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ARTICLES

A Jurisprudence of Dysfunction: On the Role of “Normal Species Functioning” in Disability Analysis

Ani B. Satz, Ph.D., J.D.*

INTRODUCTION

The Americans with Disabilities Act (ADA) was signed into law by President George H. W. Bush on July 26, 1990. After twenty years of struggle and compromise by civil rights and disability advocacy groups, the legislation was hailed as a victory. The Act established civil rights protection for disabled persons in the workplace and in the provision of services (most notably transportation services) and public accommodation. The Act sought to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [via] clear, strong, consistent, enforceable standards.”¹

Fifteen years later, the Act is widely recognized as a failure. Judicial construction of the eligibility requirements of the Act severely undermines disability protections. In 1999, the United States Supreme Court, in opposition to

* Assistant Professor of Law, Emory University. The author wishes to thank the Harvard Health Policy Society; the Yale Bioethics Forum; the Princeton Center for Human Values; the National Endowment for the Humanities Workshop on Justice, Disability, and Equality; the Health Law Teachers Workshop; and the following individuals: Howard E. Abrams, Robert Ahdieh, Anita Bernstein, Jules Coleman, Martha A. Fineman, Ann Hubbard, Marc Miller, Michael Perry, Mathias Risse, Charles Shanor, Robert Schapiro, Anita Silvers, Peter Singer, Michael Stein, Timothy Terrell, and anonymous reviewers. I offer this piece in memory of my friend, colleague, and former law school classmate, Rosemary Quigley, who was one of the most capable people I have ever known.

the Equal Employment Opportunity Commission (EEOC) and Department of Justice (DOJ) guidelines at the time, held that plaintiffs’ eligibility for disability protections must be determined after measures to mitigate disability are employed.\(^2\) The definition of disability, “a physical or mental impairment that substantially limits one . . . of the major life activities,”\(^3\) has met other judicial bars with regard to the interpretation of “substantial” and “major life activity.”\(^4\)

Thousands of articles have been written in the last few years lamenting the enervation of the ADA and suggesting remedies such as amending the Act to broaden the definition of disability,\(^5\) issuing regulations to enumerate a list of covered disabilities,\(^6\) overruling opinions that create high bars for eligibility under “substantial”\(^7\) or that look to a narrow range of major life activities,\(^8\) and reinstating the old EEOC and DOJ guidelines to consider litigants in a pre-mitigated state.\(^9\) Most recently, in a piece about the future of disability law,

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9. See, e.g., Debra Burke & Malcom Abel, Ameliorating Medication and ADA Protection: Use It and Lose It or Refuse It and Lose It? 38 AM. BUS. L.J. 785 (2001); Feldblum, supra note 5, at 222
leading disability scholar Sam Bagenstos, perhaps out of frustration with the rigid pronouncements that have become judicial construction of the ADA, argues that a return to a social welfare model is necessary to provide the disabled with the opportunities, services, and access they need.\textsuperscript{10} Given the gradual whittling of the Act, disability scholars and advocates were not surprised to learn some years ago that approximately ninety-four percent of disabled plaintiffs who pursue litigation lose in initial judicial proceedings, and eighty-four percent fail on appeal; this is comparable to the failure rate of prisoner civil rights claims, which is about eighty-six percent.\textsuperscript{11}

Perhaps the greatest judicial threat to the Act—and the subject of this Article—has yet to enter academic discussion. This Article examines the proper role of normal species functioning with regard to disability analysis. It proposes general inquiries for disability analysis and considers the Supreme Court’s application of the role of normal species functioning to each inquiry. The Court’s failure to consider properly the role of normal species functioning has profoundly impacted American disability law by creating divergent outcomes in the application of established Supreme Court tests and by undermining protections for persons with disabilities. In addition, it forces reliance on conceptions of disability that may embrace stereotypes or inaccurate assessments of abilities, resulting in the isolation and unemployment of disabled workers Congress sought

\textsuperscript{10} Samuel R. Bagenstos, \textit{The Future of Disability Law}, 114 \textit{Yale L.J.} 1 (2004). Bagenstos argues that the civil rights paradigm of disability discrimination should be abandoned in favor of a return to a welfare-based model eschewed by advocates of the ADA, in order to give force to the issues facing the disabled and to account for the withering reach of the ADA. This Article seeks to propose a new framework for disability analysis that continues to embrace the text of the ADA and give effect to disability protections as a matter of civil right thereunder. While it is clear that some issues facing the disabled (and other Americans, for that matter), such as access to health care and certain types of accommodations, are best addressed by social welfare schemes that seek distributive justice rather than formal justice, Bagenstos errs by excising disability discrimination from the civil rights context.

