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How American Society and Law Continue to Undermine People with Disabilities Seeking Education and Employment

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False Promises:

How American Society and Law Continue to Undermine People with Disabilities Seeking Education and Employment

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ABSTRACT

*Our Founders specifically identified education as necessary for economic success and full participation in our democracy and society. However, the Supreme Court held in *San Antonio Independent School District v. Rodriguez* that education in America is not a constitutional right; instead, it is a commodity that few can afford. Then, in 2023, *Biden v. Nebraska* exposed the direct result of that ruling: the average American—regardless of their disability status—struggles to pay back their student loans, even when they have a well-paying job. The student debt crisis significantly impacts the economic future of students with disabilities, who make on average sixty-six cents on the dollar even if they complete their education and do secure employment. I attribute this gap to decades of judicial and legislative actions—from *Pierce v. Society of Sisters* and *Sutton v. United Air Lines, Inc.* to the convoluted language of Section 504 of the Rehabilitation Act of 1973—that have entrenched ablism and stigma in our educational system and workspaces, forcing people with disabilities to work twice as hard to fare half as*

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well. These systemic barriers have made the promise that education will guarantee economic security a false promise for hardworking people with disabilities. By failing to protect people with disabilities and their communities, we have not only prevented qualified people with disabilities from attending our top-ranking schools and accessing the myriad of professional and personal opportunities that come with that experience, but these systemic inequalities have also held all of us back from achieving our full potential as individuals and a nation. We have been actively undermining the Founders' vision for decades by increasing the cost of education and exclusivity of our job market to the detriment of all, particularly those with disabilities. But, we have the tools to right our wrongs if we have the courage to use them.

In this Article, I identify how the evolution of education in America entrenched the "able-body standard" in our society, disability jurisprudence, and legal system as a whole. I advocate for everyone—from lawmakers and judges to educators and employers—to embrace theories championed by the disability activist community so that all people, with and without disabilities, can, in short, attain the American Dream.

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INTRODUCTION

The Court once wrote that “[t]he American people have always regarded education and acquisition of knowledge as matters of supreme

importance which should be diligently promoted.”¹ Then in *San Antonio Independent School District v. Rodriguez* it held that there is no fundamental right to education.² This incongruity manifests in many ways including the message many American students with and without disabilities receive once they enter K-12 education: if they attend college, they will have more and better employment opportunities for a promising future. As a result, some students feel they must acquire student loans to attend college to afford said opportunities. For many students, especially students with disabilities, this is a false promise because it assumes what the mission of our educational system should be, instead of what it is.

On August 24, 2020, President Biden put forth a debt relief plan that acknowledged the financial impact of student loans, a debt only made worse by the COVID-19 pandemic.³ This one-time relief plan offered up to \$20,000 in debt relief to Pell Grant recipients with loans held by the Department of Education and up to \$10,000 in debt relief to non-Pell Grant recipients.⁴ President Biden invoked two statutes to support moving forward with his plan: Title IV of the Higher Education Act of 1965 (Higher Education Act), which allows the Secretary of Education can award federal financial aid to eligible students for postsecondary education,⁵ and the 2003 Higher Education Relief Opportunities for Students Act (HEROES Act).⁶ However, six states—Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina—challenged the plan by arguing that it exceeded the Secretary of Education’s authority.⁷ The Court agreed that the states had standing because the plan would cause a financial loss to their state-authorized loan entities and reduce state tax revenue.⁸ Chief Justice Roberts, writing for the majority, held that even though the HEROES Act gave the Secretary the power to “waive or modify” student debt during a national emergency, such as a pandemic, the administration lacked the “clear congressional authorization”

1. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)

2. 411 U.S. 1 (1973); *but see Meyer*, 262 U.S., 390–400 (1923) (holding “the right of the individual to contract to engage in any of the common occupations of life, to *acquire useful knowledge*, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

3. WHITE HOUSE BRIEFING ROOM, *Fact Sheet: President Biden Announces Student Loan Relief For Borrowers Who Need It Most* (Aug. 24, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/>.

4. *Id.*

5. 20 U.S.C. § 1070.

6. 117 Stat. 904.

7. *Biden v. Nebraska*, 143 S. Ct. 2355, 2358 (2023).

8. *Id.*

necessary to sustain a program that could harm these economic interests.⁹ The Court, by siding with the states, implicitly told us the truth: if canceling student debt could result in lost revenue, then education itself had to be a commodity, which is perhaps just the logical extension of *Rodriguez*. Upon losing the suit, Biden introduced another student loan repayment plan, Saving on a Valuable Education (SAVE), but the message was clear.¹⁰ Not only is education a commodity, but it is a commodity in a market that systematically excludes and preys upon students with disabilities.

If a student with disabilities manages to overcome the struggles faced in K-12 schooling to enter college, they face a greater challenge in attending and affording higher education. Of course, there are many factors that contribute to a student's success—personal will, self-determination, alum networks, school prestige, and even zip codes—and a degree from a top college or university does not necessarily guarantee employment. But should a student with disabilities obtain an education, her job market is limited by stigma, discrimination, and, unfortunately, the disability antidiscrimination laws in place. These pressures often prevent people with disabilities from obtaining and, at times, keeping the employment that will help pay back their educational debts. For example, people with non-apparent disabilities—who are not able enough to keep a job and not disabled enough to receive disability benefits—easily fall between the cracks.¹¹ And so this promise that higher education leads to the good life falls apart in the real world where the commodity becomes a burden.

9. *Id.* at 2375; *see* 20 U.S.C. § 1098bb(a)(1) (stating that Secretary of Education “may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications” not in conflict with other parts of the statute).

10. *See* FACT SHEET: PRESIDENT BIDEN ANNOUNCES NEW ACTIONS TO PROVIDE DEBT RELIEF AND SUPPORT FOR STUDENT LOAN BORROWERS, U.S. DEP’T OF EDUC. (June 30, 2023), <https://www.ed.gov/news/press-releases/fact-sheet-president-biden-announces-new-actions-provide-debt-relief-and-support-student-loan-borrowers>. (explaining the Saving on a Valuable Education (SAVE) plan). The average taxpayer should not pick up the tab of those who took out an educational debt because the cost of education is a larger social issue, which would be unfair to lay at the feet of the working poor and the middle class. However, the *Biden v. Nebraska* case exposed the reality that students with disabilities struggle to obtain and sustain employment, making it all the more challenging to repay educational debt.

11. *See generally* Angelica Guevara, *Not Able Enough, Not Disabled Enough*, TEX. J. C. L. & C. R., (forthcoming Spring 2024) (explaining how challenging it is for people who have non-apparent disabilities, particularly those with depression, anxiety, and PTSD, to maintain employment or receive social services because Americans with these conditions are not able enough to keep jobs without accommodations and are not disabled enough to qualify for social security services).

How can education not be a fundamental right and therefore not merit the same constitutional protections as other vital institutions,¹² but also the key to economic success and social acceptance? The current state of education in the United States demands a closer historical look at the entire K-12 system, the academic structures that reinforce the false promises of higher education told to students with disabilities, and the very disability antidiscrimination laws that attempted to provide opportunities, rather than equity, for students with disabilities.

The following discussion is divided into three parts that create the false promises told to people with disabilities in K-12 education, higher education, and then in the workforce. The first part will give the reader a brief historical overview of the United States educational system that established K-12 schooling primarily funded by state taxes, encompassing the education of students with disabilities. The second part will discuss the state of our higher education systems and the debt Americans incur to attend said schooling, placing students with disabilities in a financially vulnerable position. The third part explains the limited employment opportunities for students with disabilities to obtain and keep employment to pay their incurred educational debt. Through this Article, I assert that the disability discrimination theory of reasonable accommodations only highlights the inefficiency of disability antidiscrimination law. I instead advocate for us to embrace new paradigms pioneered by the disability rights community to achieve equity at school and work.

I. HISTORICAL OVERVIEW OF K-12 SCHOOLING IN THE UNITED STATES

The establishment, evolution, and entrenched commodification of private and public education traces back to the founding. The failure to mention education in the Constitution failed to mention education may have foreshadowed the outcome of our educational systems today, but our K-12 education systems evolved alongside other deep social and financial interests.

A. Education at the Founding

The earliest generations of Americans had a reverence for education, just a particular kind of education for particular people. The Boston Latin School, founded in 1635, is the oldest public school in the United States; its

12. See *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage is a fundamental right); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (family); *Meyer*, 262 U.S. 390 (1923) (parental control).

origins are rooted in preparing boys for college.¹³ New College, as it was first known, was established to educate the Clergymen before the United States was formed.¹⁴ Today, it is one of the most expensive and prestigious private colleges in the United States. The early settlers in Puritan Massachusetts in 1647 taxed town residents to support public education, thus demonstrating that it was a priority.¹⁵

After the Revolutionary War started and the Founders signed the Declaration of Independence, Americans first encountered the concept of public education in 1779.¹⁶ Thomas Jefferson proposed a bill entitled “A Bill for the More General Diffusion of Knowledge” that would allow the newly formed government to provide that service.¹⁷ He and John Adams initially proposed providing public education to the nation’s white male land-owning citizens to create a more robust democracy.¹⁸ If Americans were to vote on important issues, an educated, competent populace was crucial to the success of that democracy. Further, white men already had established the aforementioned institutions, so it was only logical for the new government to support them. At least, that was their initial intent.

After the First and Second Constitutional Conventions in 1788, the U.S. Constitution was ratified without mentioning education.¹⁹ Instead, Congress passed the first federal law concerning public education, the Act to Establish Public Education, in 1796.²⁰ Since the Founders did not write the Constitution to incorporate education, it fell under the auspices of the Tenth Amendment codified in the Bill of Rights of 1791.²¹ The administration of

13. See *BLS History*, BOS. LATIN SCH., https://bls.org/m/pages/index.jsp?uREC_ID=206116&type=d (last visited Apr. 10, 2023) (“On the 13th of the second month, 1635. . .At a Generall meeting upon publique notice. . .it was. . .generally agreed upon that our brother Philemon Pormort shall be intreated to become scholemaster for the teaching and nourtering of children with us. — Town Records”) (spelling from original source).

14. See *The History of Harvard*, HARV. UNIV. (2023), <https://www.harvard.edu/about/history/#:~:text=On%20September%20%2C%201636%2C%20Harvard,400%20books%20to%20the%20School> (last visited Nov. 11, 2023).

15. See Billy D. Walker, *The Local Property Tax for Public Schools: Some Historical Perspectives*, 9 J. EDUC. FIN. 265, 269 (1984).

16. See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776); and STEPHEN CONWAY, A SHORT HISTORY OF THE AMERICAN REVOLUTIONARY WAR (2013).

17. See JENNINGS L. WAGONER, JEFFERSON, AND EDUCATION 10 (2004); see also Cameron Addis, *Jefferson and Education*, in BLACKWELL COMPANIONS TO AM. HIST., A COMPANION TO THOMAS JEFFERSON 457, 458 (Francis D. Cogliano, ed., 2012).

18. See JOHANN N. NEEM, DEMOCRACY’S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA 9–10 (2017); RICHARD D. BROWN, THE STRENGTH OF A PEOPLE: THE IDEA OF AN INFORMED CITIZENRY IN AMERICA, 1650–1870 (1996).

19. U. S. CONST. (1778).

20. See WAGONER, *supra* note 15, at 42; see also Addis, *supra* note 17, at 458–60.

21. See U.S. CONST. amend. X.

education is thus a conferred power which established our current state-based educational systems. However, the federal government retained the power to influence state curriculums using additional federal funds as a carrot to incentivize them to change or adjust educational practices. For example, between 1785-1787, the federal government gave land grants to states joining the union if they agreed that some acres would be set aside for public education.²² If students with disabilities had been a priority, the government would have created incentives to encompass their learning. Our education systems eventually transitioned from being exclusively for nobility and white male landowners to include the white working poor as industrialization boomed over the subsequent decades. This delay foreshadowed the slow march to progress that has become a reoccurring theme in the fight for education equity.

By the 1830s, American public education became more readily established, as evidenced by the creation of common schools and public universities.²³ The states funded these common schools and provided free education to all citizens except those they considered unworthy of investment, giving rise to the ideology that was later to become known as the eugenics era.²⁴ These schools were encouraged to mainly teach the “three R’s” (reading, writing, arithmetic) to develop literate, moral voters equipped to contribute to society and strengthen the nation’s economy.²⁵ The school system catered to students who learned through reading and writing, not those who were later known to be auditory, kinesthetic, or visual learners.²⁶ Thus, reading and writing learners had a social advantage embedded in the educational systems. School systems chose to normalize reading and writing as the standard

22. See Alexandra Usher, *Public Schools and the Original Federal Land Grant Program. A Background Paper*, CTR. ON EDUC. POL’Y (2011).

