Id.; see also Richard Lewis, Jr., George Yancey & Siri S. Bletzer, Racial and Nonracial Factors That Influence Spouse Choice in Black/White Marriages, 28 J. BLACK STUD. 60, 64 (1997). In Rachel Moran’s words, “The critical divide may no longer be between whites and nonwhites but between blacks and nonblacks.” Moran, supra note 23, at 175 (footnote omitted).
47 Id.; see also Kellina M. Craig-Henderson, Black Men in Interracial Relationships 15 n.11 (2006) (citing National Urban League, The State of Black America 2001, for the proposition that African American men are three times more likely to marry across race than are African American women).
48 Fryer, supra note 46, at 77.
Yet other explanations must be considered, including the different social meanings of specific gender and race pairings, the potential role of who (that is, men or women) tends to initiate dating, implicit associations between gender and race, in-group pressure on African American women to preserve the black family, and the maternalization of African American women as caretakers in white homes, to name a few. Whatever contribution sociobiological explanations may make to our understanding of race and intimacy, the complicated interplay of gender and race in these statistics suggests that sociobiology cannot end the discussion.

In sum, while rates of interracial dating and marriage have increased, they have not increased nearly as much as favorable attitudes, nor do they reflect what random sorting would predict. This may be unsurprising, but the gender contours of these statistics also trouble any quick explanations.

49 Theories include, for instance, that homogamy increases altruism among relatives or marital stability and thus increases fitness. See Del Thiessen, Robert K. Young & Melinda Delgado, Social Pressures for Assortative Mating, 22 PERSONALITY & INDIVIDUAL DIFFERENCES 157, 157–58 (1997). The work on positive assortative mating tends to be particularly impressed that the phenomenon can occur even for disabilities, such as deafness or psychiatric impairment. See, e.g., Del Thiessen & Barbara Gregg, Human Assortative Mating and Genetic Equilibrium: An Evolutionary Perspective, 1 ETHOLOGY & SOCIOBIOLOGY 111, 116–17 (1980).

50 For instance, the historical fear of black male/white female sexual relations is of course deeply implicated in some of the ugliest features of American racism, from lynching to the origins of the Ku Klux Klan. It bears a different set of meanings than the no less ugly but distinct legacy of white men’s appropriation of black women’s bodies and claim to sexual access under slavery. See, e.g., CRAIG-HENDERSON, supra note 47, at 23–26; see also R. Richard Banks, The Aftermath of Loving v. Virginia: Sex Asymmetry in African American Intermarriage, 2007 WIS. L. REV. 533, 536–37 (discussing other scholars’ views of the importance of this history to the gender gap in black-white marriage).

51 See, for example, CRAIG-HENDERSON, supra note 47, at 88–89, for a discussion of the theory that if racial pairing is affected by conscious or unconscious social climbing, then perhaps the gendered expectation of male initiation of dating means that men will tend to date up or across but not down the social hierarchy. This theory, which Craig-Henderson is not endorsing, leaves something to be desired as a response to the gender patterns in Asian-white relationships. See id.

52 Some provocative new work in social psychology by Phillip Goff and colleagues suggests that implicit bias and stereotypes might play a role in interracial intimate relationships. See Phillip Atiba Goff, Margaret A. Thomas & Matthew Christian Jackson, “Ain’t I a Woman?”: Towards an Intersectional Approach to Person Perception and Group-Based Harms, 59 SEX ROLES 392 (2008). Their work suggests that African American men are perceived (by a subject pool of mostly white students) as more masculine than white men — perhaps not entirely surprising — but apparently the same goes for African American women, whom white observers more often mistake for men than they do white women. Id. at 400. The same study also suggests that Asians — both men and women — are perceived as more feminine. See Margaret A. Thomas & Phillip Atiba Goff, Pain at the Crossroads: How Intersectionality Works and Hurts (Jan. 2009) (unpublished manuscript, on file with the Harvard Law School Library).

53 See Banks, supra note 50, at 541.

54 See, e.g., MORAN, supra note 23, at 104 (describing the portrayal of black women as “asexual and motherly” (footnote omitted)).

55 For further discussion, see Robinson, supra note 4, at 2803–08.
2. **Websites.** — The commercial dating market provides a revealing
glimpse into private preferences and expectations surrounding them.\(^\text{56}\)
Of particular interest to this discussion of intimate norms is the struc-
ture these companies impose on desire through the questions they ask
in order to organize participants.

Dating websites and speed dating companies ask for information
about sex and race and organize people according to their answers.
An inspection of popular mainstream dating sites\(^\text{57}\) reveals some nota-
ble features across the identity categories at issue in this Article, as this
and subsequent sections will discuss. Race is a salient category on all
the mainstream sites, though it is presented more subtly than sex.
Race is never on the initial introductory page, which typically contains
only sex, age, and geography. But all these sites allow you to indicate
your racial preferences or search by race.\(^\text{58}\) All ask for your race, and
some require you to state it.\(^\text{59}\)

Perhaps most strikingly, the site Singlesnet assumes homogamous
preferences in the way it asks about racial preferences, inquiring
“Would you consider dating someone from a different race?” with only
“yes” or “no” options.\(^\text{60}\) The structure of this question is worth pausing
over, as it reflects the way assumed norms operate. The question is

\(^\text{56}\) Several scholars have made excellent use of personal ads and dating websites to demon-
strate, among other things, the striking ways that race still explicitly organizes so many people’s
private lives. See, e.g., Robinson, supra note 4; Note, Racial Steering in the Romantic Market-
place, 107 HARV. L. REV. 877 (1994); see also KENNEDY, supra note 10, at 27–37.

\(^\text{57}\) An online site provides rankings of the most popular dating sites from three “dating service
ranking companies”: Hitwise, Comscore, and Nielsen-Netratings. InternetDatingUSA.com, Best
Dating Sites, http://www.internetdatingusa.com/online-dating-site-rank.htm (last visited Feb. 8,
2009). As of December 2007, the sites that appear on those three top ten lists combined, which I
consider a useful proxy for mainstream popularity, are as follows (in rough order of combined
com; Black People Meet, http://www.blackpeoplemeet.com; gay.com, http://www.gay.com; Black
lavalife.com (all sites last visited Feb. 8, 2009).

\(^\text{58}\) As noted, my emphasis here is on sites dedicated to dating. See supra note 57. However, it
is interesting to note that the popular social networking site Facebook, http://www.facebook.com
(last visited Feb. 8, 2009), does not ask for race and allows participants to choose whether they
want their sex displayed. Uploading pictures is popular and serves a similar function to stating
these features in many cases, though revealing this information through pictures alone does not
allow searches by race in the way that a drop-down menu would. Though Facebook is a tool for
friendship for many, it also invites participants to indicate their relationship status and the sex
they are seeking (male, female, or both) and so can be used for dating purposes as well.

\(^\text{59}\) For instance, eHarmony asks for your ethnicity and asks, “What ethnici ties would you be
willing to accept as matches?” and “How important is your match’s ethnicity?” You cannot pro-
cede beyond that page unless you answer these questions.

\(^\text{60}\) In addition, while most questions on the initial registration page provide further submenus
when you answer yes to a question, no further questions (such as, perhaps, “which race?”) follow
this question. The question is only whether you would consider interracial dating.
not, “Would you consider dating someone of your own race?” The latter would likely sound preposterous as a general question.\(^{61}\) Even in a world of multifarious possibilities, the assumed move is to date — and marry — within one’s own race.

3. Literature. — The race homogamy norm has been depicted in a wide array of films and print fiction.\(^ {62}\) Though only one such example, Derrick Bell’s story, *The Last Black Hero*, usefully articulates the norm’s strength and consequences within both black and white culture. This fictional account of the relationship between a wounded hero of race politics, Jason Warfield, and his white doctor, Sheila Bainbridge,\(^ {63}\) elaborates the potential consequences of interracial love from both white and black society. Sheila faces the racism of her colleagues at the hospital who, “appalled at her relationship with a Black man, . . . suspended her for allegedly violating their doctor-patient regulations,” despite her “scrupulous . . . dealings with Jason,” including ceasing her treatment of him when she realized her feelings.\(^ {64}\) (Such grossly unlawful treatment of a white employee for an interracial relationship might seem outdated, a thing of the past, but for recent case law to the contrary.\(^ {65}\) More important for both lovers, however, is the meaning of their relationship to the black community: if Jason, “a Black, political leader who espoused pride in Blackness,” married a white woman, how could that act, “at the very least, [not] shift[] [Jason’s organization’s] energies from its racial reform goals to a divisive and likely interminable debate over the rightness and propriety of his marital choice?”\(^ {66}\) The story depicts Jason’s internal struggle:

Jason had never advocated hate for whites as a component of his uniquely successful Black pride program. . . . [B]ut [his program] did everything it could to encourage Black men to “look to the sisters and do not forsake them. For in Black women,” he urged, “you will find both counsel and ci-

\(^{61}\) There are of course some contexts in which this would not be a surprising question, such as if posed to a person with a history of having a particular racial type not her own. For a discussion of “types” of this sort, see infra section II.A.4, pp. 1343–44.

\(^{62}\) For an excellent review of this literature, see KENNEDY, supra note 10, passim. See also, e.g., infra notes 216, 294 (discussing some such films).


\(^{64}\) Id. at 282.

\(^{65}\) See, e.g., Holcomb v. Iona Coll., 521 F.3d 130, 131–32 (2d Cir. 2008) (reversing summary judgment for the defendant in a claim brought by an associate head basketball coach allegedly fired for his interracial relationship). The court recounted among the plaintiff’s facts the following comment (also heard by a third party) by a vice president of the college, when asked by the plaintiff if he had received the plaintiff’s wedding invitation: “[Y]ou’re really going to marry that Aunt Jemima? You really are a nigger lover.” Id. at 134 (alteration in original) (internal quotation marks omitted).

\(^{66}\) Bell, supra note 63, at 280.
vility, love and support, friendship and faithfulness, probity and integrity. For the Black man, the Black woman is the equivalent of home.67 Yet he loved a white woman, and he had always railed against the (white) American tradition of sacrificing individual black material interests to some larger political project of society.68

The story also depicts the pain of rejection felt by Neva, the black woman to whom Jason had planned to propose, who served as his deputy in their political organization. When Neva learns about Jason’s relationship with Sheila, her mother asks her, “Suppose Jason’s doctor had been Black? Would you feel less hurt?” Neva responds, “I would be disappointed as a woman who lost her man, but I would not feel rejected as a person.”69

When Neva, Sheila, and Jason all meet, Sheila first proclaims that she cannot marry Jason and do such an injustice to the African American community. But Neva rejects this “martyrdom” from a white woman, insisting that Sheila’s services will be more useful, and her commitment to the community more meaningful, if she comes back with Jason and takes a staff position at Jason’s organization.70 Eventually Sheila agrees. The narrative concludes with the interracial couple planning to travel to New York to try to brave the storm of outrage they will undoubtedly face both from Jason’s organization and from the black community more broadly. In the final lines of the story, Jason contemplates his failure as a hero, and the need for reality and faith over heroism.71 The pressures of the homogamy norm take Jason to self-abnegation and ultimately prayer, in an ending that leaves the reader with little confidence that the result of this love will be anything less than a terrible injury to his advocacy community, and the loss of everything for him and his beloved, whose own career has already been seriously damaged by her love of him. The story portrays some of the ongoing challenges faced by interracial couples, and dramatizes the significance of the homogamy norm not only to superordinate groups, but to subordinate groups, who may value solidarity in both public and private realms.

67 Id. at 279.
68 See id. at 281.
69 Id. at 284 (internal quotation mark omitted).
70 Id. (internal quotation marks omitted).
71 See id. at 287–88.
72 See id. at 289.
C. Desexualization: Disability

Important recent work in disability studies has called attention to the desexualization of disabled people. As Tom Shakespeare has written, “disability is a very powerful identity, and one that . . . has the power to de-sex people, so that people are viewed as disabled, not as men or women, straight or gay.” In one study, “college students were asked to free associate with the terms ‘woman’ and ‘disabled woman.’” The students associated “sexuality, sexual relations, and mothering with the former, but loneliness and lifelessness with the latter.”

The relationship between disability and sexuality is complicated. In some representations, disabled people seem presumptively hypersexual, rather than nonsexual. But such attributions of heightened or uncontrolled libido again serve as a justification for denying the sexuality of disabled people — to prevent them from imposing their sexuality on others and potentially tainting the human race. In this way, even when the depictions or assumptions vary, the norm of desexualization remains fairly robust.

1. Statistics. — Although disability studies scholars have worked to dispel the myth that people with disabilities are not sexual beings,

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74 Tom Shakespeare, Disability, Identity and Difference, in Exploring the Divide: Illness and Disability 94, 109 (Colin Barnes & Geof Mercer eds., 1996). Susan Stefan makes a similar point specifically about people with psychiatric disabilities, writing that “[t]heir identity as psychiatrically disabled swallow[s] all other aspects of who they were — their sexuality, their religious identity, and their racial or ethnic identity.” Susan Stefan, “Discredited” and “Discreditable”: The Search for Political Identity by People with Psychiatric Diagnoses, 44 WM. & MARY L. REV. 1341, 1363 (2003). For foundational work on both the societal resistance to recognizing the sexuality of people with mental disabilities, particularly in institutions, and the concept of sanism, see Michael L. Perlin, Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?, 20 N.Y.U. REV. L. & SOC. CHANGE 517 (1993–1994).


76 Id.

77 For instance, see Deborah Denno’s discussion of the competing presentations of disabled girls as alternatively nonsexual (by prosecutors) and hypersexual (by defense attorneys) in recent trials of men accused of having nonconsensual sex with mentally disabled girls. Denno, supra note 9, at 324. Michael Rembis shows a similar dynamic in historical portrayals of girls institutionalized for alleged mental impairment in the first half of the twentieth century. Rembis, supra note 23. Interestingly, one study finds that nondisabled men, but not women, are inclined to attribute to disabled people a “greater interest in sexual activities.” Kristen Robillard & Catherine S. Fichten, Attractions About Sexuality and Romantic Involvement of Physically Disabled College Students: An Empirical Study, 6 SEXUALITY & DISABILITY 197, 197 (1983).

78 See sources cited supra note 77; see also supra section IA, pp. 1315–18 (discussing eugenic-based legal restrictions).

it remains true that many disabled people continue to have more limited sexual and romantic opportunities than nondisabled peers. People with disabilities are less likely to be married than people without disabilities. The latest U.S. Census data indicate that, among people between the ages of 25 and 64, 67.6% of nondisabled people are married, as opposed to 59.6% of people with disabilities that are not severe, and 50.1% of people with severe disabilities. The 2006 National Health Interview Survey shows a comparable gap between disabled and nondisabled people: among adults in general (those over age 18), 46.3% of those with disabilities are married, as opposed to 59.8% of those without disabilities. People with disabilities are also less likely to be sexually active, with the gap apparently more pronounced for congenitally acquired impairments than for those acquired late in life.

2. Websites. — Disability is almost entirely absent from the mainstream dating websites, suggesting, I think, its assumed importance (that is, its status as disqualifying). The main exception is Date.com, which allows people to list “disabled” under their own “body type,” and to search for (or not to search for) “disabled” under the “body type” they are seeking. In addition, True.com includes American Sign Language among its languages spoken or sought. No other mainstream site that I consulted mentions disability in any way.

Marginal dating sites fill the gap for disabled people and, in so doing, articulate the exclusion felt by disabled people on the mainstream sites. For instance, the disability-related site Lovebyrd.com is “exclusively” for disabled people, including most every disability imaginable. Indeed, Lovebyrd’s proprietors assert that they will adjust their site’s structure to include your disability in the drop-down menu within sev-

Sexualities and Disabilities (June 2008) (unpublished manuscript, on file with the Harvard Law School Library); see also Michael Ashley Stein, From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities, 43 EMORY L.J. 245, 260 n.97 (1994) (referring to “the common myth that disabled people are sexless”).


81 E-mail from H. Stephen Kaye, Inst. for Health & Aging, Univ. of Cal., S.F., to Becca von Behren, research assistant to author (Apr. 10, 2008, 10:47) (on file with the Harvard Law School Library).

82 See, e.g., J.C. MacDougall & S. Morin, Sexual Attitudes and Self-Reported Behavior of Congenitally Disabled Adults, 11 CAN. J. BEHAV. SCI. 189, 189 (1979) (reporting, in a study of forty-five congenitally disabled adults, that over half of the subjects had never had a sexual experience with another person); Marita P. McCabe & George Taleporos, Sexual Esteem, Sexual Satisfaction, and Sexual Behavior Among People with Physical Disability, 32 ARCHIVES OF SEXUAL BEHAV. 359 (2003); Diana H. Rintala et al., Dating Issues for Women with Physical Disabilities, 15 SEXUALITY & DISABILITY 219 (1997); Eric R. Wright et al., Stigma and the Sexual Isolation of People with Serious Mental Illness, 54 SOC. PROBS. 78 (2007).

83 See supra note 57 (explaining how mainstream sites were identified).
enty-two hours if your disability is not on their list. One might ask, in response to this site: Why would a person with “visual problems” have any specialized interest in dating a person who is “bipolar” or who has “Down syndrome”? Why would disabled people want an exclusive in-group setting for date seeking?

Lovebyrd itself provides an answer:

Disabled singles complain that it is more difficult to meet someone on a mainstream dating site when you have a disability. That is mainly because other members do not know you have a disability until you disclose this information yourself; and often when this fact is revealed, the interest of the counterparty is lost.

3. “Literature.” — In the mainstream dating scene, disability is often relegated to the status of a joke. The idea that a disabled person would be a desirable sexual or dating companion is treated as funny. This association is not new — indeed, Freud’s writings on jokes include many jokes that turn on the humor of a matchmaker trying to pass off a bride who is disfigured or disabled. But let us pause here to consider a contemporary example for its depiction of the relation between disability and sexuality.

Below is a “Joke of the Month!” from the men’s magazine, Maxim. Before quoting it, I want to acknowledge that, to many, this is a very disturbing “joke,” and not one experienced as funny.

85 Lovebyrd.com, Disabled Dating Services, http://www.lovebyrd.com/dating_services.php (last visited Feb. 8, 2009); see also, e.g., KROLL & KLEIN, supra note 79, at 28. Paralympian swimmer Denise Beckwith poignantly expresses this difficulty in her profile in the elegant Intimate Encounters show of disabled “self-portraits” photographed by Belinda Mason-Lovering.

Beckwith was photographed on a rock with a mermaid’s tail; her caption read, “Like the little mermaid wanted love, I too yearn for that. I have been so close on numerous occasions. But as I have to stand up at some point (and use my crutches to walk) . . . and they are forced to realise I am disabled, they seem to become somewhat scared.” Media Release, Intimate Encounters by Belinda Mason, A Photographic Exhibition Exploring Sexuality, Disability and Body Image (2007) (quoting Denise Beckwith), available at http://www.belindamason.com/art/pdfs/mediareleases2007/intimate%20encounters.pdf; see also Belinda Mason, Intimate Encounters, http://www.belindamason.com/art/ie_07_05.html (last visited Feb. 8, 2009).
86 See SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS 61–65 (James Strachey ed. & trans., W.W. Norton & Co. 1960) (1905). For instance:

The would-be bridegroom complained that the bride had one leg shorter than the other and limped. The Schadchen contradicted him: “You’re wrong. Suppose you marry a woman with healthy, straight limbs! What do you gain from it? You never have a day’s security that she won’t fall down, break a leg and afterwards be lame all her life. And think of the suffering then, the agitation, and the doctor’s bill! But if you take this one, that can’t happen to you. Here you have a fait accompli.”

Id. at 62–63 (internal quotation marks omitted).
87 As with my discussion of the Bell story, see supra section I.B.3, pp. 1323–24, this account examines one source closely; I do not pretend to represent the range of the many fictional sources available in print, film, and television.
gies, I hope the reader will persist here, because jokes such as this can reveal shared cultural assumptions particularly starkly. Here it is:

Joke of the Month!
A man with no arms or legs is sunbathing on a beach. After a while he is approached by three gorgeous women, who take pity on him.

The first one says to him, “Have you ever been hugged?”
“Why, no, I can’t say that I have,” the man replies, shaking his head. So she leans down and gives him a hug.

The second woman says to him, “Have you ever been kissed?”
He shakes his head again. She kisses him.
Rather abruptly, the third asks, “Have you ever been fucked?”
“No,” says the man, his eyes lighting up.
“Well, you are now. The tide’s coming in.”

Someone clearly found this joke funny: it is the Joke of the Month in a magazine with over 2.5 million readers. Why?

Maxim supplies its own answer. Above the joke is a cartoon of the scenario: A man whose sleeves and pant legs taper off to signify the missing arms and legs sits in a deck chair on the beach, surrounded by three voluptuous vixens in bikinis. He looks excited and embarrassed. A caption reads “It’s funny ‘cause he’s horribly disabled!”

Perhaps Maxim is right. Perhaps the mere fact of his disability is what makes the joke funny to its celebrants. There is of course humor based just on disability: one might think of Mr. Magoo almost falling from great heights because of visual impairment, or the genre of “guy with no arms and no legs” jokes, of which this is one. Laughing at disability can cause offense, making it a prime target for the Maxim humor page, which apparently trades in the shock value, or rebellious frisson, of saying “un-PC” things.

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88 Josh Richman, Joke of the Month!, MAXIM, Jan. 2008, at 18 (joke submitted to the magazine “via email”).
92 The page also includes the following “roasts,” targeting sex, age, and race: “Dr. Ruth is so old, her pussy has mice” and “Shaquille O’Neal: ‘Your knuckles look scraped. Did you walk here?’” Jeffrey Ross, The Dean of Mean, MAXIM, Jan. 2008, at 18 (internal quotation marks omitted).
But this joke is about something more: it is about disability and sexuality. The crucial moment is the turn from the man’s hopeful expectation of sex to his being told he instead faces looming disaster. The pun on the word “fucked” — its double meaning of intercourse and ending up in dire straits — provides the vehicle for his disappointment. The women look down on him from the beginning, both literally and figuratively. They “pity” him; the first one “leans down” and gives him a hug.93 There may also be something in the active use of the verb “to fuck” by the woman. The question is not whether he has ever “fucked” a woman, which would situate him as the active partner, but whether he has ever “been fucked” by a woman.

The (presumptively straight male nondisabled) Maxim reader can feel reassured by the punchline.94 The world has been turned right side up again — back to the universe he expects — where beautiful women do not proposition disabled men. After being led along by the women’s apparently kind approach, the reader who keeps thinking, “No, no, surely this guy isn’t going to live out every guy’s fantasy of sex with beautiful women on a beach,” is then reassured, “Of course not.” The Maxim reader can reassure himself that at least he is better than someone.

We might see the disabled character in the joke as representing a set of fears, of “existential anxieties” about disability,95 that makes the reader concerned to distance himself from this character.96 Then, when the character looks like he might get exactly what the reader wants, the anxiety increases. However, the pun saves the day, and the disabled guy is “fucked” in life rather than “fucked” in bed. Maxim’s

93 The women’s hug and apparent pity might read initially as maternal, particularly in light of the infantilization of disabled people that contributes to desexualization.

94 Indeed, it is not only nondisabled readers who might respond to the joke in this way; hierarchies of status operate within, as well as around, the disability community. And those who have a disability but do not identify as disabled may have particularly good reason to try to distance themselves from other disabled people, on a principle similar to that which underlies the word and concept of homophobia.


