
CLAIMING DISABILITY[†]

KATIE EYER*

ABSTRACT

We stand at the cusp of a potentially transformative moment for disability rights. For decades, the disability rights movement has been burdened by a profound obstacle: many of its potential constituents do not self-identify as disabled. Disability has long been constructed around a social welfare–law model: as quintessentially associated with intrinsic limitation and an inability to work. Although disability civil rights law includes no such requirement, it has not yet transformed entrenched colloquial understandings. As such, many people who qualify as disabled under contemporary civil rights law do not self-identify in that way.

But numerous factors make this a uniquely opportune moment to transform this state of affairs. The Americans with Disabilities Act Amendments Act (“ADAAA”), enacted in 2008, has, for the first time, provided a definition of disability that is broad, inclusive, and untethered to functional limitation. So too, the advent of social media and the growth of both disability pride and disability positivity all hold promise for encouraging a mass movement of disability identity. If only a fraction of those who qualify as disabled under the ADAAA were to “claim disability” and embrace a disabled identity, millions of Americans would self-identify as disabled for the first time.

[†] Selected for the 2020 Equality Law Scholars Forum. Although I had not yet heard of Simi Linton’s work at the time I first began thinking about this project in terms of “claiming disability,” it is important to note that this turn of phrase is not original to me but to the excellent disability scholar Simi Linton. SIMI LINTON, CLAIMING DISABILITY (1998).

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Such “claiming” of disability has the potential to be transformational for disability rights. As scholars have long observed, the disability movement has struggled to dislodge bias against people with disabilities, even as the law has formally afforded them rights. Even in a time when bias against other stigmatized groups has rapidly decreased, disability bias has remained substantially unyielding. This Article suggests that “claiming disability” holds the potential to radically disrupt this state of affairs by vastly expanding the opportunities for known contact with people with disabilities and by increasing the self-perceived constituents of disability rights.

In addition to its benefits for disability rights as a whole, this Article argues that claiming disability may also be individually transformational. For too many people, the experience of physical or mental health impairment is one of enforcing silence, closeting and covering, hiding pain and difficulty, and not taking pride in identity. So too, it is too often the case that societal tropes of deficiency and limitation associated with impairment can be internalized in the absence of a positive disability frame. Claiming disability identity thus holds the potential to offer a liberatory alternative to the current experience of impairment, even as it paves the way for broader transformations in disability rights.

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INTRODUCTION

In 2019, scholars from “Project Implicit” published data from millions of online tests measuring implicit biases in the United States between 2004 and 2016. Their findings demonstrated significant decreases in implicit biases with respect to sexual orientation and, to a somewhat lesser extent, race (33% and 17% change toward neutrality, respectively).¹ But they found that implicit attitudes about disability remained essentially unchanged. While explicit disability biases (those that people are willing to self-report) have fallen somewhat—though much less than sexual orientation and race biases—people’s internal negative associations with disability have not.²

The findings of Project Implicit are consistent with the observation of legal scholars that the disability rights movement³ “has failed to change public hearts and minds about people with disabilities.”⁴ While the disability rights movement has achieved enormous legislative success—securing the passage of arguably the most comprehensive federal civil rights law protecting any group—its more fundamental mission of eradicating bias against people with disabilities remains incomplete.⁵ Bias against disabled people⁶ remains routine, and indeed often

¹ Tessa E.S. Charlesworth & Mahzarin R. Banaji, *Patterns of Implicit and Explicit Attitudes: I. Long-Term Change and Stability from 2007 to 2016*, 30 PSYCH. SCI. 174, 182-90 (2019).

² *Id.* at 186.

³ Although I use the familiar terminology “disability rights” throughout this Article to refer to all of the diverse strands of the disability movement, there are some newer strands of the movement, especially the “Disability Justice” part of the movement, which would reject that label. *See generally* SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE (2d ed. 2019). For the purpose of clarity, where I am making arguments that are specific to a subpart of the movement, like “Disability Rights” or “Disability Justice,” I use capital letters to signify that I am using the term as a signifier of a particular subpart of the movement. Most of my observations and arguments in this Article are intended to be general and extend to any of the diverse movements for disability thriving and equality, although their inflection and significance might be different in different parts of the movement.

⁴ Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 896 (2019) [hereinafter Harris, *Aesthetics of Disability*]; accord Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587, 595-96 (2015) [hereinafter Waterstone, *Costs of Easy Victory*].

⁵ This is of course only one of the core missions of the disability rights movement, which has long recognized that paternalism and indifference to the participation of people with disabilities in society are equally significant obstacles to disability rights as stigma and animus. For more on the multiplicity of goals in the disability rights movement, see *infra* Part VI.

⁶ There is a divide in the disability community over whether people-first language (“person with a disability”) or identity-first language (“disabled person”) is more empowering and respectful. *See, e.g.*, Erin E. Andrews, Anjali J. Forber-Pratt, Linda R. Mona, Emily M. Lund, Carrie R. Pilarski & Rochelle Balter, *#SaytheWord: A Disability Culture Commentary on the*

taken for granted, despite the advent of disability rights.⁷ And, as legal scholars have observed, absent this type of social transformation, the work of civil rights law with respect to people with disabilities has remained necessarily incomplete.

Why have biases against people with disabilities remained so durable, even as biases against other groups have been in flux? This Article suggests that the fact that many of the disability rights movements' constituents do not self-identify as disabled—i.e., do not “claim disability” as an identity—is likely an important cause.⁸ Large numbers of people with physical or mental health conditions, including many who qualify as disabled under federal civil rights

Erasure of “Disability,” 64 REHAB. PSYCH. 111, 112-13 (2019); Anjali J. Forber-Pratt, *Yes, You Can Call Me Disabled*, QUARTZ (June 3, 2019), <https://qz.com/1632728/yes-you-can-call-me-disabled/> [<https://perma.cc/VQ35-C5WV>] (suggesting that “identity-first language makes disability a marker of pride”). I honor that divide herein by not exclusively using one or the other but rather moving between both conventions. As others have observed, when possible (e.g., when discussing subcommunities or individuals), observing and following the conventions preferred by particular individuals or communities is the ideal approach. *See, e.g.*, Cara Liebowitz, *I Am Disabled: On Identity-First Versus People-First Language*, THE BODY IS NOT AN APOLOGY (Mar. 20, 2015), <https://thebodyisnotanapology.com/magazine/i-am-disabled-on-identity-first-versus-people-first-language/> [<https://perma.cc/7TM6-GFSE>].

⁷ *See infra* Part I.

⁸ Of course, the fact that many people do not self-identify as disabled is far from the only cause of continuing biases against people with disabilities. Other scholars have identified, for example, the role of aesthetics and nondisclosure, the negative ways we frame disability in everyday life, the lack of public debate over disability rights, and the ancient religious roots of disability biases. *See, e.g.*, Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1389; Harris, *Aesthetics of Disability*, *supra* note 4, at 897; Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 489-96 (2015) [hereinafter Harris, *Processing Disability*]; Jasmine E. Harris, *The Privacy Problem in Disability Antidiscrimination Law*, in DISABILITY, HEALTH, LAW, AND BIOETHICS 159, 160 (I. Glenn Cohen, Carmel Shachar, Anita Silvers & Michael Ashley Stein eds., 2020) [hereinafter Harris, *The Privacy Problem*]; Waterstone, *Costs of Easy Victory*, *supra* note 4, at 615. But even with respect to many of those other factors, it seems likely that the absence of widespread embrace of a disabled identity plays a role. For example, to the extent that societal biases may be unlikely to be disrupted by exposure to those who are the most visibly disabled or functionally limited—as Jasmine Harris has persuasively argued—the fact that many with less visible or less limiting impairments do not “claim disability” may impose particularly substantial limitations on the disability stigma disruption project. *See, e.g.*, Harris, *Aesthetics of Disability*, *supra* note 4, at 971; Harris, *The Privacy Problem*, *supra*, at 162-65. So too, the relative paucity of those self-identifying as disabled has no doubt limited the scope of public debate and engagement over disability bias and disability rights. *See* Waterstone, *Costs of Easy Victory*, *supra* note 4, at 615.

law,⁹ do not self-identify as disabled.¹⁰ Although the causes of this are varied, research suggests that the continued dominance in our society of a social welfare–law construct of disability¹¹—associating disability intrinsically with functional incapacity and an inability to work—plays an important role.¹²

⁹ When I refer to federal disability civil rights law or simply “disability civil rights law” herein, I am referring to the Americans with Disabilities Act (“ADA”), *see* 42 U.S.C. §§ 12101-12213; 47 U.S.C. §§ 225, 611, and to its predecessor, the Rehabilitation Act, *see* 29 U.S.C. §§ 791, 794. Both the ADA and the Rehabilitation Act have the same definition of disability for the purposes of their civil rights provisions and are covered by the expansive interpretive provisions added by the Americans with Disabilities Act Amendments Act (“ADAAA”). *See* 42 U.S.C. § 12102 (ADA definition, with ADAAA amendments); *see also* 29 U.S.C. § 705(20)(B) (incorporating by reference the definition set out at 42 U.S.C. § 12102). Note that although the ADA and the Rehabilitation Act are the most important omnibus legislation addressing disability civil rights at the federal level, there are other disability civil rights statutes, not all of which were explicitly amended to include the ADAAA definition. *See, e.g.*, Deborah A. Widiss, *Still Kickin’ After All These Years: Sutton and Toyota as Shadow Precedents*, 63 DRAKE L. REV. 919, 932-33 (2015) (mentioning, for example, the Fair Housing Act, 42 U.S.C. §§ 3601-3619); *see also A Guide to Disability Rights Laws*, ADA.GOV, <https://www.ada.gov/cguide.htm> [<https://perma.cc/2AFA-JJVT>] (last updated Feb. 24, 2020) (describing a variety of other federal civil rights laws related to disability).

¹⁰ *See infra* Part II. I am referring here to internal self-identification, rather than public disclosure. For a more extended description of how I use the terms “claiming disability” and “self-identification” in this Article, *see* the end of this Introduction.

¹¹ When I refer herein to a “social welfare” understanding of disability, I am referring to the restrictive definitions of disability that typically govern access to social welfare benefits, such as Supplemental Security Income (“SSI”) and Social Security Disability Insurance (“SSDI”), Workers’ Compensation, and other disability-based models. Under such definitions of disability, incapacity is typically the central consideration, and often an individual must be partially or wholly incapacitated from working.

¹² *See infra* Part III. When I use the terms “functional incapacity,” “functional limitation,” or “functional impairment” throughout this Article, it is not linked to any conception of the causal origin of such limitations (i.e., whether the limitation is “innate” to impairment—the “medical model”—or the result of social structures—the “social model”). As proponents of the social model of disability posit, the causal origins of functional limitations are often sited significantly or entirely in the limiting effects of a discriminatory society and the built environment. *See, e.g.*, Tom Shakespeare, *The Social Model of Disability*, in THE DISABILITY STUDIES READER 214, 215 (Lennard J. Davis ed., 4th ed. 2013). Nevertheless, as others point out, the experience of functional limitation—or, for that matter, pain or illness—is not always entirely constructed through interaction with a nonaccommodating society (as the social model of disability might suggest when taken to its limits). *See e.g.*, Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in THE OXFORD HANDBOOK OF LAW AND HUMANITIES 145, 155 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2019); Shakespeare, *supra*, at 217-18. Though understanding the role of social and societal barriers on the construction of “functional limitation” can be very important in other contexts, for the purposes of the arguments made herein, the causal origins

Against a backdrop of such a construct, those who do not perceive themselves as functionally limited, or unable to work, may not see themselves in prevalent understandings of disability. Such individuals may also fear being seen as imposters—within the disability community or without—because they perceive themselves as “too functionally capable” to qualify as disabled.¹³ Other factors, such as fear of stigmatization or internalized disability bias, can also discourage disability identity, with the ultimate result that very few of those who might plausibly claim disability identity actually do so.

This widespread tendency to disclaim the label of disability has important consequences. Under the definition of disability set out in contemporary civil rights law, it is likely that a *majority* of Americans qualify as people with disabilities.¹⁴ And yet, without this foundational self-identification, such individuals do not “come out” as disabled or perceive their own self-interest in disability civil rights.¹⁵ This has adverse consequences for disability rights, including profoundly limiting the scope of potentially stereotype-disrupting exemplars to which nondisabled people are exposed and limiting the solidarity and self-interest that individuals with disabilities might otherwise perceive in disability rights.¹⁶

Conversely, the transformational potential of a greater number of individuals claiming disability seems obvious. One of the most powerful tools of the LGBTQ rights movement—“coming out”—becomes far more accessible to the disability rights movement if more people (especially those with invisible disabilities) claim disability.¹⁷ As others have observed, coming out is a particularly effective tool of stigma disruption, precisely because others often (at least partially) form their views of an individual before having knowledge of their potentially stigmatizing status.¹⁸ So too, simply expanding the range of *who* people think of when they think of disability may have profound effects on what stigma they do—or do not—attach to disability.¹⁹ Finally, the mere act of self-

of “functional limitation” (inherent to impairment versus constructed through interaction with society) are not central.

¹³ See *infra* Part III.

¹⁴ See *infra* notes 70-81 and accompanying text.

¹⁵ See *infra* Parts III-IV.

¹⁶ See *infra* Parts III-IV.

¹⁷ See generally Ellen Samuels, *My Body, My Closet: Invisible Disability and the Limits of Coming-Out Discourse*, 9 GLQ 233 (2003) (discussing the parallels and contradictions between the notion of coming out in the disability and queer communities); Mark Sherry, *Overlaps and Contradictions Between Queer Theory and Disability Studies*, 19 DISABILITY & SOC'Y 769 (2004) (same).

¹⁸ See *infra* Part IV. Coming out is of course just one example of the contact hypothesis: that many forms of prejudice and stigma can be reduced by contact between members of majority and minority groups. See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

¹⁹ See *infra* Part IV.

identification may increase the solidarity and self-interest that people with disabilities feel with the movement for disability rights, thereby increasing support for disability rights law and policy objectives.²⁰

The time is especially ripe to push forward a movement of disability self-identification. The ADA Amendments Act of 2008 (“ADAAA”), which expanded federal civil rights laws’ definition of disability, for the first time provides a definition of disability that is broad, is untethered to functional limitation, and allows the identification of impairments that should universally be considered disabilities.²¹ While the core civil rights definition of disability remains the same under the ADAAA—“a physical or mental impairment that substantially limits one or more major life activities”²²—the interpretation rules attached to that definition mean that today no functional limitation is required (e.g., substantial limits to bodily functions suffice, and a condition completely mitigated by medication is covered if substantial limitations would exist when unmitigated).²³ Moreover, as the U.S. Equal Employment Opportunity Commission (“EEOC”) has recognized, the ADAAA’s new rules make it possible to “easily” conclude that an array of impairments—from major depressive disorder, to HIV, to diabetes—will, as a matter of course, constitute disabilities.²⁴

The ADAAA thus offers a framework that could—to an even greater extent than prior civil rights definitions of disability—afford a powerful way of challenging the long-dominant conception of disability as intrinsically

²⁰ See *infra* Part IV.

²¹ Disability civil rights law (as defined *supra* note 9) has traditionally used a three-part definition of disability: “The term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . .” 42 U.S.C. § 12102(1). I focus herein on the first category because the other two are referential and do not purport to recognize a condition of current “actual” disability, which is the conception that would be required to serve as a basis for disability identity. The ADAAA did not change the basic structure of the definition of disability, but the interpretive rules it added radically changed the substance of who can be covered under prong (A), the “actual disability” prong, making it far more inclusive. See *infra* notes 120-127 and accompanying text. Although the ADAAA for the most part expands the reach of who is covered by the “actual disability” prong, it makes clear that one extremely common condition—vision impairment that is fully corrected through ordinary glasses or contact lenses—generally does not qualify as a disability, although employers are restricted in certain ways in their ability to make it the basis for adverse actions. See 42 U.S.C. § 12102(4)(E)(ii) (making clear that the mitigating effects of ordinary glasses and contact lenses must be considered in the disability assessment); *id.* § 12113(c) (prohibiting employers from using an uncorrected vision standard except where “job-related for the position in question and consistent with business necessity”).

²² 42 U.S.C. § 12102(1).

²³ *Id.* § 12102(4).

²⁴ 29 C.F.R. § 1630.2(j)(3)(iii) (2020).

associated with functional incapacity and an inability to work. Rather than requiring people with disabilities to perform or embrace incapacity in order to qualify as disabled, the ADAAA recenters disability around meaningful bodily or mental impairment and its internal effects.²⁵ Unlike even the original Americans with Disabilities Act (“ADA”) definition—which, as construed by the courts, required a meaningful showing of functional incapacity—current civil rights law embraces, and thus provides a template for, an understanding of disability that is decoupled from negative conceptions of functional impairment.²⁶

Other factors also make this a uniquely opportune time for encouraging more individuals to claim disability. Social media allows unprecedented communication among people with disabilities, aiding in the formation of disability identity. So too, social media offers myriad opportunities for public self-identification, something that disability scholars have observed is itself constitutive of disability identity. Growing movements around disability pride and neurodiversity offer a positive perspective on what it might mean to self-identify as disabled. Thus, this may be a uniquely opportune time—even for reasons apart from the ADAAA—to radically expand the group of those who self-identify as disabled.²⁷

It is also important to note that disability self-identification may have liberatory potential for the individuals who engage in it—reaching even beyond its instrumental value for disability rights.²⁸ Currently, outside of the space of “disability” identity, physical and mental health conditions continue to be constructed as quintessentially private.²⁹ This puts enormous pressure on those with significant physical or mental health conditions to closet or cover and thus not bring their full selves to work, school, and relationships.³⁰ Moreover, those who do not claim a disability identity are far less likely to experience the concrete benefits of disability civil rights laws—and the more amorphous benefits of understanding the social or diversity/minority model of disability or embracing disability pride.³¹ Thus, the value of claiming disability identity

²⁵ See *infra* notes 120-127 and accompanying text.

²⁶ See, e.g., *infra* notes 116-119 and accompanying text.

²⁷ See *infra* Part III.

²⁸ There is a critical distinction between internally claiming a disability identity and a disability label that is externally imposed. External imposition of a disability label can at times be highly stigmatizing and is decidedly nonliberatory. See *infra* notes 193-195 and accompanying text.

²⁹ See *infra* Part V.

³⁰ See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

³¹ See *infra* Part V. As described *supra*, proponents of the social model of disability posit that disability, as distinct from impairment, is a condition that arises from the interaction of impairment with a social and physical environment that is often both inaccessible and

resides not only in its ability to disrupt society-wide disability stigma—a phenomenon that should lift all boats for those with impairments—but also in its ability to be individually transformational.

Of course, this does not mean that claiming disability will solve all of the problems of the disability rights movement or that it will benefit all people with disabilities equally. Most notably, the social movement benefits that might flow from greater claiming of disability identity would not necessarily affect all disability goals equally but rather would extend most predictably to stigma disruption and the eradication of disparate treatment.³² These are important goals, but they are surely not the only—or even the most important—goals of the disability rights movement. Other critical objectives—such as transforming social structures, building the environment to be accessible, and securing supportive resources required for full meaningful participation of all people with disabilities—might also be affected by greater numbers of individuals claiming disability identity (and thus perceiving their own stake in accessibility and resources). But those effects seem less certain and more contingent.³³

So too, the personal benefits of claiming a disability identity may be unequally distributed and, for all individuals, are likely to have limits. Although social media opens up access to community in previously unthinkable ways, it remains the case that people are sited within real-life communities that may make claiming of disability identity far less feasible or affirming.³⁴ Individual circumstances, including intersecting forms of oppression or especially stigmatized diagnoses, may make it difficult for a positive disability identity to form, or may make it especially costly to disclose such an identity.³⁵ Though this argument can be overstated—and indeed those with intersectional and stigmatized identities have been important actors in the movement toward disability positivity and liberation—there certainly will be limitations on the

explicitly biased. *See supra* note 12. The proponents of the minority/diversity model of disability instead focus on centering disability as a positive political trait, rather than one inherently bound up in functional incapacity. *See, e.g.*, ERIN E. ANDREWS, *DISABILITY AS DIVERSITY: DEVELOPING CULTURAL COMPETENCE* 28 (2020); Andrews et al., *supra* note 6, at 112.

³² Some scholars have problematized the idea of a sharp divide between accommodation and disparate treatment, a perspective I generally agree with. *See, e.g.*, Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 591-93 (2004). To the extent that disability bias underlies a refusal to grant reasonable accommodations or undergirds employers' insistence on the "natural" nature of work requirements like full-time face-time, the project of disrupting disability bias would have important implications there as well. *See generally* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 46-92 (2005) (discussing full-time face-time norms).

³³ *See infra* Parts IV, VI.

³⁴ *See infra* Part III.

³⁵ *See infra* Part III.

ability of all individuals to equally experience claiming disability identity as liberatory.

And indeed, even for those best situated to experience claiming disability identity as liberatory, there will no doubt be circumstances in which identity disclosure will be risky and potentially damaging. Much like the early stages of social change around sexual orientation and gender identity (and even today), there are sure to be contexts in which disclosure of disability identity by those who lack external markers of disability could lead to stigmatization and discrimination.³⁶ Thus, even for those who claim disability identity and may experience embracing that identity as a liberatory project overall, there are sure to be innumerable secondary decisions about how and where to disclose and about the potential for rejection and discrimination as a result of disclosure.³⁷

Nevertheless, there are reasons to think that even the partial benefits that greater claiming of disability identity may afford are important—for both the movement and individuals. Eradicating stigma is not the only goal of the disability rights movement, but it is surely an important one. And it is one of the objectives that has proved the most intractable—with real consequences for the basic anti-disparate treatment mission of disability civil rights law.³⁸ Moreover, even if claiming disability identity is not immediately accessible to all individuals—or cannot immediately be publicly affirmed across all contexts without risks—wider embrace of disability identity should ultimately expand the circle of those for whom claiming a positive disability identity is possible and also expand the spaces within which disclosing such identity is safe and welcomed. While disability identity is likely to remain an uncomfortable fit for some who fall within the civil rights understanding of disability, the embrace of disability identity by even a fraction of those who would qualify may offer significant benefits for both such individuals and the disability movement at large.³⁹

A final word about terminology and methodology is in order before proceeding. This Article's discussion of the phenomenon of claiming disability is focused on *internal* self-identification, rather than *external* self-identification (i.e., identification to other people). Thus, when I use the term "self-identification," standing alone herein, I mean to refer to internal self-identification, and when I use the term "claiming disability," I intend to refer to the internal process of self-identifying as disabled. Whenever I mean to refer to self-identification as disabled to other individuals (as opposed to one's own inner sense of identity), I use the terms "public self-identification," "external self-identification," or "coming out."

Of course, internal self-identification and external self-identification are not unrelated. Indeed, as disability scholars have shown, the process of public self-

³⁶ See *infra* notes 233-235 and accompanying text.

³⁷ See *infra* notes 233-235 and accompanying text.

³⁸ See *infra* notes 61-68 and accompanying text.

³⁹ See *infra* Part V.

identification is often constitutive of the construction of internal disability identity, and those who have an internal disability identity are also more likely to publicly self-disclose.⁴⁰ Moreover, much of the stigma-disrupting potential of increased *internal* disability self-identification lies precisely in its capacity to serve as the predicate or motivator for *external* disability self-identification.⁴¹

But this Article suggests that although they are related—and not entirely capable of disaggregation—the absence of an *internal* disability identity is a distinct and important feature of the limitations of contemporary disability rights. As laid out in Part II, studies amply support the conclusion that a lack of *internal* disability self-identification is an independent and widespread phenomenon that stands as a barrier to the type of stigma-disrupting effects that broader external claiming of disability could have. The narratives of individual people with disabilities confirm that internally “claiming” an identity of disabled by no means follows inevitably from impairment, even when outsiders would so label an individual.