23. See CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860* (1983).

24. See, e.g., Margot W. Smith, PhD, *The Impact of Eugenics on Special Education in 1930s San Francisco*, EDUC. RESOURCES INFO. CTR., DEP’T OF EDUC. (Feb. 2008), <https://files.eric.ed.gov/fulltext/ED602746.pdf>.

25. See Nancy Kober & Diane Stark Rentner, *History and Evolution of Public Education in the U.S.*, CTR. ON EDUC. POL’Y 3 (2020), see generally SAMUEL BOWLES & HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE* (1976).

26. See generally Neil Fleming and David Baume, *Learning Styles Again: VARKing up the right tree!*, 7.4 EDUC. DEV. 4 (2006); Rita Dunn, “*Survey of Research on Learning Styles.*” 46.6 EDUC. LEADERSHIP 50 (1989).

way to learn, and thereby established, amplified, and perpetuated this academic ableism.²⁷

I argue that by initially delegating the power to shape public education, the federal government permitted the states to adopt education systems with stigmas that linger to this day. Many students who deviated from the reading and writing learning style or students with disabilities were excluded from these schools, and inconformity always presents the danger of promoting discrimination.²⁸ While we may think that only those with “visible” disabilities²⁹ bear the brunt of discrimination, non-apparent disabilities are not immune from stigma.³⁰ Those who were deemed “emotionally disturbed,” or had an intellectual disability,” were ostracized just like children who were deaf and blind.³¹ HIV is an example even today.³² Scholars like Samuel R. Bagenstos have argued for a stigma-focused approach to the law, building on Erica Worth Harris’s belief that “social disadvantage results only when disabilities have an ‘obvious effect on the daily activities of the individuals’ with those conditions.”³³ However, Harris’ approach ignores the numerous preconceived notions people have about people with disabilities, a stigma entrenched into the American psyche that ultimately separates or “others” those our society has conditioned us to ignore.³⁴ The inability to overcome such stigma and discrimination creates and perpetuates the false promise that

27. See JAY TIMOTHY DOLMAGE, *ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUCATION* 86 (David T. Mitchell & Sharon L. Snyder eds., 2017) (explaining how the curb cuts to accommodate wheelchair users benefit others).

28. *A History of the Individuals with Disabilities Education Act*, U.S. DEP’T EDUC., <https://sites.ed.gov/idea/IDEA-History> (last visited Apr. 10, 2023).

29. MARGARET PRICE, *MAD AT SCHOOL: RHETORICS OF MENTAL DISABILITY AND ACADEMIC LIFE* 18 (2011) [hereinafter “PRICE, MAD AT SCHOOL”] (explaining that referring to mental disability as “invisible” or “hidden” is a misnomer because it “may become vividly manifest[ed]” and “is not so much invisible as it is apparitional, and its ‘disclosure’ has everything to do with the environment in which it dis/appears”).

30. Samuel R. Bagenstos, *Subordination, Stigma and Disability*, 86 VA. L. REV. 397, 492 (2000).

31. *A History of the Individuals with Disabilities Education Act*, *supra* note 28.

32. See Bagenstos, *supra* note 30, at 492.

33. *Id.* (“The example of HIV demonstrates the value of a societal-stigma “regarded as” approach. It also persuasively refutes the notion, advanced by some commentators, that “hidden” conditions are immune from stigma. Applying a stigma-focused approach, some have argued that “hidden” impairments should never be considered substantially limiting. Erica Worth Harris asserts, for example, that social disadvantage results only when disabilities have an ‘obvious effect on the daily activities of the individuals’ with those conditions.”).

34. The leading scholar in sociology, Erving Goffman, defines stigma as “an undesired differentness from what we had anticipated ... [T]hose who do not depart negatively from the particular expectations at issue [he calls] the normals. Therefore, anyone outside of “normal” becomes even more stigmatized. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 4–5 (1963).

higher education will provide financial stability because opportunities depend on the market and the employer. Therefore delegation provided an opportunity for states to normalize and perpetuate these stigmas in public education based on parochial and regional idiosyncrasies in addition to national discriminatory practices and beliefs.

And so if students with disabilities wanted to learn, their parents would have to pay for private school or private tutoring.³⁵ This pressure to attend private schools is one of many reasons why students with disabilities were not seriously incorporated into federal law until the 1970s, some two hundred years after the Founders mentioned education as a potential priority.

B. 10th Amendment, Taxes, and the Proliferation of Private Schools

The Tenth Amendment gave states the power to establish and administer public education, and while states must adhere to federal laws, this delegation ultimately results in varying quality and practices. One influential factor is how states decide to fund their public school districts: state income taxes, sales taxes, and local tax revenue. Property taxes are local taxes which are often the primary source of revenue for public schools.³⁶ The higher the property value, the higher the local property tax to fund the local schools. The more funding, the more resources those schools can provide to their students including the necessary accommodations for students with disabilities.

State changes to the administration of property taxes have underscored this correlation. Some states, including Michigan, Massachusetts, Oregon, and New York, recently enacted laws limiting the collection of property taxes.³⁷ New York had a tax cap in 2011. After observing 663 school districts in New York between 2006 to 2016, the National Tax Journal noted that even the slightest loss of funding impacted student outcomes. For every “\$1,000 loss in per-pupil revenues from the tax cap le[d] to drops in student test performance of 0.04 standard deviations, driven by reductions in

35. See generally KIMBERLY FRENCH, PERKINS SCHOOL FOR THE BLIND (2004); EDWARD MINER ET AL., HISTORY OF THE COLLEGE FOR THE DEAF (1983).

36. See Walker, *supra* note 15; NATIONAL CTR. FOR EDUCATION STATISTICS, *Public School Revenue Sources*, U.S. DEPARTMENT OF EDUCATION, INSTITUTE OF EDUCATION SCIENCES (May 2023), <https://nces.ed.gov/programs/coe/indicator/cma/public-school-revenue> (“On a national basis in 2019–20 some \$318 billion, or 81 percent, of local revenues for public schools were derived from local property taxes. Connecticut (99 percent), Rhode Island (97 percent), New Hampshire (97 percent), and Maine (97 percent) had the highest percentages of local revenues from property taxes.”).

37. See generally David M. Cutler et al., *Property Tax Limitations in Retrospect: The Example of Massachusetts*, 89 NAT’L TAX ASS’N (1996); Iris J. Lav & Michael Leachman, *State Limits on Property Taxes Hamstring Local Services and Should Be Relaxed or Repealed*, CTR. ON BUDGET & POL’Y PRIORITIES (July 18, 2018), <https://www.cbpp.org/sites/default/files/atoms/files/7-18-18sfp.pdf>.

instructional expenditures, teacher hiring, and support personnel.”³⁸ Wealthier districts ultimately incurred more costs from the tax cap because they relied more on the property tax.³⁹ Property taxes matter because their economic impact disproportionately affects schools in the neighborhoods where children of color live.⁴⁰ Numerous studies and publications have shown how redlining – the practice of denying mortgages to creditworthy applicants, many of whom could afford wealthy neighborhoods, because of their race – impacted the neighborhoods where people of color could live.⁴¹ As a result, students of color were more likely to attend schools in lower property value neighborhoods that generate less tax revenue and therefore offer fewer resources.⁴² The probability of success for people with disabilities similarly depends on the school systems they attend.⁴³ Thus, the services available to students with disabilities in a public school in one state, or even one neighborhood, may not exist in another. This educational discrimination led some students with disabilities to turn to private schools instead.

The history of private schools is intertwined with the history of religious education. The Roman Catholic Church established its private educational systems to combat discrimination in public classrooms and the “Protestant indoctrination”⁴⁴ occurring in the “common school” system around the 1830s.⁴⁵ In the early days of public schooling in America, many Catholic students were harassed and discriminated against by teachers and students.

38. Lucy Sorensen et al., *The Distributional Effects of Property Tax Constraints on School Districts*, 74 NAT’L TAX J. 621 (2021); cf. William F. Blankenau et al., *Public Education Expenditures, Taxation, and Growth: Linking Data to Theory*, 97 AM. ECON. REV. 393, 396 (2007) (finding that a positive relationship exists between investment in public education and long-run economic growth).

39. *Id.*

40. See *San Antonio Independent School District*, 411 U.S. 1 (1973) (holding that there is (1) no fundamental right to education (2) poverty is not a quasi, or suspect class, and (3) money doesn’t mean better schools, so no discriminatory disparate impact).

41. See generally Daniel Aaronson et al., *The Effects of the 1930s HOLC “Redlining” Maps 2* (FED. RSRV. BANK CHI. Working Paper, Paper No. 2017-12, 2017), <http://hdl.handle.net/10419/200568>.

42. Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (Sept. 8, 2023) <https://educationdata.org/public-education-spending-statistics>.

43. The Court somehow came to the opposite conclusion in *San Antonio Independent School District*. In addition to finding there is no fundamental right to education, the Court reasoned that because poverty is not a quasi, or suspect class, and money doesn’t mean better schools, then there is discriminatory disparate impact on public school students who attend underfunded schools. 411 U.S. at 27–28.

44. See Dick M. Carpenter II & Krista Kafer, *A History of Private School Choice*, 87 PEABODY J. EDUC. 336, 337–38 (2012).

45. DAVID TYACK ET AL., *SCHOOL: THE STORY OF AMERICAN PUBLIC EDUCATION* 15–16 (Sarah Mondale & Sarah B. Patton eds., 2001).

At times Catholic students were beaten and expelled because they were unwilling to follow the Protestant way.⁴⁶

Later, in 1922 the Compulsory Education Act in Oregon required parents or guardians to send children between the ages of eight and sixteen to public school in their local district of residence in hopes of eventually eliminating Catholic schools.⁴⁷ Two private organizations, the Society of Sisters of the Holy Names of Jesus and Mary and the Hill Military Academy, challenged the statute's constitutionality under the Fourteenth Amendment.⁴⁸ The Supreme Court unanimously deemed this Act unconstitutional, agreeing with the petitioners that the "right to conduct schools was property," and the statute deprived them of that property without due process.⁴⁹ The Act also violated the right of parents to direct their children's education.⁵⁰ Further, "the fundamental liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."⁵¹ The *Pierce v. Society of Sisters* ruling was known as the Magna Carta of the parochial school because it legally allowed Catholic schools to exist.⁵² Here, the educational fate of Catholic students improved by turning to the private sector; however, this would not necessarily be the case for students with disabilities. The proliferation of private schooling in the wake of *Pierce v. Society of Sisters* meant that some students with disabilities incurred debt to attend these more costly schools.⁵³

Private schooling or tutoring became the norm for students with disabilities because the public school systems did not incorporate them into the fabric of public education. Then in 1975, Congress finally passed The Education for All Handicapped Children Act, now known as the Individuals with Disabilities Education Act (IDEA).⁵⁴

46. *Id.* at 33.

47. See *Pierce v. Society of Sisters*, 268 U.S. 510, 529–31 (1925); Compulsory Education Act, Laws Or. 1923 (Nov. 7, 1922); Holsinger, M. Paul, *The Oregon School Bill Controversy*, 37 PACIFIC HISTORICAL REVIEW 3 (Aug. 1968).

48. See *Society of Sisters*, 268 U.S. at 533–34.

49. *Id.* at 534–535.

50. *Id.* at 535–536 ("Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.") (internal citations omitted).

51. *Id.* at 535.

52. *Id.* at 533–534.

53. See Editor Thomas D. Snyder, *120 Years of American Education: A Statistical Portrait*, CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, at 45–53 (Jan. 1993), <https://nces.ed.gov/pubs93/93442.pdf>.

54. Individuals with Disabilities Education Act, Pub. L. No. 101-476 (as codified and amended at 20 U.S.C. § 1400) [hereinafter "IDEA"].

C. Rights and Regulation of Public and Private Schools

Americans passed the first laws establishing public education specifically for students with disabilities under IDEA. The Act was authorized in 2004 and amended in 2015 under The Every Student Succeeds Act.⁵⁵ Public schools excluded 1.8 million children with disabilities from education before IDEA. As of the 2020-2021 school year, public schools educate over 7.5 million children with disabilities.⁵⁶ Students with disabilities in K-12 schooling heavily rely on laws, such as IDEA, because they require free appropriate public education (FAPE) for students with disabilities and special education for students who need such services to succeed.⁵⁷ The congressional language of the IDEA expressed an initial intent, or at least an attempt, to view people with disabilities as part of the human variation.⁵⁸ Congress stated that

“[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”⁵⁹

Regardless of initial congressional intent, the courts have held that if a student does not receive adequate education in public elementary and secondary schools, or the necessary accommodations for success, then the family can obtain a voucher for a private school that can provide this necessary support.⁶⁰ In 2015, the Montana legislature enacted a tax-credit scholarship program providing a tax credit to individuals and businesses who donate to private, nonprofit scholarship organizations.⁶¹ The Montana Department of

55. See Every Student Succeeds Act of 2015, Pub. L. No. 114-95 (codified as amended in scattered sections of 20 U.S.C.); see *A History of the Individuals with Disabilities Education Act*, *supra* note 28.

