Disclaiming Disability

Nicole Buonocore Porter[*]

In the Americans with Disabilities Act ("ADA") Amendments Act of 2008, Congress ordered the courts to broadly interpret the definition of disability under the ADA. For the most part, courts have followed that instruction, but there are still too many instances in which they have not. One particularly pernicious error made by courts is relying on a plaintiff's statement "disclaiming" her disability — that is, testifying that she does not consider herself "disabled" — to hold that she does not meet the statutory definition of disability, and therefore loses her claim. This Article addresses this error. Specifically, after cataloguing this phenomenon, this Article argues that this practice by courts is incorrect as a matter of law and troubling as a matter of policy. In making the latter point, I explore the arguments on both sides of the debate — the benefits of requiring plaintiffs to affirmatively "claim" their disabilities versus the costs of such a requirement. Exploring these policy arguments requires me to grapple with the tensions that animate the disability rights movement and the important question of how we should define disability. Ultimately, I conclude that, despite the benefits of claiming disabilities, courts should not penalize plaintiffs for refusing or neglecting to do so.

TABLE OF CONTENTS

 Distinguished University Professor and Professor of Law, University of Toledo College of Law. I would like to thank the faculty at the University of Iowa College of Law for their valuable feedback when I presented a very early version of this Article while I was a Visiting Professor in the Fall of 2019. I would also like to thank participants of the AALS Disability Law Section's works-in-progress workshop in the summer of 2020, including Samuel Bagenstos, Rabia Belt, Natalie Chin, Doron Dorfman, Elizabeth Emens, Arlene Kanter, Katherine MacFarlane, Jamelia Morgan, Blake Reid, Jessica Roberts, Laura Rothstein, Jennifer Shinall, D'Andra Shu, and Mark Weber. The faculty at the University of Toledo College of Law also provided helpful feedback during an internal workshop in January 2021. I am grateful for the University of Toledo College of Law's summer research support. Finally, as always, thank you to Bryan Lammon, for everything.

INTRODUCTION

Imagine an employee, Lisa, who has had diabetes most of her life. Although her employer knows about her condition, it does not become an issue until Lisa applies for a promotion. When her boss informs her that she is not getting the promotion (despite being the most qualified applicant), the boss mentions Lisa's diabetes and suggests that managing her disease would be difficult if she were placed in the new role. Lisa sues for disability discrimination and during her deposition, when asked if she believes her diabetes is a "disability that substantially limits her ability to do her job or any other daily living tasks,"[1] Lisa responds: "No, I can still do my job and I do not feel limited by my diabetes." Lisa responds in this way because she has spent her life properly managing her diabetes so that it doesn't interfere with her ability to do her job or with her ability to enjoy her life. The court ultimately holds that Lisa is not disabled, relying on her deposition testimony that "disclaimed" the existence of a disability.

Has the court erred in so holding? That is the question this Article addresses. More precisely, if plaintiffs deny or disclaim that they are "disabled," should courts use that as evidence that they cannot prove that they have a disability as defined by the ADA?

The ADA defines disability as a "physical or mental impairment that substantially limits one or more major life activities."[2] Prior to the ADA Amendments Act of 2008, courts had given the definition of disability a very strict and narrow interpretation. Impairments such as diabetes or cancer were often held not to be disabilities under the ADA. But the ADA Amendments Act of 2008 ("ADAAA" or "Amendments") reversed course. Congress made clear that it was unhappy with the narrow interpretation the Supreme Court and the lower courts had given to the definition of disability. Although Congress did not change the basic definition of disability in the ADAAA, it amended the ADA to include several interpretive provisions that should lead to a much broader definition of disability.

[1] Many management-side lawyers ask the question in this way, *see infra* Part II.A, even though this is not an accurate definition of disability.

[2] 42 U.S.C. § 12102(1)(A) (2018).

For the most part, courts have followed Congress's mandate for a broad definition of disability. I and other scholars who reviewed the body of cases decided in the first five years after the ADAAA went into effect (2009–2013)[3] determined that courts were generally getting the disability question correct; most courts decided that the plaintiff had a disability as broadly defined by the ADAAA.[4]

Thus, I was surprised by what my research for a recent article, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, revealed.[5] That research, which reviewed all of the cases decided in the second five years after the ADAAA went into effect (2014–2018), revealed 976 cases that discussed the definition of disability. Of those, I determined that 210 had incorrectly held that the plaintiff did not have a disability.[6] Courts and litigants made several errors. I am discussing one such error here.

In this Article, I address the following issue: when determining whether someone has a disability under the ADA, should courts use plaintiffs' failure to specifically claim that they are disabled against them, thereby holding that they are not disabled and therefore not protected under the ADA? I argue that courts who do so are arriving at incorrect legal conclusions, and those conclusions are troubling from a policy perspective.

When courts rely on plaintiffs' assertions in this way, their opinions contain one or more interpretive missteps, which leads to conclusions that are inconsistent with the text of the ADAAA. First, many courts are using testimony by plaintiffs that they can perform their jobs as evidence that they are not disabled. This puts plaintiffs in an intolerable catch-22; they are required to prove that they are qualified for their position, so relying on testimony about their ability to perform their job

[3] The ADAAA went into effect on January 1, 2009. But because it did not apply retroactively, EEOC v. Agro Distrib., LLC, 555 F.3d 462, 469 n.8 (5th Cir. 2009), courts will only apply the ADAAA in cases where the underlying facts (in employment cases, usually the adverse employment action) occurred after January 1, 2009. *See, e.g.*, Carreras v. Sajo, García & Partners, 596 F.3d 25, 33 (1st Cir. 2010) (not applying the ADAAA when the conduct occurred prior to the amendments). Accordingly, when looking at the first five years after the ADAAA went into effect (2009–2013) many of those cases had to apply the pre-ADAAA definition of disability.

[4] *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050-51 (2013); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 19 (2014) [hereinafter *Backlash*].

[5] Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383 (2019) [hereinafter *Not Disabled*].

[6] *Id.* at 385.

in order to hold they are not disabled is not only non-sensical, but also unfair.[7] Second, with the inclusion of "major bodily functions" as major life activities,[8] most plaintiffs are incapable of testifying as to what is happening inside of their bodies.[9] So, for instance, our hypothetical Lisa (who is not a doctor) cannot testify about how her diabetes substantially limits her endocrine function. Third, (but related to the second argument), asserting a disability as defined by the ADA is a legal conclusion, and under Federal Rule of Evidence 701, lay witnesses should not testify as to legal conclusions.[10] And finally, courts would not find dispositive plaintiff's testimony that she *does* consider herself disabled so it is inconsistent and unfair to give dispositive weight to the plaintiff's denial of or disclaiming her disability.[11]

The policy arguments in favor of and against requiring plaintiffs to specifically claim their disabilities necessarily implicates the issue of how we should be defining disability.[12] On the "pro" side, requiring all plaintiffs to claim their disabilities has the benefit of helping society see disability as an identity, and should also have the benefit of broadening and normalizing disability, thereby leading to reduced stigma.[13] But, on the "con" side, forcing plaintiffs to affirmatively "claim" their disabilities interferes with their autonomy, might be disempowering, and is paternalistic. Perhaps most importantly, it will lead to fewer plaintiffs succeeding on their disability discrimination claims. This might, in time, lead to a narrower protected class under the ADA, and that ultimately hurts everyone.[14]

This Article proceeds in four parts. In Part I, I provide a brief introduction to the ADA and to the roller coaster on which the interpretation of the definition of disability has been riding. Part II provides a snapshot of cases where I have observed the phenomenon identified in this Article. This Part also explores the various reasons why plaintiffs have the tendency to disclaim or downplay the significance of their disabilities. In Part III, I argue that cases where this phenomenon takes place are incorrect as a matter of law and troubling from a policy perspective. This Article concludes with a relatively small solution that

[7] *See infra* Part III.A.1.
[8] *See infra* Part I.B (describing the major bodily functions provision).
[9] *See infra* Part III.A.2.
[10] *See infra* Part III.A.3.
[11] *See infra* Part III.A.4.
[12] *See infra* Part III.B.1.
[13] *See infra* Part III.B.2.
[14] *See infra* Part III.B.3.

will hopefully stop courts from penalizing plaintiffs for refusing or neglecting to claim their disabilities.

I. HISTORY OF THE DEFINITION OF DISABILITY UNDER THE ADA[15]

A. The First 18 Years of the Americans with Disabilities Act of 1990

The ADA was passed in 1990 with overwhelming support in the House and the Senate.[16] The ADA is made up of several titles. Of most significance here is Title I, which applies to employers with fifteen or more employees.[17]

One of the unique features of the ADA is its definition of the protected class. Unlike Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, sex, religion, and national origin,[18] and protects *all* individuals from discrimination based on those protected categories,[19] the ADA only provides protection to a specific class of individuals: those who can show that they meet the definition of disability.[20]

Despite the optimism surrounding the ADA, it wasn't long before courts began narrowly construing the definition of disability under the ADA.[21] In what has been referred to as the *Sutton* trilogy of cases, the Supreme Court held that courts must consider the ameliorative effects of mitigating measures when deciding whether an individual has a disability.[22] *Sutton v. United Air Lines, Inc.* involved twin sisters with

---

[15] This Part is derived in significant part from my prior work. *See* Porter, *Not Disabled*, *supra* note 5, at 386-92.

[16] Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 5 (2013) [hereinafter *Exactly*].

[17] 42 U.S.C. § 12111(5)(A) (2018) (defining employer to include "a person engaged in an industry affecting commerce who has 15 or more employees for each working day"). There were a few cases in my original dataset that were not employment cases, but the overwhelming majority were. All the cases discussed in this Article are employment cases.

[18] *Id.* §§ 2000e to 2000e-17.

[19] Nicole Buonocore Porter, Martin*izing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 535-36 (2013).

[20] *Id.*; *see also* Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. STATE U. L. REV. 313, 316 (2007).

[21] There has only been one Supreme Court case interpreting the definition of disability under the ADA that is arguably pro-plaintiff. *See* Bragdon v. Abbott, 524 U.S. 624, 641 (1998). In that case, the Court held that asymptomatic HIV might be a disability under the ADA. *Id.*

[22] Sutton v. United Air Lines, Inc., 527 U.S. 471, 488-89 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

severe but fully correctable myopia who applied for positions as global airline pilots for United Airlines.[23] They were both rejected because their uncorrected vision did not meet the uncorrected vision standard United Airlines set as a job requirement, even though they both had 20/20 vision with glasses or contacts.[24] The Court held that the Sutton sisters did not have a disability because that determination needs to be made considering any mitigating measures, which in that case, included their corrective eyewear.[25]

The Court decided two other cases on the same day as *Sutton* (hence the "trilogy" moniker). In *Murphy v. United Parcel Service*,[26] the plaintiff was a mechanic for UPS and had high blood pressure.[27] Because of his high blood pressure, he failed the medical exam for Department of Transportation ("DOT") certification, which he was required to pass because his job as a mechanic required that he drive the trucks he was servicing.[28] The Court applied the mitigating measures rule it had just announced in *Sutton* and held that, in determining whether Murphy had a disability under the Act, he should be viewed in his mitigated state, which includes the medication he takes for his high blood pressure.[29]

Finally, in *Albertson's, Inc. v. Kirkingburg*,[30] the third of the trilogy, the Court considered whether the plaintiff's monocular vision constituted a disability.[31] The plaintiff in this case, similar to the *Murphy* case, also had a job that required DOT certification.[32] During a fitness-for-duty physical exam, the doctor noted that Kirkingburg had monocular vision and therefore did not meet the vision requirement for DOT certification.[33] Even though Kirkingburg did not have eyeglasses, medication, or any other devices to ameliorate his monocular vision, the Court elaborated on its mitigating measures holding and stated that courts should not only consider artificial assistive devices, but should also look at how someone's brain can mitigate his vision impairment by developing techniques to cope with the monocular vision.[34]

---

[23] *Id.* at 475.
[24] *Id.* at 475-76.
[25] *Id.* at 481-83, 488-89.
[26] 527 U.S. 516 (1999), *superseded by statute*, ADA Amendments Act of 2008.
[27] *Id.* at 518.
[28] *Id.* at 519.
[29] *Id.* at 521.
[30] 527 U.S. 555 (1999), *superseded by statute*, ADA Amendments Act of 2008.
[31] *Id.* at 563.
[32] *Id.* at 558-59.
[33] *Id.* at 559.
[34] *Id.* at 565-66.

As scholars have discussed, after the Court's announcement of the mitigating measures rule, the lower courts used this rule to hold that many impairments were not disabilities because those impairments, in their mitigated state, did not cause a substantial limitation on any major life activities.[35] For instance, if an employee has diabetes, and must regulate his blood sugar by a closely monitored regimen of eating frequent and proper meals, testing blood sugar levels, and occasionally using insulin to regulate his blood sugar, courts have held that such an employee was not disabled, because in his mitigated state, his diabetes did not cause a substantial limitation on a major life activity.[36]

A few years after the *Sutton* trilogy of cases, the Court struck a final blow against ADA plaintiffs in *Toyota Motor Manufacturing v. Williams*.[37] In this case, the Court clarified the proper meaning of "substantially limits" and "major life activities."[38] The Court held that when looking at the major life activity of "manual tasks," those tasks have to be of "central importance to most people's daily lives."[39] Furthermore, the Court defined "substantially limits" as "considerable" or "to a large degree,"[40] stating: "We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."[41] Finally, the Court also stated that these terms need to be interpreted strictly to create a "demanding standard."[42]

Between the mitigating measures rule in *Sutton* and the more stringent test for substantially limiting a major life activity after *Toyota*,

---

[35] *See* Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. ON C.L. & C.R. 187, 192-93 (2008); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 220 (2008), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1144&context=nulr_online&httpsredir=1&referer= [https://perma.cc/W6MB-44Q2] (stating that, as a result of the mitigating measures rule, "numerous individuals with fairly severe physical or mental impairments have been found not to have a disability under the ADA").

[36] *See, e.g.*, Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724-25 (8th Cir. 2002) (holding that properly mitigated diabetes it not a disability), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

[37] *See* Toyota Motor Mfg. v. Williams, 534 U.S. 184, 187, 198, 203 (2002), *superseded by statute*, ADA Amendments Act of 2008.

[38] *Id.* at 197, 200.

[39] *Id.* at 198.

[40] *Id.* at 196.

[41] *Id.* at 198.

[42] *Id.* at 197.

the ADA's protected class shrunk substantially. Conditions like diabetes,[43] cancer,[44] AIDS,[45] bipolar disorder,[46] multiple sclerosis,[47] monocular vision,[48] epilepsy,[49] cerebral palsy,[50] intellectual disability,[51] and many others were found not to be disabilities under the original statute.[52]

As to the why — why did courts so narrowly construe the definition of disability — there have been several theories posited.[53] But the theory that has gained the most traction is perhaps also the simplest explanation: courts were hostile to the ADA and were engaging in a "backlash" against it, deliberately construing the class of individuals who could claim protection of the Act narrowly.[54] As Professor Matthew Diller explained, after exploring and dismissing other reasons for the poor results in ADA cases, such as weak claims, a poorly drafted statute, and confusion over new legislation, the higher failure rate is likely attributable to a judicial backlash against the ADA.[55] He stated: "The term *backlash* suggests a[] hostility to the statute and toward those who seek to enforce it. The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resisting it."[56] Other scholars have devoted entire books or sections of books discussing the

[43] *See* Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724-25 (8th Cir. 2002).

[44] Long, *supra* note 35, at 218 (discussing one particularly egregious case where, after the plaintiff had died from cancer, the court still decided that he had not been substantially limited in a major life activity); *see also* Ani B. Satz, *Disability Discrimination After the ADA Amendments Act of 2008: Foreword*, 2010 UTAH L. REV. 983, 984 (2010).

[45] Long, *supra* note 35, at 218.

[46] *Id.*

[47] Satz, *supra* note 44, at 984.

[48] *See* Albertson's, Inc., v. Kirkingburg, 527 U.S. 555, 567 (1999).

[49] Satz, *supra* note 44, at 984.

[50] Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 200 (2010) [hereinafter *Crossroads*] (citing to a 10th Circuit case, Holt v. Grand Lake Mental Health Ctr., Inc., 443 F.3d 762, 766-67 (10th Cir. 2006)).

[51] *Id.* (citing to an 11th Circuit case, Littleton v. Wal-Mart Stores, Inc., 231 Fed. App'x 874, 875, 878 (11th Cir. 2007)).

[52] *See* Barry, *Exactly*, *supra* note 16, at 9.

[53] Porter, *Backlash*, *supra* note 4, at 12-14 (discussing these theories).

[54] *Id.* at 13-14.

[55] *See* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, *in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 62, 63-65 (Linda Hamilton Krieger ed., 2003).

[56] *Id.* at 64.

backlash against the ADA, and there is little debate that the backlash does indeed exist.[57]

B. The ADA Amendments Act of 2008

Because of the backlash against the original ADA, Congress amended the statute to bring the coverage of the ADA into line with the high expectations for the original statute.[58] Although there were several attempts at amendments,[59] the ADA Amendments Act was signed into law by George W. Bush on September 25, 2008, and went into effect on January 1, 2009.[60] As summarized by Professor Alex Long in one of the first articles written about the Amendments:

> The ADAAA's most important revisions involve the definition of disability. These revisions include instructions to the courts regarding how the terms of the Act should be interpreted; attempted clarification to the Act's "substantially limits" language; expansion of the "major life activities" concept; and dramatic changes to the Act's "regarded as" prong.[61]

The Amendments did not change the basic definition of actual disability: a physical or mental impairment that substantially limits one or more major life activities. Instead, the Amendments include several rules of construction to help courts interpret the definition of disability.[62] The Amendments made clear that Congress disagreed with both the "demanding standard" language in *Toyota* as well as the mitigating measures rule announced in the *Sutton* trilogy.[63]

The Amendments state that the Court's "demanding standard" language in *Toyota* was incorrect and thus the Act should be interpreted

---

[57] *E.g.*, RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 96-125 (2005); SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT 44-45 (2005).

[58] *See* Long, *supra* note 35, at 217 (stating that expectations for the original ADA were very high).

[59] Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1284 (2009) (discussing the differences between the earlier proposed amendments and the amendments that were ultimately enacted).

[60] *See* Long, *supra* note 35, at 217.

[61] *Id.* at 218.

[62] Anderson, *supra* note 59, at 1286-87.