96 The gender angle on the joke supports another kind of anxious identification between the reader and the disabled man on the beach: both are potential victims of feminine wiles. The cartoon above the joke helps bring this out, as the women look like female villains in a Disney movie, wily and catlike with exaggerated curves and sinister eyes. The reader’s anxiety may go further, for, under a psychoanalytic account, dismemberment may evoke anxieties about impotence or castration. See Margrit Shildrick, Dangerous Discourses: Anxiety, Desire, and Disability, 8 STUD. GENDER & SEXUALITY 221, 233–38 (2007). Under this account, such anxieties surround sex generally because of its perceived potential to restore the self to an early state of undifferentiated dependency, of pre-Oedipal polymorphous perversity — a prospect that is alluring yet also terrifying in its threat to the coherent self. Id. at 235. When sexuality meets disability, Shildrick argues, the anxiety is overwhelming. Id. at 234.
cartoon caption thus serves to reassure the reader: “It’s funny ‘cause he’s horribly disabled!”97 Not you, that is — him.98
The joke thus shows several things. Most importantly, it depicts a set of assumptions: a disabled man who has never been hugged, much less kissed or bedded, and an apparent need to explain under what circumstances beautiful bikini-clad women would have sex with an amputee — out of “pity.” The joke shows the ease with which a disabled character is treated as a ridiculous figure for aspiring to fulfilling sexual relations. This is normative desexualization.
And lest we think this desexualizing treatment of disability is confined to laddish or trivial cultural contexts, we need only turn to the pages of the Federal Supplement for contrary evidence. In a case from the late 1990s involving a claim of asociational discrimination under the Americans with Disabilities Act of 199099 (ADA), a federal district court implicitly revealed its view of the likelihood of a disabled person engaging in sexual relations. Explaining what kinds of relationships the ADA’s regulations assumed that disabled people would have, the court wrote:

As the regulations make clear, the ADA’s purpose is to prevent discrimination against . . . those who may have a close familial, social, or possibly even physical, relationship with a disabled person. The paradigmatic case is that of the parent of a disabled child, whose employer may fear that the child’s disability may compromise the employee’s ability to perform his or her job.100

A disabled person paradigmatically would have a parent, and may have a “social . . . relationship.” But a physical — that is, sexual — relationship is presented as almost inconceivable: “possibly even.”

D. Heterogamy: Sex

Sex of course operates differently than either race (pairing inside one’s group) or disability (not pairing at all). The norm for sex is heterogamy: pairing outside one’s group. As Alan Sinfield says, “The only relation of difference that is validated is gender, and then only when a male and a female are involved.”101 More colorfully, you may get

97 Caption to Joke of the Month!, MAXIM, Jan. 2008, at 18 (emphasis added).
98 The passive sexuality — figured through the disabled man cast as the object of the verb “to fuck” rather than the subject — might represent a sexual fantasy for some men, but one that needs to be disowned, pinned on someone else (to invoke Michael Warner’s phrase, from another context), a distancing function that disability usefully serves. See Michael Warner, The Trouble With Normal 3 (1999).
101 Alan Sinfield, On Sexuality And Power 14 (2004). Contra Sinfield’s implication that sex is unique in this way, the family is another domain with regard to which heterogamy is assumed; that is, the incest taboo pushes a kind of intimate heterogamy. Judith Butler suggests
called a narcissist for desiring people of your own sex, but you are not likely to get called a narcissist for desiring people of your own race or ability.\footnote{102} U.S. law and norms have a long (though not uncomplicated) history of pushing heterogamous pairing with regard to sex. From marriage law to sodomy law to “no promo homo” statutes,\footnote{103} this norm is immediately recognizable in law as well as culture. Indeed, the sex heterogamy norm is so assumed as to be invisible at times, even in academic writing; for example, work in sociology on relationship patterns sometimes speaks as if homogamy is generally the driving force in romantic pairings, without noticing that a starting point for most people is heterogamy with regard to one key category: sex.\footnote{104}

The heterogamy norm for sex — still inscribed in express legal restrictions on marriage — is so obvious as to render almost any description of it superfluous. This section is therefore brief, noting a few statistics and website features, then glossing a cultural artifact that highlights the heterogamy norm through parody.

1. \textit{Statistics.} — Fewer people act on same-sex desires than have them, and even fewer identify as gay or lesbian. Specifically, according to some studies, 7.7\% of men and 7.5\% of women report having same-sex desires,\footnote{105} and 4.7\% of men and 3.5\% of women report having had at least one same-sex experience since the age of eighteen,\footnote{106} as compared to the 2.8\% of men and 1.4\% of women who report identifying as gay or lesbian (or bisexual).\footnote{107} These numbers may well understate the prevalence of same-sex desire and experience, as other studies find higher rates,\footnote{108} and of course the meaning of these data depends on

\footnote{100} That the incest taboo is generative of all other sexual taboos. See \textsc{Judith Butler}, \textsc{Antigone’s Claim} 71 (2000).
\footnote{102} On psychiatry’s historical linking of narcissism and homosexuality, see, for example, \textsc{gayhistory.com}, words: Narcissism, http://www.gayhistory.com/rev2/words/narcissism.htm (last visited Feb. 8, 2009).
\footnote{103} \textsc{William N. Eskridge, Jr.}, \textit{No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review}, 75 \textsc{N.Y.U. L. Rev.} 1327 (2000) (discussing laws that prohibit the “promotion” of homosexuality through, for instance, teaching safer sex practices for same-sex, as well as cross-sex, conduct).
\footnote{104} See, \textit{e.g.}, \textsc{Lewis, Yancey & Bletzer}, supra note 45, at 61–62.
\footnote{105} \textsc{Edward O. Laumann et al.}, \textit{The Social Organization of Sexuality} 297 (1994).
\footnote{107} \textsc{Laumann et al.}, supra note 105, at 293.
\footnote{108} See, \textit{e.g.}, \textsc{The Kinsey Institute}, Data from \textsc{Alfred Kinsey’s Studies}, http://www.indiana.edu/~kinsey/research/ak-data.html (last visited Feb. 8, 2009) (summarizing data from \textsc{Alfred C. Kinsey et al.}, \textit{Sexual Behavior in the Human Male} (1948) (1948); \textsc{Alfred C. Kinsey et al.}, \textit{Sexual Behavior in the Human Female} (1998) (1953) (reporting that 37\% of males had had at least one same-sex experience to orgasm and that 13\% of women had had such an experience)).
many factors. But even these conservative estimates point to some kind of gap that, while impossible to verify definitively, seems to reflect the heterogamy norm expressly inscribed in the law of marriage.

2. Websites. — On the mainstream dating websites, sex is omnipresent, nearly always asked first on the introductory pages of the sites. The standard opening puts sex first and age second, on a typical introductory page taking this form: “I’m a: [Woman/Man] Seeking a: [Woman/Man] From: [age] To: [age].” In addition, mainstream sites require participants to seek only men or only women, thereby structurally erasing the possibility of bisexuality. As with race, most sites do not otherwise try to force parties to conform to specific norms of intimate discrimination in their choice of partners. Nonetheless, the sites’ insistence that participants identify their own sex (and sometimes race) requires participants to be subject to searching along these axes of identity and suggests the significance of these traits for participants’ mate choices. Moreover, one mainstream site — eHarmony — allows only cross-sex seeking, directly demonstrating the sex heterogamy norm. Given that participants can sort themselves according to what sex they are seeking and thus avoid contacting or being contacted by members of a sex they do not desire, it is striking that a major site would limit its customers in this way. Perhaps an even more

109 Such factors include how many people have these desires while in monogamous relationships with opposite-sex partners, and how many have desires toward other people of the opposite sex that they forgo acting upon, as well as how many people identify as bisexual.

110 True.com, http://www.true.com (last visited Feb. 8, 2009); see also, e.g., websites cited supra note 57.

111 Cf. Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 STAN. L. REV. 353 (2000) [hereinafter Yoshino, Bisexual Erasure]. Mate 1 used to be the exception in this group. As of March 20, 2008, Mate 1 allowed participants to be seeking a “man,” “woman,” or “either.” By December 2008, however, the site allowed only monosexual options.

112 As of February 8, 2009, the options on eHarmony are “I’m a Man seeking a woman” or “I’m a Woman seeking a man.”

striking indication of the persistence of the sex heterogamy norm is the fact that a niche site for singles with elite educations (the so-called Right Stuff) — which sidesteps the intimate norms around race by declining even to invite participants to indicate racial preferences — permits only cross-sex searching.  

3. Literature. — Cultural texts depicting the pressures toward sex heterogamy are legion and familiar. Rather than examining one of those texts, therefore, this section highlights a source that parodies the sex heterogamy norm through the provocative lens of gender. Normative heterogamy also applies to some extent to gender, in the sense of masculine and feminine, as well as to sex, in the sense of male and female. Within the normative heterogamy of heterosexual expectations, masculine is expected to want feminine and feminine masculine. A few years ago, a parody of the alternative gender pairing — and thus of the heterogamy norm for sex — appeared in the New Yorker. Lamponning what the author calls “Samish-Sex Marriage,” the piece suggests a new horizon for the opponents of same-sex marriage: those male-female couples composed of masculine wives and feminine husbands, whose genders come close enough to the middle or the other side as to approximate same-gender marriage. “Because my feeling is,” the author writes, “when God made man and woman He had something very specific in mind. It goes without saying that He did not want men marrying men, or women marrying women, but also what He did not want, in my view, was feminine men marrying masculine women.”

The piece was parody — mainly of the same-sex marriage debate and, especially, the anti–gay marriage position — but it also comically depicted another serious phenomenon. Gender expectations in dating and marriage still arguably favor divergent roles and traits, and within male-female dating, some of these still imply a cer-

Housing Act claim, because the CDA’s safe harbor provision does not apply to content that internet service providers “develop” in whole or in part, and Roommates.com develops content by requiring users to create a profile that identifies their sex, sexual orientation, and parental status and then matching only those who fit each other’s criteria; but cf. Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).

114 The Right Stuff bills itself as the “Ivy League of Dating” and checks out asserted academic credentials to make sure members actually attended one of the elite schools on their list. See The Right Stuff, Schools, http://www.rightstuffdating.com/v_schools.cfm (last visited Feb. 8, 2009); The Right Stuff, How It Works, http://www.rightstuffdating.com/v_how_it_works.cfm (last visited Feb. 8, 2009) (“To join, . . . write a short profile of yourself, which will be seen by all members of the opposite sex.”); infra notes 208–11 and accompanying text.


116 George Saunders, My Amendment, New Yorker, Mar. 8, 2004, at 38, 38.

117 Id.
tain inequality of partners. For example, research on male-female speed dating suggests that even a highly educated man who considers intelligence a plus in women generally does not want a woman whom he believes is more ambitious or intelligent than he is, whereas the woman prefers more intelligence in a man, even if that means he is more ambitious or intelligent than she.118

E. Intimate Norms Beyond the Intimate Sphere

The norms from the intimate domain — of heterogamy, homogamy, and desexualization — extend beyond the bedroom walls into other domains. For instance, these norms affect the ways that courts understand claims of employment discrimination. Specifically, they shape what scenarios courts recognize as discrimination in the workplace by fueling misleading "core stories," Linda Krieger’s term for societal stories that form a kind of template against which we compare all instances of discrimination.119 Krieger focuses on the problematic role of discriminatory intent in our core stories of employment discrimination, an aspect of the antidiscrimination project that I also hope to unsettle through this consideration of discrimination.120 But core stories have other features as well, beyond the presence or absence of intent. This section begins by introducing the idea of core stories and then sketches the significance of the intimate discrimination norms for our core stories of employment discrimination in the realms of sex, race, and disability. Core stories are important to identify because they deflect courts’ attention away from forms of discrimination that do not fit the anticipated story.

1. Three Core Stories of Discrimination. — The question “which is worse?”, when asked about forms of discrimination, is typically best avoided. It threatens to create turf wars and hierarchies among incommensurable experiences, and thus in many contexts, it is misguided at best, and deeply divisive at worst.121 But the question can be useful pedagogically, and I therefore ask my employment discrimination students: “Is it worse to be an employee categorically excluded by a discriminating employer, or to be an employee retained, kept within the fold, but relegated to a particular demeaning position?”

118 See Raymond Fisman et al., Gender Differences in Mate Selection: Evidence from a Speed Dating Experiment, 121 Q.J. ECON. 673, 684–85 (2006).

119 Krieger explains that the “core stories” that courts create “structure[e] the interpretation of experience and provide[e] the authors and audiences of future stories with commonly recognized plots, symbols, themes, and characters.” Krieger, supra note 5, at 1166.

120 See infra Parts II–III, pp. 1340–79.

121 Its most obvious version is one that was commonly asked during the 2008 Democratic presidential primary: which is worse, race discrimination or sex discrimination?
The question arises in our discussion of an early Title VII case, *Slack v. Havens*, in which an employer ordered three African American women to do heavy cleanup of a worksite, when their jobs were supposed to entail only light cleanup of their individual workstations. The significance of race to the employer’s assignment of tasks seemed fairly clear from the employer’s decision that day to transfer out of the department the one white employee and to transfer back in a black employee who had been temporarily assigned elsewhere. The role of race was then made explicit, in response to the women’s insistence that this wasn’t part of their jobs, by the supervisor’s comments that “Colored folks are hired to clean because they clean better” and “Colored people should stay in their places.”

Contrast the scenario in *Slack* with what we might call *Clack*, a hypothetical case in which the supervisor simply fires the women because the new plant manager does not like black people. Which is worse from the women’s perspective? Which employee would you prefer to be?

The question of course has no simple answer, if it has an answer at all, but asking the question invites the students to elaborate what is deeply troubling about each scenario. The students raise points like the fact that the *Slack* employees at least have a choice: they get to choose whether to stay on the job. Moreover, they still have a job, and a paycheck, a material reality easy to overlook amidst discussions of stigma and contact and integration. On the other hand, some students suggest that the excluded employees may face less of a dignity harm in their exclusion. Those who are forced out may be spurred to develop their own businesses and self-sustaining enterprises. Their lack of choice may help propel them to independence and eventually to real equality with their former employers.

A student will eventually point out that in our contemporary world, our core story for race discrimination looks more like *Clack*, in which the employer just does not like people of another type and wants to avoid them at all costs, whereas our core story for sex discrimination looks more like *Slack*, in which the employer is the kind of man who does not necessarily dislike the other group, and does not want to avoid them; on the contrary, he wants women near him, but only in certain roles. The student may recall Mary Becker’s point:

[The] desire for subordination, rather than aversion, may be a greater part of discrimination against women than against racial minorities. Sexist men do not, as a general rule, try to avoid all contact with women. On the contrary, they desire contact in certain subordinating forms, such as

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123 Id. at 886–87 (internal quotation marks omitted).
having women as secretaries and dependent wives. In contrast, many whites would prefer to avoid all contact with African Americans, although other whites . . . enjoy subordinating relationships with people of color.124

Of course, as Becker suggests, both kinds of stories are present for both race and sex and, I would add, for disability. (To imagine just one scenario in which a nondisabled discriminator would want disabled people around and in a particular role, think of the Maxim reader wanting someone to laugh at, someone around whom to feel masculine and sexually successful.125) But core stories tend to be those that dominate the imagination. They can operate like an eclipse, making it hard to see other types. This story of Slack invites us to consider how the intimate discrimination lens of this Article illuminates our core stories — and courts’ associated difficulties seeing other stories — across sex, race, and disability. The tripartite distinction in the intimate domain among normative heterogamy (Slack), homogamy (Clack), and desexualization (an even more isolating story than Clack) turns out to help shape courts’ (mis)understanding of workplace dynamics, as this section explains.

2. Heterogamy: Intimate Hierarchy, or, Hold Them Close but Keep Them in a Role. — Our intimate norm about sex/gender proscribes within-group pairing; it works against men pairing with men and women with women in the intimate domain. But normative heterogamy also prescribes putting men and women together and keeping them together. In a sense, it is an integrative norm, one that requires intensely intimate forms of togetherness between members of different groups, a point that some anti–same-sex marriage briefs have played upon by using the language of equality and integration.126 But normative heterogamy does not mean being together in all ways. Rather, it typically prescribes holding women close, but keeping them in a role. It is, in this way, the Slack version of events, more than the Clack version. Thus, by one account, when women begin to enter the workforce in traditionally male spheres, the men try to turn them into mistresses, thus replacing them in the private sphere. Hence the familiar story of sexual harassment: the sexualizing of women in the workplace.

124 Becker, supra note 34, at 1668.

125 See supra section I.C.3, pp. 1327–30 (discussing a joke from Maxim).

126 See, e.g., Brief Amicus Curiae by the Roman Catholic Diocese of Burlington Vermont et al. at 10–11, Baker v. State, 744 A.2d 864 (Vt. 1999) (No. 98-32) (“Proponents of homosexual marriage often present their position as advancing the equality of the sexes. Precisely the opposite is true. Homosexual marriage embodies a vision of sexual segregation which denies the equal value and indispensability of each sex to marriage. . . . The Court should not require the state, in the name of equality, to publicly affirm and legally sponsor relationships which fundamentally contradict the vital ethos of gender integration.” Id. at 11 (citation omitted)); see also Brief of Appelee State of Vermont at 87, Baker (No. 98-32).
But men’s desire to maintain that role-based relation translates not only into sexualization; it can also translate into wanting to keep women out of the workplaces traditionally reserved for men. Integrating those environments alters the expected roles. It threatens to change not only those workplaces, but the relations between men and women in their intimate spheres. If women operate as equals in male public worlds, then perhaps they won’t accept being something less than equals in private heterogamous intimate worlds (or perhaps they won’t accept those worlds at all). Hence the story of sexual harassment that Vicki Schultz has made prominent: men use sexuality and sexualization (as well as other work-undermining strategies) to try to push women out of jobs, not to keep them in and use them for sex.

As Schultz has shown, courts often do not see the nonsexual forms of harassment as harassment.\(^{127}\) Normative heterogamy is assumed to be such a strong social force that courts expect that intimate pull between men and women to be ever present, and thus courts see the mating story above (and often instead of) all else. When the undermining is based on competence, when the goal is exclusion and not sexual congress, then courts’ perceptive abilities fail them. The norm of the intimate domain thus both contributes to one form of discrimination in the employment domain and skews courts’ perception so they can see only that form of discrimination.

3. Homogamy: Dissociation, or, the Illusion of Separate but Equal. — For race, the sexual norm is homogamy. The expectation is that people desire and wed within their own group. But this assumption is not a purely symmetrical one. Rather, those on the bottom are generally expected to want those on the top; most notably, black men are expected to want white women.\(^{128}\) The dominant group is expected, however, to want to disassociate from other races. In the workplace, this intimate norm may help to underpin the core story of race discrimination.

The expectation of normative homogamy with regard to race may translate into difficulties for courts in seeing subtler forms of bias that involve what Becker calls “the desire to subordinate,”\(^ {129}\) rather than the desire to exclude or simple aversion. As noted earlier, Epstein writes, in theorizing about workplace dynamics, that “[l]ike attracts

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\(^{128}\) See, e.g., supra note 51. The fact that subordinate group members are expected to want to violate the norms of homogamy does not mean they actually want to. (Think here, for example, of the reasons discussed in the Bell story, supra section I.B.3, pp. 1323–24.) As to why more black men marry white women than black women marry white men, this is a complicated question subject to multiple explanations, as discussed in section I.B.1(e), pp. 1326–21.

\(^{129}\) Becker, supra note 34, at 1667.
That is certainly the assumption in the intimate domain with regard to race. Whereas courts are keen to understand intergroup relations between men and women in the workplace as all about (male) desire — rather than exclusion — courts looking at race discrimination cases may fail to see complicated dynamics of role-based racial discrimination because they are expecting exclusion. Unless the case presents strongly racialized language and direct comparator evidence, as in Slack, courts may have difficulty in appreciating as discrimination the role-based demands that permit employees to remain so long as they perform or cover their race in particular ways.\footnote{EPSTEIN, supra note 33, at 68 (internal quotation marks omitted).}

Desexualization: Isolation, or, Not Even the Illusion of Separate but Equal. — Just as normative desexualization is about utter exclusion of disabled people from the intimate realm — not just relegation or segregation to pairing only within one’s group — so our core story of disability employment discrimination is about utter exclusion, that is, isolation. The history of institutionalization of people with disabilities makes its way into our current thinking about disability, in the intimate domain and elsewhere. Normative desexualization entails an idea of disability that involves complete isolation — the man who has never been kissed or hugged, much less had sex — the kind of person who lives in the isolation of an institution. (Of course, institutions are full of people, but I think in the popular imagination they involve being wrenched from one’s friends and family, and thus from any kind of social world.) Even noninstitutional living for disabled people seems to imply by its name — “independent living” — a kind of isolated living, all alone, independent.\footnote{I thank Jill Anderson for the point about the term “independent living.”}

In the workplace context, this notion of total social isolation fuels a misleading core story in two ways. First, it may contribute to, and rationalize, the bind of the disabled ADA plaintiff in having to show both that she is \textit{really} “substantially limit[ed in a] . . . major life activit[y]”\footnote{42 U.S.C. § 12102(2) (2000).} and that she is also otherwise qualified for the job.\footnote{Id. §§ 12112(a), 12111(b). On this bind, see, for example, Chai Feldblum, \textit{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, 147–57 (2000).} While this is certainly a bind for the plaintiff, it is not, I think, the paradox that it seems. If the image of a disabled person is of a person intensely and inherently limited — so limited that she must be isolated and institutionalized — then of course it is difficult to show that one is disabled and yet capable of participating in the workplace.
In addition, an idea of sexual and social isolation for disabled people may undergird courts’ letting employers off the hook. If isolation is the paradigm of disability, then the employer who already hired the disabled person, deeming that person capable of working and of participating in the work world, must not be prejudiced. Given that discrimination lawsuits are, for various reasons, rarely failure-to-hire cases, the employer in such cases has therefore already demonstrated its enlightened — even superhuman — perspective on disability, by hiring a disabled person and thus defying this core story of isolation. This may help to explain why ADA plaintiffs have such a low success rate. Judge Posner has been criticized for saying that the word “stigmatizing” is “merely an epithet” when applied to separate but equal facilities under the ADA. Though the criticism of Judge Posner’s normative or legal conclusion may be apt, as a descriptive matter he may be correctly intuiting contemporary norms. To have separate but equal facilities, to suffer merely segregation rather than isolation, is still viewed as a major advance for disabled people in the work world. Courts may therefore not be able to see beyond this core story of discrimination as utter isolation, and thus they may fail to recognize other forms of workplace discrimination in this context. In these ways, we see how the norms of intimate discrimination operate in the domain of the workplace to frame what forms of discrimination courts are able to see and thus to vindicate.

II. ON INDIVIDUAL DIFFERENTIATION

Is intimate discrimination bad? Might it be neutral, or even good? What does it mean to base our desires, our intimate decisions, on identity traits that cannot, by law, form the basis for decisions in other domains like employment? Then again, what would it mean not to

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137 Judge Posner wrote, of a plaintiff’s complaint about a failure to make a $150 accommodation to lower a kitchen sink so the plaintiff could wash out her coffee cup in the kitchen rather than the bathroom, as follows:

[W]e do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions “stigmatizing.” That is merely an epithet.

discriminate on the basis of race, disability, or sex in the erotic and romantic realms?

This Part examines intimate discrimination at the individual level to try to address these questions. For purposes of this Part, then, intimate discrimination largely means intimate differentiation, that is, individuals distinguishing other individuals on the basis of these traits in the context of intimate relations. The aim here is twofold: first, to unearth and elaborate the complications of the subject, for their inherent interest; and second, to help us see why the general policy assumption in this area — that individual differentiation in the intimate realm should not be legally prohibited — is both correct and incomplete. Studying the contours of this frequently overlooked cousin to legally regulated discrimination prepares us for a discussion of what roles the state should and should not play in intimate discrimination.