56. *Id.*

57. See *Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1129 (9th Cir. 2021), *cert. denied sub nom. S.W. on Behalf of B.W. v. Capistrano Unified Sch. Dist.*, 143 S. Ct. 98 (2022) (quoting *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748 (2017) (IDEA “offers federal funds to States’ for providing a free appropriate public education (‘FAPE’) to all children with certain physical or intellectual disabilities.”); see also 20 U.S.C. § 1412(a)(1)(A).

58. See Part III(A) (defining human variation).

59. *About IDEA*, U.S. DEPT. EDUC. (2023), <https://sites.ed.gov/idea/about-idea/> (last visited Apr. 3, 2023).

60. See generally Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education*, 39 J. L. & EDUC. 291 (2010).

61. See Mont. Const. art. 10, § 6; and MONT. CODE ANN. § 15-30-3101 et seq. (2015), *invalidated by Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2251–2252 (2020).

Revenue passed an administrative rule prohibiting scholarship recipients from using the funds to enroll in religious schools, citing the “no-aid provision” under Montana’s state constitution.⁶² The state constitution prohibits “direct or indirect” public funding of schools with a religious affiliation.⁶³ Then in 2020, Kendra Espinoza and other mothers applied for these state scholarships to keep their kids enrolled in Stillwater Christian School.⁶⁴ Even though the school was a “qualified education provider[,]” as defined by the statute and her child had earned a scholarship to attend, they could not enroll because of the “no-aid” provision.⁶⁵ The group of mothers argued that the state constitution and administrative rule “discriminated on the basis of their religious views and the religious nature of the school [the mothers] had chosen for their children.”⁶⁶

In what would become *Espinoza v. Montana Department of Revenue*, the National Disability Rights Network (NDRN) filed an amici curiae on behalf of Montana to argue that this ruling would harm students with disabilities and weaken public education systems. Among the myriad of concerns, NDRN pointed out that the redirection of public funds into private institutions that are unregulated by federal laws that protect the rights of students with disabilities would put those children’s educational future at risk.⁶⁷ This redirection of funds would in turn increase costs and create an additional barrier for students with disabilities to obtain education that promises stable economic success.⁶⁸ To this day, public schools are more beholden to federal and state laws than private schools since they receive federal and state government funding, while private schools could opt only to accept private funds.⁶⁹ Many parents, however, are unaware of this dynamic.⁷⁰ NDRN cited to a United States Government Accountability Office (GAO) report: it found that seventy-three percent of parents did not know that they would forfeit rights guaranteed at public schools—like access to special education—when they enrolled their kids in private schools because those schools never

62. *Espinoza*, 140 S. Ct. at 2252.

63. *See id.* at 2251.

64. *Id.* at 2262–63.

65. *Id.* at 2252.

66. Brief for Respondent at 8, *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) (No. 18-1195) 2019 WL 6245290 [hereinafter “NDRN Brief”];

67. *Id.* at 33; *Supreme Court Ruling Will Harm Students with Disabilities and Weaken Public Schools*, NAT’L DISABILITY RTS. NETWORK (July 1, 2020), <https://www.ndrn.org/resource/supreme-court-ruling-will-harm-students-with-disabilities-and-weaken-public-schools/>.

68. NDRN Brief at 14, 17; *Supreme Court Ruling Will Harm Students with Disabilities*, *supra* note 67.

69. NDRN Brief at 9–10.

70. *Id.* at 19–20.

gave any information about this change.⁷¹ The report shows that another ten percent of parents were given inaccurate information.⁷² In an appeal to Congress, the GAO stated that it “continue[s] to believe that states should be required, not merely encouraged, to notify parents/guardians about key changes in federal special education rights when a parent moves a child with a disability from public to private school.”⁷³

In the end, the Supreme Court found that Montana’s education funding law violated the Free Exercise Clause of the First Amendment, a holding that in many ways echoed the one in *Pierce v. Society of Sisters*.⁷⁴ The opinion authored by Chief Justice Roberts started by explaining that this clause “protect[s] religious observers against unequal treatment” and against “laws that impose special disabilities on the basis of religious status.”⁷⁵ Therefore, the strict scrutiny standard of review necessarily applied because the “no-aid” provision excluded religious schools from public funds mainly because of religious status.⁷⁶ Montana had to demonstrate that the state actions advanced a governmental “interest[] of the highest order” and that the actions were narrowly tailored in pursuit of those interests.⁷⁷ Chief Justice Roberts found Montana’s proffered interest—promoting religious freedom by strengthening the separation between church and state—was not compelling because the law created a greater separation than required by the

71. U.S. GOV’T ACCT. OFF., GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS WITH DISABILITIES, at 31, fig. 9 (2017) [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.gao.gov/assets/gao-18-94.pdf](https://www.gao.gov/assets/gao-18-94.pdf). [hereinafter “GAO REPORT”]; NDRN Brief at 19–20; *id.* at 2 (“Once enrolled in a private school that does not offer an appropriate education or otherwise protect their rights, students with disabilities have few good options. They can stay in the private school and continue to forfeit the right to a proper education. Or they can abruptly switch schools and disrupt their schooling further. Either way, the education and development of students with disabilities suffers.”) (internal citations omitted).

72. NDRN Brief at 19–20; GAO REPORT at 31, fig. 9.

73. *Id.* at 36.

74. *Id.* at 2256.

75. *Espinoza*, 140 S. Ct. at 2254 (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2012) (internal quotation marks and alterations omitted)); *see generally* *Society of Sisters*, 268 U.S. 510 (1925).

76. *Espinoza*, 140 S. Ct. at 2255; *see* *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (holding that a strict scrutiny standard of review is triggered when classifications against race of “fundamental rights” are implicated. The classifications must be narrowly tailored to a compelling government interest); *see also* *Espinoza*, 140 S. Ct., 2260.

77. *Espinoza*, 140 S. Ct. at 2261–2262; *see also* *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993) (finding that “proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances.”).

Constitution.⁷⁸ Therefore, the Court created another economic barrier for to overcome public schools by upholding school vouchers for students with disabilities and ruling in favor of Espinoza and the other mothers.⁷⁹

Most parents are still unaware of the changing legal landscape in their state concerning children with disabilities. For example, some courts have found that public schools are generally required to provide Individual Education Plans (IEPs)—a customized academic success plan—whereas private schools might not have to fulfill this requirement.⁸⁰ The Ninth Circuit held in *Capistrano Unified School District v. S.W.* that IDEA only recognizes two categories of private school students: those enrolled by their parents (who are not entitled to IEPs) and those placed there by public agencies (who require IEPs).⁸¹ A school district is not legally required to prepare an IEP for a student enrolled by parents in private schools unless the parents request an IEP.⁸² Those who enroll their child into a private school may request an IEP; however, just because an IEP was not created does not mean a FAPE was denied under IDEA.⁸³

While parents may advocate on behalf of students with disabilities from K-12, the student must become their own advocate in higher education. Per the Family Education Rights and Privacy Act (FERPA), the student must self-advocate, which includes asking for access to information about disability services.⁸⁴ Under FERPA, the student and the university do not need to disclose any information to the parents if the school receives funds from the U.S. Department of Education.⁸⁵ The university may only disclose to the parents any information related to the student by obtaining the student's written consent.⁸⁶ Parents cannot intervene even if they want to. In private

78. *Espinoza*, 140 S. Ct. at 2260 (quoting *Trinity Lutheran Church of Columbia, Inc.*, 582 U.S. at 466 (“A State’s interest ‘in achieving greater separation of church and State than is already ensured under the Establishment Clause [] is limited by the Free Exercise Clause.’”)).

79. *Id.* at 2252 (2020).

80. *See Fry*, 137 S. Ct. at 378–79 (citing 20 U.S.C. § 1401(9), (26), (29) (“The IEP, ‘a personalized plan to meet all of the child’s educational needs,’ is ‘the primary vehicle for providing each child with’ a FAPE. . . . As defined in the Act, a FAPE comprises “special education and related services”—both instruction tailored to meet a child’s ‘unique needs’ and sufficient ‘supportive services’ to permit the child to benefit from that instruction.”); 20 U.S.C. § 1401(9) (requiring school districts to provide a FAPE “at public expense, under public supervision and direction, . . . in conformity with” an IEP); *see also* 20 U.S.C. § 1414(d).

81. 34 C.F.R. § 303.37; *see generally Capistrano*, 21 F.4th, 1138 (9th Cir. 2021).

82. *Capistrano*, 21 F.4th at 1138.

83. *Id.* (“There is no freestanding requirement that IEPs be conducted when there is a claim for reimbursement.”).

84. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

85. 20 U.S.C. § 1232g(b)(1)(F).

86. 20 U.S.C. § 1232g(b)(1).

schools, however, these rules only apply if the school receives funding from the U.S. Department of Education, then FERPA applies.⁸⁷ Therefore, if the goal is to graduate college, it is imperative for students with disabilities to learn how to advocate for themselves since their parents may be unable to intervene.

Assuming a student with a disability can overcome all of these obstacles and enters college, but does not have one of the disabilities that qualify for loan forgiveness, then how will the student pay for their education?⁸⁸ The answer is loans.

II. STUDENTS WITH DISABILITIES AND HIGHER EDUCATION DEBT

As the Court has acknowledged most recently in *Biden v. Nebraska*, education is a commodity, and in turn, education has become unaffordable to a vast number of people. And even if a student obtains a college degree, there is no longer a guarantee of employment or a decent salary that previous generations enjoyed.⁸⁹ In fact, the cost of higher education is sometimes significant enough to overwhelm even those with well-paying jobs.⁹⁰ This challenge is even more apparent for students with disabilities. Students with disabilities have historically earned significantly less than their counterparts, and as a result face an enormous burden in paying back the cost of higher education.

87. 20 U.S.C. § 1232g(a)(3).

88. See generally U.S. DEPT. OF EDUCATION FEDERAL STUDENT AID, TOTAL AND PERMANENT DISABILITY DISCHARGE (2023), <https://studentaid.gov/manage-loans/forgiveness-cancellation/disability-discharge> (last visited Nov. 19, 2023) (Some severe mental or physical disabilities qualify for federal student loan forgiveness if the individual is unable to engage in substantial gainful employment and has proof.).

89. Andy Kiersz, *Here's how much the typical millennial, Gen X, and baby-boomer worker earns in every US state*, BUS. INSIDER (Dec. 20, 2018), <https://www.businessinsider.com/typical-income-millennial-gen-x-baby-boomers-every-state-us-2018-7#idaho-13> (See Alaska: \$43,000 for Millennials, \$65,000 for Gen Xers, and \$71,000 for Baby Boomers; and California: \$40,000 for Millennials, \$60,000 for Gen Xers, and \$61,400 for Baby Boomers; but see Idaho: \$33,000 for Millennials, \$50,000 for Gen Xers, and \$48,100 for Baby Boomers); Melanie Hanson, *Student Loan Debt Statistics*, EDUC. DATA INITIATIVE (Aug. 20, 2023), <https://educationdata.org/student-loan-debt-statistics> (finding that 34.6 percent of federal borrowers are between the ages of 25 to 34 whereas 6.2 percent of federal borrowers are 62 years of age and older).

90. The median starting salary among all new graduates is \$61,600, but the average monthly payment for student loans is \$503, meaning a minimum of sixteen percent of the average graduate's monthly budget goes to paying back loans. See Melanie Hanson, *Average Student Loan Payment*, EDUC. DATA INITIATIVE (May 30, 2023). Whereas median salary among all people with disabilities working full-time is \$39,297—meaning a minimum of eighteen percent of the average graduate's monthly budget goes to paying back loans. See Institute on Disability, *2020 Annual Disability Statistics Compendium*, UNIV. OF N.H. (2020), <https://disabilitycompendium.org/compendium/2020-annual-disability-statistics-compendium?page=10>.

People with disabilities are often marginalized and othered.⁹¹ This experience means that they cannot meaningfully engage in the job market because the othering effect reduces a person with disabilities to little more than the value of their reasonable accommodation.⁹² Employers use shortcomings in disability antidiscrimination laws to not provide what an individual needs to succeed in their job, claiming at times an undue hardship to the employer.⁹³ This discrimination creates insiders and outsiders, cementing a structural system of oppression against people with disabilities.

A. The Impact of Stigma in Higher Education

Once students with disabilities graduate high school and enter college, they must rely on the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 to access necessary accommodations. Many studies have found that students with disabilities are underrepresented in colleges and career training programs: only eleven percent of students with disabilities graduate high school, one out of five people with disabilities go to college, and then only four percent graduate with a bachelor's degree.⁹⁴ Previous studies found that high school students with disabilities disproportionately come from low-income households, compared to their peers without disabilities.⁹⁵ Given the prevalent social stigma, most students with

91. See GOFFMAN, *supra* note 34, at 10–11.

92. See *generally* 42 U.S.C. § 12111(9) (defining reasonable accommodation).

93. See *generally* 42 U.S.C. § 12111(10)(A) (defining undue hardship); 42 U.S.C. § 12111(10)(B) (“In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—(i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility.”); RUTH COLKER & PAUL D. GROSSMAN, *THE LAW OF DISABILITY DISCRIMINATION FOR HIGHER EDUCATION PROFESSIONALS* 76–78 (2014) [hereinafter COLKER & GROSSMAN].