[63] *See* 42 U.S.C. § 12102(4)(B), (4)(C), (4)(E)(i) (2018); 29 C.F.R. § 1630.2(j)(1)(i) (2021); Anderson, *supra* note 59, at 1284-87; Long, *supra* note 35, at 220, 221-22.

in favor of broad coverage.[64] As mentioned earlier, in *Toyota*, the Court defined "substantially limits" as "prevents or severely restricts."[65] Although there was quite a bit of debate on how to define "substantially limits,"[66] Congress ultimately chose to leave the term undefined but deferred to the EEOC to promulgate regulations regarding this term with the admonition that it was Congress's expectation that the "[EEOC] will revise that portion of its current regulations that defines the term 'substantially limits' . . . to be consistent with this Act, including the Amendments made by this Act."[67] The EEOC promulgated regulations, which are consistent with the broad interpretation mandated by Congress.[68]

The Amendments also overruled *Sutton* by expressly rejecting the mitigating measures rule announced in that case.[69] The ADAAA states that a court should determine whether an impairment substantially limits a major life activity without regard to the ameliorative effects of mitigating measures.[70]

The ADAAA also made changes to the major life activities provision. The original ADA did not define "major life activity" and the EEOC's promulgated list was very brief, leading to a great deal of litigation regarding what qualifies as a major life activity.[71] The ADAAA made several changes. First, it clarified that if an impairment limits one major life activity, it need not limit other major life activities.[72] Second, the ADAAA provides a non-exhaustive list of major life activities, but one that is much broader than the list in the EEOC's regulations under the original ADA. Major life activities now include (with additions in *italics*): Caring for oneself, performing manual tasks, seeing, hearing, *eating*, *sleeping*, walking, *standing*, *lifting*, *bending*, speaking, breathing,

64 Long, *supra* note 35, at 219-21.

65 Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002).

66 Anderson, *supra* note 59, at 1284-87 (discussing the fact that an earlier version of the Amendments, which would have been called the Americans with Disabilities Restoration Act, would have eliminated any reference to substantial limitation of major life activities). In other words, if the individual had an impairment, the individual would be considered to have met the definition of disability.

67 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(6), 122 Stat. 3553, 3554 (2008) (codified as amended at 42 U.S.C. § 12101(b)).

68 *See* 29 C.F.R. § 1630.2(j)(1)(i).

69 Long, *supra* note 35, at 220.

70 42 U.S.C. § 12102(4)(E)(i) (2018).

71 Long, *supra* note 35, at 221-22.

72 § 12102(4)(C).

learning, *reading*, *concentrating*, *thinking*, *communicating*, and working.[73]

Very significantly, and also ingeniously (in my opinion), Congress defined major life activity to include the operation of "major bodily functions," including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[74] These bodily functions basically track many of the impairments that lower courts had held were not disabilities under the original ADA, impairments such as: diabetes (endocrine); HIV (immune system); cancer (normal cell growth); multiple sclerosis (neurological); high blood pressure (circulatory), etc.

Congress also addressed the situation where an individual has an impairment that is episodic in nature. The Amendments state that if an impairment is substantially limiting when it is active, it is still considered substantially limiting even when in remission.[75] This is very significant for impairments like multiple sclerosis ("MS") and cancer, which are either episodic (MS) or go into remission (cancer). Combined with the major bodily functions addition to major life activities, this provision has allowed courts to hold that impairments like cancer and MS are disabilities even when they are not currently active.

C. The First Five Years of the ADAAA

Virtually everyone who discussed the Amendments speculated that they would (and should) cause many more individuals to be considered disabled under the law.[76] I set out to investigate that speculation in my 2014 article, *The New ADA Backlash*.[77]

The results of my research of the case law from the first five years after the Amendments became effective were very promising.[78] As I

---

[73] *Id.* § 12102(2)(A).

[74] *Id.* § 12102(2)(B).

[75] *Id.* § 12102(4)(D).

[76] *See* Cox, *Crossroads*, *supra* note 50, at 204; *see also* Long, *supra* note 35, at 228; Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, N.J. LAW., Feb. 2009, at 37, 37-38 (stating that the new statute will open the floodgates for employees bring lawsuits).

[77] Porter, *Backlash*, *supra* note 4.

[78] Other scholars have also reported on the positive results in the first several years after the ADA was amended. *See, e.g.*, Befort, *supra* note 4, at 2050-51 (concluding from empirical study comparing disability status cases applying pre-ADAAA law and post-ADAAA law: "these data provide considerable support for the proposition that the

concluded in my 2014 article, which surveyed all of the ADA cases decided under the Amendments from the time of their passage until December 31, 2013, the cases discussed "present strong evidence that . . . courts have followed Congress' mandate to broadly interpret the definition of disability under the ADA."[79] That article discussed dozens of cases where courts allowed plaintiffs to survive summary judgment on the issue of whether the plaintiffs can prove that they meet the definition of disability. In many of these cases, I am certain that courts would have found the plaintiffs not disabled before the ADAAA. Perhaps more importantly, I only identified seven cases that I believed incorrectly held that the plaintiff could not meet the definition of disability,[80] and another eight cases that I concluded were poorly litigated.[81] Overall, I was optimistic that the days of narrowly interpreting the definition of disability were firmly behind us. Thus, I was very surprised to see the errors discovered in the body of cases interpreting the definition of disability in the second half of the decade after the Amendments became effective.

D. The Second Five Years of the ADAAA

In an article entitled *Explaining "Not Disabled" Cases Ten Years After the ADAAA*, I set out to review every case that addressed the definition of disability issue in the second five years after the ADAAA became effective — January 1, 2014–December 31, 2018).[82] This search resulted in 976 cases. Of those, I concluded that the court erroneously held that the plaintiff was not disabled in over 200 of them.[83] My prior article attempted to explain what went wrong — why were courts coming to the wrong conclusion in these cases?

Although a detailed analysis of my findings in that article is not necessary for purposes of this Article, I will briefly summarize the highlights. The most surprising finding of all was the number of cases where the courts (and presumably the parties) were unaware that the ADA had ever been amended. Of the 210 cases that I believed were erroneously decided, the court cited to absolutely no post-ADAAA law

ADAAA is having the intended effect of fostering a broad construction of the revised disability definition").

[79] Porter, *Backlash*, *supra* note 4, at 46.

[80] *Id.* at 41-44.

[81] *Id.* at 44-46.

[82] Porter, *Not Disabled*, *supra* note 5, at 385.

[83] *Id.* There were other cases where the court held that the plaintiff was not disabled but because I believed the court was correct in those cases, I did not include them in my analysis. *Id.*

in fifty-four of them.[84] Many of these plaintiffs had fairly significant limitations, including significant mobility limitations caused by multiple sclerosis and other impairments, epilepsy, and someone who had undergone a kidney transplant.[85]

Even when the litigants and courts were aware of the ADAAA, there were plenty of cases where the plaintiffs seemed unaware of some of the most significant and helpful provisions of the ADAAA, such as the major bodily functions provision or the episodic/in remission provision.[86] As noted earlier, together these two provisions allow conditions that are episodic or in remission and that do not limit a functional activity of the body to still be considered disabilities.[87] So relapsing-remitting MS should be considered a disability even when the person's MS is in remission because, when active, the MS would substantially limit the person's neurological function (in addition to any functional limitations, like partial blindness, weakness, numbness, etc.). But in my dataset, many plaintiffs did not take advantage of these provisions when they would have been the most straightforward way to prove disability. Finally, even when courts cited to the ADAAA, they sometimes failed to follow the clear statutory language, for instance, by considering mitigating measures despite Congress's clear repudiation of the mitigating measures rule announced in the *Sutton* trilogy.[88]

While studying the 210 cases I found to be erroneously decided, I discovered the recurring error that is the subject of this Article. I repeatedly found instances of courts using a plaintiff's statements disclaiming or downplaying her disability against her to hold that she cannot meet the statutory definition of disability.

II. THE PROBLEM: WHAT AND WHY

This Part first provides a description of the different types of cases where this phenomenon appears — where courts used a plaintiff's statements disclaiming or downplaying her disability against her to hold that she cannot meet the statutory definition of disability. Following the presentation of these different types of cases, this Part then attempts to describe why this is happening. Specifically, why are plaintiffs either

[84] *Id.* at 392-93. There were another thirty-four cases where the court failed to cite to the proper ADAAA law for the regarded as prong of the definition of disability, *id.* at 397, but that prong is not the focus of this Article.

[85] *Id.* at 393-96.

[86] *See id.* at 398-402 (discussing the cases I have labeled "incompetence").

[87] *See supra* notes 74–75 and accompanying text.

[88] Porter, *Not Disabled*, *supra* note 5, at 404-05.

disclaiming, denying, or simply neglecting to affirmatively "claim" their disabilities?

A. Case Examples

Perhaps the most egregious example of this phenomenon is *Randall v. United Petroleum Transports, Inc*.[89] The plaintiff in this case had a seizure disorder that prevented him from driving; accordingly, he asked his employer for an accommodation to allow him to work from home.[90] The excuse slip from his doctor stated: "he is disabled as he cannot drive for 6 month[s]."[91] The court noted that the plaintiff "testified that he did not have any physical impairments" and "[w]hen asked if . . . [he had] a 'real disability' that prevented him from working, Randall answered: 'No, I just could not drive.'"[92] The court stated that this "admission" was "critical," because driving is not a major life activity.[93] Despite the fact that seizures are significant, and epilepsy is listed in the EEOC regulations as one of the impairments for which it should "easily be concluded" that the impairment will substantially limit a major life activity (for epilepsy, neurological function[94]) the court found the plaintiff not disabled, in large part because of his deposition statement where he denied having a disability.[95]

1. Cases Where Plaintiff Disclaims Any Problem with Working[96]

The most common way the problem demonstrated in *Randall* plays out in the case law involves the plaintiff denying any difficulty performing his or her job. As will be discussed later, this is especially

[89] *See* Randall v. United Petroleum Transps., Inc., 131 F. Supp. 3d 566 (W.D. La. 2015).

[90] *Id.* at 568, 570.

[91] *Id.* at 568.

[92] *Id.* at 571.

[93] *Id.* In so holding, however, the court relied on only pre-ADAAA law. *See id.*

[94] 29 C.F.R. § 1630.2(j)(3)(iii) (2021).

[95] *Randall*, 131 F. Supp. 3d at 571.

[96] In addition to the cases discussed in this Section, other courts also relied on the plaintiff's statements about his ability to perform his job to hold that he was not disabled. *See, e.g.*, Soules v. Connecticut, No. 14-CV-1045, 2015 WL 5797014, at *3, *18-19 (D. Conn. Sept. 30, 2015) (noting that Plaintiff said he was "'capable of performing his job,' and that his 'work as a police officer had been excellent'" despite his PTSD and knee injury); Wedel v. Petco Animal Supplies Stores, Inc., No. 13-CV-2298, 2015 WL 859072, at *4, *7 (D. Kan. Feb. 27, 2015) (noting that "Plaintiff concedes that her Crohn's disease did not affect her employment" in granting summary judgment in favor of the employer).

problematic because in order to prove discrimination (including a failure to accommodate) under the ADA, the plaintiff must also prove that he is able to perform the essential functions of the job with or without reasonable accommodations.[97]

This issue was present in the *Randall* case just discussed. Similarly, in *Stermer v. Caterpillar Inc.*, the plaintiff alleged that his disabilities included ADHD, depression, and anxiety.[98] Despite his assertion that his impairments affected his ability to concentrate, learn, and sleep, the court pointed to the fact that the plaintiff stated at his deposition that his impairments did not "prevent or limit his ability to work for Defendant in any way."[99] Accordingly, the court held he was not disabled.[100]

In *Gavurnik v. Home Properties, L.P.*,[101] the plaintiff was a service technician at an apartment complex, which required quite a bit of manual labor, including walking.[102] The plaintiff suffered from a "series of vascular and musculoskeletal conditions including Raynaud's, rheumatoid arthritis, and bunions, which affected his ability to walk and stand."[103] He asked for two accommodations: "podiatric footwear" and no mandatory overtime.[104] He was granted the special footwear accommodation but was not allowed to avoid mandatory overtime.[105] During his deposition, the plaintiff testified that he "would walk as far as needed on the job, including for at least an hour" and that he could walk "as a normal person can."[106] The court then used that testimony, along with the fact that the plaintiff was meeting expectations on his performance evaluations, to hold that the plaintiff was not disabled.[107] Recognizing that the context of these questions is unclear, there are several explanations for why the plaintiff might have testified the way he did. If he was being asked about his ability to do his job, his responses make perfect sense, because he's required to prove he can perform his job. As for the comment that he can walk "as a normal person can," I

[97] *See* 42 U.S.C. § 12111(8) (2018) (defining qualified as someone who, "with or without reasonable accommodation[s], can perform the essential functions . . . [of the job]").

[98] Stermer v. Caterpillar Inc., 102 F. Supp. 3d 959, 964 (N.D. Ill. 2015).

[99] *Id.* at 965-66.

[100] *Id.* at 966.

[101] 227 F. Supp. 3d 410 (E.D. Pa. 2017).

[102] *Id.* at 415.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 419.

suspect this is the result of a defensive response to the employer's attorney's questions that made him feel like he was somehow deficient because of his disability.

The court in *Graham v. Three Village Central School District* was also erroneously focused on the plaintiff's ability to do her job, even though she was not claiming working as the major life activity that was substantially limited.[108] The plaintiff described herself as "disabled as of 1983" after she broke her hip.[109] She had subsequent surgeries and rehabilitation therapy.[110] Although plaintiff claims she had limited mobility after the injury to her hip, and she had been given a "handicapped sticker" by the state, she had no need to request an accommodation from her employer because there was a handicapped parking spot close to her workplace.[111] This case involves the plaintiff's request to have a handicapped parking spot reinstated when the employer's building was undergoing construction — an accommodation that the employer failed to provide.[112] Given that plaintiff's only request was a parking accommodation to allow her to more easily get into the building, the employer's attorney's focus on her ability to perform her job is confusing and troubling. The court quotes at least ten questions that all relate to whether the plaintiff could walk well enough to do her job.[113] These questions are irrelevant for purposes of determining whether the plaintiff was disabled because she was only asking for an accommodation that would allow her to more easily get into the workplace. Once there, she could handle walking the short distances within the building.

In *Palish v. K & K RX Services, L.P.*, the plaintiff suffered from spondylolisthesis, degenerative disc disease, and retrolisthesis, all of which affected his back.[114] When he was hired as a pharmacy manager and asked to be allowed to sit occasionally on the job, his employer refused.[115] The court held he was not disabled in part based on the

[108] *See* Graham v. Three Vill. Cent. Sch. Dist., No. 11-CV-5182, 2013 WL 5445736, at *10-14 (E.D.N.Y. Sept. 30, 2013).

[109] *Id.* at *2.

[110] *Id.*

[111] *Id.*

[112] *Id.* at *4-5.

[113] *Id.* at *13.

[114] Palish v. K & K RX Servs., LP, No. 13-CV-4092, 2014 WL 2692489, at *1 (E.D. Pa. June 13, 2014).

[115] *Id.* at *2.

plaintiff's testimony that he was able to do the amount of standing required for his position even though it caused him pain.[116]

The court in *Smart v. DeKalb County, Georgia* also held that the plaintiff was not disabled based in part on his deposition testimony.[117] Plaintiff's job required him to maintain a commercial driver's license, which required periodic physical examinations.[118] He failed one of these tests because he had glaucoma and high blood pressure.[119] He ultimately resigned because he could not pass this physical.[120] Plaintiff's testimony focused on his ability to work and downplayed his limitations. For instance, when asked about limitations related to his vision, he testified that he had no issues and was not limited in driving, doing chores, or taking care of himself.[121] He also testified that his glaucoma was no longer severe because of his medication and surgeries.[122] However, in holding that he was not disabled, the court also relied on the fact that the plaintiff had testified that he was "ready and willing to return to work as soon as possible."[123] The court made similar mistakes with regard to the plaintiff's hypertension. It relied on the plaintiff's testimony that since he began taking blood pressure medication, he was not limited in any major life activity. The court ultimately held that because the plaintiff was able to return to work despite his hypertension, he was unable to show that his hypertension substantially limited a "major bodily function or major life activity."[124]

Similarly, in *Toland v. BellSouth Telecommunications, Division of AT&T, Inc.*, the plaintiff (proceeding pro se) was denied employment because, during a lifting test, his blood pressure was too high.[125] The plaintiff argued that his hypertension was a disability because it

116 *Id.* at *7-8.

117 Smart v. DeKalb Cnty, 16-CV-826, 2018 WL 1089677, at *8 (N.D. Ga. Feb. 26, 2018).

118 *Id.* at *1.

119 *Id.*

120 *See id.* at *3.

121 *Id.* at *7.

122 *Id.* This last statement should have been irrelevant because the amended ADA requires courts to determine whether someone is disabled by viewing them in their unmitigated state. Thus, the fact that his glaucoma was improved because of his medication and surgery should not have been considered by the court.

123 *Id.* at *8.

124 *Id.* This is a perplexing statement by the court. The fact that the plaintiff's blood pressure limits his circulatory function, a major bodily function after the amendments, is irrelevant to his ability to perform his job.

125 Toland v. BellSouth Telecomms., Inc., No. 15-CV-02441, 2017 WL 6374873, at *3 (N.D. Ga. May 1, 2017).

substantially limited his cardiovascular and circulatory systems, which are major bodily functions under the Amendments.[126] The court ignored the major bodily functions provision, and instead pointed to the fact that the plaintiff testified that he was diagnosed with high blood pressure many years ago, but that it had not "affected his performance in past jobs, that he believed it would not restrict him from performing the wire technician position, and that his 'blood pressure [did not] restrict him from any other activities in [his] life.'"[127] The court's reliance on these statements was especially infuriating because the whole point of the major bodily functions provision is to protect people who have health conditions that might affect their body on the inside even when those conditions do not create any substantial limitations on functional activities.

In another case where the plaintiff was proceeding pro se, *Bumphus v. Unique Personnel Consultants*,[128] the court held that neither the plaintiff's PTSD, nor his spinal stenosis, which caused a spinal fusion surgery, were disabilities. The court stated that there was not sufficient evidence that his back impairment was substantially limiting because he "testified that he was able to perform nearly all aspects of his warehousing job and that his back pain did not hinder his ability to be productive."[129] Accordingly, the court held that, because he could perform his job, he was not disabled.[130]

And in one final pro se case, the plaintiff had carpal tunnel syndrome,[131] which caused physical pain and muscle spasms in his fingers, hands, and arms.[132] He was asked during his deposition whether

[126] *See id.* at *7. This was a bit surprising because I would not have expected a pro se plaintiff to know about the provision in the ADAAA regarding major bodily functions.

[127] *See id.* (alterations in original).