A. The Individual Lover's Discourse

This section both demonstrates the complexity of intimate discrimination and explores the richness of the subject by presenting the ideas in a format that resists a simple summary. Thus, what follows is a series of observations presented as numbered propositions, from one to twelve. Some of the propositions are provocative; some may seem banal. These ideas are not meant to be the last word on the subject, but are meant, rather, to adumbrate the beginning of a study. The propositions start with an inquiry into the problem of intimate discrimination — asking what the trouble is here — then proceed to examine the reasons why people discriminate in the intimate domain. The list concludes with some preliminary reflections on the difficulty of determining what intimate nondiscrimination would mean at an individual level.

Speaking about intimate discrimination in general means inevitably eliding important distinctions at times — most notably, the vast differences among sex, love, marriage, dating, and desire, all of which find, albeit variously and incompletely, a place under the rubric of the intimate. At moments I will discuss these nuances in some detail, and at times I will breeze past them to reach other points. Likewise, the identity categories at issue operate in significantly different ways — as Part I goes some way toward showing — but this section will at times speak of the categories together, to learn from their connections, to see

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138 It may well be true that “it’s only by being shameless about risking the obvious that we happen into the vicinity of the transformative.” Eve Kosofsky Sedgwick, Epistemology of the Closet 22 (1990).

139 See supra note 7 (noting the complexity of the term intimacy).
their contrasts more starkly, or again to reach further points without submitting to endless detours and disclaimers.

1. Some intimate discrimination tracks discrimination that we find objectionable in other domains. — As Charles Lawrence noted two decades ago, one of the signs of the unconscious significance of racism is the way it takes sexual forms, in “[t]he preoccupation among racially prejudiced people with sexual matters in race relations” and by the designation of outgroups as “dirty or smelly or both.” In this way, the white person whose online dating profile says that she would consider dating others of every race but African American may well have something against that particular group. Demographers tend to measure a country’s racial integrative success by the levels of interracial marriage in that country, and while there may be important, and sometimes benign, reasons for in-group affiliation (of which more later), extremely low rates of intermarriage in a country plausibly signify the presence of what we commonly understand to be racial animus. Relatedly, rates of marriage and sexual activity for disabled people are lower than for nondisabled people, for what is surely a complicated set of reasons, among them the stigma that discredits disabled people as not fully human, and disgust at disabled bodies or minds.

Anecdotally, it is interesting to note that even those highly critical of what they term the “politically correct” project of thinking in terms of discrimination may invoke an individual’s personal relationships as a sign of their deeper politics of integration. Thus the theorist Slavoj Zizek said in a recent talk, as an assumed indictment of political correctness and as if punctuating the end of a conversation rather than beginning one, “All the big multiculturalists I know have no black friends.” It is interesting to consider what it would mean to think

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141 As Randall Kennedy points out, with personal ads, as with other racial discrimination, “[w]e see the racial signals but not the motives behind them.” KENNEDY, supra note 10, at 29. In response to Kennedy’s written queries, some authors of personal ads explained their motives, including the “first person who answered,” who “gave racist reasons for including whiteness among the traits he desired. He believed that whites — or, to use his terminology, ‘Aryans’ — were superior to others and needed to band together to combat what he saw as the worldwide antiwhite conspiracy.” Id. at 30.
142 See, e.g., Lewis, Yancey & Bletzer, supra note 45, at 60–61 (considering the United States’s interracial marriage rates).
144 See, e.g., SHAKESPEARE, GILLESPIE-SSELLS & DAVIES, supra note 73.
145 Slavoj Zizek, Remarks at the Critical Legal Conference at Birkbeck College, University of London (Sept. 2007).
this sort of commonplace accusation, not in the realm of friendship, but in a sexual realm, where it is so rarely made.146

2. But some forms of intimate discrimination may be not only common but also necessary for desire. — With regard to the first proposition one might ask, What about sex, as opposed to disability or race? Most people believe the sex of another is the starting point for their desire.147 That is, most people understand themselves to be monosexual rather than bisexual, so another person’s maleness or femaleness is a prerequisite for desire, or at least for sexual intimacy.148 Even among many bisexuals, a partner’s sex is not irrelevant.149 So if someone else’s sex is often understood to be necessary to desire, might this be true, for some people, of race or disability as well?150 Then again, one might ask, how often are assumptions about desire and race or disability based in stereotypes, and if stereotypes are by definition not true in every case, then how often can race or (dis)ability be truly necessary to desire?151

3. Affirmative desire for a certain type may seem less troubling than a desire to exclude or avoid certain types or categories. — The Asian American woman who, on a dating website, checks that she specifically seeks Hispanic men, looks rather different from the same woman who checks every box but African American. Likewise, we may wonder whether the Christian person who checks every religion, including Muslim and Hindu, but declines to check Jewish, harbors anti-Semitic feelings. More broadly, categorical desexualization of disabled people may be more troubling than individual intergroup affini-


147 This is a reason cited by and to parents of intersex children in favor of genital surgery. See, e.g., Elizabeth Weil, What If It’s (Sort of) a Boy and (Sort of) a Girl?, N.Y. TIMES, Sept. 24, 2006, § 6 (Magazine), at 48, 50.

148 Of course, literature is rife with examples of people desiring people of the sex they thought they did not desire, when the other is in cross-sex disguise. Bisexual desires are apparently more common than they are acknowledged, see, e.g., Yoshino, Bisexual Erasure, supra note 111, at 377–88, but most people nonetheless understand their desire to be, first and foremost, framed by the other’s sex. The internet provides multifarious possibilities for unsettling this assumption, which may be part of why sex is always and obviously asked first on mainstream dating sites. See supra section I.D.2, pp. 1332–33.

149 See infra p. 1355.

150 Some of the evolutionary theories of love and desire, which aim to explain such phenomena of assortative mating, would posit biological factors as key to this kind of sorting, including along racial lines. For more on assortative mating, see infra notes 286–87 and accompanying text. But note also that even sex for these purposes may be largely culture (gender) — the cues to biological sex — rather than sex per se, in the sense that desire typically precedes direct knowledge of another’s sex organs or chromosomes (for instance). Perhaps the gender of another, his or her masculinity or femininity, is crucial.

151 Cf. infra note 182.
ties and disaffinities, such as compliance with a racial homogamy norm, since desexualization isolates rather than segregates.

4. Category-based affinities may also be controversial, however — a tension captured by the language of having a “fetish” as opposed to a “type.” — So-called fetishists or devotees around certain races or disabilities or body types garner very mixed reactions. For instance, “amputee devotees” (or acrotomophiliacs), who specifically desire female amputees,152 are met with outright hostility by some amputees and other disabled people for their objectification of particular bodies and impairments. But these devotees are greeted more favorably by others, who feel that desire generally involves objectification, and that it is appealing to be desired, even or especially for that which inspires rejection or revulsion in many.153 These debates mirror features of longstanding debates among feminists and disability activists about whether and when objectification might be appealing, particularly to those who have been subjected to normative desexualization.154 Relatedly, early psychological work on cross-ability relations implied that nondisabled people who became involved with disabled people must be pathological in some way; more recent work has attempted to counter this pathologizing move with qualitative studies of nondisabled people in cross-ability relations.155

The complicated terrain of racial types, or exoticism, is elegantly captured by Phyllis Rose in her biography of Josephine Baker:


155 See, e.g., Maureen S. Milligan & Aldred H. Neufeldt, Postinjury Marriage to Men with Spinal Cord Injury: Women's Perspectives on Making a Commitment, 16 SEXUALITY & DISABILITY 117 (1998). As Milligan and Neufeldt explain, one early work offered the following “typology of individuals who are unusually attracted to disabled people, though no data was given in support of their descriptors”: “walking wounded”; “would-be dictators”; “unsolicited missionaries”; “gallant gesturers.” See id. at 118 (citing CHARLENE DELOACH & BOBBY G. GREER, ADJUSTMENT TO SEVERE PHYSICAL DISABILITY 95–96 (1981)). DeLoach and Greer do acknowledge an alternative nonpathological type, though very briefly. See DELOACH & GREER, supra, at 95 (“Not included among the descriptions which follow are those valued individuals who relate well to everyone, disabled or not.”).
Compared with racism, exoticism is merely decorative and superficial. It doesn’t build death camps. It doesn’t exterminate. Exoticism cares mostly about its own amusement and tends to find differences of color amusing where racism finds them threatening. Exoticism is frivolous, hangs out at nightclubs, will pay anything to have the black singer or pianist sit at its table. Racism is like a poor kid who grew up needing someone to hurt. Exoticism grew up rich, and a little bored. The racist is hedged around by dangers, the exoticist by used-up toys.

If one is to be treated as a thing, one would rather be treated as a rare and pretty thing than as a disgusting or dangerous one. But that is still to be treated as a thing.\(^\text{156}\)

In the rather different domain of adoption, Rachel Moran writes that adoption “agencies tend to distrust adoptive parents who express a preference for a child of a different race and commonly make extensive inquiries about their racial attitudes.”\(^\text{157}\) This example from another context sets into relief the suspicion assigned to particular intimate affinities across the divides of race or disability, in contrast to the assumed normalcy of a particular desire for one’s own race or of a categorical lack of desire vis-à-vis disability.

5. Moreover, certain intersections of identity categories conjure their own stereotypes and hierarchies of desirability and exclusion. — For men, blackness is associated with greater masculinity, and Asianness with less.\(^\text{158}\) Russell Robinson has written eloquently about the constraints these stereotypes of desire place on dating options, particularly among gay men, and has demonstrated the presence of certain “racialized sex roles” on gay dating sites,\(^\text{159}\) specifically, the “aggressive black top” and the “submissive Asian bottom.”\(^\text{160}\) These stereotypes work together with the broader cultural privileging of masculinity in men — and in many contexts, though not all, femininity in women — in the intimate domain.\(^\text{161}\) As discussed earlier, the meanings of inter-

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\(^\text{156}\) PHYLLIS ROSE, JAZZ CLEOPATRA; JOSEPHINE BAKER IN HER TIME 44 (1989), quoted in MORAN, supra note 23, at 115.

\(^\text{157}\) MORAN, supra note 23, at 147; see also BARTHOLET, supra note 10, at 182.

\(^\text{158}\) Cf. Thomas & Goff, supra note 52.

\(^\text{159}\) Robinson, supra note 4, at 2788.

\(^\text{160}\) Id. (internal quotation marks omitted); see also id. at 2809–18.

\(^\text{161}\) Mary Anne Case has written persuasively about the greater value placed on masculinity in both men and women in other spheres of life. Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1 (1995). The intimate and sexual spheres may provide the central counterexample to this phenomenon for women (though not for men), in the context of their relationships with men and sometimes women. I say “sometimes women” because butch lesbians generally do better than butch straight women in their respective status hierarchies of desire, but femmes or non-butches are nonetheless more in demand for many women seeking women. See, e.g., Christine A. Smith & Shannon Stillman, Butch/Femme in the Personal Advertisements of Lesbians, in LESBIAN LOVE AND RELATIONSHIPS 45, 48 (Suzanna M. Rose ed., 2002) (discussing a study of lesbian personal ads in which, of the one-third of ads that specified a gender preference, more of those ads explic-
racial sex for black men with white women differ markedly from those for black women with white men, in ways that may contribute to the
gendered divide in black-white marriage rates.162 Some work suggests
that “[t]he only group of disabled adults in which women are more
likely than men to be married is women who are labeled retarded,” an
anomaly scholars have attributed to the intersection of disability and
gender stereotypes.163 That is, “the retarded wife may fit all too well
the criteria of the ‘good wife’: one who is docile, passive, loyal, and
dependent, not likely to show her husband up.”164 Some identity inter-
sections create categories of individuals who are relatively left out of
the dating market, much as normative desexualization works to ex-
clude people with disabilities. For instance, as discussed earlier, and as
Robinson notes, interracial dating rates are higher among black men
than black women, leaving black women with relatively fewer poten-
tial partners.165 Moreover, access to dating opportunities and even in-
formation may be affected by the intersection of one’s identity catego-
ries, as, for example, many gay disabled people know too well.166
These are just a few of the intersections that work to create differential
opportunities in dating markets.167 These examples show some of the
ways that the identity contexts of intimate discrimination defines its
meaning.168

162 See supra notes 50–55 and accompanying text.
163 Asch & Fine, supra note 154, at 15 (citing Constantina Safilios-Rothschild, Discrimination
164 Id.
165 See supra notes 46–55 and accompanying text. Age also works with sex to help create the
relatively disadvantaged category of older women.
166 See, e.g., Chelsea Whitney, Intersections in Identity: Identity Development Among Queer
Women with Disabilities, 24 SEXUALITY & DISABILITY 39, 40 (2006); cf., e.g., MILK (Focus
Features 2008) (portraying a young man in a wheelchair trying to figure out how to escape his
parents’ plans to institutionalize him for being gay).
167 A related problem is the way that certain identity intersections can leave some individuals
particularly vulnerable to sexual victimization — such as African American women and disabled
women — whether through pervasive ideas or circumstances of vulnerability, sexualizing stere-
types, or relative disregard by the criminal justice system. See, e.g., Kimberl[e] Crenshaw, Mapping
the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,
43 STAN. L. REV. 1241, 1255–82 (1991); supra notes 23, 74 and accompanying text; see also Ken-
neth W. Mack, Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segre-
alia, the “image of the Jezebel, the sexually promiscuous black woman,” id. at 389). Sexual vic-
timization can sometimes, paradoxically, be abetted by the norm of desexualization. See infra pp.
1381–82.

168 For a thoughtful discussion of the varied meanings of interracial intimacy, depending on
context, see Robert S. Chang & Adrienne D. Davis, The Adventure(s) of Blackness in Western
Culture: An Epistolary Exchange on Old and New Identity Wars, 39 U.C. DAVIS L. REV. 1189
(2006). Davis and Chang note the cultural assumption by some — their example is the arc of the
film Monster’s Ball — that interracial sex is inherently anti-racist, that it is “subversive of the his-
6. Intimate discrimination has different meanings and causes depending on the type of relationship. — For instance, people will sometimes sleep with people whom they would not marry (or sometimes even date).\textsuperscript{169} A person’s family, friends, and religious and other communities typically have more opportunities to express their views about more serious, and more public, relationships. Indeed, one function of weddings is surely to present the prospective spouse to one’s community, to confront the views of “God and everyone.”\textsuperscript{170} Another way that the type of relationship matters to intimate discrimination concerns numerosity. That is, most people have many more friends than lovers and certainly more than they have spouses.\textsuperscript{171} So for most people, the possibilities for diverse intimates are typically broadest in friendship, less broad in dating and sex (depending on how many partners they have over time or at once), and least broad in marriage (also, however, depending on how many times they divorce and re-marry). If people form lasting and exclusive relationships, as many people do or aspire to do,\textsuperscript{172} then any categorical variations among their sexual intimates come from their dating or sexual history rather than from present practices.

7. Categorical affinities for in-group members look different, and potentially more appealing, when expressed by members of subordinate groups. — Members of any group might worry that multiracialism, for instance, will lead to all of us becoming culturally “beige” rather than a more complicated and varied bunch.\textsuperscript{173} But the desire to preserve

\textsuperscript{169} Cf. Erica Chito Childs, Listening to the Interracial Canary: Contemporary Views on Interracial Relationships Among Blacks and Whites, 76 Fordham L. Rev. 2771, 2775 (2008) (“Even white college students [interviewed in the study] who said their parents did not care if they dated interracially clearly indicated that their families prefer, or in some cases demand, that they marry within their race.

\textsuperscript{170} See infra p. 1360.

\textsuperscript{171} Cf. Emens, supra note 146, at 288–91 (discussing the norm against jealousy in friendship as opposed to in sexual relationships).

\textsuperscript{172} See id. (discussing the gap between the fantasy and the reality of monogamy).

\textsuperscript{173} See, e.g., Peggy Orenstein, Mixed Messenger, N.Y. Times, Mar. 23, 2008, § 6 (Magazine), at 9 (“Race is thrust on Hapas [multiracial] based on the shades of their skin, the shapes of their eyes, their last names. (Quick: What race is Apolo Ohno? How about Meg Tilly? Both are half-Asian.) But ethnicity, an internal sense of culture, place and heritage — that’s more of a choice."
one’s culture through homogamy seems more easily separable from racism (or its equivalent) when expressed by members of subordinate groups. In his generally measured and thoughtful book *Interracial Intimacies*, Randall Kennedy dismisses too easily such preferences as “essentially defensive and compensatory responses to white aggression."  A variety of reasons might drive such politics, including wanting to create or preserve a family or a community that feels safe from a hostile world, or to signify pride in one’s own subordinated community, reasons dramatized in Bell’s *The Last Black Hero*, discussed earlier. 175 Relatedly, a member of a subordinated group could want to avoid pairing with superordinate group members if assimilation means absorption into the dominant culture. 176 (The difficulties of avoiding absorption into the dominant culture are well known to non-Christians — or to Christians, for that matter — trying to raise children without Christmas.) One could even imagine a version of this anti-assimilationist desire that would lead a person (on a dating website) not to pick only her own (non-white) race, but instead to check every box but white. The separatist move within deaf culture is by now well known, though more for struggles over cochlear implants and who should lead Gallaudet University than the concomitant debates around out-marriage versus in-marriage. Just as there are deaf parents who resist cochlear implants for their children, though, there are deaf individuals who would prefer a deaf spouse. 177

8. *Members of superordinate groups may also have reasons that are not obviously related to racial animus or discomfort with disability to*

Cultivating it in our children could be the difference between a Hapa Nation that’s a rich, variegated brown and one that fades to beige.”).

174 KENNEDY, supra note 10, at 34.

175 See generally supra section I.B, pp. 1318–24. Ayres and Brown acknowledge an antisubordination justification as the only legitimate exception to their endorsement of race- and sex-blind dating, emphasizing an African American’s reasonable desire to avoid the “vestiges of racism” and associated difficulties in intimate relationships, AYRES & BROWN, supra note 12, at 35, or a woman’s desire to avoid the gender stereotyping that might come more readily in a relationship to a man, or to show that “male supremacy . . . is not necessary for the operation of healthy, loving relationships,” id. at 37.

176 Kennedy acknowledges these reasons:

Among the most influential opponents of interracial intimacy are blacks who see it as capitulation to white dominance. Asserting that blacks need to feel a greater sense of racial obligation to themselves as a collective, that on the ground of racial kinship they ought to prefer one another to others, and that interracial intimacy constitutes a divisive diversion, significant numbers of African Americans oppose black participation in interracial dating, marriage, or adoption (especially when the others involved are white).

KENNEDY, supra note 10, at 34. But he prefaces these words with the following explanation: “Victims of oppression are . . . quite capable of hurting themselves and others through specious beliefs and mistaken actions.” Id. Kennedy seems to be concerned about blacks policing other blacks’ choices, however, and other comments suggest he might be more sympathetic to an individual’s reasoned choice along the lines I state.

177 Cf., e.g., Thiessen & Gregg, supra note 49 (discussing disability-based homogamy).
prefer in-group members, although it may be difficult or impossible to separate those reasons from animus or stereotyping. — A member of a dominant group might cite any number of reasons for preferring one’s own group, such as a perception of shared cultural reference points, or a feeling of being better understood, or ease of family and community acceptance,178 or worries about a harder life for one’s children because of discrimination or segregation,179 or a wish for particular functional abilities in one’s spouse,180 or a desire to avoid what Erving Goffman calls the “courtesy stigma” of close association with a stigmatized group member.181 Some of these may appear race- or disability-neutral on their face, though they may ultimately be hard or impossible to distinguish cleanly from animus or especially from stereotyping, by the individual or the community.182

9. Identity categories are multifaceted; some traits or signals of a particular category might matter more or less to different people. — This point may be most obvious with disability, which comprises so many different types of impairments: from deafness to blindness to mobility impairments to psychiatric or cognitive impairments, to name just a few. Types of disabilities include functional limitations (which are greater or lesser depending on the design and accessibility of the environment183), cosmetic variations that entail no functional limitations (such as scarring from burns184), and mitigated impairments (such as a heart condition corrected by a pacemaker185), as well as combina-

178 Cf. Note, supra note 56, at 889–90 (discussing the constitutional illegitimacy of advertising to social prejudice to justify state discrimination, see Palmore v. Sidoti, 466 U.S. 429 (1984), and yet the difficulty of this question as a social or moral matter).

179 Cf. Chito Childs, supra note 169, at 2780–81 (noting the concern among black individuals interviewed on the subject of interracial relationships for “how the biracial children will fare in this racially divided world”). On the burdens on interracial families, especially housing segregation, see infra section IV.E.2, pp. 1398–99.

180 Cf. infra section II.A.9, pp. 1348–50.

181 ERVING GOFFMAN, STIGMA 30 (Touchstone 1986) (1963) (“In general, the tendency for a stigma to spread from the stigmatized individual to his close connections provides a reason why such relations tend either to be avoided or to be terminated, where existing.”).

182 See Chito Childs, supra note 169, at 2776–77 (describing white interviewees, on the subject of interracial relationships, “den[ying] racial preference” but providing a similar set of apparently neutral reasons for “their reasons for not dating intersracially”); Note, supra note 56, at 888–91 (problematicizing the reasons, such as aesthetics, given for racial preferences). The accommodation step of the individual self-inquiry proposed in section II.C may go some way towards identifying the sources of — and even unsettling — these seemingly neutral reasons for some individuals; to ask, for instance, whether any changes to one’s environment or community could alter one’s feelings about the desirability of a partner of a particular race or disability should prompt an interro-

183 See infra section III.A, pp. 1366–73 (discussing the social model of disability).

184 29 C.F.R. § 1630.2(l) (1994) (providing the example of a “prominent facial scar or disfigurement” as a disability under the “regarded as” prong of the ADA definition).

185 Cf. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding, in a case involving corrective lenses, that ADA plaintiffs who mitigate must be considered in their mitigated state for pur-
tions of these. Preferences against the latter two categories seem necessarily related to stigma or stereotypes, or at least to concerns about courtesy stigma, whereas functional limitations might fit to varying degrees with different personalities and needs (and may also be linked to stigma). A particular individual — a pianist, say — might care tremendously about hearing in a partner, whereas a visual artist might care much less about sound than sight. A carpenter or builder who likes to drill at odd hours — or a person who snores — might see advantages to impaired hearing in a partner. A person with a mobility impairment might want a partner with great physical agility, for the flexibility of engaging in certain sexual activities or routine tasks without third-party assistance. Or the same person with a mobility impairment might desire someone who shares her impairment, for the understanding or identification or sexual freedom that inhabiting unconventional bodies brings to some. (Desires for in-group members among subordinated groups, such as within the deaf community, were discussed earlier as a phenomenon with relatively well known politics; this point instead tries to consider other kinds of reasons for particular identity-based pairings.) In addition, people may select their prospective partners in part because they intend to have biological children and, correctly or incorrectly, expect the partner’s traits to be passed to the children, or expect those traits to help or hinder parenting skills.

Seeing this point with regard to disability helps us see its relevance to race, which is of course a deeply contested category, with many possible defining elements. Throughout U.S. history, legal and social definitions of race have variously emphasized skin color, physiognomy, cultural recognition, or blood lines (variously defined). Any one of these could be more or less important to an individual’s imprinted erotics or community and companionship needs or social milieu. Or any of these might trigger racist fantasies in a prospective partner —

poses of the definition of disability). In contrast with Sutton’s narrow reading of the ADA, this Article considers disability generally to include mitigated impairments, consistent with various state statutory definitions, see, e.g., N.Y. EXEC. LAW § 292(21) (McKinney 2005), and with the recent revisions of the ADA (except for vision impairments), see ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

186 See supra p. 1348.
187 See, e.g., Rembis, supra note 79, at 7–12 (citing sources).
189 Cf. Asch & Fine, supra note 154, at 21 (“Fears that disabled women would produce children with similar conditions (nearly always groundless since the vast majority of disability is not hereditary) have mingled with convictions that they would harm, deprive, or burden children they attempted to rear.”).
racist fantasies that might be a deeply disturbing reason for both partners to avoid such a relationship or, as some have written, that could become part of a cooperative, role-playing exploration or expurgation of these cultural artifacts.  

