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ESSAY

RELIEVING (MOST OF) THE TENSION: A REVIEW ESSAY OF SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT*¹

Nicole Buonocore Porter*

This Review Essay reveals the considerable contribution made by Professor Samuel Bagenstos in his book, Law and the Contradictions of the Disability Rights Movement, where he acknowledges and tackles most of the contradictions and tensions within the disability law field. Instead of repeating familiar arguments about a backlash against the Americans with Disabilities Act (ADA), Bagenstos recognizes and explains that much of the lack of success of the ADA can be attributed to tensions in the goals and projects of the disability rights movement. He makes a very convincing argument that the anti-discrimination and accommodation model of the ADA, while worthwhile and therefore worth preserving and reinforcing, has limitations that cannot be overcome simply by amending the ADA. Instead, Bagenstos argues that we need to explore social welfare interventions and we need to tailor them in such a way as to avoid “unnecessary paternalism and dependence.”

While Bagenstos does an admirable job exploring and suggesting solutions to most of the tensions in the disability law area, the one that he does not explore is a conflict that I believe will be pivotal as courts begin deciding cases after the ADA Amendments Act of 2008. Because the Amendments have made it easier for individuals to pass the threshold issue of coverage, more courts will be forced to analyze the underdeveloped reasonable accommodation provision in the ADA. Many of these cases will involve the tension that arises when the accommodation needed by an individual with a disability conflicts with the rights or interests of other employees in the workplace. This Review Essay will discuss this conflict, exploring a resolution that draws support from the lessons learned in Bagenstos’s book, while infusing the discussion with a communitarian influence.

¹ SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009).

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INTRODUCTION

As Professor Samuel Bagenstos states in his book, *Law and the Contradictions of the Disability Rights Movement*, “[i]n many respects, the disability rights movement has been a remarkably successful social movement . . . so much so that the United States is the envy of disability rights activists around the world.”² Yet, despite these successes, many scholars, including Bagenstos, agree that the Americans with Disabilities Act³ (ADA) has not lived up to its full potential. Rather than the common argument that amending the ADA will solve all of its problems, Bagenstos argues that attacking the “deep-rooted structural obstacles to disability equality” will require “confronting the tensions within disabil-

² BAGENSTOS, *supra* note 1, at 11.

³ 42 U.S.C. §§ 12101–12213 (2006).

ity rights thinking and coming to terms with the limits inherent in the anti-discrimination and accommodation paradigm.”⁴ That is exactly what he accomplishes in this book.

In this timely and very good book, Bagenstos explores all of the tensions and contradictions of the disability rights movement and the primary legislation that the movement helped produce—the ADA. Many scholars have touched on these tensions, but this is the first effort I have seen that thoroughly confronts all of the contradictions and tensions in an attempt to explain where the disability rights movement has been, where it is now, and where it can and should go in the future. This book has honest responses to some of the tough conflicts in the area of disability law and theory. Whether the reader is a lawyer, a law professor, a legislator, a disability rights advocate, or a person with a disability, this book speaks to many interests and does so in accessible prose.

Despite his commendable job exploring and tackling the many contradictions, however, the one conflict that Bagenstos does *not* discuss is the one that I believe will become pivotal once courts begin deciding new employment discrimination cases under the ADA Amendments Act.⁵ Because more plaintiffs will be able to pass the threshold coverage issue of being defined as an individual with a disability,⁶ more courts will be forced to analyze the underdeveloped reasonable accommodation provision in the ADA. While I think there will be many issues that will arise under the reasonable accommodation provision,⁷ the most difficult (and in fact the only one the Supreme Court has found fit to decide)⁸ is the conflict that occurs when the accommodation needed by an individual with a disability conflicts with the rights or interests of other employees in the workplace. Accordingly, this Review Essay will discuss this tension and will use some of the lessons learned from Bagenstos’s book

⁴ BAGENSTOS, *supra* note 1, at 11.

⁵ ADA Amendments Act of 2008, Pub L. No. 110-35, 122 Stat. 3553 (codified as amended in scattered sections of 29 and 42 U.S.C.). For a discussion of the Amendments, see, for example, Reagan S. Bissonnette, *Reasonably Accommodating Nonmitigating Plaintiffs After the ADA Amendments Act of 2008*, 50 B.C. L. REV. 859 (2009); Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187 (2008); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217 (2008) [hereinafter Long, *Introducing*]; Susan L. Smith, *ADA Amendments Broaden Scope of the Law*, 11 NO. 3 J. HEALTH CARE COMPLIANCE 63 (2009).

⁶ See Feldblum et al., *supra* note 5, at 216 (noting that the Supreme Court’s jurisprudence—which has been largely overruled by the Amendments—caused courts to focus on the threshold issue of whether an individual is disabled rather than whether the employer has discriminated against the plaintiff).

⁷ See Long, *Introducing*, *supra* note 5, at 228–29 (noting that there are a “host of reasonable accommodation issues” that will have to be decided by the courts).

⁸ See, e.g., *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007), *reh’g en banc denied*, 493 F.3d 1002 (8th Cir. 2007), *cert. granted*, 128 S. Ct. 742 (2007), *cert. dismissed*, 128 S. Ct. 1116 (2008).

to help illuminate and guide the resolution of this issue. Specifically, I will argue that the independence goal of the disability rights movement supports my effort to accommodate individuals with disabilities even when the accommodation places burdens on co-workers. I will also draw parallels between the communitarian's emphasis on working together to reach common goals and Bagenstos's universal approach to disability reform. I will explain how this parallel supports my proposal to relieve the tension between individuals with disabilities and their non-disabled co-workers by accommodating the employee with the disability even when that accommodation places some burdens on co-workers.

In Part I of this Review Essay, I will discuss Chapters 1–4 of Bagenstos's book, which lay the groundwork for describing the history of the disability rights movement and explaining the many conflicts of the movement that Bagenstos believes contributed to the Supreme Court's constrained decisions in the disability law area. Part II will discuss how the contradictions of the disability rights movement have unique implications in the safety area (Chapter 5) and the life and death decisions surrounding the disability community (Chapter 6). Part III will explain Bagenstos's thesis that the limits of the anti-discrimination model is responsible for the unreached potential of the ADA and will present his solutions for helping the disability rights movement move forward towards reaching its goals. In all of my discussion of Bagenstos's book, I offer my thoughts and opinions where applicable. In Part IV, I explore my thesis—the tension that is left unrelieved in this book—the conflict between individuals with disabilities in the workplace and their non-disabled co-workers. Part IV is followed by a conclusion.

I. CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT AND HOW THEY AFFECT DISABILITY LAW

A. *Chapter 1: Introduction*

In the introduction of his book, Bagenstos highlights the hopeful promise and lackluster progress of the ADA.⁹ Although many believed that passage of the ADA was a “major victory” that allowed individuals with disabilities to be “equal citizens,” things have not worked out as advocates had hoped.¹⁰ ADA plaintiffs lose an astounding number of cases and employment rates are “stagnant at best.”¹¹ While many have attributed this bleak picture to a “backlash”¹² against the ADA, and have

⁹ 42 U.S.C. §§ 12101–12213 (2006).

¹⁰ BAGENSTOS, *supra* note 1, at 1.

¹¹ *Id.* at 1.

¹² For a discussion of the backlash argument, see Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, in *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 62 (Linda Hamilton Krieger ed., 2003).

sought to “fix” the ADA through the ADA Amendments Act of 2008, Bagenstos believes that the amendments are no “magic solution” and that the problems with the ADA “reflect contradictions and tensions within the ideas of the disability rights movement itself.”¹³ Bagenstos claims that one goal of his book is to draw out the complexities of the disability rights movement to show that a “richer picture” requires abandonment of the traditional backlash argument.¹⁴

Bagenstos describes the three major themes in his book as “the pluralism of the disability rights movement; the contestable nature of what is a ‘disability’ . . . and the narrowness of the reasonable accommodation requirement.”¹⁵

In discussing the pluralism of the disability rights movement, Bagenstos highlights the different types of disabilities and the varying agendas of those who experience those disabilities.¹⁶ Because of these differences, individuals with disabilities disagree on many issues, including, for example, what opposing paternalism might look like or whether integration of individuals with disabilities is a proper goal.¹⁷ Although the ADA passed by an overwhelming majority, with broad support from both parties, it became clear that supporters had different agendas—liberal supporters focused on the civil rights aspect and conservatives focused on the ADA as a tool to allow individuals with disabilities to become independent.¹⁸ Bagenstos believes that some (but not all) of the Court’s restrictive cases are the result of a choice among a set of principles, “each of which has a solid disability rights pedigree.”¹⁹ He also highlights the conflicting perceptions of the reasonable accommodation mandate in the ADA.²⁰ While some see the reasonable accommodation provision as necessary for addressing the structural barriers that keep individuals with disabilities out of the workforce, others are concerned that reasonable accommodations look too much like charity or social welfare, sending the message that individuals with disabilities should be pitied.²¹ Accordingly, Bagenstos summarizes a very important dilemma—the need for independence from interventions that send a message of pity conflicts with the need for those same interventions to dismantle structures that operate to discriminate against individuals with disabilities.²²

¹³ BAGENSTOS, *supra* note 1, at 2.

¹⁴ *Id.*

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3–4.

¹⁷ *Id.*

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 5.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 6.

It is this last conflict that guides much of what Bagenstos suggests by way of potential reform in Chapter 8 of the book.²³

The next major theme Bagenstos discusses is the “contestable nature of disability.”²⁴ As explained by Bagenstos, “disability” is not an inherent trait but rather a condition that results from the interaction between the physical or mental impairment and the societal decisions that make physical and social structures inaccessible to people with this condition.²⁵ This was not always how disability was defined. The old view treated disability as an inherent personal characteristic that should be fixed.²⁶ This view stigmatized individuals with disabilities and treated them as something less than normal.²⁷ This definition viewed existing social arrangements as neutral, yet disability advocates do not believe they are neutral at all.²⁸ Instead, the medical condition and the environment cause a disability.²⁹

Lastly, Bagenstos discusses the “narrowness of the accommodation requirement.”³⁰ While disability rights advocates deemed the accommodation requirement very significant because of its ability to demand that employers alter the way they structure jobs, others have argued that the accommodation mandate imposes significant costs on employers, costs that most “rational” employers would seek to avoid.³¹ Bagenstos disagrees with this criticism, both because accommodations can be rational and because other anti-discrimination laws limit some employer behavior that might be deemed rational.³² More importantly, however, Bagenstos argues that the accommodation mandate in the ADA has not been read very broadly, and that “courts have consistently assimilated [the accommodation] requirement very closely to traditional anti-discrimination rules.”³³

B. Chapter 2: The Projects of the American Disability Rights Movement

In Chapter 2, Bagenstos explores the intriguing and varied history of the disability rights movement.³⁴ Because of the fractured nature of

²³ See *infra* Part III.B.

²⁴ BAGENSTOS, *supra* note 1, at 6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 7.

²⁹ *Id.*

³⁰ *Id.* at 8.

³¹ *Id.* at 9.

³² *Id.*

³³ *Id.* at 10.

³⁴ *Id.* at 12.

the movement, one cannot speak of the “goals” of the disability rights movement; instead, there were many different projects.³⁵

New Deal Projects treated disability as a condition that exempted the person from the obligation of having to work and entitled them to government relief.³⁶ But disability rights groups thought this charity was stigmatizing and they wanted to work—rather than receive charity.³⁷ In the early 1970s, the independent living movement began, along with the belief that individuals with disabilities should control the services they receive.³⁸ If it can be said that there is one defining principle of the disability rights movement, it is that each individual is different and unique and that individuals with disabilities are in the best position to decide what services they need.³⁹

Amidst this varied history, the one consensus of the movement is that “disability” should be defined according to a “social” model, rather than a “medical” model.⁴⁰ The social model views disability as a condition that results from the interaction between a person’s impairment and the physical and social structures that are inaccessible.⁴¹ Viewed this way, the proper remedy is civil rights legislation to eliminate the attitudes and practices that exclude people.⁴² This approach differed from the medical model, which focused on medical treatment, charity, and public assistance.⁴³ The critique of the medical model is that it sees disability as a personal tragedy—a terrible chance event that occurs at random to unfortunate people.⁴⁴ This view is also problematic, according to Bagenstos, because it stigmatizes people with disabilities, by defining them as less than normal.⁴⁵ Most disability rights activists disagreed with the medical model and embraced the view that difference is constructed by social relations.⁴⁶ Accordingly, advocates see environmental

³⁵ *Id.*

³⁶ *Id.* at 13.

³⁷ *Id.*

³⁸ *Id.* at 13–14.

³⁹ *Id.* at 14–15.

