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## **Bargaining for Integration**

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# BARGAINING FOR INTEGRATION

SHIRLEY LIN\*

*The Americans with Disabilities Act (ADA) requires employers to restructure exclusionary environments upon the request of their employees with disabilities so that they may continue working. Under a virtually unexamined aspect of the mandate, however, the parties must negotiate in good faith over every accommodation request. This “interactive process,” while decentralized and potentially universal, occurs on a private, individualized basis.*

*Although the very existence of the mandate has been heavily debated, scholarship has yet to acknowledge that the ADA is actually ambivalent to individuals’ relative power to effect organizational change through bargaining. This Article is the first to critique the law’s interactive requirements. The process does not appear in the statute, but is an agency’s conceptualization of the mandate as an idealized exchange. By evaluating new empirical evidence relating to race, class, and gender outcomes against the meso-level theories underlying the mandate, this Article argues that the process disempowers employees through deficits of information, individuated design, and employers’ resistance to costs. Nonetheless, momentum to replicate the mandate to accommodate pregnancy and other workers’ needs continues apace.*

*As the workplace is increasingly deemed essential to societal well-being, this new frame reveals the law’s design flaws and unfulfilled potential. In response, this Article proposes reallocations of power so that the state may gather and publicize organizational precedent to facilitate structural analysis, regulation, and innovation at scale; legally recognize that antidiscrimination work, particularly dismantling ableist environments, is a collective endeavor; and expand the social insurance model for accommodations. Perhaps, then, the ADA’s original vision of institutional transformation may become possible.*

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## INTRODUCTION

For three decades, the Americans with Disabilities Act (ADA) has offered a bold new approach to civil rights by acknowledging that workplaces are embedded with legacy practices of exclusion.<sup>1</sup> The law recognizes that health, social, and institutional factors can render employees disabled and imposes a duty on employers to provide an accommodation for those disabilities upon request.<sup>2</sup> This duty, known

<sup>1</sup> Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 696 (2014) (noting the accommodations requirement “challenges the assumption that labor markets begin from neutral and fair baselines”); see also *infra* Section I.B.1.

<sup>2</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101. How “disability” is defined is the subject of dynamic discourse. Purposive definitions for laws such as the ADA and federal program eligibility vary, but disability is increasingly viewed through the social model, which conceives of disability as a social consequence of the interaction between individuals’ impairments and environmental conditions, both physical and societal. Richard V. Burkhauser, Andrew J. Houtenville & Jennifer R. Tennant, *Capturing the Elusive Working-Age Population with Disabilities: Reconciling Conflicting Social Success*

as the accommodations mandate, acquired its current form during an era of pronounced deregulation when the Reagan Administration's Equal Employment Opportunity Commission (EEOC) devised the interactive process to carry out this mandate.<sup>3</sup> In 1991, the EEOC announced that an interactive process should begin the moment an employee seeks an accommodation from an employer, setting into motion a thicket of procedural and substantive determinations the parties must resolve.<sup>4</sup> While the mandate's very existence drew the most controversy after the ADA's passage, now that it has withstood judicial and ideological challenge it has attracted considerable attention as a template for reform.<sup>5</sup> However, the persistence of structural inequities within workplaces reveals the mandate's potential flaw: it expects individual employees to achieve social change through what is effectively private, common-law bargaining.

Although it is a defining feature of modern disability law, the accommodations mandate has not yet made accommodations accessible for many Americans who require them.<sup>6</sup> After passing the ADA,

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*Estimates from the Current Population Survey and American Community Survey*, 24 J. DISABILITY POL. STUD. 195, 196 (2014); Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 188–89 (2008). By contrast, under the medical model, a disability is defined as a condition that solely requires medical treatment or therapy. *Id.* at 185–86; Elizabeth F. Emens, Essay, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2337–40 (2021) (explaining how the models historically informed the ADA). This Article alternates between use of people-first and disability-first language in acknowledgement of the diversity of views among disability advocates.

<sup>3</sup> See *infra* Section I.A; Samuel R. Bagenstos, “*Rational Discrimination*,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 826–30, 828–30 n.9 (2003) [hereinafter Bagenstos, “*Rational Discrimination*”] (summarizing the literature and challenging the argument that “traditional” antidiscrimination law and the ADA accommodations mandate are substantively different); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 120–22 (1993) (“The Reagan-Bush administration had been sworn into office in 1981 with a mandate for deregulation.”). The scope of this Article addresses the ADA’s employment title, Title I, with reference to other provisions where relevant. Titles II and III of the ADA—addressing public employers and public accommodations or commercial facilities, respectively—require entities to undertake structural changes under proscriptions against physically inaccessible buildings. 42 U.S.C. §§ 12131(1), 12132, 12182.

<sup>4</sup> See discussion *infra* Section I.A.2, notes 160–82 and accompanying text (analyzing an illustrative failure-to-accommodate claim); *infra* note 71 (demonstrating how several circuit courts reasoned that determining whether an interactive process is mandatory depends upon whether a substantive right to accommodation actually existed).

<sup>5</sup> See PETER BLANCK, MICHAEL WATERSTONE, WILLIAM N. MYHILL & CHARLES D. SIEGAL, *DISABILITY CIVIL RIGHTS LAW AND POLICY* 61–63 (3d ed. 2014) (providing a history of Congressional debate over the reasonable accommodations mandate and its potential costs); *infra* Section II.B (summarizing reform proposals).

<sup>6</sup> This includes Americans who are employed and those who could be employed if accommodated. See *infra* Section II.A.1 (showing that high rates of non-accommodation persist).

Congress delegated the task of devising implementing regulations to the EEOC.<sup>7</sup> The agency then presented the interactive process, an exchange in which employers and employees would ideally collaborate in identifying an accommodation that would enable the employee to continue performing the essential functions of a particular job.<sup>8</sup> The mandate nevertheless continued to fuel social and judicial backlash against the ADA, as well as a rich vein of responsive legal scholarship that brought nuance to the debate over the law's reach.<sup>9</sup> These protracted first-wave struggles over who qualifies as disabled under the law, however, appear to have led courts and scholars to uncritically accept the interactive process and presume that it adequately balances employers' prerogatives against employees' needs. The literature has yet to acknowledge that the mandate relies upon a bargaining-based model to secure compliance with a civil right,<sup>10</sup> or that the law's design fails to generate the lasting norms necessary for workplaces to dismantle discrimination at scale.<sup>11</sup>

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<sup>7</sup> 42 U.S.C. § 12116.

<sup>8</sup> 29 C.F.R. § 1630.2(o)(3) (2020). The employee must be able to perform the essential function of their job to qualify for the ADA's protection. 42 U.S.C. § 12111(8) (defining "qualified individual").

<sup>9</sup> See, e.g., Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 501, 503–04, 513, 516 (2000) (attributing social and legal backlash against the Rehabilitation Act and ADA to societal and judicial misunderstanding of the social model of disability, conflicting social norms relating to distributive and corrective justice, and perceptions about who should benefit from the ADA); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 312 (2009) [hereinafter Travis, *Lashing Back at the ADA Backlash*] (describing the accommodations mandate as the "primary target" of socio-legal backlash against the ADA); Bagenstos, "Rational Discrimination," *supra* note 3, at 902 (focusing on the effect of the anti-ADA backlash on civil rights advocates' emphasis on the distinction between antidiscrimination and accommodations so as to protect canonical antidiscrimination protections under Title VII); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 135–36 (2003) [hereinafter Stein, *The Law and Economics of Disability Accommodations*] (observing debate among academic scholars regarding whether the ADA mandate is a form of antidiscrimination, redistribution, or affirmative action).

<sup>10</sup> Cf. Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 563, 600 (2020) (framing disability law as "largely left for private enforcement by members of society" in everyday interactions where "formal law enforcement is absent," at least in the immediate sense (citing SARAH MARUSEK, POLITICS OF PARKING: RIGHTS, IDENTITY, AND PROPERTY 138–39 (2012))).

<sup>11</sup> Jasmine E. Harris argues in *Taking Disability Public* that disability laws "overvalu[e]" privacy, incurring social costs including an inaccurate understanding of the actual prevalence and breadth of disability. 169 U. PA. L. REV. 1681, 1726 (2021) [hereinafter Harris, *Taking Disability Public*]. Further, Harris notes a default to status-quo stigma can cause people with disabilities to "[c]over[.]" *id.* at 1732 n.234, underaccommodate, or privately absorb the costs of accommodation instead of shifting pressure on the public to "change [ableist] structures, practices, and policies," *id.* at 1733–36.

This Article is the first to critically assess the institutional design of the ADA's interactive requirements.<sup>12</sup> By analyzing empirical evidence, court decisions, and tensions among theories of equality, procedural justice, and common-law negotiation underlying the mandate, it reconceptualizes the law's design as a product of political economy. While scholars have explored the novelty of the ADA's mandate broadly, with one extolling the interactive process as a "laudable revolution" in workplace procedures,<sup>13</sup> the literature has generally focused on definitional gatekeeping issues such as employers' undue hardship defense,<sup>14</sup> courts' deference to employers as to the "essential functions" of job descriptions,<sup>15</sup> and how to determine whether the accommodation offered is "reasonable."<sup>16</sup> Furthermore, divergent

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<sup>12</sup> The latest research into the shortcomings of accommodations attributes them to employer uncertainty regarding the costs of an accommodation and ambiguity aversion, particularly at hire. See generally Jennifer Bennett Shinall, *Anticipating Accommodation*, 105 IOWA L. REV. 621 (2020). It instead identifies the failure to address employer uncertainty as the ADA's "fatal flaw." *Id.* at 678; see also *infra* notes 334, 345 and accompanying text (demonstrating employers' concerns and policy solutions for the costs of accommodations). In a recent article, Katherine Macfarlane criticizes courts' extratextual reliance upon the medical model of disability in requiring medical documentation during the interactive process. Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 59–89 (2021). Previously, Stacy Hickox examined bargaining over disability accommodations only from the lens of collective bargaining by unions. See Stacy A. Hickox, *Bargaining for Accommodations*, 19 U. PA. J. BUS. L. 147, 148 (2016).

<sup>13</sup> Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 616 (2004).

<sup>14</sup> See 42 U.S.C. § 12111(10)(A)–(B) (defining employers' undue hardship defense); see also, e.g., Stein, *The Law and Economics of Disability Accommodations*, *supra* note 9, at 89–90 (discussing the many considerations that comprise undue hardship); 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, 397 (1995) (introducing the article's focus on the financial components of undue hardship).

<sup>15</sup> 42 U.S.C. § 12111(8) (defining a "qualified individual"); see, e.g., Travis, *Lashing Back at the ADA Backlash*, *supra* note 9, at 348 (highlighting relevant EEOC guidance); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 21–33 (2005) [hereinafter Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*] (discussing the transformative and essentialist approaches to interpreting the ADA's accommodation mandate, which both rely on the scope of a job's essential functions); Amy Knapp, *The Danger of the "Essential Functions" Requirement of the ADA: Why the Interactive Process Should Be Mandated*, 90 DENV. U. L. REV. 715, 731–35 (2013) (arguing that the use of an essential functions requirement would undermine the purpose of the ADA). Even today, employers continue to include clauses in job postings that purport to describe essential functions of a job but operate to dissuade disabled applicants, such as a requirement that a dean of fine arts must be able to lift twenty-five pounds. David M. Perry, Opinion, *Job Discrimination in Plain Print*, AL JAZEERA AM. (Feb. 10, 2016, 2:00 AM), <http://america.aljazeera.com/opinions/2016/2/job-discrimination-in-plain-print.html>.

<sup>16</sup> 42 U.S.C. § 12112(b)(5)(A) (providing for "reasonable accommodations"). See generally Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation*

approaches to employment law and labor law doctrines have generated a blind spot in which the integration of people with disabilities is relegated to “individual rights,” to the exclusion of discourse around intersecting hierarchies and organizational justice.<sup>17</sup>

For people with disabilities, the availability of accommodations may determine their livelihood, well-being, and ability to participate with dignity “in the life of the community.”<sup>18</sup> Examples of workplace accommodations may include altering one’s physical environment, equipment, work schedule, or position, or by adjusting a company policy.<sup>19</sup> Disability law’s gradual approach thus paved the way for the removal of ableist structures in public and private environments nationwide.<sup>20</sup> Yet disability’s frameworks remain vastly undertheorized. Identifying as disabled signifies a social and legal identity that implicitly demands institutional transformation—a potentially broader view of disability than that of a status conferring an individual

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*and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59 (2008) [hereinafter Basas, *Back Rooms, Board Rooms*] (discussing reasonable accommodations and advocating more involvement in the accommodations process for people with disabilities).

<sup>17</sup> See, e.g., RAYMOND HOGLER, EMPLOYMENT RELATIONS IN THE UNITED STATES: LAW, POLICY, AND PRACTICE 252 (2004) (urging “integrat[ion]” of labor and employment laws that have been interpreted to conflict on account of varying policy concerns originating from each); Robert A. Dubault, Note, *The ADA and the NLRA: Balancing Individual and Collective Rights*, 70 IND. L.J. 1271 (1995) (demonstrating that Congress provided stronger protections for the individual than the collective); Bradley A. Areheart, *Organizational Justice and Antidiscrimination*, 104 MINN. L. REV. 1921, 1927 (2020) (contending that antidiscrimination policies focused on the individual often fail, as opposed to policies targeting the organization); *infra* notes 21, 131, 185–96 (discussing additional DisCrit and organizational theory scholarship); see also *infra* note 41 (discussing the wane of unionism and labor law in the wake of a shift to individualized and market-based conceptions of rights).

<sup>18</sup> Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 843 (1966) (arguing for the integration of people with disabilities in the design of disability law). Jacobus tenBroek, a lawyer and human rights advocate, founded the National Federation of the Blind, which advocated for antidiscrimination protections in the workplace as integral to the “right to independence.” DAVID PETTINICCHIO, POLITICS OF EMPOWERMENT: DISABILITY RIGHTS AND THE CYCLE OF AMERICAN POLICY REFORM 71 (2019).

<sup>19</sup> 42 U.S.C. § 12111(9) (providing examples of potential ADA “reasonable accommodations”).

<sup>20</sup> The Architectural Barrier Act of 1968, the Rehabilitation Act of 1973, and the ADA aspire to transform public and private workspaces into accessible spaces, modeling a gradual distributive approach. See, e.g., Doron Dorfman & Mariela Yabo, *The Professionalization of Urban Accessibility*, 47 FORDHAM URB. L.J. 1213 (2020); SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 18–19 (2009) (arguing that disability rights advocates should fight to change society’s understanding of disability from a medical to a social model); Larry E. Craig, *The Americans with Disabilities Act: Prologue, Promise, Product, and Performance*, 35 IDAHO L. REV. 205, 207–11 (1999) (outlining the steady growth of legal protection for individuals with disabilities).

right to be claimed. It is this tension between systemic change and liberalism's individuated approach to civil rights that disability activists increasingly critique as they conceive of disability justice as robust, with particular attention to co-constructed social identities, including race.<sup>21</sup>

The ADA's explicit focus on organizational justice coincided with prominent calls by scholars in the early 2000s to address "second generation" workplace discrimination.<sup>22</sup> Second generation discrimination refers to exclusionary practices embedded in workplace structures for which legal solutions are admittedly more elusive because they require theories of liability that do not rely upon proof of motive and intent, where courts have trained their focus on traditional statutes.<sup>23</sup> Amid this shift in attention toward the structural, a growing number of scholars and advocates in the last fifteen years have proposed adopting the accommodations mandate as is for requests related to pregnancy and childbirth, caregiving, religious

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<sup>21</sup> See, e.g., Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSP. 209, 210 (2011) (discussing ways that disability is compounded to justify ideas of racial inferiority, further marginalize based upon the health effects of environmental racism, and ground stereotypes regarding incompetence and unworthiness); Mia Mingus, *Changing the Framework: Disability Justice*, LEAVING EVIDENCE (Feb. 12, 2011, 1:56 PM), <https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice> ("[Disability justice] work is about shifting how we understand access, moving away from the individualized and independence-framed notions of access . . . and, instead, working to view access as collective and interdependent."). On antidiscrimination law's elevation of the individual, see Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1066–67, 1069 (2017) and *infra* note 41. Yet resistance to the systemic harms of segregation and institutionalization of people with disabilities has been prominent in the confinement context for decades. ADA Title II litigation led the Supreme Court to affirm the right to community-based treatment and discharge from state hospitals based upon antidiscrimination theory. LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 253–57 (2020) (discussing *Olmstead v. L.C.*, 527 U.S. 581 (1999) and potential grounds for disability-conscious intersectional coalitions with prisoners' rights and desegregation advocacy).

<sup>22</sup> See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–79, 484 n.80 (2001) [hereinafter Sturm, *Second Generation Employment Discrimination*] (discussing a move towards structuralism in antidiscrimination law); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95–108 (2003) (discussing a number of structural and social changes that affect the manner in which discrimination occurs).

<sup>23</sup> See Sturm, *Second Generation Employment Discrimination*, *supra* note 22, at 460 (explaining that second-generation claims involve exclusion that is not directly traceable to intentional actions); Shirley Lin, *Dehumanization "Because of Sex": The Multi-axial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 759–64 (2020) (observing that judicial disputes over the definitions of intent and motive limit the reach of antidiscrimination law as a form of social regulation).



practices, and other workers' needs.<sup>24</sup> A few intrepid commentators have implied that the ADA's mandate is the best of the very narrow options available among antidiscrimination tools.<sup>25</sup> Efforts to improve the process through which accommodations are secured or to advance public norms for dismantling ableist practices, however, are scant.<sup>26</sup> Meanwhile, state-facilitated avenues for collective action have receded, leaving workers to shoulder the risk of illness and injury with less leverage to assert their rights—a reality the COVID-19 pandemic has thrown into sharp relief.<sup>27</sup>

<sup>24</sup> See, e.g., Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021) (expanding the Pregnancy Discrimination Act (PDA) to require employers to provide reasonable accommodations to workers who have limitations stemming from pregnancy, childbirth, or related medical conditions absent undue hardship through processes identical to those for workers with disabilities); Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 30 [hereinafter Arnow-Richman, *Public Law and Private Process*] (proposing a new family-leave accommodation that adopts the ADA's interactive process); Dallan F. Flake, *Interactive Religious Accommodations*, 71 ALA. L. REV. 67, 73–74 (2019) (explaining that the interactive process is not statutorily mandated); Stein et al., *supra* note 1, at 737–38, 750 (proposing to provide everyone who is work-capable with impairments with an accommodation, including the elderly, and preserving the undue hardship analysis). Beyond the ADA interactive process framework, Sagit Mor urges an approach combining the international principles of right of access and access to justice for all groups through the philosophy of universal design: a “human diversity approach” that “emphasizes the general ethical commitment to recognize, accept, and integrate all groups in society, including persons with disabilities” and “challenges the normal versus abnormal opposition and points at the power structures that turn a human variation into a social and political difference.” Sagit Mor, Essay, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 613, 623–24 (2017).

<sup>25</sup> Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 3–4, 41–42 (2006) [hereinafter Bagenstos, *The Structural Turn*] (noting courts' hostility to antisubordination approaches that target structurally located discrimination, such as disparate impact doctrine, rather than intentional discrimination may rest on background demands for employer fault that extend to accommodations law as well); Arnow-Richman, *Public Law and Private Process*, *supra* note 24, at 55 (calling the accommodations mandate “[a]rguably the most aggressive of the federal equal employment opportunity laws” despite “failing to achieve significant changes in work structure”).

<sup>26</sup> After Jennifer Shinall's recent article, *Anticipating Accommodation*, *supra* note 12; see also *infra* notes 334, 345 and accompanying text (discussing aspects of Shinall's proposal), the closest proposal would expand the pool of individuals outside of strict classes by focusing the ADA standard of reasonableness on the effectiveness of the accommodation. Stein et al., *supra* note 1, at 737–38, 750 (proposing to provide everyone with impairments unrelated to a disability with an accommodation as long as the ADA deems it effective). It remains very much focused on the substantive breadth of the mandate, however. On public norms and of the persistence of stigma, see *infra* Section III.A.

<sup>27</sup> Social inequalities are foregrounded in burgeoning protests nationwide and widespread public concern over workplace safety during the COVID-19 pandemic. See, e.g., Alexia Elejalde-Ruiz & Lauren Zumbach, *Workers Now Deemed 'Essential' Want More: How the Coronavirus Crisis Might Bring Permanent Labor Gains on Unionizing, Sick Leave and Other Issues*, CHI. TRIB. (Apr. 13, 2020, 8:35 AM), <https://>

The ultimate design of the interactive process is therefore a curiosity. It primarily relies on employees negotiating the implementation of an entitlement<sup>28</sup>—the merits of which the law presumes will also become apparent to the parties through private discussion. The EEOC devised the interactive process with little direction from Congress,<sup>29</sup> and the agency's formal rule defines it as a private, collaborative exchange that would help parties identify an accommodation once an employee disclosed a disability.<sup>30</sup> The legal literature has largely sidestepped inquiry into the dynamics of a law dependent upon discriminatees negotiating with employers over compliance, and whether this design might undermine a legislative guarantee for the most vulnerable workers.<sup>31</sup> Unlike settlement talks where parties bargain in the shadow of the law, expected to settle for less in light of the uncertainty of litigation on the merits or a desire for expediency, the parties bargain over the substance of a “mandate.”

A bargaining frame is unsettling if we understand it to be a civil rights mechanism to replace private ordering, yet it is implicit in the law, and courts have deepened this framing within ADA jurisprudence without explicitly naming it.<sup>32</sup> All the while, the interactive pro-

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[www.chicagotribune.com/coronavirus/ct-coronavirus-worker-protections-sick-leave-changes-20200410-je7jb4lrqfbovn13uut4xe5yau-story.html](http://www.chicagotribune.com/coronavirus/ct-coronavirus-worker-protections-sick-leave-changes-20200410-je7jb4lrqfbovn13uut4xe5yau-story.html); *infra* note 273.

<sup>28</sup> See John Thibaut, Laurens Walker, Stephen LaTour & Pauline Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1275 (1974) (providing, in the context of actual legal disputes, a taxonomy placing “bargaining” at the far end of the spectrum of dispute resolution due to the full disputants’ “total control” over the process and the absence of a decisionmaker); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (illustrating the role of law in private bargaining during divorce proceedings to settle cases through parties’ exchange and compromise on entitlements, rather than securing all statutory guarantees); *id.* at 951–52 (observing that viewing divorce settlements from the perspective of “private ordering” raises policy questions of emphasis, degree, and whether procedural and substantive safeguards are needed).

<sup>29</sup> See *infra* Section I.A.1 (explaining the difficulty in defining reasonable accommodations under the ADA).

<sup>30</sup> See *supra* note 8 and accompanying text.

<sup>31</sup> Instead, empirical studies by nonlegal disability experts have begun to document the rates of denials of accommodations, and to only a limited extent through intersectional inquiry, the demographic characteristics of who has access to ADA rights. See, e.g., *infra* notes 148–54, 185–96 and accompanying text.

<sup>32</sup> See *infra* Section I.B.2 and notes 86–89, 129, 322–28 and accompanying text; cf. Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL’Y 171, 177–80 (2005) (describing the process of drafting individualized education programs between educators and families pursuant to the Individuals with Disabilities Education Act as bargaining subject to market forces).

cess has been universally accepted by courts, employers, and legal practitioners for decades.<sup>33</sup>

As many Americans have realized, the accommodations mandate is illusory for those with low workplace bargaining power.<sup>34</sup> Between 47% and 58% of working-age Americans lacked a workplace accommodation but reported that they required one in order to work.<sup>35</sup> More than one in four respondents who did request an accommodation were denied one by their employer.<sup>36</sup> The rates of denials are higher among racial minorities, those with lower educational attainment, those in physically demanding jobs, and women, reflecting extant social inequalities.<sup>37</sup> To deprive workers of access to accommodations undermines employees' job protection and workplace safety, exacerbating the risk of further disability, illness, and death among historically subordinated populations.<sup>38</sup> This alternative frame for understanding accommodations law raises prescriptive implications for fulfilling the mandate and others patterned after it. Reappraisal of its design is all the more urgent as the community of people with disabilities is growing. One in four Americans will become disabled before reaching age sixty-seven.<sup>39</sup>

This Article proceeds in three parts. Part I provides an overview of the accommodations mandate, the development of the formal regu-

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<sup>33</sup> As I discuss later, *see infra* note 63 and accompanying text, a one-size-fits-all approach to an accommodations mandate is not possible given the sheer diversity of disabilities, job functions, and worksites.

<sup>34</sup> *See infra* Section II.A (detailing empirical findings of widespread inability to receive accommodations).

<sup>35</sup> Nicole Maestas, Kathleen J. Mullen & Stephanie Rennane, *Unmet Need for Workplace Accommodation*, 38 J. POL'Y ANALYSIS & MGMT. 1004, 1007 (2019) (including respondents who were not working but would benefit from an accommodation that would allow them to work in their estimate). This groundbreaking study attempts to break through the historic logjam within U.S. Census survey methods that are unable to disaggregate respondents with disabilities as defined by the ADA from those who are working-age but are unable to work even with an accommodation. *Id.* at 1006, 1011, 1017 (implementing methodology to identify "accommodation-sensitive" individuals, i.e., those "on the margin of working and not working depending on whether they are accommodated").

<sup>36</sup> *Id.* at 1020 tbl.6 (reflecting that twenty-six percent of respondents' requests for a disability accommodation were denied).

<sup>37</sup> *See infra* Section II.A.2.