Sex might seem a cleaner category, less subject to cultural dismantling. Of course much has been written, however, about sex’s complexity. Whether sex is defined by chromosomes, external or internal genitals and sex characteristics, appearance and community recognition, or self-identification is hotly disputed. Our categories of sexual orientation tend to assume a rather thin notion of sex, but surely our erotic selves respond to a more complicated set of signals, including how someone inhabits his or her sex, what gender role or roles the person occupies, in ways that track or defy normative expectations. (One might think here of the *New Yorker* piece discussed earlier.

10. It is unclear how fixed or malleable desire is. — Some people’s sexual tastes change over time or in response to new encounters or new people; some people’s do not. Much work in the history of sexuality is dedicated to showing that sexuality is constructed, partially or fully, by social and historical context. While this work shows that sexual preferences and desires change to some extent across time and culture, it does not necessarily claim that the forms sexuality takes are any less real, or any more flexible, to a given individual at a given time. There is also work in psychology — which terms this phenomenon “erotic plasticity” — asserting that women’s desires are more malleable than men’s. Is this plausible, and if so, is it the result of biology or

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193 See supra section I.D.3, pp. 1333–34.


195 See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 552–53 (1994) (distinguishing types of constructivism and noting that “it is possible for a constructivist to claim that sexual-orientation identity is mutable across the range of human possibility, without making the distinct claim that it is mutable in a given person, or even in a given society or era”).

something more cultural? Is it the result of subordination, of women’s not having their desires matter so much as men’s, or is it a sign of greater attunement to the range of sexual possibility or of desirability?\textsuperscript{197} Some people also discover or realize a new sexual orientation later in life to the surprise — or sometimes not — of their friends. But we commonly understand a person’s “sexual orientation” with regard to sex to remain the same over time, even if it is not always realized. (In contrast, people’s age-related desires are expected to shift over time, to get older as they get older.\textsuperscript{198})

Thus, desires might sometimes appear to change because, in fact, the desirer was previously mistaken about his desire or hiding it from others.\textsuperscript{199} Desires may also change because experience exposes the desirer to real people whom she would not have anticipated liking in the abstract. If a person of race $X$ grew up in a racially homogeneous community, she might think she could never desire someone of race $Y$; later life events might nonetheless bring her into contact with people of race $Y$ and change that feeling. (The assumption here is not that everyone’s preferences would change with such exposure, but that some would.) In this way, desires may be somewhat endogenous to an individual’s social architecture.

Relatedly, though people with disabilities are often portrayed as asexual,\textsuperscript{200} what is assumed to be true of the able-bodied person whose able-bodied partner becomes disabled? Is his or her desire imagined to leave with that transformation? It might be assumed that there is some sociobiological or essential aversion to pairing with a disabled


\footnotesize{\textsuperscript{197} See DIAMOND, supra note 196, at 9 (contesting the former argument). For further discussion, see Elizabeth F. Emens, Adaptive Desires (July 2008) (unpublished manuscript, on file with the Harvard Law School Library).}

\footnotesize{\textsuperscript{198} It is not pedophilia for an eleven-year-old to fancy another eleven-year-old, but it is different if a forty-year-old fancies an eleven-year-old. Indeed, the increasing age of a desired object over time is what makes age homogamy possible for most people. Note, though, the typical imbalances in the age norms — it is entirely acceptable, or even expected, for men to desire younger women, and for women to desire older men; even large age gaps in that direction draw fewer looks than the reverse. Commercial dating sites reflect the complicated status of age homogamy: the movement has been toward greater homogamy, though with a remaining assumption that men in straight pairings will be slightly older. One can see this, for example, in the age brackets invited to commercial “speed dating” events, which are for, say, “women 23–32, men 25–35” or “women 29–39, men 31–42,” in which the men are two to three years older in each pairing. New York Easydates, Upcoming Speed Dating Events in the New York, Manhattan, and Surrounding Area [sic], http://www.nyeasydates.com/events.php (last visited Feb. 8, 2009).}

\footnotesize{\textsuperscript{199} In addition, proponents of wider recognition of bisexuality as an identity category sometimes claim that such flips, from straight to gay, or the reverse, reflect ongoing mistakes about identity because more people evince bisexual desires than embrace bisexual identities. See, e.g., Yoshino, Bisexual Erasure, supra note 111.}

\footnotesize{\textsuperscript{200} See supra section I.C, pp. 1325–30.}
person, if humans are assumed to possess some eugenic aspect to their desires.\textsuperscript{201} But Harlan Hahn has written eloquently of the historic associations between disability and erotic revelry.\textsuperscript{202} And lest one imagine that only disability advocates think impairment can be beautiful, it is worth remembering Edmund Burke on how much more beautiful women are when flawed:

> There is another notion current . . . ; that \textit{perfection} is the constituent cause of beauty. . . . But in these, so far is perfection, considered as such, from being the cause of beauty; that this quality, where it is highest in the female sex, almost always carries with it an idea of weakness and imperfection. Women are very sensible of this; for which reason, they learn to lisp, to totter in their walk, to counterfeit weakness, and even sickness. In all this, they are guided by nature. Beauty in distress is much the most affecting beauty.\textsuperscript{203}

In Burke’s rendering, a minimal level of impairment is an attractive part of femininity.

Setting aside the complications, of which there are many, we can observe that sexual orientation (in the sense of the sex someone desires) is generally assumed to be more fixed and less malleable, at the level of individual control, than is desire related to race or (dis)ability.\textsuperscript{204} This is partially reflected in the differences across categories in whether we have names for those who violate or comply with the norms of intimate discrimination. Mainstream English has names in a strong sense for those who desire within their own sex (homosexuals and bisexuals) and for those who desire across sex (heterosexuals); in a much weaker sense for those who desire across race (miscegenator or miscegenist) and not for those who desire within race (the normative choice); and not much for those who desire across disability (specific disability fetishists, such as the amputee fetishist mentioned above, might be an exception) and not at all for those who desire within disability or ability.\textsuperscript{205}

\textit{11. To be rejected for one’s identity category may be especially painful; however, for others to signal their preferred type may also be especially useful in the intimate domain.} — Given the emotion surrounding intimacy for many people, it is unsurprising that intimate re-

\textsuperscript{201} But \textit{cf. supra} note 49 (citing work on disability-based homogamy).


\textsuperscript{203} EDMUND BURKE, A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL 84 (Dover 2008) (1759).

\textsuperscript{204} \textit{Cf. infra} p. 1389. This is not to say that sexual orientation is “essential” rather than “constructed.” \textit{See supra} notes 194–95 and accompanying text.

\textsuperscript{205} Under race, there is also the term “nigger lover,” \textit{see supra} note 65 (discussing a recent employment-discrimination case involving the term), though arguably this offensive term often refers as much to friendship and simple social affiliation as to anything romantic.
jection related to one’s salient identity traits is often described in poignant terms. In the words of Ricardo Pau-Llosa:

With the Anglo woman, you are reminded of your exile not just from Cuba but from effortless cultural participation of any kind. . . . Whether I dated unapologetically philistine cubanas or gringas out to prove (and therefore disprove) their ‘open-mindedness,’ it has been in matters of love where I have felt the pain of double exile the strongest.206

In recent years, as single works and then volumes have emerged on disability and sexuality, the pain of desexualization and related disappointments emerges as a persistent theme.207 Yet people’s explicit articulation of their dating preferences as to race, (dis)ability, and sex may be efficient for — or even, in some cases, appreciated by — prospective mates (and non-mates). Gays and lesbians, for example, have long understood the utility of creating distinctive spaces for gay socializing; even in the absence of a need to avoid detection or violence, queer-only spaces save time and energy, not to mention needless rejection.

Relatedly, the niche website The Right Stuff, for straight-seeking elite-educated folks, asks members to include their age, religion, and religious preference in their (otherwise freeform) short profile.208 While members must pay to obtain other people’s longer bios, this short profile is available for free. The suggestion to reveal religious preference at the first stage is presumably trying to save members the money (and trouble) of buying profiles of others whose religious preferences might categorically exclude them. By contrast, the site nowhere asks members to state race preferences — and also waits until the long pay-per-view profile to ask for a member’s own race, “if relevant to you” — likely reflecting heightened sensitivity surrounding race issues among those with elite education.209 As others have noted, while race is often visible, racism is not.210 For that reason, some might even wish that preferences in this domain were made more explicit, so that mismatches could be avoided.211

207 E.g., *BAER*, supra note 79, at 22; *KROLL & KLEIN*, supra note 79, at 15–22; *SHAKESPEARE, GILLESPIE-SELLS & DAVIES*, supra note 73; see also *Mason-Lovering*, supra note 85.
208 The Right Stuff, New Membership Form, http://secure.rightstuffdating.com/forms.cfm (last visited Feb. 8, 2009). As noted earlier, The Right Stuff refuses to allow same-sex searching, which may open it up to a lawsuit akin to that filed against eHarmony. See *supra* pp. 1332–33.
209 The Right Stuff, *supra* note 208. Of course, participants can choose to state a race preference in the open form sections of the short or long profile. In the short profile, they may also opt to state their race or to include a photo, which may permit some assumptions about race.
211 Of course, there are also many reasons why parties on a dating site might not want to state racial preferences even if they have them, including (1) not wanting to acknowledge the preference
Not knowing about another’s racial preferences can have unfortunate consequences in the public sphere of, for instance, employment, as it can make it harder to avoid employers or coworkers who harbor hostility to one’s race. In the workplace, however, one might choose to live with subtle antipathy, if other factors (for example, salary) sufficiently counterbalance it. Such a tradeoff is harder (though certainly not impossible) to imagine in the romantic arena, because interaction between the partners is the essence of the relationship. Explicit articulation of categorical preferences and aversions thus may be particularly welcome in the intimate domain, because it allows those whose category is not desired to avoid wasting time and emotion on unappealing or fruitless interactions. Moreover, it may at times be preferable to understand accurately any such rejections as categorical, rather than speculating about one’s attractiveness as a mate in some more individualized way. While categorical rejections — disparate treatment — in other domains are sometimes assumed to be more painful for victims than disparate impact,212 this seems far from clear in the intimate domain, as a categorical rejection may make it easier to dislike or blame the other party in some contexts, rather than doubting oneself.213 That said, as with employment, we might wish that deciding what trades are worthwhile could be left up to the one who would be rejected; if the prospect of any partner is scarce, some partner — even one with some issues around the other’s identity — may be preferable to none. Or at least some individuals may feel that way, while others will not, making it hard to settle on a general rule in this sphere.214

12. It is not clear what intimate nondiscrimination would mean. — Would it be intimate nondiscrimination to claim not to notice someone’s race or disability (or even sex)? In antidiscrimination law, metaphors of “color-blindness” and “sex-blindness” represent one common understanding of antidiscrimination — the model sometimes

to oneself; (2) not wanting to be thought by others as racist or narrow-minded; and (3) not wanting to send appealing signals to prospective mates who are generally racist.  

212 E.g., Jeremy Waldron, Indirect Discrimination, in EQUALITY AND DISCRIMINATION 93, 95 (Stephen Guest & Alan Milne eds., 1985) (“There is a sense in which harm suffered through action motivated by prejudice is felt more keenly and resented more deeply than superficially identical harm suffered through action that was not consciously racist or sexist.”).

213 I suspect this depends in part on whether one’s surrounding community, and associated norms, would support one in feeling wronged by the other’s prejudice (as might be the case with race), or whether the surrounding community would be likely to share the other person’s prejudice (as might be more likely with disability). Sex operates differently, however; there, the extent to which we assume categorical fixity of desires based on sex may help ameliorate individual feelings of rejection. That is, we understand rejection based on sex to be rejection more because of the other person’s sexual orientation than because of our sex. Cf. supra pp. 1351–52. This presumably works differently in long-term relationships, however, than in first meetings.

214 This is one reason why individual self-inquiry, with the contextual particularities permitted by it, may nonetheless be useful. See infra section II.C, pp. 1357–66.
known as *antidifferentiation*. In the realm of sexual intimacy, this seems a particularly odd way to understand the ideal treatment of others.\textsuperscript{215} Think how offended a lover can be if a partner fails to notice trivial aspects of appearance, such as new glasses or a haircut; imagine if it were the partner’s sex that went unnoticed.\textsuperscript{216}

Rather than involve the “blindness” metaphor common in antidiscrimination law, then, perhaps intimate nondiscrimination would be desiring aspects of how someone wears his group identity — how the person inhabits his race, or his disability, for instance. That is, rather than not see those traits, one might see them and appreciate their relation to the whole of the person. Theorists of bisexuality comment on something similar with sex, because bisexuality is not what many think; it is not generally about not noticing or caring if someone is a man or a woman. Rather, bisexuality often involves desires related to maleness or femaleness, masculinity and femininity, as they relate to how they are inhabited and by whom, but not in a way that is limited to only men or only women.\textsuperscript{217}

And what does nondiscrimination in the intimate domain look like, if we are operating under an antisubordination, rather than an antidifferentiation, model? For some minority group members, marrying within one’s own group may be an appealing antisubordination move, as discussed above. Thus, in some contexts, choosing a mate with race or disability (or even sex) in mind may be a form of discrimination in contact that works to combat discrimination more broadly and in other domains. I return to the question of what intimate nondiscrimination might mean at the individual level later in this Part.\textsuperscript{218}


\textsuperscript{216} For a portrayal of the race-blindness metaphor literalized onscreen, see *A PATCH OF BLUE* (Filmway Pictures 1965), in which a blind white girl (played by Elizabeth Hartman) falls in love with the character played by Sidney Poitier without realizing he is black. When she learns his race from her disapproving, abusive mother (played by Shelley Winters, who won an Oscar for the role), she loves him no less, while he continues to think she loves him because she is literally “blind” to his race. In a climactic scene, she rattles off a list of things she knows about him, about his kindness and the like, ending with “and I know you’re colored, and I think you’re beautiful.” He is moved, both to learn that she knows, and to hear her describe him as beautiful, and he responds, “Most people would say the opposite.” While here love across race is made possible by disability, by literal blindness (and across disability by race, by his stylized isolation from society), the film nonetheless makes it important that she loves him with this knowledge, and incorporates it into her love for him, rather than merely seeming to tolerate it and remain blind to it.

\textsuperscript{217} See, e.g., Martin S. Weinberg et al., *DUAL ATTRACTION* 7 (1994).

\textsuperscript{218} See *infra* section II.C, pp. 1357–66 (discussing a proposal for an individual ethical self inquiry).
B. Abandoning the Individual Bad Actor

What I take from the above analysis of normative meanings and descriptive possibilities is that our intimate choices — about whom to date, sleep with, or marry — do matter, but they should not be judged at an individual level. Finding a bad actor in the intimate realm may sometimes seem easy: it’s the person who jilted you. But on a principled level this may be harder to do, at least on the basis of “discrimination” along recognizable axes.

As discussed, people may have strongly held preferences in the realm of desire. Those preferences may sometimes overlap with, or be shaped by, invidious sentiments toward certain groups.\(^{219}\) Alternatively, these preferences may be innocuous or even positive;\(^ {220}\) regardless, they may sometimes be necessary to an individual’s desire.\(^ {221}\) They may be relatively fixed with regard to an individual, or they may change or adjust over time, just as we generally hope aspects of our desires adjust as we and our partners and peers grow older and endure sickness as well as health.\(^ {222}\) Expressing desires that involve differentiating on the basis of race or disability (or even sex) may sometimes be hurtful to those who are not desired on a given occasion.\(^ {223}\) But in some contexts, not acknowledging the exclusionary nature of one’s desires may lead to more hurtful consequences.\(^ {224}\)

The complexities of individual desire along these axes — and thus of intimate discrimination in the sense of intimate differentiation — suggest that judging others is largely misguided in this realm. Love, marriage, desire, and sex are deeply personal and highly significant aspects of human experience. To impinge on people’s individual preferences in the intimate domain would seem a gross imposition on personal autonomy, in the absence of a substantial showing of countervailing harm.\(^ {225}\) Even to judge these desires as a matter of social rather than legal regulation, as some scholars have urged,\(^ {226}\) would risk false conclusions and perverse consequences.\(^ {227}\) For society, much less law, to cast judgment on an individual’s choices or patterns in this realm generates troubling echoes of the forms of physiological and psychiatric “conversion therapy” historically imposed upon, and some-

\(^{219}\) See supra section II.A.1, pp. 1341–42.
\(^{220}\) See supra sections II.A.2–3, pp. 1342–43; II.A.7–9, pp. 1346–50.
\(^{221}\) See supra section II.A.2, p. 1342.
\(^{222}\) See supra section II.A.10, pp. 1350–52.
\(^{223}\) See supra section II.A.11, pp. 1352–54.
\(^{224}\) See id.
\(^{225}\) An example with substantial potential harms would be pedophilia.
\(^{226}\) See Ayres & Brown, supra note 12, at 30–37.
\(^{227}\) We might of course ask whether these problems of the individual bad-actor model could apply as well to the employment domain; this is a broader question that I do not answer in this Article, though I return to it briefly in the Conclusion.
times submitted to by, homosexuals. Even if the sex-based desires that have been targeted by conversion therapy are more deeply entrenched, for any given individual, than desires related to race or disability — which seems plausible though not definite — we might worry about perverse consequences of imposing social judgment on these desires.

Some people’s desires may be fixed along relevant axes, temporarily or permanently, such that proscribing them might mean those individuals find no sex or mate at all. Part III includes a discussion of why intimate discrimination matters, citing, among other things, research on health and lifespan effects of sex and relationships. To pass judgment on the ways people attain these benefits, when they are fortunate enough to find consensual forms of fulfilling love or sex, seems to sacrifice too much of what makes for satisfaction and meaning in human lives. Moreover, we might worry not just about the love lost generally — which might or might not be substituted with different love gained — but also about a disparate impact on love lost. Some people would surely be more likely than others to take that social judgment to heart and deny themselves what they most desire. As sex-positive feminism has highlighted, for instance, the last thing women in particular need is another reason to suppress, critique, or feel bad about what turns them on. The complexities of intimate differentiation — including its benefits for some members of subordinated groups and, more widely, for its role in the pursuit of love, lust, and happiness for individual seekers of many stripes — argue against a conclusion that the associated harms could justify individual-level regulation.

C. Functionalism As an Individual Ethical Inquiry

Does this mean that intimate discrimination should not be a matter of legal or ethical concern? The answer is no, for two reasons. First, there is another meaning of the term discrimination, which refers to structural subordination rather than to individual differentiation along protected class lines. Law has played a role in intimate discrimina-

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228 See, e.g., Yoshino, supra note 131, at 783–803 (recounting this history as part of the assimilation demands placed on gays).
229 See supra section II.A.10, pp. 1350–52.
230 See infra section III.B, pp. 1374–79.
tion from this structural perspective and continues to do so, for instance, by prohibiting policies that create a disparate impact (in some circumstances) even when they do not involve disparate treatment. In the intimate realm, there is significant room for legal reform at this structural level, as I discuss in Parts III and IV.

Second, there is even room for some scrutiny at the individual level, warranted by the effects individual decisionmaking has on the patterns of exclusion that characterize the dating market. As this section discusses, there is a set of ethical questions one can and should ask oneself, suggested by the functionalism framework established by employment discrimination law. This discussion introduces an innovative relation between law and critical analysis by first using a doctrinal framework as a tool for individual ethical inquiry, and second, using the nonlegal application of this framework to teach us something about the legal framework itself. This move bears a similarity to the work of legal pluralists, who demonstrate how legal frameworks come to inform extralegal contexts. But rather than describing a feature of how law influences culture, the analysis here uses


For discussion of why intimate discrimination matters, due to subordination within the dating market and the repercussions beyond it, see infra section III.B, pp. 1374–79.

Ayers and Brown provide several thoughtful examples of discrimination-related self-inquiries, see AYRES & BROWN, supra note 12, at 37, 158, with which I agree in form, though in content I take a different position on the role of moral judgment, for the reasons discussed in section II.B, pp. 1356–57.


The discussion in this section particularly benefited from conversations with Adrienne Asch.

law as a heuristic to guide normative inquiry beyond the legal domain. Employment discrimination law characterizes job applicants and job holders in functionalist terms—that is, in terms of their “ability to perform” the job in question. Under the ADA, which offers a useful formulation of this functionalism approach, the question for the employer is whether this employee can perform the “essential functions” of the particular job (with or without reasonable accommodation). This inquiry forces the employer to consider the employee’s abilities and the necessary components of the job to see if they are a good fit. The accommodation inquiry also forces a reconsideration of how the job is typically done.

In the context of intimate relations, the equivalent inquiry would be to ask, What are the essential functions of being X’s partner? Can Y perform those functions? Unlike the functionalism framework in the employment context, which privileges functionality over appearance, functionalism in the intimate context would surely fold appearance into the functionalism inquiry. That is, the essential functions of being X’s partner might include being a type of person that X desires, which includes being, say, a man, or being a man X finds attractive. Thus,

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238 Heuristic is here used in its traditional, broad meaning—that is, of an interpretive device, a device “serving to find out or discover,” as THE COMPACT OXFORD ENGLISH DICTIONARY 193 (2d ed. 2004) defines it—not its meaning in behavioral economics, which considers heuristics to be mental shortcuts that misfire in important ways. In the language of behavioral economics, my use of the legal framework for qualified individuals under the ADA is more akin to a debiasing strategy. A debiasing strategy aims to counteract an individual’s bounded rationality, see Christine Jolls & Cass R. Sunstein, Debiasing Through Law, 35 J. LEGAL STUD. 201–02 (2006), or, more broadly, as Jolls and Sunstein put it in a recent article discussing debiasing strategies of antidiscrimination law, it is a strategy “designed to counteract biases of various sorts,” see Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 CAL. L. REV. 969, 973 (2006). Here we might understand the norms of intimate discrimination to lead people to make judgment errors about what range of individuals could potentially be a good partner for them (for whatever form of intimacy). The individual self-inquiry forces them to consider more precisely what they want and to question the assumed context of their relationship, in ways that may open their eyes to a broader or different set of individuals. Although individuals surely have some interest in keeping an open mind even without the pressure of an ethical inquiry, the breakdown of steps herein may help to counteract the pressure that norms can apply and thus to constrain an individual’s thinking, or his or her “gut impulses,” in this domain. A similar intent to counter bias through systematic consideration of needs, fit, and context presumably underpins the qualified individual and accommodation inquiry in the employment discrimination law context itself.

239 In this way, it is akin to the approach of institutional proceduralism, which uses the structure of due process analysis to devise institutional processes. See, e.g., Susan Sturm, Law’s Role in Addressing Complex Discrimination, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 35 (Laura Beth Nielsen & Robert L. Nielsen eds., 2005). In substance, however, the probing inquiry proposed here probably bears more similarity to the idea of “institutional mindfulness,” see Sturm, Architecture of Inclusion, supra note 232, at 257–58, than to either institutional proceduralism, see Sturm, supra, or debiasing, see supra note 238.

