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## ARTICLES

### INTEGRATING ACCOMMODATION

ELIZABETH F. EMENS<sup>†</sup>

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*Courts and agencies interpreting the Americans with Disabilities Act (ADA) generally assume that workplace accommodations benefit individual employees with disabilities and impose costs on employers and, at times, coworkers. This belief reflects a failure to recognize a key feature of ADA accommodations: their benefits to third parties. Numerous accommodations—from ramps to ergonomic furniture to telecommuting initiatives—can create benefits for coworkers, both disabled and nondisabled, as well as for the growing group of employees with impairments that are not limiting enough to constitute disabilities under the ADA. Much attention has been paid to how the integration of diverse groups of people helps to ameliorate discriminatory attitudes through “contact.” But integrating people with disabilities also means integrating accommodations. These accommodations affect and benefit third parties in the workplace and thus shape attitudes toward both disability and the ADA. An understanding of third-party benefits is crucial to designing and disclosing accommodations in ways that will best promote the aims of the statute and the prospects of disabled people.*

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## INTRODUCTION

Consider the following scenario:

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

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

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

Design matters. An employee whose disability requires her to work from home for periods of time could be accommodated by periodically reassigning her tasks to a coworker, creating added burdens for the coworker. Or, alternatively, her accommodation request could lead her employer to create a broad-based telecommuting initiative that benefits multiple employees who wish to work from home. Likewise, an employee whose psychiatric impairment leads him to request

more concrete work assignments and more measured and constructive feedback could consume more of a supervisor's time, to the detriment of other workers. Or the process of designing this employee's accommodation could lead an employer to rethink and improve its supervisory practices more generally. These few examples gesture toward the many ways that accommodations can benefit third parties.

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

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

Yet accommodations, while rightly designed to benefit people with disabilities, have more benefits and more kinds of benefits for others than are typically recognized. Accommodations may benefit not only other disabled workers, but nondisabled coworkers, as well as the ever-growing group of the *sub-ADA disabled*—that is, those individuals who have impairments that are not substantially limiting enough to qualify

them for protection under the ADA.<sup>1</sup> One aim of this Article is to rectify this oversight by identifying third-party benefits across a range of accommodations and discussing ways that design and disclosure of accommodations affect the extent of their benefits to third parties.

Accommodations can, of course, impose costs on third parties, as well as conferring benefits on them, as the anecdote about the conference presentation suggests. The request for a description of the diagram helped audience members understand the diagram, but it may also have burdened some audience members who already understood the diagram (if any did) or who simply wanted the talk to move along more quickly (as some surely did). As an empirical matter, it is difficult to know whether the overall benefits of the accommodation outweigh the costs. This Article therefore remains agnostic on the question of whether particular accommodations, or even accommodations in general, are ultimately more beneficial—to people with disabilities or to the overall society—than they are costly. The findings of the ADA embrace multiple goals, including broad integrationist aims as well as efficiency aims, and courts have made clear that the benefits of accommodations need not exceed the costs.<sup>2</sup> Thus, the ADA does not require accommodations to be cost justified, for the employer or for society. Nonetheless, courts have relied on the language of costs and benefits when interpreting the ADA's accommodation requirement, and this Article therefore uses that language to identify a broad swath of considerations that have been previously overlooked in the analysis of accommodations.

The inattention to third-party benefits means they have been undertheorized. This Article thus provides a series of analytic tools to help scholars, policymakers, and employers recognize these benefits and analyze accommodations with such benefits in mind. It distinguishes between benefits that promote the general welfare and those that promote favorable attitudes toward disability and the ADA, emphasizing how the design and disclosure of accommodations can particularly help to promote the latter type. This analytical clarification

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<sup>1</sup> Cheryl Anderson has called this group the “‘not impaired enough’ plaintiffs.” Cheryl L. Anderson, “*Deserving Disabilities*”: *Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised To Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 85 (2000).

<sup>2</sup> See *infra* Part II.A (discussing the courts' interpretation of the reasonableness requirement and undue hardship defense as not requiring that benefits exceed costs); *infra* note 143 and accompanying text (discussing the multiple purposes, and particularly the integrative purpose, set forth in the statutory findings of the ADA).

leads to several proposals for policy and doctrine on accommodation. Administrative agencies charged with facilitating implementation of the ADA should try to encourage employers to recognize and promote these benefits, not simply because they are good for society at large, but because they are good for the success of the ADA and the integration of disabled people into the workplace. The EEOC should therefore revise its guidance on accommodations to encourage thoughtful disclosure of accommodations—subject to employee consent—and to highlight third-party benefits. The Job Accommodation Network (JAN)<sup>3</sup> should encourage employers to think about third-party benefits when designing accommodations. Courts, when using cost-benefit comparisons to decide whether accommodations are reasonable or impose an undue hardship, should also recognize that accommodations can have third-party (and second-party) benefits, as well as first-party benefits and costs and third-party costs. Finally, institutional policymakers should appreciate the possibility of third-party benefits when deciding whether to include disability in their diversity initiatives alongside race and sex.

This Article has five parts. Part I creates a framework for recognizing third-party benefits. This Part uses categories, diagrams, and examples to provide tools for seeing and enhancing such benefits. Part II shows that, although courts have interpreted the accommodation requirement to require a comparison of costs and benefits, courts and other entities have nonetheless overlooked the third-party benefits of accommodations in surprising ways. It then suggests some legal, political, and cultural reasons that benefits may be less salient than costs in discussions of the ADA. Part III considers whether third-party benefits should matter to discussions and decisions about accommodation. I argue that, while accommodations should be designed principally to facilitate the integration of people with disabilities, attending to the third-party benefits of accommodation furthers the ADA's integrationist project by promoting positive attitudes toward disabled people. Part IV discusses the implications of this analysis, highlighting ways that an appreciation of third-party benefits can affect legal analysis, agency guidance, and institutional policy on the implementation of the ADA. Finally, Part V identifies some concerns about focusing on third-party benefits—most importantly, that attending to third-

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<sup>3</sup> JAN is part of the Office of Disability Employment Policy of the U.S. Department of Labor. JAN's mission is "to facilitate the employment and retention of workers with disabilities." JAN, What Is JAN?, <http://www.jan.wvu.edu/english/whatis.htm> (last visited Feb. 15, 2008).

party benefits could mislead employers and courts into thinking that the aim of the ADA is to improve welfare for *everyone*, rather than to prohibit discrimination and encourage integration of *disabled people*. Though this concern is important, the success of the ADA will ultimately depend upon the attitudes of those who implement and live with the statute. Therefore, recognition of third-party benefits is critical to achieving the aims of the statute.

## I. IDENTIFYING THIRD-PARTY BENEFITS

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

*Cheaper by the Dozen*<sup>4</sup>

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

Courts and agencies interpreting the ADA have ignored the third-party benefits of accommodations, as I discuss in the next Part. Thus, these benefits have generally been overlooked and undertheorized. This Part therefore uses examples of workplace accommodations to identify types of third-party benefits and aspects of accommodations that create such benefits. Third parties include other disabled people, nondisabled people, and what I call the sub-ADA disabled.<sup>5</sup> After distinguishing between *usage* and *attitudinal* benefits of accommodation, I then expand the discussion to consider the various categories of usage benefits that accrue to third parties from accommodations, including material, physical, hedonic, relational, and, perhaps most interestingly, experimentation benefits. Some but not all of these third-party benefits can be internalized by employers, as I will discuss. I

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<sup>4</sup> FRANK B. GILBRETH, JR. & ERNESTINE GILBRETH CAREY, *CHEAPER BY THE DOZEN* 126 (1948).

<sup>5</sup> See *supra* text accompanying note 1.

conclude this Part by discussing how the design of accommodations affects whether they create benefits to third parties.

### A. A Basic Spectrum of Third-Party Benefits

We can imagine a spectrum with, on the right-hand side, accommodations with more third-party benefits, and on the left-hand side, those with fewer third-party benefits (if any). A ramp, for example, might go on the far right side of the spectrum, because it can be used, currently and in the future, by both disabled and nondisabled people (e.g., for suitcases and strollers).<sup>6</sup> On the far left, we might place a reader hired to read to a blind employee, because this accommodation's benefits are, at first glance, completely coterminous with that disabled individual's use of them.<sup>7</sup> Somewhere in the middle is perhaps the purchase of a reading machine that magnifies print or turns printed text into speech, which can be used by only one employee at a time but also can be used by other employees, now and in the future, when the person accommodated is not using the machine.<sup>8</sup>

**Figure 1: Basic Spectrum of Third-Party Benefits**



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

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

<sup>7</sup> Cf. 42 U.S.C. § 12111(9)(B) (defining "reasonable accommodation" to include "the provision of qualified readers or interpreters"); *Nelson v. Thornburgh*, 567 F. Supp. 369, 382 (E.D. Pa. 1983) (requiring readers for blind employees), *aff'd*, 732 F.2d 146 (3d Cir. 1984).

<sup>8</sup> Cf. 42 U.S.C. § 12111(9)(B) (defining "reasonable accommodation" to include the "acquisition or modification of equipment or devices").



accommodation can be seen or known about by others, to whom it may signal something positive).<sup>9</sup>

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

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

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

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

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

<sup>10</sup> See, e.g., Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22, 29-30 (1991); cf. JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 109, 125-33 (1983).

or improve overall supervision.<sup>11</sup> Or a business might include in its advertising the fact that it provides a reader for a blind employee. Perhaps, then, it is hard to imagine an accommodation that could never have a third-party benefit, at least of an expressive sort. Moreover, a highly visible ramp may create benefits for some, but costs for others, such as those who find it aesthetically unappealing or resent its presence for other reasons.<sup>12</sup> Such costs are always possible and make Pareto-optimality hard to achieve in this context. As noted, though, the aim here is not to show that benefits exceed costs, but rather to say that there are benefits that are not fully recognized or realized.

### B. *Usage Versus Attitudinal Benefits*

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

### C. *Second- Versus Third-Party Benefits*

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

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

<sup>12</sup> See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 480-94 (1992).

may also be second-party benefits. Indeed, as Michael Stein and others have pointed out, effective accommodations have a number of second-party benefits, such as reduced job turnover and absenteeism.<sup>13</sup> Moreover, if an accommodation increases morale or productivity for coworkers, then an employer may internalize those benefits.<sup>14</sup> In theory at least, employers should be able to pay employees less (or charge customers more) to the extent that their jobs (or products) offer more benefits. Even if transaction costs prevent immediate renegotiation of wages or prices, later pay raises or pricing might well adjust to reflect such benefits.

Even in a frictionless world, though, not all third-party benefits will be internalized, including some that are particularly relevant to the subject of this Article. For instance, improved attitudes toward people with disabilities or the ADA, the subject of Part III, are unlikely to be internalized by the employer.<sup>15</sup> Thus, as with public goods more generally, employers may not have an incentive to create such benefits. Note also that the line between second- and third-party benefits is

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

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

<sup>15</sup> However, improved attitudes toward people with disabilities might improve teamwork or morale, and thus increase productivity.

not always easy to draw. For example, as Stein observes, the benefits to society of integrating people with disabilities—such as a societal culture of productivity encouraged by increased employment levels and self-sufficiency among people with disabilities generally—can help to create better labor pools, which may ultimately benefit employers.<sup>16</sup> These are benefits that arise from effective accommodations in general, rather than from any particular accommodations. For the purposes of this Part, it is not important to determine which third-party benefits will be internalized. The aim here is to identify the ways that accommodations can have third-party benefits and to outline key categories of such benefits.

#### D. *Types of Third-Party Usage Benefits*

Accommodations positively affect workplaces and other environments in a variety of ways, as several commentators have noted.<sup>17</sup> This Part outlines specific types of usage benefits in order to help make visible their range and significance: (1) material benefits, (2) physical benefits, (3) hedonic benefits, (4) relational benefits, and (5) experimentation benefits. I will briefly discuss the first three categories, which are relatively self-explanatory and continuous with the preceding discussion, before turning to the last two categories. These five categories are not discrete, but overlapping.

**(1) Material.** Accommodations may materially benefit others in the workplace by making them more productive or reducing their workload. New equipment or an office redesign that makes lifting

<sup>16</sup> Stein, *supra* note 6, at 106-07.

<sup>17</sup> See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE 84-86 (1990) (discussing, for example, the benefits to all students if a classroom teacher were to accommodate a deaf student by teaching all students sign language and teaching in sign and spoken language at the same time); Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 223-24 (1994) (noting spillover benefits in public transportation systems, factories, and sidewalk-street interfaces); Stein, *supra* note 6, at 104-08 (discussing second- and third-party benefits, as explained *supra* notes 13-16); see also *infra* notes 26, 74 (discussing important work by Peter Blanck and colleagues on second- and third-party benefits). Douglas Leslie asserts that in a small survey he found only one case in which an accommodation could have benefited multiple employees, but his example—a challenge to an employer's refusal to hire employees who failed a nerve conduction test—does not come from a failure to accommodate case. Douglas L. Leslie, *Accommodating the Employment Disabled*, 17 LAB. LAW. 143, 151 (2001). Leslie rejects as irrelevant to accommodation analysis the potential third-party benefits to future employees with the same disability, such as future asthma sufferers after an employer grants one accommodation to an asthma sufferer, without considering the relevance of the doctrinal focus on cost-benefit balancing. *Id.* at 151 n.13.

easier for an employee with a disability may make lifting easier for everyone.<sup>18</sup> Taller dividers on office cubicles to help one employee with a cognitive or psychiatric disability to concentrate may have the same benefit for others, more or less disabled.<sup>19</sup> And, of course, ramps and elevators make it easier for anyone to move heavy objects or objects on wheels.