⁴⁰ *Id.* at 18.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See also Marcia H. Rioux & Fraser Valentine, *Does Theory Matter? Exploring the Nexus Between Disability, Human Rights, and Public Policy*, in *CRITICAL DISABILITY THEORY, ESSAYS IN PHILOSOPHY, POLITICS, POLICY AND LAW* 47, 51 (Dianne Pothier & Richard Devlin eds., 2006) (“The pathology is that there is something wrong with the society that needs to be fixed, rather than that there is something wrong with the individual that needs fixing.”).

⁴⁵ BAGENSTOS, *supra* note 1, at 18.

⁴⁶ See also RUTH COLKER, *THE LAW OF DISABILITY DISCRIMINATION* 6 (7th ed. 2009) (defining disability as an “imputation of difference from others; more particularly, imputation of an *undesirable* difference”). She states: “To the fact that a handicapped person differs from the norm physically or mentally, people often add a value judgment that such a difference is a big and very negative one.” *Id.*

barriers as a form of discrimination, representing a view that uses the able-bodied as the norm and ignores all variations from that norm.⁴⁷ The social model has dominated the disability rights movement, with most activists insisting that “society as a whole has a responsibility to eliminate the social and physical structures that deny people with disabilities access to opportunities.”⁴⁸

I have always been troubled by a strict interpretation of the social model of disability and a complete denouncement of the medical model of disability. With some disabilities, it is hard to see it as anything but a personal tragedy or a terrible chance event. Anytime someone is diagnosed with cancer or multiple sclerosis, or has a skiing accident that leaves her paralyzed, the person is likely to see it as a “personal tragedy” and a terrible chance event, and will want to seek medical treatment, to make her body function as “normally” as is possible. I certainly agree that many barriers for individuals with disabilities are caused by inaccessible social structures and that ending discrimination against individuals with disabilities must include changing those inaccessible social structures. But a strict interpretation of the social model of disability assumes that there are no physical limitations of the impairment—that the only reason an impairment is disabling is because of inaccessible social structures. Yet, when someone cannot get out of bed to go the bathroom without assistance, it is not inaccessible social structures that cause that limitation; it is the paralysis or weakness of the legs (depending on the impairment). I do not disagree that it is important for the disability rights movement to focus on the discrimination of actors who fail to make physical and social structures accessible, but I think advocates should be more honest about the causes of disability. One is not *only* disabled by the interaction with physical structures and discriminatory attitudes; one is also disabled by one’s own physical limitations, whether they are from pain, numbness, tremor, etc.

Even though disability rights advocates agree on the social model of disability, there is still much disagreement. One of the continuing debates is between the universal model and the minority group model.⁴⁹ The minority group model sees disability as being defined fairly narrowly and seeks remedies directed at that narrowly defined group.⁵⁰ The universal model sees the disability label as arbitrary and useless and would instead pursue universal policies that recognize that the entire population is at risk for disability and disease.⁵¹ The remedies would not

⁴⁷ BAGENSTOS, *supra* note 1, at 19.

⁴⁸ *Id.* at 20.

⁴⁹ *Id.*

⁵⁰ *Id.* at 21.

⁵¹ *Id.*

be disability-specific but instead would require all places to be designed and built according to a universal template, designed to embrace the largest variety of potential users.⁵²

According to Bagenstos, the biggest tension in the disability rights movement is concerning independence.⁵³ Activists argue that “people with disabilities do not want charity, pity, or government handouts; instead, they simply want the opportunity to live in the community and work for a living.”⁵⁴ Although everyone can agree on independence as an ideal, the law (primarily the ADA) does pose significant requirements that can look like charity.⁵⁵ This “wariness about welfare” was promoted by both the political left and right.⁵⁶ While some viewed disability benefits as an objectionable form of welfare that gives something for nothing, others criticized disability benefits because they are seen as a sign of pity, creating stigma against those receiving the benefits.⁵⁷ Accordingly, many activists focused on a “fundamental reorientation of disability policy toward a civil-rights-focused approach.”⁵⁸ Redefining the nature of independence was therefore necessary to reach this civil rights focus.⁵⁹

Nevertheless, there remains a tension between benefits that are given to excuse individuals with disabilities from the obligation of working with benefits that allow individuals with disabilities to “test their skills in the world and experience the dignity of risk.”⁶⁰ Focusing on independence allows activists to obtain support from mainstream political leaders and the broader public, by moving beyond the civil rights frame, which had a good deal of opposition in the 1980s.⁶¹ Activists realized that the civil rights paradigm made it difficult to justify reasonable accommodations, which are believed to be more burdensome than the obligation not to discriminate.⁶² Accordingly, activists used the frame of independence along with a de-emphasis on charity to achieve the endorsement of fiscal conservatives.⁶³

Bagenstos explains how the independence focus was a very important step in actually creating the disability community. Prior to this time, the disability movement was very fragmented based on types of disabilities, and this fragmentation diluted the strength of the movement. But

⁵² *Id.*

⁵³ *Id.* at 22.

⁵⁴ *Id.* at 22–23.

⁵⁵ *Id.* at 23.

⁵⁶ *Id.*

⁵⁷ *Id.* at 24.

⁵⁸ *Id.* at 25.

⁵⁹ *Id.*

⁶⁰ *Id.* at 26.

⁶¹ *See id.* at 27–28.

⁶² *See id.* at 28.

⁶³ *Id.* at 29.

the independence focus resonated with a great number of individuals with very different disabilities.⁶⁴ All individuals with disabilities seek to make decisions about their own lives, along with the corresponding risks. As Bagenstos notes, “[a]ll sought what they understood as self-reliance rather than dependence on the state or charity.”⁶⁵

Despite the success of the independence frame, there are still tensions, primarily because individuals with disabilities still rely on assistance from third parties—courts, employers, federal agencies, etc.—in the form of reasonable accommodations and sometimes publicly-funded personal assistance services.⁶⁶ Accordingly, “[t]o achieve the political goal of securing passage of programs that promote ‘independence,’ disability rights activists may therefore ironically feed the view that charity and welfare are the appropriate responses to disability.”⁶⁷ In fact, it is my sense that the public’s perception of individuals with disabilities is not consistent with the independence goal; instead, courts and the public seem to believe that individuals with disabilities are trying to have it both ways—being treated like everyone else and receiving special treatment at the same time. I do not agree with this perception but I think the disability rights movement has to deal with it if we are to have any hope of achieving widespread support for disability rights initiatives.

C. Chapter 3: Defining Disability

In Chapter 3, Bagenstos challenges the attacks that have been made on the Supreme Court’s interpretations of “disability” under the ADA.⁶⁸ While he shares many of the criticisms of the Supreme Court’s jurisprudence, Bagenstos believes that the fault lies not just in the Supreme Court’s decision-making but in the shortcomings of some of the principles upon which the ADA was passed.⁶⁹

As Bagenstos aptly explains, disability law is different from other civil rights law because it is based on the idea of a protected class.⁷⁰ Title VII, by contrast, protects individuals of all races, genders, ethnicities, and religions.⁷¹ Because disability is specifically defined in the statute, “an enormous portion of ADA litigation has focused on the threshold

⁶⁴ *Id.* at 30.

⁶⁵ *Id.* at 31.

⁶⁶ *Id.* at 32. For instance, Michael Selmi argues that the ADA was mainly concerned with “transferring social welfare responsibilities from the federal government to private employers.” Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 771 (2006).

⁶⁷ BAGENSTOS, *supra* note 1, at 33.

⁶⁸ *Id.* at 34–54.

⁶⁹ *Id.* at 34–54.

⁷⁰ *Id.* at 34.

⁷¹ 42 U.S.C. § 2000e-2 (2006).

question of whether the plaintiff is a member of the protected class rather than on whether the defendant engaged in improper discrimination.”⁷² Bagenstos takes the reader through the five Supreme Court cases that decided this threshold issue of what constitutes a disability. While the Court in *Bragdon v. Abbott*⁷³ seemed to embrace a broad interpretation of the disability definition, that broad reading was quickly replaced by a more restrictive interpretation in the next four cases⁷⁴—*Sutton v. United Air Lines, Inc.*,⁷⁵ *Murphy v. United Parcel Service*,⁷⁶ *Albertson’s, Inc. v. Kirkingburg*,⁷⁷ and *Toyota Motor Manufacturing v. Williams*.⁷⁸ Using *Toyota* as the guidepost, Bagenstos explains that the Supreme Court believed it was the Court’s job to use a restrictive definition of disability to limit the number of people who would come under the ADA’s protection.⁷⁹

Bagenstos criticizes the Court’s holding in the *Sutton* trilogy,⁸⁰ which held that whether someone has a disability should be determined by viewing the individual in the mitigated state, taking into account the ameliorative effects of medication and other assistive devices.⁸¹ This holding has caused lower courts to conclude that many conditions that Congress believed would be covered are not disabilities.⁸² Bagenstos notes that criticism was even sharper for the Court’s interpretation of the “regarded as” prong (or perceived disability prong, as he calls it).⁸³ In both *Sutton* and *Murphy*, the employers believed the plaintiffs’ impairments disqualified them from their positions but because there was no evidence that their employers perceived the plaintiffs as being precluded from a broad class of jobs, their claims failed.⁸⁴ Critics believe that this aspect of *Sutton* and *Murphy* confirms the trend in lower courts to limit ADA protection to a small group of severely disadvantaged people—the

⁷² BAGENSTOS, *supra* note 1, at 34; *see also* Feldblum et al., *supra* note 5, at 216 (explaining that the ADA jurisprudence prior to amendments *Toyota* focused on the coverage issue rather than the causation question of whether the employer discriminated or not).

⁷³ 524 U.S. 624 (1998).

⁷⁴ BAGENSTOS, *supra* note 1, at 35.

⁷⁵ 527 U.S. 471 (1999).

⁷⁶ 527 U.S. 516 (1999).

⁷⁷ 527 U.S. 555 (1999).

⁷⁸ 534 U.S. 184 (2002).

⁷⁹ BAGENSTOS, *supra* note 1, at 35.

⁸⁰ *Id.* at 37–38. The *Sutton* trilogy includes the *Sutton*, *Murphy*, and *Albertsons* cases.

⁸¹ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–83 (1999). For additional criticism of the Court’s decision on the mitigating measures issue, *see* Feldblum et al., *supra* note 5, at 192–93.

⁸² *See, e.g.*, Feldblum et al., *supra* note 5, at 202 (listing impairments that the courts have found to not be disabilities but which Congress intended to be defined as such: cancer, epilepsy, diabetes, hearing loss, multiple sclerosis, HIV infection, intellectual disabilities, and others).

⁸³ BAGENSTOS, *supra* note 1, at 37.

⁸⁴ *Id.*

"truly disabled."⁸⁵ Many argue that limiting protection in this way goes against the core principles of the ADA and treats the statute like a disability benefits program that redistributes benefits to a disadvantaged class, rather than like a civil rights law.⁸⁶

However, Bagenstos argues that the Supreme Court decisions are consistent with some of the principles behind the disability rights movement in the 1970s and 1980s.⁸⁷ Specifically, as will be demonstrated below, Bagenstos argues that the Supreme Court's decisions are consistent with both the independence focus and the minority group model.⁸⁸ I agree with Bagenstos's discussion below that the decisions can be read in a way that is consistent with some of the goals of the disability rights movement. But I am skeptical that the Supreme Court in 1999 and 2002 (when these controversial cases were decided) was influenced by the motivations of the disability rights movement in the 1970s and 1980s. Having said that, Bagenstos's explanation for the Court's decisions is certainly intriguing and a welcome departure from the traditional backlash argument.

Bagenstos first argues that the Supreme Court's decisions are consistent with the independence focus of the disability rights movement.⁸⁹ If the ADA is understood as saving society money by allowing individuals with disabilities to move from welfare to work, then it makes sense to provide the ADA's protections to those who are the "most" disabled—those who would otherwise be unable to work and would therefore be on public assistance.⁹⁰ Cases that limit coverage to the "truly disabled" can be read as drawing the line between those who could find work without the ADA and those who would be on public assistance without the ADA.⁹¹ As Bagenstos states: "An 'independence' approach would treat the ADA as a way of getting people out of benefits programs and into the workforce, not as a way of getting job accommodations for people who

⁸⁵ *Id.* at 37–38.

⁸⁶ *Id.* at 38; *see also* Feldblum et al., *supra* note 5, at 217 (arguing that one reason courts might limit the definition of disability is because they see the term "disability" as synonymous with an inability to work, which necessarily suggests that individuals with disabilities are "significantly different than 'the rest of us'" (citation omitted)).

⁸⁷ BAGENSTOS, *supra* note 1, at 38.

⁸⁸ *Id.* at 38–41.

⁸⁹ *Id.* at 39.