[128] Bumphus v. Unique Pers. Consultants, No. 16-CV-312, 2018 WL 4144475 (S.D. Ill. Aug. 30, 2018).

[129] *Id.* at *3.

[130] *Id.* To be fair, this is not the only error made by this court. The court did not cite to any post-Amendments law and also stated that "lifting limitations do not qualify as a disability under the ADA." *Id.* This is despite the fact that "lifting" is listed as a major life activity in the statute. 42 U.S.C. § 12102(2)(A) (2018). Because the plaintiff was proceeding pro se, it is not surprising that he did not cite to current law, but it is disappointing that the court (which also referred to the statute's name incorrectly — the "American with Disability Act" rather than the "Americans with Disabilities Act" did not get the law correct. *Bumphus*, 2018 WL 4144475, at *3.

[131] Sierra v. Port Consol. Jacksonville, LLC, No. 14-CV-1496, 2016 WL 927189, at *1 (M.D. Fla. Mar. 4, 2016).

[132] *Id.* at *4.

he was "able to perform general manual labor type of work."[133] And he responded: "I was able to do my job."[134] Relying in part on this testimony, the court held that he was not disabled.[135]

2. Cases Where Plaintiff Downplays Any Limitations

Especially in cases where a plaintiff is not requesting an accommodation, the plaintiff might be especially unwilling to admit any limitation caused by the disability.[136] For instance, in *Wilson v. Dollar General Corp.*, the plaintiff was claiming that the employer failed to hire him because of his monocular vision.[137] He was not seeking an accommodation and believed that he was fully qualified to perform the job. Thus, it was not surprising when he testified that he was not at all limited by his monocular vision. As the Supreme Court addressed in a pre-ADAAA case involving monocular vision, individuals who have this condition are often able to compensate for the impairment by using the other eye.[138] In the pre-ADAAA era, the fact that a person's brain could compensate for the limited-vision eye meant that the person might not be considered disabled because courts were to view the question of disability considering mitigating measures.[139] But because that is no longer the law after the ADAAA, the court in *Wilson* erred by considering the plaintiff in his mitigated state.[140]

Moreover, the court in *Wilson* also relied on the plaintiff's deposition testimony. As the court stated: "More compelling . . . is Plaintiff's own

[133] *Id.* at *5.

[134] *Id.*

[135] *Id.* at *6.

[136] If a plaintiff does not need an accommodation, the easiest way of proceeding under the ADA as amended is to proceed under the new "regarded as" prong. Under that prong, a plaintiff only needs to show that she suffered an adverse action because of an actual or perceived impairment, whether or not the impairment does or is perceived to substantially limit a major life activity. 42 U.S.C. § 12102(3)(A) (2018). As a compromise for this broad coverage, the Amendments state that a plaintiff is not entitled to an accommodation if she only meets the definition of disability under the regarded as prong. *See id.* § 12201(h). But even though some of the plaintiffs I'm discussing in this article were not seeking an accommodation (at the time of their termination) and therefore could have brought their claims under the regarded as prong, it is still problematic when a court gets the actual disability analysis wrong. This is because the erroneous analysis becomes entrenched in the case law and might be relied on by subsequent courts and litigants.

[137] Wilson v. Dollar Gen. Corp., 122 F. Supp. 3d 460, 461, 463 (W.D. Va. 2015).

[138] *See* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

[139] *Id.* at 565-66.

[140] *See Wilson*, 122 F. Supp. 3d at 465.

testimony detailing his lack of limitations . . . ."[141] The plaintiff testified in his deposition that he can do "everything a man with two eyes can do" and "I can do anything physical that anybody else can do" (other than ride motorcycles). And then in response to defense counsel's question of whether there is anything that he cannot do other than riding motorcycles, the plaintiff replied: "That's right, I can do anything — anything you can do, I can do."[142] What's interesting is that the defense counsel specifically referred to the plaintiff's "disability" by asking: "[s]o your *disability* causes no restrictions or limitations on what you can do in life?" And the plaintiff actually referred to his monocular vision as a "disability."[143] But apropos of the category of cases above,[144] the plaintiff states that he could have performed many jobs at Dollar General.[145] The court held that the plaintiff's monocular vision was not a disability.[146]

Similarly in *Feltman v. BNSF Railway Company, Inc.*, the employer withdrew an employment offer to the plaintiff after learning that he has a partially amputated right foot.[147] The court held that the plaintiff's amputation was not an actual disability under the ADA because during his deposition, he testified that his condition does not limit his daily life activities.[148] This testimony is not surprising because the plaintiff was trying to prove that the employer should not have withdrawn his offer simply because of his amputation. In fact, in his initial letter notifying the employer of his foot condition, he stated that it had not caused him to be unable to do anything he wanted to do and that it was a "minor issue that was overcome decades ago."[149]

In another case, *Cheung v. Donahoe*, the plaintiff had psoriasis, an auto-immune disorder, which led to her request to wear leather or cotton gloves while operating sorting machines at the USPS, a request the employer denied.[150] In holding that the plaintiff had not established that her psoriasis was a disability, the court stated:

---

[141] *Id.*

[142] *Id.* at 465-66.

[143] *See id.* at 466 (emphasis added).

[144] *See supra* Part II.A.1.

[145] *Wilson*, 122 F. Supp. 3d at 466.

[146] *Id.*

[147] Feltman v. BNSF Ry. Co., No. 16-CV-01051, 2018 WL 529952, at *1 (N.D. Ala. Jan. 24, 2018).

[148] *Id.* at *8.

[149] *Id.*

[150] Cheung v. Donahoe, No. 11-CV-0122, 2016 WL 3640683, at *2-3 (E.D.N.Y. June 29, 2016).

> In fact, the greatest blow to the instant claim is Cheung's own deposition testimony, in which she acknowledged that, in spite of her psoriasis, she was able to do the maintenance work in her apartment building, which, again, included, among other activities, shoveling snow, changing light bulbs, cleaning up, maintaining the lawn, raking leaves, sweeping the grounds, and mopping floors. She also testified that she ably performed chores around the house, such as doing the laundry, washing dishes and cleaning. She did not wear gloves during these activities, nor was there any indication in the record that these chores were particularly onerous for her . . . . Such testimony fails to provide the statutorily-required proof that plaintiff's psoriasis "substantially limits one or more of her major life activities." Rather, her self-professed ability to function normally, without any meaningful risk or difficulty, devastates her claim to be disabled.[151]

The court's reliance on plaintiff's testimony in this regard is frustrating. Because the plaintiff's claim is that her psoriasis substantially limited her immune function, one of the major bodily functions listed in the Amendments, the fact that the plaintiff testified regarding activities she *can* perform is irrelevant. The ADA only requires a plaintiff to be substantially limited in *one* major life activity.[152]

A plaintiff might downplay the significance of their symptoms because their disability is episodic or, even if not an impairment that is known to be episodic, the plaintiff might have good days and bad days. And when questioned, they might emphasize their good days. For instance, in *Bates v. Roche Diagnostics Corp.*, the plaintiff had complications from an improper hysterectomy, that caused at least two operations and severe and long-lasting pain in her leg.[153] However, when asked how she was doing at the time of her termination, she testified that "I was healthy. I was doing great."[154] This might be true, but it ignores the provision in the Amendments that states that impairments that are episodic or in remission can still be disabilities if they would have substantially limited a major life activity at the time they were active.[155] If the plaintiff's termination was because of an impairment that, when active, would substantially limit a major life

[151] *Id.* at *6 (citations omitted).

[152] 42 U.S.C. § 12102(4)(C) (2018).

[153] Bates v. Roche Diagnostics Corp., 971 F. Supp. 2d 833, 844 (S.D. Ind. 2013).

[154] *Id.* at 845.

[155] 42 U.S.C. § 12102(4)(D).

activity, it should not matter that she testified that she was feeling great at the time of her termination.

A similar issue arises with impairments that are improved by mitigating measures. The ADA now states that courts should not consider the plaintiff's mitigating measures when determining if the plaintiff is disabled.[156] But the plaintiff might be considering the mitigation when answering questions about her limitations. For instance, in *Gorbea v. Verizon New York, Inc.*, the plaintiff had asthma that she managed by avoiding certain irritants and using an inhaler when needed.[157] But when she was questioned about her asthma, she downplayed its significance,[158] likely because she has learned to manage it by avoiding things that trigger her asthma and using her inhaler as needed.

In a rather unique version of this problem, the plaintiff in *Brown v. DTE Electric Company* was unable to prove a disability based on an enlarged prostate.[159] He was fired when he was unable to provide a urine sample on demand and the employer refused to provide an alternative drug test.[160] He claimed urination as the major life activity, but in his deposition he testified that the frequency of his urination, a couple of times a day, does not really limit him in any way.[161] He stated in his deposition that he had not sought further medical attention for his enlarged prostate because it "hadn't been a major issue."[162] This is an interesting variation of the more common problem identified in this Section, because this plaintiff's specific problem (infrequent urination) caused by his impairment (enlarged prostate) is not normally considered a problem. If anything, people often complain about having to urinate too often. (See virtually every pregnant person ever.) But his impairment directly led to his termination and should have been accommodated.

---

156 *Id.* § 12102(4)(E)(i).

157 Gorbea v. Verizon N.Y., Inc., No. 11-CV-3758, 2014 WL 917198, at *2 (E.D.N.Y. Mar. 10, 2014).

158 For instance, the plaintiff responded affirmatively to the question: "Would you say that you are able to perform all of the regular major life activities without any issues connected to your asthma?" *Id.* at *8.

159 Brown v. DTE Elec. Co., No. 17-CV-12863, 2018 WL 4145923, at *4 (E.D. Mich. Aug. 30, 2018).

160 *Id.* at *1.

161 *Id.* at *4 (ignoring the reality that the limitation on his ability to urinate is what caused him to get terminated because he could not produce urine for his random drug test).

162 *Id.*

3. Cases Where Plaintiffs Do Not Specifically Refer to Their Condition as a Disability

Even more problematic than the preceding category of cases, in the cases discussed in this Section, plaintiffs are penalized not for downplaying their limitations, but simply for not specifically labeling their impairment a "disability."

For instance, the plaintiff in one case had to have a battery replaced in his pacemaker for his heart and he developed an infection.[163] After the employer refused to let him return to work from a leave of absence, this lawsuit ensued.[164] During his deposition, he was asked what his disability was.[165] He responded: "I was still under a doctor's care."[166] In response to a follow-up question regarding how he would characterize his claim that his condition constituted a disability under the ADA, he replied: "I am not a doctor. I cannot determine when I am able to go back to work."[167] The court held he was not disabled.[168]

Similarly, in *Nichols v. OhioHealth Corp.*, the plaintiff, who had degenerative arthritis in her knee related to a meniscus tear,[169] was asked whether she believed she was disabled, and she responded "no."[170] Although the court acknowledged that the plaintiff's deposition testimony does not conclusively establish that plaintiff is not disabled, the court still found it relevant.[171] The court ultimately held that the plaintiff was not disabled.[172]

In a case brought by a pro-se plaintiff, the court held that the plaintiff's back injury did not constitute a disability because he did not specifically allege in his complaint that his back injury was a disability.[173]

---

[163] Yinger v. Postal Presort, Inc., No. 15-1106, 2016 WL 3541744, at *2 (D. Kan. June 29, 2016), *rev'd and remanded*, 693 F. App'x 768 (10th Cir. 2017). Fortunately, the error the court made in this case was fixed when the Court of Appeals reversed. However, the case is still representative of the phenomenon this Article is exploring.

[164] *See id.*

[165] *Id.* at *3.

[166] *Id.*

[167] *Id.*

[168] *Id.* at *8.

[169] Nichols v. OhioHealth Corp., No. 14-CV-2796, 2017 WL 3537184, at *6 (S.D. Ohio Aug. 17, 2017).

[170] *Id.* at *5.

[171] *Id.*

[172] *Id.* at *7.

[173] Williams v. City of Richardson, No. 16-CV-2944-L-BK, 2017 WL 4404461, at *8 (N.D. Tex. Sept. 8, 2017).

In some cases, the plaintiff might find invasive health questions offensive and refuse to answer them. For instance, in one case, in response to interrogatories about plaintiff's claimed disability (he had a heart condition that caused him to be out of work for two months),[174] he responded: "various health issues" and "personal information."[175] This plaintiff was proceeding pro se so he did not have an attorney available to inform him that, even though the questions might be invasive, he is nevertheless required to answer them.

In another case, the plaintiff (proceeding pro se) was HIV positive.[176] The plaintiff testified at his deposition that although his HIV status caused him "general fatigue, the occasional cold, and a few bouts with pink eye," he also testified that: "I am not disabled" and "I don't consider [HIV] a disability."[177] Despite the fact that the EEOC regulations state that certain impairments will "virtually always be found to impose a substantial limitation on a major life activity," and it should be easily concluded that HIV substantially limits immune function,[178] (a major bodily function that constitutes a major life activity under the ADA), the court held that the regulations are not controlling and that they only create a rebuttable presumption that HIV is a disability.[179] The court then stated that the plaintiff cannot meet the definition under the ADA because of the plaintiff's testimony that he did not consider himself "disabled."[180]

The method I have chosen to categorize these cases is not perfect because there is often a great deal of overlap. For instance, *Abbott v. Elwood Staffing Services, Inc.* arguably falls into all three categories. [181] The plaintiff became pregnant while working at an automotive plant.[182] Some of her work, specifically installing doors, was physically

[174] Bryant v. Greater New Haven Transit Dist., 8 F. Supp. 3d 115, 122 (D. Conn. 2014).

[175] *Id.* at 140.

[176] Rodriguez v. HSBC Bank USA, Nat'l Ass'n, No. 14-CV-945-T-30TGW, 2015 WL 7429273, at *1 (M.D. Fla. Nov. 23, 2015). In the statement of facts, the court stated that the plaintiff was a "gay man who contracted the Human Immunodeficiency Virus (HIV) in 1998." *Id.* It is unclear to me why his sexual orientation is relevant except to suggest to the reader that the plaintiff contracted HIV through unprotected sex with men.

[177] *Id.* at *3.

[178] 29 C.F.R. § 1630.2(j)(3)(ii)-(iii) (2021).

[179] *Rodriguez*, 2015 WL 742973, at *7.

[180] *Id.* at *8.

[181] *See* Abbott v. Elwood Staffing Servs., Inc., 44 F. Supp. 3d 1125, 1125 (N.D. Ala. 2014).

[182] *See id.* at 1143, 1146.

arduous.[183] When plaintiff was installing a door one day, she had to strain to do so.[184] She later noticed that she was experiencing vaginal bleeding.[185] She went to the emergency room and the doctor told her to take it easy and not engage in the activity that caused the bleeding in the first place.[186] She sought a light duty accommodation to not have to do the difficult work of installing the doors.[187] The employer said it could not meet her medical restrictions and placed her on leave; after she exhausted leave while she was still pregnant, she was terminated.[188] Regarding her disability claim, the court first noted that pregnancy is not ordinarily considered a disability unless a pregnancy-related impairment substantially limits a major life activity.[189] The court stated that there was no evidence that the plaintiff's pregnancy was not "healthy" or that there were any complications with it.[190] More importantly (or "tellingly," according to the court), in the plaintiff's deposition, she testified that her condition "wasn't a disability, it was pregnancy and on-the-job injury, I wasn't disabled. I was at all times physically able to work with requirements and restrictions."[191] The court stated that the plaintiff "never considered herself disabled" when she was working and that she had also stated that she was limited to light duty "solely as a result of [her] pregnancy."[192] Accordingly, the court granted the employer summary judgment, and her ADA claims were dismissed.[193]

This case arguably falls into all three of the categories I have identified. The plaintiff testified that she was able to do all aspects of her job (presumably with the light duty accommodation she had sought based on her doctor's advice). Moreover, she downplayed the significance of her "impairment," the complications caused by her pregnancy, despite the fact that these complications apparently threatened the viability of her pregnancy. Finally, she refused to call her

183 *See id.* at 1146.

184 *Id.*

185 *Id.*

186 *Id.* at 1147.

187 *Id.* at 1148-49.

188 *Id.* at 1150-51.

189 *Id.* at 1165. *See generally* Nicole Buonocore Porter, *Accommodating Pregnancy Five Years After* Young v. UPS*: Where We Are & Where We Should Go*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 73, 84-94 (2020) [hereinafter *Pregnancy*] (discussing the issue of pregnancy as a disability).

190 *Abbott*, 44 F. Supp. 3d at 1165.

191 *Id.* at 1166 (quoting her deposition testimony).

192 *Id.*

193 *Id.*

pregnancy a disability. This is a fairly common phenomenon with respect to pregnancy. Many (if not most) pregnant women see their pregnancies as something miraculous that their bodies are doing (creating life) rather than as a limitation, even when that pregnancy causes limitations. But under the broad definition of disability under the ADAAA, complications from pregnancy can be a disability.[194]

B. Why This Happens[195]

There are three explanations for why this is happening — why plaintiffs are "disclaiming" their disabilities. First, the structure of the ADA causes some of this phenomenon. Second, the realities of litigation also has an effect on these cases. And third, this Section discusses some of the reasons plaintiffs affirmatively want to disclaim the "disabled" label. These include the stigma of being labeled as "disabled" and the fear of vulnerability that attaches to claiming a disability.

1. Structure of the ADA

One reason plaintiffs are unable to testify that they are disabled is because the plaintiff's most straightforward way of establishing a disability is often to argue that she was substantially limited in one of the major bodily functions listed in the statute.[196] But, unless the plaintiff is a doctor, she will be unable to testify as to how her impairment substantially limits one of her major bodily functions.[197] This problem occurred in *Alston v. Park Pleasant, Inc.*, where the plaintiff had breast cancer.[198] Although the court recognized that cancer "can—and generally will—be a qualifying disability under the ADA," it

[194] Porter, *Pregnancy*, *supra* note 189, at 84, 87-88.

[195] One point of clarification: This Section is focusing on why *plaintiffs* tend to disclaim their disabilities. I am not addressing why *courts* are using that evidence against them. As I argue below, courts are in error when they rely on this evidence. *See infra* Part III. But as for why courts are making these mistakes, there does not seem to be any common thread linking these cases. To be sure, some of these cases would have been dismissed for reasons not related to the disability coverage question. But it is still problematic when courts get the disability issue wrong, even though there were other grounds on which to dismiss the case. The problem is that an analysis of the disability issue that is in error becomes entrenched in the law and might be relied on by future litigants and courts.

[196] *See* 42 U.S.C. § 12102(2)(B) (2018); *see also supra* Part I.B.

[197] *See infra* Part III.A.2.