But all of this simply confirms what should be obvious to many of us upon reflection on our own lives and identities. How many of us have (or have had) a condition that today should easily qualify as an ADA disability—such as cancer, diabetes, or depression?⁴² And yet, how many of us self-identify as disabled? For many of us the answer to the first question will be yes, but the answer to the second question will be no. The aim of this project is to disrupt that divide.

This Article addresses the foregoing issues in six parts. Part I describes continuing biases against people with disabilities and the ways that these biases have limited the transformative potential of disability civil rights law. Part II introduces to the legal literature the body of research in disability studies, rehabilitation, and sociology, as well as the narratives of individual disabled authors, showing that many people with physical or mental health conditions do not self-identify as disabled or may take many years to self-identify.⁴³ Part III

⁴⁰ See *infra* Part III.

⁴¹ See *infra* Part IV.

⁴² See 29 C.F.R. § 1630.2(j)(3)(iii) (2020) (identifying these conditions and others as conditions that should “easily” qualify as disabilities under the ADAAA).

⁴³ This Article thus situates itself in the tradition of Disability Legal Studies. See, e.g., 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, 445-49 (2011) (discussing the emerging field of Disability Legal Studies, and describing the importance of including a Disability Studies perspective within legal scholarship); Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 YALE J.L. & HUMANS. 63, 64 (2006) (coining the term “Disability Legal Studies,” and describing the importance of importing a Disability Studies perspective into legal analysis); see also Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 LAW & SOC. INQUIRY 195, 197 (2017) [hereinafter Dorfman, *Re-Claiming Disability*] (describing Disability Legal Studies as “seek[ing] to apply the theory behind disability studies to the law and examin[ing] the role legal institutions play in the social construction of disability”).

describes the barriers to disability self-identification, especially those posed by dominant social welfare–law understandings of disability as inextricably linked to incapacity and an inability to work. This Part also discusses why the current moment may offer unique opportunities for encouraging more widespread claiming of disability identity by virtue of legal, technological, and social reforms. Part IV explains why the fact that many do not self-identify as disabled can be seen as problematic for the stigma-disrupting objectives of the disability rights movement and why, conversely, more widespread claiming of disability could be transformative. Part V describes why claiming disability is not only of instrumental benefit to disability rights but also has liberatory potential for those who engage in it. Finally, Part VI takes up potential critiques of the project of encouraging broader disability self-identification, including concerns that it is a form of respectability politics, concerns that it could lead to resource allocation unfairness or backlash, and arguments regarding the potential incoherence of an ever-expanding definition of disability.

I. BIASES AGAINST PEOPLE WITH DISABILITIES AND THE LIMITATIONS OF FEDERAL CIVIL RIGHTS LAW

Nearly fifty years have passed since the enactment of the ADA’s predecessor, the Rehabilitation Act of 1973.⁴⁴ And yet disability stigma and bias remain widespread. Indeed, although disability discrimination is often thought of as rooted in “benign neglect,” explicit prejudice and biases against people with disabilities also remain common in contemporary society. So too, implicit biases against people with disabilities have remained widespread and essentially unchanged, even during a time frame when the biases associated with other groups have been undergoing rapid change.⁴⁵ This persistence of high levels of disability bias has posed important limitations on the ability of disability civil rights law to effectuate its goals, especially its anti–disparate treatment mission.

The evidence of continuing disability bias in contemporary American society is far too extensive to comprehensively review here. But some examples include the following:

- Regular incidents of continuing explicit disability bias, animus, and abuse, including by those who provide services to people with disabilities, such as teachers, healthcare providers, and personal assistance providers.⁴⁶

⁴⁴ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

⁴⁵ See, e.g., *supra* notes 1-2 and accompanying text.

⁴⁶ See Erin Rhoda, *St. Mary’s Hospital Employees Created a ‘Wall of Shame’ of Patients with Disabilities*, BANGOR DAILY NEWS (Oct. 3, 2019), <https://bangordailynews.com/2019/10/02/mainefocus/st-marys-hospital-employees-created-a-wall-of-shame-of-patients-with-disabilities/>. See generally MARK SHERRY, *DISABILITY HATE CRIMES: DOES ANYONE REALLY HATE DISABLED PEOPLE?* (2010); MARK C. WEBER, *DISABILITY HARASSMENT* (2007).

- Stasis in the implicit biases held against people with disabilities during a time of rapid change in the biases against other groups.⁴⁷
- Widespread suspicion that the category of disability identity is essentially strategic, including perceptions that those who claim a disability identity are fakers or fraudsters illegitimately seeking benefits.⁴⁸
- Stereotypes that people with disabilities are incapable or incompetent, with expectations for their capacities being far lower than their abilities or potential.⁴⁹
- Disparagement and dismissiveness of the creative alternative methods that people with disabilities may use to achieve the same results as nondisabled individuals, and irrational insistence on abled methods of accomplishing objectives.⁵⁰
- Diagnosis-specific stereotypes about subcategories of people with disabilities, including, for example, stereotypes that people with mental health disabilities are dangerous and violent.⁵¹
- Widely shared perceptions that the quality of life of people with disabilities and their families is very low, resulting in the perception that disability is a tragedy and that disabled lives are not worth living.⁵²

⁴⁷ See Charlesworth & Banaji, *supra* note 1, at 182-90.

⁴⁸ See, e.g., Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 1065-78 (2019) [hereinafter Dorfman, *Fear of the Disability Con*].

⁴⁹ See, e.g., CORBETT JOAN OTOOLE, *FADING SCARS: MY QUEER DISABILITY HISTORY* 21-22 (2d ed. 2019); Heidi L. Janz, *Ableism: The Undiagnosed Malady Afflicting Medicine*, 191 CANADIAN MED. ASS'N J. E478, E478-79 (2019).

⁵⁰ See, e.g., OTOOLE, *supra* note 49, at 200-20.

⁵¹ See, e.g., Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerous Mentally Ill,"* 34 U.C. DAVIS L. REV. 849, 867-85 (2001).

⁵² See, e.g., Emens, *supra* note 8, at 1389-96; Kanter, *supra* note 43, at 413-14; Sagit Mor, *The Dialectics of Wrongful Life and Wrongful Birth Claims in Israel: A Disability Critique*, 63 STUD. L. POL. & SOC'Y 113, 120 (2014); Michelle Diamant, *Feds Urged to Take Action on Disability Bias in Organ Transplants*, DISABILITY SCOOP (Oct. 10, 2019), <https://www.disabilityscoop.com/2019/10/10/feds-urged-action-disability-bias-organ-transplants/27282/> [<https://perma.cc/FD6G-PEY2>]; Alaina Leary, *We Need to Stop Talking About Disability as a Burden*, VICE (Mar. 20, 2018, 8:00 AM), <https://www.vice.com/en/article/xw78a7/we-need-to-stop-talking-about-disability-as-a-burden> [<https://perma.cc/64NM-7GDG>]. For a recent, tragic example of the potentially deadly consequences of these biases, see Kim Roberts, *Austin Hospital Withheld Treatment from Disabled Man Who Contracted Coronavirus*, TEXAN (June 29, 2020), <https://thetexan.news/austin-hospital-withheld-treatment-from-disabled-man-who-contracted-coronavirus/> [<https://perma.cc/V9EH-VVH3>].

- Presumptions that people with disabilities will not actively participate in society, leading to the creation and maintenance of societal and architectural structures that inherently foreclose their participation.⁵³
- Continuing active segregation, isolation, and restraint of people with disabilities, as well as application of “treatments” that we would describe as torture if they were perpetrated on nondisabled individuals.⁵⁴

The persistence of these negative stereotypes and biases has had important consequences for the ability of federal civil rights law to effectuate its anti-disparate treatment mission.⁵⁵ Most strikingly, employment levels of people with disabilities remain very low, despite the desire of many people with disabilities to be employed.⁵⁶ While multiple factors play a role in these high

⁵³ See, e.g., TANYA TITCHKOSKY, *THE QUESTION OF ACCESS: DISABILITY, SPACE, MEANING* 78 (2011); Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. REV. 141, 147-48 (2005); Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 612-13 (2017).

⁵⁴ See, e.g., Jennifer Smith Richards, Jodi S. Cohen & Lakeidra Chavis, *The Quiet Rooms*, PROPUBLICA (Nov. 19, 2019), <https://features.propublica.org/illinois-seclusion-rooms/school-students-put-in-isolated-timeouts/> [<https://perma.cc/RE9S-KSZS>]; see also Press Release, U.S. Food & Drug Admin., FDA Takes Rare Step to Ban Electrical Stimulation Devices for Self-Injurious or Aggressive Behavior (Mar. 4, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-rare-step-ban-electrical-stimulation-devices-self-injurious-or-aggressive-behavior> [<https://perma.cc/L7NT-XHUV>] (indicating that, in 2020, the FDA—after decades of use—was banning devices designed to deliver an electrical shock to individuals with autism as a form of behavior modification because of little evidence of benefit and because of “significant psychological and physical risks . . . associated with the use of these devices, including worsening of underlying symptoms, depression, anxiety, posttraumatic stress disorder, pain, burns and tissue damage”); Lydia X. Z. Brown – Autistic Hoya, *Footage of Judge Rotenberg Center Torturing a Person With a Disability Aired in Court*, YOUTUBE (Apr. 10, 2012), <https://www.youtube.com/watch?v=aAj9W0ntUMI> (relaying extremely disturbing video of electroshock device used on autistic teenager at residential school at which he resided).

⁵⁵ There is some reason to believe that the expressive message of the disability civil rights laws has worked in some arenas but not in others. Employment is the arena where the limitations of the law have been most apparent. See, e.g., Alex C. Geisinger & Michael Ashley Stein, *Expressive Law and the Americans with Disabilities Act*, 114 MICH. L. REV. 1061, 1072-77 (2016) (reviewing RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015)).

⁵⁶ See, e.g., Silvia Bonaccio, Catherine E. Connelly, Ian R. Gellatly, Arif Jetha & Kathleen A. Martin Ginis, *The Participation of People with Disabilities in the Workplace Across the Employment Cycle: Employer Concerns and Research Evidence*, 35 J. BUS. & PSYCH. 135, 137 (2020); 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, 293 (2014) [hereinafter, Porter, *A Defining Moment*] (reviewing *DISABILITY AND EQUITY AT WORK* (Jody

levels of unemployment, studies have shown that discrimination is an important cause.⁵⁷ Indeed, tester studies have found that a disabled applicant's chance of receiving an offer of employment can be as low as 27% of the likelihood of an identical, nondisabled applicant.⁵⁸

Research has shown that disparate treatment also continues across a host of other contexts beyond employment, despite federal civil rights law. For example, housing, public accommodations, and educational discrimination all persist—with tester studies demonstrating that straightforward disparate treatment (as opposed to failure to accommodate, which is also common) continues to occur.⁵⁹ Disability harassment by teachers, work supervisors, and peers—a particularly invidious form of disparate treatment—has also been extensively documented across an array of contexts.⁶⁰

Nevertheless, as prior scholars have observed, the courts have been especially skeptical of the anti-disparate treatment mission of the ADA.⁶¹ Indeed, in the decade and a half following the ADA's enactment, numerous cases involving allegations of explicit disability disparate treatment were dismissed, frequently because the plaintiff was found to lack a qualifying disability under the law.⁶² Following the enactment of the ADAAA, which overturned courts' narrow

Heymann, Michael Ashley Stein & Gonzalo Moreno eds., 2014)). Of course, this number is no doubt complicated by the very baseline problem described in this Article: who is identifying as disabled. As others have written, our ability to know the scope of the employment problem for people with disabilities, or to address it, is significantly compromised by the lack of a consistent definition of disability by those studying the problem. See, e.g., Porter, *A Defining Moment*, *supra*, at 292.

⁵⁷ See Marc Bendick Jr., *Employment Discrimination Against Persons with Disabilities: Evidence from Matched Pair Testing*, 17 INT'L J. DIVERSITY ORGS. CMTYS. & NATIONS 11, 16 (2018); see also Mason Ameri, Lisa Schur, Meera Adya, F. Scott Bentley, Patrick McKay & Douglas Kruse, *The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior*, 71 ILR REV. 329, 333 (2018); Marjorie L. Baldwin & Chung Choe, *Re-Examining the Models Used to Estimate Disability-Related Wage Discrimination*, 46 APPLIED ECON. 1393, 1405 (2014) (“The results suggest employed persons with physical disabilities earn wages at least equal to their expected productivity on the job, but that discrimination potentially occurs in the selection process determining entry to the labour force.”).

⁵⁸ See, e.g., Bendick, *supra* note 57, at 16; see also Ameri et al., *supra* note 57, at 333.

⁵⁹ See, e.g., Judith Rich, *What Do Field Experiments of Discrimination in Markets Tell Us? A Meta Analysis of Studies Conducted Since 2000* 44-48 (Inst. for the Study Lab., Discussion Paper No. 8584, 2014).

⁶⁰ See generally WEBER, *supra* note 46; see also Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 599-603, 611-13 (2020) [hereinafter Dorfman, *[Un]Usual Suspects*] (describing harassment of people with disabilities by strangers when they are perceived as illegitimately making use of accommodations).

⁶¹ See, e.g., Linda Hamilton Krieger, *Sociolegal Backlash*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 340, 378-81 (Linda Hamilton Krieger ed., 2003).

⁶² See *id.* at 379-80; see also Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 8-11 (2014) [hereinafter Porter, *New ADA Backlash*].

interpretations of the ADA's definition of disability, some scholars have found that courts have remained skeptical of disability disparate treatment claims, though they have mostly shifted their justification for dismissing such claims to other grounds.⁶³

Given the pervasiveness of societal biases about disability, it is unsurprising that judges have not warmly embraced the anti-disparate treatment mission of the ADA. Judges are, after all, a product of their environment to a significant extent; it would be unrealistic to believe that societal biases do not affect judges in their decision-making (and indeed research shows to the contrary⁶⁴). For a judge who subscribes to negative stereotypes or biases about disability, efforts to enforce the anti-disparate treatment provisions of the ADA may seem unwarranted or even unfair.⁶⁵

But even if judges were more receptive to disability disparate treatment claims, the persistence of disability biases would remain a critical obstacle for the effectiveness of disability civil rights law. For any group, civil rights law cannot hope to do its work through litigation enforcement alone.⁶⁶ Instead, the effectiveness of civil rights law depends in large part on its ability to deter discrimination,⁶⁷ something it cannot effectively do so long as biases persist and remain widespread. Indeed, employers, schools, service providers, and landlords may not even recognize that they are engaging in discriminatory treatment to the extent that they strongly believe in stigmatizing stereotypes and myths about disability.⁶⁸

Biases against people with disabilities have ancient roots,⁶⁹ and there are no doubt many reasons for their persistence despite the advent of federal civil rights law. This Article does not purport to fully explain the reasons for biases' persistence, but it does suggest one possible cause and one strategy for their

⁶³ See, e.g., Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1717-20. Note that some courts have also continued to erroneously apply pre-ADAAA law. See generally Widiss, *supra* note 9.

⁶⁴ See, e.g., Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1324-26 (2012).

⁶⁵ See, e.g., Krieger, *supra* note 61, at 380-81.

⁶⁶ See, e.g., Katie Eyer, Brown, *Not Loving: Obergefell and the Unfinished Business of Formal Equality*, 125 YALE L.J.F. 1, 9-10 (2015) [hereinafter Eyer, Brown, *Not Loving*]; see also Porter, *A Defining Moment*, *supra* note 56, at 318 (in reviewing *Disability and Equity at Work*, noting that one of book's takeaways is that it "takes more than just strengthening our employment discrimination laws" to "fix the problem of unemployment and underemployment of individuals with disabilities").

⁶⁷ Eyer, Brown, *Not Loving*, *supra* note 66, at 9-10.

⁶⁸ See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-88 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328-44 (1987).

⁶⁹ See, e.g., WEBER, *supra* note 46, at 16-20.

reduction: the low number of individuals who self-identify as disabled. The following two Parts turn first to the literature documenting that large majorities of people with significant physical and mental health conditions do not self-identify as disabled, and second to a discussion of why now may be a uniquely opportune time to disrupt this state of affairs.

II. MANY PEOPLE WITH PHYSICAL OR MENTAL HEALTH CONDITIONS DO NOT SELF-IDENTIFY AS DISABLED

Impairment is ubiquitous in our society.⁷⁰ 60% of American adults have a chronic physical or mental condition, such as diabetes, heart disease, or depression.⁷¹ 42% have multiple chronic conditions.⁷² Approximately 46% of Americans will experience mental illness in their lifetime,⁷³ 38% will experience cancer,⁷⁴ and 40% will experience diabetes.⁷⁵ Mobility, hearing, vision, and cognition impairments all affect significant numbers of American adults.⁷⁶ By

⁷⁰ When I use the term “impairment” rather than disability, I am using it to connote a physical or mental condition that would satisfy the definition of “impairment” under the ADA, without regard to whether it would qualify as a “disability.” See 29 C.F.R. § 1630.2(h) (2020) (defining “[p]hysical or mental impairment” to mean “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or . . . [a]ny mental or psychological disorder, such as an intellectual disability (formerly termed ‘mental retardation’), organic brain syndrome, emotional or mental illness, and specific learning disabilities” (emphasis omitted)). Most diagnosable medical or mental health conditions will qualify as impairments under this definition.

⁷¹ CHRISTINE BUTTORFF, TEAGUE RUDER & MELISSA BAUMAN, RAND CORP., *MULTIPLE CHRONIC CONDITIONS IN THE UNITED STATES* 6, 10 fig.1.5 (2017).

⁷² *Id.* at 6.

⁷³ Ronald C. Kessler, Patricia Berglund, Olga Demler, Robert Jin, Kathleen R. Merikangas & Ellen E. Walters, *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 *ARCHIVES GEN. PSYCHIATRY* 593, 595 (2005).

⁷⁴ AM. CANCER SOC’Y, *CANCER FACTS & FIGURES 2018*, at 2 (2018), <https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/annual-cancer-facts-and-figures/2018/cancer-facts-and-figures-2018.pdf> [https://perma.cc/DA8S-GF4Z].

⁷⁵ Edward W. Gregg, Xiaohui Zhuo, Yiling J. Cheng, Ann L. Albright, K.M. Venkat Narayan & Theodore J. Thompson, *Trends in Lifetime Risk and Years of Life Lost Due to Diabetes in the USA, 1985-2011: A Modelling Study*, 2 *LANCET DIABETES & ENDOCRINOLOGY* 867, 871 (2014).

⁷⁶ See CATHERINE A. OKORO, NATASHA D. HOLLIS, ALISSA C. CYRUS & SHANNON GRIFFIN-BLAKE, CTRS. FOR DISEASE CONTROL & PREVENTION, *MORBIDITY AND MORTALITY WEEKLY REPORT: PREVALENCE OF DISABILITIES AND HEALTH CARE ACCESS BY DISABILITY STATUS AND TYPE AMONG ADULTS – UNITED STATES, 2016*, at 882 (2018).

the numbers, those with impairments are no minority but are likely the majority of the American population.⁷⁷

While not all of those with significant impairments would be considered to have a disability under contemporary federal civil rights law, many would.⁷⁸ Common conditions such as diabetes, depression, and cancer all should easily qualify as disabilities under contemporary civil rights law—regardless of the functional limitations (or lack thereof) that they impose.⁷⁹ So too, those with mobility impairments, intellectual disabilities, blindness, deafness, and cerebral palsy all will easily meet the definition of disability, regardless of their level of functional impairment.⁸⁰ Other common conditions like heart disease, attention-deficit/hyperactivity disorder (“ADHD”), and learning disabilities also qualify an individual as disabled, provided that they have significant effects on bodily functions or life activities.⁸¹ Thus, millions of Americans—indeed, almost surely a majority—qualify as disabled under existing federal civil rights law.

And yet, work across a variety of disciplines has consistently shown that disability self-identification remains rare.⁸² While the numbers vary depending on the group surveyed and the questions asked, many studies find that rates of disability self-identification are very low.⁸³ For example, in one recent study,

⁷⁷ See 29 C.F.R. § 1630.2(h) (2020); BUTTORFF, RUDER & BAUMAN, *supra* note 71, at 6.

⁷⁸ See 29 C.F.R. § 1630.2(h)-(j).

⁷⁹ See *id.* § 1630.2(j)(3)(iii).

⁸⁰ See *id.*

⁸¹ See *id.* § 1630.2(j)(1)(ii).

⁸² See Elizabeth F. Emens, *What's Left in Her Wake: In Honor of Adrienne Asch*, HASTINGS CTR. REP., Mar.-Apr. 2014, at 19, 20 (as a part of her tribute to Adrienne Asch, asking the question “How can the disability rights movement better understand, benefit, and collaborate with the average person with a disability who does not identify as disabled?,” and discussing the insights that Asch and her work contributed to this question (emphasis omitted)); Nicole Buonocore Porter, *What Disability Means to Me: When the Personal and Professional Collide*, 5 HOUS. L. REV. OFF REC. 119, 128 (2015) [hereinafter Porter, *What Disability Means*] (observing that, although the author would likely qualify as a person with a disability under the ADA, the lack of functional limitations associated with her impairment made her feel that she was not a person with a disability); Interview by Karen Tani, Prof., Univ. of Pa. Carey L. Sch., with Thomas D. Sutton, Partner, Leventhal Sutton & Gornstein (Jan. 2019) (on file with the author) (noting that most of his clients do not see disability as part of their identity).

⁸³ See, e.g., ANDREWS, *supra* note 31, at 86-105; Andrews et al., *supra* note 6, at 114; Kathleen R. Bogart, Adena Rottenstein, Emily M. Lund & Lauren Bouchard, *Who Self-Identifies as Disabled? An Examination of Impairment and Contextual Predictors*, 62 REHAB. PSYCH. 553, 560 (2017); Holly McCartney Chalk, *Disability Self-Categorization in Emerging Adults: Relationship with Self-Esteem, Perceived Esteem, Mindfulness, and Markers of Adulthood*, 4 EMERGING ADULTHOOD 200, 203 (2016) [hereinafter Chalk, *Disability Self-Categorization*]; Holly McCartney Chalk, Christopher P. Barlett & Natalie D. Barlett, *Disability Self-Identification and Well-Being in Emerging Adults*, 8 EMERGING ADULTHOOD

only 14% of those with one of eighty-six common impairments identified as either a “disabled person” or a “person with a disability.”⁸⁴ Even among those who rated their impairments as severe (48% of those surveyed), few self-identified as disabled.⁸⁵ Certain groups, such as those with acquired or intermittent disabilities and those with invisible disabilities, are especially unlikely to self-identify as disabled.⁸⁶ Even among those with impairments that are at the core of what many outside observers would classify as disabilities—such as wheelchair users—significant numbers do not identify as disabled.⁸⁷

It is important to note that in most of the quantitative research addressing this topic, the study population was comprised exclusively of those who identified themselves to the researchers as having a physical or mental health condition. Thus—unlike other contexts where it might be difficult to disaggregate an unwillingness to come out from an internal lack of self-identification—it is clear that study participants were willing to identify their impairment, at least in the context of the research. Nevertheless, in many studies, the large majority of those surveyed reported not identifying as disabled.⁸⁸

Qualitative research and the narratives of individual scholars and nonscholars with disabilities confirm that for many people with impairments—even those

306, 311 (2020) [hereinafter Chalk, Barlett & Barlett, *Disability Self-Identification*]; David Leake, *Problematic Data on How Many Students in Postsecondary Education Have a Disability*, 28 J. POSTSECONDARY EDUC. & DISABILITY 73, 83 (2015); Lisa Bourke & Catherine Waite, “It’s Not Like I Have a Disability or Anything!” *Perceptions of Disability and Impairment Among Young, Rural People*, DISABILITY STUD. Q. (2013), <https://dsq-sds.org/article/view/3261/3265> [<https://perma.cc/W43A-EN84>]; see also Susan Stefan, “Discredited” and “Discreditable”: *The Search for Political Identity by People with Psychiatric Diagnoses*, 44 WM. & MARY L. REV. 1341, 1348 (2003).