<sup>38</sup> *See* Andrea L. Steege, Sherry L. Baron, Suzanne M. Marsh, Cammie Chaumont Menéndez & John R. Myers, *Examining Occupational Health and Safety Disparities Using National Data: A Cause for Continuing Concern*, 57 AM. J. INDUS. MED. 527, 534 tbl.IV (2014) (reflecting Census of Fatal Occupational Injuries by, inter alia, race/ethnicity with occupational homicide rate of .80 for Black, .87 for American Indian/Alaska Native/Asian/Pacific Islanders, and .46 for Hispanic, compared with .27 for White/non-Hispanic).

<sup>39</sup> Maestas et al., *supra* note 35, at 1004 (citing SOC. SEC. ADMIN., SOCIAL SECURITY FACT SHEET (2014), <https://web.archive.org/web/20140706165531/http://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf>).

lations defining the interactive process, and the bargaining-based assumptions embedded in the ADA's statutory, regulatory, and decisional law. It then discusses the theoretical justifications for the accommodations mandate as corrective justice and procedural justice. Part II evaluates the legal design of the mandate against its record for making accommodations available, particularly for workers with overlapping subordinated identities. It then provides an overview and critique of recent proposals to replicate the mandate to extend the reach of accommodations for pregnancy, religious practice, caregiving, and other workers' needs. Part III suggests new approaches that would enhance workers' ability to access accommodations and employers' ability to provide them. They are designed with an eye toward developing structural analysis, norms, regulation, and innovation at scale—publicizing information gathering and access to detailed data regarding precedent for accommodations by position and industry, enhancing collective legal approaches to dismantling ableist structures, and expanding the social insurance model for accommodations.

After three decades of experience with the ADA, the universal change it envisioned is not yet possible under the current framework. The bipartisan success story that occasioned such a unique mandate obscures the law's decollectivized conceptions of problem and process upon implementation, and the challenges they pose to generating public norms and changing attitudes.<sup>40</sup> The ADA, and reforms that would adopt its approach, center problem-solving by courts, institutions ill-suited to provide prospective guidance on workplace restructuring for the vast array of future situations. The design critiques advanced here point to the need to develop responsive state and systemic approaches,<sup>41</sup> with implications for civil rights, labor and employment law, and organizational and regulatory theory.

As long as accommodations law is tethered to common-law negotiation and focused on market-mediated concepts such as employer cost—forms of privatization of public law that constrain how far civil

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<sup>40</sup> See *infra* Part III.

<sup>41</sup> *Id.* Unionism and labor law, the primary means of democratizing corporations, have waned upon the rise of liberal ideology after World War II, and after Title VII instituted a separate framework for antidiscrimination law that centered reliance on the judiciary. See NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 187-91* (rev. & expanded ed. 2013); REUEL SCHILLER, *FORGING RIVALRY: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* 7 (2015). By the ADA's passage in 1990, politics further shifted to individualized and market-based conceptions of rights. See PETTINICCHIO, *supra* note 18, at 5-8 (discussing the transformation of grassroots disability rights movements' goals into institutional activism that met with "[n]eoliberal attitudes about social and economic policy").

rights sweep—expanding the mandate to new groups will not increase access to accommodations where they may be needed most.<sup>42</sup>

## I

### THE ACCOMMODATIONS MANDATE AS A NEW PROMISE FOR CIVIL RIGHTS

The ADA was heralded as “a broad and remedial bill of rights for individuals with disabilities”<sup>43</sup> addressing severe socioeconomic exclusion such that “no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness.”<sup>44</sup> The extensive litigation<sup>45</sup> and scholarship<sup>46</sup> following its enactment predictably focused on the substantive definition of disability. In response to the Supreme Court’s unduly narrow interpretations of the term, lawmakers passed the ADA Amendments Act of 2008 (ADAAA), significantly expanding the definition.<sup>47</sup> Reflecting dominant political discourse at the time, much of the commentary around the mandate revolved around a law and economics view of accommodations and

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<sup>42</sup> See also *infra* Section I.A.1 (discussing the undue hardship defense against provision of accommodation); Section I.B.2 (discussing the EEOC’s design of the ADA accommodations mandate as ostensibly a hybrid of Title VII’s religious accommodations mandate and employers’ NLRA duty to bargain in good faith a “private” collective bargaining agreement). In future scholarship, I will elaborate on my framework of workplace law as “privatized public law,” identifying collectively beneficial workplace organization and antidiscrimination obligations as a reconceptualization of commerce.

<sup>43</sup> 135 CONG. REC. S4984–87 (daily ed. May 9, 1989) (statement of Sen. Harkin).

<sup>44</sup> President George Bush, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), in 1 DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990, PUBLIC LAW 101-336, DOC. NO. 9 (Bernard D. Reams, Jr., Peter J. McGovern & Jon S. Schultz eds., 1992).

<sup>45</sup> See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

<sup>46</sup> See Travis, *Lashing Back at the ADA Backlash*, *supra* note 9, at 312, 315–21 (observing that the backlash “is fueled, at least in part, by a belief that the ADA is a form of targeted social welfare rather than a general antidiscrimination law, and that the ADA’s accommodations mandate gives employees with disabilities preferential treatment rather than merely ensuring equal employment opportunities”); see also Krieger, *supra* note 9, at 503–14 (arguing that the ADA’s expansive definition of disability contributed to the perception of the accommodations mandate as a form of distributive rather than corrective justice); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99–100 (1999) (discussing how media coverage of ADA litigation has misled the public to believe the law is a “windfall statute for plaintiffs”).

<sup>47</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The ADAAA explicitly rejected the Supreme Court’s narrow holdings in *Sutton*, 527 U.S. 471, and *Toyota*, 534 U.S. 184. ADA Amendments Act of 2008 § 2(a)(3)–(7), 2(b)(2)–(6). *But see* Deborah A. Widiss, *Still Kickin’ After All These Years: Sutton and Toyota as Shadow Precedents*, 63 DRAKE L. REV. 919, 936–45 (2015) (discussing the concerning trend among courts of continuing to rely on superseded pre-ADAAA holdings).

debated the rationality of shifting the costs of accommodations onto employers.<sup>48</sup>

But the original framework for the mandate and justifications for the interactive process were in fact much broader. Section I.A describes the statutory and regulatory components of the process used to evaluate an employee's accommodations request. Section I.B reviews the theoretical justifications for the accommodations mandate and interactive process as defined by Congress, the EEOC, and the courts, as well as the broader commentary addressing workplace law as organizational theory. I then contrast the ADA's institutional and procedural design with the bold ambition of its mandate.

### A. *The Accommodations Mandate*

#### 1. *Statutory Framework*

The ADA was to be "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>49</sup> The statute only briefly describes the mandate, however, in a provision declaring that employers are to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."<sup>50</sup> An employer is wholly excused from doing so if the accommodation would "impose an undue hardship on the operation of the business."<sup>51</sup> The statute therefore places two limitations on the mandate: (1) the accommodation must be considered "reasonable"; and (2) the accommodation cannot present an "undue hardship" to the employer.<sup>52</sup>

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<sup>48</sup> See, e.g., Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 230–64 (2000) (developing an economic model for wage and employment impacts of accommodations mandates on subsets of workers); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 834 (2001) (describing those who seek accommodations under the ADA as making "claims" on "social resources" which "compete[]" with the claims of others for those same resources); J.H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903, 905–27 (2003) (arguing that the ADA promotes labor market efficiency); Stein, *The Law and Economics of Disability Accommodations*, *supra* note 9, at 85–155 (advancing a framework for assessing accommodation costs that marries the neoclassical labor market model with social justice ideals).

<sup>49</sup> 42 U.S.C. § 12101(b)(1).

<sup>50</sup> *Id.* § 12112(b)(5)(A).

<sup>51</sup> *Id.*

<sup>52</sup> Bagenstos, *"Rational Discrimination," supra* note 3, at 836–37 (quoting 42 U.S.C. § 12112(b)(5)(A)) (describing the two concepts as distinct but related limitations upon the reasonable accommodations mandate); see also *US Airways, Inc. v. Barnett*, 535 U.S. 391, 399–402 (2002) (treating the two concepts as limitations upon the accommodations mandate).

The ADA's employment provisions drew criticism soon after passage as broad, vague, and difficult to apply.<sup>53</sup> Neither "reasonable" nor "accommodation" are defined. The definitions section simply provides examples of possible accommodations: making "existing facilities . . . accessible to and usable by individuals with disabilities," or offering modifications such as job restructuring, part-time or modified schedules, reassignment, alterations to equipment, examinations, training materials, or policies, provision of readers or interpreters, or similar accommodations.<sup>54</sup> Only in the legislative history may we discern how Congress conceived the "reasonableness" of an accommodation: an accommodation is reasonable if it is "effective," i.e., whether its implementation would allow the employee to perform the core duties of the job.<sup>55</sup>

By contrast, the statute provides extensive detail regarding the "undue hardship" defense available to employers. Expanding upon an earlier iteration of the defense under Section 504 of the Rehabilitation Act,<sup>56</sup> the ADA ultimately defined undue hardship as "an action requiring significant difficulty or expense,"<sup>57</sup> enumerating at least four

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<sup>53</sup> See John Parry, *Title I—Employment* (agreeing with critics who labeled Title I as "hard to interpret" despite arguing, ultimately, that its vagueness was the product of a worthwhile tradeoff between "certainty" and "fairness" (citing Carolyn L. Weaver, *Disabilities Act Cripples Through Ambiguity*, WALL ST. J., Jan. 31, 1991, at A16)), in *IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS* 57, 58 (Lawrence O. Gostin & Henry A. Beyer eds., 1993); Christine M. Harrington, *The Americans with Disabilities Act: The New Definition of Disability Post-Sutton v. United Air Lines, Inc.*, 84 MARQ. L. REV. 251, 255 (2000) (noting that the statute's vagueness prompted Congress to authorize the EEOC to clarify the meaning of key terms).

<sup>54</sup> 42 U.S.C. § 12111(9). The EEOC later defined "reasonable accommodations" more broadly through regulation. "Reasonable accommodation[s]" are "[m]odifications or adjustments to a job application process" or "to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position," or that otherwise allows an employee "with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o)(1) (2020).

<sup>55</sup> See S. REP. NO. 101-116, at 35 (1989) (noting that after the parties "[h]av[e] identified one or more possible accommodations, the third informal step is to assess the reasonableness of each *in terms of effectiveness and equal opportunity*" (emphasis added)). *But see Barnett*, 535 U.S. at 400–01 (declining to interpret "reasonable" to mean effective in evaluating the reasonableness of an accommodation).

<sup>56</sup> 45 C.F.R. § 84.12(c) (2020); see Chai R. Feldblum, *The (R)evolution of Physical Disability Anti-Discrimination Law: 1976–1996*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 613, 614, 618 (1996) (describing how, in drafting the ADA, lawmakers substantially borrowed the "undue hardship" defense from U.S. Department of Health and Human Services regulations that succeeded the 1977 Health, Education and Welfare regulations implementing Section 504).

<sup>57</sup> 42 U.S.C. § 12111(10)(A).

factors employers could rely on in determining whether providing an accommodation would trigger the defense:

- (i) the nature and cost of the accommodation needed . . . ;
- (ii) the overall financial resources of the facility or facilities involved . . . or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business . . . with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce . . . .<sup>58</sup>

The undue hardship factors do not require the parties to explore the potential benefits an accommodation would provide to coworkers, to the company, or to the public.<sup>59</sup> Instead, they rest on short-term, zero-sum assumptions about cost to the employer in providing an accommodation.<sup>60</sup>

An undue hardship defense ensures that the accommodations mandate does not operate as a mandate in practice, because the need for an accommodation raised by the employee is effectively negotiated in relation to these factors. The defense did not appear in the earliest version of the ADA, but represented a watering down of the mandate as the bill wound its way through debate. As originally introduced, the law would only have excused the employer from providing an accommodation if it would have been catastrophic and “threaten[ed] the existence of” the employer’s business.<sup>61</sup> The statute

<sup>58</sup> 42 U.S.C. § 12111(10)(B).

<sup>59</sup> See generally Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008) [hereinafter Emens, *Integrating Accommodation*]; *id.* at 841 (providing examples of immediately wider benefits of employers installing a ramp, using ergonomic furniture that reduces strain, and installing an air filter to improve air quality).

<sup>60</sup> The ADA’s individualized assessments have discouraged group-based theories to advance structural change and broad-based accommodations. Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 867, 879–82 (2006). Unlike Title VII, the ADA does not have a general statutory disparate impact cause of action. See 42 U.S.C. § 2000e-2(k). In *Raytheon Co. v. Hernandez*, the Court opined that “disparate-impact claims are cognizable under the ADA,” but the case did not involve an ADA failure-to-accommodate claim. 540 U.S. 44, 53 (2003). In the absence of the Supreme Court holding otherwise, Stein and Waterstone have persuasively argued that although the ADA focuses on individuals, the statute does not foreclose the viability of general ADA disparate impact claims. Stein & Waterstone, *supra*.

<sup>61</sup> Bagenstos, “*Rational Discrimination*,” *supra* note 3, at 836 n.28 (quoting S. 2345, 100th Cong. § 7(a)(1) (1988)). The undue hardship defense was added to the employment title of the ADA in 1989, and several factors to determine what constitutes undue hardship were added in 1990 before passage. Ruth Colker, *The ADA’s Journey Through Congress*, 39 WAKE FOREST L. REV. 1, 13, 31 (2004) (citing H.R. REP. NO. 101-485, pt. 3 (1990)). An amendment to provide a presumption of undue hardship if the cost of an accommodation



ultimately focused on whether the employer must accommodate an employee's disability, not what the process should look like. This omission is surprising in light of the profoundly different kind of compliance the ADA expected of employers. Unlike, for example, the mandate that employers pay into Social Security on behalf of their employees,<sup>62</sup> this mandate requires employers to interact directly with each worker to remediate a barrier in a time-sensitive manner.

The legislative history yields very little about the interactions Congress expected to unfold. Understandably, given the sheer diversity of disabilities, job functions, and worksites, a one-size-fits-all approach to an accommodations mandate was not possible.<sup>63</sup> During Congressional debate, lawmakers simply expressed that a "problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations."<sup>64</sup> The Senate Committee on Labor and Human Resources expressed a general expectation that "employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation."<sup>65</sup> But the final text only referred to this consultation by way of another defense provision: employers that negotiate an accommodations request in "good faith" would not be liable for any damages if they ultimately do not accommodate the employee.<sup>66</sup> "Good faith" was yet another term the ADA left undefined.

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"exceeds 10 percent of the salary or the annualized hourly wage of the job in question" was criticized as too generous, too arbitrary, and contrary to the ADA's purpose of assisting low-wage workers, and was rejected from the final bill. *Id.* at 37–38 (quoting 136 CONG. REC. 10,903 (1990)).

<sup>62</sup> 26 U.S.C. § 3111.

<sup>63</sup> As I argue in Part III, the state can and should play a role in understanding meso-level environments that may be specific to industries and types of limitations, i.e., a lifting restriction. In addition, as Ruth Colker has argued, the law can set default expectations for modifications that facilitate universal design. *See generally* Ruth Colker, *The Americans with Disabilities Act Is Outdated*, 63 *DRAKE L. REV.* 787 (2015) (arguing that employment and education should be required to adhere to baseline standards for information technology to avoid harms to people with disabilities who must make retrofitting requests).

<sup>64</sup> S. REP. NO. 101-116, at 34 (1989); *see also* H.R. REP. NO. 101-485, pt. 2, at 65 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 348; 29 C.F.R. pt. 1630.9 app. at 423 (outlining the "problem-solving approach" employers should use). Katherine Macfarlane observes that a benefit of keeping the process informal may be that fewer people with disabilities would be denied accommodations due to lack of medical documentation. *See* Macfarlane, *supra* note 12, at 20, 32. As discussed *infra* Sections I.B.2 and III.A, my critique addresses the lack of procedural justice and organizational fairness in the process.

<sup>65</sup> S. REP. NO. 101-116, at 34.

<sup>66</sup> The damages provision is fairly circular and vague, providing an award only against defendants that fail to "demonstrate[] good faith efforts, in consultation with the person with the disability . . . to identify and make a reasonable accommodation that would provide . . . an equally effective opportunity and would not cause an undue hardship on the

## 2. *Regulatory Addition of the Interactive Process*

Despite the unique nature of the accommodations mandate, lawmakers decided to delegate to the EEOC the task of determining how it would be implemented.<sup>67</sup> The ADA did not specify any procedure in connection with the mandate, but lawmakers understood that remediation would generally happen at the initiative of an employee who discloses the need for an accommodation to their employer.<sup>68</sup> Thus, a year after the law's passage, the EEOC issued regulations that announced an "interactive process."<sup>69</sup> The agency outlined the goals of the process as identifying the disabled employee's job limitations and then discovering the accommodations that would be effective for

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operation of the business." 42 U.S.C. § 1981a(a)(3). Nor do the statute, regulations, or case law expressly refer to other doctrines to define "good faith." Introducing good faith as the measure for employers' efforts further weakened the accommodations mandate. Colker, *supra* note 61, at 16; *see infra* notes 85–88 and accompanying text (noting that the good faith standard has been poorly defined, lacks clear consequences for failure to comply, and creates additional obligations for employees). A year before the ADA's passage, EEOC Commissioner Evan Kemp (a prominent Republican disability rights advocate who used a wheelchair) responded to probing regarding the good faith standard as follows:

Mr. JONTZ. What would be your response to whether [differentiating between a good faith effort and a non-good faith effort] is desirable or not, based on your experience with EEOC and some of the problems relating to this whole area?

Mr. KEMP. I think that we have to realize that it is a process, that the first determination is whether the person is a handicapped person. Then you make a determination of whether he is a qualified handicapped person. To do this you look at his limitations and look at the job and see if he can do the job with or without an accommodation. Then you determine if the accommodation can be given or is it available, and if it is available, is it an undue burden. *So, it is a process, and I don't think that corporations which can show that they go through that process will be held liable for anything.* But if they think that a person in a wheelchair is mentally retarded and has one foot in the grave and another on a banana peel and don't hire him for that reason, and don't look at the individual, then I think they should be held liable.

*The Americans with Disabilities Act of 1989: Joint Hearing on H.R. 2273 Before the Subcomms. on Emp. Opportunities & Select Educ. of the H. Comm. on Educ. & Lab.*, 101st Cong. 18 (1989) [hereinafter *Joint Hearing*] (emphasis added) (statement of Evan J. Kemp, Jr., Comm'r, United States Equal Employment Opportunity Commission).

<sup>67</sup> 42 U.S.C. § 12116 (authorizing the EEOC to implement regulations); *see also* Flake, *supra* note 24, at 74–75 (reviewing the Senate Committee report and noting that although statutory text does not reference interactive process, the Committee understood the statute to require employers and employees to work together at every stage of the process).

<sup>68</sup> *See* discussion *infra* notes 77–78 and accompanying text.

<sup>69</sup> 29 C.F.R. § 1630.2(o)(3) (2020). If any of the 697 public comments the Commission received in response to the proposed rule criticized the interactive process, the promulgation of the Final Rule omitted any mention of them. *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (July 26, 1991) (codified at 29 C.F.R. pt. 1630).

both parties.<sup>70</sup> Surprisingly, although the regulations and supplemental interpretive guidance use the word “may” in relation to using the interactive process, a majority of circuits have since declared the process to be mandatory.<sup>71</sup>

Courts have been uncharacteristically enthusiastic toward the EEOC’s regulations defining the interactive process. Perhaps the support could be attributed to the weight courts allocate to agency interpretation after applying *Chevron* deference.<sup>72</sup> But the likelier motives for transforming an otherwise permissive private process into a mandatory one were to advance judicial economy and abide by a his-

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<sup>70</sup> 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. pt. 1630, app. at 423; *see also* S. REP. NO. 101-116, at 34–35 (describing the same).

<sup>71</sup> *See* Echevarría v. AstraZeneca Pharm. LP, 856 F.3d 119, 133 (1st Cir. 2017) (treating the interactive process as a potential “duty” prompted by a request for an ADA accommodation (quoting *Ortiz-Martínez v. Fresenius Health Partners*, 853 F.3d 599, 605 (1st Cir. 2017))); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315–16 (3d Cir. 1999) (explaining how the employer’s obligation to “take some initiative” is inherent in the notion of an interactive process, and that “the process must be interactive because each party holds information the other does not”); *Taylor v. Principal Fin. Grp. Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (stating that the employee’s request for an accommodation automatically “triggers” an “obligation” on the part of the employer to “participate in the interactive process”); *Rorrer v. City of Stow*, 743 F.3d 1025, 1041 (6th Cir. 2014) (citing *Keith v. Cnty. of Oakland*, 703 F.3d 918, 929 (6th Cir. 2013); and then citing *Breitfelder v. Leis*, 151 F. App’x 379, 386 (6th Cir. 2005)) (declaring the interactive process “mandatory” and an independent violation of the ADA if the plaintiff proposed a reasonable accommodation); *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (“The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn’t know how to ask for it, the employer should do what it can to help.”); *Fjellestad v. Pizza Hut of Am. Inc.*, 188 F.3d 944, 952 (8th Cir. 1999) (holding that when an employer receives an accommodation request, “it becomes necessary to initiate the interactive process”); *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1137 (9th Cir. 2001) (treating an employer’s engagement in the interactive process as a “mandatory obligation” under the ADA); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999) (en banc) (holding that notice of a need for accommodation triggers the employer’s interactive-process obligation and that “[t]he obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation”). *But see* *Willis v. Conopco, Inc.*, 108 F.3d 282, 285–86 (11th Cir. 1997) (holding that the plaintiff must show the availability of a reasonable accommodation to trigger the employer’s obligation to participate in the interactive process).

<sup>72</sup> In Congress’s general discussion of parties problem-solving an accommodations request, courts may have surmised support for the concept so as to grant *Chevron* deference to the agency’s position. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (holding “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute” to be entitled to “controlling weight”). Moreover, unlike Title VII where the EEOC was granted only procedural rulemaking authority, Congress granted the EEOC substantive rulemaking authority as to the ADA in 42 U.S.C. § 12116. *See* *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”).

toric deference to employers' discretion in organizing workplace structures. As one court opined, the interactive process "is more of a labor tool than a legal tool . . . . It is clearly a mechanism to allow for early intervention by an employer, outside of the legal forum."<sup>73</sup> The debut of the interactive process thus elicited praise as a "revolutionary change in workplace procedural norms," requiring a form of employer-employee dialogue even if the accommodation is ultimately denied.<sup>74</sup>

Dallan Flake traces the idea for the interactive process to a 1989 Senate Committee report.<sup>75</sup> The Committee was fairly optimistic about an easy flow of conversation between the employer and employee regarding the disability and a solution.<sup>76</sup> The presumption of a dialogue appeared to be a sound one. Unless the employee's disability is "known," i.e., obvious or previously disclosed to the employer, it is the employee who typically initiates an accommodations request by revealing a disability.<sup>77</sup> As Flake describes it, Congress contemplated an interaction between equals that would encourage

employers to "consult with and involve" the accommodation seeker because she "may have a lifetime of experience identifying ways to accomplish tasks differently in many different circumstances" and would thus be best positioned to identify the precise type of accommodation needed. . . . [T]he employee's suggested accommodation is often simpler and less expensive than the accommodation the employer may have envisioned, resulting in a win-win situation for the employee and employer.<sup>78</sup>

Lawmakers further assumed that the accommodations mandate would manifest in workplaces through a "process" that was individualized and bottom-up, rather than top-down.<sup>79</sup> The decentralized

<sup>73</sup> *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002); *see also* Deane v. Pocono Med. Ctr., 142 F.3d 138, 149 (3d Cir. 1998) (en banc) (noting that the interactive process serves to prevent unnecessary litigation).

<sup>74</sup> Befort, *supra* note 13, at 616, 619. Another commentator largely views the benefits of the exchange as providing "exacting tools for resistance" and transparency to bias-based denials of accommodation, while noting the interactive process is not perfect. *See* Basas, *Back Rooms, Board Rooms*, *supra* note 16, at 110-12.

<sup>75</sup> Flake, *supra* note 24, at 74. Even less discussion of the process took place in the House of Representatives. H.R. REP. NO. 101-485, pt. 3, at 39 (1990), *as reprinted in* 1990 U.S.C.A.N. 445, 462 ("Consultations between employers and the persons with disabilities will result in an accurate assessment of what is required in order to perform the job duties.").

<sup>76</sup> S. REP. NO. 101-116, at 34 (1989).

<sup>77</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>78</sup> Flake, *supra* note 24, at 74 (quoting S. REP. NO. 101-116, at 34).

<sup>79</sup> S. REP. NO. 101-116, at 34 ("The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed." (emphasis added));

approach is evident in the ADA's employment title, Title I, which deviates from Title VII in that it does not include a generic disparate impact provision.<sup>80</sup> Nor does it address the possibility of group-based requests for accommodations.<sup>81</sup> Congress viewed information sharing between individual parties as the main engine of ADA compliance, without attempting to address the structural barriers workers with disabilities as a whole would encounter.

Thus, the final regulations generally instruct the parties to "identify the precise limitations resulting from the disability and potential reasonable accommodations" to overcome them.<sup>82</sup> Interpretive guidance thereafter outlines four steps intended to set up a give-and-take to promote collaboration and information sharing between the parties, directing employers to:

- (1) Analyze the particular job involved and determine its purpose and essential functions;
- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

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*see also* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,739 (July 26, 1991) (codified at 29 C.F.R. pt. 1630) ("[T]he determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis. . . . [A]n accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential functions."), *amended by* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,003 (Mar. 25, 2011).

<sup>80</sup> A disparate impact provision within the ADA appears in the context of employers' use of qualification standards, employment tests, or other selection or screening criteria unless they are job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6). *But see supra* note 60 (noting a disparate impact claim under the ADA is not foreclosed by statutory silence, and the Court has signaled approval of the theory).