94. NAT'L CTR. FOR EDUC. STAT., *DISABILITY RATES AND EMPLOYMENT STATUS BY EDUCATIONAL ATTAINMENT*, (2017); NAT'L CTR. FOR EDUC. STAT., *FAST FACTS STUDENTS WITH DISABILITIES* (2023), <https://nces.ed.gov/fastfacts/display.asp?id=60> (last visited Apr. 18, 2023).

95. See Thomas R. Wolanin, *Students with Disabilities: Financial Aid Policy Issues*, 35 *NASFAA J. STUDENT FIN. AID* 17, 17 (2005); Rebecca Moore, *STUDENTS WITH DISABILITIES FACE FINANCIAL AID BARRIERS*, NAT'L COUNCIL ON DISABILITIES (Sept. 15, 2003), https://webharvest.gov/peth04/20041015152849/www.ncd.gov/newsroom/advisory/youth/yac_aidbarriers.htm; *People with Disabilities and Postsecondary Education*, NAT'L COUNCIL ON DISABILITY, <https://www.ncd.gov/publications/2003/people-disabilities-and-postsecondary-education-position-paper> (last visited Sept. 9, 2023); ADVISORY COMMITTEE ON STUDENT FINANCIAL ASSISTANCE, *EMPTY PROMISES: THE MYTH OF COLLEGE ACCESS IN AMERICA* (2002).

disabilities do not report their disability to the school.⁹⁶ In fact, it is estimated that only one-third of students with disabilities attending college disclose their disability to the school to receive services.⁹⁷ Students with disabilities have to concern themselves not only with the expense of college, but also any costs pertaining to their disability, which may sometimes impact their ability to attend and afford college.

Each state has a Vocational Rehabilitation (VR) program, which are supposed to offer individuals with disabilities resources and guidance to help them to “prepare for and engage in competitive integrated employment or supported employment and achieve economic self-sufficiency.”⁹⁸ In other words, states established these programs to help students with disabilities to obtain the necessary training to find and keep employment.⁹⁹ The eligibility requirements, quantity, and quality of these services vary from state to state but the federal government can influence these programs through reporting for federal funds.¹⁰⁰ For instance, 34 states in the United States have one VR agency that services individuals with all different types of disabilities, known as combined VR agencies.¹⁰¹ In contrast, other states have General VR agencies that serve all other types of disabilities and then specialized programs like Blind VR Agencies that serve the blind and visually impaired.¹⁰²

B. The High Cost of Higher Education

Depending on the educational institution a student chooses to attend or can afford, there is a vast difference in cost, a burden that is all the more taxing for students with disabilities who are likely to make sixty-six cents on the dollar.¹⁰³ Students paid \$84,413 to attend Harvard College in the 2022-

96. See A MAJORITY OF COLLEGE STUDENTS WITH DISABILITIES DO NOT INFORM SCHOOL, NAT'L CTR. FOR EDUC. STAT. (Apr. 26, 2022), https://nces.ed.gov/whatsnew/press_releases/4_26_2022.asp (last visited Apr. 18, 2023).

97. *Id.*

98. REHAB. SERV. ADMIN., STATE VOCATIONAL REHABILITATION SERVICES PROGRAM, OFF. OF SPECIAL EDUC. AND REHAB. SERV., U.S. DEP'T OF EDUC. (2023), <https://rsa.ed.gov/about/programs/vocational-rehabilitation-state-grants>.

99. See *Wonder if You Are Eligible for Extra Help with Employment and Training Goals?* CAREERONESTOP, <https://www.careeronestop.org/ResourcesFor/WorkersWithDisabilities/vocational-rehabilitation.aspx> (last visited Apr. 18, 2023).

100. See *supra* note 98 (describing formula grant requirements).

101. U.S. DEP'T OF EDUC., REHAB. SERV. ADMIN., *State Vocational Rehabilitation Agencies* (2023), <https://rsa.ed.gov/about/states> (last visited June 26, 2023).

102. See *supra* note 98.

103. See Jennifer Cheeseman Day & Danielle Taylor, *Do People with Disabilities Earn Equal Pay?*, U.S. CENSUS BUREAU, (Mar. 21, 2019), <https://www.census.gov/library/stories/2019/03/do-people-with-disabilities-earn-equal-pay.html> (explaining that people with disabilities earn sixty-six

2023 academic year.¹⁰⁴ In-state tuition to attend a top public university, like UC Berkeley, costs \$43,794, half that of a private university.¹⁰⁵ In-state tuition at the University of Georgia, the first state-chartered university in the United States, costs \$27,542 in the same year.¹⁰⁶ Thus, those with financial restrictions and limited means are often relegated to attending lower-ranked, more affordable schools. Rankings matter before and after attendance. Many college consultants, parents, and students refer to the U.S. News and World Report when looking at colleges to apply to increase future employment opportunities.¹⁰⁷ Employers often also use this metric to determine an employee's potential, with the key assumption that the higher-ranked school or more well-known schools are likely to produce higher-quality workers. While baseless, there is an implicit assumption that students who attended a lower-ranked school did so because they could not obtain admission into a higher-ranked school; otherwise, the choice would have been obvious. This rankings-focused analysis often fails to factor in other key considerations, such as a student's limited financial situation or the student's preferences for specific academic environments.

Attending highly ranked colleges today is not what it was when federal loans were first offered or even ten years ago.¹⁰⁸ Federal Student Loans were first offered in 1958 under the National Defense Education Act (NDEA) to help the United States compete with other countries.¹⁰⁹ Private institutions offered individual loans to college-bound students, but after the passage of

cents on the dollar for every dollar than those with no disability earn in 2019); *see also A Fair Shot for Workers with Disabilities*, CTR. FOR A. PROGRESS (Jan. 28, 2015), <https://www.americanprogress.org/article/a-fair-shot-for-workers-with-disabilities/#:~:text=Recent%20research%20by%20Michelle%20Yin,just%2063%20cents%20on%20average> (showing that the earnings were less in 2015 than in 2019).

104. *How Aid Works*, HARV. COLL., <https://college.harvard.edu/financial-aid/how-aid-works> (last visited Mar. 23, 2023).

105. *Financial Aid & Scholarships*, UNIV. OF CAL., BERKELEY, <https://financialaid.berkeley.edu/how-aid-works/student-budgets-cost-of-attendance/> (last visited Mar. 23, 2023).

106. *Cost of Attendance*, UNIV. OF GA., <https://osfa.uga.edu/costs/> (last visited Mar. 23, 2023).

107. *See* Stephanie Saul, *Despite Years of Criticism, the U.S. News College Rankings Live On*, N.Y. TIMES (Sept. 15, 2022), <https://www.nytimes.com/2022/09/15/us/us-news-college-ranking.html>; *see also* CHARTED UNIV. CONSULTANTS, *Services*, <https://uscollegeconsulting.com> (last visited June 26, 2023) (offering a variety of services including advice on which courses to take in high school, planning school visits, and "personalized assistance with completing common applications and supplements" to name a few).

108. *See* U.S. DEPT. OF EDUC., *THE FEDERAL ROLE IN EDUCATION* (2023) <https://www2.ed.gov/about/overview/fed/role.html> (last visited Apr. 10, 2023).

109. *See generally* GLENN C. ALTSCHULER & STUART BLUMIN, *THE GI BILL: A NEW DEAL FOR VETERANS* (2009); MICHAEL J. BENNETT, *WHEN DREAMS CAME TRUE: THE GI BILL AND THE MAKING OF MODERN AMERICA* (1996); Keith W. Olson, *The G. I. Bill and Higher Education: Success and Surprise*, 25 AM. Q., 596 (1973).

NDEA, the funding landscape shifted dramatically.¹¹⁰ A survey of financial aid offers from 4-year educational institutions found that seventy-two percent of undergraduates received financial aid, grants, loans, or were part of a work-study program in the 2015-2016 academic year.¹¹¹ In that same academic year, approximately twenty-two percent of undergraduates received state aid.¹¹² It is unclear whether there is any correlation between the increased limit of federal Stafford loans¹¹³ and the increase of college tuition in 2008, but it is significant to note that if debt allowances increase, prices increase.¹¹⁴

In general, those unaware of the educational landscape come from limited means and have limited access to information. These students often lack the generational wealth of knowledge from college-educated family members and are often more susceptible to the predatory recruitment of for-profit schools that target students who can pay or take out loans. Unfortunately, veterans and students with disabilities often become perfect candidates for these for-profit schools, which the following section will discuss further.

The experiences of veterans and students with disabilities do not overlap completely, but they face notably similar obstacles. Those who served in the military and who are honorably discharged can use their GI Bill benefits to help pay for college.¹¹⁵ Like students with disabilities, many veterans who use their GI Bill benefits to obtain higher education are also often first-generation college students, and they may not know about or understand the impact of school rankings on future employment opportunities. But unlike students with disabilities, the GI Bill covers the full cost of tuition and fees at a public in-state school or up to \$26,381 per academic year at a private or

110. See *A Timeline of Harvard's History*, HARV. UNIV., <https://www.harvard.edu/about/history/timeline/> (last visited May 2, 2023); MARCIA GRAHAM SYNNOTT, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970* 8-13 (1979); see generally Matthew B. Fuller, *A History of Financial Aid to Students*, 44 J. STUDENT FIN. AID 42, 46 (2014).

111. See NAT'L CTR. FOR EDUC. STAT., NATIONAL POSTSECONDARY STUDENT AID STUDY, <https://nces.ed.gov/surveys/npsas/> (last visited Apr. 18, 2023) (NPSAS examines the characteristics of students in postsecondary education, with special focus on how students finance their education).

112. *Id.*

113. The Federal Direct Loans (Direct Loan) Program offered Direct Stafford Loans directly from the U.S. Department of Education with low-interest rates for eligible students to help cover the cost of higher education at a four-year college or university, community college, or trade, career, or technical school. See generally U.S. GOV'T ACCOUNTABILITY OFF., *FEDERAL STUDENT LOANS: PATTERNS IN TUITION, ENROLLMENT, AND FEDERAL STAFFORD LOAN BORROWING UP TO THE 2007-08 LOAN LIMIT INCREASE* (2011).

114. See generally U.S. GOV'T ACCOUNTABILITY OFF., *FEDERAL STUDENT LOANS: IMPACT OF LOAN LIMIT INCREASE ON COLLEGE PRICES IS DIFFICULT TO DISCERN* (2014).

115. See *The Federal Role in Education*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/overview/fed/role.html> (last visited Apr. 10, 2023).

foreign institution.¹¹⁶ These benefits, however, are not nearly enough to cover the cost of a prestigious private education in one of the top universities in the United States. Furthermore, since many veterans reside in states that lack a high-ranking college or university, the higher education puzzle becomes even more complicated. These veterans, like many students with disabilities, often must settle for a lower-ranked local state school or a local for-profit college to obtain a higher education. Of course these debt repayment structures overlap to provide veterans with disabilities more pathways to debt relief. But if a veteran took out loans to obtain their degree of choice, then they qualify for federal student loan forgiveness *as long as* they have a service-connected disability with a one hundred percent “Total Disability Individual Unemployability” rating.¹¹⁷ It is shocking to think that someone who serves our country might be financially better off if they become disabled, but only if they are disabled *in the right way*.

C. For-Profit Schools Prey on Students with Disabilities

For-profit schools exemplify the education-as-commodity paradigm and unfortunately students with disabilities are extremely vulnerable to these schools’ predatory practices. When public educational systems fail, students with and without disabilities turn to the private sector for instruction and tutelage. Unfortunately, it is challenging for the average individual not only to afford, but even to distinguish private schools from for-profit schools. To gain legitimacy, for-profit schools market themselves the same as private and public universities, such as The University of Phoenix and ITT Tech, and then they lie to those students to squeeze out profits.

For-profit schools targeted vulnerable populations to enroll in their colleges because those groups were more susceptible to their sales tactics and would have to take out federal loans to attend.¹¹⁸ In 2010, the GAO uncovered manipulative financial aid and admissions tactics that for-profit colleges

116. See *VA Individual Unemployability if you can't work*, U.S. DEP'T OF VETERAN AFFS. (Oct. 12, 2022), <https://www.va.gov/disability/eligibility/special-claims/unemployability/#:~:text=If%20you%20can't%20work%20because%20of%20a%20disability%20related,has%20a%20100%25%20disability%20rating> (last visited Nov. 22, 2023) (describing what the GI Bill will cover for an honorably discharged soldier).

117. *VA Individual Unemployability if You Can't Work* U.S. DEP'T OF VETERANS AFFS., <https://www.va.gov/disability/eligibility/special-claims/unemployability/> (last visited May 24, 2023).