⁹⁰ *Id.* at 39; *see also* Feldblum et al., *supra* note 5, at 217. Feldblum believes that the view of disability as being synonymous with "inability to work" might have been caused by the fact that most disability cases are claims for disability payments under Social Security, where the standard is whether the individual has a physical or mental impairment which makes him or her unable to engage in any substantial gainful activity correctly points out that the ADA is a civil rights law, not a disability payment law and that the goal of the ADA is to prohibit discrimination against individuals because of their disability, even if they can work. *See id.*

⁹¹ BAGENSTOS, *supra* note 1, at 39.

could be in the workplace anyway.”⁹² The point is, according to Bagenstos, that the Supreme Court’s decisions do not necessarily demonstrate a betrayal to the promises of the ADA but instead demonstrate the problems with the emphasis on independence.⁹³

I agree with Bagenstos that the focus on independence explains the Court’s disability rights jurisprudence. But the thrust of the ADA is clearly a civil rights law. As an analogy, it would never be an appropriate response to assert that as long as a racial minority can find work, it does not matter that he cannot continue to work for the same employer. While independence was a goal of some supporters of the ADA, the clear emphasis of the statute is a civil rights law.⁹⁴ And because that conclusion is inescapable, I believe that the Court’s opinions *do* represent a betrayal of the civil rights goal of the ADA.

Bagenstos also argues that the Supreme Court’s decisions are consistent with the minority group model, which seeks to define disability as a discrete, stigmatized minority group. For instance, HIV is highly stigmatized and the Court held it was a disability in *Bragdon v. Abbott*.⁹⁵ Fully correctable vision and high blood pressure controlled by medication (conditions the Supreme Court found to *not* be disabilities) are not stigmatizing and are fairly common impairments.⁹⁶ Bagenstos also argues that the minority group model justifies the mitigating measures decision in *Sutton* because the ability to use mitigating measures will often make a difference in how society responds to an impairment.⁹⁷ Bagenstos recognizes that some mitigating measures do not reduce the stigma of an impairment and may, in fact, contribute to the stigmatization of the impairment [think: hearing aid] but he does not believe that anything in *Sutton* supports such an inference that these impairments should not be covered.⁹⁸ Either these conditions should be covered because the mitigating measure causes significant limitations on the individual’s major life activities (such as the effects of antiepileptic drugs) or the impairments should be covered under the “regarded as” prong because significant segments of society view the conditions as stigmatizing.⁹⁹ I think Bagenstos makes a good point that the Supreme Court’s jurisprudence is consistent with the minority group model. Such a position finds support

⁹² *Id.* at 40.

⁹³ *Id.* at 41.

⁹⁴ See Feldblum et al., *supra* note 5, at 217 (stating that the ADA is a civil rights law and therefore the goal of the ADA is to prohibit discrimination against a person because of the person’s disability).

⁹⁵ 524 U.S. 624, 655 (1998).

⁹⁶ BAGENSTOS, *supra* note 1, at 41 (referring to *Sutton* and *Murphy*).

⁹⁷ *Id.* at 41–42.

⁹⁸ *Id.* at 42–43.

⁹⁹ *Id.* at 43.

in the original ADA;¹⁰⁰ however, the Amendments to the ADA make clear that this is too limited of a reading of the ADA.¹⁰¹

In sum, Bagenstos argues that even though the Supreme Court's decisions are not consistent with a universal view of disability, they are consistent with the independence focus and the minority group model.¹⁰² Accordingly, "it is not fair to say that the Supreme Court's definition-of-disability decisions disregarded the principles of the disability rights movement. It is more accurate to say that those decisions took sides in a dispute within the movement."¹⁰³ This does not mean that he agrees with the decisions—he does not—instead, he argues that the shortcomings of the decisions are related to the limitations of the independence focus and the minority group model.¹⁰⁴

The limitations of the independence focus are obvious. Many individuals with disabilities may be able to hold down a job and therefore will be considered "independent." But yet, these individuals suffer from limitations that can limit their full range of opportunities.¹⁰⁵ As Bagenstos notes:

"If the goal of disability rights law is to promote equal opportunity to participate in the economic and civic life of the community, the law must strike at those limitations, even if they do not compromise individual 'independence.' Mere 'independence,' without equality, is not what disability rights activists *really* seek, and a statute constrained by a focus on independence is unduly limited."¹⁰⁶

Bagenstos next argues that the minority group model is also too narrow to be the basis for disability rights law. First, the minority group model makes the ADA more vulnerable to political attack and stigmatizes the beneficiaries, which leads to judges vigorously policing the line between the protected and the unprotected.¹⁰⁷ In fact, judges *have* guarded the boundary vigorously, asserting the fear that if the ADA is

¹⁰⁰ 42 U.S.C. § 12101(a)(7) (2006) (providing the finding of Congress that "individuals with disabilities are a discrete and insular minority").

¹⁰¹ See *id.* (showing the Amendments deleted the reference to the "discrete and insular minority").

¹⁰² BAGENSTOS, *supra* note 1, at 44.

¹⁰³ *Id.* at 45. While I agree that the decisions can be read in a way entirely consistent with Bagenstos's argument, I disagree that the Supreme Court was cognizant of the fact that it was "taking sides" in a debate—especially when the side of the debate it took is not the side of the debate reflected in the statute Congress enacted.

¹⁰⁴ *Id.* at 45.

¹⁰⁵ *Id.* at 46.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

extended too broadly, it will harm the people who are truly in need.¹⁰⁸ Bagenstos responds to this focus on the minority group model:

Even if one thinks that disability defines a discrete, subordinated group, then it does not make sense to target disability law's protections to that group alone: the very act of targeting triggers political and judicial pressures to shrink the size of the protected class and to reduce the protections afforded to that class. A targeted disability law may ironically have exactly the opposite effect from the one the lower courts predict: it may reduce the chances that full protection will be provided to the full intended protected class.¹⁰⁹

I have found that law students in my disability classes tend to agree with the Court's emphasis on the minority group model and attempts to strictly limit the size of the protected class. Their concern seems to be that if too many people are considered to have a disability, the employer will have to provide accommodations to all of those people, missing the obvious fact that many of those individuals (like the *Sutton* sisters)¹¹⁰ will not need an accommodation. The concern with having to provide accommodations to too many people seems to be based on two separate concerns, depending on the student's perspective. Either students think it will be too expensive for employers or students assume that there is a finite number of accommodations that can be given and providing accommodations to some minimally disabled individuals will preclude providing accommodations to the more severely disabled.¹¹¹

Bagenstos argues that a more difficult problem is that the minority group model misstates the nature of disability inequality. Disability inequality is not just discrimination against a stigmatized group.¹¹² It also consists of norms developed by those who design institutions without taking into account the needs of people who differ, physically or mentally.¹¹³ Bagenstos points out how the courts' rulings demonstrate a re-

¹⁰⁸ *Id.* at 47.

¹⁰⁹ *Id.*

¹¹⁰ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999). The sisters in *Sutton* had fully correctable myopia. *Id.* They would not need an accommodation. *Id.*

¹¹¹ See also Feldblum et al., *supra* note 5, at 228 (discussing the legislative process for the ADA Amendments Act, where she (as a witness) responded to the fear of some that the amended statute will undermine the cause of people with disabilities because the law will no longer cover just the "truly disabled" by stating that people with disabilities want the amendments to pass and do not worry that the new statute will set back their cause because they understand that there is no set of "truly disabled" people; instead, we all exist along a spectrum of abilities).

¹¹² BAGENSTOS, *supra* note 1, at 47.

¹¹³ *Id.* at 48. For instance, using learning disabilities as an example, Bagenstos explains how standardized testing has been developed with time constraints, not because of targeted

luctance to allow protection to plaintiffs when their claims involve an incompatibility with workplace norms and structures.¹¹⁴ He also correctly notes that allowing plaintiffs to fall under ADA protection would not automatically render the workplace norms invalid. It would simply require the employer to justify the exclusionary norm or practice.¹¹⁵

Bagenstos considers two possible solutions to the definition problem—the ADA Amendments Act and a broader definition of disability. While he thinks the ADA Amendments Act is a “worthy effort that is likely to make things somewhat better,” he does not think it will get us past the courts’ urge to strictly interpret the statute.¹¹⁶ Even if the ADA defined coverage to include everyone with an impairment—regardless of whether it imposes a substantial limitation on a major life activity—courts would likely turn to interpreting “impairment” strictly to limit coverage.¹¹⁷ I have a more positive outlook about the Amendments, at least with respect to finding individuals to be in the protected class. As will be discussed later, I think courts’ limiting interpretations of the ADA will now be on the reasonable accommodation provision of the ADA.¹¹⁸

Bagenstos also explores a broader definition of disability that is used in Australia. There, the definition does not require a “substantial limitation” on a major life activity; it includes possible future impairments, and it does not require the impairment to have an immediately harmful effect on the body.¹¹⁹ While the broader definition is thought to avoid the “anomaly” that an individual who has been rejected because of his disability is determined to not be disabled enough for protection under the statute, it has not proven extremely successful in Australia because victims remain reluctant to bring claims.¹²⁰ Even if this type of law was very successful, Bagenstos believes that it is highly unlikely Congress would pass such an act in the United States because the minority group model and independence focus had so much appeal to liberals and conservatives.¹²¹ I agree with his conclusion that a universalist approach would indeed be a radical change in the law and one that needs extensive political work—not just a statutory change.¹²²

discrimination against those with learning disabilities, but because a norm that neglected to consider the differences in those with learning disabilities. *Id.*

¹¹⁴ *Id.* at 48–49.

¹¹⁵ *Id.* at 49.

¹¹⁶ *Id.* at 51.

¹¹⁷ *Id.*

¹¹⁸ See *infra* Part IV.

¹¹⁹ BAGENSTOS, *supra* note 1, at 52–53.

¹²⁰ *Id.*

¹²¹ *Id.* at 53.

¹²² *Id.* at 54.

D. Chapter 4: The Role of Accommodation in Disability Discrimination Law

In Chapter 4, Bagenstos discusses the role of the accommodation mandate—the “centerpiece” of disability discrimination laws. Because accommodations require taking the protected class into account, rather than ignoring the protected class status, critics of the ADA claim a “strong normative distinction between the ADA’s accommodation mandate and the anti-discrimination requirements of [other] civil rights laws.”¹²³ These critics believe that the ADA is a redistributive scheme that is essentially a mandated benefits program for the disabled, rather than a civil rights law. Bagenstos, however, makes a convincing argument that under the minority-group model, “anti-discrimination and accommodation are very closely aligned normatively.”¹²⁴

Despite the obvious differences between anti-discrimination laws, which demand entities treat people equally, and accommodation mandates, which demand entities take differences into account, Bagenstos argues that they are more similar than different for a couple of reasons.¹²⁵ First, accommodation mandates often expose hidden conduct that would be seen as discriminatory if it were out in the open. For instance, many disability activists point out that employers accommodate needs of non-disabled employees all the time and only protest when a disabled worker needs an accommodation.¹²⁶ Furthermore, Bagenstos argues that both anti-discrimination and accommodation mandates “target conduct that violates the duty to avoid contributing to a subordinating system, at least where that can be accomplished at a reasonable cost.”¹²⁷ Seen this way, accommodation mandates are just an example of the general prohibition on rational discrimination.¹²⁸

Bagenstos agrees with other theorists who argue there are three reasons for prohibiting rational discrimination in the race-based context: (1) the racial differences that make discrimination rational are caused by earlier irrational discrimination; (2) from the victim’s perspective, the harmful result is the same, even if the reason is rational;¹²⁹ and (3) an “employer who has the power to work against the underlying problem of cumulative disadvantage, even if it involves sacrifice, bears some degree of responsibility”—especially when holding the employer responsible is

¹²³ *Id.* at 55.

¹²⁴ *Id.* at 56.

¹²⁵ *Id.*

¹²⁶ *Id.* In my years of private practice representing employers, I observed this phenomenon all of the time.

¹²⁷ *Id.* at 57.

¹²⁸ *Id.*

¹²⁹ *Id.* at 62.

not likely to cause an unreasonable burden.¹³⁰ Accordingly, employers have an obligation to refrain from rational discrimination because it perpetuates prior inequalities.