<sup>81</sup> The ADA presently discourages all stakeholders from addressing modifications at a larger scale. It holds employers to tight confidentiality provisions, from prohibiting inquiry into whether an employee has a disability or the nature of the disability unless it is job-related or consistent with business necessity, 42 U.S.C. § 12112(d)(4)(A), to limiting use of information derived from medical tests or inquiries, 42 U.S.C. § 12112(d)(3)(B). Conversely, employees who voluntarily disclose information about their disabilities with coworkers may not be able to control adverse use of the information by their employers. *See Harris, Taking Disability Public, supra* note 11, at 1726 (describing disability law as "overvaluing privacy" at the expense of "an accurate picture of the breadth of disability in society").

<sup>82</sup> 29 C.F.R. § 1630.2(o)(3) (2020).

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.<sup>83</sup>

These interactive requirements are only subject to the common-law guardrail: a standard of good faith. Like Congress, the EEOC did not address what constitutes “good faith,” yet employers may avoid any damages for a failure to accommodate if they abide by that standard during the interactive process.<sup>84</sup> As a result, jurisdictions have developed widely variable interpretations as to what constitutes good faith and whether failure to participate in the ADA interactive process supports a substantive violation of the broader duty to accommodate.<sup>85</sup>

The concept is most reminiscent of an employer’s duty to bargain with a union in good faith.<sup>86</sup> In labor law, this duty has been interpreted to merely require the parties—usually the employers—not to bargain in bad faith.<sup>87</sup> A growing number of courts have used findings of bad faith *by employees* during the interactive process to preclude the employee from prevailing on the merits of a failure-to-accommodate claim, thus extending the good-faith obligation bilaterally.<sup>88</sup> This maneuver expands traditional common-law understand-

<sup>83</sup> 29 C.F.R. pt. 1630, app. at 423.

<sup>84</sup> 42 U.S.C. § 1981a(a)(3); *see supra* note 66 and accompanying text.

<sup>85</sup> Much of the law is piecemeal as courts generate a common law of the interactive process, and thus would not be accessible to a layperson. *E.g.*, *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000) (en banc) (holding employer failure to participate in the interactive process may preclude it from obtaining summary judgment on an ADA accommodation claim), *vacated on other grounds*, 535 U.S. 391, 407 (2002); *Ballard v. Rubin*, 284 F.3d 957, 960 (8th Cir. 2002) (holding the same and that such failure was prima facie evidence of bad faith under the ADA); *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005) (holding no bright-line rule exists for determining if a party was responsible for failure of interactive process); *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1138 (9th Cir. 2001) (holding an employer’s obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee seeks a different accommodation or where the employer is aware the initial accommodation was ineffective); *see also supra* note 66, *infra* notes 128–29, 180–81, 204 and accompanying text.

<sup>86</sup> *See* 29 U.S.C. § 158(a)(5), (d).

<sup>87</sup> *See* KENNETH G. DAU-SCHMIDT, MARTIN H. MALIN, ROBERTO L. CORRADA, CHRISTOPHER D. CAMERON & CATHERINE L. FISK, *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 653, 663 (3d ed. 2019) (describing the National Labor Relations Board interpretations of Section 8(d)’s obligation to exclude any requirement that parties make any concessions).

<sup>88</sup> *E.g.*, *Dep’t of Fair Emp. & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 742–43 (9th Cir. 2011) (holding an employee failed to participate in the interactive process by failing to propose an alternative accommodation, and therefore the defendant could not be held liable); *Barnett*, 228 F.3d at 1115 (“[C]ourts should attempt to isolate the cause of the break-down [in the interactive process] and then assign responsibility so that liability . . . ensues only where the employer bears responsibility for the breakdown.” (quoting *Beck v.*

ings of good faith by treating the interactive process itself as embedded in an employment contract, rather than a civil rights mandate correcting for private ordering. Of course, the parties could receive legal advice from counsel about interactive process obligations to avoid missteps, but this is far less likely to be true for employees.<sup>89</sup>

Antidisability animus that follows employees' disclosure of their disabilities during the interactive process is not addressed in the procedural aspects of the rules. Status-based disability discrimination is prohibited in other provisions of the ADA.<sup>90</sup> Thus, in practice, employees disclose disabilities in a manner least likely to generate stigma or retaliation because the risk of hostility remains high.<sup>91</sup> Once

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Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135–37 (7th Cir. 1996)) (internal quotation marks omitted) (second alteration in original)); cf. IAN AYRES & GREGORY KLASS, *STUDIES IN CONTRACT LAW* 707–08 (9th ed. 2017) (describing the parties' mandatory duty of good faith in performing a contract); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 811 (1982) (“[A]lthough the general duty of good faith and fair dealing is no more than a minimal requirement (rather than a high ideal), its relevance in contractual matters is peculiarly wide-ranging, and it rules out many varieties of bad faith in a diverse array of contexts.”).

<sup>89</sup> While comprehensive data on access to counsel for employees with disabilities would be hard to obtain, a rough proxy would be the number of EEOC charges filed under the ADA, solely or concurrently, as a prerequisite to mediation or litigation. While some of these employees may be pro se, only 24,324 such charges were filed in FY 2020. *Americans with Disabilities Act of 1990 (ADA) Charges (Charges Filed with EEOC) (Includes Concurrent Charges with Title VII, ADEA, EPA, and GINA) FY 1997– FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statistics/americans-disabilities-act-1990-ada-charges-charges-filed-eeoc-includes-concurrent> (last visited Aug. 19, 2021). This figure reflects only a modest rise from the 18,108 charges with ADA claims the EEOC received in FY 1997. *Id.* As discussed *supra* note 36 and *infra* note 156, approximately 642,900 Americans have requested disability accommodations and approximately twenty-six percent are denied one entirely.

<sup>90</sup> 42 U.S.C. § 12112(a). As to timing, the ADA does prohibit inquiries about the existence, nature, or severity of any disability at the interview stage. *Id.* § 12212(d)(2). It also prohibits discrimination against individuals with a record of impairment, which may also be implicated by virtue of an employee having sought an accommodation from their employer. *Id.* § 12102(1)(b).

<sup>91</sup> See, e.g., *infra* note 212 and accompanying text; see also Sarah von Schrader, LaWanda Cook & Wendy Strobel Gower, *Creating an Accommodating Workplace: Encouraging Disability Disclosure and Managing Reasonable Accommodation Requests* (“Carefully planning when and how much to share about one’s disability is a strategy employees use to increase the likelihood of a positive response.” (first citing Alecia M. Santuzzi, Pamela R. Waltz, Lisa M. Finkelstein & Deborah E. Rupp, *Invisible Disabilities: Unique Challenges for Employees and Organizations*, 7 INDUS. & ORG. PSYCH. 204, 204–19 (2014); then citing Sarah von Schrader, Valerie Malzer & Susanne Bruyère, *Perspectives on Disability Disclosure: The Importance of Employer Practices and Workplace Climate*, 26 EMP. RESPS. & RTS. J. 237, 237–55 (2014) [hereinafter von Schrader et al., *Perspectives on Disability Disclosure*]), in *EMPLOYMENT AND DISABILITY: ISSUES, INNOVATIONS, AND OPPORTUNITIES* 99, 105 (Susanne M. Bruyère ed., 2019) [hereinafter von Schrader et al., *Creating an Accommodating Workplace*]. Estimates of the rate of negative responses following a disclosure or request for an accommodation (including retaliation) are difficult to pinpoint. In a recent survey, 10% of those who reported disclosing their disability at

denied an accommodation that they should have received, those without an intermediary to facilitate compliance with the ADA must resort to legal process to enforce their rights and exhaust agency remedies.<sup>92</sup> They must be willing to act as private attorneys general to enforce the mandate through legal action,<sup>93</sup> as alternative dispute resolution is not offered by the EEOC until an employee files an administrative charge.<sup>94</sup>

In light of the EEOC's predominant role in implementing the mandate, it may be tempting to try to improve the interactive process through rulemaking alone. The next Section examines the extent to which accommodations law and the disability framework instead may or may not fulfill a broader public responsibility for remediating ableism. The underlying rationale for the accommodations mandate extends our task from diagnosing barriers to understanding approaches that have been avoided, undertheorized, or only modestly implemented.

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work rated their "immediate disability disclosure experience as negative," and 24% rated "the longer term consequences of the disability disclosure experience as negative." Von Schrader et al., *Perspectives on Disability Disclosure*, *supra*, at 249. Employees with less apparent disabilities were more likely to experience negative disclosure experiences relative to those with very apparent disabilities. *Id.* at 250 tbl.5 (listing 10.6% versus 6.9% negative immediate disclosure experiences, and 26.9% versus 19.8% longer-term disability disclosure experiences, respectively); Santuzzi et al., *supra*, at 206, 212–13 (concluding that employees with disabilities that are "invisible," i.e., that are non-obvious and require disclosure such as mental disabilities, continue to weigh a "high risk" of potential stigma that accompanies supervisors' and coworkers' knowledge of the disability against the work-related and other benefits of disclosing their condition at work). A 2017 study similarly found that 91% of employees with disabilities who disclosed to a supervisor received either a "positive" or "neutral" response. LaWanda Cook, *The Workplace Disclosure Dilemma*, ABILITY MAG., Aug.–Sept. 2017, at 42, 42 tbl.X (noting the proportion of 59% positive plus 25% neutral responses from a supervisor relative to the 92% of survey respondents who did disclose their disability).

<sup>92</sup> 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-5 and thereby establishing filing of an agency charge, a prerequisite for litigation).

<sup>93</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). Although *Albemarle* addressed Title VII litigants, the EEOC enforces Title VII and ADA Title I employment rights. *See* 42 U.S.C. § 12117(a) (incorporating into ADA Title I sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of Title VII's enforcement provisions).

<sup>94</sup> *Mediation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/mediation> (last visited Aug. 24, 2021) (discussing offer of voluntary mediation with the EEOC only after a party has filed a charge of discrimination); *see also infra* note 266 (describing the political rise of private enforcement of rights and fragmented policy that results).



## B. Civil Rights Justifications for the Accommodations Mandate

### 1. Mandate as Corrective Justice

The duty to accommodate contrasts with civil rights laws enacted during the Rights Revolution of the 1960s and 1970s, which generally prohibit employers from acting upon a social status.<sup>95</sup> Under “traditional” antidiscrimination law, employer conduct that consciously relies upon protected statuses typically arises only as affirmative remedies after a determination of liability.<sup>96</sup> This distinction has caused scholars and critics of the ADA to characterize it as redistributive rather than antidiscriminatory.<sup>97</sup> Others view the accommodations mandate as a form of corrective justice,<sup>98</sup> and, as discussed below, the ADA itself advances this view. How the mandate is justified very much matters as it bears on how employers, employees, and the public view employers’ obligations to change their practices and how aggressively the mandate should be implemented.<sup>99</sup>

Sam Bagenstos has argued that the accommodations mandate is antidiscrimination law, rather than a substantially different kind of law, merging both corrective and distributive justice arguments.<sup>100</sup> He and others rely upon arguments from feminist scholars who considered accommodations necessary to ensure equality—most prominently in the pregnancy context—because both approaches “aim to overcome systematic patterns of stigma and subordination” by targeting occupational segregation and other structural sources of inequality.<sup>101</sup> Requiring accommodations that provide employees with

<sup>95</sup> Bagenstos, “*Rational Discrimination*,” *supra* note 3, at 826–30, 828 n.9.

<sup>96</sup> See 42 U.S.C. § 2000e-5(g) (providing court remedy to “order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate”).

<sup>97</sup> *E.g.*, Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 836–37 (2001); Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court’s Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 75 (1999) (calling the accommodations mandate “affirmative action” for people with disabilities); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 10–11 (1996) (arguing that reasonable accommodations require employers to consider disability under a “difference model”).

<sup>98</sup> See, *e.g.*, Krieger, *supra* note 9, at 504; see also *infra* Section I.B.2.

<sup>99</sup> Krieger, *supra* note 9, at 504–05; Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMPAR. L. 205–06, 219–21 (2012).

<sup>100</sup> Bagenstos, “*Rational Discrimination*,” *supra* note 3, at 828–30, 859–70.

<sup>101</sup> *Id.* at 830; see also Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1120–21 (1986) (“Most feminists agree that one of the crucial issues to be addressed in order to eliminate the economic and social subordination of women . . . is to make the workplace more

disabilities the same opportunities afforded to those without disabilities is necessary to achieve equality<sup>102</sup> because preserving ableist structures is discriminatory—and therefore normatively undesirable. Bagenstos offers the metaphor of the baseline to support the theory that the mandate is not redistributive, but corrective:

If . . . antidiscrimination law simply restores a just distribution but accommodation redistributes, then one must assume that any distribution reflecting intentional discrimination is unjust and therefore an inappropriate baseline for a determination of whether redistribution is occurring. . . . [But] why can we not say the same thing about a distribution reflecting the creation of institutions inaccessible to people with disabilities (i.e., one reflecting the lack of accommodation)? By this account, accommodation requirements (like antidiscrimination requirements) simply restore a just distribution; they do not “redistribute.”<sup>103</sup>

A comparison of doctrinal tools further illustrates how the ADA is not radically different.<sup>104</sup> Christine Jolls observed that in addition to some kinds of pregnancy accommodations, Title VII disparate impact doctrine requires employers to affirmatively alter certain practices to accommodate the needs of groups to ensure equal treatment, such as in job-selection criteria and grooming rules.<sup>105</sup> Because the mandate often requires correcting earlier decisions by an employer, “whether

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accommodating to pregnancy and parenting needs.”); Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 559–60 (1983) (“[B]ecause members of different . . . sexual groups manifest normative differences in height, weight, history of arrests or completion of high school, equal treatment of members of these different groups under a selection procedure based on any of the above criteria is not likely to result in equality of effect.”). Further breaking down the dichotomy is the current colloquial understanding of affirmative action as encompassing policies and practices designed to promote equality “in ways not strictly required by antidiscrimination law alone,” including those “designed to respond to past discrimination, prevent current discrimination, and promote certain societal goals such as social stability or improved pedagogy.” Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1063–64, 1064 n.3 (2006).

<sup>102</sup> Bagenstos, “*Rational Discrimination*,” *supra* note 3, at 860 (citing *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)). Richard Epstein is the most vocal opponent of the ADA and other protective employment laws for workers with disabilities, on grounds that they interfere with the market. But even Epstein acknowledges the “dominant social view today rejects out of hand any return to a market solution” and treats “all existing discrimination regulation as sacrosanct.” RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 484–85 (1992).

<sup>103</sup> Bagenstos, “*Rational Discrimination*,” *supra* note 3, at 862.

<sup>104</sup> See Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 653–66 (2001) (arguing that accommodation and antidiscrimination are overlapping concepts).

<sup>105</sup> *Id.* at 644, 653–68.

conscious or simply uncaring,” that employer must make the effort to understand and correct the original error.<sup>106</sup>

The ADA itself justifies the mandate under the corrective justice framework. The statute expressly requires employers to incorporate accommodations without legal process by defining “discriminate” to include “*not making reasonable accommodations* to [address] the known physical or mental limitations of an otherwise qualified individual with a disability.”<sup>107</sup> EEOC regulations furthered this approach by elaborating on the statutory definition of reasonable accommodation—a broadly illustrative definition—to one that highlights outcome-driven equality.<sup>108</sup> A catch-all provision of the rule defines reasonable accommodation to include actions that allow an employee with a disability to “enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”<sup>109</sup>

Even as the corrective justice view of the mandate is now amply represented in the scholarship, it is a different question entirely whether the ADA’s design sufficiently matches the ambition of its mandate.<sup>110</sup> Some employers, courts, and commentators have resisted the ADA’s corrective justice approach. They describe the accommodations mandate as targeted social welfare in the form of cost shifting onto employers, with their arguments well reprised in the literature.<sup>111</sup> To combat hostility towards accommodations, reforms must afford more meaningful guardrails between a subordinated party and an

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<sup>106</sup> Krieger, *supra* note 9, at 504, 504 n.97.

<sup>107</sup> 42 U.S.C. § 12112(b)(5)(A) (emphasis added).

<sup>108</sup> 29 C.F.R. § 1630.2(o)(1) (2020).

<sup>109</sup> *Id.* § 1630.2(o)(1)(iii).

<sup>110</sup> See Krieger, *supra* note 9, at 505–06 (noting that disability’s extensive history with the welfare state contributes to controversy over the accommodations mandate when viewed as imposing privilege, entitlement, and obligation) (citing DEBORAH A. STONE, *THE DISABLED STATE* 28 (1984)); cf. discussion *infra* Section II.B (noting the Supreme Court’s adoption of the defendant employer’s framework that affirmatively obligating employers to accommodate pregnancy-related conditions would create a “most-favored nation status” (quoting Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 *Geo. L.J.* 559, 560–61 (2017))).

<sup>111</sup> Krieger, *supra* note 9, at 516 (noting large segments of the public, including many judges, do not view the ADA as an antidiscrimination statute but rather a social welfare benefits program like social security disability); Bagenstos, *The Structural Turn*, *supra* note 25, at 3–4, 41–42 (noting that the reach of accommodations law, as with other antidiscrimination doctrines, may rest on judges’ background demands that fault is attributable to the employer); cf. Verkerke, *supra* note 48, at 932 (noting the political popularity of unfunded mandates in antidiscrimination law, as they do not require raising tax revenue). See generally Stein, *The Law and Economics of Disability Accommodations*, *supra* note 9 (suggesting how society should conceptualize disability-related accommodation costs from law-and-economics perspectives).

employer to secure remediation. These guardrails are particularly important in organizations where exclusionary structures are the most entrenched.

## 2. *Mandate as Procedural Justice*

In addition to its substantive contributions, the accommodations mandate has been termed a “quiet revolution”<sup>112</sup> because it instigated millions of private dialogues about workplace barriers. Stephen Befort celebrated the interactive process as a development that “significantly transformed procedural structures and norms” affecting people with disabilities.<sup>113</sup> Employers are expected to address requests for accommodations voluntarily and “expeditiously.”<sup>114</sup> A 1989 report from the Senate Committee on Labor and Human Resources declared that discussions over an accommodation should be structured as collaborative “problem-solving.”<sup>115</sup> But Congress’s description remained at a high level of generality, without advancing any structural framework. Such an open-ended method for exploring accommodations, and the underlying question of the employee’s standing to request one, carries the potential for wider conflict.<sup>116</sup> Requests for a workplace accommodation ask employers to change their position to resolve the rights of the employee. The policy’s acknowledgment that the interactive process requires collaboration belies the need for fairness to create access.<sup>117</sup>

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<sup>112</sup> Befort, *supra* note 13, at 628.

<sup>113</sup> *Id.* In a somewhat different vein, Linda Hamilton Krieger believes public resentment toward the ADA also arises from the obligatory function of the interactive process as a deviation from the absence of procedural justice in most workplaces. Krieger, *supra* note 9, at 506.

<sup>114</sup> The EEOC enforcement guidance urges employers to respond “expeditiously” to a request for an accommodation and engage in an interactive process, if necessary, “as quickly as possible.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, NO. 915.002, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>. Thereafter, an employer should “act promptly to provide the reasonable accommodation” as “[u]nnecessary delays can result in a violation of the ADA.” *Id.*

<sup>115</sup> S. REP. NO. 101-116, at 34 (1989); *see also* H.R. REP. NO. 101-485, pt. 2, at 65 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 348; 29 C.F.R. pt. 1630.9 app. at 423 (outlining the problem-solving approach employers should use).

<sup>116</sup> *See* Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 57–60 (2009) (including workplace rights-based disputes as a “problem of scale” in organizational justice); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 7 (observing that many problems presented as “individual” conflicts are rooted in policies, organizational practices, or systems affecting broader groups with respect to resolution required).

<sup>117</sup> More cynically, the Ninth Circuit opined that “[t]his rule fosters the . . . cooperative problem-solving contemplated by the ADA, by encouraging employers to seek . . . accommodations that really work, and by avoiding the creation of a perverse incentive for employees to request the most drastic and burdensome accommodation possible out of

As a mandatory dialogue, the interactive process determines the substantive rights of employees with disabilities even if no specific outcome is preordained.

In social psychology, “procedural justice” examines decision-making and interpersonal functions of procedures between individuals, including bargaining.<sup>118</sup> Studies in workplace organizational psychology reflect employees’ desire for procedural fairness in addition to substantive outcomes<sup>119</sup> as a means of mediating their identities.<sup>120</sup> External laws, in turn, provide the bounds of acceptable decisionmaking and practice.<sup>121</sup> Most courts took it upon themselves to refine the interactive process to not only require good faith by both parties, as noted above, but also to rein in the relatively unfettered discretion of employers over outcomes.<sup>122</sup> But whether the interactive process was intended to be a form of procedural justice or came to approximate one after decades of judicial refinement, for too long it has been a neglected experiment in civil rights.

The accommodations mandate incentivizes employers to create compliance structures and engage employees—at some level—in light of the external law of the ADA, but in an era when comprehensive

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fear that a lesser accommodation might be ineffective.” *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1138 (9th Cir. 2001).

<sup>118</sup> E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 61–65 (1988); accord Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 *PERS. & SOC. PSYCH. REV.* 349, 350 (2003). In corollary scholarship regarding procedural justice within legal dispute resolution, a foundational taxonomy places “bargaining” at the far end of the spectrum where disputants have primary control over the process and a third-party decisionmaker is absent. Thibaut et al., *supra* note 28, at 1274–75. As discussed above, unlike settlement discussions or “[b]argaining in the [s]hadow of the [l]aw,” Mnookin & Kornhauser, *supra* note 28, to avoid litigation, however, the interactive process places employees in the position of negotiating the implementation of an entitlement.

<sup>119</sup> Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 *CALIF. L. REV.* 433, 496 (2009) (citing LIND & TYLER, *supra* note 118).

<sup>120</sup> Tyler & Blader, *supra* note 118, at 351–55 (discussing how an individual’s cooperation with a group is shaped by the level of material resources that person receives from that group). Previously, Doron Dorfman applied procedural justice theory in an in-depth study of the corollary process of the Social Security Administration’s disability determination process for SSI or SSDI benefits, which entrenches the binary categories of disabled and non-disabled. Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 *LAW & SOC. INQUIRY* 195, 196–98, 221 (2017). It underscores the state’s active, public role in advancing a purposive definition of disability as an inability to work, when juxtaposed with the vastly privatized system of the interactive process within workplaces.

<sup>121</sup> Sturm & Gadlin, *supra* note 116, at 54.

<sup>122</sup> See *supra* note 71 and accompanying text; see, e.g., *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 318 (3d Cir. 1999) (“An employer who acted in bad faith would be in essentially the same, if not better, position than one who participated . . . . The less the employer participated, the easier this would become, and . . . the requirement that employers participate in the interactive process would be toothless.”).

agency oversight has ebbed for decades.<sup>123</sup> The interactive process appears to borrow from the only two other mandatory-negotiation frameworks within labor and employment law: Title VII religious accommodations<sup>124</sup> and labor law.<sup>125</sup>

In 1972, nearly two decades before the passage of the ADA, Title VII was amended to introduce religious accommodations as a requirement of nondiscrimination, unless the employer could demonstrate undue hardship.<sup>126</sup> Although Title VII's mandate/defense structure is similar to the ADA's, the standard for religious accommodations is stricter because of a 1977 Supreme Court decision interpreting Title VII's undue hardship defense broadly to be triggered whenever the cost to an employer is more than *de minimis*.<sup>127</sup> And as noted in Part I, the ADA's sole guardrail for the interactive process, good faith, finds its closest analogy in the National Labor Relations Act (NLRA) requirement that employers and unions bargain with each other in good faith toward a collective bargaining agreement (CBA).<sup>128</sup> The NLRA has not been interpreted to require that parties make any substantive move in negotiations, but simply to require the absence of bad faith.<sup>129</sup> Ostensibly, the EEOC fashioned the accommodations

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<sup>123</sup> See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 321–22 (2005) (comparing the model of judicially enforceable individual rights with the regulatory model of minimum standards enforceable by agencies as the backdrop to the rise of employer self-regulation since the 1960s).

<sup>124</sup> 29 C.F.R. § 1605.2(b) (2020). The Rehabilitation Act of 1973, which placed reasonable accommodations duties on federal employers, federal contractors, and recipients of federal funding, originally did not contain an interactive process. In 1992, Congress amended the Act to adopt the standards of the ADA. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, sec. 503(b), § 791(g), sec. 505(c), § 793(d), sec. 506, § 794(d), 106 Stat. 4424, 4428 (1992).

<sup>125</sup> The National Labor Relations Act requires employers to negotiate collective bargaining agreements with unions or labor organizations in “good faith.” See *supra* notes 86–87 and accompanying text.

<sup>126</sup> Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j)).

<sup>127</sup> See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

<sup>128</sup> See 29 U.S.C. § 158(a)(5), (d).

<sup>129</sup> See *supra* notes 87–88 and accompanying text. In labor law, a party that “goes through the motions” of bargaining toward a CBA with no intent to reach an agreement, or undertakes unreasonable stalling tactics, breaches the duty of good faith. *E.g.*, U.S. Ecology Corp., 331 N.L.R.B. 223, 225 (2000) (finding of bad faith in surface bargaining), *enforced*, 26 F. App'x 435 (6th Cir. 2001); Health Care Servs. Grp., Inc., 331 N.L.R.B. 333, 336 (2000) (finding employer that failed to appear for scheduled bargaining sessions, among other stalling tactics, evinced bad faith). Indeed, the common law of the interactive process that has developed has come to mirror the functional approach to good faith as outlined in the Restatement (Second) of Contracts: “Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards

mandate as a hybrid of the two precedents: one grounded in public law, one in private law.