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

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

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

<sup>20</sup> Cf. *Webb v. Clyde L. Choate Mental Health & Dev. Ctr.*, 230 F.3d 991, 994, 998-99 (7th Cir. 2000) (discussing requests by an asthmatic employee for, inter alia, a ventilated office and prior notice of use of chemicals, and ultimately dismissing the case on the basis that, inter alia, the plaintiff is not substantially limited in the major life activity of working); *Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200, 207, 209 (E.D.N.Y. 1997) (declining to award summary judgment to an employer, on the grounds of lack of disability or insufficient evidence of a hostile work environment, in a case involving an asthmatic plaintiff who had been promised a smoke-free work environment). By contrast, in a move that is relevant to the upcoming Section on designing accommodations, an accommodation that involves merely transferring the asthmatic employee to another work space with less allergens may create third-party costs by requiring another coworker to work in the more allergenic space. Cf. *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634-35 (6th Cir. 1998) (discussing an employee's request for a transfer to an allergen-free work area and rejecting this request as too vague to be reasonable or as unavailable). Also, of course, a no-smoking rule may be a health benefit to all, but it is nonetheless a hedonic cost to those who wish to smoke, as the allegedly harassing comments in the *Hendler* case reflect. See 963 F. Supp. at 202.

minor pain or difficulty with particular activities; there may also be a disproportionate benefit to certain groups, such as older workers, who are more likely to develop disabilities and who may also be more likely to fall into this sub-ADA grouping.<sup>21</sup> Ergonomic furniture and office design also benefit coworkers by easing strain and preventing injuries.<sup>22</sup> This is well known to the many academics who have sought assistive devices to prevent the worsening of mild forms of repetitive stress injuries, which, under *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, are unlikely to constitute ADA disabilities even if they become more serious.<sup>23</sup>

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

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

<sup>22</sup> According to Beth Loy and John Greer,

Ergonomics is the science of fitting jobs to people. The discipline encompasses a body of knowledge about physical abilities and limitations as well as other human characteristics that are relevant to job design. Essentially, ergonomics is the relationship between the worker and the job and focuses on the design of work areas to enhance job performance. Ergonomics can help prevent injuries and limit secondary injuries as well as accommodate individuals with various disabilities, including those with musculoskeletal disorders . . .

Beth Loy & John Greer, JAN, *Ergonomics in the Workplace: A Resource Guide*, <http://www.jan.wvu.edu/media/ergo.html> (last visited Feb. 15, 2008).

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

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

<sup>25</sup> See *infra* Part I.F (discussing how the design of accommodations can affect the extent of third-party benefits as opposed to costs).

policies and practices: training in management skills for supervisors, better clarification of work-team members' talents and responsibilities, or the creation of clearer and more thoughtful policies about violence in the workplace.<sup>26</sup> Accommodations for concentration problems—such as quiet, uninterrupted time to complete tasks, or the option to wear music headphones while doing noninteractive work—may also be useful to nondisabled (and to sub-ADA-disabled) employees. Changes such as these may make employees not only more productive, but more content.

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

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

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

*Id.* at 349. See also Helen A. Scharzt et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 MISS. L.J. 917, 943 (2006) (concluding from an empirical study that although most accommodation costs are low, the resultant benefits are relatively high).

sented by a disabling environment.<sup>27</sup> There is also research that suggests potential cost savings to retaining an employee rather than going through the process of finding and training a new employee.<sup>28</sup> Accommodations may help retention by allowing a particular employee to remain in the workplace, and, some have argued, may create particularly loyal employees.<sup>29</sup> The administrative burdens of hiring new employees translate not only into costs to employers, but also create potential burdens that fall directly on other employees who must help to find, train, and build relationships with new employees.<sup>30</sup> Retaining an employee by accommodating her can avoid such costs to coworkers.

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

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

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

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

<sup>29</sup> See, e.g., RILEY, *supra* note 13, at 126 (quoting a publicist for Sears on the "element of loyalty" that can be created by accommodating new or existing employees); see also *supra* note 28 (quoting relevant findings by Scharztz, Hendricks & Blanck).

<sup>30</sup> See generally *supra* note 28 and accompanying text.



nologies, scanners, large print books and readers, books on tape, sock sorters, and the phonograph.<sup>31</sup>

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

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

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

<sup>32</sup> See Stephen Jay Gould & Elisabeth S. Vrba, *Exaptation—A Missing Term in the Science of Form*, 8 PALEOBIOLOGY 4, 6 (1982).

<sup>33</sup> *Id.* at 8.

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

<sup>35</sup> Thanks to Ben Liebman for this point.

<sup>36</sup> See, e.g., MONTA Z. BRIANT, *BABY SIGN LANGUAGE BASICS* (2004); JOSEPH GARCIA, *SIGN WITH YOUR BABY* 18 (1999).

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

In the workplace, accommodations may lead to changed policies and practices that have wider applicability. For instance, accommoda-

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<sup>37</sup> See, e.g., Patricia Silver, Andrew Bourke & K.C. Strehorn, *Universal Instructional Design in Higher Education: An Approach for Inclusion, EQUITY & EXCELLENCE IN EDUC.*, Sept. 1998, at 47, 49 (describing the views of UID held by university professors, admittedly UID-friendly enough to be involved in this pilot study, who thought that "their diverse teaching methods may benefit all students" and that "they have been informed of the diverse learning styles by the presentation of diverse learners in their classes (e.g., students with learning disabilities)"); see also Jolly-Ryan, *supra* note 34 (discussing Jolly-Ryan's work urging law professors to improve their teaching methods for all students by accommodating disabled students). Exciting work in a similar vein is the effort, spearheaded by Martha Minow, to forge the legal and technological innovations necessary to produce textbooks and other curricular materials in a format that is accessible to children with a wide range of disabilities. For a description of this effort, see Emily Newburger, *Book Smart*, HARV. L. BULL., Summer 2004, available at [http://www.law.harvard.edu/alumni/bulletin/2004/summer/feature\\_5-1.php](http://www.law.harvard.edu/alumni/bulletin/2004/summer/feature_5-1.php). See also CAST Universal Design for Learning, National Center on Accessing the General Curriculum (NCAC), <http://www.cast.org/policy/ncac/index.html> (last visited Feb. 15, 2008) (describing the NCAC, which seeks to "create practical approaches for improved access to the general curriculum by students with disabilities").

<sup>38</sup> See The Center for Universal Design, About UD: Universal Design Principles, [http://www.design.ncsu.edu/cud/about\\_ud/udprincipleshtmlformat.html](http://www.design.ncsu.edu/cud/about_ud/udprincipleshtmlformat.html) (last visited Feb. 15, 2008) (defining Universal Design as "the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design," and setting out seven principles for Universal Design: "equitable use"; "flexibility in use"; "simple and intuitive"; "perceptible information"; "tolerance for error"; "low physical effort"; and "size and space for approach and use"); see also Ronald L. Mace, Founder, Ctr. for Universal Design, A Perspective on Universal Design, Presentation at Hofstra University for Designing for the 21st Century: An International Conference on Universal Design (excerpt from remarks given June 19, 1998), available at [http://www.design.ncsu.edu/cud/about\\_us/usronmacespeech.htm](http://www.design.ncsu.edu/cud/about_us/usronmacespeech.htm) ("I have never seen a building or facility I would say is universally usable. I don't know that it's possible to create one. . . . It's not that there's a weakness in the term. We use that term because it's the most descriptive of what the goal is, something people can live with and afford.").

<sup>39</sup> See Dorothy Kerzner Lipsky & Alan Gartner, *The Third Wave of School Reform, in INCLUSION AND SCHOOL REFORM*, *supra* note 27, at 235, 235-41; see also Personal Communication with Shael Polakow-Suransky, Chief Academic Officer, Empowerment Sch., N.Y. City Dep't of Educ., in N.Y., N.Y. (Oct. 17, 2006).

tions for employees with psychiatric disabilities often involve modifications of schedules or workplace practices or policies, as opposed to changes in the physical environment.<sup>40</sup> These modifications operate as experiments in what is possible or desirable in the workplace. For instance, giving a disabled employee the option of flextime—to work late one day in order to leave work early the next day for a therapy appointment—may reveal flextime to be feasible for many. In addition, as noted earlier, the presence of mental disability may require better management, which can lead to improved institutional processes.<sup>41</sup>

Note that experimenting with processes may also challenge established conventions or norms. For instance, in a context far from the workplace, Simi Linton tells of a blind friend who is permitted to touch works of art at the Museum of Modern Art, wearing rubber gloves—a practice that is at once controversial among curators and yet linked to larger trends in conceptual art and curatorial practices that emphasize experiential appreciation of art.<sup>42</sup>

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<sup>40</sup> It is difficult to determine precisely which types of accommodation for psychiatric disabilities are most common, since, as others have noted, there is no consistent mode of categorization of accommodations for psychiatric disabilities, making it difficult to compare studies of these accommodations to one another. See Kim L. MacDonald-Wilson et al., *An Investigation of Reasonable Workplace Accommodations for People with Psychiatric Disabilities: Quantitative Findings from a Multi-Site Study*, 38 COMMUNITY MENTAL HEALTH J. 35, 36 (2002). But it seems fair to say that accommodations for people with mental illness more often involve changes to policies or practices. Cf. 42 U.S.C. § 12111(9)(B) (2000) (defining “reasonable accommodation” as including “job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . appropriate adjustment or modifications of examinations, training materials or policies, . . . and other similar accommodations for individuals with disabilities”); Stein, *supra* note 6, at 88 (noting that “[r]easonable accommodations” can involve not only the physical alteration of the workplace, but also “the alteration of the way in which a job is performed”). For instance, three representative accommodations requested for psychiatric disabilities are (1) modifying an employee’s schedule—e.g., allowing an employee to leave one hour early one day a week for therapy; (2) changing supervisory practices—e.g., allowing a job coach to participate in meetings with supervisors, or modifying how a supervisor gives criticism or assignments; and (3) changing where or how an employee works—e.g., allowing an employee to telecommute.

<sup>41</sup> See *supra* note 26 and accompanying text (discussing relevant findings by Sturm and Gadlin, among others); see also *infra* Part IV.B (discussing Gates’s work on this topic in more detail).

<sup>42</sup> See SIMI LINTON, *MY BODY POLITIC: A MEMOIR* 221 (2006) (noting that “hands-on” art has been a recent movement and has encouraged the view that physical engagement with art “results in enhanced learning”); see also Nick Paumgarten, *Do Not Touch*, NEW YORKER, Nov. 27, 2006, at 90 (describing how visually-impaired museum visitors are occasionally encouraged to touch the art, which enhances their experience). Even more controversially, as Linton notes, in 2000 a Pussycat Club in East Sussex, England, requested a variance from its no-touching policy to permit blind patrons

(c) *Contingent Versus Automatic Benefits.* Experimentation benefits highlight an interesting wrinkle to the third-party benefits of some accommodations: these benefits may not automatically accrue to third parties. Rather, third-party benefits are often contingent on intervening steps—on the success of the experiment and an employer's (or sometimes a coworker's) recognition of that success. If accommodation experiments are successful from the employer's perspective—because, for example, the accommodations reduce costs or increase productivity—the employer may permit other employees (disabled, nondisabled, or sub-ADA-disabled) to avail themselves of these modified arrangements.<sup>43</sup> For instance, a telecommuting initiative—an accommodation that will be discussed in more detail later—can reduce the costs of office space and give employers and employees efficiency gains by reducing time spent commuting.<sup>44</sup>

Alternatively, experiments prompted by accommodation may benefit third parties if the experiments give information to coworkers about what is possible in the workplace. This is akin to an argument made by Ruth O'Brien that the ADA has significant potential to make the workplace far more tailored to individuals, in part because the interactive process for disabled people will reveal information about how workplaces can or could operate.<sup>45</sup> This additional information may give coworkers ideas for improvements or leverage to negotiate

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

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

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

<sup>43</sup> See Stein, *supra* note 6, at 105-06 (citing BLANCK, *supra* note 14).

<sup>44</sup> See *infra* Part III.B.

<sup>45</sup> See RUTH O'BRIEN, *BODIES IN REVOLT* 2, 135 (2005) (arguing that the ADA's employment provisions "create a model for interjecting a notion of workplace need that is based on our individuality").

with employers. The current EEOC guidelines on disclosure of accommodations inhibit this kind of information transmission, however, as I discuss in Part IV.

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

#### E. *Why Haven't They Done It Already?*

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

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

Status quo bias and system justification may support existing workplace practices.<sup>47</sup> In Martha Minow's words, we tend to assume

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

<sup>47</sup> See, e.g., Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1119 (2006) (discussing, as the focus of "system justification theory," "the motive to defend and justify the social status quo, even among those who are seemingly most disadvantaged by it"); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228-29 (2003) (explaining "status quo bias" as the tendency of "individuals . . . to prefer the present state of the world to alternative states, all other things being equal"); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62

that “the status quo [is] good, natural, and freely chosen.”<sup>48</sup> Individual cognitive shortcomings can be magnified rather than corrected by firm structure, and a firm’s mechanisms for coping with individual shortcomings can lead to pathologies of their own.<sup>49</sup> Organizations may develop routines to facilitate smooth operations, but these useful structures can have a “dark side”<sup>50</sup>: for instance, they may lead decision makers to approach problems with a particular decision frame in mind, and thus cause them to ignore new or unfamiliar information and to underestimate risks.<sup>51</sup> Changes prompted by disability may well involve changes to the basic environment or assumptions of a workplace, changes that might not otherwise come readily to mind. As John Donohue has observed, responding in another context to the claim that if a practice is efficient, it would have been adopted already, “The human mind finds it far easier to make the best out of the current state of the world than it does trying to conceive all of the ways in which the state of the world itself can be altered.”<sup>52</sup>

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

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

<sup>48</sup> Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 55 (1987).

<sup>49</sup> See, e.g., Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decision-making, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 417-20 (2006).

<sup>50</sup> See generally Diane Vaughan, *The Dark Side of Organizations: Mistake, Misconduct, and Disaster*, 25 ANN. REV. SOC. 271 (1999).

<sup>51</sup> See Bamberger, *supra* note 49, at 420-23.

<sup>52</sup> John J. Donohue III, *Commentary, Opting for the British Rule, or If Posner and Shavell Can’t Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1115 (1991). For some examples of where markets fail to produce benefits that would be internalized in the environmental context, see generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (forthcoming 2008).

For example, think of curbs, which, in the absence of curb cuts, require everyone to step up. This is a cost for people with minimally bad knees; in fact, it is some cost for everyone.<sup>53</sup> But society may notice the cost, and devise the solution of curb cuts, only when faced with people for whom the costs are truly significant.