Viewing anti-discrimination as a way of tackling subordination, Bagenstos argues that the link between anti-discrimination and accommodation is clear.¹³¹ Accommodation in the disability context merely provides equal opportunity by dismantling the structure of subordination of individuals with disabilities.¹³² As Bagenstos convincingly argues, accommodation requirements “simply restore a just distribution; they do not redistribute.”¹³³

Bagenstos then argues that the three justifications for imposing liability on employers for rational discrimination in other civil rights contexts (like race discrimination)—(1) rational discrimination may be animus-based discrimination in disguise; (2) even non-animus-based rational discrimination may reflect selective sympathy and indifference; and (3) rational discrimination represents an employer’s continued maintenance of subordination—also apply to failure to accommodate claims.¹³⁴

First, many failure to accommodate claims can be seen as animus-based or at least involving selective sympathy and indifference because employers make individualized accommodations to non-disabled employees all of the time.¹³⁵ Further, even if the accommodation is not comparable to other accommodations requested or given, one can still see a case of selective indifference by expanding the time frame to include a time at which physical or institutional structures were designed without consideration of the needs of employees with disabilities.¹³⁶ Those needs were not considered, possibly, because of past discrimination that assumed that disabled employees would not be working.¹³⁷ Finally, even when accommodations are unique and entail significant costs, the justification for requiring them is similar to the third justification for prohibiting rational discrimination—the employer is the party in the best

¹³⁰ *Id.* at 63.

¹³¹ *Id.*; see, e.g., Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 898–920 (2004) (arguing that the reasonable accommodation provision is very similar conceptually to our other antidiscrimination theories); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 652 (2001) (arguing that other aspects of traditional anti-discrimination law, most notably the disparate impact theory, are the same as accommodation requirements).

¹³² BAGENSTOS, *supra* note 1, at 64.

¹³³ *Id.* at 65.

¹³⁴ *Id.* at 67.

¹³⁵ *Id.*

¹³⁶ *Id.* at 67–68.

¹³⁷ *Id.* at 68.

position to dismantle the system of subordination where accommodations are not overly burdensome.¹³⁸

Despite his argument that accommodation mandates are theoretically and normatively similar to anti-discrimination mandates, Bagenstos further argues that we should not be satisfied with an anti-discrimination model because it lacks the power to “attack broad-gauged inequalities.”¹³⁹ This is because anti-discrimination law is a fault-based regime that requires employers to eliminate barriers that in some way resulted from the employer’s behavior. But, as Bagenstos claims, some barriers for individuals with disabilities are structural and cannot be attributed to any particular employer. The three barriers he refers to are: (1) the unavailability of personal assistance to help some individuals with disabilities get ready for work, (2) the lack of accessible transportation to work, and (3) the discriminatory structure of our health insurance system.¹⁴⁰ Bagenstos then explains how two doctrines—the “job-related” rule and the access/content distinction—have worked to drain the accommodation requirement of significant power to eliminate structural barriers that keep individuals with disabilities out of the workforce.¹⁴¹

The job-related rule requires employers to provide only those accommodations that are job-related and not personal items. This rule limits accommodations that employers could provide at reasonable costs.¹⁴² If an accommodation could help an employee outside of her job (like training a new service animal or transportation to allow the employee to get to work) the employer does not have to provide it.¹⁴³ The access/content distinction also limits the reach of the reasonable accommodation provision.¹⁴⁴ This rule only requires an accommodation if it allows individuals with disabilities to gain access to the same benefit; it does not require that those individuals be given the same content of the benefit.¹⁴⁵ For example, a bookstore has to allow a blind person into the store (and even the blind person’s Seeing Eye dog despite a “no animal” rule) but it would not be required to stock any Braille books or audio books that the blind person could utilize.¹⁴⁶ This access/content distinction has the most significance in the insurance industry, where insurance companies are able to get away with putting special coverage caps on certain diseases (like AIDS) by arguing that they offer people with AIDS the same

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 69.

¹⁴¹ *Id.*

¹⁴² *Id.* at 70.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 71.

¹⁴⁶ *Id.*

insurance protection as everyone else (coverage with an AIDS cap) so it does not matter that the cap on AIDS harms individuals with HIV more than individuals without HIV. “No accommodation is required if it would alter the content of the opportunity the defendant offers generally.”¹⁴⁷

Bagenstos argues that both the job-related rule and the access/content distinction operate to bring the accommodation requirement very closely in line with the anti-discrimination requirement. If we force employers to help disabled employees to get to work or to help them with their daily living, it seems like we are requiring employers to make up for the disadvantage suffered by the individual with a disability.¹⁴⁸ This, in turn, would lead some to view the accommodation requirement as charity, which is what most disability advocates sought to avoid.¹⁴⁹ As Bagenstos argues: “So long as courts interpreting the accommodation requirement feel compelled to focus on the fault of individual employers, as opposed to that of society as a whole, that requirement will lack significant power to undo the deep-rooted structural barriers to employment for people with disabilities.”¹⁵⁰

Bagenstos’s explanation of the limits of the anti-discrimination model is an important contribution to the disability literature. There is so much of an emphasis on trying to fit disability law into the anti-discrimination model. And while Bagenstos accomplishes that persuasively, he correctly notes that anti-discrimination law cannot accomplish all that needs accomplishing.

II. SPECIFIC APPLICATIONS OF THE CONFLICTS OF THE DISABILITY RIGHTS MOVEMENT

In the next two chapters of the book, Bagenstos explores the general conflicts identified earlier in two specific applications—how entities (mostly employers) deal with safety risks and the life and death debate.

A. *Chapter 5: Disability and Safety Risks*

In Chapter 5, Bagenstos discusses the fear of safety risks that leads to a great deal of disability discrimination. Bagenstos is critical of the paternalism against individuals with disabilities.¹⁵¹ One of the first debates he discusses is whether risk should be assessed using an expert, technocratic approach, or a democratic approach that gives weight to

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 72.

¹⁴⁹ *Id.* at 73.

¹⁵⁰ *Id.* at 74.

¹⁵¹ *Id.* at 76.

“lay” perceptions of risk.¹⁵² Those who are skeptical of the professional communities might prefer a democratic approach, which gives respect to differing value judgments about risk.¹⁵³ Bagenstos disagrees with this view, stating: “If the goal of disability rights activists is to impose a check on the prejudices of the majority, then a regime that aims simply to transform the majority’s view into policy seems instantly problematic.”¹⁵⁴ He also argues that the public’s fear of disease is very connected to the stigma and stereotypes that disability rights laws seek to eliminate.¹⁵⁵

But Bagenstos also recognizes that too much reliance on all professionals is also problematic. He believes the law has deferred too broadly to professionals, but he supports some deference to professionals—specifically, to public health professionals.¹⁵⁶ The Supreme Court has said that the views of public health authorities “are of special weight and authority,” and courts should normally defer to their reasonable medical judgments. If public health officials say it is safe to hire someone, the defendant cannot exclude that individual unless the defendant shows that the judgment of those officials is “medically unsupportable.”¹⁵⁷

While Bagenstos recognizes that this deference is in tension with the skepticism towards professionals, he supports the rule because of the political balance of power in public health agencies.¹⁵⁸ Bagenstos argues that deference to public health officials is certainly better than letting judges and juries decide these safety risk issues because they may be particularly susceptible to prejudices that lead to discrimination, and because, when asked to view the issue just as it relates to one defendant, judges and juries are more likely to ignore the broader effect of exclusion.¹⁵⁹ Certainly, Bagenstos recognizes that the deference to public health officials rule is imperfect¹⁶⁰ but thinks that the “deference rule allocates authority to adjudicate disputes over risk-based discrimination to an entity that is uniquely likely to act in a manner that furthers those advocates’ integrationist goals.”¹⁶¹

One reason for believing that public health officials will be likely to take into account the interests of individuals with disabilities is that the institutional culture of public health agencies is especially concerned

¹⁵² *Id.* at 77.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 78.

¹⁵⁶ *Id.* at 78–79.

¹⁵⁷ *Id.* at 79.

¹⁵⁸ *Id.* at 80.

¹⁵⁹ *Id.* For instance, many early HIV cases held that *any* risk of transmission was significant, regardless of how small.

¹⁶⁰ *Id.* at 81.

¹⁶¹ *Id.* at 82.

with the probabilities of risk and harm—they gather enormous amounts of data, which guards against cognitive biases.¹⁶² Further, the fear of driving risk underground has recently given public health officials an interest in eliminating unjustifiable discrimination against those who are believed to pose risks.¹⁶³ Finally, and counter-intuitively, Bagenstos argues that the broad jurisdiction of these agencies might be helpful for disability rights, because individuals with disabilities (especially individuals with risky disabilities) are likely to have disproportionate access to these agencies, which will help to counter the tendency of the private market to discriminate.¹⁶⁴

Despite favoring deference to public health authorities, Bagenstos opposes “technocratic deference to ‘expertise.’”¹⁶⁵ Specifically, he is against giving deference to agencies like the Federal Highway Administration (FHA), for example, whose regulations (and courts’ deference to them) has led to the exclusion of many individuals with disabilities, many perhaps unjustly.¹⁶⁶ The reason for his opposition is simply because these agencies are more likely to be responsive to the concerns of the industry, labor unions, and public interest groups, rather than to individuals with disabilities.¹⁶⁷

Bagenstos then turns his attention to the issue presented in *Chevron USA, Inc. v. Echazabal*,¹⁶⁸ whether it is unlawful to discriminate on the basis of a fear that a person with a disability will injure himself and not someone else. As Bagenstos discloses in the Introduction,¹⁶⁹ he argued the case before the Supreme Court on behalf of the plaintiff, Echazabal, so Bagenstos’s interest in and criticism of this case is not surprising.¹⁷⁰ In *Chevron*, the Court decided the narrow issue of whether the EEOC had correctly interpreted the direct threat standard—an employer may refuse to employ an individual with a disability if he poses a “direct threat to the health or safety *of other individuals* in the workplace.—to include threat to oneself.¹⁷¹ The Court held that the EEOC had not exceeded its authority in stating that employers may refuse to employ an individual with a disability if the disability causes the individual to pose a direct threat to only himself. Bagenstos disagrees with the Court’s decision when considered in light of the prohibition against paternalistic

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 83.

¹⁶⁵ *Id.* at 85.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 86.

¹⁶⁸ 536 U.S. 73 (2002).

¹⁶⁹ *Id.* at 3.

¹⁷⁰ *Id.* at 87.

¹⁷¹ *Id.* (emphasis added).

protection in the sex discrimination context and Congress's recognition of paternalism as a major target of the ADA.¹⁷²

He states that the *Chevron* decision is particularly troubling to many disability rights advocates because the "dignity of risk" is a central ideal for many individuals with disabilities.¹⁷³ Bagenstos explains how libertarians also believed in this idea that individuals should be free to make safety decisions for themselves, but libertarians would take this idea so far as to claim all workplace safety laws (like OSHA) unjust.¹⁷⁴ Some have criticized advocates who favor the position argued in Echazabal for this reason. But as Bagenstos explains, the dignity of risk argument does not need to follow a libertarian's position of rejecting *all* paternalism; it could be seen instead as "practical egalitarianism."¹⁷⁵ The problem is not all paternalism; it is paternalistic discrimination—singling out and excluding a historically disadvantaged group based on safety concerns. This view would challenge the decision in *Chevron* but not challenge general workplace safety rules that apply to everyone.¹⁷⁶

B. Chapter 6: Disability, Life, Death, and Choice

In Chapter 6, Bagenstos discusses the very controversial issues surrounding assisted suicide, non-treatment of newborns with disabilities, and genetic testing followed by selective abortion of fetuses with disabilities.¹⁷⁷ As Bagenstos points out, these issues reveal deep tension in the disability rights community, with both sides of the debate claiming that *their* view is espoused in principles of anti-paternalism and choice.¹⁷⁸ Of course, these life and death issues in the disability context inevitably are intertwined with the abortion debate.¹⁷⁹ Bagenstos explores in some detail the intersection between disability rights and anti-abortion advocacy. One common link between the disability movement and the anti-abortion movement is the belief that any "choice" exercised is not a free choice because social pressures make most choices not truly free.¹⁸⁰

Bagenstos first discusses the selective refusal to treat infants with disabilities.¹⁸¹ In the 1980s, cases were filed when parents agreed with a doctor's advice to not treat fatal health conditions of babies who had

¹⁷² *Id.* at 88–89.

¹⁷³ *Id.* at 90–91.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 92.

¹⁷⁷ *Id.* at 95.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 96.

¹⁸⁰ *Id.* at 97.