[198] Alston v. Park Pleasant, Inc., 679 F. App'x 169, 170 (3d Cir. 2017).

criticized Alston for not specifically alleging that she was substantially limited in normal cell growth.[199]

Similarly, in *Smart v. DeKalb County, Georgia*,[200] the court noted that the plaintiff had not testified that his hypertension affected a major bodily function, his circulatory function.[201] This is not surprising because the plaintiff is unable to testify about how his hypertension substantially limits his circulatory function. Only a medical professional could so testify.

A second reason plaintiffs might not have testified sufficiently about their disabilities is that most plaintiffs do not understand the breadth of the ADA after the Amendments. (To be clear: many attorneys and courts also do not understand the breadth of the definition of disability after the ADAAA.)[202] For instance, as mentioned above, the ADAAA now includes major bodily functions as major life activities, and yet many individuals might not understand that having a health condition such as diabetes or hypertension constitutes a disability because of the limitations that occur to the person's major bodily functions.[203] As another example, pregnancy can be a disability after the ADAAA, and yet most women do not see their pregnancies as disabilities.[204] Finally, some of the cases where I observed this phenomenon involved impairments related to the plaintiff's knee or back.[205] Most people do not automatically consider such impairments to be disabilities and therefore, they might deny they are disabled, even though they believe that the employer took some adverse action against them *because of* their knee or back impairment.

2. Realities of Litigation

The point above — that some plaintiffs are not aware of the breadth of the definition of disability after the ADAAA — is understandable

[199] *Id.* at 172-73.

[200] 16-cv-826, 2018 WL 1089677 (N.D. Ga. Feb. 26, 2018).

[201] *See id.* at *7-8.

[202] *See* Porter, *Not Disabled*, *supra* note 5, at 393-400 (discussing the many errors made by attorneys and courts).

[203] *See supra* notes 74–75. *See generally* Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 574 (2021) (discussing the importance and breadth of the major bodily function provision).

[204] *See* Porter, *Pregnancy*, supra note 189, at 84-94.

[205] *See, e.g.*, Williams v. City of Richardson, No. 16-CV-2944-L-BK, 2017 WL 4404461 (N.D. Tex. Sept. 8, 2017) (failing to claim his back injury as a disability); Nichols v. OhioHealth Corp., No. 14-CV-2796, 2017 WL 3537184 (S.D. Ohio Aug. 17, 2017) (failing to claim her knee injury to be a disability).

given that several of the plaintiffs in these cases were not represented by an attorney, but were proceeding pro se.[206] For instance, in one case discussed above, the pro se plaintiff refused to respond to interrogatories about his claimed disability (he had a heart condition that caused him to be out of work for two months).[207] In response to those interrogatories, he replied: "various health issues" and "personal information."[208] Because this plaintiff was pro se, he did not have an attorney available to tell him that, even though the questions might be invasive, he is still required to answer them.

To be clear, the majority of the plaintiffs in these cases *were* represented by counsel. We would expect that the plaintiffs' lawyers would have consulted with their clients before their deposition to explain to them what facts they will need to prove in order to keep their cases alive; specifically, what is required to prove that the plaintiff has a disability as defined by the ADA. To be clear (and I hope this is obvious) I am not suggesting that plaintiffs' lawyers should counsel their clients to embellish the truth. Instead, plaintiffs' lawyers should prepare their clients for the questions that might be asked by the employer's lawyer, and how the employer's lawyer might try to confuse them or get them to deny one of two points that are seemingly in conflict — that they are substantially limited in a major life activity but that they are nevertheless qualified to do their jobs with or without accommodations. Obviously, I cannot know how plaintiffs' lawyers prepared their clients for depositions. But it seems to me that at least some of the mistakes could have been avoided with adequate

206 *See* Bumphus v. Unique Pers. Consultants, No. 16-CV-312, 2018 WL 4144475, at *1 (S.D. Ill. Aug. 30, 2018); *Williams*, 2017 WL 4404461, at *1; Toland v. BellSouth Telecomms., Inc., No. 15-CV-02441 , 2017 WL 6374873, at * 1 (N.D. Ga. May 1, 2017); Sierra v. Port Consol. Jacksonville, LLC, No. 14-CV-1496, 2016 WL 927189, at* 1 (M.D. Fla. Mar. 4, 2016); Rodriguez v. HSBC Bank USA, Nat'l Ass'n, No. 14-CV-945-T-30TGW, 2015 WL 7429273, at *1 (M.D. Fla. Nov. 23, 2015); Bryant v. Greater New Haven Transit Dist., 8 F. Supp. 3d 115, 121 (D. Conn. 2014).

207 *See Bryant*, 8 F. Supp. 3d at 140.

208 *Id.*

preparation.[209] And as others have revealed, many plaintiffs' lawyers are themselves unsure of the intricacies of the definition of disability.[210]

3. Disclaiming Disability Because of Stigma

Some plaintiffs might disclaim disability because of the stigma[211] attached to being labeled as "disabled." Although the ADA was enacted in part to end this stigma,[212] and although many have argued that the stigma surrounding disability has lessened,[213] most would agree that being "disabled" is still stigmatized.[214] Disabled people are stigmatized as something less than normal.[215] The stigma regarding disabilities manifests in exclusion, prejudice, stereotyping, and neglect.[216]

[209] I do not mean to suggest that plaintiffs' lawyers should have no qualms convincing their clients that they need to adopt the disability label if they want to be successful in their lawsuits. As Professor Laura Rovner details in her article, plaintiffs' lawyers are often uncomfortable assigning their clients a disabled identity. *See* Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 307-14 (2001) [hereinafter *Perpetuating*].

[210] *See* Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1, 3 (2013) (highlighting the many mistakes plaintiffs' attorneys make in pleading ADA claims after the amendments).

[211] *See* Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 BERKELEY J. EMP. & LAB. L. 166, 176 (2000) (describing disability as the most severely stigmatized of all physical differences).

[212] Stacy A. Hickox & Keenan Case, *Risking Stigmatization to Gain Accommodation*, 22 U. PA. J. BUS. L. 533, 535 (2020) (noting that the ADA was adopted in large part to combat the stigma associated with people with disabilities); *see* Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1207 (2020) (stating that the ADA was enacted to correct the past injustices of the stigma attached to individuals with disabilities); Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587, 593 (2015) (stating that reducing stigma was one of the main goals of the ADA); Meg E. Ziegler, *Disabling Language: Why Legal Terminology Should Comport with a Social Model of Disability*, 61 B.C. L. REV. 1183, 1185 (2020) (discussing the ADA's attempt to use "people first" language to avoid stereotypes and stigmatizing labels).

[213] *See, e.g.*, Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 22 (2004) [hereinafter *Future*] (noting that defenders of the ADA argue it lessens the stigma attached to disability).

[214] *See, e.g.*, Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1174 (2016) (stating that the social meaning of disability has remained static over the years and therefore, the "stigmatic harms associated with being labeled as disabled will likely persist"); Eyer, *supra* note 203, at 550-51 (noting that stigma remains despite the passage of the ADA).

[215] Samuel R. Bagenstos, *Subordination, Stigma, and "Disability*," 86 VA. L. REV. 397, 427 (2000) [hereinafter *Subordination*].

[216] *See id.* at 436.

a. Avoiding Disability Label

Several scholars have discussed the phenomenon of avoiding being labeled as disabled in order to avoid the attendant stigma.[217] Professor Doron Dorfman has discussed this in several of his articles. For instance, some disabled people might avoid getting a placard to park in disabled-only parking spots. Or they might avoid using a cane or requesting accommodations that they need to do their job. Much of this avoidance is caused by wanting to avoid being labeled as disabled because of the stigma that accompanies such a label.[218]

Professor Rovner discusses the problems some plaintiffs have in accepting the disability "identity."[219] She tells the story of one of her clients in the legal clinic she runs who revealed on the phone that she was paralyzed from the waist down.[220] Rovner made the decision that the client was a person with a disability and might have a disability discrimination claim against an airline for refusing to provide her assistance getting on and off the plane as promised and required by the Air Carrier Access Act.[221] When the client testified at trial, she presented a very positive perspective about her disability.[222] Specifically, she testified that she had always learned that she could do anything she wants if she puts her mind to it.[223] This positivity led to her losing her

[217] *See, e.g.*, Eyer, *supra* note 203, at 551, 553 (noting that disability self-identification is very rare); Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 452 (2011) (noting that many students do not identify as disabled because they want to avoid the stigma that would attach to such a label); Nicole Buonocore Porter, *A Defining Moment: A Review of Disability & Equity at Work, Why Achieving Positive Employment Outcomes for Individuals with Disabilities Requires a Universal Definition of Disability*, 18 EMP. RTS. & EMP. POL'Y J. 289, 328 (2014) (reviewing DISABILITY AND EQUITY AT WORK (Jody Heymann, Ashley Stein & Gonzalo Moren eds., 2014)) [hereinafter *Defining*] (discussing how people might avoid defining themselves as disabled because of the stigma); Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1159 (2004) (reviewing DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION (2003)) [hereinafter *Radar*] (discussing people passing as non-disabled to avoid the stigma attached to disability).

[218] Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 1077 (2019) [hereinafter *Con*]; *see also* Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 LAW & SOC. INQUIRY 195, 209 (2017) [hereinafter *Re-Claiming*] (discussing people with disabilities who avoid using a cane because of the stigma associated with disability).

[219] Rovner, *Perpetuating*, *supra* note 209, at 251.

[220] *Id.* at 261.

[221] *Id.*

[222] *See id.* at 283.

[223] *Id.*

claim because the jury did not see her as someone who was harmed by the airline's failure to provide her assistance.[224]

In explaining why some people with disabilities might reject that label, Rovner explains that some clients might worry that by adopting a disability identity or narrative for purposes of litigation, they might have a hard time shedding that identity when the litigation is over, which will have implications for the client's future self-identity.[225] As Rovner states: "One of the most important and empowering aspects of telling your story is the ability to choose the terms you use about yourself."[226] Because disability conjures up images of being inferior, dependent, childlike, sick, miserable, victims, helpless, weak, or pathetic,[227] it is understandable that some plaintiffs might want to avoid accepting the disability label. Having to identify as a person with a disability is difficult for many plaintiffs because they either do not see themselves reflected in the definition or they are concerned they will keep the disability identity, and all of its baggage, when the litigation is over.[228]

And as Professor Dorfman has explained, being labeled as disabled can create stigma that manifests in fear, disgust, misunderstanding.[229] Because people with disabilities have encountered stigma, they often find ways to protect themselves from that negative characterization.[230] In this case, that protection is often denying the existence of the disability.[231]

b. Particularly Stigmatized Impairments

Some plaintiffs might avoid claiming their disability because they have an impairment that is particularly stigmatizing. For instance, as many scholars have documented, mental illnesses are among the most stigmatizing of all disabilities.[232] Many people assume that those with

---

[224] *See id.*

[225] *Id.* at 253.

[226] *Id.* at 261 (emphasis omitted).

[227] *Id.* at 262-63.

[228] *Id.* at 277.

[229] *See* Doron Dorfman, *Disability Identity in Conflict: Performativity in the U.S. Social Security Benefits System*, 38 T. JEFFERSON L. REV. 47, 51 (2015) [hereinafter *Identity*].

[230] *See id.* at 55-56 (discussing how recipients of Social Security Disability benefits often feel uncomfortable claiming their disability status).

[231] *See, e.g.*, Dorfman, *Re-Claiming, supra* note 218, at 201 (discussing how people avoid the label of "disability" to avoid the stigma associated with being disabled).

[232] *See, e.g.*, Ariana Cernius, *Enforcing the Americans with Disabilities Act for the "Invisibly Disabled": Not a Handout, Just a Hand*, 25 GEO. J. ON POVERTY L. & POL'Y 35, 64 (2017) (stating that some people with mental illnesses do not self-identify as disabled in part because they do not want to suffer the stigma associated with such disabilities);

mental illnesses are not capable of rational thought.[233] Other scholars define the stereotype surrounding mental illness and other invisible disabilities as: "defective, damaged, debilitated, deformed, distressed, afflicted, anomalous and/or helpless."[234] This enhanced stigma often leads to these individuals not admitting that they have a mental illness.[235] Even if someone with a mental illness has not actually experienced stigma or bias because of their mental illness, the fear of such stigma might be enough to cause them to not disclose their disability.[236]

Other stigmatized disabilities, such as HIV/AIDS[237] or cognitive disabilities,[238] might cause someone to not disclose their disabilities. But to be clear, even what might be seen as more common or minor disabilities can create stigma.[239] In fact, sometimes an impairment is stigmatized precisely because it is so common — back impairments are one example.[240]

c. Stigma of Not Being Able to Work

As discussed above, one way the plaintiffs in these cases disclaimed their disabilities is by testifying that they are capable of performing their job.[241] This is not surprising because one of the reasons for the stigma surrounding disability is the stereotype that those who are disabled are unable to work, and instead are living off of public benefits.[242] As Professor Bagenstos notes, the actual or perceived inability to work

Jeannette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429, 431, 454 (2010) (arguing that there is generally more stigma attached to mental illness than other disabilities); Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1253 (2003) (discussing the fact that those with mental illnesses have been subject to "extreme forms of discrimination").

233 Katherine L. Moore, *Disabled Autonomy*, 22 J. HEALTH CARE L. & POL'Y 245, 251 (2019) (noting that this belief is often based on stigma and misunderstanding).

234 Hickox & Case, *supra* note 212, at 550.

235 Cernius, *supra* note 232, at 64.

236 Hickox & Case, *supra* note 212, at 536, 539.

237 Bagenstos, *Subordination*, *supra* note 215, at 484-85.

238 *See* Stein, *Radar*, *supra* note 217, at 1158-59 n.36 (noting that people with cognitive disabilities encounter "strong prejudice").

239 *See, e.g.,* Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendments Act*, 40 U. BALT. L. REV. 419, 427 (2011) (noting that there are health conditions that are not claimed as disabilities because of the stigma).

240 *See id.* at 436.

241 *See supra* Part II.A.1.

242 *See, e.g.*, Samuel R. Bagenstos, *Disability, Universalism, Social Rights, and Citizenship*, 39 CARDOZO L. REV. 413, 424 (2017) (discussing the stigma associated with receiving public benefits).

causes those individuals to be stigmatized.[243] For hundreds of years, people with disabilities were deemed incapable of working and were excluded from the labor market. They were only expected to collect a welfare check.[244] And as Professor Eyer notes, because society views disability as being associated with the inability to work, those who are disabled are reluctant to admit any functional limitation that might affect their ability to work.[245]

4. Disclaiming Disability Because of Fear of Vulnerability

In addition to avoiding claiming disability because of the stigma attached to disability, many plaintiffs might disclaim their disabilities because admitting the disability makes them feel vulnerable and most people have a tendency to avoid feeling vulnerable. This fear of vulnerability can include the fear of death or dependency.[246] Scholars confirm that the fear of vulnerability affects people's willingness to adopt the disability label. As Professor Emens notes, disability as an identity is threatening to many people because, unlike race and sex, people can become part of the disability "protected class" at any point in time, and this reality creates fear of the unknown.[247] And as Professor Travis notes: "Our highly resilient 'illusion of invulnerability' combined with the general existential anxiety triggered by stereotypic notions of disability create a strong force pushing most individuals not only to resist taking on the disability label, but to deny that the label will ever apply to them."[248]

Professor Dorfman explored this phenomenon in his work addressing individuals with disabilities seeking SSDI benefits.[249] In order to qualify for SSDI benefits, individuals have to demonstrate that they are not capable of any paid work. In order to do so, they often have to play the "sick role," where they are told by their lawyers that, during their

[243] Bagenstos, *Subordination*, *supra* note 215, at 506, 508, 510.

[244] Dorfman, *Re-Claiming*, *supra* note 218, at 202 (discussing this phenomenon).

[245] Eyer, *supra* note 203, at 568.

[246] *See* Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 53 (2020), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1232&context=penn_law_revire_online [https://perma.cc/8XJM-4HNB] (stating that the negative perceptions about people with disabilities are rooted in a person's fears about death, vulnerability, difference, and dependency).

[247] Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act* 224 (Columbia L. Sch., Working Paper No. 12-300, 2012).

[248] Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 989 (2012) (citation omitted).

[249] *See* Dorfman, *Identity*, *supra* note 229, at 48-49.

interviews regarding their benefits, they should focus on what living with their disability is like on their worst day.[250] But as Dorfman notes, this is very hard to do. They might want to put a positive spin on their disability but if they want to qualify for SSDI benefits, they cannot be too positive; otherwise, the government administrators will deny their claims.[251]

Obviously, plaintiffs are not always explicit about feeling vulnerable and perhaps they do not even realize it themselves. But instances of plaintiffs testifying in a defensive or egotistical[252] way (e.g., "there is nothing I'm not capable of accomplishing") reveal a fear of vulnerability.

For instance, in the previously discussed case of *Feltman v. BNSF Railway Co., Inc.*,[253] the employer withdrew an employment offer it had made to the plaintiff after learning that he had a partially amputated right foot.[254] When questioned about his disability, despite calling it a "disability," when the defendant's attorney asked him how his condition limits his daily life activities, he answered: "It doesn't." And when the attorney asked — "If you did not have the prosthesis, how would it impact your daily activities . . . ?" — the plaintiff answered "it wouldn't. I could do the same things."[255]

III. COURTS ARE WRONG BOTH LEGALLY AND FROM A POLICY PERSPECTIVE

This Part argues that this phenomenon I have identified in Part II — courts using plaintiff's assertions (or lack thereof) regarding their impairments against them to hold that they are not disabled — is wrong both legally and from a policy perspective. I first address the legal arguments before turning to the policy arguments.

A. Legally Wrong

In this Section I provide four reasons why courts are wrong when they use plaintiff's statements against them by holding that they are not

[250] *Id.* at 69.

[251] *See id.* at 68 (stating that SSDI recipients resent having to play the sick role).

[252] *See, e.g.*, Dorfman, *Re-Claiming, supra* note 218, at 210 (discussing an individual with a disability who felt the need to offset the vulnerability and stigma of being disabled by telling people other great things about himself — that he speaks six languages, and has traveled to fifty countries).

[253] No. 16-cv-01051, 2018 WL 529952 (N.D. Ala. Jan. 24, 2018).

[254] *Id.* at *1.

[255] *Id.* at *8.

disabled if they have disclaimed their disability or failed to affirmatively claim their disability.