\textsuperscript{11} Ruth Colker, \textit{The Americans with Disabilities Act: A Windfall for Defendants}, 34 \textit{Harv. C.R.-C.L. L. Rev.} 99, 100 (1999). This does not account for settlements and other informal agreements. In addition, the fact that most plaintiffs lose their cases does not mean that the ADA is unsuccessful in upholding a civil right but only that the right could be more robust. The ADA serves as a statement of government that discrimination against disabled persons is a violation of civil right and functions to discourage some acts of such discrimination. I am grateful to Charles Shanor for this point.
This Article will reference two different models of functioning: the normal species functioning model and the alternative modes of functioning model. Briefly stated, the normal species functioning model considers deviation from functioning that is normal for our species to be disabling. The alternative modes of functioning model does not look to a particular type of functioning but assesses functional outcomes to determine whether a certain level of functioning is disabling. For example, reading with one’s eyes is normal species functioning, while using one’s fingers to read Braille is an alternative mode of functioning. Supreme Court jurisprudence can be understood to appeal to both of these models: Alternative functioning is considered when determining whether someone is disabled under the ADA, and normal species functioning informs reasonable accommodation under the Act. This Article urges the Court to consider directly the role of functioning and to employ these two models in the opposite fashion, adopting what this Article terms Functioning-Based Disability Analysis. Under Functioning-Based Disability Analysis, the Court should consider normal species functioning when deciding eligibility for protection under the Act and alternative modes of functioning when determining reasonable accommodation.

To help clarify the differences between the normal species functioning model and the alternative modes of functioning model consider the following hypothetical:

Hannah, an employee of a software development company, was born with partial upper arms. She is able to type using upper arm prostheses, but she finds wearing them painful and typing with them inefficient; it is also difficult to hold the telephone or items on her desk while wearing them. She prefers to use her “fleshy feet” to type as well as to grasp and manipulate objects.12

Under a normal species functioning model, Hannah is disabled because she does not have full-length arms. She is entitled to resources and an accommodation to further normal functioning, where “normal functioning” means typing with her upper arms. Under an alternative modes of functioning model, Hannah is disabled because her functioning is impaired in her work environment and not because she is missing part of her arms. She is entitled to a remedy, and it need not support normal functioning. Thus, her employer may offer to adapt her office to enable her to type with her fleshy feet.

13. This example is adapted from one in Satz & Silvers, supra note 12, at 183.
This example of Hannah and the software company, and the role of normal species functioning in disability analysis more generally, also speaks to an overarching tension in disability law: the tension between civil rights and social welfare models. Generally speaking, a civil rights model grounds a right to equality of participation for disabled persons as a protected class. Under this model, others have concomitant duties to adjust, within certain parameters, places of employment, public accommodation, services, and transit, in order to decrease isolation and enable greater participation of disabled persons in society. The duties supported by this right entitle Hannah to a remedy if her rights are violated, though they do not speak to the nature of her remedy. Accommodation under a civil rights model need not support any particular manner of functioning, so long as steps are taken to promote equality in the workplace. Indeed, the ADA does not specify the manner of functioning that should be supported. In other words, the Act, a civil rights mandate, does not require employers to accommodate atypical modes of functioning, such as Hannah’s fleshy feet. A social welfare model, on the other hand, is redistributive. It seeks to better the position of the disadvantaged through resource allocation. Under a social welfare model, Hannah may be recognized as disadvantaged by her manner of functioning and entitled to resources to facilitate typing using her feet. A social welfare model would not, though, confer rights on Hannah based upon her disability per se. Under a social welfare model, she is entitled to resources because she is disadvantaged in a particular population by the manner in which she functions; others who are disadvantaged—whether disabled or not—have similar entitlement. The civil rights model, by contrast, recognizes a history of discrimination against the disabled and affords disabled individuals, as members of a protected class, rights addressing such discrimination in a variety of contexts.

This Article contends that a parallel blending of the models of functioning at one level, and of the civil rights and social welfare models at a higher level, is the future of American disability law. This Article examines a discrete and integral part of this view, namely, the role of normal species functioning in disability analysis. Part I of the Article provides background to the ADA and Supreme Court jurisprudence interpreting the Act. Part II provides an introduction to two models of functioning: the normal species and alternative modes of functioning models. Philosophical development of these models is useful for understanding