Access to accommodations was effectively delegated to private conversations that could have infinite variations in worksites across the country. As a baseline, a decentralized interactive requirement makes sense in light of the alternatives.<sup>130</sup> However, a mandate designed to rely upon private process to eliminate discrimination must account for “information, structure, decision rights, and incentives” to be successful in protecting the agency of subordinate groups seeking meso-level change.<sup>131</sup> Under a procedural justice approach, the fairness of an internal workplace process is generally measured against the following values: “consistent bias-free application, accurate information usage, an appeal mechanism to correct inadequate decisions, and conformity to broadly prevailing norms and ethics.”<sup>132</sup> Judicial review of parties’ meaningful engagement in the process under a good-faith standard *ex post* can only go so far.

Prior to the ADA’s passage, Congress heard testimony related to organizational psychology and the benefits of involving multiple stakeholders in designing accommodations. Mark Donovan, a community employment and training program manager for the Marriott Corporation, recommended that the statute “establish processes and frameworks [that] promote cooperation rather than confrontation between various constituencies in the resolution of challenges.”<sup>133</sup> His testimony drew from his own experience integrating employees with disabilities into the workforce.<sup>134</sup> He urged lawmakers to include a wide array of parties in the interactive process beyond the individual worker as needed, such as “professional organizations, industry associations, public sector officials, advocacy groups, service providers

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of decency, fairness or reasonableness.” RESTATEMENT (SECOND) OF CONTS. § 205 cmt. a (AM. L. INST. 1981).

<sup>130</sup> The alternatives could be, e.g., a system of mandatory disclosure of any/all disabilities in order to be eligible for an accommodation at any point without regard for the level of severity of the disability or impairment; or a mandatory central registry that dictates an accommodation regardless of the specific work environment.

<sup>131</sup> Lobel, *supra* note 119, at 491. Although here Orly Lobel examined the web of governance approaches in the context of legal design of corporate whistleblowing regimes, the principles are broadly applicable to default internal workplace processes. Within organizational theory, employers that fail to eliminate bias in their practices act as “meso-level social structures that limit the personal agency and collective efficacy of subordinate . . . groups while magnifying the agency of the dominant . . . group.” Victor Ray, *A Theory of Racialized Organizations*, 84 AM. SOCIO. REV. 26, 36 (2019) (examining the organizational influence of race and defining the “racialized organization[]”).

<sup>132</sup> Lobel, *supra* note 119, at 496.

<sup>133</sup> *Joint Hearing, supra* note 66, at 46–47 (statement of Mark R. Donovan, Manager, Community Employment and Training Programs, Marriott Corporation).

<sup>134</sup> *See id.* at 45.

and individuals affected to participate together in seeking solutions. Inclusion of all parties involved, as active participants in the problem solving process, [would] almost always yield the best answers.”<sup>135</sup> Doing so, he said, would “lay[] the strongest foundation for implementation of those answers” as a matter of “conflict resolution.”<sup>136</sup>

The regulations instead conceive of the interactive process as employer driven and internal. The EEOC directs employers to lead the dialogue over an accommodation by suggesting they “[a]nalyze” the employee’s job functions, “[c]onsult with the individual with [the] disability,” and “[c]onsider” the employee’s preference under the regulation’s four-step process.<sup>137</sup> In a few significant ways, the interactive process resembles the self-initiated compliance Orly Lobel examined in the context of corporate whistleblowing laws.<sup>138</sup> However, those laws incentivize internal procedural exhaustion and mechanisms for independent review.<sup>139</sup> Because the EEOC designed the interactive process to be informal, the ADA does not require any documentation or recordkeeping to memorialize the negotiations themselves.<sup>140</sup> The interactive process requirement relies on a form of self-regulation, furthering deregulation with only a background threat of agency enforcement<sup>141</sup> or litigation.<sup>142</sup> It may come as little surprise that many employees with disabilities have not fared well during the quiet revolution.

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<sup>135</sup> *Id.* at 47.

<sup>136</sup> *See id.*

<sup>137</sup> *See* 29 C.F.R. § 1630.2(o)(3) (2020) (“[I]t may be necessary for the covered entity to initiate an informal, interactive process . . . .”); 29 C.F.R. pt. 1630, app. at 423. The EEOC appendix notes that if more than one accommodation would be effective, “the preference of the individual with a disability should be given primary consideration,” however, the employer has “ultimate discretion” to choose “the less expensive accommodation or the accommodation that is easier for it to provide.” *Id.*

<sup>138</sup> *See* Lobel, *supra* note 119, at 496–98.

<sup>139</sup> *See id.* at 497–98.

<sup>140</sup> *See* 29 C.F.R. § 1630.2(o)(3) (“[I]t may be necessary for the [employer] to initiate an informal, interactive process . . . .”). *But cf.* Sarbanes-Oxley Act of 2002, Pub. L. 107-204, § 301, 116 Stat. 745, 776 (codified at 15 U.S.C. § 78j-1(m)(4)) (requiring audit committees of public accounting firms to establish procedures for “the receipt, retention, and treatment of complaints” and “confidential, anonymous submission by employees”). The problems employees will encounter under procedural justice criteria are evaluated below in Section II.A.

<sup>141</sup> *Cf.* Estlund, *supra* note 123, at 355–62 (discussing the issue of regulatory underenforcement in the context of labor law’s statutory framework of self-regulation).

<sup>142</sup> *See* Hickox, *supra* note 12, at 149.



## II A PROMISE NOT YET FULFILLED

Even after Congress overrode Supreme Court decisions hostile to the ADA's substantive disability standard through statutory amendment, there is good reason to believe that accommodations law still does not reach those who may need it most.<sup>143</sup> Section II.A evaluates the statute's overall design to shed new light on procedural and institutional barriers to accessing the mandate. Although a growing number of proposals—including the highly anticipated Pregnant Workers Fairness Act—seek to adopt the ADA's mandate for additional groups of workers,<sup>144</sup> its framework of privatized regulation continues to reflect the need for broader interventions. Section II.B weighs these proposals to replicate the mandate against the theoretical and practical concerns regarding their effectiveness.

### A. *The Interactive Process as Constraint on the Accommodations Mandate*

Any regulation of the interactive process should make it difficult for employers to act arbitrarily and without factual basis in denying an accommodation. However, as detailed below, the empirical data reveal a framework that fails to address the power differentials affecting a right that must be negotiated. Employers are particularly hostile to requests from minority employees and those in physically demanding positions,<sup>145</sup> despite the ADA's explicit goal of targeting economic precarity.<sup>146</sup> The highly discretionary structure of the interactive process could have yielded a prediction decades earlier that remediating ableist workplaces would stall.

It is now anodyne to remark that the ADA has failed to increase the overall employment rate of people with disabilities, as their workforce participation may have actually declined.<sup>147</sup> But criticism of

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<sup>143</sup> See *infra* Section II.A.2.

<sup>144</sup> See *supra* note 24 and accompanying text.

<sup>145</sup> See *infra* Section II.A.2.

<sup>146</sup> See *supra* note 44 and accompanying text; cf. Denise M. Rousseau, Violet T. Ho & Jerald Greenberg, *I-Deals: Idiosyncratic Terms in Employment Relationships*, 31 *ACAD. MGMT. REV.* 977, 977–78 (2006) (describing increased acceptance of special employment conditions outside the disability context that are voluntarily negotiated between individual workers and employers as a means of recruiting and retaining employees with skills valued by the employer). See generally Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 *WM. & MARY L. REV.* 921 (2003) (discussing how, at the time of its enactment, many perceived the ADA to be a form of welfare reform focused on giving low-income individuals with disabilities jobs rather than public assistance).

<sup>147</sup> Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 *J. POL. ECON.* 915, 926–50 (2001) (finding lower employment rates for certain demographics of workers with disabilities).

the ADA's track record should be contextualized further within two phases often elided in legal commentary. Employer bias and hesitance to provide accommodations pose obstacles at the hiring stage; after hire, they hinder the interactive process once an employee then reveals a need for an accommodation. In this section, my analysis emphasizes the latter phase of integration but recognizes the interrelated influence of structural barriers at the hiring stage.

### 1. Rates of Non-Accommodation

Until recently, little empirical evidence existed regarding the rates of non-accommodation among workers with disabilities.<sup>148</sup> An innovative, nationally representative study of U.S. workers in 2019 revealed a great deal about the extent to which accommodations are currently available.<sup>149</sup> Its findings established that approximately twenty-three percent of workers either had a workplace accommodation or would require one at work, a figure consistent with current estimates that one in four Americans will become disabled before reaching age sixty-seven.<sup>150</sup> But a disturbing share of respondents with a work-limiting "impairment or health problem" (forty-seven to fifty-eight percent) reported that they would benefit from an accommodation but did not have one.<sup>151</sup> This group includes workers who asked for an accommodation, as well as those who did not feel empowered

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post-ADA); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RES. 693, 701 (2000) (concluding male workers with disabilities experienced a decline in employment and wages post-ADA); cf. Julie L. Hotchkiss, *A Closer Look at the Employment Impact of the Americans with Disabilities Act*, 39 J. HUM. RES. 887, 888, 909 (2004) (concluding the ADA had no effect on workers with disabilities in the labor market).

<sup>148</sup> Researchers have "[s]urprisingly . . . little information on how many accommodation requests are made, the percentage that are accepted versus denied, and for those that are denied, why they are denied." Lisa Schur, Lisa Nishii, Meera Adya, Douglas Kruse, Susanne M. Bruyère & Peter Blanck, *Accommodating Employees with and Without Disabilities*, 53 HUM. RES. MGMT. 593, 595 (2014).

<sup>149</sup> Maestas et al., *supra* note 35, at 1004–08, 1011 (nationally representative study of 5,700 respondents).

<sup>150</sup> *Id.* at 1007; *id.* at 1004 (citing SOC. SEC. ADMIN., *supra* note 39).

<sup>151</sup> *Id.* at 1007, 1011, 1012 fig.2 (including respondents who were working and those who were not working, but would benefit from an accommodation that would allow them to work); see also *id.* at 1006 (summarizing six studies reflecting only twenty to thirty percent of individuals with disabilities reported receiving a workplace accommodation when their health began to limit their ability to work). The study's authors note that a limitation of the study is its reliance on respondents to accurately assess whether an accommodation "would in fact help them remain employed or regain employment." *Id.* at 1023. The study did not ask respondents why they did not initiate a request for an accommodation. To the extent that respondents' lack of initiation indicates a fear of stigma, fear of retaliation, or unawareness of their right to a reasonable accommodation, these outcomes may reflect worker disempowerment and information deficits.

to ask.<sup>152</sup> Equally troubling, more than one in four respondents who did request an accommodation from their employer were denied one entirely.<sup>153</sup>

Not only has the ADA failed to secure accommodations for a wide swath of employees that the statute was intended to cover, but improper denials of access have become increasingly common. The share of EEOC charges citing a failure to accommodate has more than doubled since implementation: from 14.3% of all claims in charges under the ADA in 1993 to 36.7% of all claims by 2014.<sup>154</sup>

For their part, employers have expressed concerns about employing disabled workers or bearing the costs incurred by an accommodation.<sup>155</sup> Yet surprisingly, U.S. Census data show that ninety-five percent of persons making accommodations requests are people without disabilities.<sup>156</sup> The subject of these special requests from employees without disabilities similarly include job flexibility, a

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<sup>152</sup> *Id.* at 1012.

<sup>153</sup> *Id.* at 1020 tbl.6. The questionnaire's phrasing of work-limiting impairments or health problems is not a complete proxy for legal ADA eligibility, but it is the closest available to lay respondents since prior surveys that omit a work-activity limitation question have led to biased estimates. Burkhauser, Houtenville & Tennant, *supra* note 2, at 201, 205. Because "disabilities" refers to a heterogeneous array of conditions with varying levels of severity, relying upon studies that include disabilities widely rather than selectively will address some of the skews that may result from the varying levels of social stigma that attach to different conditions. *E.g.*, Shinall, *supra* note 12, at 645.

<sup>154</sup> Von Schrader et al., *Creating an Accommodating Workplace*, *supra* note 91, at 113 & fig.1. The rise cannot be attributed to the ADA's expansion of the definition of "disability," effective May 2011, as by then failure-to-accommodate claims had already doubled their share of ADA claims in EEOC charges to around thirty percent. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,978, 16,980 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630) (noting the effective date of the broader definition of "disability"); von Schrader et al., *Creating an Accommodating Workplace*, *supra* note 91, at 113 & fig.1. They are the second-most common ADA claim after discriminatory discharge claims. *Id.* at 100.

<sup>155</sup> Reflecting "aversion to risk," approximately 64% of employers reported that not knowing how much an accommodation would cost is a challenge in hiring people with disabilities, and a similar share, 62%, believed that the actual cost of an accommodation was an additional concern. OFF. OF DISABILITY EMP. POL'Y, U.S. DEP'T OF LAB., SURVEY OF EMPLOYER PERSPECTIVES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES: TECHNICAL REPORT 13 (2008) [hereinafter U.S. DEP'T OF LAB., SURVEY OF EMPLOYER PERSPECTIVES], <https://www.dol.gov/sites/dolgov/files/odep/research/surveyemployerperspectivesemploymentpeopledisabilities.pdf>.

<sup>156</sup> Sarah von Schrader, Xu Xu & Suzanne M. Bruyère, *Accommodation Requests: Who Is Asking for What?*, 28 REHAB. RSCH., POL'Y & EDUC. 329, 337, 338 fig.4 (2014) [hereinafter von Schrader et al., *Accommodation Requests*] (developing estimates from the May 2012 Current Population Survey Disability Supplement, reflecting 11,844,200 individuals without disabilities versus 642,900 individuals with disabilities having made an accommodations request). The Census questionnaire asks for historical requests of their current employer rather than limiting the timeframe to the prior year. *See id.* at 333 tbl.1 (asking respondents if they "ever requested any change in [their] current workplace").

change in policy, additional equipment, or other forms of assistance that deviate from their employer's "normal" work structure.<sup>157</sup> Instituting a rights-claiming system may not have encouraged more requests from those for whom the law was intended: A mere 12.7% of employees with disabilities request accommodations, nearly comparable to the rate at which employees without disabilities request accommodations (8.6%).<sup>158</sup>

The interactive process and its good-faith guardrail are not adequate protections for employees whose employers are not familiar with modifying job duties. This resistance is particularly strong in hierarchically low-ranked positions.<sup>159</sup> *Armstrong v. Burdette Tomlin Memorial Hospital* provides a cautionary example of the harm of excessive discretion in the interactive process.<sup>160</sup> In that case, Arnie Armstrong suffered a back and neck injury before being hired as a hospital stock clerk.<sup>161</sup> The position required placing supplies on carts, pushing the carts, and putting the supplies away.<sup>162</sup> His employer rated him a satisfactory or better employee throughout his tenure.<sup>163</sup> However, a reinjury prompted him to request accommodations in which he would not perform heavy lifting, pulling, or bending.<sup>164</sup> The hospital responded that because stock clerks were required to lift items weighing up to 150 pounds (a claim Mr. Armstrong disputed), he could not return to his job.<sup>165</sup> During the interactive process, the parties disagreed about the essential functions of a job Mr. Armstrong had held for six years, and subsequent interactions revealed that the process foundered at this first step laid out in the EEOC regulations.<sup>166</sup>

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<sup>157</sup> See *id.* (listing employee special requests under "Accommodation type").

<sup>158</sup> *Id.* at 337.

<sup>159</sup> See *infra* Section II.A.2.

<sup>160</sup> 438 F.3d 240, 246 (3d Cir. 2006) (analyzing a failure-to-accommodate claim under state disability discrimination law, which is interpreted under standards identical to the ADA). Then-Judge Alito joined in the unanimous panel decision reversing the district court and remanding the case for a retrial. *Id.* at 242, 246.

<sup>161</sup> *Id.* at 242.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 242–43.

<sup>164</sup> *Id.* at 243.

<sup>165</sup> *Id.* at 242–44.

<sup>166</sup> See *id.* at 243–45, 248; 29 C.F.R. pt. 1630, app. at 423 (2020) (exhorting employers to "(1) Analyze the particular job involved and determine its purpose and essential functions"). The EEOC's sole illustration of the interactive process in fact revolves around a position involving manual labor: a sack handler position in which the employee originally had to pick up fifty-pound sacks and transport them between rooms, noting that the employer could analyze the job and "determine[] that the essential function . . . is not the requirement that the job holder physically lift and carry the sacks, but the requirement that

Mr. Armstrong ultimately returned to his stock clerk position after obtaining a doctor's note clearing him to work, and remained in the role for two more years.<sup>167</sup> At that point, due to staff vacancies, stock clerks like Mr. Armstrong were required to assume linen distribution responsibilities in addition to their own.<sup>168</sup> These responsibilities required Mr. Armstrong to repeatedly bend down and pick up twenty- to thirty-pound bundles of linen from a five-foot deep cart.<sup>169</sup> Mr. Armstrong disputed the new responsibilities, and argued that the position was more strenuous than his stock clerk job.<sup>170</sup> However, the hospital did not accommodate his request to return to his original duties.<sup>171</sup> At this stage in the process, both parties disagreed about the limitations posed by his disability, the nature of the accommodation needed, and whether the new position was an effective accommodation<sup>172</sup>—illustrating a breakdown of the interactive process.<sup>173</sup>

The new position caused a reinjury within two weeks, requiring Mr. Armstrong to seek emergency treatment.<sup>174</sup> He returned to work with further medical restrictions: He was not to perform excessive lifting, bending, pushing, or pulling.<sup>175</sup> After he requested to return to the stockroom, the hospital ultimately required him to choose between taking disability leave or resigning.<sup>176</sup> He chose to take leave, but the hospital fired him once his condition did not improve, under the theory that he was unable to perform the second job.<sup>177</sup>

Mr. Armstrong and the hospital exchanged copious information for years, but did not find resolution even after two jury trials and an appeal to the Third Circuit, which issued a decision seven years after his last day at work.<sup>178</sup> The panel held that jury interrogatories erred in suggesting that Mr. Armstrong had to request a specific accommodation, which precluded jurors from inquiring into whether the hos-

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the job holder cause the sack to move [between rooms].” 29 C.F.R. pt. 1630, app. at 424 (2020).

<sup>167</sup> *Armstrong*, 438 F.3d at 243–44.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 244–45.

<sup>172</sup> *Id.*

<sup>173</sup> See 29 C.F.R. pt. 1630, app. at 423; *supra* note 4 and accompanying text; *infra* notes 198–202 and accompanying text.

<sup>174</sup> *Armstrong*, 438 F.3d at 244.

<sup>175</sup> *Id.*

<sup>176</sup> See *id.* at 244–45.

<sup>177</sup> See *id.* In addition, the panel recounted the alleged harassing remarks Mr. Armstrong's supervisor made in reference to his disability throughout the interactive process. *Id.* at 243.

<sup>178</sup> See *id.* at 243–45.

pital thwarted the interactive process.<sup>179</sup> If jurors had examined the process, they might have allowed him to prevail because he “could have been reasonably accommodated but for the employer’s lack of good faith.”<sup>180</sup> The court reasoned that the hospital made a “unilateral decision” instead of engaging in open dialogue.<sup>181</sup> The panel itself then speculated whether the linen cart could have been modified; whether a fellow clerk could have traded some functions for Mr. Armstrong’s linen functions; and whether a kitchen job, that was in fact available, could have been offered as reasonable accommodations.<sup>182</sup>

Intersectional factors such as an employee’s relatively low rank, explored in the next Section, point to additional “built-in headwinds” limiting the reach of the mandate when employers have discretion to choose the ultimate accommodations or withhold complete information.<sup>183</sup> In other cases, the wide latitude afforded to employers as the interactive process plays out remains commonplace.<sup>184</sup> How

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<sup>179</sup> See *id.* at 247–49.

<sup>180</sup> *Id.* at 246 (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 320 (3d Cir. 1999)). Although courts reviewing an interactive process for bad faith do not reference any particular doctrine, under the common-law duty of good faith implied in every contract, including the employment relationship, the hospital appears to have failed to satisfy basic tenets of common-law good faith in its blatant failure to cooperate with a reasonable request for accommodation. Cf. *AYRES & KLASS*, *supra* note 88, at 707 (including among the circumstances where claims of bad faith frequently arise: “prevention, hindrance, or failure to cooperate” and “exercise of discretion granted by the contract”); *Good Faith*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining good faith as “[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage”).

<sup>181</sup> See *Armstrong*, 438 F.3d at 248–49.

<sup>182</sup> *Id.* at 248.

<sup>183</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Such arbitrariness of employers’ discretion during the interactive process is commonplace and persists today. See *infra* note 184.

<sup>184</sup> See, e.g., *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1117 (9th Cir. 2000) (holding that defendant’s five-month delay and failure to respond to employee’s initial request for an accommodation caused a breakdown in the interactive process, and absent an undue hardship defense would have been grounds for a failure-to-accommodate claim), *vacated on other grounds*, 535 U.S. 391, 407 (2002); *Budwig v. Allegiant Air*, No. 18-cv-01068, 2020 U.S. Dist. LEXIS 160481, at \*2–9, \*21–25 (E.D. Cal. Sept. 2, 2020) (recognizing a failure-to-accommodate claim of an air transport supervisor disabled by a new cleaning agent who was placed on unpaid leave for nearly six months after a temporary demotion to flight attendant, in part because for two months, the defendant did not explore a simple proposed accommodation of providing gloves); *Luckett v. Dart*, No. 14-CV-6089, 2017 U.S. Dist. LEXIS 124311, at \*45–48 (N.D. Ill. Aug. 7, 2017) (recognizing the same regarding a supervisor of a corrections officer with conditions including PTSD where suspicions regarding conflicting medical examinations were not followed up on with the employee, but resulted in the employer’s improper denial of accommodation based upon “lack of medical documentation”).

employers “value” employees with subordinate identities appears to explain they are less likely to be accommodated through the interactive process than their peers.

## 2. *Intersectional Factors: Education, Race, Class, and Gender*

Awareness that organizational hierarchies “reflect[] and reproduce[] the culture of the larger society” is a tenet of social constructionist theory that the ADA embraced in justifying placing the mandate on employers.<sup>185</sup> Nevertheless, accommodations law and commentary are relatively silent as to how social markers such as disability and race are mutually constructed to uphold ableism within systems of marginalization, stereotyping, segregation, and other resistance to dismantling white supremacy. Operation of the accommodations mandate at the granular level, without more, fails to advance the ADA’s rationales for institutional transformation.

Social identities and organizational hierarchy amplify majoritarian practices absent system-wide intervention. Empirical comparisons of outcomes for people with disabilities across demographic dimensions reveal that firms have denied additional accommodations that should have been provided. The few multidimensional studies that have examined success rates in securing accommodations have concluded that several factors—namely, education below a college degree, racial and gender minority status, and physically demanding jobs—are correlated to fewer grants of accommodations.<sup>186</sup>

While more detailed empirical studies of accommodations denials correlated to race and disability are needed, current data reflect concerning disparities. Qualitative interviews from a landmark study of government employees showed that white employees were three

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<sup>185</sup> Sharon L. Harlan & Pamela M. Robert, *The Social Construction of Disability in Organizations: Why Employers Resist Reasonable Accommodations*, 25 *WORK & OCCUPATIONS* 397, 399 (1998) (citing GARETH MORGAN, *IMAGES OF ORGANIZATION* (1986)); see Ray, *supra* note 131, at 26 (“Scholars of organizations typically see organizations as race-neutral bureaucratic structures. Scholars of race and ethnicity have largely neglected the role of organizations in the social construction of race.”); Ribet, *supra* note 21, at 212–13 (discussing ways that disability is compounded to justify ideas of racial inferiority); Jamelia N. Morgan, *Toward a DisCrit Approach to American Law*, *DISCRIT EXPANDED: INQUIRIES, REVERBERATIONS & RUPTURES* (forthcoming 2021) (manuscript at 6–11), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3730705](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730705) (discussing how racism and ableism are interconnected, noting the need for more research on the subject, and using Disability Critical Race Theory as a framework to better understand the issue).

<sup>186</sup> See, e.g., Matthew J. Hill, Nicole Maestas & Kathleen J. Mullen, *Employer Accommodation and Labor Supply of Disabled Workers*, 41 *LAB. ECON.* 291, 292, 294 tbl.2, 297 (2016) (surveying U.S. respondents who were newly disabled workers and in their fifties and concluding “the most predictive factors are relatively fixed employee characteristics such as education and race,” and correlation between denials and physically demanding jobs); *infra* notes 187–88, 194–96 and accompanying text.

times as likely as Black employees to have a supervisor affirmatively suggest an accommodation to them.<sup>187</sup> Whether an employee received an accommodation was “almost always associated with the position in the job hierarchy” of the individual making the request under the view that “[c]lerical, service, and blue-collar workers are easier and cheaper to replace than to accommodate.”<sup>188</sup> Lower-level employees are perceived to be “one-dimensional” and measured by only a few tasks even if the jobs entail “considerable intellectual, emotional, or other invisible work.”<sup>189</sup> Higher-level employees who enjoy more flexibility at work can informally obtain accommodations, such as taking breaks or shifting their work schedules—and many are able to avoid the interactive process entirely.<sup>190</sup> Two studies in the context of voluntarily provided flexible scheduling programs, i.e., benefits with considerable overlap with the needs of people with disabilities, have shown that white, “professional” workers benefit from the programs while employers hindered non-white workers with lower pay and lower educational attainment in accessing those opportunities.<sup>191</sup> In the analogous context of students with disabilities, studies of the distribution of finite state resources pursuant to the Individuals with Disabilities Education Act (IDEA) reflect student disparities that break down along racial and socioeconomic lines.<sup>192</sup> Like the ADA’s interactive

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<sup>187</sup> Harlan & Robert, *supra* note 185, at 414.

<sup>188</sup> *Id.* at 422.

<sup>189</sup> *Id.* at 423.