⁸⁴ See Bogart et al., *supra* note 83, at 557 n.2.

⁸⁵ *Id.* at 557, 559.

⁸⁶ See, e.g., Andrews et al., *supra* note 6, at 114; Kathleen R. Bogart, *The Role of Disability Self-Concept in Adaptation to Congenital or Acquired Disability*, 59 REHAB. PSYCH. 107, 112 (2014); Bogart et al., *supra* note 83, at 558; Christopher L. Griffin, Jr. & Michael Ashley Stein, *Self-Perception of Disability and Prospects for Employment Among U.S. Veterans*, 50 WORK 49, 50 (2015) (finding that veterans are less likely than government to acknowledge their own disability status); Leake, *supra* note 83, at 83 (finding that students with “hidden” disabilities are much more likely to state they did not have disabilities); Aimee Burke Valeras, “We Don’t Have a Box”: *Understanding Hidden Disability Identity Utilizing Narrative Research Methodology*, DISABILITY STUD. Q. (2010), <https://dsq-sds.org/article/view/1267/1297> [<https://perma.cc/Q253-T8XG>].

⁸⁷ See Joan W. Howarth, *Recruiting Sexual Minorities and People with Disabilities to Be Dean*, 31 SEATTLE U. L. REV. 751, 757 (2008) (citing survey research finding that “[a]lmost 20% of adult manual wheelchair users nationwide do not perceive themselves as disabled” (alteration in original) (quoting Annie G. Steinberg, Lisa I. Iezzoni, Alicia Conill & Margaret Stineman, *Reasonable Accommodations for Medical Faculty with Disabilities*, 288 JAMA 3147, 3148-49 (2002))).

⁸⁸ See, e.g., Bogart et al., *supra* note 83, at 557-59, 557 n.2 (noting that of study participants with common impairments, only 14% claimed disability).

that are visible and significant—disability self-identification is far from automatic.⁸⁹ As disabled scholars such as Rosemarie Garland-Thomson and Simi Linton have written, the journey to disabled self-identification can be long and iterative—spanning decades—even for those who ultimately form a strong self-identification as disabled.⁹⁰ Even individuals who at one time or in one context may self-identify as disabled may continue to question whether disability self-identification is appropriate and may reject the label at other times or in other contexts.⁹¹ And for many, especially including those with invisible or intermittent disabilities, disability identity formation may never occur at all. Thus, qualitative and narrative insights confirm, and offer additional nuance to, what quantitative research has found: claiming disability identity remains rare.⁹²

It is clear that this phenomenon extends even to many individuals that current civil rights law would classify as people with disabilities. Thus, there are many people with cancer, major depressive disorder, diabetes, autism, post-traumatic

⁸⁹ See, e.g., SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 5 (1998) [hereinafter LINTON, CLAIMING DISABILITY]; OTOOLE, *supra* note 49, at 20-21; Dorfman, *Re-Claiming Disability*, *supra* note 43, at 212; Nick Watson, *Well, I Know This Is Going to Sound Very Strange to You, but I Don't See Myself as a Disabled Person: Identity and Disability*, 17 DISABILITY & SOC'Y 509, 514 (2002); Heather D. Evans, *Disability, Identity, and the Law: A Phenomenological Study of Living with Acquired, Invisible Impairment* 185 (2016) (Ph.D. dissertation, University of Washington) (ProQuest); Valeras, *supra* note 86.

⁹⁰ See SIMI LINTON, MY BODY POLITIC: A MEMOIR 3 (2006) [hereinafter LINTON, BODY POLITIC]; Rosemarie Garland-Thomson, *Opinion, Becoming Disabled*, N.Y. TIMES, Aug. 21, 2016, at SR1 [hereinafter Garland-Thomson, *Becoming Disabled*]; Rosemarie Garland-Thomson, *The Story of My Work: How I Became Disabled*, DISABILITY STUD. Q. (2014) [hereinafter Garland-Thomson, *The Story of My Work*], <https://dsq-sds.org/article/view/4254/3594> [<https://perma.cc/HJ4K-XNAA>] (recounting that her “transition from ‘I was born this way’ to ‘I have a disability’ was [not] simply accomplished”); see also Anjali J. Forber-Pratt, Dominique A. Lyew, Carlyn Mueller & Leah B. Samples, *Disability Identity Development: A Systematic Review of the Literature*, 62 REHAB. PSYCH. 198, 204 (2017).

⁹¹ See, e.g., Evans, *supra* note 89, at 61; see also JONATHAN MOONEY, NORMAL SUCKS: HOW TO LIVE, LEARN, AND THRIVE, OUTSIDE THE LINES 19 (2019). There are significant parallels here to the experience of multiracial individuals, for whom inconsistent racial identification across their life spans is relatively common. See, e.g., Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1532-39 (2014).

⁹² Social media sites, such as Twitter, also demonstrate this phenomenon. Participants often genuinely query whether their medical and mental health conditions “count” as disabilities, expressing uncertainty regarding their ability to claim the label of disabled. See, e.g., Imani Barbarin (@Imani_Barbarin), TWITTER (Apr. 27, 2020, 11:47 AM), https://twitter.com/Imani_Barbarin/status/1254799261633519616 (thread including many individuals with ADAAA-qualifying disabilities questioning whether they can be considered disabled); see also Katie Eyer, *Am I Disabled? Disability Identity and Law Faculty*, J. LEGAL EDUC. (forthcoming 2021) (discussing the dilemmas that those who are ambiguously disabled face in deciding whether to embrace disability identity, including fears of illegitimately co-opting identity).

stress disorder, HIV, epilepsy, and other conditions identified by the EEOC as easily constituting disabilities under the ADAAA's rules⁹³ who would not self-identify as disabled.⁹⁴ Indeed, both quantitative research and qualitative disability narratives make clear that even those who *are* significantly functionally limited by impairment, and thus might qualify as "disabled" even under pre-ADAAA civil rights standards, often do not claim a disability identity.

Of course, even among those who do claim a disability identity, what that identity means to them may vary significantly. For many, disability identity can be a basis for pride or political identity—much as identity functions for many (albeit certainly not all) who are racial minorities or members of the LGBTQ community. However, for others, its connotations may be less affirming.⁹⁵ Indeed, part of what helps explain the widespread lack of disability self-identification is the social construction of disability as a concept associated intrinsically with limitation and especially with the inability to work.⁹⁶ Thus, for some, self-identifying as disabled may represent a reluctant concession of functional limitation, as opposed to a claiming of a desired identity.⁹⁷

As set out in the following Part, these and other obstacles to claiming disability identity are very real and pose substantial challenges to a project aimed at increasing disability self-identification. Nevertheless, the current confluence of a number of factors—legal, social, and technological—mean that the time has never been better for a movement that encourages the claiming of a disability identity. Moreover, those same factors mean that the opportunities for shaping the meaning of disability identity around a positive self-concept are uniquely promising.

III. OBSTACLES TO DISABILITY SELF-IDENTIFICATION AND THE POTENTIAL OF THE CURRENT MOMENT FOR CLAIMING A POSITIVE DISABILITY IDENTITY

Although a variety of factors play a role in the widespread tendency toward disability disidentification, it is clear that dominant societal understandings of

⁹³ See 29 C.F.R. § 1630.2(j)(3)(iii) (2020).

⁹⁴ See, e.g., Richard Elliott, Leah Utyasheva & Elisse Zack, *HIV, Disability and Discrimination: Making the Links in International and Domestic Human Rights Law*, 12 J. INT'L AIDS SOC'Y, Nov. 2009, at 1, 2; Porter, *A Defining Moment*, *supra* note 56, at 328; Paul T. Shattuck, Jessica Steinberg, Jennifer Yu, Xin Wei, Benjamin P. Cooper, Lynn Newman & Anne M. Roux, *Disability Identification and Self-Efficacy Among College Students on the Autism Spectrum*, AUTISM RSCH. & TREATMENT, Feb. 2014, at 1, 4.

⁹⁵ See, e.g., Chalk, *Disability Self-Categorization*, *supra* note 83, at 201; Evans, *supra* note 89, at 142.

⁹⁶ See Chalk, *Disability Self-Categorization*, *supra* note 83, at 201; Evans, *supra* note 89, at 142.

⁹⁷ See, e.g., Marjorie F. Olney, Jae Kennedy, Karin F. Brockelman & Mark A. Newsom, *Do You Have a Disability? A Population-Based Test of Acceptance, Denial, and Adjustment Among Adults with Disabilities in the U.S.*, J. REHAB., no. 1, 2004, at 1, 8; Watson, *supra* note 89, at 512; Evans, *supra* note 89, at 91; Valeras, *supra* note 86.

disability as inextricably associated with functional limitation and an inability to work play an important role. Despite the fact that contemporary civil rights law does *not* link disability to functional incapacity, much less an inability to work, our dominant societal understanding of disability remains linked to a social welfare–law model under which functional incapacity is defining. Thus, for many people, their colloquial understanding of disability is focused on those who are the most functionally limited by impairment and often is limited to those who are partially or wholly incapable of remunerated employment.⁹⁸

As historian Sarah Rose has written, disability was not always associated with an intrinsic inability to contribute productively but came to be so in the late nineteenth and early twentieth centuries due to a confluence of factors including industrialization.⁹⁹ By the early twentieth century, this association was strong in the United States—so much so that people with disabilities were often presumed to be unemployable, even in the face of evidence to the contrary.¹⁰⁰ Today,

⁹⁸ See, e.g., Elliott, Utyasheva & Zack, *supra* note 94, at 2; Mitchell Loeb, *Disability Statistics: An Integral but Missing (and Misunderstood) Component of Development Work*, 31 *NORDIC J. HUM. RTS.* 306, 308-10 (2013); Watson, *supra* note 89, at 513; Evans, *supra* note 89, at 3; Bradley A. Areheart & Michael Ashley Stein, *The Disability-Employability Divide: Bottlenecks to Equal Opportunity*, 113 *MICH. L. REV.* 877, 882-83 (2015) (book review); Bourke & Waite, *supra* note 83, at 1; Valeras, *supra* note 86; see also Dorfman, *Re-Claiming Disability*, *supra* note 43, at 202 (“There is a strong connection between the presumed inability to work and the medical model.”). Note that although dominant societal understandings of disability play an important role in disability disidentification, these understandings are of course likely not the only factor contributing to this phenomenon. Among the factors that may contribute to the widespread tendency not to self-identify as disabled are a desire to distance oneself from a stigmatized identity, a relative lack of self-aware contact with others within the group (as compared to other identity groups like race or sex), mourning of a nondisabled past, and the heterogeneity of conditions that are grouped under the disability identity. See Michelle R. Nario-Redmond & Arielle Silverman, *Contending with Ableism from Internalized Ableism to Collective Action*, in MICHELLE R. NARIO-REDMOND, *ABLEISM: THE CAUSES AND CONSEQUENCES OF DISABILITY PREJUDICE* 220, 232-33 (Daniel Perlman ed., 2020); see also Bogart et al., *supra* note 83, at 555; Forber-Pratt et al., *supra* note 90, at 205; Evans, *supra* note 89, at 146; S.E. Smith, *Disability Sucks Sometimes. Why Is It Taboo to Say So?*, *CATAPULT* (Aug. 25, 2020), <https://catapult.co/stories/disability-sucks-sometimes-why-is-it-taboo-to-say-so-column-s-e-smith> [<https://perma.cc/E3YD-FW5V>]. More individualized factors that contribute to disability self-identification (or conversely may make disability self-identification less likely) are also numerous and include the existence or lack of external markers of disability (i.e., whether the disability is “hidden”); whether the disability is acquired or congenital; the duration of impairment; the severity of impairment; demographic factors like race, sex, and age; and whether the individual experiences stigma as a result of the disability. See, e.g., Bogart et al., *supra* note 83; Valeras, *supra* note 86.

⁹⁹ SARAH F. ROSE, *NO RIGHT TO BE IDLE: THE INVENTION OF DISABILITY, 1840S–1930S*, at 2 (2017).

¹⁰⁰ DOUGLAS C. BAYNTON, *DEFECTIVES IN THE LAND: DISABILITY AND IMMIGRATION IN THE AGE OF EUGENICS* 79-81, 91-97, 136-38 (2016).

disability remains strongly associated with functional limitation and an inability to work in the United States. Indeed, many disabled people themselves identify functional limitation and/or an inability to work as the crux of their understanding of disability.

This conception of disability poses obvious barriers to widespread disability self-identification. Individuals who are able to work or who do not experience their impairment as functionally limiting may view this capacity as intrinsically negating disability status and thus identity.¹⁰¹ Moreover, for those who view disability as focused on functional limitation or inability to work, disability identity may appear less a matter of social or political identification but rather a matter of conceding incapacity.¹⁰² Unless individuals have been exposed to another model of disability identity—such as the social,¹⁰³ diversity/minority,¹⁰⁴ or Disability Justice¹⁰⁵ models—there may be significant reasons why only those most functionally limited, and specifically those who are largely or entirely unable to work, are likely to self-identify as disabled.

¹⁰¹ See, e.g., Watson, *supra* note 89, at 514; Evans, *supra* note 89, at 91; Bourke & Waite, *supra* note 83; Valeras, *supra* note 86. Note that in order to qualify for protections under the employment provisions of federal civil rights law, an individual must be “qualified” for employment. 42 U.S.C. § 12112. Thus, a definition of disability that centers on inability to work has essentially no overlap with those whom federal employment discrimination law protects as people with disabilities. *Id.*; cf. Cleveland v. Pol’y Mgmt. Sys. Corp., 526 U.S. 795, 802-03 (1999) (declining to hold that an application for SSDI estopped plaintiff from alleging that she was qualified within the meaning of the ADA, but also noting theoretical conflict between certifying inability to work for purposes of SSDI and alleging qualification for work under the ADA).

¹⁰² See, e.g., Watson, *supra* note 89, at 516; Evans, *supra* note 89, at 68; Bourke & Waite, *supra* note 83; Valeras, *supra* note 86.

¹⁰³ See *supra* note 12 and accompanying text (noting that the social model of disability posits that disability, as distinct from impairment, is a condition that arises from the interaction of impairment with a social and physical environment that is often both inaccessible and explicitly biased).

¹⁰⁴ The diversity/minority model of disability focuses on centering disability as a positive political trait, rather than one inherently bound up in functional incapacity. See, e.g., ANDREWS, *supra* note 31, at 28; Andrews et al., *supra* note 6, at 112.

¹⁰⁵ The Disability Justice movement arose in response to the perceived limitations of the Disability Rights model of disability liberation and especially concerns that the Disability Rights movement and its rights-based model do not adequately account for the experience of those who may face intersectional forms of oppression, have more stigmatized forms of disabilities (such as mental disabilities), and/or may be otherwise unable to benefit from a legal/rights-based model. See, e.g., SINS INVALID, *supra* note 3, at 13-15. The Disability Justice movement centers understandings of disability on intersectional identity, individual value outside of capitalist notions of productivity, and collective liberation of all with brain and body difference. See, e.g., *10 Principles of Disability Justice*, SINS INVALID (Sept. 17, 2015), <https://www.sinsinvalid.org/blog/10-principles-of-disability-justice> [<https://perma.cc/68DV-33BC>].

So too, even those who might entertain the possibility of a disability identity might believe themselves to be unentitled to claim such an identity where their impairments that do not prevent them from working (or do not otherwise cause them to experience substantial functional limitations). Because of the continuing, widespread association of disability with functional incapacity and an inability to work, many individuals with impairments experience concerns about whether they are disabled “enough” to claim a disability identity.¹⁰⁶ Even for those with substantial functional impairments, they may fear being perceived as illegitimately claiming the label of disability if they so self-identify. And indeed, there is often policing of disability identity—both by those outside of the disability community and sometimes by those within—with an understanding of disability that demands meaningful or even systematic functional incapacity.¹⁰⁷

This restrictive social construct of disability was of course built around a legal model—social welfare law—that was *intentionally* limited and exclusionary, rather than broad and inclusionary.¹⁰⁸ Even as many people with disabilities were being pushed out of opportunities for productive work by the rise of standardization, mechanization, and disability bias, social welfare policy increasingly defined disability narrowly, as a virtually entire incapacity to work due to impairment.¹⁰⁹ Driven by fears of laziness, immorality, and grift, policy makers defined disability narrowly, with the aim of awarding benefits to only those most profoundly incapacitated from working.¹¹⁰ Thus, the modern societal understanding of disability remains rooted in a social welfare–law model that understands disability as inevitably connoting functional incapacity and an inability to work—and which treats claiming disability identity as suspect and as targeted at illegitimate resource consumption.

In contrast, in many other contexts, the law’s historical role in constructing our social understanding of minority categories favored construing such categories broadly—though ordinarily for oppressive means. For example, in the context of race and sexual orientation, the law and legal regulation were typically concerned with policing the boundaries of access to nonminority status

¹⁰⁶ See, e.g., Evans, *supra* note 89, at 135-36; see also *supra* note 92.

¹⁰⁷ See, e.g., Dorfman, *[Un]Usual Suspects*, *supra* note 60, at 599-603, 611-13; Evans, *supra* note 89, at 135-36.

¹⁰⁸ This is not universally true. For example, for the purposes of some oppressive policies such as exclusion from public schools or the institutionalization of people with disabilities, it is clear that a narrow exclusionary conception of functional limitation or inability to work did not always govern—indeed, as Sarah Rose points out in the institutionalization context, the most capable workers were often institutionalized the longest in order to retain the benefits of the services they provided to the institution. See ROSE, *supra* note 99, at 73-74.

¹⁰⁹ See *id.* at 4.

¹¹⁰ See *id.*

rather than limiting access to minority status.¹¹¹ This legal policing was used for oppressive means, including enforcing discrimination and denying access to resources, and it continues to be used to these ends as a matter of social construction today. But these expansive constructs of identity also helped to create widespread, although surely not universal, self-identification among the constituents of many of the other identity movements that exist today.¹¹² Thus, the divergent legal history of how disability has been constructed (as compared to other identity categories) may help explain why the obstacles to disability self-identification are in some respects comparatively unique—and why our dominant social frame has traditionally been uniquely discouraging of widespread disability identity.

This central obstacle to disability identity formation no doubt remains strong. It continues to be the case for many people that inability to work or other functional limitations form the *sine qua non* of their conception of disability.¹¹³ This may cause such individuals not to see themselves at all in the concept of disability or to worry that claiming of disability identity may be perceived as (or is in fact) illegitimate. But there are many reasons to believe that this central obstacle to the claiming of disability identity also is unusually subject to

¹¹¹ The so-called “one drop” rule is the most obvious and extreme example of this phenomenon. Although, as other scholars have shown, the American legal landscape was far more complicated than a singular “one drop” rule in its construction and understanding of race, it remains the case that the legal definition of race arose in the predominant contexts of efforts to police the boundaries of admission to the privileges of Whiteness, rather than efforts to limit the scope of who could claim minority status. *See, e.g.*, IAN HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, at xiv (10th anniversary ed. 2006); Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860*, 91 MINN. L. REV. 592, 593, 596–97 (2007); *cf.* MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 2* (William Chafe, Gary Gerstle, Linda Gordon & Julian Zelizer eds., 2009) (describing the history of the construction of identity in the sexual orientation context); Craig J. Konnoth, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 YALE L.J. 316, 328–357 (2009) (same).

¹¹² *See, e.g.*, Aaron Gullickson & Ann Morning, *Choosing Race: Multiracial Ancestry and Identification*, 40 SOC. SCI. RSCH. 498, 505–06 (2011) (showing that among multiracial people with Black ancestry, a majority of those who also have White or Indigenous ancestry nevertheless identify exclusively as Black); *cf.* Anthony W. Marx, *Contested Citizenship: The Dynamics of Racial Identity and Social Movements*, 40 INT’L REV. SOC. HIST. 159, 177–79 (1995) (describing the ways that a lack of an overarching state-imposed racial system and the relative permeability of Brazilian racial categories has posed difficulties for the development of social movement organization around racial injustice in Brazil, stating that “the lack of official racial discrimination was more consequential in muting the prospects for racial identity formation or mass protest”); Rich, *supra* note 91, at 1532–39 (describing how, even in the United States, multiracial identity is complex, and describing the variety of factors that may affect external and internal multiracial identity, including context and individuals’ experiences with racism).

¹¹³ *See supra* note 98 and accompanying text.

challenge in the current moment, due to a confluence of factors that could facilitate a broad reenvisioning of disability as a concept—around impairment and political identity, rather than functional limitation.

Among those factors is the ADAAA's passage.¹¹⁴ While scholars have offered mixed reviews of the ADAAA's efficacy in its *legal* goals, its most significant importance may actually reside in its potential as a tool of social framing.¹¹⁵ Prior to the ADAAA, even those definitions of disability in civil rights law were generally linked to functional limitation.¹¹⁶ Those that were not, like the ADA and Rehabilitation Act's "regarded as" and "record of" categories, still appeared to assume that "real" disability centered on functional limitation.¹¹⁷ Moreover, because of the focus on functional limitations, it could be difficult under some definitions to know whether any given impairment would be qualifying.¹¹⁸ Thus, for example, decisions of the courts prior to the ADAAA found that individual workers with multiple sclerosis, intellectual disabilities, bipolar disorder, epilepsy, and more were not "disabled" under the ADA because they were not sufficiently impaired.¹¹⁹

While the ADAAA does not entirely move away from a functional-limitation model, it does so in significant part.¹²⁰ By including "major bodily functions"

¹¹⁴ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-54 (codified as amended at 42 U.S.C. § 12101).

¹¹⁵ For commentary questioning whether the ADAAA has achieved its legal/policy goals, see, for example, Stephen F. Befort, *An Empirical Assessment of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2030-31 (2013); Jennifer Bennett Shinall, *What Happens When the Definition of Disability Changes? The Case of Obesity*, 5 IZA J. LAB. ECON., no. 2, 2016, at 1, 3.

¹¹⁶ See 42 U.S.C. § 12102(1)(A) (defining disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual"). As the ADAAA itself demonstrates, this definition, accompanied by a set of liberal interpretation rules, *could* be construed not to require actual functional limitation. But in fact, the Supreme Court and the lower courts interpreted it prior to the ADAAA to require a very significant degree of current functional limitations. See, e.g., 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, 212-14 (2008) [hereinafter Areheart, *Just Right*]. The two other prongs of the definition—"regarded as" and "record of"—while not requiring that current functional limitation themselves were read as simply referring back to the "actual" disability prong and its understanding of disability as necessitating significant functional impairment. See, e.g., *Sutton v. United Air Lines*, 527 U.S. 471, 489 (1999).

¹¹⁷ See, e.g., *Sutton*, 527 U.S. at 489.

¹¹⁸ See Porter, *New ADA Backlash*, *supra* note 62, at 11 (describing the wide array of conditions that were found not to constitute disabilities under pre-ADAAA law).