118. Stephen Hayes & Andrea Lowe, *Combating Exploitative Education: Holding For-Profit Schools Accountable for Civil Rights Violations*, 15 (2020), https://protectborrowers.org/wp-content/uploads/2020/12/Combating-Exploitative-Education_2020.pdf; see also Melissa Korn, *Party Ends at For-Profit Colleges*, WALL ST. J. (Aug. 23, 2011), <https://www.wsj.com/articles/SB10001424053111904279004576524660236401644>.

and universities used to entrap students and obtain federal aid.¹¹⁹ Investigators posed as prospective students seeking admission at fifteen different colleges in six states and Washington D.C.—all of which received eighty-nine percent or more of their revenue from the Department of Education in federal student aid.¹²⁰ Four applicants falsified their financial aid forms when an admissions representative asked the undercover applicants to omit the fact that they had \$250,000 in savings.¹²¹ Some admissions representatives exaggerated the potential salary after graduation and failed to inform an undercover applicant of the program’s duration and graduation rates.¹²² One admissions officer told an undercover applicant that they could earn up to \$150,000 to \$250,000 a year as a barber when the Bureau of Labor Statistics reports that ninety percent of barbers make less than \$43,000 a year.¹²³ Some admissions officers at for-profit schools pressured applicants to sign the enrollment contract at all costs, regardless of whether it was in the applicants’ best interest. Admissions officers would pressure undercover applicants to sign their enrollment contract before they could speak to a financial aid counselor.¹²⁴ Others made patently outrageous and untrue statements to undercover applicants: for example, one representative falsely stated that the school was accredited by the same organization that accredits Harvard and the University of Florida.¹²⁵ One school representative further misled an undercover applicant about student loans by claiming that student loans were not like car loans because no one would come after the applicant if she did not pay back her loans.¹²⁶ The Consumer Financial Protection Bureau (CFPB) had to get involved because these for-profit schools acted for a sole purpose: profit. The CFPB recognized that when schools offer education as a service—rather than perhaps a constitutional right—the students, as education consumers, become inadvertent victims of this predatory lending scheme that only benefits for-profit schools at the expense of students and other taxpayers.

119. U.S. GOV’T ACCOUNTABILITY OFF., FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES (2010).

120. *See id.* at 2.

121. *See id.* at 7–8.

122. *See Id.* at 9–11.

123. *Id.* at 10, 22.

124. *See id.* at 12.

125. *Id.* at 9.

126. *Id.* at 12, 23.

The reduction of federal loans broadened a private lender market and these entities saw their opportunity to offer students higher interest rates.¹²⁷ Today, the overall amount of money a student could borrow from the federal government is \$138,500.¹²⁸ Students eventually defaulted on their loans once they could not obtain employment after graduating from these for-profit schools, putting the country's loan market in jeopardy.¹²⁹ Thanks to the CFPB's investigation into ITT Technical Institute, a for-profit organization, and its predatory lending practices, the U.S. Department of Education took action.¹³⁰ In August 16, 2022, the Department announced that it would discharge all federal loans taken out by students who attended ITT Technical Institute from January 1, 2005 to its closure in September 2016.¹³¹ This was an important step, but this solution required taxpayers to pay for these defaulted loans and in turn the greed of those running these for-profit schools.

Although for profits schools have been the primary target of increased regulation and scrutiny, there are also non-profit programs attached to private schools—for instance, the American Repertory Theater (A.R.T.) Institute at Harvard University—that are very expensive and do not result in comparable post-graduation employment.¹³² Students who graduate from A.R.T. sometimes borrow more than \$63,000 for the two-year program that places them in a position with an average salary of about \$36,000 annually, representing a debt-to-earnings rate of 22.5 percent.¹³³ This is a cautionary tale about why students with and without disabilities “should” know that an education may or may not provide the necessary salary to repay the debt laid

127. Melissa Korn, *Party Ends at For-Profit Schools*, WALL ST. J. (Aug. 23, 2011), <https://www.wsj.com/articles/SB10001424053111904279004576524660236401644>.

128. *The U.S. Department of Education offers low-interest loans to eligible students to help cover the cost of college or career school*, U.S. DEPT. OF EDUC. FED. STUDENT AID, <https://studentaid.gov/understand-aid/types/loans/subsidized-unsubsidized> (“\$138,500 for graduate or professional students—No more than \$65,500 of this amount may be in subsidized loans. The graduate aggregate limit includes all federal loans received for undergraduate study.”).

129. See generally Luis Armona et al., *Student Debt and Default: The Role of For-Profit Colleges*, 144.1 J. FIN. ECON. 67, 68 (2022).

130. *Id.*

131. *Education Department Approves \$3.9 Billion Group Discharge for 208,000 Borrowers Who Attended ITT Technical Institute*, U.S. DEP'T OF EDUC. (Aug. 16, 2022), <https://www.ed.gov/news/press-releases/education-department-approves-39-billion-group-discharge-208000-borrowers-who-attended-itt-technical-institute>.

132. See generally *The A.R.T. Institute at Harvard University*, HARV. UNIV., <https://americanrepertorytheater.org/education-engagement/art-institute/> (last visited May 19, 2023).

133. *Id.*; see also Angelica Guevara, *Ableness as Property*, 98 DENV. L. REV. F. 1, 10 (2020), <https://static1.squarespace.com/static/5cb79f7efd6793296c0eb738/t/5ee2821c4697a938378535fa/1591902753122/Ableness+as+PropertyGuevaraFinal.pdf> [https://perma.cc/EM2V-F8M5];

Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 409 (2011).

out in loan agreements. But if you come from the systemically excluded communities that these institutions prey on, then how are you supposed to know?

III. REFRAMING DISABILITY AND DISABILITY LAW

Many people in the disability community have prioritized coalition building across disability categories and with so-called able-bodied allies. These activists, scholars, and community members have popularized many of the common terms and ideologies we use to talk about educational and employment discrimination.¹³⁴ However, just like many areas of the law and in medicine, there is a lot of jargon. So before discussing the employment of Americans with disabilities, we should review some key terms and concepts: comorbidity, illness, non-apparent disability, the medical and social models of disability, human variation, universal design, and neurodiversity. Each term explains and connects disability antidiscrimination law to its shortcomings. These concepts will also help us address the unequal opportunity landscape that people with disabilities must face in social spaces at work and on campus. We can then apply all these ideas to our other systemic challenges as a country, including how we must address the aftermath of the COVID-19 pandemic.

A. The Power of Terms and Definitions

The key terms and concepts detailed in this sections are the result of generational activism and community building. These words and phrases are in many ways alive, personal, and therefore contain more depth than we can discuss here.

Comorbidity, or multiple disabilities, is common within the disabled community because rarely does a disability impact solely the body and not the mind.¹³⁵ The body cannot move without the mind. Thus, mental illness and disabilities are just as important as physical ones. Therefore, if we acknowledge the interconnectedness of physical and mental disabilities, then we gain a more comprehensive understanding of what it is actually like to advocate for and support those with disabilities.

Even though illness, impairment, and disability are all distinct concepts, we often use illness and impairment interchangeably as we will in the following discussion. But we must still understand the differences between illness and impairment from disability. Physicians may define *impairment* as

134. See generally ALISON KAUFER, FEMINIST, QUEER, CRIP, 151 (2013) (discussing crip politics).

135. Jose M. Valderas, et. al., *Defining Comorbidity: Implications for Understanding Health and Health Services*, ANN FAM MED. (July–Aug., 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2713155/>.

“any loss or abnormality of psychological, physiological or anatomical structure or function,” such as a missing limb.¹³⁶ So an “[i]mpairment is, in fact, nothing less than a description of the physical body.”¹³⁷ An *illness* is something in an individual that needs treatment, such as the flu; whereas a disability is how we treat an individual socially.¹³⁸

Whereas disability scholars define *disability*, as “the disadvantage or restriction of activity caused by a contemporary social organism which takes no or little account of people who have physical [or mental] impairment and thus excludes them from the mainstream of social activities.”¹³⁹ A related term is *non-apparent disability*, a disability which is not obvious but may become apparent after observation, such as neurodiversity. Some non-apparent disabilities can become “intermittently apparent.”¹⁴⁰ Renowned disability scholar Margret Price uses *stimming*—a set of behaviors that include repetitive or unusual body movement or noises—that *some* autistic people *sometimes* exhibit as examples of a disability that appears intermittently.¹⁴¹

136. Sheena L. Carter, Ph.D., *Impairment, Disability and Handicap*, EMORY UNIV. SCH. OF MED. (2018), <https://med.emory.edu/departments/pediatrics/divisions/neonatology/dpc/impairment-mx.html> (last visited Nov. 3, 2023).

137. MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 35 (1996) [hereinafter “OLIVER, UNDERSTANDING DISABILITY”].

138. See SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 11–12 (1998) (describing the difference between definitions of “disability,” including its medical definition, which has a negative connotation, and its definition as a social/political category, which relates to the identity of “a group bound by common social and political experience”); see also SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 50 (2009) (explaining the importance of a pan-disability identity when unifying a group for a political movement). see generally Kanter, *supra* note 133.

139. See MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH 11 (1990) [hereinafter “OLIVER, POLITICS OF DISABLEMENT”]; see Michael Oliver, *The Politics of Disability*, 4 CRITICAL SOC. POL’Y 21, 22–23 (1984) [hereinafter “Oliver, *Politics of Disability*”]; but see, e.g., Deborah Marks, *Models of Disability*, 19 DISABILITY & REHAB. 85, 85–86 (1997) (discussing the difficulty of defining disability due to the constantly changing nature of qualifying factors); TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS REVISITED 106 (2d ed., 2014) (proposing that the social model may cause disabled individuals to define themselves in comparison or contrast with non-disabled individuals); JANE CAMPBELL & MICHAEL OLIVER, DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE 19–20 (1996) (describing the shift to the social model and subsequent positive change in the political mobility of organizations founded by disabled individuals).

140. See Margaret Price, *The Bodymind Problem and the Possibilities of Pain*, 30 HYPATIA (SPECIAL ISSUE) 268, 272 (2015) [hereinafter “Price, *The Bodymind Problem*”].

141. PRICE, MAD AT SCHOOL, *supra* note 29, at 18 (explaining that referring to mental disability as “invisible” or “hidden” is a misnomer because it “may become vividly manifest[ed]” and “is not so much invisible as it is apparitional, and its ‘disclosure’ has everything to do with the environment in which it dis/appears”); see also Margaret Price, *Defining Mental Disability*, in DISABILITY STUDIES READER 306 (4th ed. 2013) [hereinafter “Price, *Defining Mental Disability*”] (“Stimming . . . is a self-soothing repetitive activity that may be practiced by persons with a variety

The term “non-apparent” should supersede the notion of “visible” or “invisible” disabilities because these terms are inherently ableist in assuming an objective standard of perception defined by sight.¹⁴² Of course, any efforts to reframe the experience of disability must contend with the existing structures and perceptions that influence laws and policies.

There are two disability models to keep in mind: the *medical model of disability*, which has clericalized the experiences of disability, and the *social model of disability*—a movement to address and dismantle the structural barriers that hold all people, disabled or not, from our full potential. The medical field unsurprisingly cemented the medical model to help doctors determine whether an individual has an impairment or loss of function to qualify for disability benefits.¹⁴³ But the medical model has not stayed confined to the medical profession—where it belongs. It has seeped into the general psyche, resulting in the societal view that people with disabilities are impaired. Even the American Medical Association understands that the “medical judgment of impairment is separat[e] from the more subjective and value-laden judgment of disability.”¹⁴⁴ The medical profession as a whole nevertheless still “takes the position that impairment is a purely medical phenomenon, while disability is a medical-administrative-legal phenomenon.”¹⁴⁵

One reason why the general public remains unaware of the difference between impairment and disability is the fact that the law continues to draw on the limited medical model.¹⁴⁶ The medical model lends itself to considering disability a “personal tragedy, which suggests that a disability is some terrible chance event that occurs at random to unfortunate individuals,” like

of disabilities, including autism, obsessive-compulsive disorder, or anxiety.”); *see id.* at 304 (articulating that stimming does not fit into normative social behavior and it is intermittently visible not invisible); *see also* Olivia Ordoñez, “*The Bodymind Problem and the Possibilities of Pain*” by Margaret Price, WORDPRESS BLOG (Apr. 19, 2018), <https://oliviaor.wordpress.com/2018/04/19/the-bodymind-problem-and-the-possibilities-of-pain-by-margaret-price/>

142. PRICE, MAD AT SCHOOL, *supra* note 29, at 18.

143. DEBORAH A. STONE, THE DISABLED STATE 108 (1984); *see also* BAGENSTOS, *supra* note 138, at 4 (“Some activists come close to seeking an end to the disability welfare state that is the locus of much paternalism, while others seek expanded disability welfare benefits under a system that gives people with disabilities more choice and control.”).