1. Catch-22: No Limitations on Working & Burden of Proving Qualified

In the cases identified in Part II.A.1, the court focused at least in part on the fact that the plaintiff stated in her deposition that she was able to do her job. Although working is a possible major life activity,[256] the EEOC regulations advise that it should not be the primary major life activity alleged by plaintiffs and that most impairments will limit other major life activities.[257] In other words, using working as the substantially limited major life activity should be a last resort. And yet, many defense attorneys asked questions about plaintiff's ability to perform the functions of her job. This alone would be perfectly understandable because plaintiffs are required as part of their prima facie case to establish that they are qualified,[258] which is defined as being able to perform the essential functions of their job with or without reasonable accommodations.[259] But the defense attorneys in these cases were not asking about the plaintiffs' limitations on working (or lack thereof) in order to determine whether they were qualified or not. Instead, they used the plaintiffs' testimony that they *can* perform their jobs to argue that they are *not* disabled because they are not substantially limited in the major life activity of working.

This puts plaintiffs in an intolerable catch-22. They must prove that they can perform the functions of their job in order to prove their prima facie case. But then the courts use that testimony against them to hold they are not disabled. To be fair, sometimes plaintiffs bring this on themselves by claiming working as a major life activity. But even so, it is rarely the only major life activity the plaintiffs are claiming is substantially limited. And in several of the cases, the plaintiff did not claim working as a major life activity at all but the court still focused on it.

---

256 42 U.S.C. § 12102(2)(A) (2018).

257 29 C.F.R. pt. 1630 app. (2021) ("In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working; impairments that substantially limit a person's ability to work usually substantially limit one or more other major life activities. This will be particularly true in light of the changes made by the ADA Amendments Act.").

258 Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 603 (6th Cir. 2018) (noting one element of the plaintiff's prima facie case is that she was qualified for the position, with or without reasonable accommodations).

259 42 U.S.C. § 12111(8).

For instance, in *Toland v. BellSouth Telecommunications, Division of AT&T, Inc.*, the plaintiff was denied employment because, during a lifting test, his blood pressure was too high.[260] The plaintiff argued that his hypertension was a disability because it substantially limited his cardiovascular and circulatory systems, which are major bodily functions under the Amendments.[261] The court ignored the major bodily functions issue, and instead focused on the fact that the plaintiff testified that his high blood pressure had not "affected his performance in past jobs," and that he believed it would not restrict him from performing the job he was denied.[262]

And as discussed earlier, in *Randall v. United Petroleum Transports, Inc.*,[263] the plaintiff had a seizure disorder that prevented him from driving; accordingly, he asked his employer for an accommodation to allow him to work from home.[264] The defendant's lawyer asked the plaintiff in deposition whether he had a "real disability" that "prevented him from working."[265] Because the plaintiff replied: "No, I just could not drive" the court held that he was not disabled.[266] In other words, because he did not prove that he was substantially limited in the major life activity of working (and despite the fact that a seizure disorder should undoubtedly qualify for disability coverage), the court held he was not disabled.

Similarly, in *Stermer v. Caterpillar Inc.*, the plaintiff alleged that his disabilities included ADHD, depression, and anxiety.[267] Despite his assertion that his impairments affected his ability to concentrate, learn, and sleep, the court relied on the fact that the plaintiff testified in his deposition that his impairments did not "prevent or limit his ability to work for Defendant in any way" to hold that the plaintiff was not disabled.[268]

These courts put plaintiffs in an intolerable catch-22 — if they claim that they have difficulty performing their jobs, they won't be deemed qualified and yet if they claim that they can do their jobs (perhaps with

---

[260] Toland v. BellSouth Telecomms., No. 15-CV-02441, 2017 WL 6374873, at *3 (N.D. Ga. May 1, 2017).

[261] *Id.* at *1, *6 n.9, *7.

[262] *See id.* at *7.

[263] *See supra* Part II.A.

[264] Randall v. United Petroleum Transps., Inc., 131 F. Supp. 3d 566, 570 (W.D. La. 2015).

[265] *Id.* at 571.

[266] *Id.*

[267] Stermer v. Caterpillar, Inc., 102 F. Supp. 3d 959, 965 (N.D. Ill. 2015).

[268] *Id.* at 965-66.

reasonable accommodations) the courts hold that they are not disabled. Several other scholars have criticized this catch-22 facing plaintiffs. As Professor Areheart explains, plaintiffs must emphasize things they cannot do to claim protection under the ADA, but then they must downplay their limitations to prove they are qualified.[269] Some courts note this problem as well. For instance, in *EEOC v. Chevron Phillips Chemical Company*,[270] the court addressed this problem:

> Considering plaintiffs' abilities to perform their jobs as evidence weighing against finding that they are disabled under the ADA would create an impossible catch-22 for plaintiffs: if their disabilities prevented them from doing their jobs altogether they would not be qualified individuals for the job under the ADA, and if they were able to work through their disabilities they would then not be considered disabled.[271]

Despite this intolerable catch-22, all of the cases discussed in Part II.A.1 involved the courts using testimony that the plaintiffs could perform their jobs to hold that those plaintiffs were not disabled. Given that the plaintiffs are required to prove that they are qualified to perform the essential functions of their job, these holdings are wrong, unfair, and frankly, non-sensical.

---

[269] 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, 211, 215, 221, 225 (2008) [hereinafter *Goldilocks*]; *see also* Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 99 (2000) [hereinafter *Deserving*] (stating that litigating limitations creates dilemmas for plaintiffs who must prove they are qualified); Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 571 (1997) [hereinafter *Substantially Limited*] (recognizing the catch-22 for plaintiffs who must prove they are both disabled and that they are qualified for employment); Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 448 (1991) [hereinafter *The ADA*] (same); Hoffman, *supra* note 232, at 1232 (noting that the focus on functionality creates a catch-22 for plaintiffs when they also have to prove they are qualified).

[270] 570 F.3d 606 (5th Cir. 2009).

[271] *Id.* at 619.

2. Plaintiffs Cannot Testify to Limitations on "Major Bodily Functions"

As discussed earlier, one of the most straightforward ways for many plaintiffs to establish that they have a disability is to rely on the addition in the ADAAA of "major bodily functions." After the Amendments, major life activities can include the operation of "major bodily functions," such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[272] As the EEOC regulations elaborate, many impairments (especially diseases) will substantially limit a major bodily function:

> [I]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: . . . autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.[273]

Accordingly, for someone who is recovering from cancer, or who has high blood pressure, diabetes, or multiple sclerosis, the easiest way for them to establish they have a disability is by pointing to the major bodily function affected by their impairment.[274] This is because many diseases do not constantly limit any of the functional major life activities, such as walking, seeing, etc. For instance, someone who has the relapsing remitting form of multiple sclerosis might not have any ongoing limitations on walking, speaking, seeing, or any of the other original major life activities.[275] That person might occasionally have flare-ups, which might cause weakness, spasticity, partial paralysis, and blindness,

---

[272] 42 U.S.C. § 12102(2)(B) (2018).

[273] 29 C.F.R. § 1630.2(j)(3)(iii) (2021).

[274] *See id.*; *see also* Porter, *Not Disabled*, *supra* note 5, at 401.

[275] Under the original ADA, the term "major life activity" was not defined in the statute itself; instead, it was only defined in the regulations, and it included: caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, learning, and working. Porter, *Not Disabled*, *supra* note 5, at 390.

but those instances might only last a few weeks.[276] Before the addition of major bodily functions in the Amendments, proving that MS was a disability was very difficult (unless the MS had progressed to a very advanced stage).[277] But now, an individual who has multiple sclerosis can and should allege that her MS substantially limits her neurological function,[278] which is a major bodily function listed in the Amendments.[279]

The problem with courts that require plaintiffs to "claim" their disabilities in deposition testimony is that a plaintiff (assuming she is not a doctor) is not qualified or capable of testifying as to what is happening inside of her body. She might have a working knowledge of how MS works (especially these days with the ease of finding medical information online) but courts are likely to discount, if not completely exclude, a plaintiff's testimony regarding her understanding of how her MS is affecting her neurological function. In fact, many courts explicitly require plaintiffs to present medical testimony to survive summary judgment.[280]

---

[276] *See Relapsing-Remitting MS (RRMS)*, NAT'L MULTIPLE SCLEROSIS SOC'Y, https://www.nationalmssociety.org/What-is-MS/Types-of-MS/Relapsing-remitting-MS (last visited Sept. 27, 2021) [https://perma.cc/MPJ8-QE6D].

[277] Porter, *Backlash*, *supra* note 4, at 11.

[278] Specifically, MS is an auto-immune disorder that causes a person's immune system to attack the myelin sheath surrounding the nerves in the brain and other parts of the central nervous system. When the myelin sheath is deteriorated, this causes interruptions in the signals from the brain to other parts of the body. *Definition of MS*, NAT'L MULTIPLE SCLEROSIS SOC'Y, https://www.nationalmssociety.org/What-is-MS/Definition-of-MS (last visited Sept. 27, 2021) [https://perma.cc/8B4T-DQQ8].

[279] 29 C.F.R. § 1630.2(j)(3)(iii) (2021); *see also* Porter, *Not Disabled*, *supra* note 5, at 400-01. Someone with relapsing remitting form of MS might also need to plead one other provision of the amendments — that an impairment that is episodic or in remission can constitute a disability if it would have been a disability when active. *See* 42 U.S.C. § 12102(4)(D) (2018). As long as the MS would substantially limit a person's neurological function when active (when the person is having a flare-up), it would still constitute a disability even when the person is not having a flare-up.

[280] *See, e.g.*, Barlia v. MWI Veterinary Supply, Inc., 721 F. App'x 439, 446 (6th Cir. 2018) (requiring medical evidence to support plaintiff's alleged disability of hypothyroidism but holding that plaintiff did present enough medical evidence, thus overruling the lower court's conclusion to the contrary); Felkins v. City of Lakewood, 774 F.3d 647, 651-52 (10th Cir. 2014) (holding that plaintiff's assertions that she has "avascular necrosis" is not sufficient to survive summary judgment because she is not a medical expert and her lay opinion testimony is not admissible); Anderson v. Nat'l Grid, PLC, 93 F. Supp. 3d 120, 134-36 (E.D.N.Y. 2015) (holding that the plaintiff needs medical evidence to support his assertions that his back impairment substantially limited his ability to sit).

This problem occurred in *Scavetta v. Dillon Companies, Inc.*,[281] where the court discounted both the plaintiff's medical evidence and her personal testimony. In this case, the plaintiff had rheumatoid arthritis ("RA"), and when the case went to trial, the trial court refused the plaintiff's request to instruct the jury on the major bodily functions provision (the plaintiff was arguing that her RA substantially limited her immune and musculoskeletal functions). At trial, the testimony by plaintiff's doctor described RA as an auto-immune disorder that affects the joints, causing pain, stiffness, swelling, and fatigue. But the court stated that the doctor's testimony was more about the general progression of the disease and not specific to the plaintiff (although there was no indication that the plaintiff's RA did not comport with the usual progression of the disease).[282] Affirming the lower court's refusal to instruct the jury about the plaintiff's major bodily functions, the Tenth Circuit noted that the plaintiff's testimony was more individualized, but she only focused on her daily activities and not on how her RA affected her major bodily functions.[283] What the court seemed to miss, however, is that the plaintiff could not testify as to how her disease was affecting her internal bodily systems because she was not a doctor. In fact, if she had attempted to, the court would certainly have excluded such testimony under Federal Rule of Evidence ("FRE") 701, which prohibits lay witnesses from testifying about medical information. This rule of evidence is discussed immediately below.

3. Federal Rule Evidence 701

Similar to the argument above, regarding plaintiffs' inability to testify as to how an impairment affects major bodily functions (assuming the plaintiffs are not also medical professionals), under Federal Rule of Evidence 701, lay witnesses are also not permitted to testify to legal conclusions.[284]

---

[281] Scavetta v. Dillon Cos., 569 F. App'x 622 (10th Cir. 2014); *see also* Porter, *Not Disabled*, *supra* note 5, at 406 (discussing and critiquing this case).

[282] To be clear, this Article is not addressing the issue of courts requiring medical evidence. Because this case went to a jury trial, and because it is likely that some jurors would be unaware of what rheumatoid arthritis is, it is not surprising that the plaintiff presented medical evidence regarding her condition. Although I think the court was wrong to discount the plaintiff's medical testimony because there is no indication that the plaintiff's RA did not comport with the usual progression of the disease, that is not the focus of this Article.

[283] *Scavetta*, 569 F. App'x at 623-26.

[284] FED. R. EVID. 701; *see also* United States v. Ness, 665 F.2d 248, 250 (8th Cir. 1981) (stating that when lay witness testimony encompasses a legal conclusion, the trial

Because proving that someone has a disability as defined in the statute is part of the plaintiff's legally required prima facie case, under FRE 701, the plaintiff should not be allowed to testify to the legal conclusion that she is disabled under the statute. To be clear, plaintiffs are allowed to testify as to how their impairment affects everyday major life activities (such as walking, lifting, standing, etc.) and sometimes plaintiffs fail to do that sufficiently.[285] But in some of the cases identified in Part II, the courts relied (at least in part) on the plaintiff's failure to specifically label her impairment as a "disability."

One example of this is *Rodriguez v. HSBC Bank USA, National Association*, where the plaintiff was HIV positive.[286] Although the plaintiff testified in this case about symptoms caused by his HIV, he also testified: "I am not disabled" and "I don't consider [HIV] a disability."[287] The court held that because the plaintiff testified that he did not consider himself "disabled," he cannot meet the definition of disability under the ADA.[288] And yet, if the plaintiff had asserted that his HIV constitutes a disability, the court would likely rule that testimony inadmissible under FRE 701 because it constitutes a legal conclusion.

4. "Claiming" a Disability Is Not Dispositive; "Disclaiming" Shouldn't Be Either

Because the coverage question, whether someone has a disability, is a legal issue, plaintiffs' assertions that they do have a disability are not dispositive. In fact, courts tend to give very little weight to plaintiffs claiming that they *are* disabled. Thus, it is in error and unfair for a court to consider the reverse — *disclaiming* a disability — to be dispositive.

This point was well made in a case[289] where the plaintiff had arthritis in her knees that affected her ability to walk and climb stairs.[290] The court stated:

court may exclude it); Romanelli v. Long Island R.R. Co., 898 F. Supp. 2d 626, 634 (S.D.N.Y. 2012) (holding that the employee could not testify in action against railroad under FELA regarding the railroad's legal duty to provide a track worker with a respirator).

[285] *See supra* Part II.A.2.

[286] Rodriguez v. HSBC Bank USA, Nat'l Ass'n, No. 14-CV-945-T-30TGW, 2015 WL 7429273, at *1 (M.D. Fla. Nov. 23, 2015).

[287] *Id.* at *3.

[288] *Id.* at *8.

[289] Wiseman v. Convention Ctr. Auth. of the Metro. Gov't, No. 14-C-01911, 2016 WL 54922 (M.D. Tenn. Jan. 5, 2016).

[290] *Id.* at *2.

> In the short exchange with counsel on this topic, Wiseman, a non-lawyer, was asked what she believed about whether she had a disability. She testified that she did not believe she had a disability that could not have been accommodated. When pressed, she said "I don't believe I had a disability, per se."[291]

The employer argued that the plaintiff's testimony was dispositive evidence that the plaintiff could not meet the definition of disability. The court responded:

> [W]e do not think that this exchange dooms her actual disability claim. As a practical matter, her testimony about her own beliefs, on this critical issue, does not carry the legal weight Defendant seeks to assign it. For example, if she had testified that she believed she *was* disabled, her testimony likewise would not be dispositive of the question.[292]

The court in *Wiseman* was correct. Because courts would not give much weight at all (and certainly not dispositive weight) to the plaintiff's testimony that she *does* think she is disabled, it likewise should not give weight to the fact that the plaintiff fails to specifically label her medical condition as a disability or even affirmatively disclaims the disability label.

B. Wrong from a Policy Perspective

In this Section, I address the policy question of whether, as a normative matter, we should require plaintiffs to specifically claim their disabilities or allow them to disclaim their disabilities. The policy arguments on both sides are informed by the tensions inherent in the disability rights movement along with the various theories about what it means to be disabled. Although I think there are good arguments on both sides of this debate, I ultimately conclude that courts should not require plaintiffs to specifically *claim* that they are disabled. Before I get to the arguments on both sides of this question, I first describe the various ways scholars, legislatures, and courts have defined disability.

---

[291] *Id.* at *10 (citations omitted).

[292] *Id.*

1. Disability Defined on a Spectrum

If you asked fifty random people to define "disability," their definitions would likely vary quite a bit.[293] And for anything other than "traditional"[294] disabilities — blindness, deafness, missing a limb,[295] an impairment that requires the use of a wheelchair — those same fifty people would likely disagree about whether any particular impairment is and/or should be considered a disability. For instance, if you asked people whether diabetes, high blood pressure, cancer, HIV, back injury, asthma, and many other impairments were disabilities, you would get widely disparate answers.

Not only do random people have difficulty defining disability; so do scholars. For many years, scholars have debated how to define disability. And to make things even more confusing, scholars sometimes use the same terms to mean different things and different terms to mean the same thing. This Section attempts to clear up the confusion.

a. Medical Model vs. Social Model

Perhaps the only thing scholars do agree on is a criticism of the medical model of disability. This model locates disability solely within the person who has the impairment, assumes that all impairments are bad, and seeks to fix or cure the disability.[296] This model does not

[293] *Cf.* Porter, *Defining*, *supra* note 217 (discussing the difficulty with empirically comparing percentages of people with disabilities across countries because everyone uses different definitions).

[294] Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 529 (2008) (noting that there is a broad consensus that traditional impairments constitute disabilities, but "once we move beyond that core, there appears to be little consensus regarding who ought to be defined as disabled"); *see also* Paul Steven Miller, *Reclaiming the Vision: The ADA and Definition of Disability*, 41 BRANDEIS L.J. 769, 776 (2003) (referring to traditional disabilities as "Jerry Lewis" disabilities).

[295] *But see* Carr v. Publix Super Mkts., Inc., 170 F. App'x 57, 60-61 (11th Cir. 2006) (holding that a missing limb is not a disability).

[296] *See, e.g.*, Areheart, *Goldilocks*, *supra* note 269, at 186 (noting that the medical model sees disability as a personal, medical problem requiring individualized medical solutions, and ignores problems caused by society); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 650 (1999) (noting that the medical model views disability as something wrong with the body and therefore, the appropriate remedy is to cure the disability); Hahn, *supra* note 211, at 169 (noting that the medical model focuses on the deprivation of physical or mental capacities and that deprivation reduces the person's status and worth); Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1048 (2004) [hereinafter *Disability*] (noting that the individual is the locus of the disability and thus the person needs assistance in curing

necessarily help to determine whether any particular impairment is or is not a disability.[297] Rather, this model assumes that we would only look at the physical manifestations of the impairment in order to determine whether or not it constitutes a disability. Because the medical model locates the disadvantage solely in the person's body or mind, it makes it difficult to see disability rights as anything other than special treatment or charity.[298] The medical model is also problematic because it stigmatizes people by defining them as less than normal.[299]

Instead of the medical model,[300] most scholars favor a social model[301] of disability, which separates out the impairment from the disability.[302] An impairment might[303] be biological, but the resulting disability is

it; the disabled person under this model is viewed as innately, biologically different and inferior).