¹¹⁹ See *id.*

¹²⁰ See 42 U.S.C. §§ 12102(2)(B), 12102(4)(D); 29 C.F.R. § 1630.2(j)(3)(iii) (2020). In this regard, I disagree with scholars who characterize the ADAAA as retaining a universal functional limitation requirement for actual disability, although this may be mostly a matter of semantics.

among the statutorily defined “major life activities,” the ADAAA makes clear that even those who lack *any* functional impairment in their day-to-day activities (including but not limited to work) are disabled if the functions of their bodies or brains are “substantial[ly] limited” in some way.¹²¹ Thus, for example, a person with major depressive disorder is “substantial[ly] limited” in their brain function even if they experience no functional limitations on their ability to perform day-to-day activities as a result.¹²² The ADAAA’s understanding of disability even includes conditions that are episodic or in remission or whose impact is completely ameliorated by mitigating measures.¹²³ Thus, the ADAAA’s expansive definition of disability now includes many people lacking *any* current functional impairment—in work, in social interactions, or at home.¹²⁴

Moreover, while the ADAAA continues to have an individualized definition of disability, rather than simply itemizing conditions that qualify, its expanded definition makes it far easier to identify conditions that should, as a matter of course, be deemed disabilities.¹²⁵ Indeed, the EEOC has recognized this feature of the ADAAA in regulations through the so-called “(j)(3)(iii) list,” which lists a set of conditions—including cancer, HIV, intellectual disability, blindness, partially or completely missing limbs, major depressive disorder, and others—which should easily qualify as disabilities under the ADAAA.¹²⁶ As the EEOC points out, each listed condition, in its active and nonmitigated state, predictably (and indeed often by definition) “substantially limits” a “major life activity,” often a “major bodily function.”¹²⁷

Of course, it is unlikely that the ADAAA alone can deconstruct long-standing conceptions of disability as centered on functional limitation and the inability to work or can otherwise on its own produce a widespread movement in disability self-identification.¹²⁸ But other social movement and technological developments *also* make the present moment a highly fortuitous time for pursuing such goals. As set out below, together these developments in law, society, and technology ought to make us optimistic that 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.

First, it is hard to overstate the impact that the advent of the Internet and social media outlets like Twitter and Facebook has had on the ability of ideas—

¹²¹ See 42 U.S.C. § 12102(2)(B).

¹²² See 29 C.F.R. § 1630.2(j)(3)(iii).

¹²³ See 42 U.S.C. § 12102(4)(D).

¹²⁴ See, e.g., 29 C.F.R. § 1630.2(j)(3)(iii).

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ *Id.*

¹²⁸ Nevertheless, the long history of a role for law, including disability law, in constructing identity suggests that it can play some part in this process. *Cf. supra* notes 110-12 and accompanying text.

including ideas about identity—to spread independent of their acceptance by society as a whole.¹²⁹ It is no longer the case that hegemonic societal institutions control the spread and dissemination of ideas. In the era of the Internet, ideas about identity—for example, the neurodiversity movement’s reconceptualization of our ideas about autism and related conditions—can and have spread rapidly through networks that are accessible to anyone with a computer and an Internet connection.¹³⁰ Thus, there are unique opportunities today for disrupting social understandings of what it means to identify as disabled—opportunities that simply did not exist even twenty-five years ago.

The advent of the Internet has also substantially mitigated what was once another important constraint on the formation of disability identity (especially positive disability identity): isolation from other disabled people.¹³¹ Traditionally, many people with disabilities have been raised in families where others are not disabled (or, at a minimum, do not identify as disabled).¹³² And for those who have more significant functional limitations, the ability to access models of positive self-identification has sometimes been further limited by being sited within inaccessible communities or living in institutions.¹³³

¹²⁹ See, e.g., ANNE MCGUIRE, WAR ON AUTISM: ON THE CULTURAL LOGIC OF NORMATIVE VIOLENCE 62-64 (2016); Charlotte Brownlow, Lindsay O’Dell & Hanna Bertilsdotter Rosqvist, Commentary, *Challenging Representations of Autism – Exploring Possibilities for Broadcasting the Self on YouTube*, 19 J. ON DEVELOPMENTAL DISABILITIES 90, 90-91 (2013); Justine E. Egner, “The Disability Rights Community Was Never Mine”: *Neuroqueer Disidentification*, 33 GENDER & SOC’Y 123, 144 (2019); Stefania Milan, *From Social Movements to Cloud Protesting: The Evolution of Collective Identity*, 18 INFO. COMM’N & SOC’Y 887, 895-97 (2015); Sarah M. Parsloe, *Discourses of Disability, Narratives of Community: Reclaiming an Autistic Identity Online*, 43 J. APPLIED COMM’N RSCH. 336, 340 (2015); Sarah M. Parsloe & Avery E. Holton, *#Boycottautismspeaks: Communicating a Counternarrative Through Cyberactivism and Connective Action*, 21 INFO. COMM’N & SOC’Y 1116, 1122 (2018); Anna Priante, Michel L. Ehrenhard, Tijs van den Broek & Ariana Need, *Identity and Collective Action via Computer-Mediated Communication: A Review and Agenda for Future Research*, 20 NEW MEDIA & SOC’Y 2647, 2659 (2018); Jessica M.F. Hughes, *Changing Conversations Around Autism: A Critical, Action Implicative Discourse Analysis of U.S. Neurodiversity Advocacy Online (May 6, 2015)* (Ph.D. thesis, University of Colorado) (ResearchGate).

¹³⁰ See generally Brownlow, O’Dell & Rosqvist, *supra* note 129, at 90; Parsloe, *supra* note 129, at 340; Parsloe & Holton, *supra* note 129, at 1122.

¹³¹ See, e.g., Andrews et al., *supra* note 6, at 114.

¹³² See, e.g., Kathleen R. Bogart, Emily M. Lund & Adena Rottenstein, *Disability Pride Protects Self-Esteem Through the Rejection-Identification Model*, 63 REHAB. PSYCH. 155, 158 (2018).

¹³³ See, e.g., A. Jahoda & I. Markova, *Coping with Social Stigma: People with Intellectual Disabilities Moving from Institutions and Family Home*, 48 J. INTELL. DISABILITY RSCH. 719, 722-26 (2004) (describing negative identity frames imposed on those with intellectual disabilities in an institutional context). *But cf.* LINTON, *BODY POLITIC*, *supra* note 90, at 108-10 (describing ways in which contact with other disabled people while in rehabilitation hospital following her accident helped to construct her disability identity).

Technology and the Internet have considerably lowered those barriers by creating spaces for community formation and contact that transcend physical geography.¹³⁴

Moreover, social media offers tremendous opportunities for the type of moments of self-disclosure that scholars, people with disabilities, and those who are both have recognized are constitutive of disability identity, especially for those with hidden disabilities. As people with disabilities describe, the process of identifying as disabled is often iterative, meaning that it occurs not in a single moment but rather across many moments spread over time. For many, external self-identification (i.e., identifying one's disability to others) is an important feature of this iterative process of identity formation—and indeed, it is often repeated external self-identification that helps to solidify internal disability identity.¹³⁵ In the Internet age, the proliferation of spaces in which individuals can disclose their identity enormously magnifies the ability to constitute identity through disclosure.¹³⁶

This magnification of opportunities for external self-identification is potentially contagious, meaning that increased external self-identification by some can lead to external self-identification by others. For example, when activist Annie Segarra tweeted a call for people with disabilities to “[s]how [her] what #DisabledLooksLike,” within days, thousands of people with a wide variety of underlying impairments had posted images of themselves to Twitter under the hashtag #DisabledLooksLike.¹³⁷ A similar campaign that Segarra started led to thousands of those with invisible disabilities disclosing their disabilities under the hashtag #InvisiblyDisabledLooksLike.¹³⁸ In short, the ability for external disability self-identification—and thus moments for the crystallization of disability identity—to “go viral” is one important consequence of the digital age.

In addition to (and often intertwined with) the explosion of the Internet, other developments make this a uniquely fortuitous time to overcome the traditional barriers to widespread disability identity formation. Spreading the concept of

¹³⁴ See, e.g., Smith, *supra* note 98.

¹³⁵ See Evans, *supra* note 89, at 116-17.

¹³⁶ See generally Benjamin W. Mann, *Survival, Disability Rights, and Solidarity: Advancing Cyberprotest Rhetoric Through Disability March*, *DISABILITY STUD. Q.* (2018), <https://dsq-sds.org/article/view/5917/4886> [<https://perma.cc/ZK47-3JZZ>]. It is not only the quantity of spaces for disclosure but also the qualitative features of online disclosure that may open up space for greater disclosure of identity. In comparison to in-person disclosure, online disclosure is easier, both in the sense that it entails lower up-front emotional costs and in the sense that it is likely to reach a greater number of people.

¹³⁷ See Annie Segarra (@annieelaine), TWITTER (Aug. 16, 2019, 8:13 PM), <https://twitter.com/annieelaine/status/1162517652251783168>.

¹³⁸ See Paul Harrison, *Thousands Share Their Invisible Disabilities on Twitter*, *BBC NEWS* (Oct. 25, 2017), <https://www.bbc.com/news/disability-41733769> [<https://perma.cc/VA86-S6BL>].

disability as a positive identity—as opposed to one focused on functional limitation or inability to work—is *already* a long-standing project of many within the disability movement and one that seems poised to increasingly enter mainstream consciousness with the aid of Internet access to ideas.¹³⁹ People of color and those with other intersecting marginalized identities have been at the forefront of this movement toward disability positivity, urging new ways of conceptualizing disability that focus on the embrace of brain and body difference.¹⁴⁰ As the enormous success of Sonya Renee Taylor’s “The Body Is Not an Apology” platform demonstrates, these positive messages around difference are ones that resonate with—and can reach—many people rapidly in the Internet age.¹⁴¹ Broader movements like Disability Justice, focused on disability positivity and intersectionality, are thriving, and they hold the potential to reconfigure how people think about disability and its place in the world.¹⁴²

Other examples of the turn toward disability positivity in the disability movement include the neurodiversity movement, which has succeeded in fundamentally reshaping how many individuals think about autism and other neurological or mental health conditions as a part of human neurological diversity to be embraced and supported.¹⁴³ Hashtags such as #disabilitypride, #madpride, #ActuallyAutistic, #disabledandcute, #disabodiposi, #showmeyourpump, and others have provided opportunities for online expressions of pride—opportunities that many individuals have enthusiastically embraced.¹⁴⁴ In-person disability pride movements have long existed and have recently spread more widely in a number of cities, embracing public celebration

¹³⁹ See, e.g., Rosalyn Benjamin Darling, *Toward a Model of Changing Disability Identities: A Proposed Typology and Research Agenda*, 18 *DISABILITY & SOC’Y* 881, 887 (2003).

¹⁴⁰ See OTOOLE, *supra* note 49, at 22.

¹⁴¹ See *The Story of the Body Is Not an Apology*, SONYA RENEE TAYLOR, <https://www.sonyareneetaylor.com/the-body-is-not-an-apology> [https://perma.cc/2E89-SFV9] (last visited feb. 15, 2021); see also *Disability*, THE BODY IS NOT AN APOLOGY, <https://thebodyisnotanapology.com/magazine/tag/disability/> [https://perma.cc/9FV5-MLRS] (last visited feb. 15, 2021).

¹⁴² See, e.g., SINS INVALID, *supra* note 3; Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 *DENV. L. REV.* 973, 989 (2019). For further discussion of the Disability Justice movement, see *supra* note 105.

¹⁴³ See, e.g., STEVE SILBERMAN, *NEUROTRIBES: THE LEGACY OF AUTISM AND THE FUTURE OF NEURODIVERSITY* (2015); see also sources cited *supra* note 130.

¹⁴⁴ See, e.g., Katie Dupere, *14 Empowering Hashtags for People to Celebrate Their Disabilities Online*, MASHABLE (Oct. 23, 2016), <https://mashable.com/2016/10/23/people-with-disabilities-hashtags/> [https://perma.cc/H33W-U6K4]; Elizabeth Narins, *These Sassy #DisabledAndCute Tweets Will Give You Life*, COSMOPOLITAN (Feb. 15, 2017), <https://www.cosmopolitan.com/health-fitness/a8877440/disabledbutcute-hashtag/> [https://perma.cc/XK7F-7ZML].

of disability in much the same way that pride marches have long celebrated LGBTQ status.¹⁴⁵

Of course, this is not to suggest that a purely positive conception of disability will be an easy or comfortable model of identity for all individuals with impairments, any more than the old social welfare–law model of functional incapacity would.¹⁴⁶ As Sonya Renee Taylor observes, “[i]t is hard to love a vessel that appears to be the author of significant pain.”¹⁴⁷ And so too it may be hard to embrace a positive identity rooted in a condition that produces such physical or mental pain. As Taylor’s observation recognizes, for some, there may be corporeal or mental sequelae of impairment that are decidedly *not* positive, such as physical or mental pain or severe incapacity.¹⁴⁸

But even for many such individuals, a form of positive disability identity may be possible and supported by the existing disability-positive thinking in the disability community. 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.¹⁴⁹ Indeed, arguably a positive disability identity is especially important for those who face the most difficult

¹⁴⁵ See, e.g., Vincent T. Davis, *Diversity to Be Honored at Disability Pride Parade*, SAN ANTONIO EXPRESS-NEWS, Oct. 25, 2019, at A2; Workers World New York Disability Bureau, *Disability Pride Rocks Philadelphia for 8th Consecutive Annual Parade*, WORKERS WORLD (June 30, 2019), <https://www.workers.org/2019/06/42797/> [<https://perma.cc/8JSN-QGPR>]. See generally *Disability Pride Parades*, WIKIPEDIA, https://en.wikipedia.org/wiki/Disability_Pride_Parades [<https://perma.cc/MY7P-GAPH>] (last visited Feb. 15, 2021).

¹⁴⁶ I thank Nicole Porter for this important insight.

¹⁴⁷ SONYA RENEE TAYLOR, *THE BODY IS NOT AN APOLOGY* 99 (2018); see also Smith, *supra* note 98.

¹⁴⁸ TAYLOR, *supra* note 147, at 99; see also Belt & Dorfman, *supra* note 12, at 155-56 (describing critiques of accounts of the social model, which situate all difficulties of disability in society, and describing the work of scholars noting the reality of pain as part of some individuals’ disability experience).

¹⁴⁹ My own experience, and that of many individuals in my family, testifies to the plausibility of a positive disability identity, even in the face of impairments that may cause significant difficulty and pain. For example, my experience of untreated mental illness as a child, teenager, and young adult involved intense mental suffering and active suicidality over a span of many years. It is not an experience that I would wish on anyone, nor is it an experience I would voluntarily repeat (although I continue to experience less severe forms of mental health difficulty, even with treatment). At the same time, the strength it took for me to live to adulthood—and the pride I take in having done so—are both important and positive parts of my identity. I also strongly value the empathy and resilience that form a core part of my identity, which arose in significant part from those experiences. For similar reasons, others in my family have also been able to build positive disability identities around impairments that have caused them (and in some cases continue to cause them) genuine suffering and/or difficulty, including schizophrenia, autism, and learning disabilities. In short, a positive disability identity need not be understood as a rejection of or refusal to perceive the negative aspects of impairment; rather, it can provide an important frame for understanding the experience of struggle with impairment.

experiences of impairment (whether because of physical/mental pain or bias), as it can provide an empowering frame for understanding what might otherwise be experienced as negative, discouraging, and disempowering.¹⁵⁰ Many of the movements towards disability positivity today can and do comfortably accommodate the idea that there can be negative aspects of impairment—even while embracing a positive identity frame.¹⁵¹ Thus, even for those who currently experience genuine pain or distress as a result of their impairment, the present moment may offer opportunities to find and identify with a conception of disability that is positive and empowering as opposed to linked inextricably to incapacity and disempowerment.

The time is thus ripe to push forward a movement of positive disability identification. The zeitgeist of the disability community's public expression already leans toward a positive disability identity untethered to concepts of inherent limitation, and the Internet provides a platform for the dissemination of these ideas in previously unheard-of ways. This reality means that current conditions provide unique opportunities to unseat prior social welfare-law understandings of disability and to substitute a positive conception of disability, decoupled from functional limitation. As such, the ADA's model of disability arrives at a moment when the circumstances are uniquely fortuitous for pushing such a campaign of broader disability identification.

Of course, to suggest that the time may be ripe for divorcing disability from functional incapacity is not to suggest that such a move would eliminate hard questions about how we do—or should—understand disability as a concept and as an identity. Indeed, decoupling disability identity from functional limitation may raise truly profound questions about who “counts” as disabled. To the extent we truly decouple disability from a core focus on functional limitation—even functional limitation that is environmentally constructed (as in the social model of disability)—how do we understand what a disability is?¹⁵² Even if we retain a concept of “impairment” at the core (i.e., some kind of diagnosable medical or mental health condition)—which could itself be contestable—decoupling disability from functional limitation has the potential to raise profound dilemmas.¹⁵³

¹⁵⁰ See, e.g., NARIO-REDMOND, *supra* note 98, at 235.

¹⁵¹ For example, many within the neurodiversity movement—a movement which encourages the view of autism as part of normal human variation and highlights its associated strengths—do not deny that autism may also be associated with struggle, especially in a world not built for autistic minds. See, e.g., Tim Goldstein, *What I Wish My Boss Understood About Neurodiversity*, ATLISSIAN: INSIDE ATLISSIAN (Dec. 6, 2018), <https://www.atlassian.com/blog/inside-atlassian/navigating-workplace-autism-aspergers-neurodiversity> [<https://perma.cc/YD3U-5JHH>].

¹⁵² See *infra* Part VI.

¹⁵³ Some might critique even a focus on impairment and view diagnosable medical or mental health conditions as a return to the medical model. Indeed, the very categories of what

As addressed further in Part VI, this is a difficult question and one to which there may not be a single answer, especially where resource allocation or leadership concerns arise. But, as set out in this Article, civil rights law offers one potentially meaningful response: to the extent that the ADAAA would designate a person as an “individual with a disability,” that, at a minimum, affords a benchmark of who ought to be included. This would include a great many individuals who do *not* currently self-identify as disabled, including many who may lack any current functional limitation.¹⁵⁴ And this is a comparatively restrictive approach. More radically, one might question why there is a need to police the outer limits of disability self-identification at all.

I engage further with this definitional question in Part VI. The following two parts propose that, even with the ADAAA as a starting point, there are reasons to believe that greater “claiming” of disability could be transformative—both for the project of disability rights and for those who embrace a disability identity. In short, even if greater claiming of disability identity is limited to those who civil rights law defines as “disabled,” there is much to be gained from encouraging a wider embrace of disability identity.

IV. THE TRANSFORMATIVE POTENTIAL OF CLAIMING DISABILITY FOR DISABILITY RIGHTS

As set out in the prior Parts, disability self-identification is rare, even among those who unquestionably “count” as disabled under disability civil rights law. And yet we stand at a moment where legal, technological, and social movement developments all render more widespread disability self-identification uniquely plausible. The confluence of expanded legal definitions under the ADAAA, disability positivity movements, and the radical potential of the Internet and social media all hold the potential to form the basis for a mass movement of positive disability self-identification. Building on the work of prior social movement and legal scholars, this Part argues that a movement encouraging a much wider embrace of disability identity could itself have transformative

is “diagnosable” are themselves socially constructed and ever shifting. *See, e.g.*, ALISON KAUFER, *FEMINIST, QUEER, CRIP* 7 (2013) (describing the partially socially constructed nature of impairment); Bradley A. Areheart, *Disability Trouble*, 29 *YALE L. & POL’Y REV.* 347, 363 (2011) (same). On the other hand, the social model of disability also runs up against this dilemma, and many mainstream accounts of the social model do retain impairment at the core of the conception of disability (while separating out disability as the *impacts* of the environment’s interactions with what is presumed to be a normatively neutral impairment). *See KAUFER, supra*, at 7. Even more expansively, one might conceptualize the core of disability as any kind of brain and body difference—but again, this becomes contingent as the question then becomes “difference as compared to what?” For further critiques of the problem of situating diagnosis as a gatekeeper to disability identity, see *infra* note 247 and accompanying text.

¹⁵⁴ *See supra* note 94 and accompanying text.

effects for disability rights, especially for the stigma-eradication objectives of the disability rights movement.

The most obvious way in which increased disability self-identification might prove transformative for disability rights is in its effects on the frequency and nature of potentially stigma-disrupting interactions that nondisabled individuals have with people with disabilities. Contact theory—first developed in the 1940s and 1950s—posits that under appropriate conditions, contact with members of a stigmatized group can reduce prejudice.¹⁵⁵ As one of the building blocks for modern antidiscrimination law, contact theory has been validated across an array of contexts and is credited, for example, in the rapid reduction of biases against the LGBTQ community during the last four decades.¹⁵⁶

As scholars such as Michelle Nario-Redmond have observed, existing research supports the conclusion that contact theory applies to the disability context and that it can work to reduce biases under appropriate circumstances.¹⁵⁷ Indeed, despite the wide diversity of medical and mental health conditions under the umbrella of disability, contact with a person with a disability can reduce biases against even those with very different conditions.¹⁵⁸ Importantly, these results depend on the disabled individual with whom the person has had contact with identifying themselves (externally) as an individual with a disability.¹⁵⁹ Under those circumstances, and coupled with other important contextual requirements, contact appears to have substantial effects on bias reduction in the disability context.¹⁶⁰

But as disability law scholar Jasmine Harris has explored (and as Nario-Redmond has also described), contact theory has not always worked to successfully reduce bias in the disability context.¹⁶¹ To some extent, this is explicable in part by the failure of the theory's conditions (including equal status, common goals, intergroup cooperation, and support of authorities) in some of the contexts where contact exists between disabled and nondisabled individuals.¹⁶² But as Harris has provocatively argued, there are also reasons to believe that the visible features of disability (both physical and behavioral) can

¹⁵⁵ See, e.g., ALLPORT, *supra* note 18, at 261; see also Rupert Brown & Miles Hewstone, *An Integrative Theory of Intergroup Contact*, 37 *ADVANCES EXPERIMENTAL SOC. PSYCH.* 255, 256 (2005) (describing other work in area before Allport).

¹⁵⁶ See Gregory M. Herek, *Sexual Prejudice*, in *HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION*, 441, 458 (Todd D. Nelson ed., 2009); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. PERSONALITY & SOC. PSYCH.* 751, 751 (2006).

¹⁵⁷ See NARIO-REDMOND, *supra* note 98, at 268-78.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Harris, *Aesthetics of Disability*, *supra* note 4, at 912-16. As Harris observes, this is not universally true—rather, the studies show strikingly mixed results. *Id.*

¹⁶² *Id.*

trigger negative emotional responses (such as disgust or fear) due to the aesthetics of disability.¹⁶³ As Harris suggests, it is possible that these aesthetically driven emotional responses interfere with the ability of contact to successfully reduce bias and may even lead to contact causing *increased* bias in some circumstances.¹⁶⁴

Although aesthetics theory is disturbing in its ableist implications—that many of us may have visceral (albeit socially constructed) negative responses to visible indicators of disability—it is important to take it seriously in thinking about how to eradicate disability stigma.¹⁶⁵ And, as Harris suggests, one important prescription that flows from taking aesthetics theory seriously is that greater public self-identification, especially by those who may not be otherwise identifiable as disabled, may be a critical component of moving forward the disability rights movement’s goal to eradicate prejudice.¹⁶⁶ Because those who lack aesthetic markers of disability may not provoke the same negative emotional affective response, they may be uniquely situated to disrupt the disability stigma through contact.¹⁶⁷ Moreover, as Harris hypothesizes, simply increasing the numbers of those who are identifiable as people with disabilities may create the type of “critical mass” sufficient to override otherwise potent emotional responses.¹⁶⁸

Relatedly, increased disability self-identification also holds the ability to promote what implicit bias scholars have found to be one of the most effective mechanisms of debiasing: exposure to counterstereotypical exemplars.¹⁶⁹ For example, if people with disabilities are stereotyped as inherently incapable of being successful and productive, greater exposure to disabled individuals who are highly successful in their careers could be a potent way of deconstructing those biases.¹⁷⁰ Similarly, exposure to people with disabilities in contexts where

¹⁶³ *Id.* at 897; see also Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 402 (2006) (describing limitations of contact theory in the context of people with symptomatic mental illness).