240 KIRKLAND, supra note 235, at 7.

contrary to a functionalism analysis that embraces a blindness metaphor — the paradigmatic musician behind the screen — a functionalism inquiry in the intimacy context would embrace appearance as potentially functional for many people.\footnote{On the musician behind the screen, see, for example, Jerry Kang & Mahzarin R. Banaji, \textit{Fair Measures: A Behavioral Realist Revision of "Affirmative Action"}, 94 CAL. L. REV. 1063, 1092–93 (2006).}

I think we can fairly say that $X$ is the proper arbiter of the essential functions of being his or her partner, and of whether $Y$ can perform those functions. That is, others — friends, parents, therapist, religious community — may have views on the matter, some of which $X$ may weigh heavily.\footnote{See supra section II.A.6, p. 1346.} But ultimately, though other societies may disagree,\footnote{The United States has been thought unusual in its deference to individual choice in matters of love. See, e.g., William J. Goode, \textit{The Theoretical Importance of Love}, 24 AM. SOC. REV. 38, 39 (1959) (discussing the fact that “love as a common prelude to and basis of marriage is rare, perhaps to be found as a pattern only in the United States”). Recent work suggests, however, that attitudes in other countries — even countries with strong traditions of arranged marriages such as India — are growing more favorable to love matches, with families providing consultation rather than decisionmaking power. See Elaine Hatfield & Richard L. Rapson, \textit{Love and Sex: Cross-Cultural Perspectives} 49–51 (1996) (reporting on studies of attitudes and practices in various countries).} contemporary U.S. society has largely reached the conclusion that $X$ gets to make that decision, and I do not question that conclusion here.

Nonetheless, it could help pave the way for a world of dating with fewer categorical exclusions and hierarchies\footnote{For more discussion of the significance of these effects, see infra section III.B, pp. 1374–79.} (and possibly more successful pairings generally) if everyone went through the steps of asking, “What are the essential functions of the job of being my partner? And who qualifies or doesn’t, if I think specifically and personally, rather than merely through the norms of the dating market?” Mistakes or mistaken assumptions about one’s own desire may be corrected by new experiences.\footnote{See supra section II.A.10, pp. 1350–52.} New questions may serve a similar function. The \textit{Maxim} joke presents disability as the punchline to a dating scenario, the end of an inquiry, rather than the beginning. It is assumed that the amputee in the joke would have had no sexual experience and was not going to get any now. But what if the women approaching him asked themselves, individually, what they were really looking for in a partner, what was essential to them?

For some, desire might depend on legs; for others, it might not. As noted earlier, fit is likely to be important: for a composer, hearing in a partner might be vital; for a painter who snores, a partner’s hearing might be irrelevant or even problematic.\footnote{See supra section II.A.9, pp. 1348–50.} Similarly, to ask oneself if

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a racial stereotype is necessary to one’s desire might lead to surprising conclusions. If race seems important, one might ask, what aspect of it matters? Is it about shared, or different, cultural background, in which case is race an imperfect proxy? Or is it about a value assigned to the race of one’s children, or about family approval? Or does one experience race as important to one’s sexual desire, in a way that might suggest early imprinting, through friends or family or early erotic exposure? The aim is to ask the questions, not to assume or judge the answers.

There are surely limits to what may come of this type of inquiry, in individual cases and more broadly. For instance, for most people, merely questioning the sex of whom they desire is unlikely to lead them to new conclusions. Some people of all ages do discover their sexual orientation at surprising junctures of life. Currently, however, in the United States, few people can avoid having ever encountered the question of whether another’s sex matters to their desire. To suggest that merely asking the questions I propose here could affect sexual orientation in that sense seems highly dubious. The ethical inquiry I am imagining therefore does not urge self-interrogation with regard to the sex of the person one desires.


249 Different individuals might reach different conclusions about whether to judge their own desires. Some would surely be troubled to realize that racial animus formed the basis of their preferences in the erotic domain. Whether to judge those desires, however, is a more difficult question for many reasons; for instance, it entails questions about various tradeoffs, see, e.g., supra p. 1357, and questions about what it means to judge feelings as opposed to behavior, particularly in a domain in which behavior antithetical to one’s feelings might seem itself worthy of judgment for the harms it could cause. For these reasons, I do not urge judgment as part of this inquiry.

250 A compelling exception to this may concern desires for intersexed and transgender individuals, which arguably warrant a similar self-inquiry to that proposed here for race and disability because many individuals will not have engaged in this kind of inquiry along these axes. For discussion and insight on these subjects, as well as discussion questioning the importance of gender classifications in various legal settings, see, for example, sources cited supra note 192.

251 See, e.g., Katy Butler, Many Couples Must Negotiate Terms of ‘Brokeback’ Marriages, N.Y. Times, Mar. 7, 2006, at F5; see also supra section II.A.10, pp. 1350–52.

252 On the assumption that our sex-based desires are relatively fixed, at least at the individual level, see supra section II.A.10, pp. 1350–52.

253 Ayres and Brown make a strong case, however, for raising one’s children in a way that does not presuppose hetero- or homosexuality. AYRES & BROWN, supra note 12, at 23–30. This approach, as it affirmatively embraces whatever sexual orientation children arrive with or develop, seems a sound one for nurturing parenting. Ayres and Brown go further, however, and argue for trying to raise one’s children to be bisexuals, on the ground that bisexuality is a more moral way of being than monosexuality, because it does not involve discrimination (in the sense of differentiation). Id. at 30–37. They are, for the same reason, “concerned that so many progressives are unselfconscious in even asking the question whether their own sex discrimination is moral.” Id. at 37. For the reasons discussed earlier, I am more troubled than they by the idea of imposing moral judgments on other people’s sexual desires, see supra section II.B, pp. 1356–57, and I am agnostic about the question of whether to judge one’s own desires, see supra note 249.
For some people, it may also not be new to consider probing questions about the relationship between race and their own desires; for others, it may be. Such questions are probably new for more people with regard to disability, since they are so rarely asked. In both cases, the argument here is that it is worth individuals’ asking themselves what the essential functions are of being their partner (for dating, marriage, sex, or whatever intimate practices they are seeking), and then to ask whether a particular race or disability precludes someone from fulfilling those functions.

To ask oneself the question about essential functions is to invite a focused consideration of one’s own needs and desires. It also forces one to pause over the fact that a person’s race or disability is only one of the person’s many traits. This inquiry may therefore serve a kind of debiasing function by helping to contextualize these traits and to encourage more than a gut response based on the norms of intimate discrimination.

The inquiry, following the ADA’s functionalism approach, should also involve an additional step. After articulating the essential functions, the questioner should ask whether any accommodation — either in the sense of a particular adjustment of one’s individual assumptions, immediate environment, or practices, or in the sense of a shift in the baseline of the surrounding community — would enable a relationship that otherwise might look too difficult. To make this suggestion is to highlight the fact that accommodation embraces two different, but related, ideas. Accommodation is generally thought of as individually tailored adjustments that make one person’s impairment less disabling by allowing that person to adjust to the world as it is (this is what I

254 See, e.g., Chito Childs, supra note 169, at 2774 (reporting that in her research on attitudes toward interracial relationships, “most whites interviewed replied that they ‘had never really thought about it’ and ‘didn’t know it was an issue’ when asked about interracial relationships”). Moreover, for those who have encountered the question before, to ask about the possibility of dynamic accommodations, see infra p. 1363, might affect their understanding of their desires, or at least of the issues.

255 Cf. supra p. 1352 (discussing the lack of mainstream terms for people who date inside or outside of their (dis)ability).

256 The inquiry would include an examination of one’s past experiences and relationships that may have shaped one’s assumptions about categories of potential partners. Recognizing the shaping role of one’s past may lead to discoveries about the limited experiences that make up one’s perceived desires, whether alterable or not. Relatedly, to examine whether another’s race or (dis)ability is a necessary qualification, one presumably needs to consider multiple and diverse members of the relevant groups.


258 See supra note 238 (explaining debiasing).
have elsewhere called the “static model of accommodation”). But accommodation also encompasses another meaning, which I have called the “dynamic model of accommodation,” which refers to a questioning of the baseline structure (of a workplace or, it could be, society more generally) that makes an impairment disabling. Under the dynamic model, one asks whether the individual disability and need for accommodation can show us any problems with or ways to improve on our baseline assumptions that create disability.

In the self-inquiry about intimate discrimination, both models of accommodation are potentially meaningful. Within the static model, one might ask if there is any individualized adjustment that would make a characteristic associated with disability or race no longer inhibiting of someone’s prospects for performing the essential functions of being one’s partner. For instance, adjustments to one’s home, social activities, or need for parental or community approval — or a move to a different building or neighborhood — might mean a particular disability is less disabling, or another’s race less challenging. Whether these adjustments seem too burdensome would depend on the individual engaging in the inquiry. Within the dynamic model, one might ask whether the relevant identity category would still matter to one’s intimate desires if the world were different than it is — in its laws, norms, material conditions, or architecture, for instance — and whether that alternative imagined world would be a better one. The dynamic model inquiry is more likely to be theoretical rather than practical, since changing the baseline of the surrounding community may be impossible, but the inquiry might nonetheless be instructive, at least for one’s views of the world if not of a relationship. Such

260 Id.
261 See id. at 894–96.
262 True to the accommodation doctrine, one might also ask whether the accommodation is “reasonable” and not an “undue hardship” in the sense of the costs not being disproportionate to the benefits, a concept that is interesting to ponder in this context. See, e.g., Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 546 (7th Cir. 1995).
263 See infra section III.A.2, pp. 1369–73 (discussing a hypothetical comparing relatively accessible and inaccessible cities for their effect on dating and disability); infra section IV.E.2, pp. 1398–99 (discussing the burdens that residential segregation places on interracial relationships).
264 By including the accommodation step, I am proposing an inquiry that goes beyond what Kirkland considers narrowly to be “functional individualism,” but this hybrid is still a functional account of personhood compared to the embedded personhood idea with which Kirkland contrasts it. See KIRKLAND, supra note 235, at 9–11. As Kirkland puts it, “[People with disabilities accommodated under the ADA] are still functional individuals — qualifications still matter for jobs — but the logic of functioning has been partially uprooted by a logic of blame-shifting.” Id. at 127. The blame-shifting function of the accommodation inquiry, particularly in its dynamic form, should therefore encourage an interrogation of existing hierarchies that inform desire and related decisions. Post does not consider the accommodation inquiry in his analysis of “functional rationality.” See Post, supra note 235, at 14.
changes in perspective could affect how one responds to friends and family (or even strangers) who make counternormative choices and what messages one conveys to the next generation.

In some cases, this form of self-inquiry might be eye-opening and might allow for the possibility of an intimate connection otherwise dismissed categorically; in other cases, the obstacles would seem too great, or alternative arrangements might be irrelevant to the shape of an individual’s desire or goals. But whether for shifts in behavior or only in perspective, it would be useful for individuals to engage in a functionalism inquiry modeled on that demanded by employment discrimination doctrine under the ADA. Moreover, though framed as a self-inquiry, this inquiry may work best for some individuals through, or in conjunction with, dialogue with thoughtful friends or trusted others. My emphasis on self-inquiry aims only to highlight that the ultimate arbiter of this inquiry, as I imagine it, is the individual.265

The functionalism model of personhood has been criticized in the employment domain for naively imagining that individuals can be reduced to their mere functionality. These critiques have, rightly I think, pointed to the ways our selves are defined by more than our abilities; these critiques emphasize that our selves depend crucially on our “embedded personhood.”266 Anna Kirkland explains the limits of the functionalism approach thus: “What I call embedded personhood tells us that some aspects of a person cannot simply be ignored because they supply valuable information about what kind of person she is and how we can understand and judge her within a particular context."267 She continues, “What we see in the mirror every day is a race, a gender, an able body or a disabled body, fatness or thinness, age or youth. These traits anchor us within communities and render us recognizably ourselves to others.”268 Kirkland is right that these traits are more than incidental to our identities, to the ways that we mean in the world. She aptly says

265 One could potentially conduct a similar inquiry about one’s friendships, asking about the race and disability makeup of one’s friends, about the essential functions of being one’s friend and whether race or disability is relevant, and about whether any changes to immediate circumstances or the broader community would change this assessment. Such an inquiry might pertain to ongoing decisionmaking for more people than would the intimate inquiry, because many people continue to form new friendships even if they have committed (as many do) to one monogamous sexual relationship. Moreover, the friendship inquiry highlights the potential utility of looking to impact or results, in addition to intent, in this self-examination. For varying perspectives on the meaning, uses, and proper legal treatment of friendship, see Ethan J. Leib, Friendship and the Law, 54 UCLA L. REV. 631 (2007); Laura A. Rosenbury, Friends with Benefits?, 106 Mich. L. REV. 189 (2007). See also Katherine M. Franke, Longing for Loving, 76 FORDHAM L. REV. 2685, 2702–05 (2008).

266 KIRKLAND, supra note 235, at 9–11; see also Post, supra note 235, at 14.

267 KIRKLAND, supra note 235, at 9.

268 Id. at 11.
therefore that these features of a person cannot “simply” be ignored.\textsuperscript{269} Nonetheless, I think that functionalism can be useful as a kind of heuristic, as an interpretive device for understanding ourselves and the world we inhabit. Though these traits cannot be entirely ignored, they may be usefully (even if only partially) set aside to consider the importance of other traits and, ultimately, to evaluate properly the significance of the protected traits themselves. The fact that we cannot perform this functionalism inquiry perfectly does not mean we cannot or should not perform it at all. Moreover, the functionalism heuristic — as presented by the ADA — does more than ask us to consider “intrinsic worth” as against superficial traits;\textsuperscript{270} it asks us to interrogate our own assumed desires, and then to question the influence of the surrounding context on our perceptions of our selves and those we might desire.

Indeed, considering functionalism as a way that one individual contemplates what she specifically wants and needs in an intimate partner — recognizing that love and relationships, and even sex, will often depend upon the whole of the partner, not just the sum of the parts — helps us to see why the inadequacy of functionalism to capture the depths of persons does not render it useless as an inquiry for unsettling discriminatory impulses in the employment domain. To engage in this inquiry may press us to look past categorical types and expectations, and in fact to see the person more clearly, which may ultimately include appreciating how she is embedded in the very identity traits that the exercise invites us temporarily to set aside. In this way, though imperfect, the functionalism inquiry in the employment domain can provide us with a practical tool for reimagining the workplace while also giving us insight into the relationship between the individual and the identity category at issue.

Whether or not the ethical self-inquiry discussed here opens up individual intimate possibilities, the inquiry into essential functions, and possible static and dynamic accommodations, should encourage an interrogation of existing norms and social structures. This discussion of the individual self-inquiry thus accomplishes two ends. On the one hand, we see a legal framework usefully informing an exercise in individual ethics. And on the other, we see that applying this legal frame-

\textsuperscript{269} Indeed, some may hope that these traits are part of what another loves about them. See \textit{supra} section II.A.12, pp. 1354–55 and note 216.

\textsuperscript{270} Post notes this possible use of the functionalism inquiry, suggesting that the aim of it is to consider “intrinsic worth,” which makes it difficult to distinguish individuals. See Post, \textit{supra} note 235, at 12–13. I think instead that this inquiry, particularly as required under the ADA with its accommodation requirement, can inspire a careful attention to context and the ways it can be disabling.
work to the intimate domain gives us insight into the utility of the legal framework itself.

III. ON STRUCTURAL DISCRIMINATION

“Like traffic accidents, love accidents often happen close to home.”
— Amy Spencer, Are You Ready To Find the One?271

People may have strong preferences about the types of people they like and desire. Though those preferences may sometimes overlap with, or be shaped by, invidious sentiments towards certain groups, such preferences may also be innocuous or even positive. In any case, an individual’s preferences may be fixed to some extent. For these and other reasons discussed in Part II, trying to punish or restrict individual intimate choices in the name of antidiscrimination thus seems misguided and beyond the realm of appropriate state intervention, even though structured self-inquiry may be an ethical endeavor.

Yet the state does play a role in intimate discrimination, though we like to think otherwise. The state shapes both the accidents (whom we meet) and the calculations (who we think is an appealing match) of intimate decisionmaking. This Part explains this claim. It concludes by discussing the reasons that intimate discrimination matters at a structural level, as a prelude to Part IV’s discussion of the steps the state should take in this domain.

A. The State’s Role: Of Accidents and Calculations

What determines sexual and other intimate behavior? Many factors likely come into play, including biology,272 personality traits and fit,273 desires for and against one’s own family members,274 a rational (or quasi-rational) calculus of what will make for a good life or a good night,275 intention and effort,276 and social pressures of direct and indirect sorts,277 to name a few. These factors likely matter more or less

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271 Amy Spencer, Are You Ready To Find the One?, CHEMISTRY, http://www.chemistry.com/datingadvice/ReadyToFindTheOne (last visited Feb. 8, 2009).
275 For an important rationalist account of love in a philosophical vein, see MARTHA C. NUSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 24–33 (paperback ed. 2005). See also infra section III.A.2, pp. 1369–73.
277 See, e.g., Goode, supra note 244, at 39–40.
depending upon the individual and the context. Contemporary work in the psychology of intimate relationships tends to adopt an interactionist approach, assuming that various biological and cultural factors combine to lead to the phenomena we call love and desire.\textsuperscript{278} This section considers the state’s role in lovemaking, whether what brings us together is understood as a matter more of accidents or of calculations.

1. Accidents of Sex and Love. — One factor that certainly matters to who loves whom, in a but-for sense, is the simple fact of who does and does not meet — or what demographers sometimes call “propinquity.”\textsuperscript{279} This is undeniably true in the sense that one will not befriend, bed, or marry someone whom one never meets.\textsuperscript{280} If a man in Ovid, Colorado, never meets anyone from Peru (in person or electronically), then the Ovidian will never marry a Peruvian. If the Ovidian never meets someone from another racial group, the Ovidian will never marry outside his racial group. Geography (real and virtual) shapes a result in the intimate domain on an individual level.

Expanding out from scenarios of extreme isolation, we might reasonably conclude that how often people encounter others of certain groups affects the odds of pairings across those groups. Imagine a school system segregated strictly along disability/ability lines. In this scenario (which is illegal under the ADA for its simple segregationist model), all disabled teens go to one high school, and all nondisabled teens go to a different school. In the disabled school, the teens are grouped according to their disabilities, and all teaching and recrea-


\textsuperscript{279} See, e.g., Diane C. Fujino, The Rates, Patterns and Reasons for Forming Interracial Dating Relationships Among Asian Americans, 14 J. SOC. & PERS. RELATIONSHIPS 809, 812–13 (1997); Vancy, supra note 44, at 181; see also Shana Levin, Colette van Laar & Jim Sidanius, The Effects of Ingroup and Outgroup Friendships on Ethnic Attitudes in College: A Longitudinal Study, 6 GROUP PROCESSES & INTERGROUP REL. 76 (2003). Propinquity is of course only one element in dating and sexual choices, and the size of its effect is unclear. Recent experimental work on dating websites, which attends to preferences based on race (but not sex or disability), urges that “sorting is not entirely due to search frictions, but rather that sorting patterns arise as a consequence of mate preferences, rational behavior, and an equilibrium mechanism by which matches are formed — which is not to say that search frictions are entirely absent in marriage markets.” Günther J. Hirsch, Ali Hortaçsu & Dan Ariely, Matching and Sorting in Online Dating 5 (Mar. 2008) (unpublished manuscript), available at http://ssrn.com/abstract=1113243.\textsuperscript{280} The time and context of meeting may also matter in interesting ways. See, e.g., Gary W. Lewandowski Jr. & Arthur P. Aron, Distinguishing Arousal from Novelty and Challenge in Initial Romantic Attraction Between Strangers, 32 SOC. BEHAV. & PERSONALITY 361, 361–65 (2004) (reporting, inter alia, on a series of studies showing that strangers meeting in high arousal settings — as on a shaky bridge — were more likely to report attraction than those in low arousal settings); see also Martie G. Haselton et al., Ovulatory Shifts in Human Female Ornamentation: Near Ovulation, Women Dress to Impress, 51 HORMONES & BEHAV. 40, 42 (2007) (reporting that, around the time of ovulation, women engage in more “active ornamentation” in their clothing and other apparel in ways that lead male and female judges to rate them as more attractive).
tion occur within a particular disability. So deaf students form one subunit of the school, blind students another, quadriplegic students another, and schizophrenic students another. (Students with more than one disability are placed randomly into a subunit of one of their disabilities.)

This institutional structure would probably increase the likelihood that a disabled student would form relationships with others who share her particular disability, rather than with someone with a different disability. Regardless of any prior preferences, the student spends all her time at school with those who share her disability. It also seems reasonable to conclude that the disabled students are more likely to pair across disabilities than with nondisabled teens, given their increased chances of meeting before or after school or between classes, since they are housed in the same building, entirely separate from the nondisabled students.

Now imagine one day the schools and classrooms are joined. At first, we might expect preferences to have been shaped by the prior arrangement, but over time, more intimate connections might form across the groups previously segregated. It would be surprising if who mixes with whom mapped perfectly onto what intimate relationships formed, but the contrast between no mixing and complete mixing dramatizes the fact that the structure of a community plays a role.

Casual contact creates the conditions for the accidents of sex and love.281 Of course, whom we choose as our partners depends largely on deeply held private preferences, perhaps particularly with regard to sexual desire, and on rational calculations (the next topic), perhaps particularly when people ponder marriage. But accidents do occur. Crucial accidents may be the stuff of fiction,282 but they are also, some of the time, the stuff of life. And the state plays a role in shaping these accidents.

This is what the term “accidents” captures: the sense that who will love whom and who will desire whom may sometimes be an “unpredictable, mysterious, and elusive phenomenon”283 at an individual

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281 This was of course well understood by race segregationists. See infra notes 330–32 and accompanying text.
282 E.g., WILLIAM SHAKESPEARE, A MIDSUMMER NIGHT’S DREAM; BACK TO THE FUTURE (Universal Pictures 1985); WHILE YOU WERE SLEEPING (Hollywood Pictures 1995).
283 Amy L. Wax, Discrimination As Accident, 74 IND. L.J. 1129, 1320 (1999). Wax uses this evocative description of accident, surprisingly, to argue that there is no way to shape the occurrence of the accidents of unconscious bias in the workplace. I say surprisingly because, to me, the utility of the word accident comes from its implication that individuals may be erratic, but the surrounding environment exerts influence and thus can be usefully regulated. This is not the place for a full examination of Wax’s argument, but I think her different path comes in part from her assumption that the science of unconscious bias is at such a primitive stage that such bias can never be predicted or curtailed, see, e.g., id. at 1133, an assumption that others have challenged. See, for example, the essays in Symposium, Behavioral Realism, 94 CAL. L. REV. 945 (2006).
level, and yet be inevitably shaped by the infrastructure — what Moran has called the “structural influences”\textsuperscript{284} — that determines who meets whom. In this way, even a romantic view of love is consistent with an appreciation that the state shapes our romantic choices — as is a rationalist view, which is our next topic.

2. Calculating Desire. — Some lovers temper romance with rationality: they consider, implicitly or explicitly, the costs and benefits of being in a relationship with a particular other.\textsuperscript{285} One version of a rationalist account falls under the headings of “matching theory” or “assortative mating.”\textsuperscript{286} Empirical work in this area indicates that people tend to pair with similar partners along dimensions such as attractiveness, education, wealth, earnings, and age (as well as race, as noted earlier).\textsuperscript{287} Controversies persist as to whether people seek those who are more attractive (or richer, etc.) than themselves, but end up sorting into similar matches because everyone cannot have the most attractive (richest) mate, or whether people simply seek those who are similarly situated in terms of attractiveness (wealth).\textsuperscript{288} Either way, state policies affect the distribution of social capital — such as education, wealth, and earning power — and thus play a role in shaping the barriers (and on-ramps) to entry into intimate relationships.

In the context of race, Randall Kennedy has observed that the “poverty, unemployment, lesser educational opportunities, and like deprivations” faced by many people of color place them at a disadvantage in the U.S. market for marriage.\textsuperscript{289} Kennedy thus highlights the role our personal and social assets can play in our prospects for finding or keeping a (desirable) mate. Kennedy’s work also offers vivid ac-

\textsuperscript{284} Moran, supra note 23, at 119.