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

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

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

Think in the public accommodations context of the difference between disabled parking spaces and curb cuts. Both benefit wheelchair users, but parking spaces are apparently zero-sum, while curb cuts can be used by everyone and, once constructed, create costs for few.<sup>54</sup> In the language of public goods, parking spaces are rivalrous while curb cuts are (relatively) nonrivalrous. Similarly, writing about parent-centered policies, Mary Anne Case contrasts those initiatives that benefit many with those that favor parents to the detriment of nonparents:

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

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

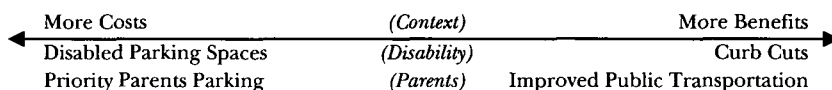
<sup>54</sup> Many people have made the point about curb cuts, including, for example, Mashaw, *supra* note 17, at 223-24. On the other hand, curb cuts may create costs for people with vision impairments, who cannot feel where the curb ends (though ridges can help with this); they may also invite the nuisance of cyclists cycling on sidewalks (though the curb cuts are surely a boon to the cyclists).

parking in shopping malls for pregnant women and parents with small children (a few do already), and the federal government could offer free or discounted admission to national parks, monuments, and museums so that moms and dads could always afford to accompany their children.”<sup>55</sup>

“Not only,” Case observes, “does the former proposal sound like an equal right and the latter like a special right, the former is coalition building, the latter has real zero-sum potential.”<sup>56</sup>

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

**Figure 2: An Expanded Spectrum from Third-Party Costs to Benefits**



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

<sup>55</sup> Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI-KENT L. REV. 1753, 1770 (2001) (footnote omitted) (quoting Joan C. Tronto, *Who Cares? Public and Private Caring and the Rethinking of Citizenship*, in WOMEN AND WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE 65 (Nancy J. Hirschmann & Ulrike Liebert eds., 2001), and Sylvia Ann Hewlett & Cornel West, *Caring for Crib Lizards*, AM. PROSPECT, Jan. 1-15, 2001, at 17, 19).

<sup>56</sup> *Id.*

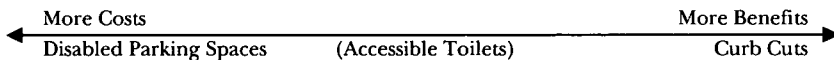
<sup>57</sup> For an interesting discussion of reports on how the broader public informally enforces the rules restricting designated parking spaces to people with disabilities, see Geoffrey P. Miller, *Norm Enforcement in the Public Sphere: The Case of Handicapped Parking*, 71 GEO. WASH. L. REV. 895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

<sup>58</sup> See J. Bichard, J. Hanson & C. Greed, *Away from Home (Public) Toilet Design: Identifying User Wants, Needs and Aspirations*, in DESIGNING ACCESSIBLE TECHNOLOGY 227 (John Clarkson et al. eds., 2006) (discussing debates in Britain surrounding the use of disabled restrooms by nondisabled people); VivaCity2020 Publications, <http://www.vivacity2020.eu/publications/> (last visited Feb. 15, 2008) (providing “Toilet Paper



relatively less fraught, though a measure of uncertainty surrounds the question—as indicated, for instance, by an episode of Randy Cohen’s call-in radio program, *The Ethicist*, dedicated to the topic.<sup>59</sup> The norm seems contested in the United States, but generally more favorable toward nondisabled people using accessible stalls than in Britain.<sup>60</sup>

**Figure 3: A Spectrum of Public Accommodations Examples**



If norms invite everyone to use these toilets, then nondisabled people may benefit from roomier stalls, particularly if they have luggage or children in tow. But if these toilets are used only by people with disabilities, their presence may mean fewer available restrooms, longer waits, and possibly even smaller (inaccessible) stalls. One difficult question, though, is whether use of these stalls by the broader public interferes with their use by people with disabilities. Though in principle most people would presumably defer to a person with a dis-

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Newsletters” discussing the same); see also *infra* note 216 and accompanying text (quoting a British wheelchair user’s complaint on the subject).

<sup>59</sup> *All Things Considered: The Ethicist: When Imperatives Collide: Handicap Bathrooms* (NPR radio broadcast Jan. 22, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5167453>.

<sup>60</sup> A caller to *The Ethicist* indicated that she would ordinarily never “use the handicapped stall,” and would instead “wait for one of the regular stalls,” but on one occasion she was in a big hurry, the “regular” restroom was overcrowded, and she didn’t see “any handicapped people or any families,” so she used the “handicapped-slash-family restroom” in the hall. *Id.* Cohen then draws a contrast to parking spaces, which drivers leave for a long or unknown amount of time, and which are legally designated as exclusively for the use of people with disabilities. *Id.* With a bathroom stall, “no one is explicitly forbidden to use it,” and “even if you are a person that uses a wheelchair, you can often wait a moment or two.” He therefore concludes that “if you actually see a handicapped person, then you should defer to them” because “you’ve got multiple stalls or multiple restrooms, but they’ve just got one,” but “unless you actually see someone in a wheelchair waiting to use it,” then you can use any stall. *Id.* Interestingly, in a follow-up program, the one letter they chose to read considered the subject too trivial to be an ethical dilemma: “I know you were being humorous with your discussion of the use of the family bathroom and public restrooms as urgent, but shouldn’t *The Ethicist* be addressing much more ethically urgent issues?” *All Things Considered: Letters: Job Safety, Washroom Ethics* (NPR radio broadcast Feb. 4, 2006) (relating a letter from Joan Mittendorf), available at <http://www.npr.org/templates/story/story.php?storyId=5189915>.



coworkers from performing the essential functions of their jobs.<sup>64</sup> Because coworkers would have additional burdens, this accommodation presumably creates third-party costs.

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

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

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

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

<sup>65</sup> See *supra* note 22 (discussing how ergonomics not only accommodates individuals with disabilities, but also helps prevent primary and secondary injuries).

<sup>66</sup> See *supra* note 28 (quoting relevant findings by Scharztz, Hendricks & Blanck).

<sup>67</sup> See *supra* Part I.A (discussing the terms generalizability and durability).

more people than zero-sum accommodations.<sup>68</sup> But even apparently zero-sum accommodations can benefit third parties. As discussed, their use can be allocated to give priority to employees with disabilities, while also permitting other users to benefit when the accommodations are not being used by those who require them. One interesting question that deserves empirical study is whether instances of reverse integration—such as including nondisabled people in contexts principally populated by people with disabilities, or allowing nondisabled people some limited access to the scarce resources of unusually beneficial disability accommodations (such as touching art in museums)—could counteract any of the stigma of disability.<sup>69</sup>

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

## II. NEGLECTED BENEFITS

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

*Vande Zande v. Wisconsin Department of Administration*<sup>70</sup>

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

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

<sup>70</sup> 44 F.3d 538, 542-43 (7th Cir. 1995) (emphasis added).

One of the oft-stated aims of the ADA is to remedy “benign neglect.”<sup>71</sup> Judge Calabresi draws upon this idea in the classic accommodation case of *Borkowski v. Valley Central School District*: “To avoid unfounded reliance on uninformed assumptions,” Calabresi observes, judges cannot simply “rely on intuition” about what are essential functions of a job or (un)reasonable accommodations.<sup>72</sup> Whether disability discrimination consists principally of benign neglect, animus, stereotyping, or something else, is a contested point. For my purposes, the phrase *benign neglect* gestures toward a different point altogether.

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

### A. *Overlooking the Benefits*

The ADA requires employers to make “reasonable accommodations” for employees with disabilities, unless those accommodations “would impose an undue hardship” on the employer.<sup>73</sup> As this Part will

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

<sup>72</sup> 63 F.3d 131, 140 (2d Cir. 1995).

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

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

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

[T]he term “discriminate” includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered

show, although key court decisions have interpreted “reasonable[ness]” and “undue hardship” in terms of costs and benefits, these decisions—as well as important agency documents and resources—have overlooked the third-party benefits of accommodations in striking ways.

Accommodations are not nearly as costly as one might expect. Work by Peter Blanck, Helen Scharztz, and others indicates that most accommodations cost little or nothing.<sup>74</sup> In addition, though employers may expect accommodations to be costly,<sup>75</sup> follow-up interviews have revealed that, in hindsight, employers often thought that the benefits of accommodations exceeded their costs.<sup>76</sup> (And of course many employees with disabilities do not require accommodation at all.<sup>77</sup>)

Nonetheless, courts and other entities frequently characterize accommodations as costly to employers (and sometimes to coworkers) and beneficial only to the disabled employee for whom they are designed.<sup>78</sup>

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entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . .

*Id.* § 12112(b), (b) (5) (A).

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

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

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

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

<sup>78</sup> See *infra* notes 80-112 and accompanying text (discussing key cases). Seth Harris has rightly noted the emphasis on costs in *Barnett*, before going on to show the potential first- and second-party benefits of accommodating in that case. See Harris, *supra*

(1) **Courts.** What makes an accommodation “reasonable” and not an “undue hardship” is murky business. The courts have given some content to these terms, almost entirely overlooking third-party benefits in the process.

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

The opinion in the foundational accommodation case *Vande Zande v. Wisconsin Department of Administration*<sup>80</sup> slips between discussing the benefits of accommodation as if they accrue to just one indi-

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note 13, at 178-79 (observing that in *Barnett* Justice Breyer neglects to discuss “the costs of failing to accommodate” Barnett, such as the benefits to the employer as well as Barnett of accommodation (emphasis added)). Harris further notes that

reading *Barnett*’s silence to suggest that the benefits of an accommodation are not relevant would amount to treating Robert Barnett and, by extension, all workers with disabilities as costs to be avoided rather than economic contributors to be valued. The desire to change this stereotype was an important motivation when Congress enacted the ADA.

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

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

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

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

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

<sup>80</sup> 44 F.3d 538 (7th Cir. 1995). For a thoughtful discussion of the *Vande Zande* opinion and the numerous ways in which it fails to compare costs and benefits adequately, see Cass Sunstein’s contribution to the Special Issue Commemorating Twenty-Five Years of Judge Richard A. Posner, *Cost-Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895 (2007).

vidual, and discussing benefits as if they could redound to multiple disabled people. Vande Zande was a program assistant to the state's housing division, a job involving mostly clerical duties.<sup>81</sup> She was paralyzed from the waist down, causing her to suffer pressure ulcers that sometimes required her to stay at home for several-week periods.<sup>82</sup> The state had provided several accommodations, including supplying backup so she could leave for medical appointments, paying to have the bathrooms modified so she could use them, and buying adjustable furniture for her.<sup>83</sup> The two disputed accommodation issues in the case were the employer's failure to permit her to telecommute and to provide computer equipment to enable her to do so, and the employer's refusal, while the office building was still under construction, to alter the design of the kitchenette on her floor to install the counter two inches lower than planned (at a cost of \$150) so that she could use it rather than using the bathroom sink for activities such as washing out her coffee cup.<sup>84</sup> In an opinion by Judge Posner, the Seventh Circuit concluded that a telecommuting accommodation was *per se* unreasonable because it interfered with teamwork and direct supervision, and that the harm involved in using the different sink was merely stigmatic and therefore too insignificant to warrant mandatory accommodation.<sup>85</sup>

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

<sup>81</sup> *Vande Zande*, 44 F.3d at 544.

<sup>82</sup> *Id.* at 543.

<sup>83</sup> *Id.* at 544.

<sup>84</sup> *Id.* at 544-46.

<sup>85</sup> *Id.* at 545-46.

<sup>86</sup> See 42 U.S.C. § 12112(b)(5)(A) (2000) (defining "discriminate" to mean "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee").

<sup>87</sup> See *id.* § 12111(10)(A) ("The term 'undue hardship' means an action requiring significant difficulty or expense, when considered in light of [several enumerated factors].").

<sup>88</sup> *Vande Zande*, 44 F.3d at 542.



term would be superfluous if it meant only “effective,”<sup>89</sup> an interpretation the Supreme Court subsequently endorsed.<sup>90</sup> Though he thought quantifying costs and benefits would not always be necessary, and the cost “slightly” exceeding the benefit did not make an accommodation unreasonable, he said, “at the very least, the cost could not be disproportionate to the benefit.”<sup>91</sup>

For undue hardship, the statute provides a definition—“an action requiring significant difficulty or expense”<sup>92</sup>—but, unsurprisingly, offers incomplete guidance on its application.<sup>93</sup> Posner noted that the “financial condition of the employer is only one consideration” under the statute, and thus concluded that “undue” must be interpreted to mean that the expense is undue in relation to the resulting benefit, as well as to the employer’s resources.<sup>94</sup>

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

So it seems that costs enter at two points in the analysis of claims to an accommodation for a disability. The employee must show that the accommodation is reasonable in the sense that it is both efficacious and proportional to costs. Even if this *prima facie* showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer’s financial survival or health.<sup>95</sup>

Posner’s emphasis is thus on the *costs*—which “*enter at two points in the analysis of claims to an accommodation.*”<sup>96</sup>

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

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<sup>89</sup> *Id.*

<sup>90</sup> See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 399-402 (2002) (rejecting the argument that “reasonable” simply means “effective”).

<sup>91</sup> *Vande Zande*, 44 F.3d at 542.

<sup>92</sup> 42 U.S.C. § 12111(10)(A).

<sup>93</sup> See *infra* Part IV.C (discussing the relevance of third-party benefits to the undue hardship analysis).

<sup>94</sup> *Vande Zande*, 44 F.3d at 543 (interpreting 42 U.S.C. § 12111(10)(B)(ii)–(iii)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (emphasis added).

required to expend enormous sums in order to bring about a trivial improvement in the life of *a* disabled employee.”<sup>97</sup> And when he first introduces the topic of undue hardship, he also speaks in terms of a single employee benefiting from accommodation: “We must ask, ‘undue’ in relation to what? Presumably . . . in relation to the benefits of the accommodation to *the disabled worker* as well as to the employer’s resources.”<sup>98</sup> But elsewhere in the opinion, he speaks as if benefits might accrue to many disabled employees: “[T]he function of the ‘undue hardship’ safe harbor . . . is to excuse compliance by a firm that is financially distressed, even though the cost of the accommodation to the firm might be less than the benefit to disabled *employees*.”<sup>99</sup>

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

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

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

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

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

*Id.* at 542-43.

<sup>98</sup> *Id.* at 543 (emphasis added).

<sup>99</sup> *Id.* (emphasis added).

<sup>100</sup> *Id.* at 546.

<sup>101</sup> 63 F.3d 131 (2d Cir. 1995).

*Borkowski* involved an elementary-school library teacher who was denied tenure because she had difficulties maintaining classroom discipline.<sup>102</sup> As a result of neurological damage sustained during an automobile accident, Borkowski had trouble with multiple stimuli due to concentration and memory problems.<sup>103</sup> Her proposed accommodation was a teacher's aide to help with classroom discipline.<sup>104</sup> The Second Circuit held that such an accommodation was not necessarily unreasonable.<sup>105</sup>

Calabresi's opinion shows a more nuanced attention to benefits than Posner's. For one thing, Calabresi pauses to note the obvious point that benefits to the disabled employee who requested the accommodation (first-party benefits), and not just benefits to the employer (second-party benefits), are relevant to the cost-benefit analysis.<sup>106</sup> That is, he emphasizes that accommodations do not need to be cost-justified from the employer's perspective.