297 Some even argue that the difference between the medical model and social model does not matter at all because there are no policy implications of choosing one model over another. *See* Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1252, 1256-57 (2007); Travis, *supra* note 248, at 944 (noting that the social model does not "produce any necessary policy prescriptions").

298 *See, e.g.*, Areheart, *Goldilocks*, *supra* note 269, at 186 (arguing that adherence to the medical model leads to the impression that accommodations are beyond anti-discrimination and are seen as special rights); Crossley, *supra* note 296, at 651-52 (noting that because the medical model sees disability as a personal matter, it does not deem it necessary to have society help those who are disabled, and if help is offered, it is seen as special treatment and charity); Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U. COLO. L. REV. 1297, 1299 (2008) (stating that if we follow the medical model of disability, then the individual has no claim of right to a remedy and any benefits received are considered special treatment or charity); Rovner, *Disability*, *supra* note 296, at 1076-79 (noting that the medical model of disability makes all accommodations seem like "special treatment" and charity).

299 Bagenstos, *Subordination*, *supra* note 215, at 427.

300 Interestingly, although most scholars do not favor the "medical model" of disability, often people with disabilities view their own disabilities through the medical model. Dorfman, *Re-Claiming*, *supra* note 218, at 201; *see also* Areheart, *Goldilocks*, *supra* note 269, at 193-208 (discussing the phenomenon of the public relying on the medical model to define disability).

301 The social model is sometimes referred to as the "socio-political model." *See* Rovner, *Disability*, *supra* note 296, at 1051 (noting that the socio-political model sees disability "as the product of interaction between individuals and the environment").

302 Michael Oliver is credited for formalizing the social model of disability in Western academia. He used the "disability binary" to explain that impairment is separate from disability. Impairments can be located within the body, but the resulting disablement comes from inaccessible physical or structural barriers. Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL'Y REV. 347, 350-51 (2011) [hereinafter *Trouble*]; *see also* Bagenstos, *Subordination*, *supra* note 215, at 428 (noting that the social model views disability as the interaction between the impairment and societal barriers).

303 I use the word "might" because there are scholars who argue that even *impairments* are sometimes socially created. *See, e.g.*, Areheart, *Trouble*, *supra* note 302,

socially created.[304] As Professor Bagenstos notes, if you consider someone who uses a wheelchair because of paralysis and cannot get into the workplace because of stairs or cannot get to work because there is not a wheelchair lift on the bus, the paralysis "is very real. But . . . the social relations model posits, it is not her physical impairment that has disabled her: What has disabled her is the set of social choices that has created a built environment that confines wheelchair users to their homes."[305] An often-cited quote that helps people understand how the social model is different from the medical model is from disability scholar Simi Lipton: "If I want to go to vote or use the library, and these places are inaccessible [to someone who uses a wheelchair], do I need a doctor or a lawyer?"[306]

Although some argue that the social model does not necessarily lead to any specific policy prescriptions,[307] there are benefits to thinking about disability using the social model. First, the social model encourages people to embrace their disability rather than disclaiming it.[308] As noted by Professor Dorfman, the social model has helped empower people with disabilities by changing the way they think about themselves and their place within society, and allowing them to form a

at 349 ("My thesis is that the 'biological' impairment prong of the disability binary is itself socially constructed, and thus disability is more constructed than acknowledged to date."); Travis, *supra* note 248, at 970-77 (noting that impairment is also socially constructed in many ways).

304 *See, e.g.*, Bagenstos, *Subordination*, *supra* note 215, at 428 (noting that the social model views disability as the interaction between the impairment and societal barriers (both physical and structural)); Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 484 (2012) [hereinafter *Pregnancy*] (noting that the "primary insight of the social model is that much of the disadvantage associated with physiological variation is attributable to contingent social realities rather than biological defect"); Roberts, *supra* note 298, at 1300 (stating that the social model of disability believes that disability is no longer located in the body of the individual but in the interaction between the individual and the environment).

305 Bagenstos, *Subordination*, *supra* note 215, at 429.

306 SIMI LIPTON, MY BODY POLITIC: A MEMOIR 120 (2006); *see also* Bagenstos, *Future*, *supra* note 213, at 12 (noting that the proper response to disability is not medical treatment or welfare; rather, it's civil rights legislation).

307 *See* sources cited *supra* note 300.

308 Katharina Heyer, *A Disability Lens on Sociolegal Research: Reading* Rights of Inclusion *from a Disability Studies Perspective*, 32 LAW & SOC. INQUIRY 261, 273 (2007) (reviewing DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORY OF AMERICANS WITH DISABILITIES (2003)); *see also* Dorfman, *Identity*, *supra* note 229, at 48 (noting that the social model embraces a disability pride idea); *id.* at 56 (noting that the social model has allowed people to create an "empowered disability identity").

common identity and establish a sense of community.[309] Second, the social model helps to reveal that many features (of workplaces and elsewhere) that are taken for granted are concessions to "typical" workers — things like eight-hour work days, lunch breaks, indoor lighting, heat, air conditioning, furniture, etc.[310] Accordingly, the social model tells us that accommodations simply remedy the fact that the physical and social structures have been built based on an able bodied norm.[311]

To be clear, there are limits to the social model, which many scholars have acknowledged. As Mary Crossley recognized, the "fundamental shortcoming of the social model — one which at least some of its proponents acknowledge — is that, by focusing on environmentally caused disadvantages, it ignores limitations inherent in bodily impairment."[312] Specifically, the social model tends to ignore that some disabilities cause real pain and real limitations.[313] As I've argued elsewhere, when "someone is diagnosed with cancer or multiple sclerosis, or has a skiing accident that leaves her paralyzed, the person is likely to see it as a 'personal tragedy' and a terrible chance event, and will want to seek medical treatment, to make her body function as 'normally' as possible."[314] This does not mean that the person will not learn to live an enriching, productive live both despite of and even because of the disability. This person might even begin to proudly identify as a person with a disability.[315] And even though some disabilities cause real pain and frustrating limitations, inaccessible physical and social structures certainly make that frustration worse.[316] Accordingly, the social model has an important role in helping people

309 Dorfman, *Re-Claiming*, *supra* note 218, at 197.

310 Cox, *Pregnancy*, *supra* note 304, at 479.

311 James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 33 (2005).

312 Crossley, *supra* note 296, at 657.

313 *Id.* at 658; Kanter, *supra* note 217, at 428 (stating that the problem with the social model is that it tends to ignore the value of the real-lived experiences of people with disabilities).

314 Nicole Buonocore Porter, *Relieving (Most of) the Tension: A Review Essay of Samuel R. Bagenstos,* Law and the Contradictions of the Disability Rights Movement, 20 CORNELL J.L. & PUB. POL'Y 761, 768 (2011).

315 *See, e.g.*, Eyer, *supra* note 203, at 578 ("One need not joyfully embrace every aspect of one's experience as a person with a disability in order to celebrate one's strength and take rightful pride in one's survival of struggle.").

316 *See* Crossley, *supra* note 296, at 658 (stating that "the social model need not deny that some limitations flow directly from impairment in order to argue that externally imposed disadvantages should be remedied").

understand how society (through inaccessible physical and social structures) makes a disabled person's impairment more disabling.[317]

These models are helpful for conceptualizing disability, but as several scholars have noted, the social model does not necessarily tell us who ought to be able to claim the protection of our disability rights statutes.[318] And to confuse things further, scholars have claimed that the social model of disability is consistent with both a broad and a narrow definition of disability.[319] The next Section will attempt to describe the variety of ways scholars, courts, and legislatures have attempted to define disability.

b. Defining Disability Under the ADA: Narrow to Broad

As discussed above, most scholars agree that disability should be conceptualized using the social model of disability. But that agreement has not led to a consensus regarding how broadly or narrowly to define disability in order to receive the protection of the ADA.[320] On that issue, scholars vary widely, with some favoring a more stringent definition while others favoring a broader definition. Scholars also use various terms to describe the way they believe disability should be defined under the ADA. Despite this variance, it is possible to reach somewhat of a consensus on the following terms used to define the contours of disability (from the narrowest definition of disability to the broadest): only "traditional" disabilities, "truly disabled," "minority" or "civil rights" approach, and a "universal" approach.

At the narrowest definition, the ADA could be seen as covering only those individuals who have "traditional" disabilities. Although it is

317 *See* Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 298 (2018) ("The social model of disability does not contest the idea that some disabilities are profoundly limiting, real, and meaningful consequences of biology, such as severe neurodevelopmental disorders, degenerative medical conditions, or catastrophic brain injuries. Rather, the central and paradigm-shifting contention of this model, which was ultimately embraced by disability law, is that society is not neutral and that biases are built into its very structures, norms, and practices, which can then produce disability.").

318 Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 213 (2010) [hereinafter *Universalism*].

319 *See, e.g.*, Travis, *supra* note 248, at 945 (stating that both the minority group model and universal model are consistent with the social model); *see also* Barry, *Universalism*, *supra* note 318, at 207, 213 (stating that the social model can be consistent with either the minority group approach or the universal approach).

320 To be clear, different statutes that address disability define disability differently. The definition used for receiving social security disability benefits is different from the definition for falling into the ADA's protected class. The focus of this Article is strictly on the definition of disability under the ADA.

impossible to classify exactly what is or isn't a "traditional" disability,[321] the most common impairments that would be considered a traditional disability include: blindness, deafness, missing a limb, and impairments that require the use of a wheelchair.[322] Some might also include intellectual disabilities on this list. To my knowledge, no scholars favor defining disabilities to only include "traditional" disabilities, although some scholars accuse courts of only allowing traditional disabilities to qualify for coverage under the ADA.[323] Other scholars argue that the ADA specifically rejected the idea that coverage should be confined to only traditional disabilities.[324] In any event, it seems clear that the only thing we can say with absolute certainty is that traditional disabilities will always be considered protected by the ADA.[325]

Some have argued in favor of a slightly broader definition of disability, where the ADA's protection would be limited to only those who are "truly disabled." Certainly, many scholars have accused the courts (especially pre-ADAAA) of only protecting those who are "truly disabled."[326] Although there is little scholarly argument in favor of confining coverage to the truly disabled, some commentators have expressed concern that the expanded definition of disability under the ADAAA might expand the protected class so much that it will benefit

[321] The late Professor Paul Miller described "traditional" disabilities as "Jerry Lewis" disabilities, referring to the well-known telethon hosted by Jerry Lewis. Miller, *supra* note 294, at 776.

[322] *See, e.g.*, Bagenstos, *Subordination*, *supra* note 215, at 405 (stating that the common understanding of disability includes things like deafness, quadriplegia, blindness, and intellectual disability).

[323] *See, e.g.*, Miller, *supra* note 294, at 776; *see also* Selmi, *supra* note 294, at 527 (stating that courts have been responsive to traditional disabilities for ADA coverage).

[324] Crossley, *supra* note 296, at 635.

[325] Selmi, *supra* note 294, at 529 (stating that "there is a core concept of disability for which a broad consensus exists, a category that is often defined as encompassing traditional disabilities. But once we move beyond that core, there appears to be little consensus regarding who ought to be defined as disabled").

[326] *See, e.g.*, Anderson, *Deserving*, *supra* note 269, at 101 (noting that some courts assert that the ADA should not protect those with minor impairments because this would take something away from the "truly disabled"); Areheart, *Goldilocks*, *supra* note 269, at 217 (criticizing courts who dismiss cases because they hold that the plaintiff is not "truly disabled"); Bagenstos, *Subordination*, *supra* note 215, at 466-69 (discussing the trend of courts only protecting the "truly disabled"); Barry, *Universalism*, *supra* note 318, at 251 (arguing that lower courts seemed to have adopted a definition of disability where they only protect those who are truly disabled); Burgdorf, *Substantially Limited*, *supra* note 269, at 536-37 (discussing a judicial opinion: "It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared").

individuals who are *not* truly disabled.[327] Despite those arguments, scholars and disability rights advocates are generally not in favor of an approach that only protects the "truly disabled."[328] As stated by Chai Feldblum, former EEOC Commissioner and one of the drafters of both the original ADA and the ADAAA:

> We all exist along a spectrum of abilities. It is true that many of us might never experience discrimination because of our physical or mental impairments, while others of us may experience significant discrimination. But that is not because some of us are *truly disabled* and others are not . . . There is no "us" and "them." There is simply a vision of equality and justice.[329]

And yet, as noted above, there are some courts that follow this "truly disabled" approach, especially before the ADA was amended in 2008.[330] In fact, much of the criticism of the ADA pre-Amendments was that in order to be disabled enough to be covered by the statute, the person was unlikely to be deemed qualified; Professor Areheart refers to this as the Goldilocks dilemma, where many, many plaintiffs were fired and deemed too disabled to work but not disabled enough to be covered by the ADA.[331]

---

[327] Barry, *Universalism*, *supra* note 318, at 256, 258 (stating that there is some concern that if we define disability too broadly, it will dilute the definition so much that those who are truly disabled might not receive the protection they need, as they will be in a long line of plaintiffs); Befort, *supra* note 4, at 2030 (discussing this argument made by others).

[328] *See, e.g.*, Bagenstos, *Subordination*, *supra* note 215, at 472 (stating that the truly disabled approach will likely exacerbate the stigmatizing effects of disabling impairments).

[329] Barry, *Universalism, supra* note 318, at 256 (quoting Feldblum et al., *supra* note 35, at 228-29 (2008) (emphasis added)).

[330] *See* sources cited *supra* notes 321–325.

[331] Areheart, *Goldilocks*, *supra* note 269, at 209, 213, 216 (discussing cases where courts held that cerebral palsy and a missing limb were not disabilities).

Moving along the spectrum towards a broader[332] definition of disability are those scholars[333] (and courts[334]) that favor the "minority group" or "civil rights" approach to defining disability. This approach asserts that only *stigmatized* impairments should be considered protected disabilities under the ADA.[335] This approach is used both descriptively (to describe what courts already do[336]) and normatively (to argue that this is the *right* way of defining disability). One reason this approach appears to garner support among scholars is because it is

[332] Although some might think that the minority group model only protects those who are "truly disabled," as Professor Kevin Barry points out, the two concepts are different because it is possible to have *stigma* associated with an impairment even if it is not *severe* enough for the person to be considered "truly disabled." Barry, *Universalism*, *supra* note 318, at 216. A good example might be someone with a prominent facial scar. This person might be stigmatized even though the scar does not at all limit any of the individual's functional activities.

[333] *See* Bagenstos, *Subordination*, *supra* note 215, at 401; Hoffman, *supra* note 232, at 1214, 1218 (stating that the ADA should only cover stigmatizing impairments so society stops wasting time on litigating frivolous cases).

[334] The most prominent judicial example of this approach is Justice Ginsburg's concurrence in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). In concurring with the majority's holding that individuals should be considered in their mitigated state when determining whether they have a disability covered by the ADA, Justice Ginsburg pointed to language in the ADA's preamble that: "individuals with disabilities are a discrete and insular minority," and are "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." *Id.* at 494 (Ginsburg, J. concurring) (quoting 42 U.S.C. §12101(a)(7) (2018)). She noted that people whose impairments can be mitigated "can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination . . . In short, in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a 'discrete and insular minority.'" *Id.* Her concurrence has been characterized as being consistent with the minority group approach to defining disability. *See* Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding "We the People": The Disability Rights Cases*, 104 COLUM. L. REV. 49, 54 (2004).

[335] *See, e.g.*, Bagenstos, *Subordination*, *supra* note 215, at 445 (stating that the disability category should include those impairments that "subject people to systematic disadvantages in society. And the concept of stigma should play an important evidentiary role"); Barry, *Universalism, supra* note 318, at 213 (stating that the minority group approach would protect only those whose impairments are stigmatized); Travis, *supra* note 248, at 939 (noting that advocates who argue for the minority approach to defining disability believe that civil rights coverage should be limited to members of a subordinated minority).

[336] *See, e.g.*, Barry, *Universalism*, *supra* note 318, at 208 (stating that the minority group approach won out in the courts); Travis, *supra* note 248, at 947 (noting that most cases narrowly interpreting disability under the original ADA are consistent with the minority group approach).

seen as being consistent with the social model of conceptualizing disability.[337]

Perhaps the most well-known scholar who supports this approach is Professor Bagenstos, although he doesn't use the words "minority group" to describe his proposal. Instead, he refers to it as an approach that would target those who are *subordinated* or face systematic disadvantage because of their disabilities.[338] Bagenstos argues that this approach is consistent with how the Supreme Court had defined disability under the original ADA,[339] and is also normatively superior to more of a universal definition,[340] which will be discussed below.

Nevertheless, the minority group approach is criticized by some. As Professor Barry notes, one problem with this approach is that it echoes the criticized medical model by focusing on limitations on bodily functions.[341] Others criticize it for not protecting those with more minor impairments who still need small workplace accommodations in order to do their jobs.

The broadest way of defining disability is what is commonly referred to as the "universal" approach. The commonly accepted way of defining the universal approach is that it would cover anyone who experiences discrimination because of an impairment, regardless of whether that impairment has any limitation on any major life activity.[342] Or stated

---

[337] *See, e.g.*, Barry, *Universalism*, *supra* note 318, at 213 (noting that in much of the legal scholarship, the minority approach is understood as an outgrowth of the social model of disability); Crossley, *supra* note 296, at 659 (noting that the minority group approach builds on the social model and transforms it into a political call to action); Hahn, *supra* note 211, at 176-78 (discussing the minority model and reluctance to adopt it); Kanter, *supra* note 217, at 426 (noting that some see the social model and minority group approach as interchangeable); Rovner, *Disability*, *supra* note 296, at 1054 (noting that the minority group approach is an outgrowth of the social model of disability).

[338] Bagenstos, *Subordination*, *supra* note 215, at 445.

[339] *Id.* at 484.

[340] *Id.* at 476-83.

[341] Barry, *Universalism*, *supra* note 318, at 216.