144. *Id.* at 110.

145. STONE, *supra* note 143, at 116.

146. *See* Harlan Hahn, *The Politics of Physical Difference: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 39 (1988) (“Although a ‘minority-group’ model has emerged to challenge the traditional dominance of the ‘functional-limitations’ paradigm for the study of disability, research on attitudes toward disabled people has not produced a theoretical orientation that reflects these developments”).

perhaps our perception of the disabled veteran.¹⁴⁷ Thus it limits the possibility for people with disabilities and impairments, the public at large, and the legal system to work towards equity and inclusion. Instead this model promotes pity for people with disabilities—encouraging others to view their fellow human beings as defective, or as having an impairment that must be eliminated, treated, or cured.¹⁴⁸ Accordingly, this model fixates the “problem” within the individual while simultaneously absolving society from further consideration. Ultimately it perpetuates stereotypes of people with disabilities as incomplete or damaged and needing fixing to accomplish any task at hand.¹⁴⁹ Artist and disability activist Simi Linton has explained that:

Society, in agreeing to assign medical meaning to *disability*, colludes to keep the issue within the purview of the medical establishment, to keep it a personal matter and “treat” the condition and the person with the condition rather than “treating” the social processes and policies that constrict disabled people’s lives.¹⁵⁰

Conversely, the *social model of disability* empowers people with disabilities and pushes back on the artificial boundaries installed by the medical model. Michael Oliver further developed the social theory of disability in his book, *The Politics of Disablement*, bringing it from its inception in the activist disability community into academia.¹⁵¹ Unlike the medical model, this theory holds that society disables individuals.¹⁵² In other words, our society’s structures create disabilities when there is nothing inherently

147. Angelica Guevara, *The Need to Reimagine Disability Rights Law Because the Medical Model of Disability Fails Us All*, 2021 WISC. L. REV. 269, 277–79 (2021) [hereinafter “Guevara, *The Need to Reimagine Disability Rights Law*”]. (explaining the medical model’s failings as a framework for disability antidiscrimination law). The root of the problem is that the medical model perpetuates “othering,” affecting us all, but further impacting People of Color. *Id.* at 270. An illness is separate from the disability. *See id.* at 276; *see also* BAGENSTOS, *supra* note 138; *see generally* Kanter, *supra* note 133.

148. *See* OLIVER, *POLITICS OF DISABLEMENT*, *supra* note 139, at 4–6, 11; *see also* STONE, *supra* note 143, at 107–17 (discussing the medical evaluation of impairment); *see* DAN GOODLEY, *DIS/ABILITY STUDIES: THEORISING DISABLISM AND ABLEISM* 16 (2014) (“Disability is established in the *World Report* as a problematic dynamic phenomenon requiring the immediate response of nations states, their governments and their citizens.”).

149. *See* OLIVER, *POLITICS OF DISABLEMENT*, *supra* note 139 at 4–6, 11 (1990); *see also* Oliver, *Politics of Disability*, *supra* note 139, at 22–23; Marks, *supra* note 139, at 85–86; SHAKESPEARE, *supra* note 139; CAMPBELL & OLIVER, *supra* note 139.

150. *See* LINTON, *supra* note 138, at 12, *see* Kanter, *supra* note 133, at 420; *see also* BAGENSTOS, *supra* note 138, at 50.

151. *See* OLIVER, *POLITICS OF DISABLEMENT*, *supra* note 139, at 11.

152. LINTON, *supra* note 138, at 10.

deficient or wrong with an individual with a disability.¹⁵³ Rather, there are diverse ways of existing in the world.¹⁵⁴

Currently, laws and policies are based on the medical model of disability because they tailor assistance and solutions to fit the able-bodied world rather than normalizing human variation, another key concept explained later on. The law can easily apply the binary nature of the medical model: a person is either disabled or not. There is no space for fluctuating symptoms in disabilities that may render a person's body able one day and disabled the next.¹⁵⁵

The social model of disability exposes how the society into which individuals are born makes all the difference in how people experience and view disability. In order to maximize each individual's potential, this model challenges the concept of "normalcy" by forcing us to reexamine our subconscious biases and assumptions about any given disability—inviting us to embrace universalism.¹⁵⁶ In doing so, decisions regarding and attitudes toward people with disabilities would change. For example, why do we only use ramps to bypass stairs? If we know that everyone can use a ramp, then why should buildings have stairs at all? Therefore, laws based on distinguishing the disabled from the non-disabled would not exist in a world based on the social model of disability.

The concept of *human variation* underpins the social model of disability because it acknowledges that there is no such thing as a standard way of being," and affirms that "the presence or absence of a disability [does not] predict [the] quality of life" of any individual.¹⁵⁷ If society normalized

153. See *id.* at 32–37; Anne Louise Chappell, *Still Out in the Cold: People with Learning Difficulties and the Social Model of Disability*, in *THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES* 211, 214–19 (Tom Shakespeare ed., 1998); SHAKESPEARE, *supra* note 139, at 106 (stating that "[w]hat divides disabled from non-disabled people, in [the social model] formulation, is the imposition of social oppression and social exclusion").

154. See, e.g., Tom Shakespeare, *Disability, Identity, and Difference*, in *EXPLORING THE DIVIDE: ILLNESS AND DISABILITY* 94, 94–113 (Colin Barnes & Geoff Mercer eds., 1996); Chappell, *supra* note 153, at 214–19; SHAKESPEARE, *supra* note 139.

155. See Price, *The Bodymind Problem*, *supra* note 141, at 268.

156. See Jerome E. Bickenbach et al., *Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps*, 48 *SOC. SCI. & MED.* 1173, 1173–84 (1999).

157. See Kanter, *supra* note 133, at 414 (citing Harriet McBryde Johnson, *Unspeakable Conversations*, *N.Y. TIMES* (Feb. 16, 2003), <https://www.nytimes.com/2003/02/16/magazine/unspeakable-conversations.html>). Johnson stated in her memoir that the Jerry Lewis muscular dystrophy telethon sent her the message, for the first time, that her neuromuscular disease would eventually kill her. Johnson opposed the "pity-based tactics" of the annual Lewis muscular dystrophy telethon. See generally HARRIET MCBRYDE JOHNSON, *TOO LATE TO DIE YOUNG: NEARLY TRUE TALES FROM A LIFE* 7, 47–75 (2005); see also Dennis Hevesi, *Harriet Johnson, 50, Activist for Disabled, Is Dead*, *N.Y. TIMES* (June 7, 2008), <https://www.nytimes.com/2008/06/07/us/07johnson.html>.

human variation, then it would provide the adjustments necessary to prioritize human dignity and ensure all individuals can maximize their potential. Institutions that genuinely seek to support people with disabilities would welcome human variation and create accessible systems instead of “‘fixing’ the individual so that he or she can better fit into existing systems.”¹⁵⁸ Had individuals historically valued the utility of human variation, perhaps the so-called able body would not be the standard today.¹⁵⁹

In a world based on the social model of disability, we would design everything to include people with disabilities, also known as *Universal Design* (UD).¹⁶⁰ UD’s greater inclusion allows social participation for all, providing universal benefits for unforeseen beneficiaries whether they have a disability or not. Building on the ramps example above, the dropped-curb, unlike barrier curbs, assists people in wheelchairs, people with strollers, and bicycle users as they move from the road to the street.¹⁶¹ During the coronavirus outbreak, many non-disabled individuals benefitted from the handicap push-button that automatically opens doors, allowing a person through without touching a door.¹⁶² More broadly, UD represents a worldview: instead of tailoring environments to marginal groups, our building and products would become a “form of hope, [and] a manner of trying.”¹⁶³ UD illustrates how a person with a disability is “limited more by social attitudes and environmental barriers than any inherent ‘defect’ or ‘deficiency’ within the person that must be remedied.”¹⁶⁴ Therefore, UD underscores what is wrong with the medical model of disability and why we should embrace the social model for the benefit of all.

158. See Kanter, *supra* note 133, at 410.

159. See, e.g., Louis Ariotti, *Social Construction of Anangu Disability*, 7 AUSTRALIAN JOURNAL OF RURAL HEALTH 216, 216 (1999); George S. Gotto IV, *Persons and Nonpersons: Intellectual Disability, Personhood, and Social Capital Among the Mixes of Southern Mexico*, in *DISABILITIES: INSIGHTS FROM ACROSS FIELDS AND AROUND THE WORLD* 193, 193–207 (Catherine A. Marshall et al. eds., 2009).

160. See generally Ronald L. Mace, *Ronald L. Mace Papers 1974–1998*, NC STATE UNIV. LIBRS. (Sept. 1998), <https://www.lib.ncsu.edu/findaids/mc00260/> (last visited Jan. 2, 2023) (Mace contracted polio as a child and quickly realized the challenges people with disabilities face, leading him to pioneer the concept of universal design and creating aesthetically pleasing buildings with an inclusive design that most people could use regardless of ability. Ronald Mace thought inclusively by designing products that could be used to the greatest extent possible by all people, not just people with disabilities); PRICE, *MAD AT SCHOOL*, *supra* note 29, at 88.

161. See DOLMAGE, *supra* note 27.

162. See PRICE, *MAD AT SCHOOL*, *supra* note 29, at 88 (furthermore, when contextualized in any social instructional settings, “universal design is best understood through intentional verbs . . . applied in various ways—for example, . . . ‘permit,’ ‘listen,’ ‘update,’ ‘guide,’ ‘clarify,’ ‘review,’ and ‘allow’”).

163. DOLMAGE, *supra* note 27, at 116.

164. See Kanter, *supra* note 133, at 409.

As more people openly discuss their experiences with depression, anxiety, and PTSD, more people want to know about *neurodiversity* and who is *neurodiverse*. Traditionally, neuro-differences and those diagnoses marking such distinctions qualify under the umbrella and social category of neurodiverse. Margaret Price states that “neuroatypical and neurodiverse mark a broader territory than psychiatric discourse: these terms include all whose brains position them as being somehow different from the neurotypical run of the mill.”¹⁶⁵ According to the Autistic Self Advocacy Network, “neurodivergent” refers to people whose brain functions differ from those who are neurologically typical, or neurotypical.¹⁶⁶ These disabilities include autism, attention deficit hyperactivity disorder (ADHD), dyslexia, obsessive-compulsive disorder, depression, intellectual disability, and schizophrenia.¹⁶⁷ Those with depression, anxiety, and PTSD have differing brain functions from neurotypical individuals; thus, they fall under this category to.¹⁶⁸ Unfortunately, instead of embracing this additional aspect of human variation, society—and in turn our school systems and workplaces—view being neurotypical (able-bodied) as the norm and continue to cater to those kinds of brains.¹⁶⁹

All these concepts play a role in how we should view and potentially could resolve our country’s greatest challenges. After the 2020 Census, the Centers for Disease Control (CDC) reported that twenty-seven percent of Americans live with some disability, with the highest numbers reported in the South.¹⁷⁰ The percentages may be even higher, given that there are people with temporary disabilities and some with non-apparent disabilities they have not yet disclosed.¹⁷¹ Moreover, the percentage of people with

165. See Price, *Defining Mental Disability*, *supra* note 141, at 303.

166. U.S. DEP’T OF LAB., OFF. OF DISABILITY EMP. POL’Y, TAPPING THE POWER OF NEURODIVERSITY IN THE WORKPLACE (Dec. 2021), <https://www.dol.gov/agencies/odep/publications/business-sense/2021/december>.

167. *Id.*

168. *Id.*

169. See Fleming & Baume, *supra* note 26; and see generally Dunn, *supra* note 26.

170. See CTRS. FOR DISEASE CONTROL & PREVENTION, DISABILITY IMPACTS ALL OF US (illustration), <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> (last updated May 15, 2023); Robert Gebelhoff, *The South has Greatest Prevalence of Disabled Adults, New Government Data Show*, WASH. POST (July 30, 2015, 5:52 PM), <https://www-washingtonpost-com.proxyiub.uits.iu.edu/news/to-your-health/wp/2015/07/30/the-south-has-greatest-prevalence-of-disabled-adults-new-government-data-show/>.

171. See U.S. CENSUS BUREAU, WHY WE ASK: DISABILITY, <https://www2.census.gov/programs-surveys/acs/about/qbyqfact/Disability.pdf> (last visited Jan. 2, 2023) (The Census primarily takes into account disabilities related to vision, hearing, mobility, and cognitive function.); see also, U.S. CENSUS BUREAU, HOW DISABILITY DATA ARE COLLECTED FROM THE AMERICAN COMMUNITY SURVEY, <https://www.census.gov/topics/health/disability/guidance/data-collection->

disabilities has increased in the aftermath of the COVID-19 pandemic. Those recovering from moderate to severe symptoms of COVID-19 continue to sustain long-term health effects, rendering some temporarily or permanently disabled.¹⁷² Others may struggle with many mental health issues,¹⁷³ such as depression, anxiety, and PTSD, due to losing a loved one, a job,¹⁷⁴ a business or a home. These mental challenges resulted at least in part from the fallout of the virus. Many could not earn money given the stay-at-home orders that some governors implemented across different states to reduce the spread of COVID-19.¹⁷⁵ The U.S. Bureau of Labor Statistics (BLS) shows that in 2021, there were 1.2 million more people sixteen years and over who identified as having a disability than in 2020.¹⁷⁶ We cannot address the effects of the COVID-19 pandemic or improve the law to protect people with disabilities in the future without keeping these experiences in mind.

acs.html (last revised Nov. 21, 2021) (noting that before 2010, the American Community Survey “focused on the presence of specific conditions, rather than the impact those conditions might have on basic functioning”).