<sup>190</sup> See *id.* at 413–14. A nationally representative study of lawyers, who occupy a specialized position with high socioeconomic status, illustrates this counterpoint. Among those self-identified as having a disability, almost two-thirds—sixty-five percent—made a request for an accommodation from their employer. Peter Blanck, Ynesse Abdul-Malak, Meera Adya, Fitore Hyseni, Mary Killeen & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 23 UDC/DCSL L. REV. 23, 46, 47, 73 tbl.3.1 (2020) (further noting that 29.9% of attorneys who reported separately experiencing bias stated that it was based upon identification with a disability). The highest proportion of accommodations requests were made by mid-career lawyers—34.8%—as compared with early-career lawyers—24%—and late-career lawyers—24.3%. *Id.* at 46, 74 tbl.3.1.

<sup>191</sup> Lonnie Golden, *The Flexibility Gap: Employee Access to Flexibility in Work Schedules*, in FLEXIBILITY IN WORKPLACES: EFFECTS ON WORKERS, WORK ENVIRONMENT AND THE UNIONS 38, 48–49, 51 (Isik Urla Zeytinoglu ed., 2005); Jennifer E. Swanberg, Marcie Pitt-Catsoupes & Krista Drescher-Burke, *A Question of Justice: Disparities in Employees’ Access to Flexible Scheduling Arrangements*, 26 J. FAM. ISSUES 866, 879 (2005).

<sup>192</sup> See, e.g., Caruso, *supra* note 32, at 196 (concluding from Massachusetts data that the IDEA system produces inequitable outcomes for non-white children with disabilities, who were “largely over-represented in separate classrooms, but significantly under-represented in [much more expensive] private residential facilities”); Mark Kelman & Gillian Lester, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 75–77 (1997) (concluding from California data that the IDEA system providing accommodations to students with disabilities permitted relatively race-



process, IDEA processes for obtaining individualized education programs for children are so discretionary that they “provid[e] no assurance of equal treatment.”<sup>193</sup>

Women in lower-ranked positions were the most likely to have disability accommodation requests denied (40%), compared with the rate of denial for all lower-ranked workers (38%), and for all higher-ranked jobs (only 22%).<sup>194</sup> Female workers may be more likely to be denied accommodations due to the confluence of disability stigma and ascribed femininity, which clash with negotiating norms that predominately favor masculine attributes, as in the well documented context of women negotiating over their salaries.<sup>195</sup> One of the only studies to examine LGBTQ+ identity and accommodations, a study of lawyers, found that transgender individuals who self-identify as a racial or ethnic minority, “LGBQ,” and having a disability have the lowest probability of having their accommodation request granted (14%), followed by cis-male and cis-female individuals who identify as racial or ethnic minorities, “LGBQ,” and also having a disability, who were granted accommodations at a rate of 19% for men and 43% for women.<sup>196</sup>

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and class-privileged white children to access higher-cost or nonstigmatic educational resources). Conversations with Daniela Caruso and Ruth Colker were helpful in developing these connections.

<sup>193</sup> Caruso, *supra* note 32, at 195 (citing Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1126–28 (2000)).

<sup>194</sup> Harlan & Robert, *supra* note 185, at 418 tbl.3 (noting one-third of women’s accommodation requests were rejected, compared to one-quarter of men’s requests).

<sup>195</sup> Michelle A. Travis, *Gendering Disability to Enable Disability Rights Law*, 105 CALIF. L. REV. 837, 875–82, 880 nn.255–61 (2017) (discussing the gender dimension of poorer negotiations outcomes during the ADA interactive process for women). In a national study of lawyers with disabilities, the odds of women being granted accommodations declined with age. Peter Blanck, Fitore Hyseni & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: Workplace Accommodations for Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 30 J. OCCUPATIONAL REHAB. 537, 553 (2020); *cf. id.* at 540 (noting general studies that individuals with advocacy skills, personal confidence, and knowledge of workplace rights and the ADA are more likely to request accommodations).

<sup>196</sup> Blanck et al., *supra* note 195, at 553, 559 fig.6. In the breastfeeding context, Marcy Karin and Robin Runge observed that a hybrid standards- and accommodations-based right enacted in the 2010 Affordable Care Act would serve low-income women well given the negotiable nature of breaks and locations for pumping, and the unequal bargaining power between hourly workers and their managers. Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 CATH. U. L. REV. 329, 369 (2014). Karin and Runge ultimately argue that the Affordable Care Act fails to fully protect low-income women because the break time for pumping milk is unpaid. *Id.* As to the conceptually linked statuses of pregnancy and disability, see *infra* Section II.B. One study found a sizable 8–11% gap in employment rates between disabled, pregnant women and nondisabled, nonpregnant women, and a 4–6% gap between disabled, pregnant women

These substantial gaps in access counsel caution in relying upon the ADA accommodations mandate as-is as a model for laws to remediate work structures for additional groups. Disparities in bargaining power could trigger repercussions for engaging institutional change advocacy within the individual rights model, particularly for employees who face marginalization on account of identities that interact with their disability. Reform efforts must recognize the limits of the current model and inquire how we may restructure workplaces to include those who have been historically excluded.

### 3. *Absence of Procedural Justice Criteria*

The literature on organizational citizenship and workplace governance literature is instructive as to why the accommodations mandate has not achieved the social progress it intended. Building upon the procedural justice model pioneered by Tom Tyler and E. Allan Lind, Lobel articulated four elements of procedural justice for the workplace: (1) quality of decisionmaking, including “decision-maker neutrality, the objectivity and factuality of decision making, and the consistency of rule application”; (2) quality of interpersonal treatment, including “concerns shown for people’s dignity and rights”; (3) the “formal rules and structures of the organization, statements of organizational values, and communication of information about organizational procedures”; and (4) the discretion of informal organizational authorities, such as “the daily interactions between co-workers and between employees and supervisors.”<sup>197</sup> Only one of these elements is contemplated under the interactive process.

The employer-driven and informal nature of the interactive process affects parties’ perceptions of the quality of the decisions that result. The fact that both parties are procedurally obligated to exchange information and interact to reach a potential solution does not render the process neutral. If an employer were not already inclined to grant the accommodation, it may contest whether the

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and nondisabled, pregnant women. Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 802–03 (2018).

<sup>197</sup> Lobel, *supra* note 119, at 496 (citing Tom R. Tyler & Stephen L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERS. & SOC. PSYCH. REV. 349 (2003)). The movement for deformalization of the liberal litigation model took root in the 1980s and was well under way by the ADA’s enactment and the EEOC’s creation of the interactive process. See Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387–91, 1398–404 (1985); Eric K. Yamamoto, *Critical Procedure: ADR and the Justices’ “Second Wave” Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765, 771–74 (2017); see also *supra* note 73; *infra* notes 219–21 and accompanying text (describing the Third Circuit’s incongruent analogizing of the interactive process to “mediation”).

employee qualifies as work-capable,<sup>198</sup> a legal determination that may overshadow information-sharing about potential solutions otherwise emphasized in the formal regulations. During the interactive process, the employer might question whether the employee is in fact able to work;<sup>199</sup> whether the employee is disabled;<sup>200</sup> whether certain functions of the employee's job are "essential" and not subject to modification;<sup>201</sup> or the applicability of any of the undue hardship defense factors, particularly those relating to operational or financial difficulty that often depend on information uniquely in the knowledge of the employer, rather than the employee.<sup>202</sup> During this back and forth, most workers lack access to organizational precedent or procedural protections that unions traditionally provide. Currently, nine out of ten U.S. workers are not unionized and typically do not have access to an intermediary with institutional knowledge of an employer's operations and practices.<sup>203</sup>

Under the first factor of a procedural justice analysis, neutrality, the ADA's interactive process rests upon unwarranted assumptions that employers will openly share information with sufficient detail to aid employees in discussing undue hardship factors of operational impact and affordability; and that they will even adopt a problem-solving approach.<sup>204</sup> Even as the process anticipates some information asymmetry between the disabled employee and the employer, somehow an individual employee is expected to embark on the inter-

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<sup>198</sup> 29 C.F.R. pt. 1630, app. at 423 (2020) (providing further guidance on the regulations' recommended four steps in the interactive process, acknowledging that "the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions").

<sup>199</sup> 42 U.S.C. § 12111(8) (defining "qualified individual" as an employee who is able to perform the essential functions of the job).

<sup>200</sup> Macfarlane, *supra* note 12 (manuscript at 9) (citing Diedre M. Smith, *Who Says You're Disabled? The Role of Medical Evidence in the ADA Definition of Disability*, 82 TUL. L. REV. 1, 3 (2007)) (discussing the persistence of the medical model during the interactive process and within broader society); Areheart, *supra* note 2, at 183, 192.

<sup>201</sup> 42 U.S.C. § 12111(8).

<sup>202</sup> *Id.* § 12112(b)(5)(A); *see also supra* notes 4, 160–83 and accompanying text (giving an illustrative example of the interactive process between employee and employer).

<sup>203</sup> Organized labor has sustained such heavy legal and economic battering that union density has dropped to a near-historic low of 10.8%. U.S. DEP'T OF LAB., UNION MEMBERS—2020 (2021), <https://www.bls.gov/news.release/pdf/union2.pdf>. Union density in the United States today is far lower than its post-war height of 36% in 1953. SAMUEL ESTREICHER & MATTHEW T. BODIE, *LABOR LAW* 41 (2d ed. 2020). As of 2018 the figure for the private sector, 6.4%, is lower than the level that existed prior to the enactment of the NLRA. *Id.*

<sup>204</sup> *See* Lobel, *supra* note 119, at 496 (describing the problems associated with corporate reporting systems where management channels receiving complaints are embedded within the organization).

active process on equal footing. The mandate also shifts any costs of the accommodation onto employers, to whom most courts defer as to operational judgment in employment matters.<sup>205</sup> These dynamics do not lend themselves to an impartial forum unless the workplace is unionized and has the right to arbitrate a denial of an accommodation as a grievance under a collective bargaining agreement.<sup>206</sup>

The EEOC regulations do appear to incorporate the second factor—quality of interpersonal treatment—by guiding employers in two of the outlined steps to “consult” the employee about her or his disability and options for the accommodations.<sup>207</sup> But the third factor—the existence of formal rules and structures—seems to depend on the sophistication and scale of the employer, and the regulations strive against formality by characterizing the interactive process as “informal” and “flexible.”<sup>208</sup> Social science and forum studies have shown that racial minorities and women experience worse outcomes in informal negotiation settings overall.<sup>209</sup>

Finally, the last factor—“discretion of informal organizational authorities,” such as daily interactions between coworkers and super-

<sup>205</sup> Hundreds of court opinions have stated that judges do not sit as “super-personnel departments,” and that even under the ADA, “a statute that directly commands courts to second-guess the manner in which employers currently structure their enterprises.” Bagenstos, *The Structural Turn*, *supra* note 25, at 25 (quoting Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1115–16 & n.337 (2004)).

<sup>206</sup> See Hickox, *supra* note 12, at 157 (describing union efforts to incorporate antidiscrimination provisions in CBAs).

<sup>207</sup> See 29 C.F.R. pt. 1630, app. at 423 (2020).

<sup>208</sup> Lobel, *supra* note 119, at 496; 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. pt. 1630, app. at 423; see also Susanne M. Bruyère, William A. Erickson & Sara A. VanLooy, *The Impact of Business Size on Employer ADA Response*, 49 REHAB. COUNS. BULL. 194 (2006) (describing issues faced by smaller businesses in complying with the ADA).

<sup>209</sup> Delgado et al., *supra* note 197, at 1387–91, 1398–404 (describing the reasons for disparate experiences and outcomes in informal negotiations for racial minorities and women). For studies documenting worse outcomes for racial minorities and women in informal dispute resolution, see Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metrocourt Study*, 20 HAMLINE J. PUB. L. & POL’Y 211, 222, 248–90 (1999); Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC. REV. 767, 776–89 (1996); see also Gilat J. Bachar & Deborah R. Hensler, *Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don’t Know*, 70 SMU L. REV. 817, 829 (2017) (noting the dearth of studies using statistically significant samples apart from social science research, but “research on objective outcomes of mediation suggests that both women and minority males fare worse than white males”). Through his seminal work on the deformalization movement, Richard Delgado deployed social science theory to explain why the structural aspects “inherent in informality itself” would disempower minorities seeking remediation. Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality*, 70 SMU L. REV. 611, 612–13, 618–22 (2017) (synthesizing social science literature and empirical studies).

visors<sup>210</sup>—would depend on an organizational culture educated about disabilities to support a procedurally just outcome. The interactive process grants employers wide discretion to shape the dialogue as between supervisors or higher-level trained administrators. Fear of disability stigma and economic insecurity continue to dissuade employees from asking their employers to comply with the ADA under current law.<sup>211</sup> The most common reason workers with disabilities provide for not disclosing a disability is the risk of being fired or not hired, 73%, and a comparable share fear their supervisor would be unsupportive, 60.1%.<sup>212</sup> Because accommodations affect “the design of work and control of workers” within a company, employers continue to resist.<sup>213</sup>

Default incentives for employers to participate in the process center upon the employer’s interests in retaining a valued employee or in avoiding legal liability. The interactive process could increase the likelihood of an employer implementing an effective accommodation and reduce the risk of litigation.<sup>214</sup> Indeed, after the EEOC issued implementing regulations, the Third Circuit urged employers and employees to take the interactive process seriously as a form of settlement discussion to avoid litigation.<sup>215</sup> It soon elaborated on that view, making clear that it misapprehends the interactive process “as a less formal, less costly form of mediation,”<sup>216</sup> in spite of the fact that mediation requires the involvement of a neutral mediator.<sup>217</sup> However, the

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<sup>210</sup> Lobel, *supra* note 119, at 496.

<sup>211</sup> Cook, *supra* note 91, at 42–43.

<sup>212</sup> Von Schrader et al., *Perspectives on Disability Disclosure*, *supra* note 91, at 244; cf. Areheart, *supra* note 17, at 1963 (noting that procedural justice concerns highly influence whether individuals file sexual harassment complaints).

<sup>213</sup> See Harlan & Robert, *supra* note 185, at 405; see also Maestas et al., *supra* note 35, at 1007 (recommending ways for employers to increase employee self-reporting to address unmet accommodation needs); von Schrader et al., *Creating an Accommodating Workplace*, *supra* note 91, at 112–13, 113 fig.1 (demonstrating that the percentage of ADA charges regarding reasonable accommodation increased over twenty percent between 1993 to 2014).

<sup>214</sup> Employers have an incentive to participate in the full course of an interactive process, even if litigation ensues, because those that engage in the interactive process “are better positioned to defend themselves, as good-faith participation constitutes strong evidence” the employer acted reasonably. Flake, *supra* note 24, at 112.

<sup>215</sup> *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 149 (3d Cir. 1998) (en banc) (noting that an employer who does not engage in the interactive process “runs a serious risk that it will erroneously overlook an opportunity to accommodate a statutorily disabled employee, and thereby violate the ADA”).

<sup>216</sup> Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 316 n.6 (3d Cir. 1999).

<sup>217</sup> JULIE MACFARLANE, JOHN MANWARING, ELLEN ZWEIBEL & JONNETTE WATSON HAMILTON, *DISPUTE RESOLUTION: READINGS AND CASE STUDIES* 298 (2d ed. 2003) (describing impartiality and neutrality as the “critical defining characteristics” of a mediator).

substantial rates of non-accommodation in spite of these incentives are troubling.

In view of the default, with the employer as the party capable of maintaining the status quo of non-accommodation,<sup>218</sup> a disinterested referee would be instrumental. But the ADA does not make any available to intervene before an employee pursues legal action or, more importantly, before the employee is laid off, injured, or worse during the interactive process. Congress incorporated an administrative exhaustion requirement of Title VII into the ADA without making further provision for time-sensitive cases.<sup>219</sup> As employers are aware, the number of employees who believe they have experienced discrimination compared with those who actually pursue legal action in the form of an EEOC charge or lawsuit—respectively, 0.85% and 0.22% by one count—remains exceedingly low.<sup>220</sup> Organizational hierarchy and the lack of situationally specific guidance lessen the odds of the parties reaching a mutually satisfactory result.

### *B. Proposals to Adopt the Accommodations Mandate as a Model*

Notwithstanding these concerns, the accommodations mandate has been considered an attractive model for other social groups facing structural barriers in the workplace. After thirty years of experience with the ADA, a generation of Americans has become accustomed to the law's private, individualized approach to claiming disability rights, and employers have become more familiar with compliance obligations and with the benefits of accommodating employees. Proposals to extend the mandate would adopt the interactive process for accommodations for (1) pregnancy, (2) religious practice, (3) caregiving, and (4) all other workers. A possible consequence of enacting these proposals would be a reduction in the stigma workers with disabilities face when seeking accommodations, as expanding the mandate could shift organizational culture around such requests. However, unless there are concurrent efforts to conceive of structural change beyond individuals, these proposals may not substantially expand access to accommodations. I address each of these proposals in turn.

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<sup>218</sup> Bagenstos, "Rational Discrimination," *supra* note 3, at 870.

<sup>219</sup> 42 U.S.C. § 12117(a) (incorporating into ADA Title I sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of Title VII's enforcement provisions).

<sup>220</sup> Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 664, 704, 706 (noting high levels of "underclaiming" and providing an estimate of 3.4 million potential race discrimination claimants, of which only 28,912 file an EEOC charge, and of those only about 7,500, or 25.9%, file a lawsuit).

First, a proposal to extend the mandate to accommodate conditions related to pregnancy and childbirth is closest to becoming reality. During the second wave of feminism, civil rights advocates' early debates around pregnancy discrimination revolved around whether they should distance their arguments from those made in support of disability rights.<sup>221</sup> In passing the Pregnancy Discrimination Act (PDA), Congress amended Title VII so that discrimination because of sex included discrimination on the basis of pregnancy.<sup>222</sup> Relying on a parity-based model, the PDA requires that "women affected by pregnancy, childbirth, or related medical conditions . . . be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ." <sup>223</sup> Confusion over whether company policies or precedent for accommodations within an organization would be included in that analysis came to a head in 2015, when the Supreme Court's interpretation of the PDA in *Young v. United Parcel Service, Inc.* conceptually linked, by implication, the provision of pregnancy accommodations to accommodations provided to disabled and other workers who sought the same kind of accommodation.<sup>224</sup> The structural logic of this holding led antidiscrimination advocacy for pregnant workers to now converge with disability rights.

Women's rights and civil rights advocates were disappointed that the *Young* Court declined to hold that the PDA automatically requires employers to provide accommodations to pregnant workers

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<sup>221</sup> See, e.g., Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 942 (1985) (discussing pregnancy as neither a disability nor a dysfunction, but a "normal moment in the human reproductive process"); Maureen E. Eldredge, *The Quest for a Lactating Male: Biology, Gender, and Discrimination*, 80 CHI.-KENT L. REV. 875, 898 (2005) (same).

<sup>222</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

<sup>223</sup> 42 U.S.C. § 2000e(k). By requiring sameness of treatment, the PDA left pregnant employees vulnerable to judicial arbitrage over which kinds of coworkers would be sufficiently "similar" comparators so that they may prove disparate treatment. Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 963–64, 964 nn.6–7, 968 (2013) (summarizing mixed precedent as to whether employees who received light-duty assignments following workplace injuries and employees with disabilities who received ADA accommodations were viable PDA comparators).

<sup>224</sup> 575 U.S. 206, 229–30 (2015). *Young's* new approach is cloaked as a procedural evidentiary rule that would locate—and thereby define—subordination. One way to prove "significant burden," the Court explained, is through the plaintiff's "evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers." *Id.* Because employers subject to both the PDA and ADA must comply with them concurrently, the evidence will almost always turn on an employer's past provision of accommodations to disabled or other coworkers.

that they would have provided to nonpregnant workers.<sup>225</sup> By heeding the employer's argument that pregnant workers should not be granted "most-favored-nation status," the Supreme Court made their accommodations contingent upon organizational precedent for accommodating workers who were not pregnant.<sup>226</sup> An employer policy that imposes a "significant burden" on pregnant workers could be discriminatory if the organizational reasons provided are not sufficiently strong to "justify" the burden.<sup>227</sup> If not, the Court held, then the unjustified burden on the pregnant worker gives rise to "an inference of intentional discrimination."<sup>228</sup> The logical extension of *Young's* holding is that detecting sex-based discrimination could remain largely contingent upon others' abilities to achieve structural justice first, i.e., most likely under the ADA's accommodations framework.<sup>229</sup> Such a convoluted system for pregnant workers has proven to be "extremely challenging" to litigate and popular support for an affirmative approach has grown.<sup>230</sup>

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<sup>225</sup> See, e.g., Dina Bakst, *Peggy Young's Victory Is Not Enough*, U.S. NEWS & WORLD REP. (Mar. 26, 2015), <https://www.usnews.com/opinion/economic-intelligence/2015/03/26/peggy-young-supreme-court-victory-is-not-enough-for-pregnant-workers> (noting the "tremendous problem" under the *Young* framework, as "[n]ot only are pregnant workers expected to produce enough evidence to prove their employer's intention was discriminatory, they must do so, in many cases, under challenging circumstances where employers have no official policies or have obscured them for their own benefit," whereas workers protected by the ADA "can bypass this arduous journey of proof").

<sup>226</sup> Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 560–61, 582 (2017) (quoting *Young*, 575 U.S. at 221) (arguing that *Young* revised the PDA to support claims that "blur[] the boundary between disparate impact and disparate treatment" by broadening the potential groups of comparators). Stephanie Bornstein persuasively describes the *Young* framework as one intended to uncover sex-based stereotypes against pregnant workers through "questioning the process and structures in the workplace," albeit as a preliminary step. Stephanie Bornstein, *The Politics of Pregnancy Accommodation*, 14 HARV. L. & POL'Y REV. 293, 313 (2020).

<sup>227</sup> *Young*, 575 U.S. at 229. The comparative argument ostensibly operates as a form of impeachment against claims of operational difficulty. For example, the *Young* Court suggested that a pregnant employee might argue that UPS's "multiple policies . . . accommodat[ing] nonpregnant employees with lifting restrictions" would indicate that "its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong," and "that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination." *Id.* at 230.

<sup>228</sup> *Id.*

<sup>229</sup> See, e.g., Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After Young v. UPS*, 50 U.C. DAVIS L. REV. 1423, 1439 (2017) (predicting that employees of small companies may be less likely to find comparators who have actually been accommodated pursuant to the ADA, or other applicable policies for comparable limitations, as evidence of discriminatory denial of pregnancy accommodation).

<sup>230</sup> Joanna Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims After Young v. United Parcel Service, Inc.*, 14 HARV. L. & POL'Y



There is now broad bipartisan appetite for transitioning pregnancy accommodations from the parity framework to the ADA's accommodations framework. The *Young* decision ramped up support for the Pregnant Workers Fairness Act (PWFA),<sup>231</sup> a bill that would require employers to provide reasonable accommodations to employees who have work limitations stemming from pregnancy, childbirth, or related medical conditions, expressly incorporating the ADA interactive process by reference.<sup>232</sup> After an impressive bipartisan effort, state-law versions of the PWFA have now passed in thirty states and five cities.<sup>233</sup> For the first time, in 2020, the federal PWFA passed in the U.S. House of Representatives, by a vote of 329–73, and it did so again in May 2021.<sup>234</sup> If enacted, pregnant workers will more explicitly be deputized as private agents for structural change. How-

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REV. 319, 339–40, 342 (2020) (identifying post-*Young* decisions in which courts demand “a high threshold showing of who is ‘similar’ to a pregnant worker,” such as source of impairment, type of impairment, or common supervisor or work location, particularly at the pleading stage pre-discovery); *infra* note 231.

<sup>231</sup> See Marianne Levine, *States Act on Pregnancy Discrimination*, POLITICO (Sept. 20, 2016, 10:00 AM), <https://www.politico.com/tipsheets/morning-shift/2016/09/states-act-on-pregnancy-discrimination-seattle-city-council-passes-scheduling-law-dhs-addressing-incomplete-fingerprint-records-216416> (referring to the *Young* decision as the “principal catalyst” for broadening support for the PWFA); see also Alisha Haridasani Gupta & Alexandra E. Petri, *There’s a New Pregnancy Discrimination Bill in the House. This Time It Might Pass*, N.Y. TIMES (Mar. 4, 2021), <https://www.nytimes.com/2021/03/04/us/pregnancy-discrimination-congress-women.html> (explaining that pregnancy discrimination remained “commonplace” after the *Young* decision, particularly as the Chamber of Commerce realized that the opinion failed to provide clear guidance regarding employers’ obligations and became motivated to endorse the PWFA).

<sup>232</sup> See The Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. § 5(7) (2021). Under section 5(7) of the bill:

[T]he terms “reasonable accommodation” and “undue hardship” have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms are construed under such Act and as set forth in the regulations required by this Act, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.

*Id.* § 5(7).

<sup>233</sup> *Our Issues: Pregnant Workers Fairness*, A BETTER BALANCE, <https://www.abetterbalance.org/our-issues/pregnant-workers-fairness> (last visited Sept. 11, 2021). Conservatives are much more willing to accept accommodation requirements as nondiscrimination mandates “in contexts that are not explicitly racial,” such as disability and pregnancy accommodation. Reva B. Siegel, Comment, *The Constitutionalization of Disparate Impact—Court-Centered and Popular Pathways: A Comment on Owen Fiss’s Brennan Lecture*, 106 CALIF. L. REV. 2001, 2011 (2018).

<sup>234</sup> The Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (as passed by House of Representatives, Sept. 17, 2020); The Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. § 5(7) (2021); *H.R. 1065 – Pregnant Workers Fairness Act*, CONGRESS.GOV <https://www.congress.gov/bill/117th-congress/house-bill/1065/actions?q=%7B%22search%22%3A%5B%22nadler%22%5D%7D&r=5&s=3> (last visited Aug. 22, 2021) (noting vote of 305 yeas and 101 nays under “Actions”).

ever, the data reflect ongoing power disparities akin to the ADA context in seeking pregnancy accommodations,<sup>235</sup> particularly for Black women, who may face much higher levels of pregnancy discrimination.<sup>236</sup> Whether greater familiarity with the potential limitations of a single condition under the PWFA, as opposed to the full array of disabilities under the ADA, will hasten changes in organizational norms remains to be seen.