14. Congress intended to protect disabled individuals as a matter of civil right in a manner similar to race, gender, religion, and national origin.
15. For an excellent discussion of providing accommodations as a matter of justice, see Michael Ashley Stein, Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination, 153 U. Pa. L. Rev. 579 (2004).
the proper role of functioning in disability analysis. The normal species functioning model determines eligibility and entitlement to resources based upon deviation from normal functioning and supports accommodation that furthers normal functioning. The alternative modes of functioning model supports normal as well as alternative modes of functioning; it is discussed as a more promising means to determine the nature of accommodation. Part III discusses how the Court currently employs the normal species and alternative modes of functioning models. Part IV proposes a model for Functioning-Based Disability Analysis. A three-prong test for disability analysis is offered to facilitate proper consideration of normal species functioning. Functioning-Based Disability Analysis considers deviation from the normal species functioning baseline when determining whether someone is disabled and entitled to a remedy under the Act but considers normal as well as alternative modes of functioning in making accommodations. The Article concludes by offering some insights into the use of Functioning-Based Disability Analysis as a means to resolve the tension between the civil rights and social welfare models of disability law.

I. DISABILITY LAW IN 2005

Prior to explaining different models for contemplating functioning, it is necessary to discuss the basic provisions of the ADA and judicial construction of the Act. The ADA contains an eligibility test for disability protections. This test, known as the disability threshold test, requires that a plaintiff be a “qualified individual with a disability.” Under Titles II and III, a qualified individual with a disability must have a disability and be discriminated against on the basis of it. In addition, Title I requires that the individual be able to perform the “essential functions” of a job “with or without reasonable accommodation”; this is known as the essential functions test.

Under each title, an individual is first assessed for disability. An individual is “disabled” if she has “a physical or mental impairment that substantially limits one or more of the major life activities . . . a record of such an impairment; or [is] being regarded as having such an impairment.” Determination of disability entails an “individualized inquiry,” meaning that the facts pertaining to the alleged disability in each case are analyzed under established statutory tests, and generalizations cannot be made for a given condition nor can a condition be considered a per se disability. In addition, disability is assessed from a post-

mitigated state, that is, after ameliorative drugs or devices are employed.\footnote{21} The definition of disability is broken into three parts by the Supreme Court. An individual must have: (1) a physical or mental impairment that (2) substantially (3) limits a major life activity. The Supreme Court has closely followed the EEOC regulations for physical or mental impairment, which require an organic defect causing a disease, disorder, condition, or other biological anomaly.\footnote{22} The most contentious aspect of the physical impairment part of the threshold test is determination of the point at which the organic defect becomes an impairment. While one must typically be mildly to strongly symptomatic to be covered under the Act, the Supreme Court has recognized an individual with asymptomatic AIDS as having a physical impairment.\footnote{23} Coverage of mental impairments is generally limited; ADA protection of individuals with mental impairments that do not result from an organic defect is even more restricted.\footnote{24}

The requirement that a disability be a “substantial” limitation of a major life activity has been interpreted in such a way that it has become a significant hurdle to recovery under the Act. The Court has followed the EEOC regulations, which state that in order to be substantially limited in a major life activity, an individual must be “unable to perform . . . [or] [s]ignificantly restricted as to the condition, manner or duration under which [she] can perform a particular major life activity


\footnote{22} 29 C.F.R. §§ 1630.2(h)(1)-(2) (2005) (“Physical or mental impairment means: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”).}

\footnote{23} See, e.g., Carroll v. Xerox Corp., 294 F.3d 231 (1st Cir. 2002) (finding an individual with anxiety and workplace stress is not disabled); Emerson v. N. States Power Co., 256 F.3d 506 (7th Cir. 2001) (finding an individual with anxiety attacks is unable to fulfill the essential function of handling emergency calls); Gaul v. Lucent Techs., Inc., 134 F.3d 576 (3d Cir. 1998) (finding an individual with workplace stress and depression is not disabled); Guerra v. Garratt, 564 N.W.2d 121 (Mich. Ct. App. 1997) (finding an individual suffering from repressed memories is not disabled); Mundo v. Sanus Health Plan, 966 F. Supp. 171 (E.D.N.Y. 1997) (finding an individual with workplace stress is not disabled); DeWitt v. Carsten, 941 F. Supp. 1232 (N.D. Ga. 1996) (finding an individual with anxiety and workplace stress is not disabled).
as compared to . . . the average person in the general population." This determination is made by considering "[t]he nature and severity of the impairment; [t]he duration or expected duration of the impairment; and [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." In four of the last five Supreme Court opinions addressing "substantially," the Court found that the plaintiffs were not disabled.

The set of major life activities recognized by the Court is small. The EEOC issued regulations for Title I that list examples of major life activities, including "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." This list encapsulates the major life activities recognized by most courts. The Supreme Court has also recognized the major life activity of reproduction, and currently there is a circuit split over whether interacting with others is a major life activity.