¹⁶⁴ Harris, *Aesthetics of Disability*, *supra* note 4, at 914.

¹⁶⁵ See *id.* at 931-40.

¹⁶⁶ *Id.* at 967-71.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*; see also Porter, *What Disability Means*, *supra* note 82, at 127.

¹⁶⁹ See, e.g., Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1572 n.38 (2013).

¹⁷⁰ See, e.g., Carmel Shachar, I. Glenn Cohen & Michael Ashley Stein, *Introduction to DISABILITY, HEALTH, LAW, AND BIOETHICS*, *supra* note 8, at xv, xv-xvi. Of course, one common response to counterstereotypical exemplars of disability is to exceptionalize the individual as extraordinary, what is referred to in the disability community as the trope of the “supercrip.” See generally Sami Schalk, *Reevaluating the Supercrip*, 10 J. LITERARY & CULTURAL DISABILITY STUD. 71 (2016) (describing the trope, while also arguing for its complication). One benefit of a widespread movement of claiming disability would be to hopefully disrupt this trope by making normal and commonplace what is currently too often treated as exceptional.

they are not seeking resources or accommodations could disrupt stereotypes that link disability identification intrinsically with (potentially illegitimate) resource seeking or consumption.¹⁷¹ If people with mental health disabilities are stereotyped as dangerous and unpleasant, learning that valued friends or colleagues—or even public figures—have stigmatized mental health conditions may help disrupt those biases.¹⁷² In short, expanding the scope of *who* people think of when they think of a given disability category could meaningfully affect the biases that are attached to that group.

Finally, wider claiming of disability identity (especially among those with invisible disabilities) offers many more opportunities for the type of contact that has been identified as perhaps the most likely to disrupt prejudices: coming out.¹⁷³ As social psychologists have theorized, “coming out” may hold unique potential for stigma disruption, precisely because it “enable[s] positive contact before the stigma is revealed.”¹⁷⁴ In this way, the benefits of a preexisting relationship formed without knowledge of the stigmatized identity, such as positive affect and individuation, can create greater susceptibility to meaningful dismantling of prejudices, including prejudices about the group as a whole.¹⁷⁵ Widely believed to be a part of what has allowed the rapid and successful reduction in anti-LGBTQ bias, disclosure of a previously unknown stigmatized status is available in many “hidden disability” contexts as well.¹⁷⁶

Of course, simply self-identifying internally as disabled need not automatically result in the type of external self-disclosure that all of the above processes require to be effective. Thus, a person could self-identify internally as a person with a disability and yet not ever disclose that information to others, in which case none of the above stigma-disruption benefits would be felt. But this seems unlikely for a number of reasons. Most notably, as disability scholars have shown, the process of embracing a disability identity is iterative and often bound up in moments of self-identification to others. Thus, disability identity often is forged in the very process of identifying oneself to others as a person with a disability.¹⁷⁷

Moreover, even if this were not true, it is evident that expanding the pool of those who self-identify internally as people with disabilities will expand the pool

¹⁷¹ See generally *infra* Part VI (describing common stereotypes about disability inherently being associated with illegitimate resource consumption).

¹⁷² See, e.g., Hubbard, *supra* note 51, at 910-14; cf. Emens, *supra* note 163, at 401-02, 405-06 (describing concern that contact theory will not work with symptomatic people with mental health conditions but also observing that there are people with medication-controlled mental illness who are not meaningfully symptomatic).

¹⁷³ See generally Samuels, *supra* note 17 (discussing the parallels and contradictions between the notion of coming out in the disability and queer communities).

¹⁷⁴ See Charlesworth & Banaji, *supra* note 1, at 190.

¹⁷⁵ See, e.g., Herek, *supra* note 156, at 449.

¹⁷⁶ See *id.*

¹⁷⁷ See *supra* note 135 and accompanying text.

of those who might externally disclose disability status. It is simple logic to know that a greater number of people who perceive themselves as identified with a group creates a greater number of people who might choose to disclose that identity. And while people may choose to disclose a specific diagnosis, even in the absence of a disability identity—something that is important and could also lead to some of the positive debiasing effects described above—there are reasons to believe that such disclosures will be both less common with respect to those who do not claim a disability identity and less likely to effectuate a broad-based debiasing effect vis-à-vis the overall category of disability.¹⁷⁸

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. And, while claiming a disability identity internally need not inexorably lead to such contact (or at least disclosed contact of the type that can disrupt biases), it opens the door to such contact, including contact under the conditions that are the most likely to disrupt stigma. People with disabilities are everywhere, poised to disrupt disability stereotypes, and yet such stereotype disruption may not occur without such individuals being understood, even by themselves, as group exemplars.¹⁷⁹

Increased claiming of disability identity thus presents a vital opportunity to disrupt what has long been one of the stickiest aspects of disability discrimination—stigma and biases about people with disabilities. But it is important to note that, although its effects are less certain in other domains, increased claiming of disability identity also could have potential impacts that are far broader for disability rights. Specifically, expanding the pool of those who self-identify as people with disabilities could also significantly expand the scope of those who identify themselves as aligned with, or indeed as participants in, the Disability Rights and Disability Justice movements. This in turn could transform political and personal behavior in ways that could serve movement objectives far beyond the eradication of stigma and disparate treatment.

¹⁷⁸ The former issue is a result of the construction of medical information as quintessentially private outside of the arena of disability identity and is discussed in Part V. The latter follows from the fact that individuated debiasing of specific diagnoses may not affect the whole of the disability community, though it may be very important vis-à-vis those specific diagnoses. *See, e.g.,* NARIO-REDMOND, *supra* note 159, at 270.

¹⁷⁹ Note that people with visible disabilities may serve as exemplars of disability to others, even if they would not characterize themselves in that way. Thus, the most important effects of a project of claiming disability come from those with invisible disabilities or visible impairments that others would not classify as disabilities. Note also that although institutionalization and segregation of people with disabilities has decreased in the modern era, it remains true that some people with disabilities will not be in mainstream circumstances that are likely to allow for stigma disruption. *See* Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 458 (2018).

The logic of this is again uncomplicated. While group identification (“I am a person with a disability”) does not necessarily lead to a movement-based collective identity or alignment with the movement’s goals,¹⁸⁰ it is surely an important piece of what might cause an individual to align themselves with, and participate in, an identity-based movement.¹⁸¹ Consider, for example, the impacts for the Civil Rights movement if the “one drop” rule were reversed, such that a large majority of those who identify today as African American or Black did not self-identify in this way because they have some modicum of White European heritage.¹⁸² Indeed, it takes no great leap to recognize that at the very core of identity-based social movements like the disability rights movement is identity. Thus, while disability identity is neither a necessary nor a sufficient precondition for alignment with the disability rights movement and support of its objectives, neither is it irrelevant.¹⁸³

Viewed in this way, the full potential of more expansive claiming of disability identity becomes apparent. As Michelle Travis has observed, despite the “us” versus “them” rhetoric that has surrounded disability rights, “[u]s’ and [t]hem’ [a]re [r]eally [w]e.”¹⁸⁴ Thus, many if not most individuals will at some juncture fall within the ADAAA’s expansive definition of disability.¹⁸⁵ If even some fraction of those individuals perceived their own self-interest in disability rights—and acted accordingly as movement participants in politics, or even in everyday life—many of the disability rights movements’ objectives would become immeasurably more likely.¹⁸⁶ In short, encouraging greater claiming of

¹⁸⁰ Witness, for example, the variety of reactions to the women’s rights movement by women in the 1970s and 1980s. See, e.g., Robyn Rowland, *Women Who Do and Women Who Don’t, Join the Women’s Movement: Issues for Conflict and Collaboration*, 14 *SEX ROLES* 679, 681 (1986).

¹⁸¹ See Michelle R. Nario-Redmond, Jeffrey G. Noel & Emily Fern, *Redefining Disability, Re-Imagining the Self: Disability Identification Predicts Self-Esteem and Strategic Responses to Stigma*, 12 *SELF & IDENTITY* 468, 471 (2013); Stefan, *supra* note 83, at 1348; Watson, *supra* note 89, at 524-25; Evans, *supra* note 89, at 143-44.

¹⁸² See Gullickson & Morning, *supra* note 112, at 505-06. See generally Henry Louis Gates Jr., *Exactly How ‘Black’ Is Black America?*, *ROOT* (Feb. 11, 2013, 12:32 AM), <https://www.theroot.com/exactly-how-black-is-black-america-1790895185>

[<https://perma.cc/5F4H-8JUE>] (noting that very few African American people are exclusively of sub-Saharan African descent and that the “average” African American person has roughly one quarter European heritage).

¹⁸³ See, e.g., Jacquelin Van Stekelenburg, *Collective Identity*, in *THE WILEY-BLACKWELL ENCYCLOPEDIA OF SOCIAL AND POLITICAL MOVEMENTS* 1, 3 (David A. Snow, Donatella della Porta, Bert Klandermans & Doug McAdam eds., 2013).

¹⁸⁴ Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 *TENN. L. REV.* 311, 332 (2009); accord Kanter, *supra* note 43, at 449.

¹⁸⁵ Kanter, *supra* note 43, at 449.

¹⁸⁶ Indeed, social movement theorists have found that it is precisely those whose group-

disability identity could radically expand the pool of potential constituents for the movement for disability rights, and thus its political and social power in all areas.

Of course, new movement constituents, especially large numbers of them, can also shape or change movement priorities.¹⁸⁷ Thus, while increased claiming of disability identity might create new constituents for disability rights—thereby placing greater momentum behind the objectives of the movement—the entry of those new constituents might also create the risk of shifts in the movement’s priorities.¹⁸⁸ In particular, it is not clear what effect a movement toward much more widespread claiming of disability identity—especially among those who do not experience their disability as functionally limiting—might have on the important work of the disability rights movement to secure resources, in the form of both accommodations and social welfare benefits.¹⁸⁹ These are not trivial risks, given the importance of resources to the ability of many people with disabilities to live full, flourishing lives.

But these are also precisely the types of risks that no movement can avoid, especially not one that is already as diverse in its constituents as the disability rights movement. As described more fully in Part VI, all movements confront dilemmas in determining strategy and priorities, and the disability rights movement is surely no exception. Indeed, with its multiplicity of existing constituents, the disability rights movement has long faced critiques that both its leadership and priorities represent only partially the interests of all of the diverse people it represents—for example, prioritizing the perspective of White men with mobility impairments over those of people who have more stigmatized disabilities or who face intersectional oppression. While it is impossible to predict how an influx of new constituents would influence those ongoing debates, the strategies for their resolution tack in the same direction—toward meaningful and thoughtful consideration of the broad needs of the disability community, regardless of who claims disability identity.

In short, greater claiming of disability identity holds the potential to have a truly radical impact on disability rights by disrupting disability stigma and by dramatically expanding the pool of potential constituents of the movement for disability rights. While the precise impacts of more widespread claiming of disability identity are impossible to fully foresee, there are ample reasons to believe that they would be both positive and significant. As set out in the

based identity is chosen, instead of externally imposed, who are the most likely to form the type of collective identity that promotes movement participation. *See* Van Stekelenburg, *supra* note 183, at 3.

¹⁸⁷ There are already a very wide diversity of subgroups within the very large disability movement, including some who do not claim a disability identity, such as the Deaf community, which conceptualizes itself as a linguistic minority. For more on the different communities within the disability movement, see Belt & Dorfman, *supra* note 12, at 150-51.

¹⁸⁸ *See infra* Part VI.

¹⁸⁹ *See infra* Part VI.

following Part, there are also reasons to believe that the claiming of disability identity could be individually transformative for many of those who do so.

V. THE LIBERATORY POTENTIAL OF CLAIMING DISABILITY FOR DISABLED INDIVIDUALS

One need look no further than the writing of disabled scholars such as Rosemarie Garland-Thomson to see the personally liberatory potential of claiming a disability identity.¹⁹⁰ As such scholars have written, absent disability identity, those with physical and mental impairments may internalize negative societal conceptions of the impairment; may experience tremendous pressure to cover or closet themselves;¹⁹¹ are unlikely to claim the legal benefits to which they are entitled, such as ADA accommodations; and do not have full access to the psycho-emotional benefits of positive models of disability identity or disability pride. Thus, although there are surely potential costs to claiming disability identity, and not every individual is equally situated to experience the benefits of claiming disability identity, there are also many reasons to believe that claiming disability identity could be personally liberatory.¹⁹²

The most basic reasons for this are straightforward: absent access to the positive identity frameworks provided by disability self-identification (such as disability pride, the social or diversity model of disability, or Disability Justice), those with physical or mental impairments may have no counterweight to the common societal construction of physical and mental impairment as personal limitations or failings.¹⁹³ In today's society, messages situating physical or mental impairments as inherently both negative and individualized remain pervasive, and internalization may be difficult to avoid.¹⁹⁴ Thus, for example, a child with a learning disability may perceive themselves as stupid or bad at

¹⁹⁰ See, e.g., Garland-Thomson, *The Story of My Work*, *supra* note 90; Garland-Thomson, *Becoming Disabled*, *supra* note 90, at SR1; see also, e.g., Andrews et al., *supra* note 6, at 114; Evans, *supra* note 89, at 186-88.

¹⁹¹ See YOSHINO, *supra* note 30, at ix (defining covering as “to tone down a disfavored identity to fit into the mainstream”); see also *id.* at 77 (distinguishing closeting and covering).

¹⁹² It is important here to distinguish between claiming disability as an identity and seeking to have a particular medical or mental condition, which may impose real pain, difficulty, and even death. Cf. Belt & Dorfman, *supra* note 12, at 155 (describing critiques of accounts of the social model which situate all difficulties of disability in society). This Part—and this Article—addresses only those who are *already* experiencing the effects of impairment and argues as to those individuals that claiming a disability identity may be liberatory.

¹⁹³ See Harris, *The Privacy Problem*, *supra* note 8, at 165; Garland-Thomson, *Becoming Disabled*, *supra* note 90, at SR1.

¹⁹⁴ See Harris, *The Privacy Problem*, *supra* note 8, at 165; Garland-Thomson, *Becoming Disabled*, *supra* note 90, at SR1.

school, and an adult who has been in a motor vehicle accident may internalize the perspective that their life is over.¹⁹⁵

Claiming a disability identity provides a counterweight to these negative frames for a host of reasons. First, as Garland-Thomson has observed, identity-based “[p]ride movements [a]re the psycho-emotional equivalents of . . . anti-discrimination . . . laws” and hold the potential to buffer or even transform internalized negative views of minority status.¹⁹⁶ Thus, for example, for those with same-sex attractions or whose gender identification does not comport with societal expectations, claiming an LGBTQ identity has offered the opportunity to transform what historically might have been experienced as shameful and deviant into an opportunity for pride and celebration.¹⁹⁷ So too, for people with disabilities, the experience of claiming disability identity affords an opportunity to situate oneself within a broader community that celebrates the strength of people with disabilities and foregrounds the creative and diverse ways in which people with disabilities navigate the abled environment.¹⁹⁸

Relatedly, claiming disability identity affords opportunities to both be exposed to and recognize the personal significance of disability-positive theories such as the social or diversity model of disability or Disability Justice.¹⁹⁹ While such theories evidently cannot change the material effects of impairment—which may for some be substantial—they offer an opportunity to situate disability as a positive trait and to recognize the role that society plays in many of the limitations and biases that disabled people encounter.²⁰⁰ As such, many disabled people describe the experience of being exposed to such theories as personally transformative.²⁰¹ Indeed, many describe such exposure as the fundamental catalyst for perceiving their own strengths as disabled people, understanding the ways that their struggles arose from societal discrimination, and/or embracing their entitlement to “be in the world.”²⁰² And yet individuals

¹⁹⁵ See, e.g., KAUFER, *supra* note 153, at 1-2 (describing the pervasively negative outlook on her future that she was confronted with after becoming disabled as a young adult); MOONEY, *supra* note 91, at 65 (describing his experiences growing up with a learning disability).

¹⁹⁶ Garland-Thomson, *Becoming Disabled*, *supra* note 90, at SR1; see also Andrews et al., *supra* note 6, at 116.

¹⁹⁷ See, e.g., Konnoth, *supra* note 111, at 326-28, 346-52.

¹⁹⁸ Corbette OToole’s book, *Fading Scars*, for example, provides an excellent window into the ways in which the disability community can and does celebrate what she refers to as “disabled bodyminds.” See generally OTOOLE, *supra* note 49.

¹⁹⁹ See ANDREWS, *supra* note 31, at 28; SINS INVALID, *supra* note 3, at 10-20; Andrews et al., *supra* note 6, at 112.

²⁰⁰ See ANDREWS, *supra* note 31, at 28; SINS INVALID, *supra* note 3, at 10-20; Andrews et al., *supra* note 6, at 112.

²⁰¹ See, e.g., LINTON, *BODY POLITIC*, *supra* note 90, at 108-20.

²⁰² This specific quote was a response that Rosemarie Garland-Thomson received from a

may not seek out such theories—or perceive them as relevant to themselves—unless they self-identify as disabled.²⁰³

Claiming disability identity can also lead to a greater likelihood of people with impairments interacting with other disabled people, both because those claiming such an identity may be more likely to seek such interaction and because they may be less likely to “closet” or “cover” in ways that discourage such contact.²⁰⁴ Thus, for example, a student is unlikely to join their school’s disabled students’ union if they do not self-identify as disabled, just as a nonidentifying employee is unlikely to join their employer’s disability employee resource group. And yet this type of interaction with others with disabilities has been shown to have positive psychological impacts and can also lead to more concrete benefits.²⁰⁵ Indeed, as Corbett OToole, Simi Linton, and others describe, it is often from others with disabilities that people with disabilities are most likely to learn key information, such as what strengths you might have that could allow you to successfully perform a job in a nonabled fashion or how to pursue a workplace or educational accommodation.²⁰⁶ Both the psychological and knowledge benefits of such interactions are, however, likely to be comparatively inaccessible to those who do not claim a disability identity.

So too, legal protections are likely to be inaccessible to those who do not see themselves as disabled and thus entitled to the law’s protection. As scholars such as Heather Evans have documented, individuals who do not claim a disability identity often do not perceive civil rights statutes, such as the ADA, or benefits statutes, such as those granting SSDI, as relevant to them and thus may not seek out accommodations or other benefits to which they are legally entitled.²⁰⁷ Because the ADA addresses itself to disabled Americans, those who do not conceive of themselves as disabled often do not see its relevance to their lives.²⁰⁸

young graduate student with a disability after giving a lecture at the student’s university. *See* Garland-Thomson, *Becoming Disabled*, *supra* note 90, at SR1; *cf.* Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 843 (1966) (early disability/disabled theorist, coining the term “the right to live in the world” as a key concept of disability rights).

²⁰³ Indeed, some people describe exposure to such theories as a *part* of their formation of disability identity, something that is consistent with the idea that building a positive disability identity is a multifaceted and iterative process. *See, e.g.*, LINTON, *BODY POLITIC*, *supra* note 90, at 108-20.

²⁰⁴ For more on closeting and covering, see *infra* notes 210-220 and accompanying text.

²⁰⁵ *See, e.g.*, LINTON, *BODY POLITIC*, *supra* note 90, at 108-20; Garland-Thomson, *Becoming Disabled*, *supra* note 90, at SR1.

²⁰⁶ *See, e.g.*, LINTON, *BODY POLITIC*, *supra* note 90, at 108-20; OTOOLE, *supra* note 49, at 206-09, 240.

²⁰⁷ *See* Evans, *supra* note 89, at 12, 33, 72-73, 187; *cf.* Garland-Thomson, *Becoming Disabled*, *supra* note 90, at SR1 (describing way that claiming disability identity shifted her perspective on the right to access accommodations).

²⁰⁸ *See* Evans, *supra* note 89, at 12, 33, 72-73, 187 (finding that individuals who do not identify as disabled often do not receive benefits for which they are qualified).

Similarly, even individuals who are entitled to disability social welfare benefits may not apply for them to the extent that they do not self-identify as disabled.²⁰⁹ Rather, such individuals may instead closet, cover, or try to survive their symptoms without support, often at substantial personal costs including poverty, fatigue, pain, psychological distress, and exacerbation of underlying medical or mental health concerns.²¹⁰

Such closeting or covering has real costs and is part and parcel of a regime that continues to construct information regarding physical and mental health as quintessentially private.²¹¹ For most of us with stigmatized physical or mental health conditions—or with children, parents, or siblings with such conditions—we are expected to keep such information private, even if it has a profound personal influence on our lives.²¹² It might be considered acceptable to tell a close friend or an especially close coworker, but for the most part, such information is treated as something to be kept private.²¹³ As a result, many people who are profoundly affected by physical or mental health impairments—their own or others’—go through much of their lives in spaces where they are expected to submerge that aspect of their identity and render it largely invisible.²¹⁴

²⁰⁹ See, e.g., Griffin & Stein, *supra* note 86, at 50 (describing the experience of disabled veterans).

²¹⁰ LINTON, CLAIMING DISABILITY, *supra* note 89, at 20-21; OTOOLE, *supra* note 49, at 3; Griffin & Stein, *supra* note 86, at 50. For those who decline to seek disability benefits because they lack a disability identity, the costs of this rejection of identity can be material and indeed may go to the presence or absence of the very tools of survival.

²¹¹ See Harris, *The Privacy Problem*, *supra* note 8, at 159-60; see also LINTON, CLAIMING DISABILITY, *supra* note 89, at 20-21; OTOOLE, *supra* note 49, at 3; Griffin & Stein, *supra* note 86, at 50.

²¹² See Harris, *The Privacy Problem*, *supra* note 8, at 159-60.

²¹³ *Id.* This is to some extent culturally contingent but certainly is widespread in the United States.