\textsuperscript{285} Rachel Moran is right to suggest that we like to think of “rationality [as] misplaced in matters of the heart”; however, as she acknowledges, some of our dating methods — such as the search mechanisms of many commercial dating services — make explicit the role of calculations. Id. at 13.


\textsuperscript{287} See, e.g., Jepsen & Jepsen, supra note 286, at 450–51 (finding matching along all axes studied — including race, age, schooling, investment income, earnings, and blue or white collar job — though more for non-labor-market variables (the first four listed) than for labor-market variables, particularly for married different-sex couples); Takeuchi, supra note 286, at 27–28 (discussing the data on attractiveness).


\textsuperscript{289} Kennedy, supra note 10, at 520.
counts of the costs endured by interracial couples in a hostile world. Though most of these accounts are historical, some of those costs still exist, as I discuss further in Part IV. Perhaps less well known or remarked upon, however, are the analogous barriers to entry surrounding intimacy and disability that can affect the rational calculation of whether to enter or remain in a relationship when one or both partners has a disability. A second hypothetical captures the point.

Imagine two towns: Accessible City (A-City, for short) and Inaccessible City (I-City). Janet, an attractive young lawyer and triple amputee who uses a wheelchair, lives in A-City, where she meets John, a nondisabled librarian, and they begin dating. In A-City, where everything is accessible, John and Janet can go wherever they please together — parks, museums, restaurants, bars. They go dancing and see movies; they take public transportation to the botanical gardens and the zoo. Most private buildings are accessible, at least on the ground floor, so they visit friends together, attend parties, and enjoy an easy and relaxed social life. In addition, the state in which A-City is located has a welfare system that provides personal assistance to Janet for daily self-care tasks (as needed), and were she to marry, Janet’s state assistance would continue as before.

Janet then moves to I-City, in a far away state, for a new job, prompting a breakup with John. In I-City she meets Tim, another lawyer, at a local Bar event, and they hit it off. Janet hopes their spark might develop into a relationship, but even dating proves difficult. Public transportation in I-City is only partly accessible — with most subway stops accessible only by stairs and more than half the city’s buses without working lifts — and there are few accessible taxis. Difficulties with transportation make Janet late to work on numerous occasions, at first threatening her status in her new job, though she adjusts by leaving home at ridiculously early hours (something Tim, not a morning person, finds tedious). Most restaurants have steps up to their entrance or such narrow aisles between tables as to make movement in a chair impossible. (Some of these obstacles violate the public accommodations title of the ADA, but compliance is poor and lawsuits have been rare.) The few restaurants that are accessible have tables with big circular bases on the table legs, so Janet has to park her wheelchair back from the table, making intimacy challenging. Movie theaters and stores are all hit or miss in their accessibility. Almost no one’s home is accessible, so they cannot attend dinner parties.

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together. Tim’s friends feel awkward about this and debate whether even to invite him to things, knowing Janet will not be able to join him. They begin to ask him, subtly and not so subtly, whether he would want to face a lifetime of such constraints.\(^{292}\) One of them, a social worker, points out that I-City’s state revokes personal-assistance services if a disabled beneficiary marries, on the assumption that her spouse will take on those duties.\(^{293}\) Janet has many more daily frustrations in I-City, and feels a great deal more anger and hostility, which creates tension and conflict with Tim, who sees her perspective but also does not experience it as she does. When he encourages her to be positive, she feels alienated from him and accuses him of an inability to understand her world.\(^{294}\) He feels excluded, and the distance between them grows.

Janet’s prospects as a dating partner look starkly different in the two towns, based on decisions by the state about infrastructure, policy, and enforcement. Her partner faces strikingly different costs related to her disability in I-City as opposed to A-City, making the prospect of dating her look rather different under any explicit or implicit rational calculus. The situation in I-City would be only starker if Janet had actually lost her job; in this and other ways, the hypotheticals do not come close to depicting the material consequences that can arise from a lack of accessibility or of legal protection against discrimination. Other variations on the hypotheticals would illuminate further dimensions of the issues. For instance, if Janet’s disability had been something she could conceal, such as a psychiatric disability, there could have been added difficulties for the relationship surrounding her disclosure to her partner and dilemmas about whether or when to tell others.\(^{295}\) In addition, although the emphasis in the hypotheticals has

\(^{292}\) Cf. KROLL & KLEIN, supra note 79; SIMI LINTON, MY BODY POLITIC 101 (2006).

\(^{293}\) See infra section IV.D.2, pp. 1390–91.

\(^{294}\) Cf. GOFFMAN, supra note 181, at 31 (“The relation between the stigmatized and his stand-in can be an uneasy one. The person with a failing may feel that reversion to type may occur at any moment, and at a time when defenses are down and dependency is up.”); Chito Childs, supra note 169, at 2780 (describing black interviewees’, on the subject of interracial relationships, “offer[ing] various examples of how whites mistreat blacks in general, connecting this to the probability that a white individual would use a racial slur, disrespect the black partner, and simply not understand what it means to be ‘black in America’”); Kim McLarin, Race Wasn’t an Issue to Him, Which Was an Issue to Me, N.Y. TIMES, Sept. 3, 2006, at ST9 (describing the pain in a mixed-race relationship when one “person . . . grapples with race” and one does not); SOMETHING NEW (Focus Features 2006) (portraying a mixed-race couple’s splitting up when the white partner proposes a break from discussing race, after the black partner had been complaining about racism at work).

\(^{295}\) See, e.g., GOFFMAN, supra note 181, at 99. Goffman provides the following quotation as an example of “stigma management work done by wives of mental patients”:

I haven’t gotten too friendly with anyone at the office because I don’t want people to know where my husband is. I figure that if I got too friendly with them, then they
been on ongoing relationships, many of the cities’ differences could affect prospects for sexual encounters as well, which depend on accessing places to meet others and to interact sexually, as well as on one’s attractiveness to potential mates. Social status, opportunities, and income can affect a person’s attractiveness and confidence, as can the presence or absence of attractive and successful group members in the relevant community and available media.296 Such outcomes are easy to imagine as different in A-City and I-City.

In addition to showing the significance of law to intimate discrimination, the contrast depicted in this hypothetical portrays a central idea of disability law and theory: the social model of disability. Unlike the so-called medical model, which views disability as a medical problem with the individual, the social model views disability as inhering in the interaction between the impairment and the social environment.297 As the writer Simi Linton, who uses a wheelchair, portrays the difference between the medical and social models, “If I want to go to vote or use the library, and these places are inaccessible, do I need a doctor or a lawyer?”298 Consistent with the social model, Janet is much more disabled — and so is her partner, in effect — in one city than in the other, entirely because of the law and structures of the two cities, and not because of any difference in her physical impairment.

The effects of inaccessibility on partners of disabled people may help to explain the bipartisan support for the ADA’s passage in 1990. Scholars have noted the many members of Congress who had disabled relatives, reasoning that these intimate affiliations gave nondisabled legislators more sympathy with the challenges and stigma faced by disabled people.299 An explanation based on sympathy may be right, but incomplete. As the hypothetical about A-City and I-City suggests, these intimate connections may also have given nondisabled legislators an understanding of the social model, through their firsthand experience with the ways that inaccessibility creates disability, both for dis-

would start asking questions, and I might start talking, and I just think it’s better if as few people as possible know about Joe.

Id. (quoting M.R. Yarrow, J.A. Clausen & P.R. Robbins, The Social Meaning of Mental Illness, 11 J. SOC. ISSUES 33, 36 (1955)). For further discussion of issues and research related to disclosure, see Emens, supra note 259, at 903–08.

296 Cf. infra note 326 and accompanying text (discussing the significance of films, such as Murderball, to ideas of desirability).


298 LINTON, supra note 292, at 120.

299 See, e.g., Joseph P. Shapiro, No Pity: People with Disabilities Forging a New Civil Rights Movement 118–19 (1993); Stein, supra note 232, at 627. The presence in Congress of people who themselves had disabilities — most notably, Rep. Tony Coelho — was also vitally important to the Act’s passage. SHAPIRO, supra, at 117–18.
abled people and for those who accompany them. Intimate relationships across race may perform a similar function, in giving members of superordinate groups experience with the ways discrimination shapes the category of race.\footnote{These effects may also work across sexual orientation: think here of a bisexual seeing what it is to be gay in a particular community through his first relationship with another man, or a straight person seeing something of how it feels to be a sexual minority through a relationship with a bisexual.}

The hypotheticals in this section could also be rewritten to involve other categories. One can imagine analogous scenarios involving cities more or less disabling to interracial couples, through features such as the availability of integrated neighborhoods, and to same-sex couples, through the practical and symbolic significance of the availability of marriage. As another example, applicable to all three groups, hate crime laws could affect the experience of these relationships, and thus the rational calculation of whether the benefits of such relationships are worth the costs.

These hypotheticals about accidents and calculations portray the structural truth lurking beneath David Mura’s words in the opening epigraph: “[T]here is/[] a relationship between whom I desire and whom I hire, [and] between whom I want my children to desire and whom I hire.”\footnote{Mura, supra note 1, at 282; see also supra p. 1309.} Mura’s words seem to suggest an individual point: I have similar feelings toward some groups that make me inclined to hire the same people I desire.\footnote{Sex operates differently from race and disability, as discussed in Parts I–II, pp. 1315–66. Cross-sex desire may not lead to hiring, but to a separate spheres mentality. But the broader points that follow in this paragraph have some bearing on sex. For instance, the sex of the people one’s children date may affect hiring choices; think here of people with unexpectedly tolerant attitudes on gay issues who, it turns out, have a gay child. In addition, an individual’s dating experiences with members of the opposite sex whose gender is not wholly conventional may be more willing to hire those whose gender is not wholly conventional. (The question of whether a straight-identified person’s same-sex sexual experiences leads to more tolerant attitudes, or to more homophobia, is complicated. See, e.g., Yoshino, Bisexual Erasure, supra note 111.)} But they also reflect the more important point of this examination of intimate discrimination: whom I hire shapes whom I meet and might desire, and whom my children meet and might desire. \textit{And vice versa.} Whom I desire and date and marry, and whom my children desire and date and marry, shapes whom I know to hire. \textit{And further.} Whom I hire shapes who has the social capital to be good enough to date my children. And whom my children marry shapes the people I want to hire, the people to whom I want to give opportunities for advancement and access to the good life.
B. Why Intimate Discrimination Matters

As noted in the Introduction, these are challenging times for anti-discrimination law. The antidiscrimination project is plainly incomplete. Widespread inequalities persist, along numerous lines, including race, disability, and sexual orientation. Yet our current antidiscrimination protections do not seem to be adequate to the problem. This challenge has been given various names, including “preservation through transformation”303 — the name Reva Siegel gives to the process by which discriminatory practices morph and persist in new forms in response to legal prohibitions — and “second generation discrimination”304 — the term Susan Sturm applies to the subtler, more diffuse patterns of interaction that lead to disparate outcomes even in the absence of any individual ill will.

In the face of such a challenge, a careful examination of intimate discrimination matters. As we have seen already, this inquiry yields useful insights about the categories of discrimination and our ways of understanding them. But its use is not merely conceptual. Intimate discrimination is itself important as a practical matter, as this section discusses. Because of intimate discrimination, some groups are excluded from opportunities for intimate affiliation, which itself has consequences for members of those groups, and everyone’s intimate opportunities are limited by the current structures of discrimination. Moreover, intimate discrimination has ramifications for discrimination beyond the intimate sphere.

1. The Direct Harms of Intimate Discrimination. — Social stigma and structural constraints exclude some people from meaningful participation in the dating, sex, and marriage markets. The norm of desexualization for people with disabilities both reflects and contributes to the relatively limited opportunities many disabled people face in forming intimate relationships.305 Moreover, inadequate implementation of legal entitlements — such as inadequate accessibility in public transportation and public accommodations — inhibits disabled people from meeting others and developing relationships.306 In addition, relative poverty and low employment rates among disabled people reduce

304 Sturm, Second Generation, supra note 232, at 468.
306 On the inadequate implementation of the ADA, see, for example, BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003); Bagenstos, supra note 291; and Feldblum, supra note 134. For an argument that the Supreme Court’s interpretations of the ADA reflect contradictions within the disability rights movement itself, see SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (forthcoming 2009).
2009] INTIMATE DISCRIMINATION 1375

the social capital they bring to the intimacy markets. As noted earlier, Randall Kennedy has made related points about the relative impoverishment of people of color, as it affects their prospects for intimate relationships. Race and gender also intersect to create particular subgroups who are relatively excluded in their intimate prospects, in particular, African American women.

Limited opportunity for sex and marriage can have welfare consequences. Empirical studies suggest that both sex and marriage have positive physical and mental health effects. For instance, studies show a positive relationship between lifespan and frequency of sexual activity, orgasm, or enjoyment of sex. Sex has also been shown to increase happiness, though some research finds this to be more true for men. Marriage is also associated with decreased mortality risk and better health outcomes, though some work has also found the mortality effect of marriage to be greater for men than for women. In addition, marriage predicts lower levels of depression and higher levels of life satisfaction than those reported by the never-married, divorced or separated, and widowed, with some research finding that


308 KENNEDY, supra note 10, at 520.


311 See id. at 402; Adam Crosley & Darren Langridge, Perceived Sources of Happiness: A Network Analysis, 6 J. HAPPINESS STUD. 107, 126 (2005); see also Mary H. Burleson et al., In the Mood for Love or Vice Versa? Exploring the Relations Among Sexual Activity, Physical Affect, Affect, and Stress in the Daily Lives of Mid-Aged Women, 36 ARCHIVES SEXUAL BEHAV. 357, 361, 364 (2007).

312 See, e.g., Norman J. Johnson et al., Marital Status and Mortality: The National Longitudinal Mortality Study, 10 ANNALS EPIDEMIOLOGY 224, 236 (2000); Pekka Martikainen et al., Differences in Mortality by Marital Status in Finland from 1970 to 2000: Analyses of Changes in Marital-Status Distributions, Socio-Demographic and Household Composition, and Cause of Death, 59 POPULATION STUD. 99, 112 (2005); see also Bonnie Burman & Gayla Margolin, Analysis of the Association Between Marital Relationships and Health Problems: An Interactional Perspective, 112 PSYCHOL. BULL. 39, §8 (1992) (reviewing the literature to date and finding that being married generally predicts better health outcomes but that no evidence supports a causal relationship).


314 See Ed Diener et al., Similarity of the Relations Between Marital Status and Subjective Well-Being Across Cultures, 31 J. CROSS-CULTURAL PSYCHOL. 419, 432 (2000); Steven Stack & J. Ross Eshleman, Marital Status and Happiness: A 17-Nation Study, 60 J. MARRIAGE & FAM. 567, 575, 531, 534 (1998); Kristi Williams, Has the Future of Marriage Arrived? A Contemporary Ex-
health effects depend on marital quality. Overall, both sexual activity and marriage appear to have welfare benefits, which those with reduced opportunities in these domains miss.

In addition, it is not just people on the bottom of the hierarchy who are limited by the current regime. Many people’s opportunities to meet people from a range of backgrounds and pursue intimate relationships are being limited by a history of exclusionary practices that have shaped our infrastructure and social conditions. Admittedly, it would require a particularly romantic conception of love to argue that specific individuals have not met “the one” for them because the walls of segregation and inaccessibility have kept those particular individuals apart. Such an idea of love is not unheard of, of course; most obviously, Plato’s Symposium offered Aristophanes’ tale of love as the search for our lost halves, created when the gods split our originary double-beings in half. But even without a belief that there is just one right person for everyone, we might feel a certain frustration or even outrage to realize that our opportunities to meet people have been constrained by the state’s (sometimes intentional) efforts to keep people like us apart. If we think of a current person we love, in whatever capacity, and imagine that the structure of the state had precluded our meeting them because of some aspect of them (or us) that the state did not want mingling, then the limitations on all of us may be felt.

It is of course impossible to determine some optimal amount of mixing. And as to whether there should be more than there is now, with regard to race in particular there are arguments on both sides, in-


316 Marriage also occupies a certain social status, which those excluded from its domain lack, despite being subject to regulation in its shadow. See, e.g., Ariela R. Dubler, In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State, 112 YALE L.J. 1641 (2003). In addition, the state treats unmarried families differently, particularly those families receiving the kinds of state support associated with poverty, who experience a greater degree of state intrusion on their family autonomy. See, e.g., Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations, 90 GEO. L.J. 299 (2002).

Intimate discrimination has effects on discrimination beyond the intimate realm. To begin, the intimate sphere is literally where we make the next generation. Whether we appear in the world through conventional or sophisticated means, most of us grow up in families of origin with adults engaging in horizontal intimate relationships, permanent or temporary. Those relationships may themselves create children of mixed race, which may at least partially unsettle some of the ugliest forms of U.S. white supremacy, based as they are on fantasies of a pure white race untainted by a single drop of nonwhite blood. Evidence that racial hierarchy can arise beyond the particular realm of white supremacy, with fine gradations of color signifying status distinctions, suggests that one should not put too much stock in the expectation that racial mixing will reduce prejudice, however. More meaningfully, there is reason to think that children of mixed race have more tolerant racial attitudes and prefer racially diverse settings more than do non–mixed race children.

Relatedly, families are at the heart of communities and thus of social and employment networks. Who one knows has significant effects on one’s opportunities. Discrimination that prevents and creates both intentional and accidental contacts can have major effects on ongoing social stratification.

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318 There are also arguments for in-group intimate preferences among disabled people, see supra p. 1347, but because the norm with disability has been desexualization (not pairing of particular groups over others), the counter-normative intervention can aim to pair both within and across disability — and therefore not implicate this concern. See infra section IV.D, pp. 1390–96 (discussing this contrast).

319 See infra sections IV.E, pp. 1390–1400.


Apart from effects on the next generation and on third-party connections, the contact created by intimate relations may improve attitudes across race and disability. Just as, under some conditions, workplace contact among people of different races or abilities improves attitudes across those categories, studies of friendship and race also suggest that interracial friendship positively affects racial attitudes. And the very limited work on the effects of interracial sexual intimacy also suggests some positive effects on racial attitudes. An important caveat to this concerns breakups: how relationships play out and eventually end (if they do) could also negatively affect attitudes toward a particular group, though I have found no empirical work on this question. Thus, while the ultimate impact is uncertain and warrants further study, there is some basis for thinking that intimate contact can help ameliorate discrimination.

Moreover, desire and liking are powerful emotions that can transform undesirables into desirables, and thus potentially alter hierarchies. Perhaps this effect is more meaningful for groups that have been cast as undesirable or desexualized, where depictions of sexual desirability — or of coolness — can be transformative in the minds of third parties. For example, the movie Murderball brought to a larger audience the sport of quad rugby and its accompanying glamour and sexuality. The audience effects of affirmative sexual depictions of sexually stigmatized groups merit careful study. But such depictions are likely to have some significance for individual responses to, as well as broader attitudes toward, stigmatized groups. Of course, the power of desire and of liking can, as noted above, lead to both negative and positive feelings. But the potential for some impact seems worth taking seriously.

323 This hypothesis has been much criticized for overstated claims, but relevant meta-analyses show statistically significant results. See Thomas F. Pettigrew & Linda R. Tropp, A Meta-Analytic Test of Intergroup Contact Theory, 90 J. PERSONALITY &SOC. PSYCHOL. 751 (2006); see also Cynthia L. Estlund, Working Together: The Workplace, Civil Society, and the Law, 89 GEO. L.J. 1, 22-29 (2000).


327 Perhaps one way that desire can help to unsettle hierarchies is by inspiring individuals from different communities to listen to each other’s stories with compassion. On the power of narrative, imagination, and compassion to aid our appreciation of hierarchies of sex and race, see Martha Nussbaum, Narratives of Hierarchy: Loving v. Virginia and the Literary Imagination, 17 QUINNIPIAC L. REV. 337 (1997).
Finally, as discussed in Part I, the norms of intimate discrimination take on a life of their own outside the intimate sphere, shaping the perceptions of courts in ways that hinder justice for employment discrimination plaintiffs.328 And court decisions are just one legal example of the broader set of ways that intimate norms — and particular expressions of those norms — contribute to stereotypes and stigma borne by various groups.329 For all these reasons, intimate discrimination creates a set of practical problems with which the state must contend. The next Part discusses how it should do so.

IV. THE ROLES THE STATE SHOULD PLAY

[...]

Those who opposed interpersonal contact between blacks and whites understood the potential consequences. They saw that through such contact the accidents of friendship, sex, and love arise.331 And they appreciated the deep significance of such relations to our identity. State actors understood this too, and used that understanding to prevent the commingling of desirables and undesirables.332 That regime

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329 See, e.g., Note, supra note 56, at 879–84.
330 W.W. Wright, Amalgamation, 29 De Bow’s Rev. 1, 14 (1860). The author continues, “If we examine the practical operation of this principle in other countries, we shall find that just in proportion as . . . this prejudice of color, if you will, is done away with and abandoned, just in that proportion is the white population of those countries reduced in the standard of civilization and morals.” Id. at 15.
331 See, e.g., Reginald Oh, Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Race and Gender Subordination, 39 U.C. Davis L. Rev. 1321, 1339–41 (2006); Reginald Oh, Regulating White Desire, 2007 Wis. L. Rev. 463, 476–85. In addition, civil rights advocates, wise to fears that public associations across race would lead to private relationships across race, devised strategies of desegregation that would minimize such fears. For instance, Thurgood Marshall recounted that the NAACP began its school desegregation efforts with graduate schools, and only later turned to primary schools, to accommodate public fears that integrating young children would have a deeper effect on attitudes toward intimate associations across race. Marshall noted, “Those racial supremacy boys somehow think that little kids of six or seven are going to get funny ideas about sex and marriage just from going to school together, but for some equally funny reason youngsters in law school aren’t supposed to feel that way.” Alfred H. Kelly, The School Desegregation Case, in Quarrels That Have Shaped the Constitution 307, 318 (John A. Garraty ed., 1987) (internal quotation marks omitted).
332 In this light, we might read an explicit carve-out in federal housing law — the so-called Mrs. Murphy exception for owner-occupied dwellings of no more than five families — as a con-
has officially ended now, at least with regard to race and to most disabilities, but it would be naïve to think that the state no longer affects our intimate choices.

Although some important legal mandates have been repealed or struck down, those historical restrictions have arguably helped to shape private preferences and social norms. These norms, in turn, have precluded certain relationships and caused pain and disadvantage for many of those individuals thus separated or desexualized. Moreover, by deciding the form of our communities’ institutional and physical infrastructure, the state has shaped who meets whom, who interacts with whom, who has the chance to fall for whom. This occurs, for instance, when the state decides whether to put accessible toilets in a town center and how many. Without accessible toilets, those who require them will not enter or remain in certain public spaces. There are many institutional examples of the state’s shaping which intimate accidents can occur — from the history of redlining and other segregation with regard to race and disability (or no school at all for some at some times); to who sits together (or not) on juries; to who is housed together in prison spaces. And we know from the cession to fears of miscegenation, though it is usually framed in terms of privacy and freedom of association. See 42 U.S.C. § 2000a(b)(1) (2000); see also James D. Walsh, Note, Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exception to the Fair Housing Act, 34 HARV. C.R.-C.L. L. REV. 605 (1999) (discussing the justifications for the exception and arguing for its repeal). On the role that perceived public fear of miscegenation played in the Supreme Court’s choices about which desegregation cases to consider in what order, see infra note 420.