Most recently, in 2002, the Court decided Toyota Motor Manufacturing,
Kentucky v. Williams, which held that the test for a major life activity is whether the activity is “of central importance to most people’s daily lives.”31 In Toyota, the Court applied this test narrowly and found that the manual task particular to Williams’s job, namely, “repetitive work with hands and arms extended at or above shoulder level[] for extended periods of time,” was not an activity that is of central importance to most people’s daily lives.32 The Court then turned to other activities in Williams’s life to determine that she was impaired in some household manual tasks but not those of central importance to most people in daily living.33 In finding Williams could not establish impairment in work-related or other household manual tasks, the Court set a high hurdle for establishing a substantial impairment of a major life activity.

Even if a plaintiff is able to demonstrate that she is disabled under the ADA, a plaintiff suing under Title I must show that she is able to fulfill the “essential functions” of her job “with or without reasonable accommodation” in order to be a qualified individual with a disability.34 The essential functions requirement places the plaintiff in a predicament under current Supreme Court precedent: It is difficult to prove disability in a post-mitigated state under the Act, but if one appears too disabled, one may be deemed unable to fulfill the essential functions of one’s job and ineligible for disability protections. In the last four Title I cases decided by the Court, plaintiffs were determined to be both not disabled under the Act and too impaired to meet employers’ job requirements.35

Nevertheless, some plaintiffs manage to establish eligibility for protections under the Act. Under current judicial construction of the Act, if an individual is a qualified individual with a disability, she is entitled to a remedy with no further

31. Toyota, 534 U.S. at 197-98.
32. Id. at 201 (citation omitted).
33. Id. at 202 (“[S]he could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house . . . her medical conditions caused her to avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens, and drives long distances.”).
34. The plain language allows employers much discretion in determining the essential functions of a job: “[C]onideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” 42 U.S.C. § 12111(8) (2000). The regulations add, in part, that a function may be essential if the position exists to perform that function, a limited number of employees can perform it, or the employee was hired to perform that function because of expertise or ability to do so. 29 C.F.R. §§ 1630.2(n)(2)(ii)-(iii) (2005).
analysis. That remedy may include an accommodation.\textsuperscript{36} For Title I, in a post-hiring context, this may include:

\begin{itemize}
\item[(A)] making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
\item[(B)] job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications or examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.\textsuperscript{37}
\end{itemize}

For Title II, the remedy may entail access to services, including publicly operated mass transit. Title III requires access to places of “public accommodation,” encompassing a wide variety of venues from zoos to doctors’ offices as well as transportation services provided by private entities.\textsuperscript{38}

While the statute does not require it, the EEOC has encouraged an “interactive process” in which an employer and employee work together to determine an employee’s accommodation.\textsuperscript{39} This process is adopted in some circuits.\textsuperscript{40} Even with an interactive process, the employer, by statute, is only required to make one reasonable accommodation.\textsuperscript{41} The offered accommodation might not be what the employee prefers.\textsuperscript{42} An employee may reject an offered accommodation.

\textsuperscript{36} Other equitable relief and civil penalties are also possible. 42 U.S.C. § 1981(a) (2000); 29 U.S.C. § 794(a) (2000).

\textsuperscript{37} 42 U.S.C. §§ 12111(9)-(10) (2000). In pre-hiring situations, an individual cannot be denied an employment opportunity because of the need for a reasonable accommodation. 42 U.S.C. § 12111(8); see also 29 C.F.R. § 1630.9(b) (2005).


\textsuperscript{39} 29 C.F.R. §§ 1630.2(o)(3), 1630.9 (2005). Much remains unresolved about the effect of the reasonable accommodation provision. Some argue that it may be cost shifting (to the employer), cost avoidance (by the employer), or cost sharing (between the employer and employee). See Elizabeth A. Pendo, Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation, 35 U.C. DAVIS L. REV. 1175 (2002).

\textsuperscript{40} See Conneen v. MBNA Am. Bank, N.A., 334 F.3d 318, 333 (3d Cir. 2003); Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001); Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208 (2d Cir. 2001); Beck v. Univ. of Wis., 75 F.3d 1130, 1135 (7th Cir. 1996); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 1996) (stating that accommodation is required only in some cases); Taylor v. Principal Fin. Group, 93 F.3d 155, 165 (5th Cir. 1996).

\textsuperscript{41} 42 U.S.C. § 12111(10) (2000) (discussing “the” or “an,” meaning one accommodation); see also 29 C.F.R. § 1630 app. sec. 1630.9, at 375-77 (2005) (discussing “a,” meaning one, reasonable accommodation).