In addition, at one point in the opinion, Calabresi seems implicitly to acknowledge the possibility of benefits to multiple individuals. In describing undue hardship as a "relational" term, like reasonable accommodation, Calabresi explains that undue hardship "looks not merely to the costs that the employer is asked to assume, but also to the benefits to others that will result,"<sup>107</sup> perhaps implying that more than one employee could benefit from an accommodation, and thus suggesting that benefits to others could matter to the analysis of reasonableness or undue hardship.<sup>108</sup>

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<sup>102</sup> *Id.* at 134.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 140.

<sup>105</sup> *Id.* at 141.

<sup>106</sup> See *id.* at 138 n.3 ("In evaluating the costs and benefits of a proposed accommodation, it must be noted that Section 504 does not require that the employer receive a benefit commensurate with the cost of the accommodation.").

<sup>107</sup> *Id.* at 139 (emphasis added).

<sup>108</sup> Judge Newman, in his concurrence, also speaks in terms of "many disabled persons" benefiting from accommodation, but read in context he does not seem to be addressing the possibility of a single accommodation benefiting more than one employee. Newman interprets Posner's position in *Vande Zande* as saying that "an accommodation is not reasonable, even if would it enable many disabled persons to become employed, if the aggregate cost of making it at numerous installations exceeds the costs that would result if these disabled persons were not employed." *Id.* at 146 (Newman, J., concurring) (emphasis added). Here, Newman is speaking about Posner's comment that the statute aims to save public money by reducing welfare dependency (and interpreting it incorrectly, I think, though not without basis); his reference to "many disabled persons" might seem to suggest the possibility of an accommodation helping more than one person, but his phrase "numerous installations" perhaps qualifies that, suggesting that he means only

But like *Vande Zande*, *Borkowski* does not actually take third-party benefits into account when analyzing reasonableness or undue hardship. Nor do cases in other circuits that follow their reasoning.<sup>109</sup> Calabresi's oversight in this regard may be most surprising, given his more careful discussion of types of benefits. It is especially notable, then, that he does not engage the issue of which (or whose) benefits matter.

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

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

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that the same accommodation could be implemented multiple times, each time for a different disabled employee, by different employers.

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

<sup>110</sup> 535 U.S. 391, 403 (2002).

always internalize costs to coworkers, and therefore thought that the reasonableness requirement must take them into account:

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

The Court reached this conclusion without even acknowledging the possibility that an accommodation could have second-party benefits, as Seth Harris has noted, or that it could have third-party benefits, for disabled or nondisabled others.<sup>112</sup>

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

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

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<sup>111</sup> *Id.* at 400-01.

<sup>112</sup> See *supra* note 78 (discussing Harris's commentary on *Barnett*).

<sup>113</sup> See EEOC, EEOC NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002) [hereinafter EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION], available at <http://www.eeoc.gov/policy/docs/accommodation.html>; see also *infra* notes 120, 182, and accompanying text (discussing the EEOC's *Enforcement Guidance on Reasonable Accommodation*).

<sup>114</sup> See, e.g., EEOC, THE AMERICANS WITH DISABILITIES ACT: A PRIMER FOR SMALL BUSINESSES (2004), <http://www.eeoc.gov/ada/adahandbook.html#reasonable>; EEOC, SMALL EMPLOYERS AND REASONABLE ACCOMMODATION (1999), <http://www.eeoc.gov/facts/accommodation.html>; EEOC, YOUR RESPONSIBILITIES AS AN EMPLOYER (2005), <http://www.eeoc.gov/facts/ada17.html>; JAN, EMPLOYERS' PRACTICAL GUIDE TO REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT (n.d.), <http://www.jan.wvu.edu/Erguide/Erguide.pdf>; JAN, Accommodation Toolbox, <http://www.jan.wvu.edu/links/#Tool> (last visited Feb. 15, 2008).

ployee requesting accommodation.<sup>115</sup> Any exceptions highlight the possible benefits to employers alone.<sup>116</sup> Nothing that I have found recognizes that certain accommodations have *third-party* benefits that are not benefits to employers. Nor do these resources mention that accommodations may be designed to have more or fewer third-party benefits.

### B. *Why Benefits Are Not Salient*

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

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

First, only the ADA imposes on employers an express obligation to “accommodate” and, through the regulations, requires them to discuss such accommodations with employees. Since its passage, the ADA has been the subject of a debate over whether it is different from other antidiscrimination legislation—in particular, Title VII’s protection of race and sex.<sup>117</sup> Both sides in this debate have missed an im-

<sup>115</sup> See EEOC, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION (2005), <http://www.eeoc.gov/facts/telework.html>.

<sup>116</sup> For instance, the webpage of the Office of Disability Employment Policy (which is part of the Department of Labor) emphasizes benefits to employers and contains a link to a piece making the “business case” for hiring people with disabilities. See Office of Disability Employment Policy, Employer: Building a Competitive Edge, <http://www.dol.gov/odep/categories/employer/> (last visited Feb. 15, 2008). Even a recent publication by the EEOC that looks like it might consider third-party benefits—a fact sheet on reasonable accommodation for attorneys with disabilities—fails to achieve this promise. See EEOC, REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES (2006), <http://www.eeoc.gov/facts/accommodations-attorneys.html>. This source advocates “thinking ahead” about “major changes in the work environment that affect all employees but may have a particular impact on attorneys with disabilities.” *Id.* But then it proceeds to talk only about accommodations’ costs and how to avoid them. *Id.* The section’s focus on costs is aptly captured by its title, “Thinking Ahead Can Avoid Future Problems.” *Id.*

<sup>117</sup> For examples of those who argue that the ADA is different because it goes beyond the antidiscrimination requirement of Title VII to mandate a distinctive form of affirmative action, see Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001); Karlan & Rutherglen, *supra* note 13; Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001); S. Elizabeth Wilborn Malloy,

portant point about the social meaning of the statute. Whether or not the ADA actually imposes distinct substantive obligations on employers, only the ADA explicitly requires employers to “accommodate” a class of employees.

Unlike Title VII, the ADA defines discrimination in terms of accommodation: “[T]he term ‘discriminate’ includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . .”<sup>118</sup> Naming the accommodation requirement is not a superficial difference. The fact that the ADA names this category of obligations “accommodations,” and expressly requires them as part of the definition of the duty not to discriminate, makes the ADA appear different from other statutes. (While Title VII’s protection of religion also includes a duty to accommodate, that duty was folded into the definition of “religion,” rather than into “discriminate,” and has been interpreted narrowly.<sup>119</sup>) And only the ADA’s regulations require employers and em-

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*Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 627-28 (2001); Amy L. Wax, *Disability, Reciprocity, and “Real Efficiency”: A Unified Approach*, 44 WM. & MARY L. REV. 1421 (2003). For the contrary argument that antidiscrimination requirements under Title VII, like ADA accommodation, require employers to absorb many costs unrelated to any obviously illegitimate action on the employer’s part (including costs of not catering to discriminatory customer or co-worker preferences, of banning rational stereotyping, and of changing rules that disparately impact protected groups), see Samuel R. Bagenstos, “*Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*,” 89 VA. L. REV. 825 (2003); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); and Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004).

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

<sup>119</sup> See 42 U.S.C. § 2000e(j) (2000) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”); see also H.R. REP. NO. 101-485, pt. 3, at 40 (1989) (distinguishing the “significant” duty to accommodate under the ADA from the lesser duty for religion under Title VII as interpreted by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), to extend only to those accommodations that impose no more than a de minimis cost on the employer); Karlan & Rutherglen, *supra* note 13, at 6-7 (commenting on the different treatment of “accommodation” in Title VII and the ADA); Malloy, *supra* note 117, at 627-28 (noting that Congress intended for accommodation to have a broader meaning in the ADA than in Title VII). One could certainly analyze the third-party effects of accommodations in the religion context in in-

ployees to engage in an “interactive process” to determine whether and what accommodations are appropriate.<sup>120</sup> Disability law thus appears to flip the assimilationist demand on its head. That is, instead of demanding that employees assimilate,<sup>121</sup> disability law seems to require the environment, rather than the individual, to change. Of course, all antidiscrimination statutes change the work environment, but the fact that the ADA requires such changes *more explicitly* than Title VII is likely to make the costs of the ADA more obvious.

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

teresting ways, and part of the narrowness of the accommodation requirement in this context is due to the greater solicitude of courts toward complaints of third-party costs. See generally 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION* 333-48 (2006).

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

<sup>121</sup> Cf. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485 (1998); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) [hereinafter Yoshino, *Covering*]. Yoshino in fact argues that the assimilationist demand persists in the disability context, asserting that the statute also requires people with disabilities to mitigate their disability as a prerequisite of obtaining coverage and accommodation under the statute. KENJI YOSHINO, *COVERING* 175 (2006). This overlaps with the argument, made by Jill Hasday, that *Sutton’s* holding that employees should be considered in their post-mitigation state to determine if they are ADA disabled, implies that employees *must* mitigate in order to be protected under the statute. See Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. 217, 230-34 (2004). This is a contested claim about the statute, as Hasday appreciates, and one with which I disagree, for reasons too lengthy to set out here. Note, though, that even if mitigation were required of those with the capacity to mitigate, this would not change the fact that the statute still requires accommodation by the workplace where mitigation is not possible or has already been completed. That said, my claim is not that the ADA makes no assimilation demands—it surely does—but only that the ADA *seems* different from Title VII in how it allocates the pressure to change.



accommodation requirement was new.<sup>122</sup> That is, in states where the accommodation requirement, but not antidiscrimination protection, for disability was new, employers hired fewer people with disabilities after the passage of the ADA—apparently suggesting that fear of having to pay for accommodations animated any disemployment effects.<sup>123</sup> This suggests that the perception of accommodation, at least at the time of enactment, was one of cost. Even more notably, the disemployment effects appear to be temporary,<sup>124</sup> suggesting that employers overestimated the costs—or, perhaps, underestimated the benefits—that accommodations would create.<sup>125</sup> To make this point is not to resolve the question of whether the ADA is in fact more costly, or imposes greater demands on workplaces, than other antidiscrimination statutes. But it does highlight a meaningful difference in categorization and terminology that may have implications for how the statute is understood.

Second, the costs of the ADA may be more salient than the costs of Title VII because of the ADA's asymmetrical structure. The ADA protects only a subgroup of the population—those who are disabled—rather than protecting everyone along an axis of his or her identity (as Title VII does for race or sex) or even protecting the most able and the least able.<sup>126</sup> (On the latter, note that one could not bring a claim

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<sup>122</sup> See Christine Jolls & J.J. Prescott, *Disaggregating Employment Protection: The Case of Disability Discrimination* 18 (Harvard Public Law Working Paper No. 106, 2005), available at <http://ssrn.com/abstract=580741>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 20-21.

<sup>125</sup> Jolls and Prescott suggest that the difference between the short-term and long-term effects may be due to any of the following: the fact that “many accommodations, including physical alterations to the workplace and modification of workplace policies, impose obvious but often one-time costs on employers—costs that may well have been exaggerated or particularly salient in employers’ minds just after the ADA’s passage”; the fact that part of the short-term effects were in the period between enactment and the effective date, so declining to hire people with disabilities because of accommodation costs would not yet have been illegal; enforcement after the effective date; possible changes in attitudes over time in response to the statute’s symbolic effect; increased investment in educational qualifications by individuals with disabilities; and declining costs of accommodations due to technological innovations and legal refinements. *Id.* at 21-22. In light of the discussion herein, we might add to this list a realization of unanticipated benefits.

<sup>126</sup> Compare 42 U.S.C. § 12102(2) (2000) (defining the protected class under the ADA as those who have “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment”), with *id.* § 2000e-2(a)(1) (prohibiting, under Title VII, the discharge of “any individual” because of “such individual’s race, color, religion, sex, or national origin”), and *McDonald v.*

under the ADA for being denied a job because of being “overqualified” or too able.) This asymmetrical structure has various interesting implications,<sup>127</sup> but for purposes of this discussion, the asymmetry is important because it limits the group of people who are likely to see themselves as benefiting from the statute. That is, only people who consider themselves to have disabilities are likely to see this statute as having been enacted *for* them. For everyone else, the statute is either irrelevant or a potential cost to them, as employers or as coworkers to whom costs may be shifted.<sup>128</sup>

Relatedly, this statutory structure shapes the parties and arguments that arise in litigation. Title VII cases can be brought by men and whites, who therefore appear before courts as plaintiffs seeking the benefits they feel are their due under the statute and articulating those benefits to the courts.<sup>129</sup> In contrast, the only people coming to court under the ADA are people who consider themselves to have (or to have a record of having or to be regarded as having) disabilities.<sup>130</sup> Courts may, and often do, disagree about a plaintiff’s disability status, leading to the many grants of summary judgment on the basis that the plaintiff is not impaired enough.<sup>131</sup> But the point is that the arguments in court are made exclusively by plaintiffs from one part of the

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Santa Fe Trail Transp. Co., 427 U.S. 273, 286-87 (1976) (holding that Title VII protects “white persons”).

<sup>127</sup> For a discussion of some of these implications, see Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 464-65 (2006).

<sup>128</sup> Of course, nondisabled people could in theory see the statute as a *potential* benefit to them if they ever became disabled, creating a feeling of what we might call “existential insurance”—a kind of counterforce to what Harlan Hahn calls the “existential anxiety” that disabled people can inspire in nondisabled people. See Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 43-44 (1988) (defining “existential anxiety” for nondisabled people as “the perceived threat that a disability could interfere with the functional capacities deemed necessary to the pursuit of a satisfactory life,” a feeling resulting from “a sense of personal identification with the position of a disabled person”). But the number of people who are likely to make such a prediction about themselves is questionable; and regardless, the effect on a nondisabled person of seeing the statute as really a benefit to herself is still likely to be different than if she had the present-day ability to bring a claim under it.

<sup>129</sup> See, e.g., *McDonald*, 427 U.S. at 286-87 (holding that Title VII protects white persons).

<sup>130</sup> 42 U.S.C. § 12102(2). The record-of and regarded-as prongs broaden the protected group and help to soften the statute’s asymmetrical structure without fundamentally altering it.