333 See supra section I.A, pp. 1315–18.
334 (Nor will they, probably, be able to have sex in the public toilets.)
337 On race, see, for example, Brown v. Board of Education, 347 U.S. 483 (1954); and Jack Greenberg, Crusaders in the Courts (2004), and on disability, for example, the findings of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400(c)(1)–(2) (2006); and Ruth Colker, The Disability Integration Presumption: Thirty Years Later, 154 U. PA. L. REV. 799, 794–96 (2006).
growing literature in social psychology and decision science that choices are often shaped by subtle influences such as their framing. Thus, because erotic preferences may be at least somewhat endogenous to these state-sponsored structures, even once the structures are removed, the framing architecture may cast a shadow over our choices. But knowing that the state has created and reinforced intimate discrimination does not tell us whether, or how, the state should be involved in remedying it, and it is to that question that I now turn.

With regard to sex/gender, of course, the state’s next step is clear. The state still places express legal restrictions on the sex of one’s marital partner, and thus excludes same-sex partners from the benefits, burdens, and expressive significance of marriage. This Part therefore discusses sex more briefly before turning to the terrain of disability and race, where the state’s ongoing role is less obvious, because express restrictions are largely a thing of the past.

In the absence of express state-mandated discrimination, state intervention at the individual level — prohibiting or discouraging individuals from discriminating, in the sense of differentiating, in the intimate realm — seems misguided at best, for the reasons discussed in Part II. But the state should nonetheless take affirmative steps to address intimate discrimination, though in different ways for disability and race, in light of the different norms surrounding each.

With disability, the norm is of desexualization, of isolation and exclusion from the intimate realm altogether. In this arena, then, state efforts to lift barriers to entry to intimate relationships are in order. This means improving access to spaces and experiences where relationships begin and develop. It means attending to intimacy in the design of accessibility — what I call the architecture of intimacy. Sex and relationship education, institutional and residential rules, and welfare laws should all be structured to anticipate and facilitate opportunities for intimate relationships. Contrary to the fears of some parents and educators, reducing stigma and building sexual self-esteem


341 Express restrictions are entirely a thing of the past for race and for most disabilities, though they remain robust for mental disabilities, as noted earlier. See supra note 9 and accompanying text; supra notes 20–24 and accompanying text.

342 The question of what sort of action the state should take after it stops requiring discrimination arises in many contexts in addition to intimate discrimination, from school segregation to marital names. See, e.g., Elizabeth F. Emens, Changing Name Changing: Framing Rules and the Future of Marital Names, 74 U. CHI. L. REV. 761 (2007).
and opportunities should help reduce, not increase, the risk of abusive relationships.343

With race, by contrast, the norm is homogamy, or in-group pairing. Here, rather than a norm that excludes an entire group from the intimate domain, the norm pushes people to pair with some rather than others. As discussed in Part II, the race homogamy norm has some proponents among the subordinated group and some sensible arguments on its behalf.344 Most notably, members of a subordinated group may well think that strong families composed of subordinated group members are the best way to build self-esteem and resist assimilation to dominant, even racist, cultural influences. For this and other reasons, a state policy that actively encourages opportunities for interracial relationships — even as a response to a history of discouraging such relationships — may be troubling. As I discuss in the final section, in the race context, the state’s involvement in intimate discrimination should therefore focus on lifting burdens on existing interracial relationships. To be in an interracial relationship today is still to face numerous obstacles that the state helps to shape to a greater or lesser extent. Particularly in light of the state’s history of express restrictions enforcing the homogamy norm, state policies should work to lift burdens on interracial couples.

This Part begins by briefly considering several interventions that the state should likely not pursue. Then it sets out a toolkit of more plausible interventions to address intimate discrimination on a structural level. The rest of the Part uses these tools to detail the best next steps for the state to take with regard to sex, disability, and race.

A. What Not To Do: Preliminary Ideas, Mostly Ill-Advised

So what are some ways, in theory, that the state might intervene in intimate discrimination in the contexts of race or disability? This section briefly considers several interventions that should not be pursued, including several that are absurd, yet are worth considering to get a handle on the reasons why.

1. The Offense of Marriage Act. — Most intrusively, one could propose a regime in which only mixed race or mixed disability marriages were allowed. (Among so many other objections, we can hear — or see — the protests of deaf Americans, representing the larger point

343 See, e.g., Carol A. Howland & Diana H. Rintala, Dating Behaviors of Women with Physical Disabilities, 19 SEXUALITY & DISABILITY 41, 41 (2001) (“Men, and often the women themselves, view women with disabilities as ‘damaged goods.’ Since they are lucky to get anyone to ask them out on a date, the societal view is that they should be grateful for the attention of any man, even if he is abusive and contributes little or nothing positive to their relationship.” (citation omitted)).

344 See supra section II.A.7, pp. 1346–47.
about subordinated-group solidarity discussed earlier. With that in mind, we might cast the state’s objection only to all-white, all-nondisabled marriages, recognizing that the numbers may not add up perfectly at first. Several years ago, Geoffrey Stone created a similar thought experiment, the Mandatory Miscegenation Act of 2100, which provided that “[n]o person who is not genetically certified as a person of mixed race may procreate with another person of the same race.” In the fanciful Supreme Court opinion Stone wrote, provocatively upholding the mock statute, the Court noted:

When the Act was first introduced in Congress, its drafters explained the Act as follows: “After centuries of racial strife and division, after endless failed efforts to eliminate racism from our hearts, our minds and our social policies, it is time to bring us all together and to end race once and for all as a divisive social construct.

If all Americans have only one race — the mixed race that is the one true melting pot of America — then and only then will we finally be ‘one Nation, indivisible.”

Nobody, of course, would actually advocate a law that so patently impinges on individual liberty and autonomy. The same could be said of a version of the Act that constrained marriage — not procreation — across race and disability. One might suggest instead, however impishly, the Offense of Marriage Act: this statute would permit civil unions for all partners, but decline to grant the label “marriage” to all-white or all-nondisabled marriages. A system that creates second-class marriages in this way also seems offensive, however, as the Act’s name suggests.

2. Private Litigation. — Another (misguided) possibility would be to extend our current antidiscrimination regime to the intimate realm: that is, to authorize private lawsuits for sexual or marital rejections that were “because of” race or disability. The problems with this are,
obviously, legion. First, there is the problem of a litigation explosion. If there is any truth to Robert Ellickson’s observation that “sociopaths and love triangles” are “much overrepresented” in the cases that make it to court, then widely authorizing discrimination-based heartbalm lawsuits would be truly perverse, as it would invite nearly every love triangle into court without even the need for a nexus with an independent legal issue. We also might worry, as above, about the wisdom of incentivizing personal relationships that individuals may not desire.

Moreover, this approach targets individual decisionmaking on the bad-actor model that haunts our employment discrimination regime and, even if it were the right model there (about which I have doubts), it seems distinctly inapt in the intimate domain. As discussed in Part II, animus and intimate discrimination may overlap, but distinctions on these categorical bases may sometimes be necessary for or generative of desire. It is particularly difficult to determine what nondiscrimination would be in this domain, and whether and when it is even desirable. Even if we could determine what nondiscrimination means, a law targeting individual perpetrators of intimate discrimination would create incentives to hide one’s preferences, thus accentuating the difficulty of avoiding those who harbor animus or categorical non-desire towards one’s own type. Moreover, desire, and desire’s response to prohibitions, is unpredictable. Indeed, prohibitions may fuel desire. Whether or not other emotions and attitudes

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350 These problems are in addition to the questionable constitutionality of such legislation, given Congress’s now-limited powers under the Fourteenth Amendment and the Commerce Clause. See, e.g., United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). Even the feared (but unrealized) extension of Shelley v. Kraemer, 334 U.S. 1 (1948), probably could not reach simple dating, though a discriminatory marriage choice is a more interesting question. Doing away with the state action doctrine, as Chemerinsky and a line of others proposed, would open the door to a whole range of such suits; but as Chemerinsky realized even back in 1985, that is not going to happen. See Erwin Chemerinsky, Rethinking State Action, 80 NW. U. L. REV. 503, 504–05, 556 (1985). (Chemerinsky also thought that, in the absence of the state action doctrine, courts would directly invoke privacy and associational protections to prevent the law’s entanglement with the (nearly proverbial) non-integrated dinner party, the example that is always raised in such conversations. Id. at 538.)

351 Professor Ellickson mentioned this idea in a Property class at Yale Law School in the spring of 2001. See also E-mail from Robert Ellickson to Elizabeth Emens (Nov. 26, 2008, 18:27) (on file with the Harvard Law School Library). Of course, many of these suits would surely not be brought, for a wide variety of reasons. Cf., e.g., Russell K. Robinson, Perceptual Segregation, 108 COLUM. L. REV. 1093, 1139–51 (2008) (discussing costs of publicly alleging discrimination). It is nonetheless interesting to think whether, or how often, love-triangle motivations would overpower the costs of alleging discrimination.

352 See supra note 227.

353 See supra sections II.A–B, pp. 1340–57.

354 See supra section II.A.11, pp. 1352–54.

respond to legal prohibitions as the laws’ enactors might have hoped, desire is surely a realm in which we would not expect prohibitions and exhortations as to individual behavior to lead neatly to the outcomes sought.

3. **Tax Benefits.** — Less ostentatiously, mixed couples could receive some sort of tax benefit. Such a benefit might seem more apt in the context of groups subject to normative desexualization, rather than normative homogamy, for the reasons discussed above; thus, perhaps this solution is most fitting in the disability context and should apply to all marriages with at least one disabled spouse, whether heterogamous or homogamous (with regard to disability). But a tax benefit in this area seems problematic for several reasons. First, tax benefits for people subject to systematic disadvantage should not depend on whether those people marry; this seems a troubling distributive principle, even if one favored the incentives it created. Second, such a tax benefit would send a stigmatizing message about the status and desirability of disabled people — to say that marrying “one of them” warrants some kind of special state financial gift. This is akin to a point made by Tom Shakespeare and others about state subsidies for sex surrogates for disabled people: such initiatives may benefit some individual people with disabilities, but they also send a troubling message about the sexual desirability of disabled people and the potential for true integration. Finally, one might also worry about creating financial incentives to marry some people rather than others, for fear that there are at least some number of people who might marry for that reason alone, which could be bad for the public fisc, the marrying individuals, or both.

**B. Toolkit: A Range of Plausible Structural Interventions**

This section sets out a range of structural interventions that may be useful to address intimate discrimination. These tools are structural in the sense that they do not intend to restrict or burden individual

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356 On the particular issue of perverse responses to law, it may be worth thinking more, for instance, about whether the individual bad-actor model in Title VII fuels the anti-“PC” sentiment behind jokes like the one from Maxim magazine discussed in Part I. See also supra note 92 (quoting some of the other jokes in that issue of Maxim, involving racist humor).

357 This would be akin to the federal tax credit provided for the adoption expenses of parents who adopt hard-to-place children, a category that includes children with disabilities. See 26 U.S.C. § 23(a)(3) (2006).


359 See SHAKESPEARE, GILLESPIE-SELLS & DAVIES, supra note 73, at 132–34.
choices; rather, they aim to allow individual choice and to create the structural conditions for relationships to form or flourish. Subsequent sections discuss which interventions are most appropriate and important for each category, depending on the particular norm and context of that category. Detailed discussion of these tools will be included in these more concrete contexts, but this section first lays out broad types of interventions.

The list, though certainly not exhaustive, should help us to think through the categories at issue in this Article, as well as provide tools for future thinking about intimate discrimination with regard to other groups. As noted earlier, there are many categories that might make for interesting and productive analysis, including age, religion, and class, to name a few. One’s assessment of the problem (if any) of intimate discrimination for a particular identity category should help determine which of the following tools are more or less useful and appropriate, and may open one’s eyes to additional tools worth considering.

1. **Lifting Formal Restrictions.** — A basic step is to remove explicit restrictions — whether criminal or civil — on who can have sex or marry.

2. **Eliminating Penalties.** — Current laws about state benefits — such as welfare benefits — may penalize particular types of relationships, intentionally or effectively, or may discourage the formation or formalization of intimate relationships by those in the relevant groups. In some circumstances, removing these penalties may be desirable.

3. **Leveling the Playing Field.** — Having less access to social and material capital — such as housing, education, or employment — can harm an individual’s prospects in dating markets. In some contexts, the state may therefore want to take steps to increase a group’s access to social and material capital in order to level the playing (dating) field for individuals in that group. In other contexts, however, although promoting equal opportunity may be good policy for other reasons, it should not be endorsed specifically to promote particular forms of intimate relationships, as discussed below in relation to race.

4. **Allowing Access and Integration.** — Removing obstacles to access — through accommodation, for instance — can affect the possi-

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360 See supra pp. 1310, 1343.
361 See supra section IA, pp. 1315–18 (discussing the formal legal restrictions that existed, and in some cases continue to exist, in these areas).
362 See, e.g., infra section IV.D.2, pp. 1390–91 (discussing policies leading to the loss of some Social Security and Medicaid benefits for disabled people who marry).
363 See supra p. 1369 (noting Randall Kennedy’s remarks on the significance of these factors for interracial dating).
bilities of intimacy, as shown earlier, and should be promoted. As with leveling the playing field, however, I do not urge that (otherwise sound) policies of racial integration be promoted in the name of interracial intimacy, as I discuss below.

5. Designing the Architecture of Intimacy. — Getting into buildings is different from getting close. And getting access to the public sphere is different from getting access to the private sphere. Accommodation and integration should be evaluated for the kinds of intimacies, as well as the basic access, that they do and do not permit.

6. State Expression. — Finally, through forms of state-sponsored expression, such as public funding for the arts or a diversity campaign using public service announcements, the state could endorse affirmative visions of relationships that are relatively disparaged. Because state expression sometimes verges on burdening other types of relationships (see the Offense of Marriage Act discussed above), using state expression in this way is a strategy to be used sparingly. A related tool — of scrutinizing public expression for subtly disapproving messages — is often useful.

The rest of this Part elaborates on the meaning and uses of these tools through specific examples relevant to the categories at issue.

364 See supra section III.A, pp. 1366–73.
365 See infra section IV.E, pp. 1396–1400 (explaining why this Article does not advocate policies that aim to encourage the formation of interracial relationships, as opposed to those — sometimes overlapping — policies whose aim is to unburden existing relationships).
366 See supra section IV.A.1, pp. 1382–83.
367 See, e.g., infra section IV.E.3, pp. 1399–1400 (noting the occasional persistence of state marriage license applications that prominently ask for the race of the prospective spouses).
368 As noted, the list is not exhaustive. For instance, one difficult question is whether the toolkit of structural interventions should include regulating third parties; in particular, we might wonder about regulating internet dating sites. The design of dating websites does, after all, help to structure the ways that many individuals define themselves and the possibilities they confront and choices they make about potential partners. See supra note 31 (discussing the popularity of dating websites). But for that very reason, such internet interactions cut rather close to the space I think needs to be carved out for individuals to make choices and to be their own moral evaluators rather than being judged by government or society. See supra section II.B, pp. 1356–57. An example demonstrates the difficulties here: My intuition is that there is a distinction between state interference in a site’s utterly excluding some groups from participation in the site — for instance, a court’s finding illegal discrimination in eHarmony’s excluding same-sex searching, or, if it existed, in a site’s excluding all disabled participants (eugenicdating.com, it might be called) — and state control of the types of searches that can be performed. Cf. supra note 113 (discussing the eHarmony cases). But even this suggestion is problematic, as the current structure of antidiscrimination law in many domains is antidifferentiation, such that a legal decision in the eHarmony case could perhaps be used later to rule, for instance, that lesbians could not have their own dating sites that exclude men. The antisubordination arguments I have discussed, on behalf of self-sorting by subordinated groups, would urge against the state intervening in the lesbian site, but courts might nonetheless allow such intervention after a favorable decision in the eHarmony context. Moreover, state restrictions on the types of search mechanisms may sometimes make sense, particularly where these sites are fora for commercial, rather than merely dating, relationships. Cf. supra note 113 (describing a case involving roommates.com). At any rate, I have not
The discussion begins with the categories subject to the greatest persistence of formal restrictions and penalties — sex and disability — and then turns to race.

C. Sex: Lifting Explicit Restrictions and Eliminating Penalties

With sex, the state explicitly burdens gay and bisexual individuals by restricting marriage to different-sex couples. As has been eloquently stated in many places, the freedom to marry is not an abstract right; for it to mean anything at all, it must mean the freedom to marry the person that you love.\textsuperscript{369} Marriage restrictions have both expressive and practical significance; indeed, their consequences appear innumerable, until one reads the enumerations put together by advocates and even courts.\textsuperscript{370} Related burdens on same-sex couples abound, from the federal Defense of Marriage Act\textsuperscript{371} (DOMA) and state mini-DOMAs and associated tax consequences, to the military’s “don’t ask, don’t tell” policy that prevents gay servicemembers from having open relationships, to the lack of second-parent adoption and restrictions on adoption by gay individuals in many jurisdictions.\textsuperscript{372} To stop enacting intimate discrimination with regard to sex, the state should begin by removing sex-based restrictions on who can marry whom and associated penalties and burdens.\textsuperscript{373}


\textsuperscript{370} See, e.g., Goodridge, 798 N.E.2d at 955–56 (providing a list of the benefits denied to some by such restrictions).


\textsuperscript{372} See generally AYRES & BROWN, supra note 12 (describing burdens and proposing innovative public and private responses). For discussion of interpretive and constitutional problems with the mini-DOMAs, see generally Andrew Koppelman, The Difference the Mini-DOMAs Make, 38 LOY. U. CHI. L.J. 265 (2007). Sex-based burdens also include zoning and police practices that target gay bars and bathhouses. See, e.g., WARNER, supra note 98, at 149–93.

\textsuperscript{373} The same-sex marriage debate has prompted many related debates, including discussion about the value of the institution of marriage, and the rightness of the state’s involvement in marriage. See generally JUST MARRIAGE (Mary Lyndon Shanley ed., 2004). There is much more to be said on this subject, but so long as the state provides civil marriage to different-sex couples, it should provide it to same-sex couples. Mary Anne Case has also argued that opening marriage to same-sex couples will facilitate some progress toward gender equity in different-sex marriage. See Mary Anne Case, What Stake Do Heterosexual Women Have in the Same-Sex Marriage/Domestic Partnership/Civil Union Debates (Feb. 2004) (unpublished manuscript, on file with the Harvard Law School Library). Whether the state can and should do anything to target gender discrimination in dating, as against feminine men or masculine women, or even against women who are highly educated or successful, see supra p. 1334, is an interesting question that deserves further
It is instructive to see how easy it is to identify what legal changes need to occur in this area, and yet how difficult it is to imagine what comes after those changes. Our intimate decisions with regard to the sex of our partners are limited — through the marriage restrictions, inter alia, mentioned above — in ways that our decisions about race and disability generally are not. Identifying the immediate steps for the state to take with regard to sex is therefore easy. Trying to imagine what will come next is harder. For instance, think of the Offense of Marriage Act discussed in the previous section. Such an act regulating relationships based on race or disability may seem troubling or offensive, but a similar act regulating relationships based on sex would be simply preposterous. It seems inconceivable that the state would try to encourage counter-normative pairings by applying the label “marriage” only to same-sex relationships and providing “civil unions” to different-sex couples. This in part reflects the entrenchment of our current legal and cultural regime. But it also reflects assumptions about the relative fixity of sex as a determinant category of desire. Imagining a legal structure that would incentivize same-sex relations seems absurd, because our usual assumptions do not admit of that degree of flexibility in choices about the sex of our sexual partners, despite studies showing the frequency of some degrees of bisexual desire. This is a striking difference from the common understandings of race and disability in relation to desire. I do not mean to overstate the imaginative leap beyond removing express legal limitations; for starters, the passage of federal employment-discrimination protection and hate crime laws would lift some material and expressive burdens on gay individuals and couples and will likely precede marriage reform. But it is nonetheless interesting to note the position of sexual orientation, relative to disability and race, in terms of whether and what affirmative steps are conceivable at this moment in time.

374 The primary exception to this comparative point is found in the remaining legal restrictions preventing sex and marriage by people with mental disabilities. See supra notes 20–24 and accompanying text. These restrictions are akin to those pre-Lawrence laws governing same-sex relations.

375 See supra section IV.A.1, pp. 1382–83.


377 See, e.g., Yoshino, Bisexual Erasure, supra note 111, at 377–88 (citing studies).

D. Disability: Removing Barriers to Entry and Encouraging Intimacy

For disability, the structure of the legal and social norm has been exclusionary: people with disabilities have been treated as if outside the sexual realm altogether. A wide range of reforms should thus be undertaken to reduce barriers to entry for people with disabilities, utilizing each strategy set out in the toolkit above.

1. Lifting Explicit Restrictions. — The state’s explicit role in intimate discrimination is most plainly ongoing with regard to sex and most plainly consigned to history for race. Disability lies somewhere in between, as discussed in Part I. Explicit eugenics-based restrictions on marriage based on physical disability are largely a thing of the past.\(^{379}\) But restrictions — even criminal restrictions — on sexual activity and marriage by people with cognitive disabilities continue.\(^{380}\) As Deborah Denno has argued, such per se restrictions need to be replaced with contextualized inquiries into competency to consent, grounded in the same considerations always relevant to determinations of consent.\(^{381}\) Per se restrictions on sexual activity by and with people with disabilities stigmatize such individuals and permit families and guardians to deny the possibility of sexuality, a mindset that may itself contribute to the risk of abuse.\(^{382}\)

2. Eliminating Marriage Penalties. — Federal and state disability benefits are structured in ways that penalize the decision to marry. In some circumstances, marriage per se terminates benefits. For instance, marriage terminates the benefits of a disabled adult child of a Social Security beneficiary if the spouse is not also a Social Security beneficiary, a rule the Supreme Court upheld in *Califano v. Jobst*.\(^{383}\) In addition to per se marriage penalties, marriage can also lead to changes in income calculations that cause a termination of benefits. For instance, a disabled individual who receives Supplemental Security Income (SSI) and then marries and lives with a spouse who is not eligible for SSI will have his income calculated as if it includes some of the spouse’s income.\(^{384}\) This increase in presumed income — “deemed” to the SSI-eligible spouse on the assumption that his ineligible spouse will use some of her income to care for his needs\(^{385}\) — may bump the dis-

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379 See *supra* pp. 1316–17.
381 See Denno, *supra* note 9, at 321. For a fuller discussion, see id. at 355–79; and FIELD & SANCHEZ, *supra* note 9.
384 See 20 C.F.R. § 416.1160(a)(1) (2005); see also Rains, *supra* note 383, at 568–70.
385 20 C.F.R. § 416.1160(a)(1).
abled beneficiary out of SSI eligibility. Moreover, Medicaid programs in some states are administered in a way that effectively reduces or eliminates a disabled person’s benefits upon marriage. Such benefits — including personal care assistance for people with significant disabilities — are particularly important because they may enable independent rather than institutional living. In addition, these benefits may be available only through public insurance because private insurance often declines to cover tasks put under the category of “personal assistance,” though they may be vital to health as well as independence. A Medicaid system that ceases personal assistance when a disabled person marries effectively assumes that the spouse will take over these tasks. Although a spouse may be willing and able to help with these activities, depending on size, strength, and time, he or she may also be daunted by the prospect of a marriage in which the state assigns to him or her such duties.