\textsuperscript{42} 29 C.F.R. § 1630 app. sec. 1630.9, at 377 (“If more than one of these accommodations will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, the preference of the individual with a disability should be given
accommodation, but the employer is not required to make an alternative one, even if the employee is no longer able to fulfill the essential functions of her job.43

The Act provides employers (or other entities under Titles II and III) two affirmative defenses for failing to make a reasonable accommodation: "undue hardship"44 and "direct threat."45 It is unlawful to fail to make a reasonable accommodation for a disabled employee, "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business."46 "Undue hardship" is defined as "significant difficulty or expense," in light of a number of factors including cost, the resources and number of employees of the covered entity or facilities involved in the accommodation, and the impact of the accommodation upon the facilities making it.47 This determination is subject to substantial judicial discretion, with little guidance from the EEOC; the Interpretative Guidance issued by the agency states merely that an employer should not be forced to provide an accommodation that is "unduly costly."48 In addition, an employer need not provide an accommodation for an employee that poses a "direct threat to the health or safety of other[s]."49

Recovery under the ADA in 2005 is akin to a complex trifecta; plaintiffs must succeed at three levels. First, the ADA includes restrictions on disability protections, namely, the eligibility requirement of the disability threshold test, the essential functions requirement of Title I, and the undue hardship and direct threat defenses. Second, the Supreme Court has narrowly construed the language of the Act in interpreting these requirements and by requiring that a plaintiff be assessed in a post-mitigated state. This Article addresses a third limitation to recovery: improper use of a baseline of normal species functioning to determine eligibility for protection, entitlement to remedy, and the nature of remedy. We will return to this limitation in Part III. First it is necessary to examine the different models for conceptualizing functioning.

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primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.

43. 29 C.F.R. § 1630.9(d) (2005).
49. 42 U.S.C. § 12113(b); see also Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (holding that a direct threat is one that poses a "significant risk" to others and is based upon "medical or other objective evidence").
II. CONCEPTUALIZING FUNCTIONING

A. Normal Species Functioning

Normal species functioning, or species-typical functioning, is a concept that originated in the field of biology, most notably in the work of Christopher Boorse in the 1970s.\textsuperscript{50} It is used to describe both functioning that benefits the survival of the species, which may not be expressed by a majority of species members, and functioning that is exhibited by a majority of members of a species, regardless of whether it serves the genetic fitness of the organism.\textsuperscript{51} The latter concept of normal species functioning was used over a decade later by philosopher Norman Daniels, in \textit{Just Health Care}\textsuperscript{52} and in supporting works, to address the just distribution of health care services. Normal species functioning provides a baseline for distinguishing basic from non-basic health care services. Services that are aimed at preventing deviation from or restoring, in whole or in part, normal functioning, are considered basic health care services, while services that merely support long-term disability are not. Daniels argues that distributive justice requires access to the former but not the latter range of services.

Today, normal species functioning is the dominant philosophical paradigm for the just distribution of health care services. Recent legal scholarship suggests that normal species functioning is useful in determining both level of impairment and the protections and compensation that impairments may require.\textsuperscript{53}

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\textsuperscript{51} See, e.g., Boorse, \textit{On the Distinction}, supra note 50, at 57.

\textsuperscript{52} Norman Daniels, \textit{Just Health Care} (1985).

Unfortunately, much of this literature misconstrues Daniels’s theory, so it is necessary to begin with a fairly detailed discussion of his framework.54

In Just Health Care, Daniels presents a contractarian theory derived from John Rawls’s A Theory of Justice, arguing for the distribution of health care resources according to a baseline of functioning considered normal for the human

54. See, e.g., Brennan, supra note 53, at 47 (discussing health care as a “Rawlsian primary social good” when Daniels specifically rejects this idea and presents only a conditional extension of Rawls’s fair equality of opportunity principle, see DANIELS, supra note 52, at 43-48); Elhauge, supra note 53, at 1468-69 (misunderstanding the connection between normal species functioning and the normal opportunity range by suggesting pain that does not prevent one from achieving life goals would fail to be considered a deviation from normal functioning); Pratt, supra note 53, at 1162 (referring to Daniels’s theory as one of “explicit rationing” when it instead embraces one of allocation of resources over a lifetime); Rakowski, supra note 53, at 1354-55 (failing to understand Daniels’s treatment versus enhancement distinction); Weiner, supra note 53, at 337, 345-46 (misunderstanding the “normal opportunity range” as “the range of life plans otherwise open to a person but for his unmet health care needs” when it speaks well beyond health needs, that Daniels’s theory recognizes impairment to normal species functioning may limit more than health, and that Daniels’s account of the elderly adjusts for natural changes in the normal opportunity range).
species. Most succinctly stated, normal species functioning is the level of functioning typically associated with “membership [in] a natural species,” where non-species-typical functioning is the result of biological defect. Daniels interprets normal functioning as functioning without disease, though his theory could apply to biological impairments that are not diseases but affect normal species functioning.