A second proposal involves extending the interactive process to requests for religious accommodations under Title VII. In *Interactive Religious Accommodations*, Dallan Flake notes that EEOC guidance from 1980 merely recommended that employers try to accommodate the employees at minimal cost to avoid incurring an undue hardship, and did not discuss dialogue with the employee.<sup>237</sup> Religious accommodations are subject to stringent cost standards—employers have a defense for anything that imposes more than a de minimis expense.<sup>238</sup> Only after considerable judicial experience with the ADA did the EEOC encourage mutual information-sharing for employees' requests

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<sup>235</sup> Before *Young*, more than a quarter million women each year were denied their requests related to their health and well-being. CHILDBIRTH CONNECTION, NAT'L P'SHIP FOR WOMEN & FAMILIES, LISTENING TO MOTHERS: THE EXPERIENCES OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE 3 (2014), <https://docplayer.net/12159547-Listening-to-mothers-the-experiences-of-expecting-and-new-mothers-in-the-workplace.html>. Because thirty-eight to forty-two percent of women also reported that they never asked their employers for pregnancy accommodations that they needed, the quarter-million figure is likely a serious underestimate of the barriers pregnant workers face. EUGENE R. DECLERCO, CAROL SAKALA, MAUREEN P. CORRY, SANDRA APPLEBAUM & ARIEL HERRLICH, CHILDBIRTH CONNECTION, LISTENING TO MOTHERS III: NEW MOTHERS SPEAK OUT 36 tbl.18 (2013), <https://www.nationalpartnership.org/our-work/resources/health-care/maternity/listening-to-mothers-iii-new-mothers-speak-out-2013.pdf>. Pregnant workers after *Young* continue to face difficulties securing accommodations after the PDA. See *supra* notes 229–30 and accompanying discussion.

<sup>236</sup> Recent EEOC filing figures suggest that racism operates within this structural inequality: Three in ten pregnancy discrimination charges are filed by Black women, although they comprise only fourteen percent of the working-age population. NAT'L P'SHIP FOR WOMEN & FAMILIES, BY THE NUMBERS: WOMEN CONTINUE TO FACE PREGNANCY DISCRIMINATION IN THE WORKPLACE: AN ANALYSIS OF U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGES (FISCAL YEARS 2011–2015), at 3 (2016), <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf>. The report did not subdivide PDA claims by form of discrimination, i.e., pregnancy status, or denial of pregnancy accommodation. In contrast to the ADA, early data reflects that employers may abide by state-level PWFAs' accommodations mandates and improve retention of pregnant workers somewhat, perhaps because employers may be more familiar with the accommodations, and the range of requests may be narrower and more time-limited. See Jennifer Bennett Shinall, *Protecting Pregnancy*, 106 CORNELL L. REV. 987, 1003, 1013, 1016 (2021) (highlighting the empirical data).

<sup>237</sup> Flake, *supra* note 24, at 83 (citing 29 C.F.R. § 1605.2 (2019)).

<sup>238</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

for religious accommodations.<sup>239</sup> In a 2008 Compliance Manual, the agency noted that courts have “endorsed a cooperative information-sharing process” for religious accommodation requests similar to the ADA interactive process for disability accommodations.<sup>240</sup> It is possible that political appetite for reforms to accommodate religious practice<sup>241</sup> will soon match judicial approval of the interactive process under the ADA and perhaps legislative approval of the PWFAs.

A third proposal would add a provision to the Family and Medical Leave Act (FMLA) that would require employers to engage in a good-faith interactive process with workers over medical or caregiving leaves, which are job-protected under the law.<sup>242</sup> As others have noted, an “ideal worker” norm persists within firms, in which unavoidable caregiving needs contravene entrenched “full-time face-time” expectations because of requests for changes in hours, shifts, schedules, attendance policies, overtime requirements, and leave of absence policies.<sup>243</sup> Under Rachel Arnov-Richman’s proposal,

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<sup>239</sup> See Flake, *supra* note 24, at 84 (citing U.S. EQUAL EMP. OPPORTUNITY COMM’N, DIRECTIVES TRANSMITTAL NO. 915.003, EEOC COMPLIANCE MANUAL, 48–49 (2008)).

<sup>240</sup> *Id.* Two courts of appeal have approved of the interactive process for Title VII religious accommodations claims. See EEOC v. AutoNation USA Corp., 52 F. App’x 327, 329 (9th Cir. 2002) (implicitly endorsing the interactive process); see also Thomas v. Nat’l Ass’n of Letter Carriers, 225 F.3d 1149, 1155 (10th Cir. 2000) (explicitly endorsing the interactive process).

<sup>241</sup> In recent years, religious organizations and the Trump Administration sought to expand the scope of exemptions *in favor of* discrimination in contravention of civil rights law, with a primary focus on shielding employers from civil rights liability or expanding “conscience”-based objections of religious employees. See 3 EMP. DISCRIMINATION L. & LITIG. LGBTQIA+ Discrimination § 27:20, Westlaw (database updated July 2021) (discussing religious exemptions and LGBTQIA+ patients). Nonetheless, the EEOC did try to encourage employers to also accommodate religious practices under Title VII’s much narrower accommodations mandate. On January 15, 2021, the majority-Republican members of the EEOC approved a revision to its non-binding guidance manual addressing Title VII religious discrimination. *Directives Transmittal No. 915.063, Section 12: Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> (last visited Aug. 1, 2021); see Kenneth C. Broodo, *Proposed New Religious Discrimination Guidance: EEOC Seeds Exceptions to Longstanding ‘More than Minimal Cost’ Defense*, NAT’L L. REV. (Dec. 14, 2020), <https://www.natlawreview.com/article/proposed-new-religious-discrimination-guidance-eeoc-seeds-exceptions-to-longstanding> (applauding EEOC changes to Title VII guidance, which included illustrating “exceptions” to the de minimis standard for establishing undue burden, such as changes to scheduling, tasks, location, and voluntary shift swaps).

<sup>242</sup> Arnov-Richman, *Public Law and Private Process*, *supra* note 24, at 56. The FMLA is a firm entitlement to unpaid, job-protected leave for one’s own serious health condition or leave to provide care for newborns, new adoptees, or family members with serious health conditions. See Family and Medical Leave Act of 1993, 29 U.S.C. § 2601.

<sup>243</sup> See Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1101 n.1, 1103–15 (2014) (quoting Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, *supra* note 15, at 6) (outlining this norm and providing examples of its

employers would be required to negotiate with employees over their leave schedule or job duties when the need for leave arises, or face a monetary penalty.<sup>244</sup> Her proposal would also use the employer's lack of good-faith participation in the interactive process as the justification for a shift in burden of proof in cases where the plaintiff alleges failure to accommodate or retaliation.<sup>245</sup>

By refining the carrots and sticks of the interactive process, the proposal aims to achieve "incentivized organizational justice" that would rely on the interactive process to enhance standard-setting and compliance behaviors: a form of "private due process."<sup>246</sup> This approach would position employers as necessary partners in undoing the second-generation discrimination that inures in workplaces<sup>247</sup> under a view that regulation cannot generate additional forms of intervention from the state.<sup>248</sup> It would introduce a monetary penalty for employers who fail to participate in the interactive process and add a litigation penalty by shifting the burden of proof onto employers as to resulting claims (rather than a substantive-law penalty).<sup>249</sup> But it is purposefully limited to the existing ADA framework based upon an assessment of politically viable options and concern for maximizing judicial consistency in any proposal for reform.<sup>250</sup>

A final proposal for reform, the most ambitious, would be a universal accommodations system similar to the ADA's that would be available to anyone regardless of social status, so long as the employees are work-capable and the accommodation is effective in elevating functionality.<sup>251</sup> Proposed by a group of four scholars, Michael Ashley Stein, Anita Silvers, Bradley Areheart, and Leslie Pickering Francis, a universal regime would avoid employers and coworkers resenting—and thus stigmatizing—the provision of accom-

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manifestation); *see also, e.g.*, Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 *DENV. U. L. REV.* 963, 981–86 (2014) (providing examples of judicial embrace of these norms); Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, *supra* note 15, at 10–12 (further outlining the ideal worker norm).

<sup>244</sup> *See* Arnow-Richman, *Public Law and Private Process*, *supra* note 24, at 56, 58 (proposing incentive for employers to comply with procedural right by requiring blatant violations to accrue liquidated damages equivalent to twice the employee's pay for the twelve-week FMLA leave period).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 27, 67.

<sup>247</sup> *Id.* at 64.

<sup>248</sup> *See* Estlund, *supra* note 123, at 321–22 (articulating this view).

<sup>249</sup> Arnow-Richman, *Public Law and Private Process*, *supra* note 24, 58–59.

<sup>250</sup> *Id.* at 58.

<sup>251</sup> Stein et al., *supra* note 1, at 737–44.

modations as “special treatment.”<sup>252</sup> A universal mandate is attractive in that it could vastly expand the transformation of exclusionary structures and avoid factually intensive negotiation over the degree of disability-related limitations on work.<sup>253</sup>

A negotiated mandate with the cost-conscious undue hardship analysis remains intact under this proposal. There is some appeal to advancing a parity-based norm of accommodations so that no social group has an exclusive claim to the mandate. But formally extending a process to all other employees—who have already been doing the lion’s share of the asking<sup>254</sup>—does not on its own remove the subordinating factors tied to ignorant or hostile denials of accommodations.<sup>255</sup> Broadly expanding entitlement without further addressing the confluence of factors that maintain social hierarchy within workplaces disregards our knowledge of who is privileged to ask and receive. Recall that only five percent of accommodations requests originate from workers with disabilities, and those likeliest to receive accommodations are white, highly placed, highly paid, or male.<sup>256</sup>

Disability law, and antidiscrimination laws generally, require society to acknowledge subordination-conscious measures as a means of social history.<sup>257</sup> In many respects, movements for racial and gender equality may look to disability law’s methodology, which illuminates possibilities for antidiscriminatory restructuring of institutions more generally.<sup>258</sup> In a lesser-known chapter of employment law, serv-

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<sup>252</sup> *Id.* at 749–55; see also Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85 (2016) (proposing to ameliorate “special treatment stigma” accompanying accommodations by providing reasonable accommodation to everyone under a universal accommodations mandate, unless it poses an undue hardship); Emens, *Integrating Accommodation*, *supra* note 59, at 861–66 (discussing how accommodations could create a range of benefits to third parties, such as promoting ergonomics that help prevent injuries for all, and lower employers’ workers’ compensation costs, as well as costs, depending upon design of the accommodations).

<sup>253</sup> Stein et al., *supra* note 1, at 750–52.

<sup>254</sup> See *supra* note 156 and accompanying text.

<sup>255</sup> The proposal to entitle all work-capable individuals to any accommodation that is effective does not alter the current system, as an accommodation is considered reasonable under the ADA as long as it is “effective.” See *supra* note 55 and accompanying text.

<sup>256</sup> See discussion *supra* Section II.A.2; *supra* note 156.

<sup>257</sup> See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 401, 456–57, 476–84 (2000) (urging the prioritization of the ADA’s antisubordination purpose over extending a benefit to everyone); RUTH O’BRIEN, *BODIES IN REVOLT: GENDER, DISABILITY, AND A WORKPLACE ETHIC OF CARE* 6 (2005) (describing disability as an ideology in the sense of a frame by which people “interpret and make events meaningful”).

<sup>258</sup> See *supra* notes 185–213; *infra* notes 313–17, 359, 361 and accompanying text; Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 328 (2018) (proposing disability law as an analytical lens for race discrimination and structural inequality, and noting that “[d]isability law recognizes that many conditions understood as disabling . . .

icemembers swiftly benefited from the ADA's accommodations model when, in 1991, Congress adopted and significantly expanded it to require employers to make "reasonable efforts" to reemploy them to an "escalator position," i.e., to help them requalify for their pre-service job or to perform the duties of the most proximate job they would have occupied if they had not served in the military.<sup>259</sup> Reflecting the policy priorities afforded to combatting anti-military bias, such employers must undertake this "accommodation plus" approach regardless of whether the servicemember has a disability.<sup>260</sup>

The origins of our current antidiscrimination mandates communicate our understanding of power differentials that would frustrate material outcomes under a universal mandate.<sup>261</sup> As a result, subordination-conscious frames for accommodations and publicizing accessibility and innovation for all employees remain necessary.

### III

#### NEW APPROACHES TO REMEDIATING STRUCTURAL BARRIERS

If we are to facilitate a universal accommodations mindset, new approaches are needed. Cass Sunstein specifically faulted disability law's regulatory design as an example of either legislative "failure of diagnosis" or failure of "coordination," resulting in a lack of accountability and responsiveness.<sup>262</sup> Proposals that simply replicate the ADA accede to Congress's choice to minimize federal agency intervention and place the onus of social change primarily upon each individual who needs an accommodation.<sup>263</sup> Courts, in turn, continue to defer to

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create disadvantage when combined with an inhospitable social or physical environment"); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 422-41 (2011) (observing that anti-stereotyping mandates that justified the PDA and the FMLA have partially shifted the costs of reproduction from individual women to the larger society); Lin, *supra* note 23, at 769-70 (proposing multiaxial analysis, a contextually variable approach to discrimination against social traits that account for relational, structural, or institutional dynamics).

<sup>259</sup> Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4313(a)(3)-(4); Marcy L. Karin, "Other than Honorable" Discrimination, 67 CASE W. RESV. L. REV. 135, 149-51 (2016).

<sup>260</sup> Karin, *supra* note 259, at 153.

<sup>261</sup> See *supra* Section I.B.1.

<sup>262</sup> CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 93, 105 (1990). Sunstein was aware then that the passage of the ADA was imminent, but his observation that "no single institution is responsible for introducing coherence" and that some policies "work at cross-purposes" remains true. *Id.* at 93.

<sup>263</sup> See Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 436-37 (2007), (noting the weak results of the private attorney general model for disability rights and arguing for more robust executive enforcement, such as structural

businesses' discretion to structure their workplaces.<sup>264</sup> Such proposals also weaken alternatives such as disparate impact theory, despite the fact that such approaches can address barriers preventatively and more powerfully at the structural level.<sup>265</sup>

The original ADA bet on private process and the liberal individual rights model to advance broad structural change.<sup>266</sup> If the accommodations mandate represents a form of privatized public law but its design prevents it from functioning as intended, how, then, should we proceed? In this Part, I begin to develop new approaches commensurate with the need for targeted civil rights policy that respond to the legal developments and concerns raised in Parts I and II. These include reforms designed to advance structural analysis, antidiscriminatory norms, and regulation at scale, including publicizing information gathering and access to detailed data regarding precedent for accommodations by position and industry, enhancing collective legal approaches to dismantling ableist structures, and expanding the social insurance model.

### A. Addressing Information Disparities

Contemporary political discourse has revived demands for intelligent governance based upon empirical expertise,<sup>267</sup> particularly one

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litigation, i.e., “a sustained pattern of cases against large power structures invoking the power of the courts to oversee detailed injunctive relief”).

<sup>264</sup> See Bagenstos, *The Structural Turn*, *supra* note 25, at 23, 25–26 (stating judges “balk . . . at inserting themselves deeply into how employers structure their workplaces or regulate day-to-day interactions among workers”).

<sup>265</sup> See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 755, 780 (2006) (concluding that disparate impact theory has limited success outside of challenges to written tests and is a difficult theory under which to succeed because it cannot replace the consensus created by social movements).

<sup>266</sup> See Arnow-Richman, *Public Law and Private Process*, *supra* note 24, at 50–51, 55–56 (applying the term “private process” to the ADA accommodations framework and advocating an extrapolated “private due process” approach to organizational justice). Some scholars have observed that private enforcement regimes like U.S. civil rights laws “produce fragmented and incoherent policy” due to the decentralized structure of the judiciary and the uneven issues presented in a party-driven litigation system. Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 667–68 (2013). This phenomenon is foregrounded in the ADA’s undue hardship defense and regulatory interactive process.

<sup>267</sup> See, e.g., Rebecca M. Bratspies, *Regulatory Trust*, 51 ARIZ. L. REV. 575, 576, 606–08 (2009) (describing the role of public trust in legitimizing the regulatory state, and characterizing the regulatory state as grounded in expertise, stewardship, and transparency: “[T]he public must be satisfied, not only with a decisionmaker’s technical qualifications, but also with the regulatory [system’s] motivations, and its ability to construct an administrative system that will function as intended”). For example, the Occupational Safety and Health Administration (OSHA) has drawn heavy criticism during the COVID-19 pandemic for failing to take concrete steps to protect workers from a fatal pathogen, despite a deluge of credible complaints. It did not issue a COVID-19 safety rule until June

that recognizes worker well-being as crucial to a healthy democracy and a strong, sustainable economy.<sup>268</sup> Congress conceived of disability accommodations as a form of social responsibility,<sup>269</sup> but did not require the federal government to address the information deficit employers and employees encounter in the interactive process.<sup>270</sup> Today, many employers report that they have evaluated decisions regarding accommodations based upon considerations extending beyond the cost-benefit frame that animated much of the 1990 ADA and its early regulations, such as improved coworker interactions, increases in overall company morale, company productivity, safety, attendance, interactions with customers, and a broader customer base.<sup>271</sup>

Since most decisions by employers are private, including the millions of decisions made under the ADA, the statute does not require the state to take responsibility for remediating large-scale, industrial discriminatory conduct.<sup>272</sup> If employers, industrial sectors, and the

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10, 2021—one which applied only to the health care sector. See Opinion, *Why Is OSHA AWOL?*, N.Y. TIMES (June 21, 2020), <https://www.nytimes.com/2020/06/21/opinion/coronavirus-osh-work-safety.html> (criticizing OSHA's issuance of only voluntary, general guidelines for worker safety during the pandemic and only a single citation amid 5,000 complaints related to COVID-19); Bruce Rolfsen, *OSHA Limits Long-Awaited Virus Safety Rule to Health Care*, BLOOMBERG L. (June 10, 2021), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/true/XBSUMHHS000000> (noting public pressure on OSHA since the earliest days of the pandemic to enact a standard to safeguard workers).

<sup>268</sup> See Lindsay F. Wiley & Samuel R. Bagenstos, *The Personal Responsibility Pandemic: Centering Solidarity in Public Health and Employment Law*, 52 ARIZ. ST. L.J. 1235, 1235–37 (2020) (situating workplace health and welfare as an intrinsic determinant of public health). See generally Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 213, 222 (2012) (describing the ecological model, which “emphasizes structural explanations for health behaviors and outcomes,” as the currently dominant model of public health science and practice).

<sup>269</sup> See *supra* Section I.B.

<sup>270</sup> Employers also face difficulties identifying or assigning values to variables outside of monetary costs such as effect on employee loyalty and workplace morale, creating informational deficits that may impede rational choice. Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1097 (2010); see also Susan Sturm, *Designing the Architecture for Integrating Accommodation: An Institutionalist Commentary*, 157 U. PA. L. REV. PENNUMBRA 11, 13 (2008) (arguing that employers need to know what questions to ask during an interactive process and proposing that employers seek to reduce bias and advance inclusion by looking at processes and routines that allow workers to thrive).

<sup>271</sup> *Benefits and Costs of Accommodation: Introduction*, JOB ACCOMMODATION NETWORK, <https://askjan.org/topics/costs.cfm> (last updated Oct. 21, 2020).

<sup>272</sup> See *supra* Part II; SUNSTEIN, *supra* note 262, at 54–55 (positing that a wide range of private conduct imposes external costs not adequately accounted for in the private market, and a “workable theory of externalities” may require political theory “rather than science or even economics”).



state were already well-versed in more macroscopic approaches to restructuring and legal coordination, Americans could benefit from orderly, humane, and racially equitable approaches to collective accommodations for disabilities.<sup>273</sup>

To facilitate the flow of information about how society can remediate structural discrimination in the workplace (and how others have already done so), the state should engage in broad-scale collection, analysis, and dissemination of information about workers with disabilities. Thus far, the government has stopped short of undertaking comprehensive analysis of structural discrimination in employment, forcing other actors to assume that responsibility. While politics surrounding increases in regulatory oversight are polarized, legislators should embrace an information-based route by funding the collection of detailed information about accommodations others have successfully achieved.<sup>274</sup>

Unlike Title VII's active solicitation of demographic race and gender data, the ADA prohibits employers from making a disability-

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<sup>273</sup> The onset of the COVID-19 pandemic illustrated the chaotic, ad hoc, and uneven nature of accommodations, in response to environmental hazards that not only imperiled every member of society, but rendered them temporarily disabled within the meaning of the social model of disability. See Samantha Artiga, Rachel Garfield & Kendal Orgera, *Communities of Color at Higher Risk for Health and Economic Challenges Due to COVID-19*, KAISER FAM. FOUND. (Apr. 7, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/communities-of-color-at-higher-risk-for-health-and-economic-challenges-due-to-covid-19> (“Overall, nonelderly Black, Hispanic, and [American Indian and Alaskan Native] adults are more likely than Whites are to report fair or poor health.”); see also Alex Ellerbeck, *Looming Fight: Millions of Disabled Workers Could Ask for COVID-19 Protections Under ADA*, CTR. FOR PUB. INTEGRITY (Aug. 28, 2020), <https://publicintegrity.org/health/coronavirus-and-inequality/disabled-workers-covid-19-protections-ada> (observing how “[a]t least 27 million workers under the age of 65 suffer from medical conditions—including heart disease, diabetes and chronic kidney disease—that put them at increased risk of dying from COVID-19 . . . [and such] conditions tend to be more prevalent among people of color”). Advocacy by unionized employees underscored the strength of disability law as a source of positive rights and potential for collective accommodations, as well as the systemic inequities that generate common grounds for future advocacy. See, e.g., *infra* notes 299–300, 320–21; Ethan DeWitt, *As N.H. Schools Prepare to Reopen, Unions Fight for Teacher Protections*, CONCORD MONITOR (July 18, 2020), <https://www.concordmonitor.com/As-New-Hampshire-schools-prepare-reopening-unions-fight-for-teacher-protections-35254450> (discussing de facto sectoral negotiations over disability accommodations during the COVID-19 pandemic between the National Education Association, United Federation of Teachers, and all school districts within the state).

<sup>274</sup> Private litigation has steadily displaced resources made available to regulatory agencies, making such an information-based route more challenging to initiate. Between President Nixon assuming office in 1969 and the end of the twentieth century, private federal statutory lawsuits increased 800%. Burbank et al., *supra* note 266, at 682. Regulatory theorists attribute this trend to a Congressional preference for private enforcement mechanisms whenever an executive of the opposing party occupies the White House to insulate operation of the statute from executive discretion. *Id.*

related inquiry prior to or during employment to avoid the possibility that bias will attach to a positive answer.<sup>275</sup> To circumvent this problem, the government, rather than the employer, could supplement the U.S. Census process to collect responses about current and past experiences with accommodations anonymously.<sup>276</sup>

Data collection advances agency objectives by providing the basis for monitoring and enabling the government to strategically allocate resources where they are needed most.<sup>277</sup> For example, the EEOC has required disclosure of race and gender data for employees of large employers and federal contractors since 1966,<sup>278</sup> but only recently has it begun to explore its potential for strengthening civil rights compliance. In December 2020, the agency unveiled a semi-public database making available demographic data collected from the mandatory EEO-1 forms by job category and geographic location, but not by employer.<sup>279</sup> Drawing from 2008 EEO-1 data, the information from 73,000 businesses encompasses 56 million workers—approximately a third of the U.S. civilian workforce.<sup>280</sup> Although the government's policy outcomes from this macroscopic approach still remain inchoate, an information-rich approach would bear on an influential theory of compliance: Regulators are likeliest to secure compliance when they act as “benign big guns,” that is, they can apply moral suasion more

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<sup>275</sup> 42 U.S.C. § 12112(d)(2)(A), (4)(A); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2000-4, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE ADA (2000), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees> (explaining “what is a ‘disability-related inquiry’”).

<sup>276</sup> By not maintaining the identity of respondents, the federal government as a potential employer of any respondents also would not violate the ADA's confidentiality provisions.

<sup>277</sup> In arguing for a “minimal sufficiency principle” for agency regulation, Ian Ayres and John Braithwaite have quipped: “Punishment is expensive; persuasion is cheap.” IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 19 (1992).

<sup>278</sup> See 29 C.F.R. § 1602.7 (2020) (requiring employers under Title VII jurisdiction with 100 or more employees to collect and file EEO-1 demographic data about employees, pursuant to 42 U.S.C. § 2000e-8(c)); 41 C.F.R. § 60-1.7 (2020) (requiring EEO-1 forms from all private federal contractors with 50 or more employees that receive federal contracts exceeding \$50,000); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EMPLOYER INFORMATION REPORT EEO-1, [https://www.eeoc.gov/sites/default/files/migrated\\_files/employers/eeo1survey/eeo1-2-2.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/employers/eeo1survey/eeo1-2-2.pdf) (listing race, ethnicity, and sex as among the required EEO-1 demographic categories employers must collect and file).

<sup>279</sup> Vin Gurrieri, *New EEOC Web Tool Aims to Sharpen Diversity Data Access*, LAW360 (Dec. 2, 2020, 11:05 AM), <https://www.law360.com/articles/1333696/new-eeoc-web-tool-aims-to-sharpen-diversity-data-access> (noting searchable online data excludes employer identities and employees' pay rates).