²¹⁴ I can identify numerous examples of this phenomenon from my own life, as someone whose personal and family life is deeply bound up in mental health concerns. For example, even though it is common practice at my law school for the Dean to send a notice out to the faculty regarding the death of a parent of a faculty member, I did not request such a message when my father with schizoaffective disorder committed suicide in 2017. Many people who know me do not know that I have lived with depression, anxiety, and OCD since I was a preadolescent or that I continue to take mental health medication and attend therapy. When homelessness or the incarceration of people with mental illness is mentioned at academic conferences, I rarely disclose that I have close personal connections with this phenomenon, having been raised in part by a parent who was in and out of jails and mental hospitals and on and off the streets from my childhood until his death. Many people also would not know that my much more positive connections to mental health, including that I have many amazing close family members with mental health and/or developmental disabilities, that I consider my greatest accomplishment surviving to adulthood with untreated depression, or that I have immense respect for students with disabilities of all kinds who make it to law school, in part

Claiming disability identity would not inexorably alter this dynamic, but it carves out space for alternative understandings of disclosure—and thus greater space for disclosure as a practice. As Jasmine Harris has argued, even disability itself has been constructed as private: both historically as something to be hidden away in institutions, and in contemporary civil rights laws, like the ADA, which impose explicit limitations on employer practices seeking or disclosing disability information.²¹⁵ This reflects the real costs of undesired disclosure of disability in a biased social context, but it also has had the unintended consequence of perpetuating expectations that disability will remain private.²¹⁶

Claiming disability identity provides opportunities to push back on these societal and legal pressures to closet and cover, although it by no means eradicates them. An individual who embraces disability as an identity has opportunities to engage in disclosure in ways that are self-evidently political and can “serve[] as a site of resistance to pressures to pass as nondisabled.”²¹⁷ Claiming disability identity provides access to a community and a disability-positive perspective that may provide the impetus to engage in acts of self-disclosure, which may encourage further disclosure as individuals experience identity disclosures’ liberatory effects.²¹⁸ This can, in turn, eventually be expected to open up space for others to publicly claim disability by breaking down social biases over the longer term.²¹⁹ Thus, just as the LGBTQ community’s coming out movement led to iterative and increasing liberatory potential for LGBTQ individuals after first requiring that individuals recognize themselves as LGBTQ and self-disclose, claiming disability identity has the potential to push back the boundaries of the closet for those whose lives are affected by medical or mental health impairments.²²⁰

because of my own experiences and those of my family. In short, I have closeted and covered my close, personal experience with mental illness in innumerable ways, despite profoundly believing in the importance of disclosure and despite being more prone than many to ignore such closeting and covering demands.

²¹⁵ See Harris, *The Privacy Problem*, *supra* note 8, at 162, 170.

²¹⁶ *Id.* at 160. The LGBTQ rights analogy seems especially apt here. Expectations to closet or cover as an LGBTQ person are oppressive, even though it can be harmful and discriminatory in some contexts for others to seek out or disclose LGBTQ status without the person’s consent. This is no doubt a dynamic that shifts over time as more disclose and society shifts from stigmatizing to welcoming.

²¹⁷ Evans, *supra* note 89, at 142; accord Allan Sutherland, Address at the Approaches to Disability Conference: Coming Out Disabled (Mar. 19, 1982), <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Sutherland-coming-out-disabled.pdf> [<https://perma.cc/7KTN-UH27>].

²¹⁸ See, e.g., Evans, *supra* note 89, at 11; Sutherland, *supra* note 217.

²¹⁹ See, e.g., Gregory M. Herek & John P. Capitanio, “Some of My Best Friends”: Intergroup Contact, Concealable Stigma, and Heterosexuals’ Attitudes Toward Gay Men and Lesbians, 22 PERSONALITY & SOC. PSYCH. BULL. 412, 422 (1996).

²²⁰ *Id.*; see also CANADAY, *supra* note 111, at 255-57 (discussing the evolution of gay identity); Konnoth, *supra* note 111, at 324-28 (same).

Thus, there are innumerable ways that claiming disability identity may afford a basis for individual liberation even as it simultaneously furthers the stigma-eradication goal of the movement for disability rights. Claiming a disability identity can provide access to positive conceptions of identity, to rights, to information, to community, and to opportunities to push back on demands to closet and cover at work and in our personal lives. Just as embracing identity plays an important role for those in other minority communities—such as the LGBTQ or racial or religious minority communities—so too embracing disability identity holds significant liberatory potential for people with disabilities. While claiming disability identity will not eradicate the material effects of impairment (which can be genuine and substantial), it affords those with impairments an opportunity to situate their experience within an identity framework that is potentially both positive and empowering.

Of course, it would be facile to claim that experiencing the foregoing benefits will inexorably follow from the simple act of claiming a disability identity or to suggest that claiming such an identity comes without potential costs. Just as embracing identity is not a uniformly positive experience for those in other minority groups, so too it is unlikely to be for those who claim disability. Opting in to a stigmatized identity—and especially disclosing such an identity—can come with costs, including, for example, the risk of being targeted for discrimination or bias.²²¹ There is always the risk that the identity internalized will be one which is centered in negative societal perceptions of disability—for example, one centered on a conception of disability as intrinsically associated with limitations or lack of ability.²²² The disability community, like any community, has its own limitations and pathologies and may not in all contexts be welcoming of those with particular diagnoses, limitations or lack thereof, or of those of diverse races or backgrounds.²²³

The risk that embrace of a disability identity will not be experienced as liberatory may be especially acute for those sited within particular communities or within particular institutional contexts.²²⁴ For example, just as it may be

²²¹ Of course, claiming identity does not automatically require disclosure in all contexts. But to the extent that identity is disclosed, it may come with costs. *See, e.g.*, Michael H. Pasek, Gabrielle Filip-Crawford & Jonathan E. Cook, *Identity Concealment and Social Change: Balancing Advocacy Goals Against Individual Needs*, 73 J. SOC. ISSUES 397, 398-99 (2017). Note also, however, that disability nondisclosure has been found to come with costs, including psychological distress. *See, e.g.*, NARIO-REDMOND, *supra* note 98, at 243-44.

²²² *See, e.g.*, *supra* notes 97, 102 and accompanying text.

²²³ *See, e.g.*, OTOOLE, *supra* note 49, at 90-105 (discussing the marginalization of people of color within the disability rights movement); Mark Deal, *Disabled People's Attitudes Toward Other Impairment Groups: A Hierarchy of Impairments*, 18 DISABILITY & SOC'Y 897, 906 (2003) (describing interdisability biases of those within disability community); Evans, *supra* note 89, at 135-37 (describing the experiences of a study participant not feeling welcomed in the disability community because she was "not disabled enough").

²²⁴ I thank Jamelia Morgan for this important insight.

difficult to claim a positive LGBTQ identity—internally or externally—in institutional or societal contexts where bias is pervasive, so too claiming a disability identity in such contexts may be difficult (though in both instances claiming such an identity may still provide opportunities to push back against repressive frames).²²⁵ Even outside of such contexts, those subject to intersecting forms of oppression or especially stigmatized impairments—for example, think of a Black man with schizophrenia who is also experiencing homelessness—may experience little immediate benefit from a project of claiming disability.

And indeed, there may even be some contexts where there are reasons to affirmatively push back on, rather than embrace, a disability label. For example, for students of color who are disproportionately labeled in school as emotionally disturbed or intellectually disabled, the consequences of being so labeled may be stigmatization and associated adverse educational and disciplinary outcomes—decidedly nonliberatory results.²²⁶ So too, for many within certain groups such as the Deaf community, those with obesity, and the transgender community, they may find the rejection of a disability label to be most affirming.²²⁷ Thus, there are certainly spaces and contexts where claiming disability may not be perceived as a liberatory project and where indeed rejecting the label of disability may be experienced as liberatory.

But these limitations and risks—while real—can be overstated. Even for those who are sited within repressive institutions or unsupportive communities, there

²²⁵ On the issue of external disclosure, see, for example, Pasek, Filip-Crawford & Cook, *supra* note 221, at 403.

²²⁶ See, e.g., SUBINI ANCY ANNAMMA, THE PEDAGOGY OF PATHOLOGIZATION: DIS/ABLED GIRLS OF COLOR IN THE SCHOOL-PRISON NEXUS 9-10, 39-40 (2018); LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.-C.L.L. REV. 381, 397 (2018). The criminal justice system poses another complicated context for the embrace of a positive disability identity, given the criminalization of disability in a variety of contexts. See generally Jamelia Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. (forthcoming 2021).

²²⁷ See, e.g., Belt & Dorfman, *supra* note 12, at 150-51, 159; Lauren E. Jones, *The Framing of Fat: Narratives of Health and Disability in Fat Discrimination Litigation*, 87 N.Y.U. L. REV. 1996, 2009 (2012). This is certainly not true for all members of those communities, some of whom may feel comfortable with a disability framework. See, e.g., Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25, 50-52 (2019) (describing a meeting to discuss disability protections for the transgender community attended by many transgender community members, in which the availability of disability civil rights claims for those with gender dysphoria was perceived as nonstigmatizing and important). In addition, in some of these communities, intracommunity debates exist as to whether a part of the resistance to the disability label itself may arise from ableism. See Dean Spade, Commentary, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 34-35 (2003) (critiquing as ableism the idea that “trans people do not want to be seen as ‘disabled,’” but describing other important reasons why medicalization of civil rights may be problematic).

may be opportunities to be exposed to positive disability identity frames, and claiming a disability identity may produce psychological benefits.²²⁸ So too, even for those with the most stigmatized conditions, claiming a disability identity may prove empowering.²²⁹ And, as the Disability Justice movement demonstrates, being subject to intersecting forms of oppression is by no means antithetical to the ability to construct positive disability identity and can in many ways deepen and enrich our understanding of what such a positive identity might look like.²³⁰ Indeed, the project of claiming disability, at its core, ought to be intrinsically wedded to transforming our societal conception of disability to one which sees disability through the lens of resilience, diversity, and intersection with other identities, rather than through the lens of intrinsic limitation or singular representatives.²³¹

Still, it is important to recognize that the process of identity formation is both intensely personal and multifaceted and that not every individual who qualifies as a person with a disability under federal civil rights law is likely to (or ought to) embrace a disability identity. Moreover, even among those who embrace some form of disability identity, such an identity may remain only peripherally relevant to their sense of self, in which case both the individual and social movement benefits of such an identity may be limited.²³² Nevertheless, given the large numbers of those who qualify as disabled under the ADAAA, if even a relatively small number of those for the first time claim a disability identity and situate it as a meaningful part of their identity, it could have dramatic individual and systemic effects.

Finally, it is important to emphasize that claiming disability as an identity need not intrinsically involve self-disclosure of hidden disabilities in all—or indeed even any—contexts. For some, it may impose unacceptable risks of discrimination, violence, or other forms of harm to disclose disability identity.²³³

²²⁸ For example, widespread access to the Internet today means that most individuals at least have the potential to access positive concepts of disability identity. On the psychological benefits of a positive disability identity, see, for example, Bogart et al., *supra* note 83, at 554, 560; Chalk, Barlett & Barlett, *Disability Self-Identification*, *supra* note 83, at 307.

²²⁹ See, e.g., ANNAMMA, *supra* note 226, at 47.

²³⁰ See, e.g., SINS INVALID, *supra* note 3, at 12, 22-27.

²³¹ See *id.* See generally OTOOLE, *supra* note 49; Garland-Thomson, *Becoming Disabled*, *supra* note 90, at SR1.

²³² Just as race, sex, and LGBTQ identities vary considerably—and may not be considered centrally relevant by all group members—it is no doubt the case that some individuals may perceive a disability identity, even if internalized, as only marginally relevant to their lives. See generally Seanna C. Leath, *Racial and Gender Identity Beliefs Among Black College Women Attending PWIs: Examining Developmental Trajectories and Associations with Interpersonal Discrimination and College Adjustment* (2019) (Ph.D. dissertation, University of Michigan), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/151518/scadel_1.pdf [<https://perma.cc/4QXZ-3EPX>].

²³³ See, e.g., Pasek, Filip-Crawford & Cook, *supra* note 221, at 402-03; Porter, *A Defining Moment*, *supra* note 56, at 297.

Moreover, disclosure of hidden disabilities is necessarily an iterative, continuing practice that individuals will elect to engage in at some times and in some spaces, but not in all.²³⁴ Thus, just as those who are not “visibly” LGBTQ must make continual and highly personal choices about how and when to disclose identity, so too those who claim disability internally will need to make a second set of choices about how and when to make such an identity known.²³⁵

But it is the hope of this Article that such choices may become easier as those who disclose open up space for others to do the same. While it may be initially those who have the most privilege who are best situated to engage in acts of self-disclosure, such disclosures ought to lower the barriers for others as well. For example, what impact might it have for disabled students or staff within law schools if tenured faculty regularly disclosed hidden disabilities, especially those that remain stigmatized such as mental health or learning disabilities?²³⁶ Or if elementary school teachers regularly engaged in such disclosures to their students? Or if politicians and celebrities more commonly did so? In short, while it is surely not the case that all individuals will equally have the space to fully embrace the liberatory potential of claiming disability identity—especially its external manifestations—such a project ideally will afford opportunities to “rise all boats” as stigma is disrupted and as individuals are better able to identify fellow group members, role models, and allies.

Thus, there are reasons to believe that a project aimed at increasing claiming disability may be not only politically transformational but also personally transformational for those who engage in it. The final Part turns to the potential critiques of a project of encouraging claiming disability identity and responds to those critiques.

VI. POTENTIAL CRITIQUES OF CLAIMING DISABILITY

There are numerous critiques that might be raised of this Article’s encouragement of greater claiming of disability identity: the incoherence of a conception of disability untethered to functional limitation; representational concerns (who speaks for the movement?); resource consumption concerns (who can claim reasonable accommodations or benefits or affirmative action?); the parallels to and perils of “respectability politics”; and, finally, the possibility of retrenchment or backlash. This Part engages with these potential critiques, including those which might arise from both within and without the disability community. It concludes that, while some potential critiques are more apparent than real, others are genuine. But even those that are genuine are for the most part not qualitatively different from existing concerns within the disability rights

²³⁴ See, e.g., Evans, *supra* note 89, at 93-115; Sutherland, *supra* note 217.

²³⁵ See, e.g., Evans, *supra* note 89, at 93-115; Sutherland, *supra* note 217.

²³⁶ For more on the role that the claiming and public disclosure of disability identity by law faculty could potentially play in addressing disability bias within law schools and the profession, see generally Eyer, *supra* note 92.

movement. Moreover, it is important to account for the costs of *not* pursuing a course of encouraging greater claiming of disability identity as well as the potential costs of doing so. Ultimately, it seems likely that the benefits of encouraging greater claiming of disability identity outweigh the risks—and might even afford opportunities to address what are long-standing representational difficulties within the movement for disability rights.

A. *Is It Incoherent to Decouple Disability from Functional Limitation?*

As described in Part III, for many decades, disability has been constructed in American society as intrinsically tethered to functional limitation and often to an inability to work. Thus, for many, the idea of disability as connoting functional limitation is foundational to their concept of what a disability *is* (literally, as the word suggests, “*dis*-ability”). For those steeped in this way of thinking about disability, the notion of a conception of disability untethered to functional limitation may seem radical or even incoherent. Thus, one critique of the project proposed herein might be that it expands disability beyond coherent boundaries by encouraging even those without functional limitations to self-identify as disabled.

But, at least insofar as the project is targeted at those falling within the ADA’s definition of disability, this critique comes too late. The ADA, now more than ten years old, has *already* decoupled disability from functional limitations as a matter of civil rights law.²³⁷ As described in Part III, under the ADA: (1) substantial limitations of “bodily functions,” such as brain function or normal cell growth, can constitute a disability, even if these limitations do not otherwise affect functioning; (2) the existence of a disability must be judged “without regard to the ameliorative effects of mitigating measures”; and (3) even a condition that is episodic or in remission “is a disability if it would substantially limit a major life activity when active.”²³⁸ As such, there are many circumstances in which an individual can be deemed a “person with a disability” under the ADA even if they lack significant (or indeed any) functional limitation.²³⁹

Moreover, it is important to recall that demands to tether our conceptions of disability to particular forms of functional limitation is precisely what the ADA responded to—and that those demands both arose from and perpetuated ableist perspectives. Consider, for example, the myriad pre-ADA civil rights cases in which people with very serious physical and mental health conditions were deemed nondisabled by the courts, precisely because they

²³⁷ See *supra* Part III.

²³⁸ 42 U.S.C. § 12102. For a more detailed discussion of disability and functional limitation under the ADA, see *supra* notes 114-28 and accompanying text.

²³⁹ 42 U.S.C. § 12102; see also 29 C.F.R. § 1630.2(j)(3)(iii) (2020).

were highly competent and capable individuals.²⁴⁰ In such cases, the ingenious ways that people with disabilities have developed to function in a world not designed for them were not celebrated but rather were situated as the basis for the conclusion that such individuals were not “disabled enough.”²⁴¹ Moreover, the consequence of such findings was that acknowledged instances of disability discrimination were treated as inactionable—despite the fact that they arose from disability-based biases. In short, tying disability to functional limitation is an approach that we have tried and that leads to predictable pathologies by demanding at the threshold that people with disabilities emphasize and perform their incapacity instead of their strengths—and by ignoring the reality that disability bias affects many who are not substantially functionally limited.²⁴²

Thus, the critique that focuses on the lack of a required connection to functional limitation ignores that we have already decoupled our understanding of disability from incapacity—and that we did so for good reason. Tying disability intrinsically to functional limitation has predictable pathologies in that it demands that people with disabilities portray themselves, or indeed be, as incapable at the cost of having their identity recognized.²⁴³ The ADAAA definition appropriately departs from this regime as a matter of civil rights law.²⁴⁴ And this project simply suggests that—at a minimum—the framework of civil rights law ought to also be our own.²⁴⁵

But what about those who are at the margins, who may not squarely fall within the ADAAA definition, or who may even be outside the ADAAA definition altogether? After all, as a social rather than legal project, each instance of claiming disability identity will ultimately be an individual determination. This individual determination need not be tethered to particular legal definitions, even if the claiming disability movement is framed in that way. Thus, one consequence of encouraging a greater number of people to claim disability

²⁴⁰ See, e.g., Areheart, *Just Right*, *supra* note 116, at 209-25; Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, in *THE DISABILITY STUDIES READER*, *supra* note 12, at 50-51.

²⁴¹ See Areheart, *Just Right*, *supra* note 116, at 212-15; Emens, *supra* note 240, at 50-51.

²⁴² See, e.g., Areheart, *Just Right*, *supra* note 116, at 216-18; see also Dorfman, *Re-Claiming Disability*, *supra* note 43, at 218-20.

²⁴³ See Areheart, *Just Right*, *supra* note 116, at 209-25; Dorfman, *Re-Claiming Disability*, *supra* note 43, at 218-20; Emens, *supra* note 240, at 50-51.

²⁴⁴ See 42 U.S.C. § 12102 (defining ADA-qualifying disabilities to include disabilities that are “episodic or in remission,” that are entirely addressed through “mitigating measures,” and that substantially limit “bodily functions” but not everyday life activities); see also 29 C.F.R. § 1630.2(j)(3)(iii) (making clear that an array of medical and mental conditions will “predictably” constitute ADAAA disabilities, even when they may not affect day-to-day functioning).

²⁴⁵ I do not deny that embracing the ADAAA definition more widely could potentially create other concerns for disability rights—I address those concerns *infra* Sections VI.B-D.

identity no doubt will be that some who fall outside the boundaries of the ADAAA's definition will self-identify as disabled.

As described below, this may in some contexts raise genuine concerns—though these concerns are not different in kind from those that already exist within the disability community. Who gets to speak for the community, who gets the benefits of potentially scarce resources, and whose needs set the agenda are all genuinely important and debated issues, even within the disability community as it is currently constituted. As set out below, it is important that any project of encouraging people to claim disability attend to these concerns and be thoughtful about ensuring that the disability rights movement is one that embraces, represents, and best supports the enormously diverse life circumstances of its constituents.

But it is also important to recognize that policing the boundaries of disability self-identification can itself be problematic and can unnecessarily box out potential allies in the fight against bias.²⁴⁶ First, as described above, there are real risks that efforts to police the boundaries of disability will devolve into demands that people perform or demonstrate functional limitations in ways that are both demeaning and fundamentally incompatible with a disability-positive perspective. Even at the level of obtaining a diagnosis, affording outside medical professionals gatekeeping status can be disempowering and can shut out those who lack financial resources or access to expert medical care.²⁴⁷ Most basically, one might inquire, as some disabled activists have, why we should not welcome any of those who choose to embrace a stigmatized identity and seek to use their privilege to defeat bias against the community.²⁴⁸

Of course, this perspective is contestable, as the furor over Rachel Dolezal's claiming of Black identity vividly illustrates in the race context.²⁴⁹ But at a

²⁴⁶ Cf. LINTON, CLAIMING DISABILITY, *supra* note 89, at 12 (noting that one answer to the question of who qualifies as disabled “might be that you are disabled if you say you are”).

²⁴⁷ See, e.g., Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1202-12 (2020) (discussing negative perspectives on medicalization of civil rights, including problems with situating the medical community as gatekeepers, but suggesting that such approaches also have real benefits); Jennifer C. Sarrett, *Biocertification and Neurodiversity: The Role and Implications of Self-Diagnosis in Autistic Communities*, 9 NEUROETHICS 23, 27, 33 (2016) (describing the disputes over the legitimacy of self-diagnosis in the autism community); Spade, *supra* note 227, at 28-29 (describing the problems with medicalization and medical gatekeeping in the context of transgender rights). Of course, in many circumstances, such as benefits or accommodations, outsiders may demand an official diagnosis even if it is not a condition of personal self-identification. See LINTON, CLAIMING DISABILITY, *supra* note 89, at 12.

²⁴⁸ See, e.g., LINTON, CLAIMING DISABILITY, *supra* note 89, at 12.

²⁴⁹ Of course, the Rachel Dolezal circumstance also involved many of the most potentially problematic features of claiming identity, including overt attempts at deception, taking leadership under false pretenses, and situating herself as the central focus of the experience of oppression. See, e.g., Doreen St. Félix, “*The Rachel Divide*” Review: A Disturbing Portrait

minimum, we ought to understand that policing the boundaries of disability identity comes with risks and ask ourselves whether those risks outweigh any benefits we hope to gain. As I discuss in the sections that follow, it may be that in most contexts concerns are most productively addressed not through a focus on policing identity but rather on ensuring that intradisability diversity is valued and taken seriously within the movement.

B. *What Does “Nothing About Us Without Us” Mean When the “Us” Expands?*

One of the core demands of the disability rights movement has long been for people with disabilities to play a central role in disability advocacy and leadership.²⁵⁰ This demand is perhaps best encapsulated by the slogan “Nothing About Us Without Us”—the idea that people with disabilities need to be included at every level of organizations or programs that purport to speak for or serve the disabled community.²⁵¹ But what does “Nothing About Us Without Us” mean when the “us” expands? Is it legitimate to conceptualize people who qualify as disabled under the ADAAA but perhaps lack any functional limitation as disabled leaders or representatives?

To some extent, as discussed in Section VI.A, this concern could be characterized as moot. The ADAAA has already substantially expanded the definition of disability to include many who may not experience disability as functionally limiting. Legally, it is no longer the case that individuals with disabilities can be characterized as a discrete and insular minority focused only on the most substantially functionally limited.²⁵² Indeed, arguably one of the lessons learned from the original ADA has been that disability bias profoundly affects the lives of many individuals with impairments, regardless of the extent to which they are actually functionally limited and regardless of whether they fit a particular socially constructed notion of disability.²⁵³

of *Dolezal’s Racial Fraudulence*, *NEW YORKER* (Apr. 26, 2018), <https://www.newyorker.com/culture/culture-desk/the-rachel-divide-review-a-disturbing-portrait-of-dolezals-racial-fraudulence>. For an opposing perspective on Rachel Dolezal’s claiming of Black identity, see Camille Gear Rich, Opinion, *Rachel Dolezal Has a Right to Be Black*, *CNN* (June 16, 2015, 8:06 AM), <https://www.cnn.com/2015/06/15/opinions/rich-rachel-dolezal/index.html> [<https://perma.cc/93TS-LXAV>] (“[T]here are costs to living life as a black person, and once Dolezal made the switch she seems never to have looked back. I will not indict her for her choice to link herself to this community, and I would consider her claim no greater if she identified a long lost African ancestor.”).

²⁵⁰ See generally JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* (1998).

²⁵¹ See, e.g., *id.* at 3-4, 16-17.

²⁵² ADA Amendments Act of 2008, 42 U.S.C. § 12101.