Daniels argues that normal species functioning requires the provision of health care services that support a normal opportunity range. The normal opportunity range allows individuals to pursue reasonable life plans and goals relative to individual “skills and talents.” Thus, one must have a disease (or biological defect) that impacts this range in order to be entitled to health care services. The range includes health care services that contribute to basic health

55. DANIELS, supra note 52, at 26-58. More specifically, Daniels extends a weak, conditional version of the second part of Rawls’s second principle of justice, the fair equality of opportunity principle, to health care aimed at supporting normal species functioning. Rawls’s principle, which states that “social and economic inequalities are to be arranged so that they are ... attached to offices and positions open to all under conditions of fair equality of opportunity,” is applied to health care by Daniels on the basis that health care is a special good that directly affects opportunity. JOHN RAWLS, A THEORY OF JUSTICE 72 (1971). Daniels’s theory is an extension of fair equality of opportunity because, like Rawls’s theory, it supports more than a formal, or negative notion of equality of opportunity. Fair equality of opportunity under Rawls and Daniels seeks to correct for detrimental influences rather than just remove barriers to equality of opportunity. This Article assumes that a sound principle of justice includes fair equality of opportunity and that Daniels presents an acceptable extension of fair equality of opportunity without presupposing acceptance of A Theory of Justice.

56. DANIELS, supra note 52, at 26-28.

57. Id. (citation omitted) (“The basic idea is that health is the absence of disease, and diseases ... include deformities and disabilities that result from trauma ... .”). Of course our conception of what is “normal” is, to some extent, the product of our evolutionary history and social environment. This does not affect the value of the baseline but rather cautions one generally against overstating the connection between disease and disability. See PHILIP KITCHER, THE LIVES TO COME 213 (1996). Our evolutionary history entails development of culture and the capacity for reflective choice, and this weakens the relationship between natural selection and what humans view as valuable. That is, our evolutionary history demonstrates that there are social elements to preferred modes of functioning. Focusing on normal species functioning, then, may entrench subjective views about functioning without considering the benefits that other modes of functioning may offer. See id.

58. DANIELS, supra note 52, at 28.

59. Id. at 32-35.

60. Id.
care needs.61

According to Daniels, to support the normal opportunity range the basic tier of health care required by the biomedical model (and concomitantly distributive justice) is that which is necessary to support normal species functioning. He considers the impact of different types of health care institutions upon normal functioning in order to inform his conception of basic health care. Candidate levels of institutions are those that:

1. Prevent disease; maintain the health of those who are functionally normal through preventative care,
2. Cure disease; restore the health of those who are ill to normal functioning by providing “medical and rehabilitative services,”
3. Compensate for disease; maintain those with mild chronic ailments, disability, or age-related health needs by bringing them closer to normal functioning with “social support” and “extended medical services,” and
4. Support disease; provide “health care and related social services” for the severely disabled or seriously chronically ill individuals who cannot be brought closer to normal functioning by providing palliative or other care.62

Daniels argues that normal species functioning requires the provision of health care services to prevent illness, restore health, or compensate for loss of health. As a result, distributive justice requires the services of the first three levels of health care institutions listed above. Supporting disease (that is, providing health care or social services for the severely disabled or chronically ill) is not aimed at preserving opportunity for functional normality and may exceed the bounds of justice.63

Daniels’s model is a medical model, as it focuses upon the presence or absence of disease (or biological defect) to determine entitlement to resources. Normal species functioning, based upon the absence of disease, is used as the

61. Id. at 19-45. While Daniels assumes a strict biomedical model of health care needs (that is, disease alone is believed to impede the normal opportunity range) he utilizes a broad conception of personal medical services and other social services that operate to support this model of distributive justice. Id. at 28-32. Daniels identifies the broad range of services that meet these needs as: “(1) [a]dequate nutrition, shelter, (2) [s]anitary, safe, unpolluted living and working conditions, (3) [e]xercise, rest, and some other features of life-style, (4) [p]reventative, curative, and rehabilitative personal medical services, [and] (5) [n]on-medical personal and social support services.” Id. at 32.