<sup>131</sup> See *infra* note 229.

population. This frames the courts' consideration of these issues in terms of the statute's benefits to only a subset of the population.

**(2) Political.** Both employers and employees have political reasons not to raise the issue of third-party benefits. Most obviously, employers may not always see these benefits,<sup>132</sup> and they have nothing to gain, at least in the litigation context, from mentioning that accommodations have additional benefits.<sup>133</sup> If an employer wishes not to provide an accommodation, her interest is, of course, in highlighting costs, not benefits.<sup>134</sup>

Less obviously, disabled people and disability advocates may also have reasons not to highlight third-party benefits. Disabled individuals and advocates may be more likely than others to see disabled bodies as extraordinary rather than flawed,<sup>135</sup> and thus may best be able to perceive that the environmental changes required by those bodies can be beneficial, rather than costly, to others. But those who advocate for disabled people may be inclined to focus on individual rights, and thus to argue that individuals with disabilities should be provided with accommodations as a matter of right. This focus may lead advocates not to acknowledge or emphasize second- and third-party benefits. Moreover, for reasons discussed later, advocates might be concerned that any attention to third-party benefits could, through a kind of doctrinal drift, become a limiting principle on accommodations required by the ADA.<sup>136</sup> These concerns about undue attention to third-party benefits are the focus of Part V.

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

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<sup>132</sup> Seth Harris's empirical work on EEOC mediation suggests that mediation is a more difficult task in ADA disputes, which he attributes in part to employers' resistance to accommodations as potentially costly. Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC's Mediation Program* (N.Y. Law Sch. Legal Studies, Research Paper No. 06/07-5, 2007), available at <http://www.ssrn.com/abstract=920110>, 12 HARV NEGOT. L. REV. (forthcoming 2008).

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

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

<sup>135</sup> See generally ROSEMARIE GARLAND THOMSON, *EXTRAORDINARY BODIES* (1997).

<sup>136</sup> See *supra* Part V.B.

filled in, supplied.<sup>137</sup> Disability is thus often understood as something lesser that requires the distribution of resources toward it to compensate.<sup>138</sup> For this reason, disability may be generally associated with imposing costs on some for the benefit of individual others.

Disability studies has challenged this idea and instead urged the adoption of a social model of disability. The traditional understanding of disability—the so-called medical model—views disability as a medical problem requiring a medical solution. By contrast, the social model says that someone is disabled by the interaction between her body (or mind) and the disabling environment that is built for one kind of body (or mind) rather than another. By contrast, the social model says that someone is disabled by the interaction between her body (or mind) and the disabling environment that is built for one kind of body (or mind) rather than another. To introduce the distinction between the models, the writer Simi Linton, who uses a wheelchair, asks her students, “If I want to go to vote or use the library, and these places are inaccessible, do I need a doctor or a lawyer?”<sup>139</sup>

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

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

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

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

<sup>139</sup> LINTON, *supra* note 42, at 120.

## III. INTEGRATING ACCOMMODATION

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

DOJ Regulations on Title III of the ADA<sup>140</sup>

Should third-party benefits matter to the choice or design of accommodations? A simple social-welfare calculus suggests that they should. As between two equally effective accommodations or accommodation designs, it seems sensible to choose the one that creates more benefits, rather than more costs, for third parties. But the ADA is not a statute aimed at promoting everyone's welfare; it is not the Americans Act.<sup>141</sup> It is a statute that outlaws discrimination against individuals with disabilities. Nonetheless, as this Part explains, an attention to third-party benefits, including nondisabled third parties, is consistent with the ADA.

A key purpose of the ADA is to integrate people with disabilities into the workplace and the broader community.<sup>142</sup> Though the statute's findings set out several areas of concern, the aim of replacing exclusion with full participation features prominently and pervasively.<sup>143</sup> Thus, while nothing in Title I of the statute requires attend-

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<sup>140</sup> ADA Standards for Accessible Design, 28 C.F.R. ch. 1, pt. 36, app. A, § 5.4 (1994); see *infra* note 144 (quoting the passage in full).

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

<sup>142</sup> See, e.g., Mark C. Weber, *Home and Community-Based Services, Olmstead, and Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269, 278-79 (2004) (describing integration as the central "promise" of the ADA); David Strauss, *Disability Discrimination* (unpublished manuscript, on file with author); cf. Jacobus tenBroek, *The Right To Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 843-47 (1966) (claiming that integration should be the goal of policymaking in this area). But cf. Colker, *supra* note 69, at 1419-23 (arguing that the integrative purpose is sometimes given too much deference, particularly in the education context, to the detriment of the goal of antisubordination).

<sup>143</sup> See 42 U.S.C. § 12101(a)(2) (2000) ("[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . . ." (emphasis added)); *id.* § 12101(a)(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities . . . ." (emphasis added)); *id.* § 12101(a)(7) ("[I]ndividuals with disabilities [have faced restrictions, limitations, and other forms of discrimination], based on characteristics that are

ing to third-party benefits, it is consistent with the statute's inclusionary aims to try to integrate accommodations, as well as the individuals they accommodate, in ways that create third-party benefits. Designing accommodations in this way has the potential to improve attitudes toward disability and toward the ADA, and thus to further these integrative goals.

### A. Desegregating Accommodation

What would it mean to have segregated accommodations? The DOJ's regulations for the implementation of Title III, the public accommodations title, explain that restaurants should make all parts of a restaurant accessible. If that is not feasible, however, then the "accessible areas [must] not [be] restricted to use by people with disabilities."<sup>144</sup> As the *ADA Guide for Small Businesses* explains: "It is illegal to segregate people with disabilities in one area by designating it as an accessible area to be used only by people with disabilities."<sup>145</sup>

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

<sup>144</sup> 28 C.F.R. ch. 1, pt. 36, app. A, § 5.4 (1994). The relevant passage reads:

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

*Id.*

<sup>145</sup> OFFICE OF ENTREPRENEURIAL DEV., U.S. SMALL BUS. ADMIN., *ADA GUIDE FOR SMALL BUSINESSES* 13 (1999), available at <http://www.sba.gov/ada/smbusgd.pdf>. The full context for this quote is as follows:

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

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

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

**(1) Improved contact.** To work and live using overlapping tools and facilities may promote an additional kind of *working together*. Cynthia Estlund has characterized the workplace as the contemporary site of adult integration—the place where we meet and become tolerant of diverse others.<sup>146</sup> This raises the question of what role accommodations play in that integrative endeavor. Accommodations surely assist with integration to the extent that they enable people with disabilities to participate in workplace communities,<sup>147</sup> but the design of accommodations could affect the form that participation takes. Put starkly, a special sink or special bathroom could be akin to the segregation Title III prohibits in the restaurant. (The plaintiff's expressive-harm claim in *Vande Zande* might be read in this light.<sup>148</sup>) Separate stalls may work

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ties in one area by designating it as an accessible area to be used only by people with disabilities.

*Id.*

<sup>146</sup> CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

<sup>147</sup> See *infra* notes 151-152 (citing literature showing the positive effects of "contact" between disabled and nondisabled persons).

<sup>148</sup> The Seventh Circuit rejected the relevance of these expressive considerations. The relevant passage in Judge Posner's opinion is this:

Her argument rather is that forcing her to use the bathroom sink for activities (such as washing out her coffee cup) for which the other employees could use the kitchenette sink stigmatized her as different and inferior; she seeks an award of compensatory damages for the resulting emotional distress. We may assume without having to decide that emotional as well as physical barriers to

like separate drinking fountains, to reinforce the stigmatic divide between groups. Perhaps separate equipment or rules could operate similarly. The extent to which stigmatic attitudes are shaped by separate facilities or tools in the disability context is an empirical question that no current research answers directly.

Research in management studies indicates, however, that "co-worker attitudes have a profound impact on the employment experiences of people with disabilities."<sup>149</sup> Further work suggests that co-

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

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

<sup>149</sup> Lisa Schur et al., *Corporate Culture and the Employment of Persons with Disabilities*, 23 BEHAV. SCI. & L. 1, 3-20 (2005) (citing Adrienne Colella, *Organizational Socialization of Newcomers with Disabilities: A Framework for Future Research*, 14 RES. PERSONNEL & HUMAN RESOURCES MGMT. 351 (1996) and Dianna L. Stone & Adrienne Colella, *A Model of Factors Affecting the Treatment of Disabled Individuals in Organizations*, 21 ACAD. MGMT. REV. 352 (1996)); see Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345 (1997); Adrienne Colella, *Coworker Distributive Fairness Judgments of the Workplace Accommodation of Employees with Disabilities*, 26 ACAD. MGMT. REV. 100 (2001); Adrienne Colella et al., *The Impact of Ratee's Disability on Performance Judgments and Choice as Partner: The Role of Disability—Job Fit Stereotypes and Interdependence of Rewards*, 83 J. APPLIED PSYCHOL. 102 (1998); see also DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* 244-45 (2003) (observing, in a qualitative study of employees with disabilities and the ADA, that most were not inclined to assert their rights directly, but, rather, "depended almost exclusively on rights becoming active in some other way—through the support of coworkers, through the unilateral actions of their supervisors, through corporate decisions to alter workplace environments or practices, or through more diffuse attitudinal changes or cultural and discursive shifts").



worker attitudes will be affected, inter alia, by whether coworkers expect that the presence of people with disabilities will make their own jobs harder or less desirable.<sup>150</sup>

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

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

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<sup>150</sup> See Stone & Colella, *supra* note 149, at 372, 380-81 (1996).

<sup>151</sup> See, e.g., Patrick W. Corrigan & David L. Penn, *Lessons from Social Psychology on Discrediting Psychiatric Stigma*, 54 AM. PSYCHOLOGIST 765, 772-73 (1999); Donna M. Desforges et al., *Effects of Structured Cooperative Contact on Changing Negative Attitudes Toward Stigmatized Social Groups*, 60 J. PERSONALITY & SOC. PSYCHOL. 531 (1991); Monika E. Kolodziej & Blair T. Johnson, *Interpersonal Contact and Acceptance of Persons with Psychiatric Disorders: A Research Synthesis*, 64 J. CONSULTING & CLINICAL PSYCHOL. 1387 (1996); Elaine Makas, *Positive Attitudes Toward Disabled People: Disabled and Nondisabled Persons' Perspectives*, 44 J. SOC. ISSUES 49 (1988); Stone & Colella, *supra* note 149, at 383; see also Emens, *supra* note 127, at 445 n.192, 481 n.344 (citing sources). For a recent large-scale demonstration of the benefits of contact across studies and categories, see Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006).

<sup>152</sup> See, e.g., Bagenstos, *supra* note 117, at 843-44 & n.55 (2003) (discussing how working together in "circumstances of relative equality can reduce prejudice and stereotyping"); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 23-24 (2000) (summarizing research indicating that the "contact hypothesis" is best supported by situations of "cooperative interdependence" involving an "equality of status" and "normative support for friendly" interactions); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1101-02 (2006) (discussing the conditions that contribute to a debiasing environment, including the need for equal status, cooperation, and nonsuperficial contact); see also Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1331 (1998) (stating that "simple integration" alone is not sufficient to reduce "intergroup conflict" and that competitive contact will actually worsen "intergroup bias").

<sup>153</sup> See Stone & Colella, *supra* note 149, at 372.

crease productivity, improve health, increase happiness, or prompt experimentation. Coworkers' or customers' associating these benefits with the presence of employees with disabilities could improve attitudes toward disability even if these coworkers or customers have no direct "contact" with people with disabilities. In addition, and more speculatively, perhaps permitting nondisabled coworkers limited access to rivalrous accommodations could create affirmative cachet for those for whom the accommodations are designed.<sup>154</sup> These suggestions are, of course, only theories, albeit plausible ones, and they raise empirical questions that merit further study. Such empirical work should investigate, among other questions, precisely how the benefits of accommodations become salient, and to what extent salient benefits translate into favorable attitudes toward the person who requested the accommodation and that person's group.

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

One approach to thinking about the conceptual potential of third-party benefits is to ask how people come to appreciate the social model of disability—the idea, discussed in Part II, that disability inheres in the interaction between impairment and the social world.<sup>155</sup> Saying that there is nothing natural or necessary about stairs, for example, may persuade some people. Or pointing out that the setup of a room makes it accessible to nondisabled people (through chairs and lights and other features) may help illuminate the social model for

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<sup>154</sup> Cf. *supra* note 69 and accompanying text (distinguishing Universal-Design accommodations from apparently zero-sum accommodations and discussing Ruth Colker's story of the "Teddy Bear" room).

<sup>155</sup> See *supra* text accompanying note 139 (comparing the medical and social models of disability).

some.<sup>156</sup> Or seeing a disabled coworker perform effectively because of an accommodation may help someone see how the world without the accommodation was structured to disadvantage that person.<sup>157</sup>

But to show that the world we inhabit is less than ideal for everyone, not just for people with disabilities, seems like a particularly potent way to denaturalize the current structure of our environment. If people can see that the disability of some people prompts improvements in the environment that benefit everyone, then they are hard pressed, I think, to claim that there is something natural and better about the status quo. They may be more likely to consider the possibility that the current way of doing things is not always best, not only because it excludes some people—disabled people—but also because this way of doing things has been disabling us all.<sup>158</sup> We might think of this as the “radical social model.”

Appreciating the radical social model leads to questioning the merits of many aspects of our current environment, with disability serving as the lens through which to gain insights into the ways in which our current environment can be improved.<sup>159</sup> As discussed in Part I, disability may be a particularly helpful lens for these purposes because, while disabled people bear costs shared by many nondisabled people, for the former those costs rise to a level that they become dis-

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<sup>156</sup> Susan Daniels, a former Social Security Commissioner for Disability, was apparently fond of pointing out that only those with disabilities bring their own chairs, and that lights, microphones, and loudspeakers are accommodations for people who get their sensory input that way. See Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 402 (2001) (citing Susan Daniels, Address at the Conference of the Association for Higher Education and Disability (July 14, 1999)).

<sup>157</sup> Or, alternatively, others may be persuaded by the point that being able to lift more than ten pounds is likely to be a major life activity in some contexts and milieus (e.g., in communities of laborers) and not in others (e.g., among judges and law professors), making an impairment in lifting a disability in one world and not in the other. Cf. *Mays v. Principi*, 301 F.3d 866, 869 (7th Cir. 2002) (noting, in dicta, that “[w]e doubt whether lifting more than 10 pounds is [a major life] activity”).