²⁵³ See, e.g., Areheart, *Just Right*, *supra* note 116, at 209-23 (describing the difficulties that disability employment discrimination plaintiffs faced pre-ADAAA in obtaining civil rights

But this is not a complete response because a part of what this project urges is the dissemination and adoption of the ADA's understanding of disability as a matter of social construction. Currently, while the ADA provides the legal definition of disability for civil rights law, that definition has not become widely entrenched in our social understandings of disability.²⁵⁴ Encouraging greater disability self-identification based on the ADA—and greater social recognition of a more diverse array of exemplars of disability—would surely impact those who might consider themselves appropriate voices or leaders for the movement or who others might view as appropriate leaders. Thus, the issue of who speaks for “people with disabilities”—and whether all who might claim disability should do so—is a genuine concern and one meriting serious consideration.

In addressing this concern, it is worth considering whether in certain contexts, including selecting leadership, disability ought not to be treated as a monolith. For example, it seems reasonable, and indeed desirable, that organizations would want to ensure that at least some of their leadership has personal experience with the pervasive ways that physical inaccessibility affects those with mobility impairments or the ways that communication accessibility issues confront those who are hearing or vision impaired.²⁵⁵ A person with medication-controlled depression or diabetes may not be an adequate representative of the experiences of those with disabilities that are highly visible and/or that cause them to regularly run up against access concerns; it is appropriate to consider and recognize these concerns.²⁵⁶

But this simply points out what is *already* a critical problem within the disability rights movement, which is that there are few within the movement who will be—by virtue of their own experiences alone—adequately situated to represent the whole.²⁵⁷ The disability movement has successfully forged a cross-disability movement from what were once thought of as distinct and minimally

coverage and the ways that courts would use the very capability of the plaintiff—who needed to prove that they were “qualified” for their job to prevail on their claim—as a reason to find them to be nondisabled).

²⁵⁴ See *supra* Part III.

²⁵⁵ It is important to note that whether this suggestion is actually lawful may turn in part on how the courts conceptualize the legitimacy of interdisability discrimination, an issue which may have significant—and far less disability-positive—implications in other contexts. See, e.g., Mary R. Anderlik & Wendy J. Wilkinson, *The Americans with Disabilities Act and Managed Care*, 37 HOUS. L. REV. 1163, 1236-38 (2000); Jeanette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429, 435-41 (2010).

²⁵⁶ Cf. NARIO-REDMOND, *supra* note 98, at 282 (quoting disability studies scholar Carol Gill in expressing skepticism of those who “justify their position of profit or leadership in a disability organization by trotting out their spectacles or trick knee or rheumatiz” (quoting Carol J. Gill, *Questioning Continuum*, in *THE RAGGED EDGE: THE DISABILITY EXPERIENCE FROM THE PAGES OF THE DISABILITY RAG* 42, 46 (Barrett Shaw ed., 1994))).

²⁵⁷ Cf. Kanter, *supra* note 43, at 435.

connected impairment groups.²⁵⁸ But the cost of having a movement that seeks to represent those in a staggering array of life circumstances—perhaps even to a greater extent than other identity movements—is that the movement does not always succeed in its mission. Thus, there are already long-standing arguments that while the disability rights movement’s leadership represents well those who are mobility impaired, White, and nonpoor; there are others—including, for example, those with mental disabilities, living in poverty, and/or facing intersectional forms of oppression—who do not see themselves as being well represented by the movement.²⁵⁹ Indeed, the origins of the Disability Justice movement were in part a response to the Disability Rights movement’s failure to fully address the diversity and intersecting forms of oppression that many people with disabilities face.²⁶⁰

Arguably, then, for *all* of those who speak for and lead the disability rights movement, it is important to be aware that one’s own experiences cannot possibly prepare one fully for representing the interests of the diverse constituents of the movement. Rather, it is important to adopt what I refer to as an “attitude of an ally”: to see oneself simultaneously as a group member and as an ally to the broader group that one represents. Especially for those who are comparatively privileged along some dimension—whether ease of functioning, race, wealth, or otherwise—it is important to recognize the need for an ally’s perspective if we wish to have a movement that truly represents the broad diversity of the disability community.

What are some of the core tenets of allyship that might constructively inform how movement leaders of privilege think about their role? Drawing on the valuable insights of both the Disability Justice²⁶¹ and racial justice movements,²⁶² we might consider the following prescriptions for those who seek leadership within the disability rights movement (including but not limited to those who might claim disability under the expanded ADA definition):

1. Do not assume that your own perspective or lived experience prepares you to understand the experiences of others.
2. Listen to the parts of the community most affected by oppression and value their lived perspective.
3. Try to find ways to meaningfully empower and raise up the voices of those who you are listening to.

²⁵⁸ See, e.g., Belt & Dorfman, *supra* note 12, at 150-51.

²⁵⁹ See, e.g., OTOOLE, *supra* note 49, at 90-91; SINS INVALID, *supra* note 3, at 13-15.

²⁶⁰ See, e.g., SINS INVALID, *supra* note 3, at 13-20.

²⁶¹ See, e.g., *id.* at 22-27.

²⁶² See, e.g., PAUL KIVEL, GUIDELINES FOR BEING STRONG WHITE ALLIES 1-3 (2006), <https://www.racialequitytools.org/resourcefiles/kivel3.pdf> [<https://perma.cc/K46K-WYJF>]; Courtney Ariel, *For Our White Friends Desiring to Be Allies*, SOJOURNERS (Aug. 16, 2017), <https://sojo.net/articles/our-white-friends-desiring-be-allies> [<https://perma.cc/DD6W-QQEH>].

4. Do not assume that your own priorities are the same as those from other backgrounds or subcommunities.
5. Make sure that resources, including leadership opportunities, are going to all subcommunities that you purport to ally with.

Of course, working with the attitude of an ally is difficult in practice, and there can be no doubt that prescribing such an approach will not solve problems of representation within the disability rights movement. But there are already parts of the disability movement, like the Disability Justice movement, that embrace many such tenets and should provide a model for others.²⁶³ Moreover, the fact remains that broader claiming of disability identity is not the origin of this problem, nor will avoiding such broader claiming solve it. Indeed, such claiming arguably may provide a fulcrum for pushing forward important conversations about how to effectively ensure that all of the disability movement's diverse constituents have access to voice and leadership.

It is also important to note that—despite the long-standing efforts of the disability rights movement—it remains the case that many organizations that serve people with disabilities or advocate on disability issues are staffed primarily or exclusively by people who do not currently self-identify as disabled.²⁶⁴ Would encouraging more of those people to self-identify as disabled change their perspective in constructive ways? It is impossible to know for sure. But given the role that social identity plays in most people's belief systems and perspectives, it certainly seems plausible that increasing the number of individuals *already* working in disability policy and services who self-identify as disabled might help to alleviate some of the pathologies that can arise from nondisabled individuals playing such an outsized role in disability advocacy and service provision.²⁶⁵ The possibility of infantilizing people with disabilities, neglecting their capabilities and strengths, or assuming that they lack the capacity to know what they want are all areas of real concern when disability service providers or advocates are not themselves disabled.²⁶⁶ But possessing a disabled identity oneself—thereby breaking down the “us versus them” divide—

²⁶³ See *10 Principles of Disability Justice*, *supra* note 105.

²⁶⁴ See, e.g., Andrews et al., *supra* note 6, at 114-15 (discussing this phenomenon in the context of psychology).

²⁶⁵ See, e.g., Kelly S. Fielding & Matthew J. Hornsey, *A Social Identity Analysis of Climate Change and Environmental Attitudes and Behaviors: Insights and Opportunities*, 7 *FRONTIERS PSYCH.*, no. 121, 2016 at 1, 1.

²⁶⁶ See, e.g., OTOOLE, *supra* note 49, at 142-43 (discussing how nondisabled professionals are more likely to overlook a disabled children's strengths because they can't “envision those children . . . having lives as rich and fulfilling as their own”); Lydia X.Z. Brown, *Not A Child; Don't Treat Me Like One*, *AUTISTIC HOYA* (Dec. 2, 2012), <https://www.autistichoya.com/2012/12/not-child-dont-treat-me-like-one.html> [<https://perma.cc/5EEM-N8GF>] (explaining how a Santa-scouting “Fantasy Flight” designed for children infantilizes adult passengers with disabilities).

might help to, at a minimum, mitigate some of these concerns.²⁶⁷ While it is unlikely to be a cure-all for ableism within the realm of disability services and advocacy, it could be a small step toward a more disability-positive and empowering regime.

Finally, it is important to recall that to the extent that leadership or voice concerns are raised as a reason not to pursue a project of claiming disability, this too would come with costs. Currently, there are large numbers of people with nonnormative bodies or minds who lack access to the liberatory potential of claiming a disability identity.²⁶⁸ Moreover, without such claiming, we would forego one potentially valuable tool for disrupting the stubborn biases and stigma that continue to exist against the disability community.²⁶⁹ In short, while there may be genuine concerns regarding who gets to speak for the movement and who “counts” as disabled leadership—concerns that may be accentuated by a project of encouraging greater claiming of disability identity—abandoning such a project on the basis of such concerns would come with costs too.

C. *Who Gets to Claim Resources (Accommodations, Affirmative Action, and Benefits)?*

One of the most stubborn forms of disability bias is the presumption that a claim of disability identity is inherently a claim on resources: that all disabled people are “takers” and perhaps, as legal scholar Doron Dorfman puts it, “fakers” as well.²⁷⁰ Even among well-meaning progressives, there is often an assumption that disability must be inherently bound up with claims of access to resources or accommodations.²⁷¹ Applying this logic, one critique of a project of encouraging claiming disability might be a concern regarding resource consumption—the fear of expanding possible claims to resources beyond that which is sustainable or beyond those who ought to have access to them.²⁷²

²⁶⁷ See Fielding & Hornsey, *supra* note 265, at 1.

²⁶⁸ See *supra* Part V.

²⁶⁹ See *supra* Part IV.

²⁷⁰ Dorfman, *Fear of the Disability Con*, *supra* note 48, at 1055.

²⁷¹ For example, most of the mainstream disability law textbooks include a section on reasonable accommodations but fail to include sections addressing disparate treatment and disparate impact. See, e.g., RUTH COLKER & PAUL D. GROSSMAN, *THE LAW OF DISABILITY DISCRIMINATION*, at ix-xvi (8th ed. 2013). While this may be explained by the fact that reasonable accommodations is the one claim unique to the disability law context, it nevertheless reinforces the perception that claims of disability equality are intrinsically associated with requests for accommodation.

²⁷² Cf. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (describing the public perception of the ADA as affording a windfall of illegitimate resources to marginally disabled workers); Porter, *What Disability Means*, *supra* note 82, at 126 (describing, and disagreeing with, perceptions that “disability is a zero-sum game,” in which giving accommodations to one person will deny those with more significant disabilities access to accommodations).

As an initial matter, it is important to note that the presumption that disability universally and inherently entails claims to extra resources is itself a form of ableism. Just like assumptions that disability must be inextricably linked to functional limitation, assumptions that all disabled people will require additional resource expenditures—as students, employees, or consumers—are rooted in perspectives that view disability as intrinsically rooted in incapacity.²⁷³ This is not to deny that resources are vitally important to allowing human flourishing for the disability community—they surely are.²⁷⁴ But the notion that claims of disability identity intrinsically entail additional resource consumption in all circumstances is both ableist and false.²⁷⁵

But of course, there are arenas in which the law protects the ability of people with disabilities to secure resources, and here genuine resource concerns might exist and are worth exploring.²⁷⁶ Starting with civil rights law itself (where the civil rights definition of disability is most evidently relevant), extant civil rights laws do indeed afford a right to “reasonable accommodations,” something that might entail the expenditure of resources. Even here, however, the potential for such expenditures can be exaggerated: the Job Accommodation Network (“JAN”), a service of the Department of Labor, has demonstrated that more than half of all accommodations require no monetary expenditures at all.²⁷⁷ As importantly, many people with ADAAA-qualifying disabilities currently work or navigate the other contexts in which the ADA and the Rehabilitation Act apply without accommodation of any kind.²⁷⁸

It is important to note that for those individuals who currently do not receive an ADA or Rehabilitation Act accommodation and do not need one, claiming

²⁷³ Cf. *supra* Part III.

²⁷⁴ See, e.g., SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 138-48 (2009).

²⁷⁵ There are of course more radical critiques that could be made of this perspective, including that as human beings in a modern society, we *all* have needs, including needs for medical care, education, shelter, food, and care, and that existing structures of privilege disproportionately ensure that some have their needs met and others do not. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1-2 (2008) (describing the ways in which we are all vulnerable subjects and how that ought to refocus our understanding of equality goals).

²⁷⁶ See Porter, *A Defining Moment*, *supra* note 56, at 328 (“[One] problem with a broad definition of disability [like that included in the ADAAA] is that there is likely to be a great deal of backlash from individuals with traditional disabilities . . . and those who are concerned that benefits given must be carefully doled out to only the most deserving.”).

²⁷⁷ See, e.g., *Benefits and Costs of Accommodation*, JOB ACCOMMODATION NETWORK (Oct. 21, 2020), <https://askjan.org/topics/costs.cfm> [<https://perma.cc/XUV4-SVR8>] (discussing results from JAN survey in which employers reported that “a high percentage (56%) of accommodations cost absolutely nothing to implement”).

²⁷⁸ Indeed, as discussed above, many of those who do not self-identify as disabled do not think of themselves as entitled to accommodations under the ADA. See *supra* notes 207-10 and accompanying text.

disability identity would not change their legal entitlement (or lack thereof) to accommodations. Most courts already hold that “accommodations” that do not address disability-related needs are not mandated by disability civil rights law, and thus those who lack any functional limitation should not be entitled to accommodations in most circumstances.²⁷⁹ In those circumstances in which they might be so entitled—for example, time off to attend medical or mental health appointments—it hardly seems like the type of resource claims to which we ought to object. Indeed, access to such resources is something we should aspire to for all workers.²⁸⁰

Of course, encouraging greater disability identity might encourage those who *are* entitled to more significant accommodations, but who currently do not claim them due to a lack of disability self-identification, to do so. Indeed, one of the obstacles to effective enforcement of the ADA has been that many of those who might be entitled to accommodations under the ADA do not conceptualize themselves as disabled and thus do not seek to enforce their rights.²⁸¹ Encouraging more people who are entitled to accommodations to claim them seems like a positive, rather than a negative, externality of greater claiming of disability identity. To the extent that some fail to realize their entitlement to ADA accommodations—and suffer consequences as a result, such as jeopardizing their physical or mental health, undergoing unnecessary pain, or, most fundamentally, being unable to succeed at work—we ought to celebrate their increased use of the ADA accommodation process.²⁸²

So too for social welfare benefits programs—such as veterans’ benefits, medical benefits, or SSI and SSDI—whether an individual claims an identity of disability will have no impact on whether they qualify for such programs. As discussed, all social welfare benefits programs have their own criteria for qualification, which tend to be very narrow and strict in their requirements of functional incapacity, and such criteria are never reducible to whether an individual self-identifies as disabled.²⁸³ Indeed, many benefits programs, for example SSI and SSDI, have such restrictive definitions of disability that only a

²⁷⁹ See, e.g., *Vande Zande v. State of Wis. Dep’t of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995).

²⁸⁰ Cf. 29 C.F.R. § 1630.2(k)(3) (2020) (explaining that employees with a “record of” disability, but no current impairment, should be allowed accommodations such as shift rescheduling to permit follow-up appointments). See generally Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 739-44 (2014) (arguing for an employment law regime under which an ADA-qualifying disability would not be a requisite to obtaining accommodation).

²⁸¹ See, e.g., *supra* notes 207-10 and accompanying text.

²⁸² See *supra* notes 207-10 and accompanying text.

²⁸³ See *supra* note 11 (introducing the restrictive definitions of disability that govern disability benefits programs and the centrality of incapacity in those definitions).

tiny fraction of those who might self-identify as disabled in accordance with the ADA's definition will ever fall within their scope.²⁸⁴

Of course, it is certainly true that encouraging greater claiming of disability identity might encourage greater numbers of those eligible to seek benefits in the first instance. For example, policy experts have voiced concerns that disabled veterans may not seek the benefits to which they are entitled or may delay doing so because they resist being labeled as disabled.²⁸⁵ But again, to the extent that this means that benefits programs reach more of those they are intended to support, this seems like a positive rather than a negative consequence of increasing disability self-identification.

More potentially concerning are contexts in which access to benefits might truly be zero-sum. The context of primary and secondary education seems at first blush especially concerning, given the chronically underfunded nature of disability educational services and the resulting resource allocation limitations.²⁸⁶ And indeed, as scholars such as LaToya Baldwin Clark and Eloise Pasachoff have described, there are serious pathologies in the current allocation of disability educational benefits under the Individuals with Disabilities Education Act ("IDEA"), with students of color and students who are poor receiving lesser and inferior access to disability supports.²⁸⁷

But while pathologies in resource allocation in education are highly problematic—and urgently in need of meaningful reform—it is not clear that encouraging greater disability self-identification would exacerbate this existing state of affairs. Like many other programs providing access to disability resources, the IDEA has its own definition of disability, which requires that students “need[] special education and related services” by virtue of their medical or mental condition in order to qualify.²⁸⁸ As such, those without functional limitation would not qualify for services under the IDEA, regardless of the label they or their parents embrace, although they might obtain accommodations under a Section 504 Plan.²⁸⁹ Just as in the workplace context,

²⁸⁴ See, e.g., 42 U.S.C. § 423(d)(1)(A) (defining disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months”).

²⁸⁵ See Griffin & Stein, *supra* note 86, at 50.

²⁸⁶ See Baldwin Clark, *supra* note 226, at 441-42; Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1417 (2011).

²⁸⁷ See, e.g., Baldwin Clark, *supra* note 226, at 441-42; Pasachoff, *supra* note 286, at 1417.

²⁸⁸ 20 U.S.C. § 1401(3)(A)(ii).

²⁸⁹ See, e.g., ADDitude Editors, *What Is an IEP? Everything You Need to Know About IDEA, IEPs, and 504 Plans*, ADDITUDE MAG., <https://www.additudemag.com/iep-vs-504-plan-idea-adhd-disability-education/> [<https://perma.cc/72ML-P5U2>] (last updated Feb. 7, 2021).

however, accommodations that are not necessary are unlikely to be deemed appropriate, regardless of a nominally qualifying disability.²⁹⁰

Thus, the primary effects of a project of claiming disability in the educational context are likely to arise from lessening the stigma around disability, which encourages parents to seek out educational accommodations or services where they might have been disinclined to do so previously. But it is not clear how such stigma-reduction impacts would cut in terms of existing patterns of resource claiming. White, privileged parents are already the subcommunity least likely to be deterred by stigma in seeking educational benefits (and are the subcommunity most likely to have the resources to effectively seek such benefits).²⁹¹ In contrast, poor communities and communities of color are often (and for good reason) more worried about the stigmatizing effects of a disability label in the educational context and thus least likely to seek such a label out.²⁹² A project of claiming disability—and the stigma-reduction effects associated with such a project—arguably has the greatest potential to increase claiming among those communities that are currently most deterred by stigma, such as poor communities of color.

But even if one believes that such an outcome is unlikely and that increased claiming by the most privileged is more likely result, it is important to note that *any* social change project that reduces stigma around disability poses the risk of exacerbating existing patterns of disproportional resource claiming by those who are the most privileged. To the extent that stigma deters people from seeking resources to which their children might be otherwise entitled, a reduction in that stigma will predictably result in greater claiming, which runs the risk of reproducing existing pathologies in resource allocation. While the disproportional claiming of disability educational resources by White and upper-class families is a problem that is surely worthy of serious consideration and reform, avoiding stigma reduction efforts is an indirect and likely ineffective solution.

Finally, no discussion of resources in the disability context would be complete without considering affirmative action and diversity program hiring. As disputes about race in hiring illustrate, affirmative action and diversity hiring can certainly be perceived as zero-sum (and can sometimes be applied as zero-sum in practice).²⁹³ As such, they can raise incentives for strategic claiming of

²⁹⁰ See *supra* note 279 and accompanying text.

²⁹¹ See, e.g., Austin Peay & Sam Kmack, *Why Students at LA's Richest Private Schools Are Far More Likely to Get Extra Time on the SAT*, LAIST (Aug. 29, 2019, 6:00 AM), https://laist.com/2019/08/29/los_angeles_student_sat_loophole.php [<https://perma.cc/GX4Q-7C84>].

²⁹² See *id.*

²⁹³ See, e.g., Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 309 (1997). But see Patricia J. Williams, Comment, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 542 (1990) (observing in response to critiques of affirmative

identity, with a potential associated cost for those who were the intended beneficiaries.²⁹⁴ Thus, to the extent that a project of claiming disability encourages a greater number of individuals to self-identify as disabled, this could potentially crowd out those who already self-identify (or are identified by others) as disabled—at least to the extent that the employer views affirmative action or diversity targets as a ceiling rather than a floor.

It is important to note at the outset that concerns over the allocation of affirmative action or diversity hiring can be overstated. It remains the case that in most employment settings, disability is more likely to lead to discrimination than a potential boost in hiring, even if it is nominally listed as a valued form of diversity.²⁹⁵ For example, while 36% of law firm lawyers are women and 17% are people of color, only 0.55% are identified as people with disabilities.²⁹⁶ While law firms surely employ more people with disabilities than this number reflects, the fact that people do not self-disclose is an indicator of the (probably accurate) perceptions that disclosing this form of diversity is likely to lead to discrimination, not diversity hiring.²⁹⁷

But there are some contexts, particularly federal government employment and federal contractor employment, where meaningful affirmative action targets exist for disability and thus we might worry about how jobs are allocated *among* those who identify as disabled.²⁹⁸ As the EEOC has recognized, the ADA

action as zero-sum that “[n]othing in this rigid win-loss dichotomy permits the notion that everyone could end up a beneficiary, that expansion rather than substitution might be possible, and that the favoring of multiple cultures is enhancement of the total rather than a sweepingly reflexive act of favoritism for anything other than the monolithic purity of an all-white nation”).

²⁹⁴ See, e.g., Rich, *supra* note 91, at 1525 n.69.

²⁹⁵ See, e.g., Nancy Geenen, *Corporate Diversity Efforts Often Leave Out an Important Group: People with Disabilities*, FORTUNE (Aug. 23, 2019, 5:30 AM), <https://fortune.com/2019/08/23/corporate-diversity-efforts-disability-inclusion/>; see also Porter, *What Disability Means*, *supra* note 82, at 123 (noting that she, a disability law scholar, would probably advise a law professor with a hidden disability not to disclose it unless she required accommodation, because employers so frequently discriminate against individuals with disabilities).

²⁹⁶ NAT’L ASS’N FOR L. PLACEMENT, 2019 REPORT ON DIVERSITY IN U.S. LAW FIRMS 7-8, 30 (2019), https://www.nalp.org/uploads/2019_DiversityReport.pdf [<https://perma.cc/V82G-PPFS>] (noting that information on disabilities “is much less widely reported than information on race/ethnicity and gender, making it much harder to draw definitive conclusions about the representation of lawyers with disabilities”).

²⁹⁷ This low number no doubt also reflects the fact that few people who might qualify claim disability identity. See *supra* Part II. Consider, by way of comparison that 3% of firm lawyers self-identify as LGBT, a significantly higher percentage than those who self-identify as having a disability, despite the fact that disability constitutes a far larger percentage of the population. NAT’L ASS’N FOR L. PLACEMENT, *supra* note 296, at 8.