62. Id. at 48.

63. Id. at 48. It seems, however, that services provided by fourth-tier institutions would preserve some aspects of normal opportunity. Health care for a severely mentally disabled person may afford her the opportunity to enjoy music, touch, friendship, or love. Even palliative care may allow a dying person the opportunity to prepare psychologically for death.
natural and relevant baseline for functioning in this context. An individual is entitled to resources to prevent movement from, or back towards, this manner of functioning. Daniels limits entitlement where resources would only support, rather than improve, disease. While the environment may cause deviation from normal functioning, Daniels’s model, as a medical model, is concerned with ameliorating or preventing biological defects of individuals to promote normal opportunity rather than altering the environment, so long as pollution is controlled and other basic needs, such as sanitation, are accounted for.\(^64\)

In addition, Daniels gives preference to prevention over restoration and restoration over compensation in order to restore normal species functioning: “It is preferable to prevent than to have to cure, and to cure than to have to compensate for loss of functioning.”\(^65\) By “compensation,” Daniels means services to manage disease and possibly disability. For example, cochlear implants might be made available to a deaf child in order to restore hearing instead of a voucher for a school for the deaf that teaches American Sign Language as a social support to compensate for loss of hearing.\(^66\)

The example of the deaf child illustrates why Daniels’s normal species functioning model, though focused upon health care, is relevant to disability analysis. First, under Daniels’s framework, a deaf child has an impaired health state, or is disabled, due to her hearing deficit, which is the product of disease or biological defect. This impairment prevents her from operating in a manner typical for our species. Second, the child is entitled to resources to bring her as close as possible to normal functioning. Third, applying Daniels’s model to the nature of the entitlement, any remedy or accommodation will prioritize the restoration of normal species functioning over accommodation that supports

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64. Id. at 32.

65. Id. at 48. It is important to note that Daniels does not give moral priority to one level of health care institutions over another, since the first three levels together support equality of opportunity. Nevertheless, an inherent preference for restoration over compensation underscores the inability of his model to consider alternative modes of functioning to support equality of opportunity.

66. Cochlear implants are the subject of much controversy in the medical ethics literature, as there is evidence to suggest that the implants are not very effective, and, as a result, a deaf child who undergoes the procedure may be unable to enter the hearing world in a meaningful way. See, e.g., National Association of the Deaf, Cochlear Implants: NAD Position Statement (Oct. 6, 2000), available at http://www.nad.org/site/pp.asp?id=foINKQMBF&b=138140; see also Satz & Silvers, supra note 12, at 173. Children with the implants may feel trapped between the hearing world and the deaf community. Id. What is clear is that, without the implant, the child will be a member of the deaf community, which is itself rich in history, culture, and tradition. Nevertheless, in Daniels’s terms, Sign language is not morally equivalent to a cochlear implant. See Dena Davis, Genetic Dilemmas and the Child’s Right to an Open Future, 27 HASTINGS CTR. REP. 7, 12 (1997).
alternative modes of functioning. The deaf child is entitled to health care services, such as a cochlear implant, to bring her as close as possible to hearing. Alternative modes of functioning, such as American Sign Language, would not be considered, as they would fail to restore her to a manner of functioning that is normal for our species.

In sum, under the normal species functioning model, if an individual does not function in a manner that is normal for our species due to biological disease (or defect), she is disabled. In addition, the normal species functioning baseline only supports remedies that facilitate functioning that is normal for our species; alternative, effective modes of functioning are not considered. The model seeks to eliminate or ameliorate disease or defect by altering the disabled person rather than the environment. In other words, disability is understood to be of biological rather than social ontology.

Under the normal species functioning model, only an individual who has a disease that impairs normal functioning is presumed to be entitled to resources to restore normal functioning. The prevention or elimination of impairment of normal species functioning is valued over compensation and support for disability by means of various accommodations or mitigating measures that may facilitate alternative modes of functioning. Laws embracing the normal species functioning model recognize an individual that deviates from normal functioning as disabled and direct resources toward preventing deviation from, maintaining, and restoring normal species functioning, instead of accommodating alternative forms of functioning that may not be normal for the species.

Thus, being able to answer the questions of when and how normal functioning matters to disability analysis is vital to understanding whether someone is disabled and what legal protections are owed. Before progressing further, however, it is necessary to consider what the normal species functioning model does not take into account. Again, philosophical works are of assistance. It has long been recognized by philosophers who write about disability that the normal species functioning model does not contemplate effective, alternative modes of functioning. Normal species functioning is concerned only with manner or mode of functioning and does not look to functional outcomes. For

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67. The implications of considering an individual disabled who functions effectively in an atypical manner will be addressed in Subsection IV.B.1. An individual may also function atypically but in a manner that is more effective than normal functioning. For example, if Einstein’s brain functioned atypically, he would not be disabled because his normal functioning range would fail to be impaired.

example, a normal species functioning approach would view walking to the street corner as a desired manner of functioning but not wheeling to the corner, even though both may bring about the same outcome.