<sup>158</sup> I agree with Adam Samaha that the social model—as a descriptive account of how disability is created—does not necessarily require any normative prescriptions. See Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1253 (2007) (“The social model . . . has essentially nothing to say about which [normative] framework to use.”). But the social model does, I believe, have real rhetorical and imaginative power to challenge assumptions about disability—and the radical social model possibly even more so. For further discussion, see Elizabeth F. Emens, *Against Nature*, NOMOS (forthcoming 2008).

<sup>159</sup> Cf. LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002) (discussing race as a lens through which to identify broader societal problems).

abling and require solutions.<sup>160</sup> This necessity may therefore inspire solutions that then diminish costs for others who have been absorbing those costs in a nondisabling way. Once these broader ameliorating effects are recognized, then the social model becomes hard to deny, at least as a plausible theory worth considering with regard to any given aspect of the world.

### B. *The Example of Telecommuting*

The accommodation of telecommuting helps to illustrate the implications of thinking about third-party benefits as promoting integrative goals. Telecommuting has not received a very favorable reception from courts as an ADA-required accommodation,<sup>161</sup> but it has been embraced by a substantial number of employers<sup>162</sup> and the EEOC,<sup>163</sup> as well as by President Bush's New Freedom Initiative (NFI).<sup>164</sup> Employ-

<sup>160</sup> See *supra* text accompanying note 53.

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

<sup>162</sup> See, e.g., Lori D. Bauer, *Telecommuting Tradeoffs: Freedom and the Law*, BUS. L. TODAY, Mar.-Apr. 2002, at 17, 17 ("[N]ew capabilities have launched telecommuting as . . . an attractive option for both employers and employees . . ."); Robert Ingle, *Telecommuting: "Taking Your Work Home with You" Will Never Be the Same Again*, MD. B.J., Nov.-Dec. 2000, at 3, 4.

<sup>163</sup> See EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 113 (indicating that, in some instances, telecommuting is a "reasonable accommodation" that employers must allow).

<sup>164</sup> Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (June 18, 2001). President Bush's New Freedom Initiative for People with Disabilities includes the Telework Program, which provides federal funds to twenty states to guarantee low-interest loans for people with disabilities to purchase computers and other equipment so that they may work from home. See Press Release, Office of Press Sec'y, White House, President Bush Highlights Commitment to Americans with Disabilities (June 19, 2001), available at <http://www.whitehouse.gov/news/releases/2001/06/20010620.html> (announcing a \$20 million budget for the Access to Telework Fund); see also RESNA NAT'L ASSISTIVE

ers have reportedly found that telecommuting reduces overhead costs, and benefits various types of employees, including those with family responsibilities and long commutes, in addition to those with certain disabilities.<sup>165</sup>

Revisiting our extended spectrum of accommodation design from Part I,<sup>166</sup> we can see in Figure 5 that a telecommuting accommodation, like an accommodation for an impairment in lifting, can be designed in multiple ways. A telecommuting accommodation might be designed in a way that creates many costs for coworkers and few or no offsetting benefits. If one worker is working from home, then employees who are on-site may need to locate materials and prepare faxes or mailings, in addition to taking over any parts of the distant worker's job that require face time.<sup>167</sup> If assuming such tasks makes it impossible for coworkers to perform the essential functions of their

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TECH. ASSISTANCE P'SHIP, INCREASING EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES: A REPORT ON THE FIRST TWO YEARS OF PROGRAM OPERATIONS OF THE TELEWORK PROGRAM FY 2004–FY 2005, at 1-2 & tbl.A (2006). Combined federal and state funds for the Telework Program total \$21.9 million (with states providing one for every nine dollars of federal funds). *Id.* As of 2005, however, only 78 applications had been submitted, mostly from entrepreneurs, at a value of \$349,535. U.S. DEP'T OF EDUC., ACCESS TO TELEWORK FUND, at G-50 (2001), available at <http://www.ed.gov/pubs/AnnualPlan2002/rv215-TeleworkFund-0412.pdf>.

<sup>165</sup> See, e.g., Ludgate, *supra* note 161, at 1321-22 ("Benefits to employers include savings on office overhead, lower employee absenteeism, increased productivity, improved employee morale, and higher employee retention. Telecommuting also provides significant public policy benefits, including reduced traffic congestion, air pollution, and energy consumption." (footnotes omitted)). Note, as a caveat to the claim of third-party benefits, that Michelle Travis has made a compelling argument that telecommuting, like any other new workplace technology, may effectively benefit those with power and burden those without it, and may do so in a particularly gendered way. Specifically, Travis argues that women are more likely to be pushed into working from home, where their home responsibilities may overwhelm them further. See Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 ME. L. REV. 261, 265 (2002).

<sup>166</sup> See Figure 4, *supra* Part I.F.

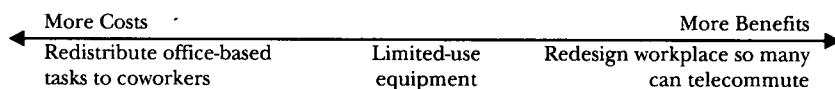
<sup>167</sup> See Kvorjak, 259 F.3d at 56 n.15 ("[T]he State maintains that such research would be difficult for an at-home employee to manage without imposing an undue burden on employees at the office because it requires physical access to paper files, as well as access to the unemployment insurance database. An at-home employee thus would have to rely on others to find, copy, and mail needed documents."); see also Timothy Golden, *Co-Workers Who Telework and the Impact on Those in the Office: Understanding the Implications of Virtual Work for Co-Worker Satisfaction and Turnover Intentions*, 60 HUM. REL. 1641, 1660 (2007) (commenting on the greater workload experienced by coworkers of telecommuters, in a study of 240 professional employees (of one organization) that found that a greater prevalence of teleworking was correlated with greater dissatisfaction with coworkers, but that this correlation was diminished for employees with greater job autonomy).

jobs, then an employer could claim an undue hardship.<sup>168</sup> Otherwise, coworkers would merely need to absorb the additional work. This sort of accommodation is best placed on the far left of the spectrum.

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

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

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



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

<sup>168</sup> See *infra* note 182 and accompanying text.

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

<sup>170</sup> Cf. *Duda v. Bd. of Educ.*, 133 F.3d 1054, 1056, 1059-60 (7th Cir. 1998) (finding that the employer violated the ADA because it "segregated [Duda] from others at the school" by forcing him to transfer to another site).

permits a worker with a disability to work from home might seem less than ideal even when requested by the employee. We might think that it is normatively acceptable only as a last resort, when other, in-office accommodations are inadequate to permit that employee to work, or when virtual communication is standard in the workplace such that contact continues remotely.<sup>171</sup>

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

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

### C. *Tradeoffs and Definitions: The Meaning of Disability and Accommodation*

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

- Doesn't an attention to third-party benefits create a further set of problems involving tradeoffs between benefits to third parties and benefits to disabled employees?  
How do we balance these competing interests?

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<sup>171</sup> On the latter, see, for example, Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1186-1205 (2000).

- Does viewing accommodation from the perspective of third-party benefits affect our understanding of the definition of disability?
- Is an accommodation still properly termed an "accommodation" once it is integrated into the environment and redounds to the benefits of the many rather than the few?

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

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

The tension between these two models of accommodation relates to what Martha Minow calls "the dilemma of difference." She writes, "when does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on *that* basis?"<sup>172</sup> Under the static model, difference is reified. A small subset of the population is the target of an intervention, designed and implemented for those individuals' benefit, because they are different. Under the dynamic model, we risk ignoring difference. Because the model treats disability as a lens through which to see the need for universal improvements, disabled people and their particular needs risk being lost in the mix. The whole idea of accommodation risks dissolving into a general social welfare program in which disabled people's needs matter no more and no less than anyone else's.

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

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<sup>172</sup> MINOW, *supra* note 17, at 20.



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

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

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

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<sup>173</sup> See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999).

<sup>174</sup> Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 418, 418-67 (2000).

protect everyone along a universalizing axis of ability/disability.<sup>175</sup> This seems exactly right, and nothing in the third-party benefits analysis suggests otherwise.

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

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

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

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

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<sup>175</sup> *Id.* at 466-84.

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

#### IV. DESIGNING INTERVENTIONS TO INTEGRATE ACCOMMODATION

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

I hope these ideas are of conceptual use to scholars. But I also hope that they might be of conceptual, and even practical, use to employers and other institutional designers. Any individual need for an accommodation can be analyzed in terms of its location on the spectrum of third-party costs and benefits, and alternative designs for an accommodation may be compared on the spectrum. As the discussion of the two models of accommodations demonstrated, any such analysis must keep the disabled individual's need foremost in mind, even while that need prompts a broader inquiry into the status quo for the workplace more generally. As Part III also discussed, the primary reason that third-party benefits matter is that they may improve attitudes toward disability and the ADA. Thus, this analysis requires one further set of tools: a framework for dis-

tinguishing usage benefits and attitudinal benefits, and analyzing alternative accommodations in terms of their production of each. The first Section of this Part provides that framework.

The rest of this Part builds upon that distinction to propose a number of legal and policy changes. Interventions that create attitudinal benefits—by, for example, publicizing already existing third-party benefits—should typically be pursued. The EEOC’s policy on disclosure of accommodations should therefore be revised. The EEOC’s guidance interprets statutory privacy provisions very narrowly to imply that employers may never disclose to coworkers the disability-related reason for a workplace accommodation, even with the employee’s consent and support. This runs directly counter to the conclusion prompted by an understanding of third-party benefits: disclosure and publicity, if properly conducted with employee consent, could improve attitudes toward people with disabilities and the ADA by properly attributing any third-party usage benefits of accommodations to the statute and to the requesting employee. The EEOC should therefore revise its guidance not only to permit disclosure where the employee consents, but also to advise employers on how to disclose in a manner that highlights third-party benefits, thus promoting favorable attitudes toward accommodation. In addition, courts should begin to consider third-party benefits in their analyses of reasonableness and undue hardship, at least to the extent that they base these determinations on a consideration of costs and benefits. Moreover, agencies and other public entities that advise employers or provide information about the ADA should discuss third-party benefits and offer guidance on designing accommodations to enhance third-party benefits. Finally, recognizing third-party benefits of accommodations should inspire more institutions to include disability in their diversity initiatives. This Part discusses each of these ideas, after first setting out a framework for thinking about the implications of this analysis.

#### A. *A Framework: Usage Versus Attitudinal Benefits*

The third-party benefits discussed in this Article can be divided into two groups: those that increase attitudinal benefits to third parties and those that increase usage benefits to third parties. As noted in Part I, attitudinal benefits are improvements in attitudes toward people with disabilities or the ADA. Usage benefits are those benefits (e.g., material, physical, hedonic) that directly accrue to the third party who uses or is affected by the accommodation. The distinction

between these types of benefits—and the means of creating attitudinal benefits in particular—requires further elaboration.

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

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

	Usage benefits to third parties	No usage benefits to third parties
Attitudinal benefits to third parties	<p><b>Box I</b></p> <p>Accommodations with usage benefits and attitudinal benefits to third parties—i.e., accommodations used by coworkers that are known to be due to disability.</p> <p><b>Examples:</b> office redesign to reduce lifting strain; broad-based telecommuting initiative.</p>	<p><b>Box II</b></p> <p>Accommodations with attitudinal benefits, but no usage benefits—i.e., accommodations used only by the individual disabled worker but known about by coworkers.</p> <p><b>Example:</b> a typing stick for a quadriplegic employee, which coworkers can see but would not use.</p>
No attitudinal benefits to third parties	<p><b>Box III</b></p> <p>Accommodations with usage benefits to third parties, but no attitudinal benefits—i.e., accommodations used by coworkers but not known to be due to disability.</p> <p><b>Examples:</b> those noted in Box I, but without coworkers knowing that disability is the source of the benefit.</p>	<p><b>Box IV</b></p> <p>Accommodations with no usage benefits and no attitudinal benefits—i.e., accommodations not used beneficially by coworkers and either not known about or known about only in terms of their burden on coworkers.</p> <p><b>Examples:</b> ergonomic office furniture not known about or shared with any other worker; or heavy lifting redistributed to coworkers.</p>

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

commodation may help coworkers appreciate the social model of disability.<sup>176</sup>


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

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

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

**Chart B: Creating More Attitudinal Benefits  
Through Disclosure and Publicity**

	Usage benefits to third parties	No usage benefits to third parties
Attitudinal benefits to third parties	<u>Box I</u>	<u>Box II</u>
No attitudinal benefits to third parties	<u>Box III</u>	<u>Box IV</u>



<sup>176</sup> See *supra* Part III.

Interventions to increase or improve disclosure and publicity surrounding accommodations have the potential to increase attitudinal benefits. Not everyone would agree, however, that publicizing accommodations is a good idea. There are legitimate concerns about employee privacy issues, discussed in the next Section. In addition, Charles Riley has argued that accommodations should be as discreet as possible. This is a surprising statement in a book focused on the benefits to employers of hiring and accommodating disabled people. Riley nonetheless writes,

The paragon [of Universal Design] is not just a "barrier-free environment" but one that hides its accessibility features, making it more comfortable for both the person with a disability and the person without. For architects, this is license to make the building beautiful as well as functional . . . . Architecture that screams "accessibility" is for a hospital or nursing home, not the office. . . . Because it will be decades if ever before a wheelchair, hearing aid, or cane does not set off at least a mild sense of alarm in the minds of coworkers or customers, the corporate environment is better off concealing the ramp, literally and metaphorically.<sup>177</sup>

Riley seems to view the stigma of disability as unavoidable. And he seems therefore to think that accommodations can be aesthetically pleasing and fully integrated only if their association with disability is concealed or minimized. But as we have learned from the gay rights movement, there is power in openness. Perhaps coming out about accommodation can improve attitudes—both toward disabled people *and toward accommodations*.<sup>178</sup> Moreover, coming out about accommodation seems a particularly promising way to improve attitudes where the accommodations have positive effects on the workplace and coworkers.

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

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<sup>177</sup> RILEY, *supra* note 13, at 110-11.