¹⁸¹ *Id.*

disabilities.¹⁸² The disability rights groups joined forces with anti-abortion groups to support the Reagan Administration's position that refusing to treat infants in these circumstances violated § 504 of the Rehabilitation Act.¹⁸³ The two major arguments made by these groups (and later used to challenge assisted suicide and prenatal testing) were: (1) the decision to withdraw treatment from an infant with a disability is often based on an erroneous understanding of the "quality of life" of these babies, where parents assumed that their children's lives are not worth living; and (2) it is the biases of doctors and not the free choice of parents that led to withholding of treatment from newborns with disabilities.¹⁸⁴

The second controversial issue Bagenstos discusses is assisted suicide.¹⁸⁵ Although it would seem that those who oppose paternalism would oppose restrictions on one's ability to make the ultimate life decision to end one's life, some disability rights groups oppose assisted suicide, viewing it as threatening to the lives and interests of individuals with disabilities.¹⁸⁶ They argue that those who favor assisted suicide falsely assume that a life with a disability is not a life worth living.¹⁸⁷ These groups are also worried that if the law allows assisted suicide, individuals would receive pressure from family and friends into exercising this right, no matter how stringently the right is regulated.¹⁸⁸ This pressure, even if well-meaning, is thought to encompass a belief that a life with a disability is so low quality that it would be a sensible decision to end it.¹⁸⁹ On the other hand, disability advocates contend that "the greatest suffering of people with disabilities is the socially stigmatized identity inflicted upon them," rather than the physical limitations.¹⁹⁰ Some believe that if the suffering from prejudice was eliminated, it would make a life with a disability as valuable as any other life.¹⁹¹ Others believe that the stigma of disability also influences the decision to die—that when a person chooses to die, "they do so from the position of a society that fears, discriminates against, and stigmatizes disability as undignified. Facing a life of societal exclusion, prejudice, and fear, in conjunction with self-deprecation and devaluation based on those same irrational assumptions, is there really a choice at all?"¹⁹²

¹⁸² *Id.* at 97–100.

¹⁸³ 29 U.S.C. § 794(a) (2006); BAGENSTOS, *supra* note 1, at 97–100.

¹⁸⁴ BAGENSTOS, *supra* note 1, at 99.

¹⁸⁵ *Id.* at 100.

¹⁸⁶ *Id.* at 100–02.

¹⁸⁷ *Id.* at 100.

¹⁸⁸ *Id.* at 100–02.

¹⁸⁹ *Id.* at 101.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 102.

While I do not want to minimize the harm caused by social stigmatization, this view ignores the fact that many individuals with disabilities who want to end their lives suffer from a terminable illness with unbearable pain. Ending the stigma of disability is not going to take away the physical pain associated with some disabilities.

The conflation of the disability rights movement and the anti-abortion movement is most prevalent in the context of prenatal testing, which is used to identify and abort fetuses that have disabilities.¹⁹³ Disability advocates object to this practice because “it is driven by misinformation,” and “it reflects the view that a life with a disability is not worth living.”¹⁹⁴ Moreover, some are concerned that reducing the number of individuals with disabilities will reduce their visibility, leading to even more prejudice and fear. It is also alleged that many of these abortion decisions are misinformed, if not coerced.¹⁹⁵ Medical professionals focus on and overemphasize the negative—costs and short life spans—while ignoring the positive aspects of children (and adults) with disabilities.¹⁹⁶ Many of these advocates do not favor more regulation of abortion: instead, they favor persuading medical professionals to include the “positive aspects of living (and parenting a child) with a disability.”¹⁹⁷

Nevertheless, the disability rights movement’s influence in this area has implications for the abortion rights debate, creating a tension between the disability rights critique and support for broad abortion rights.¹⁹⁸ Bagenstos discusses this topic at length.¹⁹⁹ The convergence can be summarized as follows: because disability rights advocates believe that private actors can limit free choice as much as the government can (based on societal stigma of disability), regulation is necessary to counterbalance the strong social forces against individuals with disabilities.²⁰⁰ Many of the abortion cases, which permit some regulation of abortion (designed to allow a more informed choice), are consistent with the arguments of disability rights advocates.²⁰¹ Accordingly, even though governmental regulation may impede choice (with waiting periods, etc.) it does so in an effort to remove greater obstacles to free choice caused by private actors.²⁰² Taken to an extreme, Bagenstos points out that one might argue that if most abortions were forced and not a wo-

¹⁹³ *Id.* at 102–03.

¹⁹⁴ *Id.* at 103.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 103–04.

¹⁹⁷ *Id.* at 104.

¹⁹⁸ *Id.* at 104–05.

¹⁹⁹ *Id.* at 104–11.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 107–08.

²⁰² *Id.*

man's true choice, then autonomy may be best served by prohibiting abortion altogether.²⁰³ He does not support this position (nor do I) but he does note how it parallels the arguments made by disability rights advocates in the assisted suicide context.²⁰⁴ The concern in the assisted suicide context is that the pressures to end one's life will be so powerful that many people with disabilities will be coerced into ending their lives.²⁰⁵ If one believes the empirical argument that legalization of assisted suicide would lead many people to unwillingly end their lives (despite strict regulations to prevent such coercion) then autonomy would demand preventing assisted suicide.²⁰⁶ The same argument can be and is made regarding abortion.²⁰⁷

There is an alternative position, according to Bagenstos.²⁰⁸ Those who defend assisted suicide point to statistics that the majority of individuals with disabilities support assisted suicide, a view that is consistent with "the core disability principles of independence and anti-paternalism."²⁰⁹ This group argues that a belief that individuals with disabilities are incapable of making their own decision is unacceptable to a substantial majority of individuals with disabilities.²¹⁰ Those who take this position are not against *all* regulation; they would endorse regulation aimed at ensuring that the decision is free and informed.²¹¹ This might seem inconsistent with the pro-choice advocates who disagree with these types of restrictions on abortion.²¹² Bagenstos points out that there are reasons to treat assisted suicide differently than abortion, but he also notes that disability rights advocates who support assisted suicide and abortion might favor informed consent requirements for disability-selective abortions.²¹³

In the end, Bagenstos astutely points out that one's position in these debates will depend in part on one's view of the empirical question regarding how often individuals with disabilities are coerced to end their own lives or the lives of disabled fetuses.²¹⁴ He also correctly notes that the debate does not and should not apply to the non-treatment of newborns with disabilities.²¹⁵ They are persons, not fetuses, and unlike

²⁰³ *Id.* at 111.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 110–11.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 112.

²¹⁰ *Id.*

²¹¹ *Id.* at 112–13.

²¹² *Id.* at 113.

²¹³ *Id.*

²¹⁴ *Id.* at 114.

²¹⁵ *Id.* at 114–15.

adults who seek assisted suicide, infants have no ability to choose or refuse treatment.²¹⁶ Therefore, there is no inconsistency in prohibiting the non-treatment of newborns with disabilities while allowing assisted suicide and disability-selective abortions.²¹⁷

III. EXPLORING AND POSSIBLY SOLVING THE CHALLENGES OF THE DISABILITY RIGHTS MOVEMENT

A. *Chapter 7: The Limits of the Anti-Discrimination Model*

In Chapter 7, Bagenstos begins the two-chapter discussion of his thesis, which first describes the limitations of the anti-discrimination model and then provides his proposal for the future of the disability rights movement. In this chapter, he focuses on whether the anti-discrimination model is ideally suited to the goals of the disability rights movement—specifically, the goals of expanding employment for individuals with disabilities and allowing them to live a full life in the community.²¹⁸

In assessing the effectiveness of the ADA on these goals, Bagenstos takes an honest look at the statistics.²¹⁹ Recognizing that statistics come in infinite varieties and there are innumerable conclusions that can be drawn from them, Bagenstos does a good job of not overstating the claims made by the studies. His goal is one of summarizing the statistics rather than analyzing any study in depth; my goal is to summarize his summary.

The evidence is mixed with respect to the goal of integrating individuals with disabilities into the community.²²⁰ There was a slight increase in individuals with disabilities who went out to eat in restaurants but a slight decrease in other important community activities.²²¹ Regarding employment, for which we have much more data, Bagenstos is more conclusive: “the statute has failed significantly to improve the employment position of people with disabilities. Indeed, by virtually all reports the employment rate for Americans with disabilities has declined over the time the statute has been on the books.”²²² He also notes that three studies demonstrate that the initial implementation of the statute was associated with a significant decrease in employment for individuals with disabilities, and this decrease could not be explained by other factors.²²³ There is a simple (albeit depressing) explanation for this fact. Because

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 116.

²¹⁹ *Id.* at 116–18.

²²⁰ *Id.* at 116.

²²¹ *Id.*

²²² *Id.* at 117.

²²³ *Id.* at 118.

the ADA imposes accommodation costs on employers (and when first enacted, employers feared much higher costs), employers are reluctant to hire individuals with disabilities who may need accommodation.²²⁴ Employers know that it is much easier for plaintiffs to prove discrimination in a termination case (or a failure to accommodate case) than a failure to hire case, so they have an incentive to not hire individuals with disabilities.²²⁵

In analyzing why the ADA has not achieved its employment goals, Bagenstos explores the argument made by many—that the Supreme Court's decisions have contributed to the failure of the ADA to improve the employment rate of individuals with disabilities.²²⁶ Although he thinks the decisions were wrongly decided (as do I), he notes that they have “roughly confined the statute's coverage to those individuals who need the ADA's protections to remain in the workforce.”²²⁷ Accordingly, the decisions are not responsible for restricting the employment of individuals with disabilities because those not covered by the ADA's constrained definitions can likely find employment elsewhere.²²⁸ His explanation of the decisions makes sense if we are primarily concerned with the distinction between employment and unemployment. But if (as he argues earlier in his criticism of the independence focus)²²⁹ the ADA's goals cannot be reached simply by securing employment for individuals with disabilities without providing full employment opportunity for every individual with a disability, then the Supreme Court's decisions are less defensible.²³⁰

So why not abandon the ADA? Bagenstos gives several reasons for keeping it. First of all, he thinks the initial negative effect on employment is a short-term phenomenon, reflecting the fact that even though employers might have initially been reluctant to hire individuals with disabilities because of accommodation costs, these costs will seem less onerous when others can benefit from the same accommodations.²³¹ Bagenstos also argues that there is no reason to think that the ADA will not have long-standing benefits.²³² It probably already has had a positive effect on individuals with disabilities who do not require accommoda-

²²⁴ *Id.* at 118–19.

²²⁵ *Id.* at 118.

²²⁶ *Id.* at 120–21.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See *supra* notes 105–106 and accompanying text.

²³⁰ BAGENSTOS, *supra* note 1, at 121.

²³¹ *Id.* at 121–22.

²³² *Id.* at 122.

tions and will ultimately have a positive effect on those who do need accommodations.²³³

Turning to the primary purpose of this chapter of his book, Bagenstos argues that there are two explanations for the ADA's limited success.²³⁴ The first is the difficulty in enforcing the ADA because of limited remedies.²³⁵ The second is the limits of the anti-discrimination model in achieving deep social change.²³⁶

With regard to enforcement difficulties, Bagenstos looks at both the problems with enforcing Title III—the ADA's public accommodation provisions and the problem with enforcing Title I—the employment provisions.²³⁷ The problem varies depending on which of these provisions is at issue.

The reason the ADA's public accommodation provisions are under-enforced is simple—the ADA does not allow for money damages when a business has been found to violate the ADA's public accommodation mandate.²³⁸ And because a rational business might not voluntarily modify its premises to make them accessible, businesses have no incentive to conform to the ADA's requirements.²³⁹ Title III of the Act depends on individual plaintiffs to enforce its provisions.²⁴⁰ But each plaintiff has little incentive to bring a lawsuit because they will not get any money.²⁴¹ Plaintiffs' attorneys do not have an incentive to bring the lawsuits because they cannot collect their fees as part of a contingency fee arrangement.²⁴² Even though the statute provides for attorney fees if the plaintiff wins, the Court has made "winning" more difficult by holding that plaintiffs can recover fees only when the litigation results in a "judicially sanctioned change in the legal relationship of the parties."²⁴³ Out of court settlements and voluntary compliance do not count. Accordingly, businesses have an incentive to adopt a wait-and-see approach—wait to see if they get sued, and if they do, wait to see if the plaintiff is likely to win, and if so, voluntarily make the modification before judgment is entered.²⁴⁴ It is not surprising then, that the statute's public accommodation provision is very under-enforced.²⁴⁵

²³³ *Id.*

²³⁴ *Id.* at 123.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 123–24.

²⁴⁰ *Id.* at 125.

²⁴¹ *Id.* at 124.

²⁴² *Id.* at 125–26.