²⁹⁸ See generally Mark C. Weber, *Numerical Goals for Employment of People with Disabilities by Federal Agencies and Contractors*, 9 ST. LOUIS U. J. HEALTH L. & POL’Y 35

definition is incorporated by reference into those parts of the Rehabilitation Act that mandate affirmative action (Section 501 for the federal government and Section 503 for federal contractors).²⁹⁹ Thus, it is possible that employers subject to these requirements might satisfy them by employing individuals who satisfy the ADAAA definition but have no functional limitation—and indeed who may not otherwise face significant barriers in the employment market.³⁰⁰ While this possibility already exists regardless of any movement toward greater disability self-identification, such a movement might well lead more individuals with lesser functional impairments to seek to qualify for affirmative action.

But in the context of federal government affirmative action, the federal government has long made use of a concept of “targeted disabilities” that could be used to mitigate concerns about allocation of jobs among those who identify as disabled.³⁰¹ Targeted disabilities are those that might cause an individual to face especially significant barriers to employment, such as developmental disabilities, traumatic brain injuries, deafness, blindness, and significant mobility impairments.³⁰² Current affirmative action regulations for federal government employment explicitly require the adoption of distinctive agency goals for targeted disabilities, requiring that agencies aim to have 2% of their workforce comprised by those with targeted disabilities.³⁰³ While this current targeted disabilities goal of 2% is a relatively small proportion of the overall disability affirmative action goal of 12% of the federal agency workforce, it could (and probably should) be adjusted upward to include a greater number of those who are most vulnerable to discrimination in the workforce.³⁰⁴ The government may also wish to consider extending this subgoal of targeted disabilities to federal contractors, which are currently subject only to an overall percentage goal of 7% workers with disabilities.³⁰⁵

Finally, it is worth remembering that claiming disability identity internally does not inexorably mean that an individual must claim disability externally in all contexts (such as for the purposes of affirmative action); instead some who

(2015) (describing federal agency and contractor affirmative action requirements and the turn toward numerical goals in those contexts).

²⁹⁹ See 29 U.S.C. § 705(9)(B); U.S. Equal Emp’t Opportunity Comm’n, *Questions & Answers: The EEOC’s Final Rule on Affirmative Action for People with Disabilities in Federal Employment* (Jan. 3, 2017) [hereinafter *EEOC Q & A*], <https://www.eeoc.gov/laws/regulations/qanda-ada-disabilities-final-rule.cfm> [<https://perma.cc/36KH-A79V>].

³⁰⁰ See *supra* Part III.

³⁰¹ See *EEOC Q & A*, *supra* note 299.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*; see also Porter, *A Defining Moment*, *supra* note 56, at 328 (“For programs like employment quotas or training programs designed to help an individual transition from school to the labor market, it is not an unreasonable argument that we should be saving spots for those who are the most severely disabled.”).

³⁰⁵ 41 C.F.R. § 60-741.45(a) (2019).

claim disability will (and should) choose to use that identity selectively, in service only of stigma-eradication goals. While selective identification is obviously voluntary—and thus in some regards a thin limitation on claiming—it is important not to lose sight of the capacity for the comparatively privileged within the disability community to choose to use their privilege selectively to help deconstruct the stigma that the disability community faces, without claiming benefits on that basis. For those of us who may construct ourselves as allies to the disability community but who might qualify as disabled ourselves under the ADAAA, this seems especially important. We ought not to use our fear of being seen as illegitimately claiming benefits—something we can opt out of by being selective about disclosure—as a reason not to opt in to the project of stigma eradication. Indeed, it is precisely those who have the greatest levels of privilege (and thus who may be most chary of seeking benefits based on disabled status) who may be best situated to bear the brunt of stigma-eradication efforts through public disclosure.

D. *Is This Respectability Politics? How Might It Change Movement Priorities?*

An additional critique of this Article's encouragement of claiming disability might be that it is a form of respectability politics and as such is likely to be accompanied by the set of pathologies that such forms of advocacy often produce. A related but distinct critique might be that shifting the composition of disabled voices will shift movement priorities in ways that will be disadvantageous to the project of ensuring that those with the most significant disabilities can live full, flourishing lives. As set out below, both of these concerns are not entirely unfounded and warrant thoughtful consideration. But as with the other concerns identified herein, they largely reflect broader preexisting problems arising from the vast diversity of the disabilities and life circumstances of those within the disability rights movement. Thus, a project of claiming disability simply highlights the need for broader consideration of, and better strategies for addressing, the wide diversity of objectives that would best suit the disability rights movements' constituents.

As an initial matter, it should be emphasized that this project is not respectability politics in the sense that its advocacy for a broader movement of disability self-identification is not limited to only those who are the most "respectable" or likely to appeal to the nondisabled public.³⁰⁶ Claiming a positive disability identity is a good that should be encouraged for all who might fall under the disability rubric, and we know that underclaiming disability

³⁰⁶ For an articulation of this view of respectability politics, see Randall Kennedy, *Lifting as We Climb: A Progressive Defense of Respectability Politics*, HARPER'S MAG., Oct. 2015, at 24 (describing respectability politics as "focusing more on those whose victimization is clearest and likeliest to elicit the greatest sympathy from the general public," and discussing arguments that the Black Lives Matter movement should focus on victims of police violence like Tamir Rice rather than Michael Brown).

identity spans the spectrum of impairments.³⁰⁷ Thus, while it is the hope of this project that encouraging greater self-identification of people with disabilities will broaden the exemplars of disability in ways that challenge stereotypes—something that may initially be most effectuated by those who have less visible or less limiting disabilities—the broader hope of this project to encourage a mass movement of disability self-identification that includes the full diverse expanse of those who qualify as disabled under the ADA.³⁰⁸

Indeed, in the long term, arguably the most profound challenge to disability stereotypes would be posed simply by radically expanding and diversifying the pool of exemplars that people think of as people with disabilities. Stereotypes are often most effectively undermined precisely when people are encouraged to think of group members as individuals.³⁰⁹ As discussed, this has been powerfully illustrated in the context of the LGBTQ rights movement, where personally knowing people who are LGBTQ has been shown to have a profound inverse effect on the tendency to make negative generalizations about LGBTQ people as a group.³¹⁰ So too, one could imagine that having many more individual touch points in the real world for what constitutes a disability could be a powerful stigma-disruption tool, as it disallows the type of group-based generalizations that reside at the core of stereotypes and bias.

It is also important to note that in the current regime, a relatively small group of people with disabilities—those who are visibly disabled or are required to disclose disability to seek accommodations or resources—disproportionally bear the brunt of disability stigma. Increasing disability identification (both internal and external) would help to spread the burden of challenging disability stigma to a much broader scope of individuals and thus ideally lighten the load of those who are currently bearing it. Currently, it is too often the case that those who do not require accommodations and can selectively self-disclose diagnoses do not help bear the burden of stigma disruption—instead viewing these characteristics as reasons to deny the very label of disability.³¹¹ This inevitably places the full burden of stigma disruption on those who already bear the greatest costs of its persistence.

Therefore, a project of claiming disability identity need not be seen as inextricably bound up with privileging a certain part of the disability community or holding up only its most “respectable” exemplars. Nevertheless, it is important to acknowledge that there is a genuine and long-standing tension between the disability rights movements’ stigma-eradication goals (which often focus on a strategy of “sameness”) and its resource-focused ones (which often

³⁰⁷ See *supra* Part II.

³⁰⁸ See *supra* Parts IV-V.

³⁰⁹ See Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 874-77 (2016).

³¹⁰ Herek, *supra* note 156, at 455-56.

³¹¹ See *supra* Part III.

entail highlighting “difference”). A project of encouraging more widespread claiming of disability—especially one focused primarily on stigma eradication—could arguably heighten this tension in some ways. As set out below, this issue—which has existed for many groups over a very long time—is not one that this project can hope to fully resolve. But I suggest that it is, at a minimum, possible to conceptualize ways in which a project of more widespread claiming of disability could raise all boats by causing many new constituents to identify with disability rights goals.

The problem of a tension between the most common stigma-disruption strategy (“we are just like you”) and the most common resource-targeted strategy (“our needs, desires and strengths are different than yours and should be centered, too”) is not new to this project, nor indeed to disability rights.³¹² Perhaps most famously fought out between “sameness” and “difference” feminists, the question of where identity movements should emphasize the sameness of their constituents and where the movements should emphasize the differences is a question that has been long debated but never resolved.³¹³

The reality is that neither of these approaches is a monolith. In the real world, all identity-based social movements adopt aspects of both strategies at different moments and in different contexts, for good reason. An unstinting strategy of emphasizing difference mapped onto a background of widespread bias is, quite simply, unlikely to succeed in disrupting bias.³¹⁴ Biases will persist and, with them, so will disparate treatment discrimination. But virtually all movements—and perhaps especially the disability rights movement—have recognized that sameness claims alone will not achieve all of their objectives. A vision of equality focused exclusively on sameness would be a hollow one indeed for many people with disabilities, something that physically inaccessible spaces perhaps most graphically illustrate.³¹⁵ Is it equality for the wheelchair user to be

³¹² Note that the “sameness” versus “difference” debate bears some resemblance to respectability politics, and in some contexts can be also a form of respectability politics, such as in the context of the LGBTQ rights movement’s campaign for same-sex marriage. However, there are times that sameness strategies need not be a form of respectability politics and where respectability politics need not be a way of emphasizing sameness. *See, e.g.*, Kennedy, *supra* note 306, at 24 (describing the ways in which the civil rights movement relied on respectability politics—highlighting *contrasts* with the behavior of White segregationists—as a powerful means of achieving equality goals).

³¹³ *See, e.g.*, Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 298-300.

³¹⁴ Consider, for example, if the women’s rights movement had exclusively focused on emphasizing the difference of women, including their disproportional caregiving obligations and capacity to become pregnant. It seems highly likely that a focus exclusively on these sex-based differences would have reinforced sexism, rather than undermining it.

³¹⁵ *See, e.g.*, Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2425 (1994) (“Sometimes equality requires the similarly situated to be treated similarly. But

told they can use the same set of stairs to get into the building as the non-mobility-impaired individual?³¹⁶ Most people can easily see why it is not.

As legal scholar Samuel Bagenstos has written—and as many other scholars have long recognized—these complexities of the disability rights movement demand a multiplicity of strategies and priorities within disability rights.³¹⁷ Indeed, the need for a multifaceted approach is built into the ADA and other disability antidiscrimination laws themselves through their recognition that disparate treatment (sameness), disparate impact, and reasonable accommodations (difference) are all important to the disability antidiscrimination project.³¹⁸ As Bagenstos points out, we should add social welfare law to this list because for many individuals with disabilities, access to social welfare benefits may form an equally important component of what allows them to live flourishing lives—indeed, in some instances to live at all.³¹⁹ Thus, it is already the case that the disability project—both in law and in the social movement discourse that supports it—of necessity ought to be and is one that embraces a diversity of perspectives and priorities along the sameness/difference continuum.

But this of course does not mean that all objectives within the movement do or will receive equal priority or weight. But here, this tension does not arise from a project of claiming disability but rather is inherent in the movement as it already exists. The question of what to prioritize within disability rights—stigma eradication, disparate treatment, accommodations, physical accessibility, autonomy, housing, attendant care, medical benefits, wraparound services for those with mental health disabilities, and so on—is already a profoundly complex one and one to which the movement as a whole has never had, and probably never will have, a singular answer.

Against this already complex set of background concerns and priorities, it is impossible to precisely predict how greater numbers of individuals claiming disability identity might impact the movement's priorities and its ability to achieve its goals. But it is possible to imagine a world in which it would help push forward all of the disability rights movements' diverse objectives—from stigma disruption to reasonable accommodation to social welfare benefits. By radically expanding the scope of those who see themselves as disabled—and thus who see themselves as having a stake in the disability rights movement and

sometimes people who are differently situated ought to be treated differently, precisely in the interest of equality. In the area of disabilities, for example, the use of stairs denies equality to people who are bound to wheelchairs, and the use of oral communication creates a problem for people who cannot hear.” (footnote omitted).

³¹⁶ *Id.*

³¹⁷ See, e.g., BAGENSTOS, *supra* note 274, at 138-48.

³¹⁸ 42 U.S.C. §§ 12112-12113.

³¹⁹ See, e.g., BAGENSTOS, *supra* note 274, at 138-48.

in the well-being of other people with disabilities—we may increase political will to provide necessary resources even as we decrease stigma.³²⁰

Here again, our best response to such concerns may be to encourage all of us who are invested in disability rights and justice to adopt the attitude of an ally in our thinking. Even today, no one individual will ever be prepared by their own life experiences to speak for the whole disability community about what priorities the movement should adopt. It is only by truly respecting, listening to, and elevating the voices of others in the diverse disability community that any of us can hope to put forward an equitable set of priorities for the disability rights movement.³²¹

E. *Can We Avoid Preservation Through Transformation and Backlash?*

Finally, even for those who might otherwise be inclined to embrace a project of claiming disability, there may be reasonable concerns about the possibility that such a project might simply lead to “preservation-through-transformation” (i.e., restoration of status quo status hierarchies in a new form) or might trigger a backlash.³²² These concerns are not insubstantial, and indeed the history of civil rights interventions—both legal and societal—suggests that such responses to major civil rights reforms are common.³²³ However, precisely because such responses to meaningful civil rights reforms are so ubiquitous, it is not clear that they are possible to avoid—and it may be most sensible simply to view them as a part of the necessary life cycle of equality reform. Regardless, it may be helpful to consider some of the most obvious ways in which a project of claiming disability could lead to preservation-through-transformation and/or backlash and what efforts could be made to avoid such outcomes.

With respect to preservation-through-transformation, perhaps the most obvious way in which a project of claiming disability could be co-opted to reinstitute the status quo would be to reconstitute disability biases around new subcategories of disability. Thus, for example, one could imagine a world in

³²⁰ See *supra* Part IV.

³²¹ Cf. Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. J.L. & SOC. CHANGE 107, 115-29 (2014) (arguing for the importance of more democratic mechanisms for priority setting, including especially those that could be facilitated by direct legal services providers, in the context of the movement for LGBT rights).

³²² Reva Siegel originated the concept of “preservation-through-transformation,” arguing persuasively that status regimes often reinstitute themselves in new form following challenges to the status quo. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN L. REV. 1111, 1113 (1997); see also Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1239-44 (2016) (describing the ways that race discrimination has evolved to survive in the face of legal and social change).

³²³ See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 423 (2001) (characterizing countermovements to identity-based social movements as “inevitable”).

which many more people claimed disability identity, but the benefits of stigma disruption affected only those who were deemed not functionally disabled—leaving behind those who do experience functional impairment. Under such a regime, status hierarchies might remain largely unchanged—with those with functionally impairing disabilities or even just aesthetic markers of disability³²⁴ experiencing substantial continuing discrimination and stigma—despite a much larger group of individuals claiming a disability identity.

This is a genuine concern—and one that it is worth thinking seriously about how to avoid. Categorization of disability as “severe” or “mild” already occurs in a number of medical and legal contexts (though not in disability civil rights law), as well as in social parlance.³²⁵ Moreover, the experiences of other groups demonstrate that while all group members may benefit to some extent from stigma eradication—and all are likely to continue to suffer to some extent from continuing discrimination—it is possible and indeed likely for society to most fully afford equality reforms to the those who perform or experience identity in certain ways.³²⁶ Thus, the possibility that the status hierarchies of disability could be reinstated around subcategories of disability seems both real and concerning.

Nevertheless, there are reasons for optimism that such an outcome is not inevitable and could be mitigated through the shaping and messaging of the movement for disability self-identification. Research has already shown that contact with an individual with a disability *can* significantly reduce biases with respect to those with other physical and mental impairments—including impairments as varied and aesthetically visible as Down syndrome and wheelchair users.³²⁷ These results suggest that the tendency to categorize by aesthetic markers or perceived severity is not already so ingrained as to be insurmountable.

Moreover, there already exist examples in the disability world for how to organize around purposefully rejecting labels that subdivide (and potentially stigmatize) parts of the disability community, which could serve as models for a more broad-based effort. For example, there is a robust movement within the

³²⁴ As Jasmine Harris has persuasively argued, it is often those with aesthetic markers of disability who prompt the most significant bias and may be assumed to be functionally incapacitated regardless of their actual capabilities. *See, e.g.*, Harris, *Aesthetics of Disability*, *supra* note 4, at 941-46.

³²⁵ *See, e.g.*, NAT’L ACADS. OF SCI., ENG’G & MED., MENTAL DISORDERS AND DISABILITIES AMONG LOW-INCOME CHILDREN 170 (Thomas F. Boat & Joel T. Wu eds., 2015), https://www.ncbi.nlm.nih.gov/books/NBK332882/pdf/Bookshelf_NBK332882.pdf [<https://perma.cc/AEG6-BXB3>] (differentiating between “mild to moderate” intellectual disability and “severe to profound” intellectual disability).

³²⁶ *See, e.g.*, Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1709 (2000); Vinay Harpalani, *Civil Rights Law in Living Color*, 79 MD. L. REV. 881, 890-97 (2020).

³²⁷ *See, e.g.*, NARIO-REDMOND, *supra* note 98, at 275.

autism community rejecting the labeling of some community members as “high functioning” and others as “low functioning” as stigmatizing and unhelpful.³²⁸ Although such efforts have not been wholly successful—especially in transforming the prevailing discourse in some professional communities—they have nevertheless affected the perspectives of many both within and without the autism community.³²⁹

Thus, although it is likely not wholly possible to avoid some tendency toward preservation-through-transformation—with disability stigma and discrimination targeted to the greatest extent at those who are most visibly or functionally disabled—it is likely possible to mitigate such effects. Existing disability communities, such as the autism community, may provide helpful examples of how to avoid such subdivision. Others are, however, themselves atomized and might unwittingly play into such a “divide and conquer” dynamic. Regardless, it is important to recall that *any* serious challenge to the status quo of status hierarchies (and not only this one) is likely to invite a preservation-through-transformation dynamic. Thus, while it is useful to be intentional in attempting to anticipate the way that the reinstitutionalization of status hierarchies might occur, the anticipation of such a response ought not to deter action in the first instance (since otherwise such action might never occur).

Finally, in considering the possible impacts of a movement of claiming disability identity, it is important to consider the possibility of backlash. There can be no doubt that a mass movement of people claiming disability identity might generate a backlash against disability rights. While claiming disability as an identity would not affect individual entitlements to benefits or accommodations (which are already set by existing law), the widespread suspicion of disability as a strategic effort at illegitimate resource conception could certainly be triggered by large numbers of individuals claiming a disability identity.³³⁰ As such, there is a possibility that the claiming of disability identity, especially by individuals lacking a functional impairment, would be met by

³²⁸ See, e.g., Lorcan Kenny, Caroline Hattersley, Bonnie Molins, Carole Buckley, Carol Povey & Elizabeth Pellicano, *Which Terms Should Be Used to Describe Autism? Perspectives from the UK Autism Community*, 20 *AUTISM* 442, 458 (2016); Jessica Flynn, *Why Autism Functioning Labels Are Harmful -- and What to Say Instead* (July 22, 2018), <https://themighty.com/2018/07/autism-functioning-labels-low-functioning-high-functioning/> [<https://perma.cc/67TT-PM9Y>].

³²⁹ See Kenny et al., *supra* note 328, at 459; Flynn, *supra* note 328.

³³⁰ As set out above, encouraging wider claiming of disability identity will not change the entitlement (or lack thereof) of people to any of the various “benefits” that can be associated with disability status. Those with little or no functional impairments will not qualify for social welfare benefits like SSI and SSDI and are unlikely even to qualify for accommodations in most circumstances. Nevertheless, the stereotype associating disability identity inherently with resource consumption is strong and would likely trigger an assumption of unfair resource claiming among at least some part of the public. See Colker, *supra* note 272, at 100; Dorfman, *Fear of the Disability Con*, *supra* note 48, at 1056-60; Porter, *What Disability Means*, *supra* note 82, at 126; *supra* note 271 and accompanying text.

societal anger and frustration—even if such individuals neither sought nor received benefits as a result.³³¹ This anger and frustration might lead to efforts to retrench disability law, potentially including efforts to rescind the ADAAA’s broad definition of disability.

But this risk, while real, is precisely the type of risk that no movement can avoid when seeking to generate real change. As legal scholar Michael Waterstone has observed, “[i]t is hard to transform society if society is not paying sufficient attention.”³³² In order to transform society, as opposed to the law, it is going to be necessary to have many more people thinking, arguing, and even being angry about disability.³³³ We will not disrupt stereotypes and stigma about people with disabilities without challenging beliefs and assumptions about what disability is and who is entitled to claim it as an identity in ways that make some people uncomfortable and upset.³³⁴ As the Black Lives Matter movement, among others, demonstrates, such disruptive actions are risky, are likely to produce backlash, and may not succeed immediately. But they are also critical to the type of social and legal reform that ultimately moves us closer to lived equality.

This is not to suggest that the possibility of backlash is inconsequential or to deny that it could create harmful results (especially in the near term). This potential for harmful results is important and should be managed and mitigated to the best of our ability—something that may require coordinated and considered movement effort.³³⁵ But it is also critical to see that the very conditions that make backlash plausible—increasing the salience of disability and thus arousing disability stereotypes—are also the conditions that make the deconstruction of bias possible. It is only by getting many more people thinking about disability—under conditions that challenge the associations they carry with that category—that we are likely to see beliefs about disability undergo meaningful change. This is surely a project that will begin with resistance and

³³¹ See Colker, *supra* note 272, at 100; Dorfman, *Fear of the Disability Con*, *supra* note 48, at 6-10; Porter, *What Disability Means*, *supra* note 82, at 126; *supra* note 271 and accompanying text.

³³² Waterstone, *Costs of Easy Victory*, *supra* note 4, at 588.

³³³ *Id.*; see also NARIO-REDMOND, *supra* note 98, at 324 (discussing importance of issue salience to policy change); Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1746-51 (2017); Michael Waterstone, *Backlash, Courts, and Disability Rights*, 95 B.U.L. REV. 833, 847-48 (2015) [hereinafter Waterstone, *Backlash*].

³³⁴ See NARIO-REDMOND, *supra* note 98, at 324; Siegel, *supra* note 333, at 1746-51; Waterstone, *Backlash*, *supra* note 333, at 838-41; Waterstone, *Costs of Easy Victory*, *supra* note 4, at 588.

³³⁵ See, e.g., William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 278-79 (2013) (discussing generative impacts of backlash, but also noting that it can be important for movements to manage potential for backlash).

discomfort, and perhaps even backlash. But it is also a project without which we are unlikely to see meaningful social equality change.

CONCLUSION

For years, biases against the disability community have remained remarkably stubborn—even as biases against other communities have been in flux. This Article suggests that one important cause of these continuing biases is likely the fact that many of the disability rights movement's potential constituents do not self-identify as disabled. Starting from the definition of disability encompassed within disability civil rights law, it argues that far more of those of us who qualify as disabled should claim a disability identity.

What would it mean for greater numbers of people to claim a disability identity? For the disability rights movement, such claiming has the potential to be transformational by challenging stereotypes on a large scale and disrupting long-standing conceptions linking disability inextricably to limitation. And for those who claim disability identity, such claiming also has the potential to be liberatory by offering a positive identity frame and space to push back on demands to closet and cover important parts of our lives.

Civil rights law thus offers us an opportunity to fundamentally reconceptualize disability—to decouple it from long-standing negative notions of intrinsic limitation and an inability to work. But that positive conception, already encompassed within civil rights law, will only have real power to affect disability biases to the extent it goes beyond the courtroom. This Article suggests that many of us have the power to play a role in that transformation through our individual choices of whether to claim for ourselves a disability identity or whether to continue to situate ourselves on the other side of the disability divide.