<sup>178</sup> Riley seems to be talking about passing, to the extent that he wants the accommodations to be concealed. His reference to "screaming," however, implies an interest in that milder sister of passing—covering. Covering involves not concealing an identity, but making it possible for others to disattend that identity. See generally Yoshino, *Covering*, *supra* note 121 (developing a theory of covering building on ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 102-04 (1963)). What effect covering, or declining to cover, has on others' attitudes would be an interesting topic for empirical study. But it seems reasonable to think that making others aware of *positive* changes to the environment due to disability would help encourage favorable attitudes toward disability. See *supra* Part III.

ing third-party benefits, and thus improving attitudes toward both people with disabilities and the ADA. Interventions aimed at upward movement are therefore less likely to raise the concerns discussed in Part V, about distracting attention from disabled people, because these interventions do not advocate redesigning accommodations to benefit third parties. As noted earlier, the statute is called the “Americans with Disabilities Act,” not the “Americans Act,” and this Article does not aim to change that focus.

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

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

	Usage benefits to third parties	No usage benefits to third parties
Attitudinal benefits to third parties	<u>Box I</u>	<u>Box II</u>
No attitudinal benefits to third parties	<u>Box III</u>	<u>Box IV</u>



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



### B. Disclosure

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

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

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

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<sup>179</sup> 42 U.S.C. § 12112(d)(3)(B) (2000).

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

<sup>181</sup> See, e.g., Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003, 1039-40 (1997).

<sup>182</sup> EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 113 ("An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability. Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be able to

morale-related concerns, though, the EEOC has done an awkward dance, suggesting that employers can engage in a kind of generalized double-talk about protecting workers' privacy and complying with federal law, which effectively says without saying so directly that the employer is accommodating a disability.<sup>183</sup>

Though perhaps an understandable compromise on a difficult issue, the EEOC's position is flawed. It fails to protect employee privacy, and it also may send the message that disability is a source of embarrassment or shame. Moreover, as I have urged, where accommodations have third-party benefits and the disabled employee approves, it would be far better if employers disclosed the impetus for those accommodations in a way that promotes the integrative purposes discussed earlier. Some work suggests that carefully designed disclosure of the disability and the accommodation can have important effects not only on work-group morale but also on coworkers' attitudes toward the accommodated employee.<sup>184</sup> Designing disclosure to

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show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees' [] ability to work." (footnote omitted)). Of course, one may also read *Barnett* as articulating a broader notion of undue hardship based on coworker morale, where job entitlements are at stake. See *supra* text accompanying notes 110-111 (discussing *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)).

<sup>183</sup> For instance, the *Guidance on Psychiatric Disabilities* says that, while an employer may not disclose medical information or the fact that an accommodation has been provided (because it implies that there is a disability), the employer may respond to coworker questions by explaining "that it is acting for legitimate business reasons or in compliance with federal law." EEOC, ENFORCEMENT GUIDANCE ON PSYCHIATRIC DISABILITIES, *supra* note 19. The *Guidance on Reasonable Accommodation* goes further, saying that

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

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

<sup>184</sup> See, e.g., Lauren B. Gates, *Workplace Accommodation as a Social Process*, 10 J. OCCUPATIONAL REHABILITATION 85, 85 (2000) (arguing that a carefully designed disclosure plan can help disclosure lose "its status as a taboo topic"); see also Rose A. Daly-Rooney, *Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act*, 8 J.L. & HEALTH 89 (1993) (suggesting that a "group brainstorming approach" to designing reasonable accommodations, which would require disclosure to coworkers, can lead to

emphasize any potential benefits to coworkers could help to facilitate more positive attitudes.

For example, Lauren Gates and her colleagues report positive results from carefully designed disclosure planning—to employers and to work groups—for employees with mental health conditions.<sup>185</sup> In their program, the decision *whether* to disclose, first to the employer, and then, as a separate decision, to coworkers, is left to the employee. But if an employee does decide to disclose her condition to the broader workplace, then the employer and employee discuss how best to reveal the information to other employees. Gates and her colleagues have seen particularly positive results for work groups in which disclosure has occurred in a group meeting led by a trained facilitator (whether a human resources person, a union representative, or an Employee Assistance Program counselor), in which the accommodation is announced, and then each group member talks about how it will likely affect her work. In such settings, sometimes the employee with the mental-health condition reveals her disability and the accommodation to the work group herself, but sometimes the employer does the actual disclosing (if, for instance, the employee is not comfortable doing so).<sup>186</sup> Under the EEOC guidances, however, a particularly cautious employer could reasonably decline to disclose the employee's condition, even if the employee actually requested that the employer do so.

The EEOC's prohibition on disclosure by the employer, although not required by the statutory language, is motivated by important policy considerations. Particularly for highly stigmatizing impairments, such as psychiatric disabilities or HIV, protection of employee privacy can be very important. Research on disclosure of stigmatized identities suggests that such employees face a complicated calculus, since either disclosing or concealing a stigmatized trait can have negative consequences.<sup>187</sup> In light of these difficulties, an assurance of privacy

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

<sup>185</sup> See Gates, *supra* note 184, at 91-95; see also Interview with Lauren B. Gates, *supra* note 24 (providing the detailed observations that follow).

<sup>186</sup> For any number of reasons, people with disabilities, physical or mental, may sometimes prefer not to have to tell their own stories. Cf. Elizabeth F. Emens, *Shape Stops Story*, 15 NARRATIVE 124, 130-31 (2007). This may mean a desire not to have their stories told at all, or it may sometimes mean a desire not to have to be the one doing the telling.

<sup>187</sup> See, e.g., Manuela Barreto, Naomi Ellemers & Serena Banal, *Working Under Cover: Performance-Related Self-Confidence Among Members of Contextually Devalued Groups*

may be a necessary condition for employees to speak up and request accommodations at all. For these reasons, the employee should have the last word on whether her disability is disclosed in her workplace—much as the employer has the last word as between two effective accommodations.<sup>188</sup> However, to say this is merely to set a floor.

The EEOC should revise its recommendations on this issue not only to set a floor ensuring the employee's right to control disclosure, but also to urge employers to rise above it. In particular, the EEOC should do three things to promote disclosure that, where acceptable to the employee, could help promote the integrative purposes discussed: (1) encourage a dialogue between employer and employee about whether the employee wants disclosure of the accommodation and, if so, in what manner; (2) make clear that an employee can give the employer permission to disclose the accommodation, and not merely that the employee can tell her coworkers about it herself<sup>189</sup> (because, *inter alia*, claims that an accommodation is benefiting coworkers may be more plausible coming from the employer); and (3) provide guidelines for disclosing accommodations to work groups in a constructive manner that particularly emphasizes third-party benefits.

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

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

<sup>188</sup> See EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 113.

<sup>189</sup> The EEOC *Enforcement Guidance on Reasonable Accommodation* says merely that "[a]s long as there is no coercion by an employer, an employee with a disability may voluntarily choose to disclose to coworkers his/her disability and/or the fact that s/he is receiving a reasonable accommodation." *Id.*

with mental health conditions and other stigmatized disabilities tend to be aware of the risks of disclosure, but less aware of the potential benefits.<sup>190</sup>

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

Interestingly, this discussion of third-party benefits shows that nondisclosure may sometimes benefit employers. Most of the work on disclosure requirements has focused on the disadvantage that nondisclosure imposes on employers, who may want to disclose that an employee is disabled and being accommodated in order to avoid morale problems caused by coworkers who think someone else is getting special treatment.<sup>191</sup> If, however, an employer designs an accommodation that *benefits* many employees—such as a broad-based telecommuting initiative—the employer may have an incentive *not* to mention the role that disability or legal compliance has played in this change in the workplace. The employer may be better able to reap the benefits

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<sup>190</sup> See Interview with Lauren B. Gates, *supra* note 24. According to Gates, disclosure can have the following benefits for a person with a mental health condition: it allows her to be protected by the ADA and to request accommodation; it relieves her of the burden that can come from hiding this aspect of herself; and since others at work can usually tell that there is a problem, disclosure prevents them from making up an explanation for the problem (such as substance abuse or incompetence) that is probably worse for the person. *Id.*

<sup>191</sup> See, e.g., Key, *supra* note 181, at 1009-11 (discussing how employers often deal with complaints from employees regarding the special treatment of a coworker with a disability); see also Jessica Zeldin, Note, *Disabling Employers: Problems with the ADA's Confidentiality Requirement in Unionized Workplaces*, 73 WASH. U. L.Q. 737, 741 n.20 (1995) (asserting that favoritism shown to the disabled employee may damage employee morale).

of these alterations (and even to internalize the benefits directly by lowering wages) if coworkers are unaware of the (disability and regulatory) origins of the change. Thus, in an effort to protect employees with disabilities by broadly interpreting the nondisclosure requirements, the EEOC may be helping employers at the expense of both employees with disabilities *and* the broader purposes of the ADA.

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

### *C. Reasonableness and Undue Hardship*

Courts have elided the question of what role third-party benefits should play in determinations of reasonableness or undue hardship. Employers might nonetheless have incentives to take some third-party benefits into account when choosing between effective accommodations (as the statute permits them to do), as noted in Part I, to the extent that those third-party benefits can be internalized by the employer through more productive employees or more contented customers.<sup>192</sup> But not all third-party benefits accrue to employees or customers. In addition to the problem transaction costs might pose to

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

adjusting wages, some kinds of benefits—such as expressive benefits (discussed in Part I) or improved attitudes toward disability or the ADA (elaborated in Part III)—are public goods that employers would have little reason to create.

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

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

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

<sup>194</sup> *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995).

<sup>195</sup> *Id.* at 543.

<sup>196</sup> *Borkowski* seems to open the door to this by referring to multiple employees in its undue hardship discussion, as discussed in Part II.A, *supra*, though I have found no cases that follow this through.

disabled users of an accommodation as a factor weighing against a finding of undue hardship.<sup>197</sup>

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

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

<sup>197</sup> In addition, the House Report accompanying the ADA includes the following passage:

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

H.R. REP. NO. 101-485, at 69 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 351. Note that the House Report makes no mention of possible benefits to nondisabled employees.

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

<sup>199</sup> See *supra* Part III.B.

<sup>200</sup> *But cf.* Kvorjak v. Maine, 259 F.3d 48, 57 (1st Cir. 2001) (claiming that one worker's telecommuting would pose an undue burden on coworkers).



courts to begin to consider third-party benefits as necessary to reasonable accommodations—or as an important factor in determining undue hardship—or prompt more attention to third-party costs.<sup>201</sup> This is a legitimate concern.

Nonetheless, as noted earlier, the Supreme Court has already indicated in *Barnett* that third-party costs could lead to a determination that an accommodation is unreasonable.<sup>202</sup> And the courts' cost-benefit analysis of accommodations is far from an exact science.<sup>203</sup> To the extent that courts are simply eyeballing the costs and benefits, and are considering third-party costs relevant to that assessment, they should also consider third-party benefits.

In order to rationalize the current doctrine, courts following *Vande Zande* should therefore take account of potential third-party benefits before rejecting accommodations as either unreasonable or an undue hardship. This is most plainly true of the reasonableness inquiry, both because the Court has already stated the relevance of third-party costs in this domain, and because reasonableness involves a more general balancing of benefits and costs, including those that will not be internalized by the employer. The undue hardship analysis places greater emphasis on the burden to employers. Therefore, it may be sensible to assume that, given the complexities of assessing third-party benefits and costs, employers—not courts—are best situated to assess the ones that they will internalize. Or it might seem that only usage benefits, but not attitudinal benefits, are relevant to the undue hardship analysis. However, *Vande Zande* does generally fold “the benefits of the accommodation” into the “undue” part of the undue hardship inquiry;<sup>204</sup> accordingly, though reasonableness seems the more obvious place for considering third-party benefits, particularly attitudinal benefits, courts should consider such benefits relevant to undue hardship as well.

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

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<sup>201</sup> See *infra* Part V.

<sup>202</sup> *US Airways, Inc., v. Barnett*, 535 U.S. 397, 400-01 (2002); see also Part II.A.

<sup>203</sup> See, e.g., Sunstein, *supra* note 80.

<sup>204</sup> See *supra* text accompanying note 195.

ing whether the plaintiff falls within the scope of the statute that the accommodation question is often not even reached.<sup>205</sup> Second, the accommodation requests that make it to court are less likely to be ones involving many third-party benefits, particularly once employers are made more aware of the possibility of such benefits. Third, some aspects of third-party benefits will be difficult or impossible for courts to assess. Most obviously, experimentation benefits depend on the contingent fact of whether the experiment succeeds, as discussed earlier.<sup>206</sup> Courts may therefore be unable to take into account all the potential third-party benefits, even under the ad hoc form of cost-benefit analysis of accommodations set forth in *Vande Zande*.<sup>207</sup>

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

#### D. *Promotion and Publicity*

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

For instance, the Job Accommodation Network (JAN) provides advice to employers about how to accommodate employees with disabilities.<sup>208</sup> Its current website, which contains a great deal of information about particular disabilities and possible accommodations, makes no reference to third-party benefits. With some textual revisions and

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<sup>205</sup> See *infra* note 229 (discussing the narrowing effect of the statutory definition of disability). For example, an employee's request for better ventilation in a workplace involving chemical fumes would look more promising if other workers' health were taken into account. But the case on this point that came before the Seventh Circuit failed because the asthmatic plaintiff was determined not to be substantially limited in a major life activity. See *Webb v. Clyde L. Choate Mental Health & Dev. Ctr.*, 230 F.3d 991 (7th Cir. 2000).

<sup>206</sup> See *supra* Part I.D.5.c.

<sup>207</sup> See, e.g., Sunstein, *supra* note 80.

<sup>208</sup> The JAN is a free service of the Office of Disability Employment Policy, U.S. Department of Labor. See JAN Homepage, <http://www.jan.wvu.edu> (last visited Feb. 15, 2008).

additional training, its promotional materials and individual consulting could encourage employers to see how some accommodations could have such benefits.<sup>209</sup> For reasons I will discuss shortly, one might worry that employers could be so attracted to accommodations with third-party benefits, especially those that can be internalized, that they might become more reluctant to grant necessary accommodations that do not have such benefits. But the JAN could make clear that an employer is required by law to grant a necessary accommodation that does not impose an undue hardship, even if the only available reasonable accommodation has no third-party benefits. Moreover, following the revisions to the EEOC guidance on disclosure suggested in Part IV.B, the JAN could encourage employers to give due credit to employees with disabilities for prompting the redesign that led to the third-party benefits—thus promoting the integrating accommodation idea—subject to the employee's consent. This could help engender both greater attitudinal and greater usage benefits.

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

### *E. Implications for Diversity Initiatives*

Recognizing that disability accommodations have multiple beneficiaries could also affect the way institutions think about their diversity initiatives. Diversity initiatives—programs or policies to promote diversity

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<sup>209</sup> For important research asking employers about the extent to which their accommodations have indirect as well as direct benefits, see the work of Peter Blanck and colleagues, *supra* notes 26, 28.