²⁴³ *Id.* at 126.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

The reason the employment provisions are under-enforced is because so much employment litigation focuses on termination rather than failure to hire.²⁴⁶ This also is a response to the incentives for plaintiffs' lawyers.²⁴⁷ Incumbent employees are more likely to be able to pay a retainer; their damages will be higher, and it is easier to prove discrimination for incumbent employees than applicants.²⁴⁸ The skew in favor of discharge cases also has the perverse effect of causing employers to discriminate in hiring because they know if they hire individuals with disabilities and later want to fire them or fail to accommodate them, it will be much harder for the employer to defend those lawsuits.²⁴⁹

The second reason for the limited success of the ADA, Bagenstos argues, is the limitation of anti-discrimination law, which focuses on individual acts of discrimination by an employer at fault for the discrimination.²⁵⁰ As Bagenstos pointed out earlier, many of the most significant challenges facing individuals with disabilities are not attributable to the acts of employers. Some challenges are caused by the lack of personal assistance services, the lack of assistive technology, or the lack of accessible transportation.²⁵¹ Bagenstos believes that the biggest problem is the current structure of our healthcare system.²⁵² The problem is not that individuals with disabilities are disproportionately uninsured.²⁵³ The problem is that most private health insurance fails to cover the personal services and assistive devices needed by individuals with disabilities and public insurance has requirements that keep individuals out of the workforce.²⁵⁴ Accordingly, anti-discrimination law is simply too narrow of a tool to effectuate any large-scale improvement for individuals with disabilities.²⁵⁵

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 127–28.

²⁴⁹ *Id.* It might be harder for an employer to defend a termination or failure to accommodation claim than to defend a failure to hire claim, but it is still relatively easy. Defendants often win summary judgment motions. RUTH COLKER, *THE LAW OF DISABILITY DISCRIMINATION* 118 (7th ed. 2009).

²⁵⁰ BAGENSTOS, *supra* note 1, at 128–30.

²⁵¹ *Id.* at 128.

²⁵² *Id.* at 129.

²⁵³ *Id.* (citing a GAO report that found that nine percent of disabled individuals reported being uninsured, compared with 15 percent of the non-disabled working age population).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 129–30 (noting that courts have construed the ADA to narrow the scope of the ADA's accommodation requirement, thus "depriving the statute of much utility in attacking the health insurance practices that keep so many people with disabilities out of the workforce").

B. Chapter 8: Future Directions in Disability Law

In the final chapter of his book, Bagenstos provides his suggestions for moving disability rights forward toward accomplishing more of its goals.²⁵⁶ He advocates a two-pronged approach: improving the enforcement of the ADA and “adopting new interventions that go beyond the ADA’s anti-discrimination/accommodation model.”²⁵⁷

To improve enforcement of the ADA’s public accommodation title (Title III), he recommends a simple (albeit politically difficult) solution: Congress should amend the ADA to allow for money damages for violations of Title III.²⁵⁸ In response to those who complain about serial litigation²⁵⁹ (individual lawyers or plaintiffs bringing hundreds of cases against businesses without notifying them) Bagenstos believes that these abusive litigation tactics are the direct result of limited remedies.²⁶⁰ He thinks the best response is to allow a damages remedy; require plaintiffs to file pre-suit notice; and to have defendants pay attorney fees to plaintiffs who succeed in eliminating the ADA violation by providing such pre-suit notice.²⁶¹

Bagenstos correctly notes that improving enforcement of the employment provisions is more difficult.²⁶² An obvious solution that he rejects for political reasons would be to increase damages for failure to hire violations.²⁶³ His other suggestion is more feasible—the EEOC should “devote more resources to failure to hire claims.”²⁶⁴ He correctly points out that private lawyers are handling the termination claims so the EEOC should be focusing on what private lawyers are *not*. The more failure to hire cases the EEOC brings, the less of an incentive employers will have to discriminate in the hiring stage.²⁶⁵

²⁵⁶ *Id.* at 131–50.

²⁵⁷ *Id.* at 131.

²⁵⁸ *Id.* at 132 (noting again that “the absence of a damages remedy has deprived plaintiff’s lawyers of an incentive to bring ADA public accommodation suits”).

²⁵⁹ *Id.* (referring to “the businesses and their political allies” who are concerned that “individual lawyers or plaintiffs [would bring] hundreds of cases each, against dozens of businesses in each town they visit, without notifying a business of the problem before filing suit”).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* (noting that “remov[ing the caps on compensatory and punitive damages] would require legislative action—which would likely face political hurdles similar to those faced by the proposal to authorize a damages remedy for ADA public accommodations cases”).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 133 (arguing that “[i]n the disability context, where private attorneys are bringing discharge cases that may actually create a disincentive to hire members of the protected class, government action to bring hiring cases that would counteract that disincentive is particularly imperative”).

Bagenstos recognizes the limits of his proposal to increase enforcement of the ADA's provisions.²⁶⁶ As discussed earlier, Bagenstos believes that one of the major reasons the ADA has not been more successful is because of the limits of the anti-discrimination/accommodation model.²⁶⁷ Accordingly, he argues that disability rights activists must move beyond the anti-discrimination model and toward social welfare interventions to achieve the goals of increased employment and integration in community life.²⁶⁸ He recognizes, of course, that many of his ideas are likely to increase the tensions within the disability movement because of the position of some activists that "charity" or "welfare" should be avoided at all costs.²⁶⁹ But he believes that "social welfare interventions must be [and can be] tailored to promote employment, integration, and community participation, and to avoid unnecessary paternalism and dependence."²⁷⁰

His major proposal is to expand public health insurance in several ways. First, Bagenstos discusses the benefits and limitations of enforcing the Medicaid Act.²⁷¹ While many lawsuits have been filed and won under this Act,²⁷² the states have wide discretion to implement benefits how they please, and the structure of the Act has a strong bias toward institutional rather than community placements.²⁷³

Second, Bagenstos discusses expanding eligibility for public health insurance.²⁷⁴ Currently, Medicare and Medicaid have powerful disincentives to work, and yet private insurance does not provide for the kinds of services that individuals with disabilities often need (personal assistance and assistive technology, for instance).²⁷⁵ This leaves individuals with disabilities in a horrible catch-22. He notes that the Ticket to Work & Work Incentives Improvement Act (TWWIIA) of 1999²⁷⁶ has made some effort to sever the link between working and being cut-off from all healthcare benefits, but this Act does not go far enough.²⁷⁷

²⁶⁶ *Id.* at 136.

²⁶⁷ *Id.* at 128.

²⁶⁸ *Id.* at 136.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 138–40.

²⁷² *Id.* at 138.

²⁷³ *Id.* at 138–39.

²⁷⁴ *Id.* at 140.

²⁷⁵ *Id.*

²⁷⁶ The Ticket to Work & Work Incentives Improvement Act of 1999, 42 U.S.C. § 1320b-19 (2006).

²⁷⁷ BAGENSTOS, *supra* note 1, at 141 (noting that the Act fails to help those whose "attachment to the workforce is shaky," and that the Act's extension of Medicare benefits "may not be sufficient to eliminate disincentives to work").

Third, Bagenstos argues for expanding the services covered by public health insurance.²⁷⁸ One attempt has been the Community Choice Act,²⁷⁹ which would eliminate Medicaid's institutional bias "by mandating that states cover personal assistance services" and allowing individuals with disabilities to decide where to receive these services and to have the power to "hire, fire and manage their assistants."²⁸⁰

Despite his advocacy for these social welfare initiatives, Bagenstos acknowledges the dilemmas that emerge with these attempts.²⁸¹ First, as a general matter, he recognizes that there is a strong critique of the social welfare system.²⁸² More specifically, he addresses the debate between universal and targeted approaches.²⁸³ Briefly stated, targeted programs are more efficient at alleviating the suffering of individuals with disabilities,²⁸⁴ but universal programs "are generally thought to be more politically stable."²⁸⁵ As a simple example, he notes the increased acceptance of social security, which benefits everyone, over means-tested welfare programs.²⁸⁶

While recognizing that disability-specific reform will not be as criticized as a program targeted to poor people because individuals with disabilities are considered the "deserving poor," programs that foster the attitude that individuals with disabilities are in need of charity conflict with the movement's emphasis on disabled individuals being considered full and equal citizens.²⁸⁷ Therefore, Bagenstos argues, disability rights activists should seek to achieve their social welfare goals through "universal policies that recognize that the entire population is at risk for the concomitants of chronic illness and disability."²⁸⁸

Accordingly, Bagenstos urges the adoption of a universal healthcare system.²⁸⁹ Such a guarantee would eliminate the fear of loss of coverage when becoming employed and the universal nature of the program "would not send the message that people with disabilities are uniquely in need of caretaking; it would send the message that we all need insurance against contingencies in life."²⁹⁰ I have made similar arguments else-

²⁷⁸ *Id.*

²⁷⁹ S. 683, 111th Cong. (2009).

²⁸⁰ BAGENSTOS, *supra* note 1, at 140–41.

²⁸¹ *Id.* at 142–48.

²⁸² *Id.* at 143.

²⁸³ *Id.* at 143–45.

²⁸⁴ *Id.* at 143.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 143–44.

²⁸⁷ *Id.* at 144.

²⁸⁸ *Id.* (quoting Irving Kenneth Zola, *Toward a Necessary Universalizing of a Disability Policy*, 67 *MILBANK Q.* 401, 401 (1989)).

²⁸⁹ *Id.* at 144–45.

²⁹⁰ *Id.* at 145.

where²⁹¹ in an attempt to justify providing some benefits that would help parents and other caregivers to balance work and family. Because anyone can find themselves forced into a caregiver role at any time (either through unintended pregnancy or when a parent or other loved one suddenly becomes sick or disabled and needs care), flexibility benefits can be seen as ultimately benefiting everyone because anyone could find himself needing the flexibility.²⁹²

The second tension Bagenstos discusses is one over consumer control.²⁹³ The concern is that an emphasis on increased “medical” services for individuals with disabilities will collide with the “anti-paternalist project” of disability rights activists.²⁹⁴ He uses the Community Choice Act to highlight the tension.²⁹⁵ Even though the Act would give individuals with disabilities control over the personal assistance services provided to them, recipients of those services would be forced to rely on home health agencies to deliver these services, which limits the autonomy of individuals with disabilities.²⁹⁶ Accordingly, Bagenstos proposes a voucher system in which individuals with disabilities serve as employers for their aids and receive a fixed amount of money to pay for their wages.²⁹⁷ Of course, he also recognizes the drawback of such a system—many do not want to employ their own attendants and the employment effects on those attendants might be negative.²⁹⁸ Therefore, a “more promising approach would retain an agency-provider model of service delivery but give people with disabilities a greater voice in the operations of the provider agencies.”²⁹⁹

In conclusion, while he recognizes that his discussion in this chapter was “quite wonkish,”³⁰⁰ he believes the goals of employment and community integration are best achieved through a combination of the ADA (with increased enforcement) and social welfare programs.³⁰¹ He states: “What the movement needs is a renewed emphasis on the approaches that have been eclipsed: approaches that look to universalism as a key

²⁹¹ Nicole B. Porter, *Why Care About Caregiving? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. KANSAS L. REV. 355 (2010) [hereinafter Porter, *Caregiving*].

²⁹² *Id.* at 399–400.

²⁹³ BAGENSTOS, *supra* note 1, at 145–48.

²⁹⁴ *Id.* at 146.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 147.

²⁹⁸ *Id.* at 147–48.

²⁹⁹ *Id.* at 148.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 149–50.

element of disability policy, and that embrace social welfare programs as important tools for achieving disability equality.”³⁰²

I agree with Bagenstos that the anti-discrimination model cannot accomplish all of the work of increasing employment and integrating individuals with disabilities into the community. I also think his proposals are good ones. As I will discuss below, I think a universal approach that avoids the stigma of disability-specific reform is important.³⁰³ My primary critique of Bagenstos’s ideas is that he focuses mostly on the severely disabled—those who either cannot get hired or whose mobility or other restrictions make it difficult for them to be integrated into the community. Yet, there are many individuals who are moderately disabled and still experience discrimination by their employers and possibly other entities, as well.

IV. THE UN-RELIEVED TENSION: THE CONFLICT BETWEEN INDIVIDUALS WITH DISABILITIES AND THEIR NON-DISABLED CO-WORKERS

Bagenstos does a great job of exploring many of the conflicts and contradictions in the disability rights movement. But the one conflict he does not address is the one that will be very significant in upcoming years—the conflict that arises when accommodating individuals with disabilities affects their non-disabled co-workers. I explore this conflict now.

A. *The Effect of the Amendments on the Reasonable Accommodation Provision*

The ADA Amendments Act of 2008³⁰⁴ will make it much easier for individuals to prove that they meet the definition of disability and therefore fall under the protection of the Act. Accordingly, more cases will have the substantive issues decided, and many of these cases will involve the issue of whether an employer failed to provide the employee with a reasonable accommodation.

There were several changes in the Amendments that will make it easier for plaintiffs to sue under the ADA. First, the Amendments make clear that courts should not use “demanding standard[s]” when deciding whether an individual is disabled under the Act.³⁰⁵ One of the rules of construction states that “the definition of disability shall be construed in favor of broad coverage of individuals under this Act, to the maximum

³⁰² *Id.* at 149.

³⁰³ *Infra* notes 365–70 and accompanying text.