<sup>280</sup> *Id.*; *Table A-1. Employment Status of the Civilian Population by Sex and Age*, U.S. BUREAU OF LAB. STATS. (July 2, 2021), <https://www.bls.gov/news.release/empsit.t01.htm> (entry for civilian labor force for June 2021).

effectively when they have “bigger and . . . more various . . . sticks” to sanction noncompliance with discrimination law.<sup>281</sup>

The government could also administer the survey so as to provide itself and the public with valuable accommodations information. It currently surveys the general population through the U.S. Census on specific reasonable accommodations needed and provided, but it should further inquire into respondents’ specific disabilities (if any),<sup>282</sup> job title, employer, location, and sectoral industry.<sup>283</sup> Evaluating the effectiveness of even the current mandate requires access to reliable, in-depth information managed by the state, an institution that is not oriented toward profit, but large enough to aggregate and publicize Census-level data beyond the 60,000 households currently sampled.<sup>284</sup>

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<sup>281</sup> AYRES & BRAITHWAITE, *supra* note 277, at 19. On the EEOC’s interest in revisiting its look-askance approach to federal contractors adopting an affirmative action plan despite having the technology to require regulated companies to submit them for inspection, see Paige Smith, *Prospect of Affirmative Action Checks Worries U.S. Contractors*, BLOOMBERG L. (Apr. 8, 2021, 5:46 AM), <https://news.bloomberglaw.com/daily-labor-report/prospect-of-affirmative-action-checks-worries-u-s-contractors> (describing enforcement blind spots and the agency’s renewed interest in collecting plans for the first time).

<sup>282</sup> Posing the questions to all respondents continues current Census practices, as data reflect that ninety-five percent of individuals had requested an accommodation at work did not have a disability. Von Schrader et al., *Accommodation Requests*, *supra* note 156, at 337, 338 fig.4. If widely publicized, this fact would vitiate the assumption that coworkers will resent the provision of accommodations to people with disabilities as receiving special treatment or as undeserving. See Dorfman, *supra* note 10, at 596, 609, 616 (reporting empirical findings that a cognitive bias toward “deservingness” as to whether one should receive a disability accommodation is grounded in considerations of ethics and fairness). At the outset of this data-gathering initiative, a goal may be to secure nationally representative samples.

<sup>283</sup> The Current Population Survey (CPS), sponsored through the U.S. Department of Labor’s Office of Disability Employment Policy, asks members of the civilian noninstitutionalized population broad questions about the nature of any disabilities, whether any accommodations were requested, the type of accommodations requested, and whether the accommodation was granted. Von Schrader et al., *Accommodation Requests*, *supra* note 156, at 332, 333 tbl.1. Experts have urged that national surveys be expanded to include “highly informative” questions regarding respondents’ demographic data, occupation, and—presently limited—industry characteristics. *Id.*; see also, e.g., Deborah B. Balsler, *Predictors of Workplace Accommodations for Employees with Mobility-Related Disabilities*, 39 ADMIN. & SOC’Y 656, 657 (2007) (noting shortcomings in large, public data sets, including the lack of comprehensive models of the intersection between socioeconomic characteristics and workplace and job characteristics). The American Time Use Survey, a subset of CPS, intermittently includes questions on access to paid and unpaid leave. *American Time Use Survey (ATUS) Leave Module Microdata Files*, U.S. BUREAU OF LAB. STATS. (Sept. 24, 2019), <https://www.bls.gov/tus/lvdatafiles.htm>. And in 2020, the CPS surveyed the availability of remote work. *Measuring the Effects of the Coronavirus (COVID-19) Pandemic Using the Current Population Survey*, U.S. BUREAU OF LAB. STATS. (Oct. 2, 2020), <https://www.bls.gov/covid19/measuring-the-effects-of-the-coronavirus-covid-19-pandemic-using-the-current-population-survey.htm>.

<sup>284</sup> *Methodology*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/cps/technical-documentation/methodology.html> (last visited June 30, 2021). The U.S. Census

Because policy, enforcement, and data-gathering expertise related to disability rights are housed across several agencies, including the EEOC, DOJ, DOL, and U.S. Census Bureau (within the Department of Commerce), it may be necessary to institute a process to coordinate these functions.

To guarantee anonymity and workers' ability to access the results, the government may administer the survey in multiple languages with an online option, as it does with the Census. Respondents' privacy can be preserved when the data is made available to the public, such that it is de-identified, i.e., only done in a manner that does not reveal any individual employee's identity and personal information. Directly surveying workers would avoid the proverbial ostrich with its head in the sand. As discussed earlier, employers continue to fight tooth and nail to avoid disclosing pay equity data in conjunction with the race and gender statistics the EEOC has required them to disclose annually for decades.<sup>285</sup>

Centralizing access to the information needed by parties to the interactive process would improve the procedural fairness of the dialogue, particularly as the quality of decisionmaking relies upon objectivity, factuality of decisionmaking, and consistency.<sup>286</sup> Individual employees do not possess the institutional knowledge that could rebut employers' hardship arguments during the interactive process. Moreover, since all accommodations are time sensitive, expecting employees to receive information on prior accommodations through discovery undermines the goals of the ADA. Moreover, while not every past accommodation may be suitable for a future need elsewhere, employers may not know what accommodations have been effective within the position or industry.<sup>287</sup>

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has asked questions about disability status since 1830. Currently the survey results assist federal, state, local, and tribal governments with planning and funding programs. *American Community Survey: Why We Ask Questions About Disability*, U.S. CENSUS BUREAU, <https://www.census.gov/acs/www/about/why-we-ask-each-question/disability> (last visited Aug. 8, 2021).

<sup>285</sup> See Paige Smith, Rebecca Greenfield & Jeff Green, *Gender Pay Reporting May Start in Weeks Across Corporate America*, BLOOMBERG L. (Mar. 6, 2019, 6:26 AM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X64UOPE8000000> (reporting that the U.S. Chamber of Commerce "strongly opposed" the additional demographic disclosures, and urged the Trump Administration to rescind the new rule); Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. Rev. 287, 300–13, 323–38 (2021) (summarizing political oscillation between EEOC approaches to expand, then reject EEO-1 data-gathering from employers under Presidents Obama and Trump, and advocating for imposing affirmative public disclosure requirements that track the pay, promotion, and harassment of employees by their sex and race).

<sup>286</sup> Lobel, *supra* note 119, at 496.

<sup>287</sup> Although there are no statistics regarding the extent to which the public is aware of prior accommodations beyond word of mouth, only four in ten large employers (i.e.,

Since 2002, however, the Supreme Court has all but required parties to assess “reasonableness” of an accommodation through precedent. In *US Airways, Inc. v. Barnett*, the Court held that plaintiffs could establish that an accommodation “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases” by demonstrating that “‘at least on the face of things,’ the accommodation will be feasible for the employer.”<sup>288</sup> For example, if a UPS driver with a lifting restriction could point to other UPS drivers that had been granted light-duty accommodations similar to the one requested—or to similar accommodations made by a comparable organization such as FedEx—and could access this information during the interactive process, the organizational precedent could provide examples of reasonable resolutions. The availability of accommodation information could thereby facilitate problem-solving conversations and prevent years of litigation. The *Barnett* Court stopped short of overreach, given that a prior accommodation by the employer in a form identical or similar to one an employee is currently requesting is not required under the ADA at all. But precedent regarding prior accommodations which deviate from typical operations may contain the operational detail parties need to address hardship arguments regarding feasibility, cost, and effectiveness.<sup>289</sup>

By publicizing knowledge regarding accommodations precedent in a highly visible and comprehensive manner, the government can help relieve individual workers and employers of the burdens of devising their own proposals from scratch.<sup>290</sup> Currently, the population of noninstitutionalized civilians in the United States with a disa-

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employing 250 or more employees) reported collecting information on accommodations for employees with disabilities to assist with future accommodations in similar situations. U.S. DEP’T OF LAB., SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 155, at 21.

<sup>288</sup> 535 U.S. 391, 401–02 (2002) (quoting *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001)).

<sup>289</sup> The evidentiary pull of organizational precedent was on full display in *Young* once the Court announced that discrimination could be shown where disabled workers and others similarly situated were accommodated, but pregnant workers seeking accommodations were not. *See supra* note 224 and accompanying text.

<sup>290</sup> In addition to the private, ephemeral nature of the interactive process, the meteoric rise in compulsory private arbitration in the workplace further constricts public records of ADA failure-to-accommodate actions and the generation of public norms relating to this right—despite Congress’s intent that people with disabilities would not be precluded from seeking public enforcement and relief. Private adjudications “produce no rules or precedents binding on nonparties” that “have obvious importance for guiding future behavior and imposing order and certainty on a transactional world that would otherwise be in flux and chaos.” David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622 (1995) (citing Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL’Y 102, 114–19 (1986)); *id.* at 2622–23.

bility is at least 40 million.<sup>291</sup> While it is expected to expand, the employment rate of people with disabilities remains less than half that of people without disabilities.<sup>292</sup> Nonprofits and vocational agencies provide a vital but inherently limited stopgap.<sup>293</sup> The Job Accommodation Network (JAN) currently serves as a national one-stop resource on effective accommodations for all major disabilities,<sup>294</sup> but as a project of the U.S. Department of Labor remains undersupported as a \$13 million nonprofit employing only thirty individuals.<sup>295</sup> When JAN is consulted—approximately 55,000 times a year<sup>296</sup>—it is usually by sophisticated employers and legal counsel rather than employees.<sup>297</sup>

Beyond empowering people engaging in the interactive process, annual national surveys would also be a powerful tool for the govern-

<sup>291</sup> *Disability Characteristics, 2019: ACS 1-Year Estimates Subject Tables*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?tid=ASMAREA2017.AM1831BASIC01> (select “filter” from the box on the left; then type “disability” in the “search query”; draw your attention to the “Estimate” under “With a disability” to see “41,089,958 with a ‘Margin of Error’ of ±115,466) (last visited Nov. 1, 2021) (estimating 41,089,958 noninstitutionalized civilians with a disability).

<sup>292</sup> In 2019, only 30.9% of people with disabilities aged 16–64 were employed in the United States, compared to 74.6% of people without disabilities aged 16–64. U.S. DEP’T OF LAB., U.S. BUREAU OF LAB. STATS., USDL-21-0316, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2020, at 4 (2021), <https://www.bls.gov/news.release/pdf/disabl.pdf>.

<sup>293</sup> Schur et al., *supra* note 148 at 615; *see also Joint Hearing, supra* note 66, at 46–47 (statement of Mark R. Donovan, Manager, Community Employment and Training Programs, Marriott Corporation) (testifying that community-based groups, labor organizations, and industry, inter alia, should be essential partners with employers in a collective, deliberative version of the interactive process).

<sup>294</sup> *See A to Z of Disabilities and Accommodations*, JOB ACCOMMODATION NETWORK, <https://askjan.org/a-to-z.cfm> (last visited Aug. 8, 2021). For example, for Attention Deficit Hyperactivity Disorder, JAN provides a list of potential reasonable accommodations and strategies based upon the particular work limitation. Attention Deficit/Hyperactivity Disorder (AD/HD), <https://askjan.org/disabilities/Attention-Deficit-Hyperactivity-Disorder-AD-HD.cfm> (last visited Nov. 10, 2021).

<sup>295</sup> *Office of Disability Employment Policy*, JOB ACCOMMODATION NETWORK, <https://askjan.org/topics/odep.cfm> (last visited Aug. 8, 2021) (stating the Job Accommodation Network is a “service provided by ODEP”); *WVU’s Job Accommodation Network Receives \$12.7 Million Funding Renewal*, WVUTODAY (Oct. 17, 2017), <https://wvutoday.wvu.edu/stories/2017/10/17/wvu-s-job-accommodation-network-receives-12-7-million-funding-renewal> (reflecting JAN’s operations located at the West Virginia University College of Education and Human Services).

<sup>296</sup> *WVU’s Job Accommodation Network Receives \$12.7 Million Funding Renewal, supra* note 295.

<sup>297</sup> The Job Accommodation Network’s funding agency declined to approve the release of a breakdown of stakeholder usage figures. E-mails from Anne Hirsch, Assoc. Dir., Job Accommodation Network, to author (Aug. 31, 2021, 16:24 EST; Sept. 7, 2021, 16:18 EST; Oct. 4, 2021, 15:48 EST) (on file with author). However, based upon the author’s experience of more than a decade of practice and research, it is far more common for well-resourced employers and legal counsel to access JAN than individuals with disabilities.

ment. For example, this data could be used to assess and track organizational culture over time.<sup>298</sup> This information could help the government identify discriminatory norms and legislate against them. This measure draws inspiration from an emerging trend in which unions have won contract terms requiring employers to administer regular climate surveys, or equity surveys, and to share survey results with the union and joint employer-worker committees tasked with responding to any trends on an organization-wide basis.<sup>299</sup> At least some of these surveys were agreed to in response to a need to identify and preemptively remediate patterns of discrimination.<sup>300</sup>

Precedent for accommodations and knowledge of new forms of accommodation could go hand in hand with educating policymakers. Experts lament the need for additional research to refine our understanding of “accommodation needs, processes, and outcomes . . . as well as the employer practices and policies that facilitate or pose barriers to accommodations.”<sup>301</sup> Collecting data that can be cross-referenced with race, sex, job title, geography, and even multiple disabilities will also provide important information for policymakers,

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<sup>298</sup> Cf. Sturm, *Second Generation Employment Discrimination*, *supra* note 22, at 492–98 (describing Deloitte & Touche’s companywide audit of desirable assignments broken down by gender to remedy failures to retain and promote women employees as an example of structural self-evaluation); Ana Avendaño, *#MeToo Inside the Labor Movement*, NEW LAB. FORUM (Jan. 2019), <https://newlaborforum.cuny.edu/2019/01/24/metoo-inside-the-labor-movement> (proposing, in the context of #MeToo, that “[w]ith a majority of unions’ consent, the AFL-CIO could require all unions to conduct climate assessment surveys annually and make those reports public”); Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 550 (2021) (noting that in the millions of administered Project Implicit bias tests between 2004 and 2016, implicit bias toward disability remained largely unchanged, while during the same period attitudes toward sexual orientation and race improved by 33% and 13%, respectively (citing Tessa E.S. Charlesworth & Mahzarin R. Banaji, *Patterns of Implicit and Explicit Attitudes: I. Long-Term Change and Stability from 2007 to 2016*, 30 PSYCH. SCI. 174, 182–90 (2019))).

<sup>299</sup> E.g., *Collective Bargaining Agreement Between Writers Guild of America, East, Inc., AFL-CIO, and Center for American Progress (January 1, 2019 – December 31, 2021)*, WRITERS GUILD AMERICA, EAST (2019), <https://www.wgaeast.org/wp-content/uploads/sites/4/2019/01/TP-Contract-2019-2021-Executed.pdf>; *Collective Bargaining Agreement Between The Union of Academic Student Employees & Postdocs at the University of Washington and the University of Washington*, UAW LOCAL 4121 (2020), <https://www.uaw4121.org/member-center-2/know-your-rights/contract>.

<sup>300</sup> See, e.g., *2020 Equity Survey*, UAW LOCAL 4121, <https://www.uaw4121.org/2020-equity-survey> (last visited Sept. 26, 2021).

<sup>301</sup> Von Schrader et al., *Accommodation Requests*, *supra* note 156, at 341; see also Balsler, *supra* note 283, at 657 (highlighting that studying antecedents to and predictors of accommodations are crucial for advancing theory, public policy, and practical outcomes for individuals).

advocates, and local governments to develop policies that understand the intersection of social traits, work, and health.<sup>302</sup>

Finally, collecting accommodations data could help shift public norms. The presumptions of individuation and privacy around disability, while serving important interests, must also be tempered to alleviate the stigma that society continues to attach to identifying as disabled. Scholars have recently drawn attention to how legal presumptions that disability adjudications should remain private may go too far and undermine our ability to educate society and reshape attitudes. Notably, Elizabeth Emens has proposed revising EEOC rules to permit employers to disclose the provision of accommodations to the beneficiaries' coworkers if they provide consent, so that they may emphasize how accommodations (such as expanded teleworking) also benefit others.<sup>303</sup> Jasmine Harris has argued that the largely private and closed contexts in which many other disability adjudications take place reinscribe disability with social stigma because those processes fail to enhance public understanding and thus generate better norms.<sup>304</sup> As Harris observes, "overvaluing" privacy about disability undermines our laws' ability to remediate discrimination when society fails to detect these experiences and then redress the policies, practices, or structures that perpetuate them.<sup>305</sup> Lacking awareness, the general public falls back on stereotypes emphasizing the "aesthetics" of who is disabled.<sup>306</sup> When we avoid any effort to publicize disability, we operate under an impression that the number of people with disabilities is lower than other minority groups, when in fact the opposite holds true.<sup>307</sup>

Expanding the depth of information the government gathers confidentially, while providing free, centralized access to the results,

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<sup>302</sup> Although public health researchers understand social determinants of health to include work and non-work conditions, efforts to prevent and respond to the COVID-19 pandemic mainly intervene in behavioral change rather than consistent social supports such as paid sick and family leave and disability- and health-based accommodations. Wiley & Bagenstos, *supra* note 268, at 1239.

<sup>303</sup> Emens, *Integrating Accommodation*, *supra* note 59, at 897–908.

<sup>304</sup> Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 459, 465, 498, 505–20, 524–26 (2015) (relying upon institutional design such as public access to adjudication "to shape a broader disability consciousness" and arguing that proceedings for guardianship, civil commitment, and special education should not be presumptively closed); *see also* Harris, *Taking Disability Public*, *supra* note 11, at 1725–26 (discussing disability laws' privacy norms as intended to preempt discrimination but noting they do so at the expense of ameliorating stigma and misunderstanding of disabilities).

<sup>305</sup> Harris, *Taking Disability Public*, *supra* note 11, at 1725–26.

<sup>306</sup> *Id.* at 1726 (citing Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC. REV. 1051, 1070 (2019)).

<sup>307</sup> *Id.* at 1726–27 (noting that people with disabilities are "the most populous minority group" in the United States).



would have considerable expressive benefits by normalizing accommodation as a universal endeavor. At present, federal data collection efforts are hampered by the many purposive definitions of disability across Census and independent surveys, such as questions intended to detect eligibility for Social Security Disability Insurance and those intended to identify people with disabilities who could work.<sup>308</sup>

Even a modest information-gathering effort will further normalize our social commitment to dismantling structures that continue to exclude vulnerable workers. A full view of society's experience with requesting an accommodation would provide valuable industry- and position-specific information about the United States' evolving norms toward accommodations<sup>309</sup> and lay the groundwork for systematic public and private planning around accommodations across organizations and industries.

The redistributive benefits of accommodations law currently begin at the level closest to the workers and employers, but have failed to generate norms to dismantle ableist environments and practices. If we expand our legal imagination, the state may scale responsibility for disability justice on a sectoral basis to support structural analysis, norm change, and regulation going forward. Initially, such monitoring may continue to be done through unions and labor organizations, but organizational precedent will also invite local governments to regulate minimum accommodations standards to vastly reduce the need for individuated bargaining.

### B. Harmonizing Workplace Law

Labor activism has traditionally provided a source of employee empowerment and voice in the workplace and could be considered an

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<sup>308</sup> Burkhauser, Houtenville & Tennant, *supra* note 2, at 195–96. It comes as little surprise, then, that members of the general public do not have an accurate understanding of whether they are disabled within the meaning of the ADA.

<sup>309</sup> In the United Kingdom, a “right to request” flexibility, which may be made once a year as to work hours, time, or location, was enacted in 2002 under the Flexible Working Act and gradually expanded from a limited set of caregivers over time to all employees in 2014. Robert C. Bird & Liz Brown, *The United Kingdom Right to Request as a Model for Flexible Work in the European Union*, 55 *AM. BUS. L.J.* 53, 67–68 (2018) (citing Employment Act 2002, c. 22, § 47(1)–(2) (UK)). However, the right to request has procedural and substantive corollaries to the ADA interactive process and undue hardship defense, and remedies are limited to procedural grounds. Anna Danziger & Shelley Waters Boots, *Urb. Inst.*, Memo on the Impact of the United Kingdom's Flexible Working Act 3–4 (2008), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1011&context=legal>. Because the right-to-request process is not a mandate, unions and parents' groups maintain that many who would benefit from flexible arrangements do not ask for them out of fear of being refused or jeopardizing their careers. *Id.* However, within the first three years, availabilities of job-sharing increased 39% to 59%, and availability of flextime increased from 38% to 55%. *Id.* at 2.

intrinsic source of leverage for employees during the interactive process. However, the doctrine and practice of labor and employment law have produced the view within labor law—and thus labor organizing—that disability accommodations involve only individual rights that threaten collective representation.<sup>310</sup> The choice to meld the ADA's employment provisions with Title VII's model and enforcement infrastructure destined it to develop isolated from labor law and to rely on potentially lengthy litigation for enforcement. The dearth of union organizing or other collective advocacy around accommodations<sup>311</sup> and the precipitous decline in unionization<sup>312</sup> have further hamstrung the potential of the accommodations mandate reaching those workers with the least leverage at work. Legal and management theory scholars agree, however, that an integrated framework for employment and labor law is desirable.<sup>313</sup> To harmonize workplace law, existing law must shift in three respects.

First, the NLRA must be amended to unequivocally state that Section 7 protected concerted activity includes inquiries about accommodations or other antidiscrimination rights, whether for oneself or other employees. Sections 7 and 8(a)(1) of the NLRA are robust: they broadly safeguard worker activism as “protected concerted activity,” and prohibit retaliation against such activity regardless of whether the employee is a union member.<sup>314</sup> Therefore, unions, other labor

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<sup>310</sup> See *supra* note 41; Hickox, *supra* note 12, at 150 (“When the ADA was adopted, some saw it as one more extension of individual rights ‘signaling and causing the demise of the industrial pluralist model of collective bargaining.’” (quoting Richard Bales, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J.L. & PUB. POL’Y 161, 164 (1992))).

<sup>311</sup> In the most recent data available, only 49 of 400 sample CBAs included a provision promising compliance with the ADA, although ninety-four percent of CBAs contain a “general” non-discrimination clause. Hickox, *supra* note 12, at 157 (citing N. PETER LAREAU, *DRAFTING THE UNION CONTRACT: A HANDBOOK FOR THE MANAGEMENT NEGOTIATOR* § 5A-10 (2008)).

<sup>312</sup> See *supra* note 203.

<sup>313</sup> E.g., HOGLER, *supra* note 17, at 252 (urging the “integration” of labor and employment laws that have been interpreted to conflict on account of varying policy concerns originating from each); Charlotte Garden & Nancy Leong, “*So Closely Intertwined*”: *Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1138, 1171 (2013) (arguing issues of labor organizing and race coincide and provide grounds for coalition). There have not been many such proposals, but leading ones include Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605 (2017); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008); and Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 750–60 (1997).

<sup>314</sup> See National Labor Relations Act of 1935, Pub. L. 74-198, §§ 7, 8(a)(1), 49 Stat. 449, 449, 452 (1935) (codified at 29 U.S.C. §§ 157, 158(a)(1)) (defining worker activism as protected concerted activity and prohibiting retaliation on that basis, regardless of whether the workers are members of a union or other formal labor organization).

organizers, and employees should be able to rely on these protections, which play a more robust role than currently conceived in expanding workers' ability to support each other in seeking accommodations. Nonetheless, oscillations in the composition of the NLRB have generated split opinions that cast doubt on whether discussing discrimination—under the ADA or other employment statutes—with others is either “selfish” or instead “concerted activity” under Section 7.<sup>315</sup>

Second, neither courts nor policymakers have sought to develop labor and employment laws or their administrative functions such that their protections complement or reinforce each other. Scholarship on labor bargaining and antidiscrimination activism has maintained that employers and unions can agree to terms that achieve diversity-based goals that benefit all employees, challenging the circumspect views toward diversity among some labor organizers and providing potential grounds for solidarity.<sup>316</sup> Thus, the NLRA should be further amended to clarify that: (1) accommodations may be a mandatory subject of bargaining as between employers and labor organizations in reaching a CBA; but also (2) that a CBA must always be construed to permit deviation from terms in order for employers and unions to comply with the ADA in the event that a provision conflicts with civil rights obligations.<sup>317</sup>

In entering an agreement, employers and unions are already obligated to bargain over accommodations that “‘materially, substantially

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<sup>315</sup> Compare *Fresh & Easy Neighborhood Market, Inc.*, 361 N.L.R.B. 151 (2014) (responding to NLRB Member dissent portraying an employee who experienced sexual harassment as “raising a personal complaint not shared by others” and “annoying” them, by reasoning that even if the discrimination is substantiated, “[i]t is also well established that an employee may act partly from selfish motivations and still be engaged in concerted activity, even if she is the only immediate beneficiary of the solicitation”), with *Holling Press, Inc.*, 343 N.L.R.B. 301, 303–04 (2004) (“[W]here one employee is the alleged victim [of sexual harassment], that lone employee’s protest is not concerted. And, even if the victim seeks support from another employee, and that seeking of support is concerted activity, the ‘mutual aid or protection’ element may be missing.”).

<sup>316</sup> Michael Z. Green, *Union Commitment to Racial Diversity* (advocating for “creative contract terms that . . . includ[e] dispute resolution tools within the grievance process that will promote worker solidarity on matters of both race and class”), in *THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY* 381, 381, 388–91 (Richard Bales & Charlotte Garden eds., 2020); cf. Garden & Leong, *supra* note 313, at 1138, 1171 (arguing issues of labor organizing and race coincide and provide grounds for coalition).