<sup>210</sup> See *supra* note 114 (providing examples of EEOC and other websites that do not acknowledge the third-party benefits of accommodations).

within a particular institution—less often include disability than race and sex.<sup>211</sup> There could be many reasons for this “disability gap,” including the fact that disability was a relative latecomer to the civil rights movements, or a reasoned judgment that the problems of discrimination with regard to race and sex are deeper, more invidious, or more pressing. Whether or not these explanations are valid, the analysis in this Article points to another factor that likely contributes to the disability gap: the perceived costs, and neglected benefits, of accommodation.

Since courts and agencies charged with administering the ADA seem to view it principally in terms of costs to employers and third parties,<sup>212</sup> it should not surprise us if businesses and educational institutions consider integrating disabled people a costly prospect. Leaders of such institutions may reason that they will comply with the law and aim to evaluate fairly any disabled people who apply, including providing accommodations if necessary, but they are not going to take affirmative steps to encourage more people with disabilities to enter their doors. Such affirmative steps could well seem like a foolish courting of costs.

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

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

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<sup>211</sup> There are few studies of which groups are included in diversity initiatives, but what I have found supports what anecdotal observation suggests—the existence of a disability gap. See, e.g., WILLIAM ERICKSON ET AL., WEB-BASED STUDENT PROCESSES AT COMMUNITY COLLEGES: REMOVING BARRIERS TO ACCESS 2 (2007), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1241&context=edicollect> (reporting that “slightly over half of the schools (57%) [responding to the survey] had a student diversity plan and about half (48%) of those with a plan included students with disabilities in the plan”).

<sup>212</sup> See *supra* Part II.

The perspective of integrating accommodation provides a conceptual and practical framework that productively utilizes the tension inherent in the dilemma of difference.<sup>213</sup> This analysis provides tools for thinking about interventions in a way that both meets individual needs and, where possible through design and implementation, promotes broader welfare (usage benefits) and integrative goodwill (attitudinal benefits). Thus, this way of thinking about accommodation begins to show how integrating disability can help to concretize the metaphors of inclusion—of “structural” change, institutional “architecture,” and “barriers” to integration<sup>214</sup>—and thus to provide conceptual and practical tools for facilitating diversity.

There are signs that some institutions are taking affirmative steps on behalf of disability diversity.<sup>215</sup> A broader recognition of accommodation’s third-party benefits could help to accelerate this movement.

#### V. CONCERNS: INTEREST CONVERGENCE AND DRIFT

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

Alan, British wheelchair user<sup>216</sup>

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

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<sup>213</sup> See *supra* Part III.C.

<sup>214</sup> See, e.g., Susan P. Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 249, 250 (2006).

<sup>215</sup> See generally RILEY, *supra* note 13.

<sup>216</sup> This quote is provided in Jo-Anne Bichard, *Our Toilets: Access Dilemmas in U.K. Public Washrooms*, Presentation at the Association of American Geographers Annual Meeting (Mar. 9, 2006) (on file with author).

### A. *Interest Convergence Versus Coalition Building*

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

How often, for example, are the proliferation of curb cuts, ramped entrances, and widened doorways hailed as a benefit for people who push shopping carts, or for parents wheeling baby strollers! I applaud the fact that nondisabled persons may discover the convenience of these architectural changes, but they should not be justified as worthwhile because nondisabled people can enjoy them.<sup>217</sup>

Asch sees attention to third-party benefits (to nondisabled people, rather than to other disabled people) as an instance of Derrick Bell's "interest convergence" principle. In Bell's words, "The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."<sup>218</sup>

Asch is surely right that we should require no further justification for curb cuts and ramps than that they "benefit a portion of the population otherwise disenfranchised from our streets and public facilities"; they are "worthwhile even if no substantial benefit accrues to the shopper or the parent and child using the stroller."<sup>219</sup> There is something deeply disheartening about the idea that the majority's self-interest alone would determine social policy about disability. A similar concern animates debates over the diversity rationale in the context of racial integration. When diversity is understood to benefit all students, this can drift into the view that the purpose of integration is to make classrooms more colorful for whites. Similarly, Asch criticizes the celebration of third-party benefits of ramps and curb cuts, and the epigraph to this Part expresses outrage at the use of "disabled toilets"

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<sup>217</sup> Asch, *supra* note 156, at 401.

<sup>218</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 20, 22 (Kimberlé Crenshaw et al. eds., 1995). Bell continues by observing that "the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle- and upper-class whites." *Id.*; see also Richard Delgado, *Introduction* to *CRITICAL RACE THEORY: THE CUTTING EDGE*, at xiii, xiv (Richard Delgado ed., 1995) ("Because racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture. . . . [W]hite elites will tolerate and encourage racial advances for blacks only when they also promote white self-interest.").

<sup>219</sup> Asch, *supra* note 156, at 401.

by nondisabled people (in Britain, where such use is more contested than in the United States).<sup>220</sup>

But even if accommodations should ideally be granted solely because of their benefits to disabled individuals, that may not in fact be sufficient as a political or institutional matter, as Asch acknowledges.<sup>221</sup> Because employment discrimination law in general—and disability accommodations in particular—are increasingly understood by many as costly interventions that need to be justified on welfarist grounds, it may be politically necessary to identify and make salient the third-party benefits of accommodations.<sup>222</sup> Moreover, for workplace environments to change *effectively* for people with disabilities, it may be necessary for the institutional structure and underlying attitudes to change.<sup>223</sup>

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

<sup>220</sup> See *supra* notes 58-61 and accompanying text (discussing disputes over accessible-toilet usage in the United States and Britain).

<sup>221</sup> Asch, *supra* note 156, at 401.

<sup>222</sup> See generally Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 851-52 (2007) (describing “a growing sense in America that employment discrimination laws have become little more than employer-funded subsidies” and arguing that while this may be true for disability accommodation in many cases, the conflation of accommodation and antidiscrimination elides the notion of employer wrongdoing that justifies a broader scope for antidiscrimination efforts).

<sup>223</sup> See *supra* Part III. For an example of how attitudes can themselves affect the successful implementation of accommodations, consider the following hypothetical, like the one that opens this Article, from a disability studies conference:

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

Third-party benefits, or third-party costs, it seems, can thus be created, depending in part on the attitude of the person implementing the accommodation.

for rigorous implementation of existing laws, and to develop new approaches to thinking about current problems. As Samuel Bagenstos points out in a different context, "bringing together individuals with a variety of interests and focusing them on localized efforts to address aspects of a particular social problem . . . holds the promise of creating a new politics in which people see beyond their initial interests and come to understand problems in new ways."<sup>224</sup> More starkly, Richard Ford writes, "To make real progress on any of these issues we need people from outside the canonical groups of identity politics; we need their ideas and we need their cooperation."<sup>225</sup>

Promoting broader benefits seems more appealing when understood as coalition building rather than interest convergence. This might merely be a shift in rhetoric. A more optimistic account would suggest that thinking about the role that accommodation plays in the workplace more generally not only could help satisfy a broader range of preexisting interests, but could also be the best tool for improving structural features of that workplace for both people with disabilities and a broader range of workers.<sup>226</sup>

Moreover, it is worth emphasizing that third-party benefits can accrue not only to nondisabled people, but also to other disabled people as well as people with impairments that do not rise to the increasingly high ADA threshold. As courts continue to narrow the definition of who counts as disabled—by raising the bar on "substantially limited," declining to find certain activities to be "major life activities," or following *Sutton*'s holding on mitigation to the conclusion that plaintiffs who can mitigate must do so—workers who are impaired but not ADA-disabled are a growing group in need of attention.<sup>227</sup> Attending to third-party benefits in the design of accommodations can there-

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<sup>224</sup> Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 45 (2006).

<sup>225</sup> RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 213 (2005).

<sup>226</sup> Cf. GUINIER & TORRES, *supra* note 159, at 117 ("Those who focus on changing particular first-dimension outcomes within the existing hierarchy produce very real short-term gains, especially to the immediate beneficiaries. But they often limit themselves to challenging outcomes only as they affect women and people of color. They do not mount a sustained critique of the rules that shape those outcomes for everyone, and they fail to imagine a larger—rather than merely reallocated—quantum of benefits." (emphasis added)).

<sup>227</sup> See *infra* note 229 (providing sources that discuss the effects of the ever-narrowing definition of "disability"); *supra* note 121 (discussing the argument that the ADA requires mitigation).



fore benefit people who fall within a broader idea of ADA beneficiaries than the current Court accepts.

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

### B. Doctrinal Drift

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

There is no analytic reason why a drift toward narrowing must occur. In theory, courts could take third-party benefits into account in making reasonableness and undue hardship determinations without saying that such benefits are *required*.<sup>228</sup> But there are nonetheless two reasons to be concerned.

First, the statutory narrowing in other areas of the ADA makes it easy to imagine a several-step process through which a lack of third-party benefits is held against an accommodation.<sup>229</sup> In schematic form,<sup>230</sup> the scenario is this: In Case #1, the court decides that an accommodation that costs \$500 is not unreasonable because, although

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<sup>228</sup> Indeed, the legislative history indicates that the fact that an accommodation assists only one person should not support a finding of undue hardship. *See supra* note 197; *see also* Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 403 (1995) ("[T]he fact that an accommodation benefits only one person does not weigh in favor of a finding of undue hardship.").

<sup>229</sup> For discussions of the ways courts have narrowed the scope of the ADA, *see* Anderson, *supra* note 1, at 91-109; Bagenstos, *supra* note 174; and Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000).

<sup>230</sup> I call this a "schematic" version because courts are so rarely comparing actual dollar estimates on one or both sides of the balance. *See* Sunstein, *supra* note 80.

the benefits to the employee with a disability who requested it are worth only \$50, the third-party benefits to coworkers and customers are worth an additional \$300. Thus, even though costs still exceed benefits, the cost is not "disproportionate to the benefit."<sup>231</sup> In Case #2, a year later, the court is then confronted with an accommodation request that costs \$500, and has benefits to the requesting employee of \$300. Is the cost disproportionate to the benefit? There is no formula in the statute or doctrine. But with Case #1 on the books, the court might be more inclined to say that this accommodation is unreasonable because it has fewer overall benefits (\$50 less)—and no benefits to third parties—in contrast to the accommodation in Case #1. Had the court in Case #1 not based its decision partly on third-party benefits, Case #2 might be more likely to result in a finding of reasonableness. This is very speculative, but far from impossible in light of the reception of the ADA in the courts over the last seventeen years.

Second, courts that account for third-party benefits might also focus more on third-party costs. As noted earlier, some decisions already discuss third-party costs, and the EEOC has concluded that while morale costs are not sufficient reason to refuse an accommodation, an accommodation that interfered sufficiently with others' productivity could create an undue hardship. And the Supreme Court has concluded that the third-party costs of unsettling a seniority system are enough to create a presumption of unreasonableness.<sup>232</sup> If third-party benefits entered the doctrinal analysis, one would expect defense-side litigators, as well as courts, to pay even more attention to these third-party costs. Moreover, if there is any validity to the point that costs are more salient than benefits under the statute,<sup>233</sup> then we might expect the third-party costs to outshine the third-party benefits, no matter the underlying reality, in the eyes of courts.

All that said, under the statute and key decisions, benefits need not outweigh costs for an accommodation to be reasonable and not an undue hardship.<sup>234</sup> And the statute's individualized focus should help to bolster it against undue narrowing through the mechanism of

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<sup>231</sup> *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995).

<sup>232</sup> See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 404-05 (2002); EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 113; see also text accompanying *supra* notes 110-111 (discussing *Barnett*).

<sup>233</sup> See *supra* Part II.

<sup>234</sup> See *supra* Part II.A.

third-party benefits.<sup>235</sup> Moreover, the legislative history asserts that an accommodation cannot be an undue hardship just because it cannot be used by multiple disabled employees.<sup>236</sup> To be sure, the risk of doctrinal drift cannot be ruled out in the abstract. But ultimately, regardless of the outcomes, third-party benefits should be considered under the current doctrine on reasonableness and undue hardship because that doctrine requires a comparison of costs and benefits, with third-party costs already considered part of the mix.

### CONCLUSION

Integration under the ADA means more than integrating people with disabilities; it also means integrating accommodations. By the statute's mandate, workplaces must confront physical or procedural changes called "accommodations." Such changes are important first and foremost because they enable the work and participation of disabled people. Accommodations thus facilitate "contact" between disabled people and nondisabled people in the workplace. However, these changes are also important because the accommodations themselves interact with third parties—disabled, nondisabled, and sub-ADA disabled.

Courts and other entities administering the ADA have recognized that accommodations may create third-party *costs*, but they have overlooked the potential for third-party *benefits*. Third-party benefits can lead to a form of contact between accommodations and coworkers that improves attitudes toward disability and the ADA. In this way, third-party benefits can facilitate a kind of integration by indirection.

Because these third-party benefits have largely been overlooked, they have not been adequately theorized or analyzed. This Article provides conceptual and practical tools for identifying potential third-party benefits and for analyzing accommodations in terms of their third-party effects. The spectra sketched in Parts I and III supply a way of thinking about how accommodation design can determine whether accommodations have third-party costs or benefits or both. The analysis in Part III shows how third-party benefits can further the integrative aims of the ADA, and demonstrates how the two distinct models of accommodation—static and dynamic—work together to make the ADA a potent force for institutional change. Finally, maintaining the focus on pro-

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<sup>235</sup> See *supra* note 173 and accompanying text.

<sup>236</sup> See *supra* note 197 and accompanying text.

moting integration of people with disabilities requires the disaggregation of two types of third-party benefits: general welfare improvements (usage benefits) and disability-related attitude improvements (attitudinal benefits). Part IV provides a framework for analyzing accommodations in terms of their design and disclosure, to promote attitudinal benefits and, secondarily, usage benefits. The hope is that these tools can be of conceptual and practical use to scholars, policy-makers, and employers.

Disability is often understood as principally entailing lack or loss, and the ADA as requiring redistributive largesse by employers and co-workers. Nothing in this Article's analysis—or in the text or doctrinal interpretation of the ADA—requires the repudiation of these views. Benefits need not exceed costs under the statute. But disability and accommodation provide a unique lens through which to challenge and improve our workplaces and beyond. The fact of third-party benefits should help us to see the ways that disability—and accommodation—give something back to our integrative projects across categories and to society in general.