172. See Melissa Healy, *Coronavirus Infection May Cause Lasting Damage Throughout the Body, Doctors Fear*, L.A. TIMES, <https://www.latimes.com/science/story/2020-04-10/coronavirus-infection-can-do-lasting-damage-to-the-heart-liver> (last visited Apr. 10, 2020, 3:03 PM); see also Julie Steenhuisen, *Scientists Just Beginning to Understand the Many Health Problems Caused by COVID-19*, REUTERS (June 26, 2020, 6:12 AM), <https://www.reuters.com/article/us-health-coronavirus-effects/scientists-just-beginning-to-understand-the-many-health-problems-caused-by-covid-19-idUSKBN23X1BZ>; Tim Jewell, *What We Know About the Long-Term Effects of COVID-19*, HEALTHLINE (Oct. 7, 2021), <https://www.healthline.com/health-news/what-we-know-about-the-long-term-effects-of-covid-19> (last visited Apr. 21, 2020).

173. See *New Poll: COVID-19 Impacting Mental Well-Being: Americans Feeling Anxious, Especially for Loved Ones; Older Adults Are Less Anxious*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/newsroom/news-releases/new-poll-covid-19-impacting-mental-well-being-americans-feeling-anxious-especially-for-loved-ones-older-adults-are-less-anxious> (last visited Mar. 25, 2020). At the time this poll was taken, forty-eight percent of Americans were anxious of getting the coronavirus, forty percent were anxious about becoming seriously ill or dying from the virus, and sixty-two percent were anxious that a loved one might contract the virus. *Id.* In fact, fifty-seven percent of Americans were concerned about the negative impact on their finances. *Id.* See also Neil Greenberg, et al., *Managing Mental Health Challenges Faced by Healthcare Workers During COVID-19 Pandemic*, 368 BRITISH MED. J. 1211, 1211 (2020); CTRS. FOR DISEASE CONTROL & PREVENTION, COPING WITH STRESS, <https://www.cdc.gov/mentalhealth/stress-coping/cope-with-stress/index.html> last updated Apr. 25, 2023) (noting outbreaks cause stress).

174. See generally Heather Long, *U.S. Now Has 22 Million Unemployed, Wiping Out a Decade of Job Gains*, WASH. POST (Apr. 16, 2020, 7:16 PM), <https://www.washingtonpost.com/business/2020/04/16/unemployment-claims-coronavirus/>.

175. See generally Sarah Mervosh et al.; see *Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

176. *Labor Force Statistics From the Current Population Survey* U.S. BUREAU OF LAB. STAT <https://www.bls.gov/cps/definitions.htm#disability> (last visited Jan. 25, 2023).

B. Disability Antidiscrimination Law

The laws that shape the experiences of a person with disabilities in our society do so without regard to the social model of disability and therefore these laws are often detrimental for those individuals. As previously mentioned, disability is a function of social treatment by society, separate from the illness itself, but the law continues to hold disability to specific, asocial requirements.¹⁷⁷ Today the law requires a disability to be “a physical or mental impairment that substantially limits one or more major life activities of [an] individual. . . .”¹⁷⁸ An illness may be a disability under the law if the illness impacts one or more “major life activities.”¹⁷⁹ However, not every disability is an illness, such as certain *neurodiverse* disabilities like learning disabilities.¹⁸⁰ Once again, an illness is separate from disability. An illness is that thing that needs treatment, and a disability is a determination of how an individual is treated socially, but these legal definitions blur these distinct concepts.¹⁸¹

The Rehabilitation Act of 1973 gave the courts, educational institutions, and employers increased discretion as to which individuals and what kinds of disabilities to accommodate and permit to enter social spaces.¹⁸² Under Section 504, a reasonable accommodation is any “change, adaptation or modification to a policy, program, service, . . . or workplace which will allow a qualified person with a disability to participate fully in a program, take advantage of a service, . . . or perform a job.”¹⁸³ The law was supposed to prohibit discrimination against people with disabilities in institutions that

177. Marks, *supra* note 139, at 85–86 (1997) (discussing the difficulty of defining disability due to the constantly changing nature of qualifying factors); *see also* Harlan Lane, *Ethnicity, Ethics, and the Deaf-World*, 10 J. DEAF STUD. & DEAF EDUC. 291, 291 (2005).

178. 42 U.S.C. § 12102(1)(A) (2018); Section 504 of the Rehabilitation Act 1973, 29 U.S.C. §§ 701–796(l) (2018) (The ADA defined disability as “a physical or mental impairment that substantially limits one or more major life activities” or as “being regarded as having such an impairment.”)

179. *See*, 42 U.S.C. § 12102(1)(A) (2018).

180. Learning disabilities are not illnesses. *See* Adarsh Kohli et al., *Specific Learning Disabilities: Issues That Remain Unanswered*, 40 INDIAN J. PSYCH. MED. 399, 399 (2018); *see also* Larry B. Silver, *Is a Learning Disability Considered a Mental Illness?* LEARNING DISABILITIES ASS’N OF AM., <https://ldaamerica.org/is-a-learning-disability-considered-a-mental-illness/> (Dr. Silver reports that a learning disability is not a mental illness because they are neurologically based).

181. *See* Kanter, *supra* note 133; *see also* BAGENSTOS, *supra* note 138, at 50 (on the pan-disability identity as a unifying political movement).

182. 29 U.S.C. § 794(a) (1974); *see also* *Reasonable Accommodations and Modifications*, U.S. DEP’T HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications (last visited Jan. 5, 2023).

183. *Id.*; *see generally* Donald Jay Olenick, *Accommodating the Handicapped: Rehabilitating Section 504 After “Southeastern,”* 80 COLUM. L. REV. 171, 172–76 (1980).

received federal funding.¹⁸⁴ However, since individuals in power can apply subjective standards for what is considered a qualified individual¹⁸⁵ with a disability, a reasonable accommodation,¹⁸⁶ and undue hardship,¹⁸⁷ the law circumvents this protection by continually moving the mark.¹⁸⁸ The Court's decisions in cases such as *Sutton v. United Air Lines, Inc.*¹⁸⁹ and later *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*¹⁹⁰ helped move the goal posts to preserve power of discretion in the workplace, even as Congress tried to undo the damage of these decisions. Both opinions heavily relied on interpretations based on the medical model of disability that persists today.

In *Sutton v. United Air Lines, Inc.*, identical twins with myopia brought a lawsuit against United Airlines under the ADA when the airline did not hire them as commercial pilots.¹⁹¹ Their uncorrected vision did not meet the minimum requirements to have visual acuity of twenty/one hundred or better.¹⁹² The Court held the twins were not disabled under the ADA because they could correct their eyesight with eyeglasses or contact lenses.¹⁹³ They were not regarded as disabled, arguing that the airline's allegation that they were unable to satisfy a job's requirements was not enough to qualify the twins as being regarded as persons with a disability.¹⁹⁴ In the end, the Court in *Sutton* held that people who could mitigate their impairments (such as wearing eyeglasses to correct poor vision) were not "disabled."¹⁹⁵ Therefore,

184. 42 U.S.C. § 12111(8) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."); see also COLKER & GROSSMAN, *supra* note 93, at 77–78.

185. See 42 U.S.C. § 12111(9); COLKER & GROSSMAN, *supra* note 93.

186. See 42 U.S.C. § 12111(10); see also COLKER & GROSSMAN, *supra* note 93.

187. See 42 U.S.C. § 12111(10)(B) (allowing the employer to determine what is considered a reasonable accommodation or an undue hardship allows the employer to continually move the mark and protect the profit margin).

188. See Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1089 (1995); see also Guevara, *The Need to Reimagine Disability Rights Law*, *supra* note 147, 277–79.

189. See 527 U.S. 471 (1999).

190. See 534 U.S. 184 (2002), *overturned in part by* 42 U.S.C. § 12102(4)(E)(i).

191. *Sutton*, 527 U.S. at 475–76.

192. *Id.*

193. *Id.* at 482.

194. *Id.* at 481–94 (citing 42 U.S.C. § 12102).

195. *Id.* at 475–76.

under *Sutton*, anyone mitigating their disability with medication or prosthetics is not considered disabled.

Recognizing that Section 504 was insufficient because it clearly demonstrated the dangers of only protecting people with disabilities in federally funded spaces, Congress passed the ADA in 1990.¹⁹⁶ The ADA intended to protect individuals in all public spaces, as the scope is no longer limited to federally funded institutions.¹⁹⁷ Significantly, it banned disability-based discrimination in employment, education, transportation, and places that are open to the public.¹⁹⁸ Under Title I, an employer cannot discriminate against people with disabilities in all employment-related activities with fifteen or more employees.¹⁹⁹ However, despite this reform, several years after the passage of the ADA, employment numbers of people with disabilities have not significantly improved.²⁰⁰

Since the language used in Section 504 was the foundation for the ADA, it renders the same effects of discrimination through “othering.”²⁰¹ Both laws define individuals with disabilities using essentially the same definition: “a physical or mental impairment” that “substantially limits one or more major life activities” or “results in a substantial impediment to employment.”²⁰² Unfortunately, by building upon the language used in Section 504, the ADA continued to view people with disabilities under the medical model of disability.²⁰³

196. See 42 U.S.C. § 12101 (1990) (Pub.L. 101-336, § 2, July 26, 1990, 104 Stat. 328; Pub.L. 110-325, § 3, Sept. 25, 2008, 122 Stat. 3554.).

197. See 42 U.S.C. § 12112(a), 12132.

198. See RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 69–70* (Richard Delgado & Jean Stefanic eds., 2005) (noting that the ADA did not significantly increase the number of people with disabilities in the workforce).

199. OFF. OF DISABILITY EMP. POL’Y, <https://www.dol.gov/agencies/odep/publications/fact-sheets/employment-laws-disability-and-discrimination#:~:text=The%20Americans%20with%20Disabilities%20Act,local%20government%20services%2C%20and%20telecommunications> (last visited May 24, 2023).

200. The ADA defined disability as “a physical or mental impairment that substantially limits one or more major life activities” or as “being regarded as having such an impairment.” 42 U.S.C. § 12102(1)(A)-(C). See generally GOFFMAN, *supra* note 34 (discussing inequities that persist from the perspective of those living with disabilities).

201. See 42 U.S.C. § 12102(1); Section 504 of the Rehabilitation Act 1973, 29 U.S.C. § 764.

202. See LINTON, *supra* note 138; see also BAGENSTOS, *supra* note 138, at 50; see generally Andrew Jenks, *Crip Theory and the Disabled Identity: Why Disability Politics Needs Impairment*, 34 *DISABILITY & SOC’Y* 449 (2019) (illustrating how a disabled identity is a complicated identity); see Guevara, *The Need to Reimagine Disability Rights Law*, *supra* note 147 (I published an article that foregrounds the need to use the social model of disability. It explains the medical model’s failings as a framework for disability antidiscrimination law.).

203. See OLIVER, *POLITICS OF DISABLEMENT*, *supra* note 139 (discussing the importance of certain definitions and critiquing the medical approach to defining disability); see also OLIVER,

In 2002, Ella Williams was terminated due to her poor attendance record, as she was suffering from carpal tunnel syndrome due to performing her assembly line duties for Toyota.²⁰⁴ She filed suit under the ADA, alleging she was not given reasonable accommodations for her carpal tunnel.²⁰⁵ Toyota then filed a motion for summary judgment, declaring no genuine issue to be tried since her carpal tunnel syndrome was not considered a disability under the ADA.²⁰⁶ It did not substantially limit any of William's major life activities, for she continued to perform manual tasks (e.g., eating, bathing, etc.).²⁰⁷ The Sixth Circuit Court of Appeals ruled in favor of Williams, finding that the carpal tunnel syndrome was a disability because it was substantially limiting her ability to perform her work.²⁰⁸ But when *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* got the Supreme Court, Justice O'Connor determined that the Court of Appeals did not use the proper standard in determining what is a disability under the ADA.²⁰⁹ Thus, the Court of Appeals was wrong in only examining whether Williams could perform her work, limiting the class of manual tasks to those she would perform at work instead of determining whether her daily life activities outside of work were impacted.²¹⁰ The Court went on to say that, under the ADA, a disability had to be permanent or long-term.²¹¹ As such, *Toyota* established a narrow standard for determining whom the ADA covered, leaving people with mental or physical disabilities that "substantially limited a major life activity" mainly covered by Section 504.²¹² As a result, disabilities such as cancer, diabetes, HIV/AIDS, intellectual disabilities, amputations, epilepsy, and multiple sclerosis were not readily protected.²¹³

Congress, perhaps in reaction to the Court, added the ADA Amendment (the Amendment) in 2008 to broaden the definition of "disability,"²¹⁴ which

UNDERSTANDING DISABILITY, *supra* note 137 (discussing the "individual" and "social" models of disability).