[342] Although not the subject of this Article, the "regarded as" prong in the ADAAA has been characterized as universal because it protects everyone who experiences discrimination because of an impairment regardless of whether that impairment limits or is believed to limit a major life activity. *See, e.g.*, Travis, *supra* note 248, at 940, 1001 ("[T]he 'regarded as' prong now protects individuals against nearly all forms of impairment-based discrimination, regardless of the real or perceived severity . . . . "). To be clear, it is not universal in the sense that Title VII is universal (everyone has a sex, race, national origin, etc.). A person would still need to have an *impairment* (or be perceived as having an impairment) to qualify for coverage under the regarded as prong of the ADA. *See, e.g.*, Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69, 125 (2017) (stating that a universal model "would be achieved by allowing anyone to claim that she had been discriminated against on the

another way, the law should not exclude someone from protection if the person experiences any form of impairment-based disadvantage.[343] The most well-known proponent[344] of this approach is Robert Burgdorf, who was involved in drafting the original ADA.

In Burgdorf's view, proving disability should be as simple as demonstrating that an employer took a negative action because of a physical or mental impairment.[345] Burgdorf argues that the ADA did not contemplate that there is some core group of people who should be protected and not everyone else.[346] He makes a comparison to Title VII, which is symmetrical and protects everyone.[347] In fact, the 1988 bill (before the version of the ADA that was enacted in 1990) had no protected class, and Burgdorf argues that there is little explanation for why the change was made to include a limited protected class.[348] Burgdorf also questions why it makes sense to focus on major life activities. For instance, for conditions such as epilepsy, diabetes, cancer, MS and other things in remission, the impairments might not substantially limit a major life activity,[349] and yet should still be considered disabilities.[350]

As part of his policy arguments in favor of a broad, universal definition of disability, Burgdorf is concerned with something I will discuss more below — the idea that a narrow protected class will lead to what I call "special treatment stigma."[351] As Burgdorf states: "The ultimate goal is to provide equal opportunities for all Americans regardless of disability, not to identify a particular group of individuals

basis of any physical or mental impairment, and along with it the right to seek a reasonable accommodation").

343 Travis, *supra* note 248, at 945.

344 Craig Konnoth has stated that disability law scholars almost uniformly endorse a universal approach to defining disability, but I do not read the literature that way. Konnoth, *supra* note 212, at 1260.

345 Burgdorf, *Substantially Limited*, *supra* note 269, at 571-72.

346 *Id.* at 572.

347 Burgdorf, *The ADA*, *supra* note 269, at 441-42.

348 *Id.* at 444.

349 This problem has arguably been fixed in the ADAAA, where major life activities are defined to include major bodily functions, which include things such as normal cell growth, neurological function, endocrine function, etc. 42 U.S.C. § 12102(2)(B) (2018). But as I've discussed elsewhere, litigants have not consistently used this provision. Porter, *Not Disabled*, *supra* note 5, at 400-02.

350 Burgdorf, *The ADA*, *supra* note 269, at 448.

351 Burgdorf, *Substantially Limited*, *supra* note 269, at 568. I coined the phrase "special treatment stigma" in Nicole Buonocore Porter, *Why Care About Caregivers?: Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 KAN. L. REV. 355, 359 (2010) [hereinafter *Why Care*].

who are entitled to some kind of special treatment."[352] Burgdorf recognizes that separating out those with more substantial limitations is common and warranted with benefit programs (such as SSDI), but for anti-discrimination provisions, he argues that everyone should be protected.[353]

There are plenty of criticisms of the universal approach. Bagenstos disagrees with this approach for two reasons. First, it would read the words "substantially limits" out of the statute.[354] But he also worries that a universal definition threatens to deny people with more severe disabilities their lived reality.[355] Bagenstos notes that some people with more severe disabilities are critical of protecting impairments that do not lead to stigma. As disability scholar Carol Gill stated in response to someone who asserted that "we're all disabled in some way":

> "No!" I say. If the only time you "walk the walk" of disability is when it's convenient for you and you even admit your disability has little impact on your life and no one regards you as disabled, give me a break—you ain't one of us! You aren't in danger of the marginalization we experience or expect on a daily basis.[356]

As Bagenstos notes, someone might lose a job because of a broken leg but that person does not experience systematic disadvantage and is not treated as "not normal."[357] Bagenstos also argues that Burgdorf's universal approach could be seen as a challenge to employment at will, which would not receive widespread support.[358]

This Section has been focused on the various scholarly arguments for defining disability broadly or narrowly. But this Article is, in large part, focused on the ADA as currently written. So where does the ADA's definition fall on this spectrum of a very narrow definition to a very

---

352 Burgdorf, *Substantially Limited*, *supra* note 269, at 526.

353 *Id.* at 583 ("Protection from discrimination based upon disability, however, belongs to everyone."); *see also* Travis, *supra* note 248, at 982-83 (noting that one goal of a universal definition is to broaden public commitment to disability rights and reduce the backlash that comes from privileging a few at what is seen as the expense of others).

354 Bagenstos, *Subordination*, *supra* note 215, at 476.

355 *Id.* at 480; *see also* Barry, *Universalism*, *supra* note 318, at 220; Travis, *supra* note 248, at 939 (stating that those who oppose a universal approach to defining disability do so because it ignores and disrespects the existence of a unique disability identity).

356 Bagenstos, *Subordination*, *supra* note 215, at 479 (quoting Carol J. Gill, *Questioning Continuum*, *in* THE RAGGED EDGE: THE DISABILITY EXPERIENCE FROM THE PAGES OF THE FIRST FIFTEEN YEARS OF THE DISABILITY RAG 42, 46 (Barrett Shaw ed., 1994)).

357 *Id.* at 479-80.

358 *Id.* at 483.

broad definition? As discussed above,[359] the ADA was amended in 2008 to dramatically expand the definition of disability. Under the original ADA, pre-Amendments, some courts were interpreting the definition of disability to protect only the "truly disabled."[360] However, most scholars would argue that the original ADA's definition was consistent with a minority group approach to defining disability.[361] I agree with that conclusion.

As for the ADA now (post-Amendments), there is little agreement regarding where the definition falls on the spectrum I've described in this Section.[362] I believe the post-ADAAA definition falls somewhere in between the minority group approach and the universal approach. I disagree with those who have argued that the actual disability prong still follows (post-Amendments) the minority group approach.[363] Kevin Barry makes this argument, stating that the right to accommodations under the actual disability prong should be reserved for those who experience stigma because of their impairments.[364] He argues that the "substantial limitation" language in the definition of disability is a proxy for stigma. In other words, impairments that substantially limit bodily functioning are generally the kind of impairments that distinguish people from the norm and subject them to prejudice.[365] But if stigma refers to animus (whether it be from fear, disgust, discomfort, etc.), there are plenty of impairments that are covered by the ADA as amended that are not stigmatized. For instance, someone with high blood pressure would likely be covered by prong one of the disability definition and yet this person is unlikely to experience stigma because of the high blood pressure.

In any event, regardless of how scholars would characterize the ADA's definition of disability on the spectrum of very narrow to very broad, this Section's discussion is important for understanding the policy arguments in favor of and against requiring plaintiffs to "claim" their disabilities. I turn to those policy arguments next.

---

359 *See supra* Part I.B.

360 *See supra* notes 321–324 and accompanying text.

361 *See supra* notes 332–335 and accompanying text.

362 As an aside, I agree with those scholars who argue that the "regarded as" prong of the definition post-Amendments has come very close to a universal definition. *See* Barry, *Universalism*, *supra* note 318, at 279; Travis, *supra* note 248, at 940. But as I've mentioned, this Article is focused on the actual disability prong of the ADA.

363 *See* Barry, *Universalism*, *supra* note 318, at 279-80; Travis, *supra* note 248, at 940.

364 Barry, *Universalism*, *supra* note 318, at 281.

365 *Id.* at 224.

2. Arguments in Favor of Requiring Plaintiffs to Claim Their Disabilities

In this Section, I will explore two primary arguments in favor of requiring plaintiffs to claim their disabilities. The first is that broadly claiming disability will help people with disabilities to see their disabilities as part of their identity and to see themselves as being part of an identifiable minority group. This "identity" focus naturally leads to the second argument in favor of requiring plaintiffs to claim their disabilities — reducing stigma. The more people who identify as disabled, the more normalized disability becomes and this increased contact should lead to reduced stigma.

a. Disability as Identity

Many people who identify with the disability community see their disabilities as part of their identity — not something that should be hidden or downplayed, but something that should be proudly claimed.[366] Those who claim a disability identity view their disability identity in much the same way that racial minorities perceive their racial identities.[367] This identity allows them to feel part of a community, and view their disabilities more positively, as something that makes them unique.[368] Perhaps the most well-known example of this is the Deaf culture, a group of Deaf individuals who are connected together through their shared identity, which they see as being a linguistic minority, rather than viewing their deafness as an "impairment" that

366 *See, e.g.*, Kanter, *supra* note 217, at 404 (discussing the fact that the disability studies field explores disability as a "phenomenon reflecting and constituting identity formation by incorporating the 'real-lived' experiences of people with disabilities").

367 *See, e.g.*, Eyer, *supra* note 203, at 568 (discussing disability identity and pride being similar to the identity and pride felt by racial minorities and LGBTQ+ individuals); Hahn, *supra* note 211, at 177 (noting that one survey of Americans with disabilities revealed that 45 percent of Americans with disabilities feel that they are part of a minority group in the same sense as racial minorities); Michael Ashley Stein, *Foreword: Disability and Identity*, 44 WM. & MARY L. REV. 907, 919 (2003) (discussing whether disabled individuals have a unifying group identity in the same way that women or people of color do).

368 *See* Dorfman, *Identity*, *supra* note 229, at 56-58; Meg E. Ziegler, *Disabling Language: Why Legal Terminology Should Comport with a Social Model of Disability*, 61 B.C. L. REV. 1183, 1212 (2020) (discussing that some advocates for identity first language believe it allows the person to reclaim the disability and alter the connotation to being one of pride).

should be "cured."[369] Autism is another example.[370] Individuals who claim a disability identity would likely argue that disclaiming disability is offensive,[371] in much the same way that other minority groups who "cover" their minority status are sometimes criticized.

Professor Eyer recently wrote an article discussing the benefits of "claiming disability."[372] One such benefit is the mental and emotional benefits that can derive from "coming out" and identifying as disabled.[373] As Eyer states: "we stand at a unique moment for reframing disability identity—away from functional capacity and inability to work and toward a positive and politically oriented self-concept."[374]

Some of those positives might include helping individuals with disabilities develop connections to the broader community that celebrates those with disabilities and helping individuals with disabilities find ways to navigate an able-bodied environment with a

[369] *See, e.g.*, Dorfman, *Re-Claiming*, *supra* note 218, at 211 (discussing Deaf people who see themselves as a linguistic minority); Heyer, *supra* note 308, at 273 (telling the story that the Deaf President of Gallaudet College would not take a pill to restore his hearing); Moore, *supra* note 233, at 274-75 (discussing individuals who are Deaf refusing to get Cochlear implants that would help them hear, because they don't want to shed their identity as a Deaf person).

[370] *See, e.g.*, Dorfman, *Re-Claiming, supra* note 218, at 211 (discussing the construction of the term neurodiversity to avoid negative associations with autism); Eyer, *supra* note 203, at 577-78 (discussing the way that the neuro diversity movement helped reshape how people think about autism); Moore, *supra* note 233, at 274 (discussing how the neurodiversity movement promotes acceptance of autism as part of "normal human diversity").

[371] *See, e.g.*, Eyer, *supra* note 203, at 590 (stating that we need to stop seeing disability as private, which requires "covering"); Travis, *supra* note 248, at 939 (noting that some people believe that disability should be narrowly defined so as not to ignore or disrespect the existence of a unique disability identity). *But see* Emens, *supra* note 247, at 230 (noting (but criticizing) that disability is rarely thought of as a positive identity with social or cultural benefits to those who belong).

[372] Eyer, *supra* note 203. In fact, the name of her article is "Claiming Disability." *Id.* Based on the title of my article, *Disclaiming Disability*, it would make sense to assume that my article is a response to her article. It is not. As a matter of timing, my Article was a work in progress (albeit much slower progress than hers) when Katie and I discovered our similar (but contrasting) titles. I had posted on Twitter that I had presented this Article at a workshop at the University of Iowa College of Law, where I was a Visiting Professor, when Katie reached out to me to discuss our works-in-progress. As should become clear in the rest of this Article, I am not arguing the opposite of what Katie argued. Katie discussed the many benefits of people with disabilities "claiming" their disabilities, but she was not arguing in favor of a legal rule that would require plaintiffs to claim their disabilities or run the risk of losing coverage under the ADA. It is this latter issue that I am focused on. Moreover, she is primarily focused on *internal* claiming of disability, *see id.* at 557, which is not at all the focus of this Article.

[373] *Id.* at 588.

[374] *Id.* at 574.

disability.[375] Scholars also argue that claiming a disability identity is empowering.[376] As stated by one scholar: "Within social model theorizing, 'oppositional consciousness' has become an important strategy for countering the stigma attached to living with a disability. This consciousness will claim a previously subordinated identity as a positive one. People with disabilities are thus encouraged to embrace their disability and find pride in it, rather than denying or downplaying it, or even hoping for a cure."[377]

b. Reducing Stigma

The other primary argument in favor of requiring plaintiffs to claim their disabilities is that broadly claiming disability will lessen the stigma. The idea is that more folks with relatively minor disabilities classifying themselves as having a disability will lead to disability being perceived as more common and typical, and this will result in less stigma attributed to people with disabilities.

This argument is the basis for Professor Eyer's article, *Claiming Disability*. She argues that the fact that many people do not self-identify as disabled is an important cause of the entrenchment of stigma and bias against people with disabilities.[378] Even though the majority[379] of Americans qualify as people with disabilities under the ADAAA's very broad definition, because most of these people don't identify as being disabled,[380] this limits the "stereotype-disrupting exemplars to which nondisabled people are exposed and [limits] the solidarity and self-interest that individuals with disabilities might otherwise perceive in

[375] *Id.*

[376] *See, e.g.*, Dorfman, *Identity*, *supra* note 229, at 56 (stating that the social model of disability has allowed people to create an "empowered disability identity," which allows them to feel pride and see themselves as part of an oppressed group rather than flawed and unworthy); Dorfman, *Re-Claiming*, *supra* note 218, at 201 (stating that the social model of disability has helped people with disabilities create an empowered disability identity).

[377] Heyer, *supra* note 308, at 273.

[378] Eyer, *supra* note 203, at 551.

[379] As Eyer notes, sixty percent of Americans have a chronic condition that would qualify as a disability. *Id.* at 564.

[380] *Id.* at 565-66 (noting that only fourteen percent of those with one of eighty-six common impairments identified as a person with a disability; many identified and admitted to their impairment but did not call it a disability). Eyer also notes that even some of those people who are significantly functionally limited by an impairment and would have qualified as disabled under the original ADA's much narrower definition do not always identify as disabled. *Id.* at 568.

disability rights."[381] Eyer argues that "coming out" as disabled is effective at stigma disruption.[382]

As Eyer states, encouraging people with disabilities to identify as disabled holds the potential to have "transformative effects for disability rights, especially for the stigma-eradication objectives of the disability rights movement."[383] This argument is based on contact theory, the idea that increased contact with people who are different from you will help to decrease stigma and bias against those people.[384] To be fair, Eyer notes that some scholars (such as Jasmine Harris) have argued that contact theory does not always work because the "aesthetics of disability" sometimes causes people to have a visceral reaction (disgust or fear) to individuals with certain aesthetic markers of disability.[385] But Eyer's response is that those who lack "aesthetic markers of disability" might be in the best position to disrupt stereotypes and stigma. The idea is that exposure to counter-stereotypical examples can help eliminate common, and sometimes instinctive biases.[386] And it is even better if the person with a disability "comes out" formally because others will know that person before knowing of their disability and will have formed impressions and opinions of competence without any preconceived notions of disability.[387]

To give this argument a more practical application, imagine that a man named "Bob" is asked to think about someone with a disability, and the image that pops into Bob's head is someone who uses a wheelchair, does not have good control of his fine motor skills, and has difficulty speaking. Now imagine Bob is talking to a coworker who Bob respects and admires when the coworker mentions that she identifies as a person with a disability. The hope is that the positive impression Bob has of this coworker will help Bob to see "disability" in a new and more positive light.

---

381 *Id.* at 553.

382 *Id.*

383 *Id.* at 580-81; *see also* Bagenstos, *Future*, *supra* note 213, at 3 (noting that making people with disabilities more visible in the community helps to remove stigma attached to disability).

384 *See* Dorfman, *Con*, *supra* note 218, at 1076-77 (noting that some others have argued that personal contact with members of stigmatized groups is a way of reducing prejudice); Eyer, *supra* note 203, at 581. This argument is the basis of the "mainstreaming" preference in education; that the more students with disabilities are educated alongside their non-disabled peers, the more likely those students are to accept and not stigmatize disabled students.

385 Eyer, *supra* note 203, at 581-82.

386 *Id.* at 582.

387 *Id.* at 583.

As Eyer summarizes: "Thus, a movement of claiming disability could potentially have substantial impacts for the stigma-disruption goals of the disability rights movement and ultimately for the movement's ability to reduce disability disparate treatment. Positive contact remains one of the most well-established ways to reduce group prejudice, including in the disability context."[388]

And yet, despite these compelling arguments in favor of claiming disability, there are even more compelling arguments on the other side — for *not* requiring plaintiffs to specifically *claim* their disabilities. I turn to those arguments next.

3. Arguments Against Requiring Plaintiffs to Claim Their Disabilities

There are three primary arguments that weigh against requiring plaintiffs to claim their disabilities (or perhaps more accurately, weigh against penalizing plaintiffs for disclaiming their disabilities). First, we should avoid paternalism and protect the autonomy of people with disabilities by allowing them to make their own decisions regarding how to define themselves. Second, just as some people might find it empowering to claim their disabilities, others might find it more empowering to disclaim their disabilities. We should respect their desire to define themselves as they wish. Finally, requiring plaintiffs to claim their disabilities in order to be protected by the ADA will likely lead to fewer plaintiffs succeeding on getting past this threshold inquiry, which can lead to a smaller protected class. As I've discussed elsewhere, there are many benefits of protecting as broad of a class of individuals with disabilities as possible. I take these three arguments in turn.

a. Autonomy and Anti-Paternalism

One of the primary goals of the disability rights movement has always been avoiding paternalism[389] and giving people with disabilities as

[388] *Id.* at 584.