³⁰⁴ ADA Amendments Act of 2008, Pub. L. No. 110-325, 22 Stat. 3553 (2009) (codified at 42 U.S.C. § 12101-12213 (2006)).

³⁰⁵ ADA Amendments Act § 2(b)(4); Long, *Introducing*, *supra* note 5, at 218.

extent permitted by the terms of this Act.”³⁰⁶ Second, the Amendments make it much easier to prove that an impairment “substantially limits” a major life activity,³⁰⁷ and the amendments also expand the list of major life activities.³⁰⁸ Finally, the Amendments state that when determining whether someone is disabled, a court should not consider any mitigating measures (e.g., medication assistive devices) that help ameliorate the symptoms of the impairment.³⁰⁹

All of these changes will make it easier for individuals to prove that they have a disability.³¹⁰ In the employment context, once an individual can prove that he has a disability, he must also prove that he is qualified for the position at issue, which means that he can perform the essential functions of the position “with or without reasonable accommodation.”³¹¹ In many cases, an individual with a disability might ask for a reasonable accommodation to make it easier or more comfortable for her to perform the essential functions of her job. Accordingly, courts will have to determine what constitutes a reasonable accommodation. Because more individuals will qualify as having disabilities, “more cases in the future will turn on the question of whether the plaintiff’s requested accommodation was reasonable.”³¹²

Several scholars (including myself) have hypothesized that one of the reasons that courts interpreted the definition of disability so narrowly (prior to the Amendments) was to avoid the difficult factual issue of determining what constitutes a reasonable accommodation.³¹³ One of the most difficult of those accommodation issues is how to handle the situation where an individual’s needed accommodation interferes with the rights or interests of other non-disabled employees in the workplace. I turn to that next.

B. The Conflict: Individuals with Disabilities vs. Their Non-disabled Co-workers

The ADA requires that employers provide individuals with disabilities reasonable accommodations to allow them to perform the essential functions of the position at issue unless the accommodation causes an

³⁰⁶ ADA Amendments Act § 4(a).

³⁰⁷ *Id.* §§ 2(b)(5), § 4(a).

³⁰⁸ ADA Amendments Act § 4(a); Long, *Introducing*, *supra* note 5, at 219–22.

³⁰⁹ ADA Amendments Act § 4(a); Long, *Introducing*, *supra* note 5, at 219–20.

³¹⁰ Long, *Introducing*, *supra* note 5, at 228 (arguing that “[b]y amending the ADA’s definition of disability, Congress has assured that more individuals will qualify as having disabilities”).

³¹¹ 42 U.S.C. § 12111(8); *see also* Long, *Introducing*, *supra* note 5, at 228.

³¹² Long, *Introducing*, *supra* note 5, at 228.

³¹³ *See, e.g., id.* at 227.

undue hardship to the employer.³¹⁴ There are many questions that arise with regard to what is “reasonable,”³¹⁵ but the most difficult issue arises when accommodations have an effect on other employees.³¹⁶ As I have argued elsewhere, most (if not all) accommodations affect other employees—they just affect these co-employees to differing degrees.³¹⁷ Even accommodations that would seem to only affect the employer (such as giving an employee modified office furniture or assistive devices) affect non-disabled co-workers indirectly because money spent on accommodations is money not spent on other benefits that could be given to other employees.³¹⁸ And it is easy to see how modifications to a disabled employee’s schedule can affect the non-disabled co-workers because employers might require those co-workers to fill in for the absent employee with a disability.³¹⁹

The most notable conflict and the most notable reasonable accommodation case (as the only one decided by the Supreme Court) is the conflict that arose between an employee with a disability and more senior employees who bid on the position sought by the disabled employee to accommodate his disability.³²⁰ In *U.S. Airways, Inc. v. Barnett*, the plaintiff needed a transfer³²¹ to the mailroom position because it was the only position he could perform with his back disability.³²² But because other employees who had more seniority than Barnett also bid on the physically less demanding position, the employer refused to accommodate Barnett by allowing him to have the mailroom position, and he was fired.³²³ When the case reached the Supreme Court, the Court resolved the conflict in favor of the non-disabled employees by stating that it is not “ordinarily” reasonable for an individual accommodation to trump a seniority system.³²⁴ The Court seemed to be basing its decision in large

³¹⁴ 42 U.S.C. § 12112(b)(5)(A) (2010).

³¹⁵ Some of the undecided issues include whether an employer has to allow an employee to work from home and whether an employer has to give an employee a leave of absence to heal from a surgery or otherwise deal with the employee’s medical condition.

³¹⁶ See Long, *Introducing*, *supra* note 5, at 227; Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313 (2007) [hereinafter Porter, *Reasonable Burdens*].

³¹⁷ Porter, *Reasonable Burdens*, *supra* note 316, at 319.

³¹⁸ *Id.* at 333 n.126.

³¹⁹ *Id.* at 319.

³²⁰ *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

³²¹ *Id.* at 394. Transfer always strikes me as the wrong word, because Barnett was technically already in the mailroom position when the company decided to open the position up to seniority bidding pursuant to its unilaterally-imposed, non-contractually binding seniority system. Even though the issue is framed as one of “reassignment to a vacant position,” it can more accurately be described as maintenance of the status quo. *Id.* at 423.

³²² *Id.* at 394.

³²³ *Id.*

³²⁴ *Id.* at 406. The Court did allow an exception to its general rule if the plaintiff can show “special circumstances” warranting a departure from the seniority system. *Id.*

part on the co-employees' legitimate expectations of fair and uniform treatment under a seniority system,³²⁵ but some commentators have argued that the Court's opinion in *Barnett* could be read more broadly, as an assault on any accommodation when it has significant effects on non-disabled co-workers.³²⁶

I predicted that this broader reading of *Barnett* would come to fruition when the Court granted certiorari in *Huber v. Wal-Mart Stores, Inc.*³²⁷ The issue in the *Huber* case was whether an employer had to accommodate a qualified, disabled employee by transferring her to a vacant position when there were other more qualified applicants for the position.³²⁸ In resolving this conflict, the Eighth Circuit held that the employer's best-qualified policy trumps its obligation to provide a reasonable accommodation under the ADA.³²⁹ The court was influenced by the rule and the reasoning from the Seventh Circuit in *EEOC v. Humiston-Keeling, Inc.*,³³⁰ which held that to give the position to the employee with the disability over more qualified applicants would "convert a non-discrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees."³³¹

This result has not been unanimous among the circuits. Other courts have found that, as long as an employee with a disability is qualified for a vacant position to which he seeks to transfer because he can no longer perform the essential functions of his current position, the employer is obligated to provide the accommodation.³³² The court in *Smith v. Midland Brake, Inc.* stated:

[I]f the reassignment language merely requires employers to consider on an equal basis with all other applicants an otherwise qualified existing employee with a disability for reassignment to a vacant position, that language would add nothing to the obligation not to discriminate, and would thereby be redundant³³³

³²⁵ *Id.* at 404–06.

³²⁶ See, e.g., Cheryl L. Anderson, "Neutral" Employer Policies and the ADA: The Implications of *US Airways, Inc. v. Barnett Beyond Seniority Systems*, 51 *DRAKE L. REV.* 1, 35–36 (2002); Porter, *Reasonable Burdens*, *supra* note 316, at 324–35.

³²⁷ 486 F.3d 480 (8th Cir. 2007), *cert. granted in part*, 552 U.S. 1074 (2007), *cert. dismissed*, 552 U.S. 1136 (2008).

³²⁸ *Id.* at 481.

³²⁹ *Id.* at 483.

³³⁰ 227 F.3d 1024, 1027–28 (7th Cir. 2000).

³³¹ *Huber*, 486 F.3d at 483 (quoting *Humiston-Keeling*, 227 F.3d at 1028).

³³² See, e.g., *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc).

³³³ *Id.*

Accordingly, in the Tenth Circuit, the reassignment obligation requires an employer to automatically award a position to a qualified disabled employee even if there are other, more qualified applicants for the position.³³⁴ Because of this circuit split, the Supreme Court granted certiorari in *Huber* but then dismissed it when the parties settled.

Arguably, the reassignment issue is one of the most difficult issues, because if other employees seek the same job that the disabled employee needs to accommodate his disability, there are significant consequences to those non-disabled workers if the accommodation is given to the employee with the disability. But these reassignment cases are not the only cases where courts express concern for the rights and interests of other employees. In several cases, courts have held that an accommodation that requires other employees to have to work longer or harder or simply different hours is not mandated. For instance, in *Rehrs v. Iams Co.*,³³⁵ the court held that allowing the plaintiff to work a straight day-shift schedule rather than a rotating shift schedule to accommodate his diabetes was unreasonable because it would place a heavier or unfavorable burden on other employees, requiring them to work the undesirable night shift more frequently.³³⁶ Similarly, in *Turco v. Hoechst Celanese Corporation*,³³⁷ the court held that moving the plaintiff to a straight day shift to help him control his diabetes would place a heavier burden on the rest of the employees and is therefore not required under the ADA.³³⁸ Finally, in *Milton v. Scrivner, Inc.*,³³⁹ the court held that an employer is not required to reallocate job duties (by giving the plaintiffs lighter loads to move) because an “accommodation that would result in other employees having to work harder or longer hours is not required.”³⁴⁰

It is at least plausible that this concern for the rights and interests of other employees could all but obliterate the reasonable accommodation obligation. In other words, if (as I have argued above³⁴¹ and elsewhere³⁴²) all reasonable accommodations affect other employees, where

³³⁴ *Id.* There is at least an argument to be made that the D.C. Circuit would reach a similar conclusion. In *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998), the court rejected an “interpretation of the reassignment provision as mandating nothing more than the employer allow the disabled employee to submit his application along with all of the other candidates.” *Id.* at 1305.

³³⁵ 486 F.3d 353 (8th Cir. 2007).

³³⁶ *Id.* at 357.

³³⁷ 101 F.3d 1090 (5th Cir. 1996).

³³⁸ *Id.* at 1094.

³³⁹ 53 F.3d 1118 (10th Cir. 1995).

³⁴⁰ *Id.* at 1125 (citing 29 C.F.R. § 1630.2(p)(2)(v) (stating that impact on other employees is a relevant factor in determining the reasonableness of an accommodation)).

³⁴¹ *Supra* notes 316-18 and accompanying text.

³⁴² Porter, *Reasonable Burdens*, *supra* note 316, at 319, 333.

do we draw the line between those accommodations that are reasonable and those that are not?

C. Resolving the Conflict: Bringing Independence and Community Together

As stated above, because the ADA Amendments will make it easier for plaintiffs to establish that they are individuals with disabilities, more cases will turn on whether the employer provided an appropriate accommodation. Some of the most difficult accommodation issues will turn on resolving the conflict between individuals with disabilities and their non-disabled co-workers. This subpart explores this conflict and explains how some of the arguments made by Bagenstos, infused with a communitarian perspective, can help relieve the tension of this conflict.

Many accommodations can have consequences on non-disabled employees, and those consequences can vary in their significance, from fairly minor (e.g., non-disabled secretary has to distribute mail more often because the secretary using a wheelchair cannot reach many of the slots) to more significant (e.g., non-disabled co-worker has to rotate through an undesirable shift more often because a disabled employee needs to work a straight shift) to the most significant (e.g., more senior non-disabled employee is denied a transfer to a coveted position because an employee with a disability needs the position to accommodate the employee's disability).³⁴³ Where do we draw the line between permissible accommodations and impermissible accommodations when all accommodations affect other employees? Professor Alex Long has suggested that we draw the line at the point where an accommodation has a "materially adverse impact" on other non-disabled employees.³⁴⁴ Drawing from the well-known test in the retaliation context, Long proposed the following rule: "[A] proposed accommodation is not reasonable when it would violate the contractual rights of another employee or otherwise result in an adverse employment action" for the non-disabled employee."³⁴⁵

However, as I have argued elsewhere, the consequence of accommodations that have a materially adverse impact on other employees still pale in comparison to the consequence to the employee with the disability if the employer does *not* provide the employee the necessary accommodation.³⁴⁶ What was troubling about the *Barnett* decision is that Barnett lost his job because the employer gave the mailroom position to

³⁴³ Porter, *Reasonable Burdens*, *supra* note 316, at 319.

³⁴⁴ Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties,"* 68 Mo. L. REV. 863, 898 (2003).

³⁴⁵ *Id.* at 901.