<sup>317</sup> See *supra* note 311; *infra* notes 322–25; see also Deborah A. Widiss, *Divergent Interests: Union Representation of Individual Employment Discrimination Claims*, 87 *IND. L.J.* 421, 425–26, 429–30 (2012) (discussing the reasons why labor unions may deprioritize members’ ability to litigate discrimination claims in anticipation of divergent interests if discrimination claims raised by a minority of members may pit members against each other).

or significantly' affect[] terms and conditions of employment,"<sup>318</sup> and more fundamentally, "over the elimination of discrimination in the workplace" in a meaningful way.<sup>319</sup> Not all accommodations change terms and conditions of employment, such as when a coworker agrees to assume a job function of another for a limited period. But if the law expressly treated antidiscrimination goals as a collective good that affects conditions for additional workers, ADA accommodations could be "material." For example, refusing a worker regular breaks for medical appointments or the provision of a ramp incline on policy grounds would rise to the level of materiality.

Moreover, involving unions and labor organizations when an accommodation could be denied creates a potentially multiplying phenomenon with collective impact.<sup>320</sup> Stacy Hickox has observed that union involvement not only increases employees' perceptions of procedural justice, but as a "repeat participant" in accommodations negotiations, unions gain and apply knowledge about ADA rights workplace-wide and facilitate coworkers' acceptance of accommodations that may require setting aside seniority or other CBA provisions.<sup>321</sup>

Finally, the ADA must be amended to correct the Supreme Court's improvident interpretation in *US Airways, Inc. v. Barnett*, which discourages employers from providing any accommodation that

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<sup>318</sup> Hickox, *supra* note 12, at 156 (quoting William J. McDevitt, *Seniority Systems and the Americans with Disabilities Act: The Fate of "Reasonable Accommodation" After Eckles*, 9 ST. THOMAS L. REV. 359, 374–75 (1997)).

<sup>319</sup> *Id.* at 157 (discussing employers' and labor organizations' mutual duty to bargain over mandatory terms under the statute and Board authority (citing *Farmers' Coop. Compress*, 169 N.L.R.B. 290, 295 (1968))). Employers violate their duty to bargain through conduct that prevents the union from also "fulfilling its duty of fair representation and expose[s] the union to legal liabilities under nondiscrimination statutes." *Id.* (quoting *Graphic Arts Int'l Union*, 235 N.L.R.B. 1084, 1084 (1978)). Mandatory subjects of bargaining are outlined in Sections 8(a)(5), 8(b)(3), and 8(d) of the NLRA and codified at 29 U.S.C. § 158(a)(5), (b)(3), (d), and the Supreme Court deemed subjects of bargaining to be either mandatory or permissive in *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

<sup>320</sup> See Carrie Griffin Basas, *A Collective Good: Disability Diversity as a Value in Public Sector Collective Bargaining Agreements*, 87 ST. JOHN'S L. REV. 793, 831–32, 836–38 (2013) (noting that CBAs in which disability rights are recognized as civil rights could positively impact broader workplace dynamics).

<sup>321</sup> Hickox, *supra* note 12, at 190–91; see also Basas, *supra* note 320, at 823 (providing an example of a state employee CBA entitling employees seeking an accommodation to union representation upon their request); cf. Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639, 651 (2017) (proposing a union "as a social or business network or an identity caucus within a union might be able to help negotiate" on behalf of Black employees to address information imbalances within workplaces).

deviates from contracts or company policies.<sup>322</sup> In *Barnett*, the Court crafted a judicial exemption disapproving of any disability accommodation that would contravene a seniority policy as unreasonable absent “special circumstances,” an approach that unfortunately persists.<sup>323</sup> Title VII contains a provision protecting seniority systems that provide some employees with preferable terms or benefits without incurring liability for discrimination,<sup>324</sup> while Congress expressly rejected the inclusion of such an exemption in the ADA.<sup>325</sup>

When we conceive of the ADA’s interactive process as de facto bargaining, it becomes clear that a market-mediated framework has conditioned lawmakers, courts, and labor activists to limit the mandate to triangulated bargaining over accommodation as among the employee, employer, and coworkers—or any CBA.<sup>326</sup> The law of accommodations casts all requests in terms of zero-sum interests among these private stakeholders.<sup>327</sup>

*Barnett*’s holding is even more stringent than the compromise the EEOC originally struck in its interpretive guidance. Originally, the agency considered any potentially conflicting CBA provision “relevant” to determining whether an employer could raise undue hardship

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<sup>322</sup> 535 U.S. 391, 404–06 (2002) (holding a disabilities accommodation request is not reasonable if it overrides a seniority provision contained in an existing policy, unless special circumstances such as formal or informal exceptions altered employees’ expectations regarding that policy).

<sup>323</sup> *Id.*; Hickox, *supra* note 12, at 162–63, 164 n.99, 165 n.101 (citing cases and noting courts have extended *Barnett* beyond general seniority policies to other companywide policies and CBAs). Although this judicial move favored symmetry toward a neoclassical economic view of antidiscrimination law, I argue that the symmetry should be applied toward public norms modifying private ones to eliminate the Title VII seniority exception. See generally Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69 (arguing for symmetrical rights design for traits across statutes such as Title VII, the ADA, and the ADEA).

<sup>324</sup> As a matter of statutory asymmetry, Title VII’s provision expressly protects the operation of a “bona fide seniority . . . system,” 42 U.S.C. § 2000e-2(h), a provision that the ADA lacks. However, the deference to employer preferences and greater familiarity with Title VII may have led to *Barnett*’s imprudent result.

<sup>325</sup> *Barnett*, 535 U.S. at 420–21 (Souter, J., dissenting) (“Because Congress modeled several of the ADA’s provisions on Title VII, its failure to replicate Title VII’s exemption for seniority systems leaves the statute ambiguous, albeit with more than a hint that seniority rules do not inevitably carry the day.”).

<sup>326</sup> See S. REP. NO. 101-116, at 32 (1989) (providing the Committee on Labor and Human Resources’s opinion that a seniority provision in a CBA could be a factor in determining whether a given accommodation is reasonable), *reprinted in* 1 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT 130 (1991); *infra* note 328 (citing EEOC regulations anticipating conflict with CBAs as a potential basis for undue hardship).

<sup>327</sup> See, e.g., Emens, *supra* note 2, at 2365 fig.1 (discussing courts’ “traditional” evaluation of accommodation requests in terms of costs to the employer and benefits to the employee, and some consideration given to costs (alone) to third parties).

and required the employer and union to negotiate a variance in good faith to facilitate accommodation.<sup>328</sup> Congress must clarify that workplace contracts and policies cannot supervene civil rights obligations, and override *Barnett* and its substantive restriction of potentially reasonable accommodations as incorrect.

Despite ascendant social mobilization around workplace safety and structural injustice, lead labor law reform proposals to protect workers still do not address accommodations law.<sup>329</sup> Because the vast majority of Americans are left to bargain alone for their safety and livelihood, reform proposals must be grounded in a theory of accommodations that extends beyond employment law's individuated approaches. These amendments would clarify labor organizations' legal responsibilities to address antidiscrimination work as concerted activity, so that such concerns are not subordinated or avoided in workplace organizing and advocacy, but amplified through public discourse. Approaching accommodations as a collective social good protected by labor law, rather than a one-off contractual deal violative of collective contracts, will in turn clarify labor protections for accommodation requests unrelated to a protected status should the mandate later expand to all workers.<sup>330</sup>

### C. Ending Cost-Shifting for Smaller Businesses

The state can also use its most distributive tool<sup>331</sup>—the tax code—to reimburse smaller employers for any disability accommoda-

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<sup>328</sup> Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,727 (July 26, 1991) (codified at 29 C.F.R. pt. 1630) (amending interpretive guidance in response to public comments regarding conflicts with any CBA provision); 29 C.F.R. pt. 1630, app. at 435 (2020) (noting that the defense of undue hardship is unavailable simply by the employer "showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs"); see also U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC NOTICE NO. 915.002, EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (1999), 1999 WL 35770204 (rejecting a *per se* rule that an employer can claim an accommodation imposes an undue hardship merely because it violates a CBA), cited in *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1119 (9th Cir. 2000), *revoked as superseded by Barnett*, 535 U.S. 391.

<sup>329</sup> See, e.g., SHARON BLOCK & BENJAMIN SACHS, HARV. L. SCH., CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 27–28, 62–63, 94 (2020) (proposing improvements to the NLRA, the Social Security Act, Federal Arbitration Act, and Internal Revenue Code, and addressing disability solely with respect to including disabled workers who earn subminimum wage as employees).

<sup>330</sup> See *supra* note 309 and accompanying discussion.

<sup>331</sup> I intentionally employ "distribution" instead of redistribution, in a departure from its more common use in discussion of the ADA. The canonical view of disability frames redistribution as a manner of special treatment in the form of a mandate on employers that sets the ADA apart from "traditional" civil rights law, as discussed *supra* in Section I.B.1.

tions they provide that do incur an expense. Most accommodations do not incur an out-of-pocket expense at all,<sup>332</sup> and other countries have implemented more typical social insurance versions of an accommodation subsidy.<sup>333</sup>

Such a proposal would expand partial tax subsidies for such accommodations currently available to small businesses to full subsidies for nearly all accommodations. As discussed below, expanding our social insurance framework to accommodations would transform access for employees across industries.

Companies, in particular small- and medium-sized businesses, indicate that employer tax credits and incentives would improve hiring of workers with disabilities.<sup>334</sup> Although there are no reliable estimates for full public funding of accommodations, such a proposal

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*See also* Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 593 & n.54 (2004) [hereinafter Stein, *Same Struggle, Different Difference*] (citing academic sources that suggest accommodations for disabled people constitute special treatment for them). However, distribution through the tax base to advance accommodations comports with the corrective justice approach that Bagenstos and Jolls, among others, advanced. *See supra* Section I.B.1. A corrective justice view rejects the flawed assumption in the canonical approach: that accommodation costs are “internally engendered by the disabled person’s inherent lower capability, rather than externally caused by social conditions.” Stein, *Same Struggle, Different Difference, supra*, at 597.

<sup>332</sup> One study estimates that fifty-six percent of disability accommodations do not cost the employer anything, and the median cost for other accommodations was \$500. JOB ACCOMMODATION NETWORK, *WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 3* (2020), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628&action=download&pubtype=pdf>.

<sup>333</sup> Through its Access to Work program, the UK provides government subsidies to employees to subsidize accommodations such as “aid and equipment in the workplace,” adaptations to existing equipment, and extra travel costs. U.K. Dep’t for Work & Pensions, *Guidance Access to Work Factsheet for Employers*, Gov.UK, <https://www.gov.uk/government/publications/access-to-work-guide-for-employers/access-to-work-factsheet-for-employers> (Apr. 1, 2021). In Japan, companies must abide by a quota for employing people with disabilities, for which non-compliance requires them to pay a levy that will fund government subsidies and aid to companies trying to meet the quota. KATHARINA HEYER, *RIGHTS ENABLED: THE DISABILITY REVOLUTION, FROM THE US, TO GERMANY AND JAPAN, TO THE UNITED NATIONS* 131–33 (2015). Israel can subsidize the cost employers incur in providing an accommodation up to 60,000 NIS, or approximately \$18,431. *State Funding for Workplace Accommodations for Employees with Disabilities*, KOL-ZCHUT [https://www.kolzchut.org.il/en/State\\_Funding\\_for\\_Workplace\\_Accommodations\\_for\\_Employees\\_With\\_Disabilities](https://www.kolzchut.org.il/en/State_Funding_for_Workplace_Accommodations_for_Employees_With_Disabilities) (last visited Aug. 9, 2021).

<sup>334</sup> *See* U.S. DEP’T OF LAB., *SURVEY OF EMPLOYER PERSPECTIVES, supra* note 155, at 17 (reporting percentages of companies citing employer tax credits and incentives as strategies that would be helpful in hiring people with disabilities at 66.8% for small businesses, 70.5% for medium-sized businesses, and 77.1% for large businesses). An experimental vignette study testing employers’ willingness to accommodate job candidates who revealed a need for accommodations also concluded that they are chiefly concerned with the costs of accommodations. Shinall, *supra* note 12, at 673; *cf. id.* at 675 & n.166 (proposing accommodation cost caps at \$500 to account for employer concerns about cost).

would be scored in Congress before passage<sup>335</sup> and may support scholars' more recent predictions that economic integration of people with disabilities provides a net gain for the economy.<sup>336</sup>

As observed earlier, the ADA places responsibility on society to facilitate the full participation of people with disabilities.<sup>337</sup> Its corrective justice frame could have allocated responsibility for any costs incurred by the mandate on the general public, rather than employers alone, to achieve its ends. At the turn of the twentieth century, a shift in U.S. tax policy ushered in our modern fiscal polity, one guided "not simply by the functional and structural need for government revenue but by concerns for equity and economic and social justice."<sup>338</sup> The government implemented public subsidies through its national tax base irrespective of self-interest, i.e., regardless of beneficiaries' economic class or region, because sustainable growth of the modern state required taxation.<sup>339</sup> Over the last twenty-five years in particular, the United States has increasingly relied on tax law to achieve non-revenue-raising goals for social programs such as the Affordable Care Act's health care mandate.<sup>340</sup>

The federal government could finance the expansion of existing but woefully underutilized subsidies,<sup>341</sup> the Disabled Access Credit and Barrier Removal Deduction, which substantially reimburse employers if they incur an expense in implementing an accommodation.<sup>342</sup> They provide to small businesses a 50% tax credit for an

<sup>335</sup> See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 763 (2014) (discussing the importance of the Congressional Budget Office's scoring of proposed legislation).

<sup>336</sup> See *infra* notes 354–55 and accompanying text.

<sup>337</sup> See *supra* Section I.B1.

<sup>338</sup> Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793, 1793, 1795, 1798 (2005) (observing that a transition to a direct tax on income and other wealth "shifted the burden of financing a modern, industrial state to those segments of society," i.e., the wealthy North and Northeast, to meet the mounting demands placed upon the public sector and government spending).

<sup>339</sup> See *id.* at 1798.

<sup>340</sup> Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 67–69 (2013).

<sup>341</sup> As of 1999, the only year for which data is available, only 0.14% (1 out of 686) corporations and 0.06% (1 out of 1,570) individuals with a business affiliation reported the Disabled Access Credit on their tax returns. U.S. GEN. ACCT. OFF., GAO-03-39, BUSINESS TAX INCENTIVES: INCENTIVES TO EMPLOY WORKERS WITH DISABILITIES RECEIVE LIMITED USE AND HAVE AN UNCERTAIN IMPACT 14 (2002).

<sup>342</sup> I.R.C. §§ 44, 190 (providing annual maximum credit to small businesses of fifty percent of "eligible access expenditures" that exceed \$250 but do not exceed \$10,250, and annual maximum deduction of \$15,000 to businesses for "qualified architectural and transportation barrier removal expenses," respectively).



accommodation expense, and a tax deduction of up to \$15,000 for removing architectural or transportation barriers.<sup>343</sup> Under the expansion proposed here, payroll taxes would fund small and medium employers to receive a 100% tax credit of up to \$5,000 per employee per location.<sup>344</sup> While it appears to function as a cap,<sup>345</sup> more than half of employers report that accommodations incurred no cost and for employers that experienced a one-time cost, the median expenditure is \$500.<sup>346</sup> Expanding employer reimbursements to resemble a social insurance model will reassure employers and, as some scholars have noted, reduce stigma tied to entitlement programs.<sup>347</sup> The tax programs must be publicized, however, as the Disabled Access Credit is hardly used by corporate employers.<sup>348</sup>

I foresee three major consequences of expanding tax subsidies for disability accommodations in this manner. First, filings from such a credit would further permit the government to receive information about the types of accommodation granted, the levels of cost, and further the state's research expertise by firm type and industry. This information could be used to inform legislative and executive policy, from developing default expectations for modifications based upon

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<sup>343</sup> *Id.*

<sup>344</sup> The amount is half the \$10,000 value of the ceiling for the current Disabled Access Credit's subsidy for accommodations not related to architecture or transportation, i.e., fifty percent of a \$10,000 employer expenditure by small businesses. Small businesses are currently defined as those with gross annual receipts of under \$1 million or fewer than 30 full-time employees. I.R.C. § 44. Medium-sized businesses could be defined as those that are not small businesses and employ fewer than 250 full-time employees. *See, e.g.*, U.S. DEP'T OF LAB., SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 155, at 2 (defining medium-sized companies as those that employ 15 to 249 employees). In combination, small- and medium-sized businesses employ approximately half of U.S. private sector workers. U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY, FREQUENTLY ASKED QUESTIONS 1 (2020), <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf>.

<sup>345</sup> Shinall recently proposed a bright-line cap of potentially a few hundred dollars, supplemented by expanded disability entitlement programs funded by a payroll tax. Shinall, *supra* note 12, at 673–81; *see also id.* at 676–77 (summarizing prior legislative interest in capping employer expense on an ADA accommodation). The proposal advanced here is more akin to a 100% subsidy given that Congress previously approved of a reimbursement of up to \$5,000 to small-business employers under the current 50% subsidy.

<sup>346</sup> *Benefits and Costs of Accommodation*, *supra* note 271. When asked how much they paid for an accommodation beyond what they would have paid for an employee without a disability who was in the same position, the median answer given by employers was \$20. *Id.*

<sup>347</sup> *See, e.g.*, Mark C. Weber, *Disability Rights, Welfare Law*, 32 CARDOZO L. REV. 2483, 2515 (2011) (proposing a disabled worker tax credit program, that arguably would lack the stigma of public welfare as it would be administered through the tax system).

<sup>348</sup> *See supra* note 341 and accompanying text.

specific disabilities (with public input),<sup>349</sup> to directly subsidizing research to advance universal design technologies that innovate in response to the most prevalent workplace barriers.<sup>350</sup>

Second, and perhaps the most important consequence of the fully distributive model, the undue hardship analysis prominently features cost in determining whether an employer should grant the request.<sup>351</sup> The implementing regulation further defines “difficulty or expense” to consider the accommodation’s cost, “taking into consideration the availability of tax credits and deductions.”<sup>352</sup> Thus, even after implementing the subsidy proposed here, not every accommodation will be deemed reasonable or vitiate the undue hardship defense. An employer may still justify why an accommodation could not be granted under the other statutory factors, but less well-resourced businesses will no longer be exempted from remediating ableism based upon cost alone. Expanding current tax credits and deductions for disability accommodations to full subsidies under the framework of social insurance would serve as a rebuttal to employers or coworkers that respond negatively to workers seeking accommodations with zero-sum resource arguments.<sup>353</sup> Meanwhile, large employers remain in the best position to capture the long-term benefits of accommodations, and would not be subsidized.

Third, this proposal could benefit parties beyond employees, such as the state, employers, and the public, long-term. At passage, the ADA appealed to a broad political cross-section of lawmakers, as disability advocates and political conservatives agreed that the cost of removing barriers to employment would be offset by a reduction in reliance upon public safety net benefits.<sup>354</sup> For many employers, any

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<sup>349</sup> See, e.g., *supra* note 63 and accompanying text (arguing for default expectations for modifications in the form of updated baseline standards for accessible information technology).

<sup>350</sup> Currently, the U.S. Department of Labor’s Office of Disability Employment Policy authors articles and videos, and convenes roundtables regarding the benefits of universal design, but private industry and non-governmental entities drive innovation. See Off. of Disability Emp. Pol’y, *Universal Design Resources*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/odep/program-areas/employment-supports/universal-design/resources> (last visited Aug. 10, 2021).

<sup>351</sup> 42 U.S.C. § 12111(10)(b)(i) (listing factors to be considered in whether an employer can establish undue hardship, including “the nature and cost of the accommodation needed under this chapter”).

<sup>352</sup> 29 C.F.R. § 1630.2(p)(2)(i) (2020).

<sup>353</sup> See *supra* notes 59–60, 341 and accompanying text.

<sup>354</sup> See, e.g., 136 CONG. REC. 10,877 (1990) (statement of Rep. George Miller) (“If [people with disabilities] are locked out of jobs, then society must bear the cost of maintaining these individuals and their families—families that otherwise would be self-supporting and paying taxes.”). See generally Bagenstos, *supra* note 146, at 958–75 (discussing the development of the ADA as welfare reform).

costs of providing an accommodation are recouped through worker retention, productivity, and overall morale.<sup>355</sup> The benefits of a broad subsidy for accommodations are also expressive: no differently than Social Security or workers' compensation, disabilities are contingencies that society prepares for and is collectively responsible for remediating.<sup>356</sup>

While some politicians might balk at the concept of expanding benefit programs, models for a social insurance approach to tax policy have already been popularly accepted and successful in the form of Social Security Disability at the federal level, and in paid family leave laws currently funded through modest payroll taxes in nine states and Washington, D.C.<sup>357</sup> Both programs finally made it possible for employees of small businesses to receive crucial benefits anyone may need at any time. Lawmakers' response to the COVID-19 pandemic under the rubric of social insurance may provide a model for further workplace accommodations. For example, in 2020, Congress enacted a publicly funded subsidy requiring employers to provide paid family and medical leave during the pandemic, an accommodation 100% reimbursable to employers through the tax code.<sup>358</sup>

As scholars express increasing concern over the limits of antidiscrimination law as a whole,<sup>359</sup> one may draw the conclusion that there is nothing more we may expect from law or the state.<sup>360</sup> This Article's

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<sup>355</sup> Helen P. Hartnett, Heather Stuart, Hanna Thurman, Beth Loy & Linda Carter Batiste, *Employers' Perceptions of the Benefits of Workplace Accommodations: Reasons to Hire, Retain and Promote People with Disabilities*, 34 J. VOCATIONAL REHAB. 17 (2011).

<sup>356</sup> See Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 17 (Martha Albertson Fineman & Anna Grear eds., 2013) (defining vulnerability theory to encompass vulnerability as a "universal and constant aspect of the human condition" that is "not deviant, but natural and inevitable").

<sup>357</sup> These states are California, New Jersey, Rhode Island, New York, Washington, Massachusetts, Connecticut, Oregon, and Colorado. NAT'L P'SHIP FOR WOMEN & FAMS., STATE PAID FAMILY AND MEDICAL LEAVE INSURANCE LAWS (2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf>.

<sup>358</sup> The Families First Coronavirus Response Act (FFCRA) was the first federal program to mandate paid family and medical leave, but only on an emergency basis until December 31, 2020. FFCRA, Pub. L. No. 116-127, § 5102(a), 134 Stat. 178, 195–96, 198 (2020) (paid sick time requirement); *id.* § 7001, 134 Stat. at 210–12 (payroll credit for required paid sick leave); *id.* § 7003, 134 Stat. at 214–17 (payroll credit for required paid family leave) (sunset 2020). Employers were permitted to voluntarily extend the benefit through March 31, 2021. COVID-related Tax Relief Act of 2020, Pub. L. 116-260, secs. 7001(c), 7003(c), § 286(b)(1), (b)(3), 134 Stat. 1964, 1989–91.

<sup>359</sup> See *e.g.*, Bagenstos, *The Structural Turn*, *supra* note 25, at 46–47 (expressing reservations regarding the efficacy of a structural approach to remediating employment discrimination).

<sup>360</sup> Doron Dorfman and Mariela Yabo's examination of disability accommodations law and regulation in Israel highlights *preventive* mechanisms such as affirmative duties of

proposals are inspired by the social movements and political advocacy leading up to the ADA's passage and in the recent years, which now challenge the frames embedded in accommodations law that have substantively limited its utility.<sup>361</sup> As has been noted before, the first calls in legal scholarship for a federal civil rights model integrating workers with disabilities did not see passage of the ADA until twenty-four years later.<sup>362</sup> The law's unique ability to condition many to believe it is the only legitimate approach has not been an impediment to its evolution.<sup>363</sup> All the more concerning is the silence when a law fails to work as intended, and we have no framework with which to diagnose setbacks in our efforts to eliminate inequalities.

### CONCLUSION

The ADA's goal of explicit institutional transformation has inspired advocates to adopt the accommodations mandate as a template to new contexts where workplace restructuring is sorely needed. This momentum to replicate the mandate may be a starting point to further chip away at barriers that exclude workers and reify social inequalities. Nonetheless, the current framework of de facto bargaining, premised primarily upon zero-sum assumptions, places a heavy burden on employees and employers to advance the profound change envisioned. They will continue to face significant headwinds in doing so if legal reforms neglect three decades of experience with shortcomings in the institutional and procedural design of the mandate.

By proposing new approaches to developing structural analysis, advancing antidiscriminatory norms through information gathering, enhancing collective problem-solving approaches, and applying a social insurance approach to eliminate resistance to cost shifting, this

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"large organizations"—including local governments—to report progress on implementing building access codes to the responsible national commission. Dorfman & Yabo, *supra* note 20, at 1248–49.

<sup>361</sup> See *supra* notes 21, 41, 298–300 and accompanying text. For example, Sameer Ashar and Catherine Fisk provide an important analysis of governance experimentalism among workers' centers upheld as models for the "new labor law," further arguing that social movement organizations will channel worker activism "in coalition with, or in lieu of unions." Sameer M. Ashar & Catherine L. Fisk, *Democratic Norms and Governance Experimentalism in Worker Centers*, 82 L. & CONTEMP. PROBS., no. 3, 2019, at 141, 141. They, too, predict that laws and institutions pertaining to workplace collective action will "transform over the next five to ten years into something substantially different from the institutions and law of the past century." *Id.* at 142.

<sup>362</sup> Stein et al., *supra* note 1, at 745 (citing Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966)).

<sup>363</sup> See Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 71, 83–90 (arguing that neoliberalism is hegemonic); see also Stein, *Same Struggle, Different Difference*, *supra* note 331, at 603 (discussing the difficulty of altering a socially accepted definition of the normative universe).

Article introduces potentially iterative, long-term projects in public and private planning toward accommodations and innovative workplace restructuring. It seeks to reopen conversation about the capacity of law to reshape society, and predicts that activism will introduce alternatives to push legislators and courts to embrace them in the future. Perhaps then, we can reimagine how the transformation of millions more environments may finally be within reach.