[389] *See, e.g.*, Bagenstos, *Future*, *supra* note 213, at 5-6 (discussing the issue of making sure solutions for people with disabilities avoid paternalism); *id.* at 8 (stating that the goal of anti-paternalism (along with community integration and employment) is the "major policy objectives articulated by most disability rights activists"); Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 931-32 (2004) (stating that "paternalistic exclusions had been a major contributor to the disadvantage experienced by people with disabilities"); *id.* at 933 (stating that Congress clearly recognized that paternalism was a major target of the ADA).

much autonomy as possible.[390] For instance, some of the impetus behind the Deaf community refusing cochlear implants is based on the desire for autonomy.[391] Similarly, the push to improve the employment rates and options for people with disabilities is also about autonomy.[392]

Respecting the autonomy of people with disabilities should mean letting them choose how to define themselves. Laura Rovner has discussed this issue with respect to clients with disabilities wanting the autonomy to name themselves as disabled or not.[393] Forcing people to define themselves in a way they don't see themselves (or risk losing their ADA discrimination claims) is paternalistic and therefore, should be avoided.

b. Empowerment

Part of the reason that some people with disabilities might choose to disclaim their disabilities is because they find it more empowering to focus on their abilities, rather than their limitations.[394] As stated by Robert Burgdorf, "[f]or persons who have spent many years of their lives stressing their abilities rather than their limitations, and who have strenuously objected to their being assigned labels such as 'handicapped,' the need to prove that one is a 'handicapped individual' can be very undesirable."[395] And as Laura Rovner states: "One of the most important and empowering aspects of telling your story is the ability to choose the terms you use about yourself."

One interesting example of both autonomy and empowerment came from an episode of the show *Queer Eye* that was called "Disabled But

[390] *See, e.g.*, Moore, *supra* note 233, at 247-51 (discussing the value of autonomy for individuals with disabilities).

[391] *Id.* at 273-75.

[392] *See, e.g.*, Leonard, *supra* note 311, at 2 ("In contemporary America, getting and keeping a decent job is the key to leading a self-sufficient life endowed with the qualities of dignity, independence, and personal autonomy.").

[393] Rovner, *Perpetuating*, *supra* note 209, at 249.

[394] *See, e.g.*, Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 21 (2015) (noting that claiming a disability might be disempowering, especially because it often means disclaiming any competencies that make it possible for the person to work); Dorfman, *Identity*, *supra* note 229, at 62 (stating that, in the context of applying for social security disability benefits, having to "perform" as significantly limited is difficult if the person has an empowered disability identity).

[395] Burgdorf, *The ADA*, *supra* note 269, at 443; *see also* Bagenstos, *Subordination*, *supra* note 215, at 475 (recognizing that it is disempowering for some individuals to have to search for and claim inherent biological limitations).

Not Really."[396] The episode features a man named Wesley Hamilton who is paralyzed from the waist down due to gunshot wounds. The show's title is based on the organization Hamilton founded of the same name, which gives people with disabilities fitness and nutrition advice to "overcome limitations and become productive as they gain the knowledge necessary for a healthy, independent lifestyle."[397] Hamilton and his organization are focused on overcoming the difficulties caused by disability through strength and perseverance. The episode centered around the show's "Fab Five" helping Hamilton by making his environment more accessible. What struck me when I watched this episode (and I had already started thinking about this Article) was the fact that, even though Hamilton clearly had a disability (regardless of how narrowly we define disability) he himself did not fully embrace the disability label. His life and his organization were centered around overcoming adversity and not allowing the limitations of disabilities to define you. For instance, the home page of the website states: "we believe that our horizon is only as far as we accept it to be."[398]

Perhaps not surprisingly, the show generated a great deal of controversy in the disability community.[399] Many in the disability community were critical of the show's title ("Disabled But Not Really") and core message because it perpetuated an ableist view that having a

396 *Queer Eye: Disabled But Not Really*, NETFLIX (July 19, 2019), https://www.netflix.com/watch/80993988?trackId=14277283&tctx=-97%2C-97%2C%2C%2C%2C [https://perma.cc/NT9B-9Q2L].

397 *DBNR's Mission & Vision*, DISABLED BUT NOT REALLY, https://disabledbutnotreally.org/our-mission/ (last visited Sept. 21, 2021) [https://perma.cc/BPA5-SMKU].

398 DISABLED BUT NOT REALLY, THE DISABLED BUT NOT REALLY FOUNDATION: A BROCHURE ABOUT WHO WE ARE, WHAT WE DO AND HOW YOU CAN BE A PART OF AWESOME, http://disabledbutnotreally.org/wp-content/uploads/2019/06/dbnr-brochure.pdf [https://perma.cc/KP85-YC9L].

399 *See* Louisa Ballhaus, *Why the* Queer Eye *'Disabled but Not Really' Episode is Dividing Fans*, SHEKNOWS: ENTERTAINMENT/ ENTERTAINMENT NEWS (July 23, 2019, 6:08 PM EDT), https://www.sheknows.com/entertainment/articles/2071159/queer-eye-season-4-disabled-episode-twitter-reaction/ [https://perma.cc/XZ6N-227T]; Alex Haagaard & Liz Jackson, *"Queer Eye" Demonstrates How We Can Show Disability, but Still Fail to Represent It*, QUARTZ (July 22, 2019), https://qz.com/1671776/the-problem-with-queer-eyes-episode-about-disability/ [https://perma.cc/XJS2-NSJS]; Jessica Slice, *I Love 'Queer Eye.' I Don't Love The Way It Portrayed People with Disabilities*, HUFFPOST: PERSONAL (July 26, 2019, 1:00 PM EST), https://www.huffpost.com/entry/queer-eye-portrayed-people-with-disabilities_n_5d39e77ae4b020cd99504d24 [https://perma.cc/RB9S-XQVM].

disability is bad[400] and represented "internalized ableism."[401] Some in the disability community wished that *Queer Eye* had chosen "someone who embraced their disability and how it made them different—instead of trying to pretend it didn't exist."[402] Others said that, as members of the disability community, they saw "glimpses of our own experiences, but they were quickly reabsorbed into a narrative that deliberately distanced itself from disabled culture."[403] Another commentator criticized the episode for dancing around "themes of disability pride, accessibility, independence/interdependence and assimilation without ever aligning themselves with the values central to the disability rights movement."[404] Referencing the "identity" theme discussed earlier,[405] one commentator stated this: "Critically, being disabled is not a negative. It's an identity, just like being queer, Black or Latinx is an identity. If it makes you pause to hear 'Black, but not really,' or 'gay, but not really,' then you should have the same reaction to 'disabled, but not really.'"[406]

But others made the point that I'm making here: that ultimately, we should let all people with disabilities, including Hamilton, decide how they want to define themselves.[407] As one author stated:

> Others felt Hamilton's attitude toward his disability should be celebrated for its positivity—even if it isn't representative of the larger community. "We're always harping about how we should ask disabled people what they want to be called. Well, [Hamilton] is disabled and named his foundation 'Disabled But Not Really,' and that's how he wants to be seen," one tweet reads. "Is everyone like that? No. But that doesn't mean we should shame him or #QueerEye for shining a light on him or helping him out."[408]

---

[400] Haagaard & Jackson, *supra* note 399 ("Members of the disability community were quick to point out how the episode's title and framing perpetuates the harmful idea that disability is inherently negative.").

[401] Ballhaus, *supra* note 399 (discussing a Twitter thread on the internalized ableism represented in the Queer Eye episode *'Disabled But Not Really'*).

[402] *Id.*

[403] Haagaard & Jackson, *supra* note 399.

[404] Slice, *supra* note 399.

[405] *See supra* Part III.B.2.a.

[406] Slice, *supra* note 399.

[407] Haagaard & Jackson, *supra* note 399 (stating that the fact that Wesley's organization's name is a "reflection of his own truth and identity").

[408] Ballhaus, *supra* note 399.

Another commentator stated that of course "[Hamilton] has the right to view disability however he would like. He is a disabled man, and it's his life, his identity."[409]

The discussion around this show highlights the tension between wanting to get more people to claim their disabilities so we can get to the point of seeing disability as an identity one can be proud of,[410] and on the flip side, wanting to give people the autonomy to define themselves in a way that makes them feel empowered or simply feels more authentic. Although I wish more people would feel comfortable and proud identifying as disabled, as a matter of a legal requirement, I come out on the side of autonomy — letting people make that decision for themselves.

c. Towards Universal Coverage

Part II of this Article provides several examples of courts penalizing plaintiffs for disclaiming their disabilities. If this trend continues unabated, we can expect more plaintiffs who should be protected under the ADA losing their ADA claims.

The problem with some plaintiffs losing their disability discrimination claims is two-fold. First and most obviously, those plaintiffs (many/most of whom have been terminated) are out of a job (which includes all of the negative effects of unemployment) and because of their disabilities, they might have difficulty finding other work. And yet Title I of the ADA was enacted precisely to improve the employment opportunities for individuals with disabilities.[411]

Second, and more broadly, fewer plaintiffs bringing successful disability discrimination claims will lead to a narrower protected class under the ADA, which in turn will stigmatize those who can prove their disability status in two ways. First, a narrow definition will cause others to see disability as "different," thus heightening the stigma already associated with difference.[412] Second, a narrow protected class allows

409 Slice, *supra* note 399.

410 *Id.* ("It is not bad to be disabled. We don't need to distance ourselves from that word. Many people with disabilities, including me, are proud of our identity.").

411 *See* Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 28 (2007) ("There is no good justification for interpreting the statute so narrowly that it . . . provides no protection to those who are mildly disabled and able to work.").

412 *See, e.g.*, Bagenstos, *Subordination*, *supra* note 215, at 427 (noting that a narrow definition of disability stigmatizes people by defining them as something less than normal); *id.* at 437 (noting stigma can be "undesired differentness"); Dorfman, *Identity*, *supra* note 229, at 51 (stating that labeling someone as different can stigmatize them);

others to perceive rights given to those plaintiffs (including the right to a reasonable accommodation) as "special" and this special treatment often creates stigma and bias.[413]

For many years, I've been discussing the resentment and bias that flows from receiving perceived special benefits in the workplace, a phenomenon I call "special treatment stigma."[414] This phenomenon operates in two ways. First, despite their legal obligation to accommodate disabled workers, employers are often reluctant to do so, which causes those employers to be less likely to hire and promote disabled workers.[415] And second, employees with disabilities are often resented by their non-disabled coworkers because of the real or perceived special treatment disabled employees receive.[416] This resentment is either because accommodations can place burdens on

Konnoth, *supra* note 212, at 1207 (using a medical status definition of disability (which would be a narrow definition) causes stigma simply by marking the person as an outsider); Porter, *Defining*, *supra* note 217, at 325 (stating that a narrow definition will "continue to perpetuate the belief that individuals with disabilities are different from the rest of us . . . . [This] will also likely increase the stigma associated with being identified as an individual with a disability"); Travis, *supra* note 248, at 940 (stating that some believe that a universal approach is the only way to erase the stigmatizing line that society has drawn between us and them); *see also* Clarke, *supra* note 394, at 88 (stating that broader protections avoid the stigma of identity politics).

[413] *See, e.g.*, Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085, 1114 (2017) (stating that universal approaches "have been thought to avoid backlash on the theory that the measure will be less polarizing and stigmatizing to the recipients"); Bagenstos, *Subordination, supra* note 215, at 475 (discussing the resentment of those who are seen as getting special benefits); Burgdorf, *Substantially Limited*, *supra* note 269, at 525, 568 (stating that singling out people with disabilities as needing special treatment is harmful and unworkable and stating that laws like the ADA "have become tainted with special, protected-class perspective"); Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 153 (2017) (noting that the backlash against the ADA is because ADA protection causes stigma based on the special treatment individuals with disabilities receive); Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 531 (2008) (appealing to universal vulnerabilities removes the stigma of needing assistance and improves protections for all, eliminating some of the backlash that occurs when only certain people get accommodations).

[414] Porter, *Why Care*, *supra* note 351, at 359 (coining the phrase "special treatment stigma"). *See generally* Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 109 (2016) [hereinafter *Accommodating Everyone*] (arguing in favor of a universal accommodation mandate to minimize special treatment stigma); Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1108 (2014) (describing how special treatment stigma affects both individuals with disabilities and workers with caregiving responsibilities in the workplace).

[415] Porter, *Accommodating Everyone*, *supra* note 414, at 97-98.

[416] *Id.* at 98-106.

their non-disabled coworkers[417] (such as an exemption from heavy lifting that would require other employees to take on more heavy lifting tasks) or because the non-disabled workers covet the type of accommodation received by the disabled employee (such as being able to sit while working or a flexible work schedule).[418] It is because of this special treatment stigma that I have argued in the past for a universal accommodation mandate.[419] Although that argument is beyond the scope of this Article, the point is that a broader class of individuals with disabilities will naturally lead to more employees requesting accommodations, which eventually should lead to accommodations no longer being seen as "special treatment." In other words, under a broad understanding of the definition of disability after the ADAAA, a majority of Americans have one or more disabilities.[420] If employers are accommodating a majority of their employees, those accommodations stop being seen as "special" and instead will be seen simply as doing the work of the employer in a different way.[421]

Other scholars have also noted the stigma that attaches to special treatment. For instance, Robert Burgdorf has argued that special treatment seems "un-American" and that is why it is criticized.[422] Instead, having a broader definition of disability, where people understand that anyone can become disabled at any point in time helps to eliminate the stigma associated with special treatment.[423] Naomi Schoenbaum also argues that a symmetrical law (that protects everyone) is "less likely to generate resentment against its beneficiaries, and is more likely to generate a broader sense of solidarity in a universal antidiscrimination project that can bring benefits, at least in theory, to everyone."[424]

---

[417] *Id.* at 98-104.

[418] *Id.* at 104-06.

[419] *Id.* at 109-10.

[420] Eyer, *supra* note 203, at 553.

[421] In fact, as I've argued before, a universal accommodation mandate could have the benefit of encouraging employers to change workplace structures and norms so they become more accessible to all. Porter, *Accommodating Everyone*, *supra* note 414, at 124-25.

[422] Burgdorf, *Substantially Limited*, *supra* note 269, at 431; *see also* Heyer, *supra* note 308, at 271 (explaining that people with disabilities are often worried about being treated differently if they are seen as receiving "special treatment").

[423] Porter, *Accommodating Everyone*, *supra* note 414, at 128; *see also* Anderson, *Deserving*, *supra* note 269, at 150 ("In a sense, disability is everyone's issue. At any point in time, any person may find himself or herself experiencing disability. The ultimate way to eliminate the stigma associated with disability is to drive home that point.").

[424] Schoenbaum, *supra* note 342, at 118.

I realize that, despite our opposite titles (*Claiming Disability* and *Disclaiming Disability*), Eyer and I are arguing the same thing — that a very broad vision of disability can help to eliminate stigma, both stigma caused by fear and disgust, as well as the stigma that attaches to perceived special treatment. But Eyer's work focused on the societal benefits of claiming disability, and not on a legal requirement to do so. I have been focusing on the fact that courts have sometimes made claiming a disability a legal requirement. As I've discussed, this will likely lead to fewer plaintiffs winning their claims and eventually, could lead to a narrower protected class. Even though I think Eyer is absolutely right that more people with disabilities *should* claim their disabilities, I know that wishing that to be true won't make it true (and certainly not very quickly). Accordingly, turning claiming a disability into a legal requirement will have the perverse effect of having more stigma attached to disability, not less. Therefore, despite the normative benefits of claiming disability, we should not make it a legal requirement. And yet the question remains: what is the best way to get courts to stop using plaintiffs' statements disclaiming their disabilities against them? I turn to that question next.

CONCLUSION: A SMALL REGULATORY FIX

Having concluded that courts who penalize plaintiffs for disclaiming their disabilities are wrong to do so both legally and as a matter of policy, the question remains: what's the solution? I think it is highly unlikely to expect a judicial decision or legislative amendment that would put a stop to this practice. Although I believe the issue I address here is important and goes to the very heart of what disability means, the problem does not arise frequently enough to prompt the courts or Congress to address it.

However, a regulation promulgated by the EEOC could certainly help guide courts in the right direction. Although the EEOC's authority to issue regulations regarding the definition of disability was debated prior to the Amendments,[425] the Amendments make clear that the EEOC *does* have the authority to issue regulations regarding the definition of

[425] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999) (stating that no agency has been given authority to issue regulations implementing the generally applicable provisions of the ADA that fall outside of the main titles of the Act), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. As the Court stated: "Most notably, no agency has been delegated authority to interpret the term 'disability.'" *Id.*

disability.[426] And the EEOC has done so.[427] Not only has the EEOC issued regulations regarding the definition of disability, but they specifically promulgated a regulation addressing the type of evidence that should suffice to prove that the plaintiff has a disability.[428] Moreover, courts have generally cited to and followed these regulations in the post-ADAAA era.[429] Thus, I believe a regulation addressing this issue has the potential to be followed by the courts and would hopefully reverse course on courts' tendency to penalize plaintiffs for disclaiming their disabilities.

The regulation I propose would state:

> As long as there is sufficient evidence in the record that a plaintiff has an impairment that substantially limits one or more major life activities, there is no additional requirement that a plaintiff specifically identify as disabled, or testify (in deposition or at trial) that he or she has a disability. Furthermore, specifically denying the existence of a "disability" shall not be used to justify a legal conclusion that the plaintiff does not meet the definition of disability under the ADA.

It is my hope that such a regulation would be sufficient to stop courts from penalizing plaintiffs for disclaiming their disabilities.

---

[426] 42 U.S.C. § 12205a (2018) ("The authority to issue regulations granted to the Equal Employment Opportunity Commission . . . under this chapter includes the authority to issue regulations implementing the definitions of disability in section 12102 of this title (including rules of construction) . . .").

[427] 29 C.F.R. § 1630.2(g) (2021) (regulations regarding definition of disability).

[428] 29 C.F.R. § 1630.2(j)(1)(v) ("The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis.").

[429] *See, e.g.*, Mancini v. City of Providence *ex rel.* Lombardi, 909 F.3d 32, 40-41 (1st Cir. 2018) (relying on the EEOC's regulations regarding the fact that short-term impairments can still be substantially limiting under the statute's definition of disability); Summers v. Altarum Inst., Corp., 740 F.3d 325, 329 (4th Cir. 2014) (same); Feldman v. Law Enf't Assocs. Corp., 779 F. Supp. 2d 472, 484-85 (E.D.N.C. 2011) (relying on the EEOC regulations to hold that the plaintiff's episodic multiple sclerosis constitutes a disability under the ADA after the Amendments); *cf.* Dallan F. Flake, *Interactive Religious Accommodations*, 71 ALA. L. REV. 67, 78 (2019) (noting that "no court to date has rejected the EEOC's regulations concerning the interactive process or any other aspect of the ADA's employment provisions").