³⁴⁶ Porter, *Reasonable Burdens*, *supra* note 316, at 335.

someone with more seniority. If the other employees did not get the mailroom position, they would still have been employed and would have been free to bid on other jobs as they became available.³⁴⁷ When comparing the consequences to the two groups of employees—disabled employees who would lose their job without an accommodation and non-disabled employees who would remain employed and would have the opportunity to bid on other positions in the future—it is easy to see that strictly from an empathetic perspective, the employee with a disability should get the accommodation to be able to remain employed.³⁴⁸

But many people do not see the workplace as the appropriate locus of compassion or empathy. Most people see the workplace as an institution that should be based on merit or other forms of objective and fair procedures, such as seniority systems. Accordingly, we need some justification for advocating for a result that contravenes what many people would think is the proper result in the workplace. We find this justification in the goals of the disability rights movement, infused with a communitarian influence.

One goal (or project, as Bagenstos refers to it) of the disability rights movement is to increase the independence of individuals with disabilities.³⁴⁹ As stated by Bagenstos, all people with disabilities agree that they do not want charity, pity, or handouts, but they do want the opportunity to live in the community and work for a living.³⁵⁰ Bagenstos recognizes that this goal (one of independence) is in some conflict with the requirements of the ADA, which many see as a form of “government-mandated largesse.”³⁵¹ Yet one way that disability rights activists were able to achieve the passage of the ADA was to use the “independence frame” to obtain the support from political leaders and the public.³⁵² As Bagenstos states:

[T]he value of the independence frame to disability rights advocates should be obvious. To achieve their goals, disability rights leaders could almost endorse the wave of fiscal conservatism and opposition to welfare programs. They could say that people with disabilities do not want to be dependent on disability benefits; they “simply want to work.”³⁵³

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ BAGENSTOS, *supra* note 1, at 13–16, 22–28.

³⁵⁰ *Id.* at 23.

³⁵¹ *Id.*

³⁵² *Id.* at 27.

³⁵³ *Id.* at 29.

Bagenstos argues that the independence focus was so strong that even the Supreme Court was influenced by the goal of independence when it decided some of the decisions that many have criticized.³⁵⁴ He argues that if the ADA is seen as a way of saving society money by getting people with disabilities off public benefits and into the workforce, then the Court's restrictive definition of "disability" in the statute makes sense. In other words, the Court wanted to keep the definition of disability narrow to only cover those individuals who would not be employed if not for the protections of the ADA.³⁵⁵ While I have my doubts about whether the Court was motivated by this goal,³⁵⁶ and Bagenstos and others have criticized whether this *should have been* the Court's goal,³⁵⁷ the independence goal can be useful here to resolve the conflict between disabled employees and their non-disabled coworkers.³⁵⁸

If one goal of the disability rights movement is to increase the independence of individuals with disabilities, and if that includes increasing the employability of disabled individuals, then we should support efforts to employ and to *keep* employed individuals with disabilities. Accordingly, if an employee needs an accommodation, and without it, the employee would lose his job, then in order to further the independence goal of the ADA, the accommodation should be given even if it causes some burdens on other employees. If the disabled employee loses his job, it might be very difficult for him to get another job, which could lead him to have to rely on public benefits. Because one goal of the disability movement is to decrease the reliance on public support, then allowing accommodations even when they affect other employees should also be a goal.

Especially when one considers that some accommodations are denied when they place relatively minor burdens on other employees,³⁵⁹ it defies logic to have a rule that would lead to the termination of a perfectly capable employee with a disability, possibly causing him to rely on

³⁵⁴ *Id.* at 39–41.

³⁵⁵ *Id.* (stating that cases that narrow ADA coverage "can be read as drawing a very similar line between those who could find work without the ADA and those who need ADA protection to avoid dependence on disability benefits programs").

³⁵⁶ See generally *supra* Part IV.A (hypothesizing that courts have used such a narrow definition of "disability" in order to evade difficult factual issues).

³⁵⁷ BAGENSTOS, *supra* note 1, at 40–41.

³⁵⁸ To be clear, independence cannot be the *only* goal of the ADA. As stated earlier, *supra* notes 89–94 and accompanying text, the goal of the ADA was (and should be) equal opportunity for all individuals with disabilities and not merely increasing the employment opportunities of the most severely disabled.

³⁵⁹ For instance, I am referring here to the cases where an employer denies an employee's request for a straight shift because the rest of the employees would have to rotate through the less desirable shift more often. See *supra* notes 335–340 and accompanying text.

government support, rather than placing relatively minor burdens on other employees. Even when the burdens on other employees cannot fairly be characterized as minor, the goal of independence still favors giving the accommodation. If, without the accommodation, the individual with a disability would be unemployed, then the accommodation should be given to the disabled employee in order to keep him employed, rather than having the disabled employee become dependent on public assistance. Put another way, our accommodation rules should favor the independence of individuals with disabilities, rather than their dependence.

For those who, despite the important goal of independence for individuals with disabilities, still quarrel with the idea of placing any burdens on the non-disabled co-workers when accommodating an individual with a disability, we can find additional justification for my approach to reasonable accommodations by turning to communitarian theory.

Communitarians emphasize the value of community over individual rights.³⁶⁰ It is easy to see that the community as a whole (both a particular workplace and society, in general) is better off when individuals with disabilities remain employed, rather than having to rely on government-funded support. Employers and their workplaces benefit by not losing a valuable employee and society benefits by not having to pay for the support of the individual with the disability. Yet many current approaches to reasonable accommodation issues under the ADA emphasize the individual rights of the non-disabled co-workers over the benefit to the community if individuals with disabilities are accommodated and allowed to remain in the workplace.³⁶¹ Two primary arguments reveal the error in that approach.

First, it is inefficient to allow the interests of non-disabled co-workers to trump the disabled employee's need for an accommodation. Accommodations that place burdens on other employees (especially minor burdens) are often much more efficient to the workplace as a whole than the alternative that does not involve placing reasonable burdens on other employees.³⁶² For instance, it is more efficient to ask non-disabled co-workers to perform certain tasks that the disabled employee cannot perform than it is to fire the employee with the disability and have to hire someone new. And these reasonable burdens are more efficient than asking the employer to bear the burden of not having the task accomplished in a timely fashion. A good example of this efficiency argument is the example of rotating shifts. Many individuals with disabilities find it dif-

³⁶⁰ Porter, *Caregiving*, *supra* note 291, at 395 (citing sources discussing communitarian theory's emphasis on community over individual rights).

³⁶¹ See *supra* Part IV.B.

³⁶² Porter, *Reasonable Burdens*, *supra* note 316, at 359.

difficult to work rotating shifts, including individuals whose disabilities make it difficult or impossible to work at night, and individuals whose medical care requires constant hours. If the employer does not accommodate the disabled individual by allowing her to work a straight shift and making other employees rotate through the other shifts more frequently, the employer has two inefficient choices. It can (and often does) fire the disabled employee and pay the price of having to hire and train a new employee, or it can allow itself to be short-staffed on some shifts and over-staffed on others. Either alternative is inefficient to the workplace.³⁶³

In his book, Bagenstos argues that the obligation to provide reasonable accommodations is very similar to the obligation to avoid discriminating when such discrimination might be considered rational.³⁶⁴ One of the justifications he gives for prohibiting rational discrimination is because an “employer who has the power to work against the underlying problem of cumulative disadvantage, even if it involves sacrifice, bears some degree of responsibility,” especially when holding the employer responsible is not likely to cause an unreasonable burden.³⁶⁵ Similarly, the rationale for requiring accommodations is that the employer is the party in the best position to dismantle the system of subordination when accommodations are not overly costly.³⁶⁶

In certain cases, however, the employer is not in the best position to dismantle the subordination—at least not alone. In some cases, some of the burden must be placed on other employees. Because the communitarian theory places an emphasis on working together to reach a common goal, it helps support the objective here, to keep individuals with disabilities employed even when needed accommodations cause comparatively minor burdens to other employees. The employer is still in the best position to end the subordination against individuals with disabilities, but in order to achieve an efficient result, it should place some of those burdens on other employees.

There is a second reason why courts are in error when they favor non-disabled co-workers over individuals with disabilities who need reasonable accommodations to remain in the workplace. This argument is complex and will take some unpacking. To state it simply: The proposal here—to require accommodations that allow a disabled employee to remain employed, even when those accommodations affect other employees—can be viewed as a universal reform rather than a disability-specific reform. As Bagenstos argues, universal programs are much more politi-

³⁶³ *Id.* at 359–60.

³⁶⁴ BAGENSTOS, *supra* note 1, at 62–68.

³⁶⁵ *Id.* at 62–63.

³⁶⁶ *Id.* at 67–68.

cally stable because they avoid the stigma attached to disability-specific programs, which are often seen as charity.³⁶⁷

In order to make this argument, we must proceed through several steps. First of all, we must recognize that the ADA, through the Amendments, has already become more of a “universal” statute and less of a disability-specific mandate. This is so because the Amendments make falling under the coverage of the ADA much easier, even for individuals with no apparent limitations.³⁶⁸ Of course, one must still meet the definition of an “individual with a disability” in order to receive accommodations under the statute and even though the Amendments put the ADA closer on the spectrum to a universal program than it was before the Amendments, it still may fairly be considered a disability-specific statute.

Secondly, we must recognize that we all exist along a spectrum of abilities,³⁶⁹ and (perhaps more importantly) the entire population is at risk for “the concomitants of chronic illness and disability.”³⁷⁰ Because we are all at risk for finding ourselves moving along the spectrum from able-bodied towards more disabled, we should be willing to support programs that might eventually help us remain employed if we need accommodations, even when those accommodations affect other employees. As the number of individuals with disabilities increases because of the broadened statutory coverage, an employee could find himself both the non-disabled co-worker who must take on some of the burden for a disabled co-worker’s accommodation and at the same time, a disabled employee who needs an accommodation to remain employed, hence placing some burdens on other employees.³⁷¹ In this way, the burdens placed on non-disabled co-workers are really no different than the community sup-

³⁶⁷ *Id.* at 144–45.

³⁶⁸ See *supra* notes 304–10 and accompanying text. As one example, consider someone with the relapsing-remitting form of multiple sclerosis. This person might have very, very infrequent limitations (maybe once per year or less, they have numbness, partial paralysis, partial blindness in one eye, etc. that lasts for a couple of weeks). Yet through a couple of new provisions in the Amendments, this person would likely be considered an individual with a disability.

³⁶⁹ Feldblum et al., *supra* note 5, at 228.

³⁷⁰ BAGENSTOS, *supra* note 1, at 144.

³⁷¹ Consider this example: John has a night vision disability, which precludes him from working the night shift. Because the employer follows my proposal and accommodates his disability, other employees (including co-worker Jim) have to rotate through the night shift more often. One day Jim is in a car accident which causes a serious back disability, making him no longer able to perform the physically demanding packing position on the plant floor. Accordingly, he requests reassignment to a less-demanding, vacant position doing light maintenance work. John also applies for this vacant job, and even though he has been there longer and is arguably more qualified than Jim, the employer (again following this proposal) gives the job to Jim to allow Jim to remain employed. In this example, John and Jim have both been the beneficiaries of my community-based rule and both have had to bear some of the burdens. In the tried and true cliché, “what goes around comes around.”

port co-workers have given to each other for years. We help others in our communities because we care about them but we also know that the members of our communities will be there to help us if and when we find ourselves in need.

The final step in viewing my resolution of the conflict between disabled employees and their co-workers as a “universal” program is the recognition that there are limits to the burdens employers can place on non-disabled employees. As I have suggested elsewhere, employers should not accommodate an employee with a disability by providing an accommodation if that accommodation would cause the termination of another employee, or would cause another employee to be bumped from his position.³⁷² Arguably then, this provision actually does benefit all employees. Without it, an employer would be free (absent contractual obligations to the contrary—namely collective bargaining agreements in the declining union sector) to terminate a non-disabled employee in order to accommodate a disabled employee who needs a transfer to a position held by someone else. I do not suggest that it would be a common scenario for an employer to do such a thing. However, as employers become more risk-averse to litigation, it might be a rational decision to fire a non-disabled employee who likely has no statutory or contractual grounds upon which to sue rather than risk the ADA suit if the employer does not accommodate the employee with the disability. Because my provision would prohibit such a result, it can be viewed as benefitting everyone, just as universal programs should.

CONCLUSION

Bagenstos’s book does an excellent job resolving many of the contradictions inherent in the disability rights movement and the law that the movement helped to create. In the end, he is willing to discuss solutions that most disability rights advocates avoid because of the contradictions created by such solutions. In addressing the one conflict not addressed by Bagenstos, I have also attempted to propose a solution that might cause tension between individuals with disabilities and their non-disabled co-workers. But hopefully, bringing the goals of independence and universal programs together with the communitarian theory helps create a solution to this conflict that will relieve this tension, just as Bagenstos has relieved many of the other tensions in the disability rights movement.

³⁷² Porter, *Reasonable Burdens*, *supra* note 316, at 335–41.