204. *Toyota Motor Manufacturing*, 534 U.S. at 187–90.

205. *Id.* at 190.

206. *See id.* at 190–91.

207. *See id.*

208. *Id.* at 191–92.

209. *See id.* at 192–93.

210. *Id.* at 199–203.

211. *Id.* at 196, 198.

212. *Id.* at 200–201.

213. *See* Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 11 (2013). After the 2008 ADA amendment, the condition no longer had to meet such a demanding standard requiring the disability to be permanent or long-term. *See* 42 U.S.C. § 12102(4)(D).

214. 42 U.S.C. § 12102(4)(E)(i) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . .").

largely abrogated the *Toyota* decision.²¹⁵ Taking aim at *Sutton*, the Amendment protected those who mitigate their disability by, for example, taking medication or using prosthetics, privileging them with a bona fide disability under the law.²¹⁶ Despite Congress's declaration "to address the major areas of discrimination faced day-to-day by people with disabilities," the Amendment did not renounce the medical model of disability.²¹⁷

The Amendment had a significant impact in broadening the definition of disability, covering more people with disabilities, and giving people with disabilities more legal recourse and protection—or so it seemed. The Amendment did cover more people, but its inadequate and subjective key terms, including "reasonable accommodations" and "undue hardship," put their interpretation in the hands of those already in power.²¹⁸ The law still fails to provide equity for people with disabilities because the Amendment's loopholes allow employers, including academic institutions, to deny requests for accommodations using their definition of reasonable accommodation and undue hardship.²¹⁹

C. Limited Employment of Americans with Disabilities

The COVID-19 pandemic exposed more people to the shortcomings of our disability rights laws, particularly how little they protect workers with disabilities. The pandemic's impact compelled more attempts to access protections under disability antidiscrimination laws. Those attempting to access these protections quickly discovered the harsh reality that disability cases are frequently unsuccessful in federal courts.²²⁰ That is because disability rights laws—such as the Section 504 of the Rehabilitation Act of 1973, the ADA of 1990 and its 2008 Amendment, and IDEA—still limit their antidiscrimination protections for people with disabilities to opportunities in social

215. See *supra* note 213 and accompanying text.

216. See 42 U.S.C. § 12102(4)(E)(i) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . .").

217. 42 U.S.C. § 12101.

218. See 42 U.S.C. § 12111(9)–(10); see also Guevara, *The Need to Reimagine Disability Rights Law*, *supra* note 147, at 287–92.

219. See 42 U.S.C. § 12112(b)(5)(A) (stating that discrimination against a "qualified individual" includes "not making reasonable accommodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business"); see also COLKER & GROSSMAN, *supra* note 93, at 81; see generally GOFFMAN, *supra* note 34; Guevara, *The Need to Reimagine Disability Rights Law*, *supra* note 147.

220. See Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 UNIV. MICH. J.L. REFORM 305, 361 (2001) (describing that disability cases are frequently unsuccessful).

spaces like the workforce, rather than equity in our society.²²¹ The root of the issue is the distinction between people with and without disabilities in the first place, which stems from basing our laws and policies on the medical model.²²²

Section 504's ambiguous phrases—such as “reasonable accommodations” and “undue hardship,”—inadvertently created shortcomings by giving discretion to the employer providing the accommodations and defining undue burden.²²³ This conflict of interest inevitably trickled into disability antidiscrimination law.²²⁴ Disability law repeats this vague language, reinforcing the medical model of disability's “othering” language. Thus, this language forces individuals with disabilities to fit into existing systems rather than in fixing the systems that disable and use an able-body standard.

The law also permits discrimination against people with disabilities when an employee discloses that they have a disability when they seek accommodations at work.²²⁵ Those who disclose are sometimes discharged from employment while ensuring the disability is never mentioned because that would be against the law.²²⁶ With the shortcomings associated with the law's key phrases including “reasonable accommodations” and “undue hardship,” it is no surprise that after the COVID-19 pandemic, those encountering chronic fatigue or post-traumatic stress were not reasonably accommodated because to do so would have been an undue hardship on the employer.²²⁷ Those limitations still bar many from securing an independent livelihood and

221. See 29 U.S.C. § 794(a).

222. See BAGENSTOS, *supra* note 138, at 35.

223. See *id.* at 71 (concluding no accommodation will be required no matter how reasonable). The phrase “Disability Rights Law” referred to in this Article comprises the Rehabilitation Act of 1973 Section 504, the ADA of 1990 and its 2008 Amendment, and IDEA.

224. See 42 U.S.C. § 12111(8) (“The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For this title, consideration shall be given to the employer’s judgment as to what job functions are essential. If an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”); § 12111(10)(A)–(B)(ii).

225. GOFFMAN, *supra* note 34, at 5.

226. U.S. EQUAL EMP. OPPORTUNITY COMM’N, THE ADA: YOUR EMPLOYMENT RIGHTS AS AN INDIVIDUAL WITH A DISABILITY (2023) (“Employers are required to provide reasonable accommodation *only* for the physical or mental limitations of a qualified individual with a disability of which they are aware. Generally, it is the responsibility of the employee to inform the employer that an accommodation is needed.”) (emphasis added).

227. U.S. EQUAL EMP. OPPORTUNITY COMM’N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS (last updated May 15, 2023), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eco-laws>.

also seeing those deemed “severely disabled” as able to make the necessary adjustments to maximize their potential given said stigma.²²⁸

Since it is illegal to terminate an employee because of their disability, business necessity becomes important.²²⁹ Business necessity becomes central to the predicament in which both the employee and the employer find themselves. Under *Griggs v. Duke Power Co.*, a case that even predates *Sutton*, an employer may not use employment requirements that ultimately exclude members of a protected class.²³⁰ However, an employee can be terminated under business necessity: a legitimate business purpose that justifies an employment decision. For instance, a midsize company employs a person with depression and anxiety. After their six-month review, the employee is not meeting expectations. The employer gives this employee three more opportunities to meet the benchmarks, but again, the employee is not performing well because the depression and anxiety are too overwhelming. The midsize company has limited resources and must consider the profit margins even more than a big corporation. The productivity of the employee ultimately must assist the employer in justifying the cost of time and energy invested in training the employee. The employee with a disability may desperately want to perform but cannot because of a flare-up of the disability interfering with performing essential job functions.²³¹ The employee with a disability cannot stay employed and thus must resort to Social Security Disability Insurance (SSDI).²³² This ability/disability binary of not being able enough or not being disabled enough affects those with non-apparent disabilities, unable to access and benefit from disability antidiscrimination law, as aforementioned in this section. As a result, employees with disabilities must access other forms of social assistance to survive, such as SSDI.

The goal behind Section 504 and the ADA that followed was, in part, to seek reasonable accommodations to help people enter the employment sector and places of public accommodation.²³³ In practice, however, these laws have done little to improve access to places of public accommodations or increase the employment rate of people with disabilities because they still rely on the medical model of disability, which perpetuates stigma and, in

228. Colin Barnes, Geof Mercer, *Disability, work, and welfare: challenging the social exclusion of disabled people*, 19 WORK, EMPLOY. & SOC'Y 527, 529–303 (Sept. 2005).

229. See Americans with Disabilities Act (ADA), 42 U.S.C. § 1210.

230. 401 U.S. 424 (1971).

231. See *id.* at 431, 436; 29 C.F.R. § 1630.2 (1991).

232. SOC. SEC. ADMIN., DISABILITY BENEFITS (2023), <https://www.ssa.gov/benefits/disability/> (last visited Nov. 20, 2023)

233. See Kevin M. Barry, *Exactly What Congress Intended?* 17 EMP. RTS. & EMP. POL'Y J. 5, 11 (2013).

turn, results in systemic negative outcomes.²³⁴ In 2022, the unemployment rate for people with disabilities was twice as high as that for those without disabilities.²³⁵ We should acknowledge that there was a statistically significant number of people with disabilities who did find employment during the COVID-19 pandemic.²³⁶ But “the relative employment growth experienced by [people with disabilities] was heavily concentrated in teleworkable, essential, and non-frontline occupations,” and “[t]hese shifts appear to be driven by rising labor force participation of [people with disabilities] rather than changes in the unemployment rate.”²³⁷ Therefore, these marginal changes, while encouraging, do not suggest that we have genuinely addressed the “inherent limitations of antidiscrimination laws in eliminating deep-rooted structural barriers to work.”²³⁸

CONCLUSION

If students with disabilities manage to survive K-12 schooling in either public or private schools, they enter higher education under the false premise that receiving a college education would provide them better opportunities to obtain employment to repay the educational debt and make a decent living. However, this article shows that these promises are at best hollow, and disastrous at worse. Today, according to the U.S. Census Bureau, people with disabilities still make sixty-six cents on the dollar and only 21.3 percent of people with disabilities were employed in 2022.²³⁹ For some, the debt is

234. See John E. Rumel, *Federal Disability Discrimination Law and the Toxic Workplace: A Critique of ADA and Section 504 Case Law Addressing Impairments Caused or Exacerbated by the Work Environment*, 51 SANTA CLARA L. REV. 515, 519 (2011); see COLKER, *supra* note 157, at 70 (noting the ADA did not significantly increase the number of people with disabilities in the workforce); see also BAGENSTOS, *supra* note 138.

235. U.S. DEPT. OF LAB., BUREAU OF LAB. STAT., PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS 2022, <https://www.bls.gov/news.release/pdf/103isable.pdf> (“[i]n 2022, 21.3 percent of persons with a disability were employed, up from 19.1 percent in 2021, the U.S. Bureau of Labor Statistics reported today. For persons without a disability, 65.4 percent were employed in 2022, up from 63.7 percent in the prior year. The unemployment rates for persons with a disability (7.6 percent) and persons without a disability (3.5 percent).”).

236. Ari Ne’eman Nicole Maestas, *How Has Covid-19 Impacted Disability Employment?* 10–11 (Nat’l Bureau Of Econ. Rsch., Working Paper 30640, 2022), <http://www.nber.org/papers/w30640>. It is worth noting that this study did address outcomes for different the “type” of disabilities including “Hearing” “Vision” “Remembering” “Physical” “Mobility” “Personal Care” and “Any,” but never defined these categories. *Id.* at 24, tbl.1; *id.* at 43, tbl.D1.

237. *Id.* at 10–11, 13.

238. BAGENSTOS, *supra* note 138, at 2; see generally *id.* at 116–130.

239. U.S. CENSUS BUREAU, DO PEOPLE WITH DISABILITIES EARN EQUAL PAY? (2019), <https://www.census.gov/library/stories/2019/03/do-people-with-disabilities-earn-equal-pay.html> (last visited Apr. 17, 2023); *Advancing Evidence Improving Lives (AIR), Disability Employment*

significant, given the cost of the school, even for those able to obtain and keep a well-paying job in the face of an increasingly hostile economic environment.

Unfortunately, not much changed for people with disabilities even after the establishment of the ADA. There are speculations as to why, but no actual confirmation.²⁴⁰ Perhaps, the shortcomings in disability antidiscrimination law were too great to begin with. Or maybe the student debt crisis, which impacts students with disabilities especially hard, has derailed a generations' hopes of obtaining better employment opportunities in the future. Predatory for-profit schools that use the enticing American Dream of higher education to feed their greed and saddle students with and without disabilities in debt and with few prospects are undoubtedly part of this problem. Entrenched stigma and discrimination in our classrooms, workspaces, and halls of government have erode past efforts at systemic change.

All of these are symptoms of the same source. Because we never made education a right under the U.S. Constitution, it has become a commodity only a few could afford and systemically excludes people with disabilities. Had education been made a right without regard for who could or could not afford it, it would alleviate part of the predicament people with educational debt find themselves in today, particularly those with disabilities who fell for the false promises of higher education. But we can fight this trend if we fully embrace the social model of disability, celebrate our human variation, and prioritize human dignity over profit and stigma.

and Marketplace in Boston and Other Top Metropolitan Areas, <https://www.air.org/project/disability-employment-and-marketplace-boston-and-other-top-metropolitan-areas> (last visited Apr. 17, 2023); U.S. DEPT. OF LABOR, BUREAU LABOR STAT., PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS 2022, <https://www.bls.gov/news.release/pdf/disabl.pdf> (last visited Apr. 17, 2023).

240. See COLKER, *supra* note 171; see also BAGENSTOS, *supra* note 138, at 50.