3. Leveling the Playing Field. — The relative poverty and unemployment of disabled people is, for the reasons Randall Kennedy has identified in the race context, a serious hindrance in the dating market. People without the income or status and social connections attendant to employment or education lack key resources for the leisure activities of dating; they may also find confidence harder to come by. In addition, while love may involve accidents and magic, the positive assortative mating patterns — showing that people tend to pair with others who are highly similar on many dimensions including income, education, and attractiveness — indicate that one’s social status largely determines one’s dating prospects. Decisions of law and policy, for instance, about which laws to enforce and how vigorously, seem remote from the intimate sphere, but may have significant effects. In addition, for some disabled people who have been denied basic sex education or early experiences with dating, it may be necessary to develop confidence and relevant social skills, as well as to gain ac-

388 See supra p. 1369.
389 See supra notes 286–89 and accompanying text. Complexities arise here, for instance, in the fact that greater education for straight disabled women could possibly be a liability in the dating market in some instances, if men are relatively less educated, cf. Fisman et al., supra note 118, at 685, or if men seek a stereotype of dependency or docility in a disabled woman, see supra note 163. Though these difficult subjects deserve far more discussion, it is fair to say that improving dating prospects should not trump improving access to other valuable resources such as education.
curate information about sexual relationships. Such programming may be particularly important for people with cognitive or psychiatric disabilities and is already provided in some local jurisdictions. Thus, reforms should promote the enforcement of existing antidiscrimination laws and the creation of new policies to support employment and independence — both of which have additional arguments in their favor — and they should expand psychological programming and support groups that specifically address dating and intimate relationships. Finally, hate crimes can affect the day-to-day experience of people with disabilities, as well as those who travel with them. Although some local jurisdictions have hate crimes laws that cover disability, most do not, and legislation to create federal hate crime protection for disability (among other categories) has been proposed but not yet enacted.

4. Basic Accessibility. — As portrayed through the I-City and A-City hypotheticals in Part III, the accessibility of the local community affects not only people with disabilities, but also those who are close to them. Whether the range of public accommodations — such as restaurants, hotels, and theaters — meets ADA standards of accessibility determines whether disabled people and their partners can enter them. Though many of these changes are already required by law, enforcement of Title III has been inadequate, as it depends largely upon private lawsuits (for which damages are unavailable) that have often been met with hostility by the courts. Public transportation must be accessible and also reasonably efficient, and accessible private trans-

390 For a list of some resources and curricula for sex education in the context of disability, see, for example, Dimple Keshav & Barbara Huberman, Sex Education for Physically, Emotionally, and Mentally Challenged Youth 4–5 (2006), http://www.advocatesforyouth.org/PUBLICATIONS/frtp/challengedyouth.pdf.

391 For instance, the New York City neighborhood of Chelsea is home to a state-financed social club called the Lonely Hearts Club for people with severe mental illness. The club operates as part “how to find a date” assistance and part discussion group involving “deeper meditations on the nature of relationships, how to find them, manage them and survive them, when merely moving through daily life can be treacherous enough.” Sarah Kershaw, Fragile Matters of the Heart, N.Y. TIMES, Feb. 10, 2008, at CY5.

392 For examples of such policies, and arguments in their favor, see, for example, Bagenstos, supra note 307; see also infra section IV.D.4, pp. 1392–93.


portation, such as taxis and airport shuttles, is crucial to enabling dat-
ing and other intimate relationships. Accessibility is important across domains of life, from housing to employment to education to health care to public spaces to government buildings, both for the indi-
viduals with disabilities who require it and for those who accompany them, disabled or nondisabled. For starters, if the courthouse is not accessible, it is hard to get married in it.

5. The Architecture of Intimacy. — Viewing these proposed changes through an intimacy lens also forces us to consider the way we integrate. Does the structure of integration merely allow everyone to be in the same building, or does it permit or even encourage any kind of closeness? For example, it is useful for restaurants to provide ramps and wide enough aisles for patrons in wheelchairs to enter the space; that is progress. And the ADA requires that public accommodations not segregate disabled patrons into separate eating areas. But intimacy requires more. The design of tables determines whether those patrons who come with their own chairs can sit near to others at the table. For instance, if tables are too short, or are supported by legs with a wide base, wheelchairs cannot pull fully up to the table, leaving diners at an awkward and impersonal distance. This is one very specific example of a broader inquiry into what we might call the architecture of intimacy.

Other examples of the architecture of intimacy are potentially as varied as disabilities. For instance, both cross- and within-disability intimacy could be enhanced by wider availability of instruction in sign language. Communicating directly with another, rather than through an interpreter, allows for a different kind of fluidity and proximity. State universities could increase fluency in American Sign Language (ASL) by permitting students to count ASL courses towards language requirements, as a limited number of universities currently do.


399 Of course, indirect contact can also involve its own particular forms of intimacy; think here of email, among other media. See, e.g., Jerry Kang, Cyber-Race, 113 HARV. L. REV. 1130, 1150 (2000). But the option of employing either direct or indirect communication would seem to expand the possibilities. In addition, in the context of sign language, communicating with an interpreter also allows intimacy with an interpreter, but more people knowing sign language might also lead to more frequent employment of interpreters for lectures and other events.

Wider availability of services in movie theaters that provide audio descriptions of what is onscreen would not only enable solo blind moviegoers, but would also allow blind moviegoers to go to the movies together, and allow blind and sighted moviegoers to watch a movie without the sighted watcher distracting himself and others by describing the movie to his blind companion as it goes along.401 (Of course, if the descriptions are sufficiently elegant and well-timed, then sighted moviegoers might benefit from them as well, further enhancing the mutuality of the experience.402)

In addition to making intimacy more possible in accessible spaces, the architecture of intimacy includes making intimate spaces more accessible. For instance, there could be public support or regulation to make private homes accessible — what has come to be known as “visitability.”403 Intimate affiliations are deeply affected by who can enter another’s home.404 The visitability movement therefore promotes home construction that enables people who use walkers or wheelchairs, or otherwise have trouble with steps, to visit or to live in those homes.405 Visitability has three basic requirements: one entrance with no steps, doorways at least thirty-two inches wide, and one main floor bathroom that someone in a wheelchair can enter.406 Though the

401 The arrangement of seats in movie theaters, and other performance spaces, provides another example: seating should be arranged so that those requiring accommodations, such as those in wheelchairs who require space without seats, can be spread out in the theater, sitting among companions who are not in wheelchairs, or gathered together, sitting among companions who are also in wheelchairs.

402 Cf. Emens, supra note 259, at 917 n.223; id. passim (discussing the third-party benefits of many accommodations, depending on how they are designed, including an example of different film descriptions that either interfered with or enhanced the experience for all).


404 Cf. supra pp. 1370–71 (portraying the role of visitability in the ease of the dating scenarios in the two hypotheticals).


406 See MAISEL ET AL., supra note 403, at 9; REHABILITATION ENGINEERING RESEARCH CENTER ON UNIVERSAL DESIGN, VISITABILITY 1, http://www.ap.buffalo.edu/idea/visitability/Booklet/VisBk%20Ver3-7-03.pdf; Visitability, http://www.visitability.org (last visited
movement is still in its early stages, a number of jurisdictions have passed visitability initiatives, often through advocacy efforts focused on both aging and disability; as of December 2007, fifty-seven such initiatives had been passed at the state or local level. Some of these are mandatory for all new homes, including one in Pima County, Arizona, that survived a state constitutional challenge brought by aggrieved builders under the privacy and equal protection provisions of the state constitution.

Visitability can also be promoted through tax credits and requirements for public housing contracts. For instance, Virginia provides a tax credit of up to $500 for making private homes visitable (and, in an unusual move, uses the word “visitability” in the statute). Georgia restricts contracts for new public housing to applications that meet some visitability requirements, unless such construction will be “unreasonably expensive,” a type of cost-cap measure common to these initiatives. Most of the current visitability legislation concerns new construction, rather than retrofitting (which is sometimes costly), though Virginia provides its tax credit for either retrofitting or new construction. These initiatives often conform to only one or two, but not all three, requirements of visitability. A bill introduced in Congress in 2002 (and again in 2003, 2005, and 2007) — the Inclusive Home Design Act — would require all new single-family homes constructed with federal financial assistance to meet all three visitability require-

Feb. 8, 2009). The bathroom can be a “half bath,” that is, with only a toilet and a sink. MAISEL ET AL., supra note 403, at 1.

See MAISEL ET AL., supra note 403, at 21.


Washburn v. Pima County, 81 P.3d 1030, 1039–40 (Ariz. Ct. App. 2003) (noting that the cost of compliance is likely to be $100 (presumably per home), “substantially less” than the cost of later retrofitting, and less than the $200 cost cap, above which the county may waive the requirement). The Arizona Supreme Court denied review. See MAISEL ET AL., supra note 403, at 66.

A recent study estimates, however, that the mandatory initiatives have led to far more visitable houses being built. MAISEL ET AL., supra note 403, at 21–22.


GA. CODE ANN. § 8-3-172 (2004). Michigan law requires, as of 2007, that 50% of new family construction that receives state funding will be accessible. MICH. COMP. LAWS § 125.2813 (2007). The Michigan law, like many of these regulations, speaks just of accessibility, without any particular attention to visitability. Requirements that enable disabled people to live in, and not just visit, newly constructed homes are of course most valuable, beyond the idea of visitability.

VA. CODE ANN. § 58.1-339.7.

See, e.g., 20 VT. STAT. ANN. tit. 20, § 2907 (2005) (imposing requirements on new construction — other than by the owner — but failing to mention the width of bathroom entrances).

ments. Promoting visitability’s requirements, whether through regulation or subsidy, could vastly alter the potential for various forms of intimacy for people with mobility impairments. Both forms of the architecture of intimacy — making accessible spaces intimate and making intimate spaces accessible — are important reforms to counter the norm of desexualization for people with disabilities.

6. State Expression. — Important work in the arts and popular culture has helped to encourage recognition of the diverse sexualities of disabled people and challenge the myth of desexualization. Much work remains to be done, however, and funding is scarce. Arts funding, as one example of state expression, could help to counter stigmatizing and misleading norms in this area.

E. Race: Unburdening Existing Relationships

Those lawmakers and bureaucrats who have overseen the incomplete project of desegregation have been well aware of the homogamy norm and, more pointedly, of fears of miscegenation. As the author of this Part’s epigraph warned in 1860, “Do[ing] away with the social and political distinctions now existing . . . [will] turn all blacks and mulattoes into citizens, co-governors, and acquaintances . . . [and thus into] friends, husbands, and wives.” This history should be an additional reason we look closely at social patterns that we claim are now just free choice; if we still are not comfortable with interracial relationships, then we may still be making policy that, on some level, reflects those fears.

1. The Best Policy for Race. — Structural subordination on the basis of race has received much attention for its material consequences. The intimate consequences should concern us here as well. Given that the historical progress of desegregation was haunted by fears of miscegenation, we might expect lingering fears in this area

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416 See MAISEL ET AL., supra note 403, at 7 (discussing H.R. 4202, (re)introduced by Rep. Jan Schakowsky (D-Ill.) on November 15, 2007).
417 In addition, all of the work I have seen on visitability focuses, somewhat surprisingly, only on facilitating wheelchair access, without regard to other kinds of disabilities.
418 See supra p. 1379 (emphasis omitted).
419 See, e.g., CASHIN, supra note 335, at xix (“[U]nless and until we complete the unfinished business of the civil rights movement, meaningfully integrating our public and private realms in a way that gives all Americans, especially those who have been most marginalized, real choices and opportunities, we will not solve the conundrum of race and class inequality in America.”); McNENDIAN ET AL., supra note 322, at 9 (“[A] combination of public and private racial discrimination has produced entrenched patterns of residential segregation and resources disparities that exist today.”).
420 See, e.g., Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 243 (1991) (discussing the Court’s evasion of the antimiscegenation law case of Naim v. Naim for fear that it could “thwart[] or seriously handicap[] the enforcement of [our] decision in the segregation cases,” as Justice Frankfurter put it to the Court in a memorandum read at con-
to continue to limit the possibilities for racial justice. Until we are able to talk about intimate discrimination, in its richness and complexity, as well as its link to the bleaker side of race relations, we may not be able to talk effectively about housing and schools and a range of other, more apparently material, domains. We should therefore think carefully about the ways the state structures who meets whom, and what influences the decisions of law and policy that determine those structures.

We might go further. We might say that the state should be concerned about the low rates of interracial marriage, in light of the state’s formal and informal contribution to preferences and choices that must in part be endogenous to the institutional and legal regimes of the society. Perhaps the state’s involvement in who meets whom, and who comes close to whom, should be the focus of explicit, targeted intervention. Perhaps intimate discrimination should be offered as the reason for the structural interventions that others have been arguing are needed for a range of social and economic reasons, and maybe we should take further affirmative steps in the name of intimate integration.421 Or perhaps the state should engage in affirmative expression — through stamps or public art — to encourage interracial relationships. The idea of promoting interracial relationships to counteract the past is an interesting idea, but one that I think goes too far, for the reasons that follow.

To center state policy on the goal of encouraging interracial relationships — even if intended as a remedial effort in response to a history of explicit state efforts to prevent such relationships — would not only run into possible constitutional difficulties, it would probably be the wrong policy decision, for two reasons. First, reasonable minds can disagree about whether intimate differentiation — at the individual level — is bad, neutral, or even good. As discussed in Part II, some people, especially members of subordinated groups, may wish to pair inside their community, to resist assimilation and form supportive intimate communities. In addition, any number of reasons might frame people’s choice of mate, political or otherwise, and so for the state to try to encourage individuals in one direction or another seems hard to justify.422 One might ask why disability warrants more explicit interventions targeting the formation of relationships. Different

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421 I read Rachel Moran to advise this approach, recommending “[t]axing policy, home loan programs, integration of schools, and affirmative action in workplaces” to “expand the range of options that individuals can consider.” MORAN, supra note 23, at 194.

422 See supra Part II, pp. 1339–66.
treatment is justified because the norm with disability is one of isolation and exclusion — not pressure toward one group rather than another — so efforts to encourage intimate possibilities for disabled people lack a counterclaimant. Remember that the efforts in the disability arena do not aim to encourage cross-ability relationships in particular; rather, they aim to support possibilities for disabled people to pair together or to pair with others without disabilities. Second, and simply, policies to encourage interracial relationships are likely to rankle, rather than persuade, as they sound like social engineering, possibly against individual or community wishes, in a highly personal realm.

2. What To Do: Lifting Material Burdens by Eliminating Housing Discrimination. — The better approach would aim to lift social burdens on existing interracial relationships. Much of the impact of such an effort would be on the enforcement side; that is, as with some of the disability proposals, relevant law is on the books in several areas, but it is not adequately enforced. The most obvious such area for race would be in housing. Housing discrimination is still rampant; indeed, interracial couples likely see more of it and more dramatically, since they are built-in testers. Studies using pairs of black and white testers continue to reveal substantial amounts of racial steering in the housing market. An administration committed to racial equality, but also one committed to unburdening interracial relationships, would put meaningful resources into enforcing the Fair Housing

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423 There are some historical counterexamples, however; for instance, Alexander Graham Bell was an outspoken opponent of deaf people marrying other deaf people, since he so favored assimilation. See, e.g., DOUGLAS C. BAYNTON ET AL., THROUGH DEAF EYES: A PHOTOGRAPHIC HISTORY OF AN AMERICAN COMMUNITY 71, 74 (2007). But the broader norm has been one of desexualization and exclusion per se.

424 Of course only consensual relationships are encouraged; as discussed earlier, though fears of abuse may contribute to desexualization, I think we should be more concerned that desexualization compounds the risk of abuse. See supra p. 1390.

425 E.g., Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008) (discussing Title VII’s protections against associational discrimination in employment).

426 Other relevant areas include, for example, education, which may affect the children of interracial couples at the primary and secondary school levels, and may affect young couples at the post-secondary levels. But the prospect of school integration has been made increasingly difficult, particularly outside of elite educational contexts with extensive resources to devote to individualized admissions processes. See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Michelle Adams, Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937 (2008); see also LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002).

427 See, e.g., CASHIN, supra note 335, at 32–34 & passim; Cynthia L. Estlund, Working Together: The Workplace, Civil Society, and the Law, 89 GEO. L.J. 1, 14–16 (2000); see also Chito Childs, supra note 169, at 2772–73.
The housing-related burdens on interracial couples are also broader than specific instances of housing discrimination. Interracial couples bear a particularly heavy burden from the lack of meaningfully integrated neighborhoods, as it makes it nearly impossible for such couples to find communities in which they — and any children they may have — can settle amidst mutual communities of origin. Preventing discrimination from interfering with individual choices of where to live is the tool described above as allowing access; working to eliminate housing discrimination in ways that lead to integrated neighborhoods that are comfortable spaces for interracial couples sounds also in the architecture of intimacy.

Residential segregation is much more than a function of private preferences; as twentieth-century historians have documented, government agents at all levels determined the patterns of racial distribution and home ownership through practices such as redlining. Important work is underway to determine the best policy routes to integrating our communities, in the interests of racial and economic justice and in an effort to undo the twentieth-century history of state-sponsored housing segregation; lifting the burdens on interracial couples is yet another reason for such efforts. Of course, greater integration may also facilitate new relationships across race. But the policy justification for them, to the extent that it implicates intimate relationships, should center upon unburdening existing relationships.

3. Lifting Expressive Burdens. — The state’s expressive burdens on existing interracial relationships should also be eliminated. As one small but striking example, marriage license applications in various jurisdictions continue to request each party’s race, even though this information should no longer have any effect on a couple’s ability to marry. Some jurisdictions request this information in an apologetic way at the bottom of the form, headlined by a note that it is being...

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429 See, e.g., CASHIN, supra note 335, at 41–43 (presenting evidence of the scarcity of integrated neighborhoods, under multiple definitions).
431 See, e.g., sources cited supra note 335.
432 See, e.g., CASHIN, supra note 335; MENENDIAN ET AL., supra note 322; Powell, supra note 232; Olatunde C.A. Johnson, Dismantling the Segregated State (unpublished manuscript, on file with the Harvard Law School Library).
433 This would be particularly true if one extended the interventions to those structural features of society that indirectly affect interracial relationships — like the ongoing fact of racial animus. Differing experiences and understandings of racism can create a heavy burden for interracial couples. See sources cited supra note 294. Increased interracial contact and public education about racism, to name two examples, would presumably be among the best ways to remove these burdens on communication and mutual understanding, see supra p. 1378; these would also likely pave the way for more interracial friendships as well as romantic relationships.
434 See Emens, supra note 342, at 846–47.
used only for data collection purposes. But Mobile County, Alabama, for instance, asks for race on the very first line of the application.\textsuperscript{435} This presumably links to a history of various Southern jurisdictions’ filing white and black marriages separately.\textsuperscript{436} This kind of framing of individual decisions should stop, due to the signals it sends inside and outside the state’s bureaucracy.\textsuperscript{437} But unlike matters incidental to marriage — like the names the parties choose to keep or adopt on marriage, which may be decided by some parties at or after the moment of state filing\textsuperscript{438} — the decision of who to marry is surely already decided by everyone who shows up to complete a marriage license application. Thus, the purpose of altering questions about race on the marriage license application is not to change a decisional frame in order to affect behavior.\textsuperscript{439} This is consistent with the Article’s proposal that the state’s approach to intimate discrimination in the context of race should be to unburden existing interracial relationships, not to encourage the formation of new ones. Race should be removed from the first line of a marriage license application because its implication is offensive — because of its expressive message — but not because it will change individual choices about intimate discrimination.

**CONCLUSION**

Analyzing the problem of intimate discrimination has shown that regulatory intervention is appropriate at the structural, but not the individual, level. Sources from law and psychology, sociology, economics, and literature demonstrate that discrimination at the level of individual preferences and interactions may be troubling, but it may also be affirming or neutral, depending on context and rationale. State involvement with individual intimate preferences would also impede personal autonomy. It would be woefully misguided to regulate individual intimate preferences in the same way that we regulate employ-


\textsuperscript{436} See, e.g., Alabama County Still Files Marriage Records by Race, WASH. POST, July 21, 1991, at A16 (“A century-old custom of recording marriages by race in books marked ‘white’ and ‘colored’ is still practiced in rural Chambers County. . . . ‘The county was organized in 1832, and it’s been handled that way all the time up to today,’ said Emerson W. Thompson, probate judge since 1983. ‘What’s wrong with it?’”).

\textsuperscript{437} By contrast to Mobile’s approach, the more neutral, even apologetic, framing of questions about race, of the sort mentioned just above, is a more appropriate way to collect data on race that may be useful to public deliberation and antisubordination efforts of various sorts. See, e.g., AMER. SOCIOLOGICAL ASS’N, THE IMPORTANCE OF COLLECTING DATA AND DOING SOCIAL SCIENTIFIC RESEARCH ON RACE (2003), available at http://www2.asanet.org/media/asa_race_statement.pdf.

\textsuperscript{438} See generally Emens, supra note 342.

\textsuperscript{439} Cf. supra note 340 (citing sources on decision science).
ment preferences. Nonetheless, self-interrogation about one’s intimate preferences could usefully inform ethical choices in this domain. Considering the possibility of such an inquiry has shown us a productive dynamic between law and critical inquiry: applying the legal framework of functionalism proves a useful way to think about intimate discrimination in a personal, ethical sense, and pushing the legal framework through this psychological lens provides fresh insight on the value of the legal framework as an interpretive tool for challenging stereotypes.

Important norms in the intimate domain frame our choices: for race, homogamy; for sex, heterogamy; for disability, desexualization. Society punishes those who violate these norms, but the norms can also harm those who do not violate them, in particular, those people with disabilities who may never have the chance to violate these norms because they are relatively excluded from the dating markets. Moreover, hierarchies in the markets for sex and marriage have significant consequences for welfare — affecting longevity, health, and happiness — and for the problem of discrimination more broadly. Intimate norms also seep into the employment domain, where assumptions from the intimate sphere hinder courts’ ability to recognize discrimination where it occurs.

We have also seen how the state shapes the accidents and calculations of sex and love. Even when seemingly uninvolved in intimate discrimination, the state creates infrastructure and influences hierarchies in ways that determine whom we meet (accidents) and how we view those we meet (calculations). And here, unlike in the individual domain, the state should take action. Most obviously, the state should complete the process of removing itself from express restrictions on who can pair with whom in the domain of sex. The state should also work to overcome the desexualization norm for disabled people by, inter alia, not only fulfilling the promise of the ADA to provide adequate accessibility, but also reconsidering accessibility through the novel frame of the architecture of intimacy. The architecture of intimacy encompasses both making accessible spaces intimate and making intimate spaces accessible. The former refers to enabling disabled people to do more than simply enter spaces, by enabling them also to be close to those they might meet, date, and love. The latter refers to the visitability movement, which aims to make new private home construction accessible, at least minimally, so that disabled people can be welcomed into the homes of their friends, their lovers, and the friends and families of those they love.

Moreover, studying intimate discrimination in the context of race reveals the burdens that state policy places on existing interracial relationships, thus highlighting the failures of the project of integration. In particular, residential housing segregation burdens interracial couples by failing to provide interracial communities where they might
choose to live. Thus, the intimate lens with regard to race largely gives an additional reason for initiatives that seem a good idea otherwise. But it also helps explain why the housing problem has not yet been solved: the assumption that like attracts like joins with lingering fears of miscegenation to impede progress toward integration close to home. In short, if we already know what to do, it may be helpful to understand why we have not done it yet.

Finally, we have seen in the study of intimate discrimination an important reason for moving from the individual level to the structural level in antidiscrimination law. Focusing on the individual level raises a whole host of problems and pitfalls that the structural level avoids. Moreover, focusing on the structural level can open up possibilities for change that are unimaginable at the individual level. It is inconceivable that punishing individuals whose intimate desires do not encompass all races or ability levels or sexes will bring about an appealing outcome at the individual, much less the societal, level. Yet this individual bad-actor model is precisely what underpins the dominant understanding of our current employment discrimination regime. In contrast, structural changes — from embracing the architecture of intimacy to lifting burdens on mixed race couples by helping to support genuinely integrated neighborhoods to changing marriage law to include same-sex couples — might engender larger, more substantive change. Creating opportunities for human flourishing, without unduly burdening individual potential and autonomy, should be the core aims of antidiscrimination efforts. An examination of the intimate domain helps us to see why a move to the structural level is crucial to that effort.