B. Alternative Modes of Functioning

In Harrison Bergeron, Kurt Vonnegut provides an extreme view of social equality, where citizens’ talents and attributes are equalized to the lowest common denominator.69 As dictated by the Handicapper General, the attractive must wear sacks over their heads, the slender weights on their bodies, and the intelligent thought-scrambling devices.70 Disabilities are socially constructed in order to equalize abilities across a given population. Obviously, disability anti-discrimination laws do not seek to equalize abilities but to make the opportunities of those with impaired functioning more equal to those without disabilities. Nevertheless, Vonnegut poignantly raises the question of whether promoting equality requires changing the individual or society.

Unlike proponents of the normal species functioning model, advocates for alternative modes of functioning believe that it is not the individual functioning atypically who should be changed; rather, society should adapt to that individual’s method of atypical functioning. This is an expression of a social model of disability. Such models generally stand for the proposition that disability is the result of a hostile social environment rather than impairment of normal biology. There is a spectrum of social disability, of course. It is useful here to invoke a concept I develop elsewhere between categorical and relative disability.71 A disability is categorical if no reasonable adjustment in one’s social environment—such as installing elevators and ramps, providing traffic crossings with audible signals, making reading materials available in Braille, or lowering door handles—further enables functionality.72 A disability is relative, or not categorical, if social adjustment enables functionality.73 The greater the degree of social construction of a disability, the less categorical a disability becomes. Stated another way, the ability to function depends upon how hostile or accommodating the environment is to someone with a particular disability.

Social models of disability, regardless of where the disabilities they encompass fall on the spectrum, are based upon two premises: a right to participation in certain social endeavors (such as education, work, and travel) and

69. KURT VONNEGUT, HARRISON BERGERON, IN WELCOME TO THE MONKEY HOUSE 7 (1968).
70. Id.
72. Id. at 286.
73. Id. at 286-87.
a right to particular outcomes from functioning (as distinguished from modes of functioning) within certain environments. 74 Both the medical model embraced by the normal species functioning baseline and the alternative modes of functioning supported by the social model (hereinafter the alternative modes of functioning model) may promote a right to participation; this is, in fact, the purpose of Daniels's normal opportunity range. The latter premise is what distinguishes the alternative modes of functioning model from the normal species functioning model. 75 As Anita Silvers and Ron Amundson argue, the alternative modes of functioning model opposes promoting one type of functioning over others, or what they term "functional determinism." 76 The alternative modes of functioning model looks to results.

It is necessary to separate the question about whether the alternative modes of functioning model should be used to determine whether someone is disabled from the question about whether she is entitled to a remedy, and, if so, what the nature of that remedy should be. Under the alternative modes of functioning model, an individual is disabled if she is unable to function to a particular degree due to a certain social environment. She may be entitled to a remedy depending upon available external resources and her own ability to mitigate her socially constructed disability. Those who are disabled by a particular environment may be entitled to accommodation that results in changes to that environment: structures, work schedules, etc. These accommodations may support manners of functioning that are effective, though not normal for our species.

Since mitigation and resources play a role under the normal species functioning model as well, the key differences between the two models lie with determining whether an individual is disabled and the nature of accommodation. The conception of disability under the alternative modes of functioning model is controversial, since it may greatly expand the protected class. For this reason, many reject the notion that a disability can be entirely socially created; they argue that a disability must have a biological component. Elucidation of the categorical and relative spectrum is useful here. To use an oft-cited example attributed to Silvers, placing a food dish for a Dachshund on the kitchen counter and a food dish for a Great Dane on the kitchen floor would impair their ability to eat; the Dachshund may in fact starve. 77 Adjusting the dogs' environment by

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74. For an excellent discussion of the distinction between the social and medical models see Silvers, supra note 68, at 59-85, 94-95. See also Amundson, supra note 68, at 102-06.

75. One could be concerned with functional outcomes but embrace a biological approach. This would, however, collapse into the normal species functioning model. I am discussing the alternative modes of functioning model of disability as an outcome-based approach that supports functioning other than species-typical functioning.

76. Amundson, supra note 68, at 102-10; Silvers, supra note 68, at 13-145.

77. Silvers, supra note 68, at 127.

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switching the food bowls would enable both to eat with ease. This is an example of an entirely socially created disability, or a relative disability. Similarly, parents of children of short stature have argued that their children should have access to Human Growth Hormone because, in some parts of western society, short stature is disabling.  

On the other end of the spectrum are diseases or other biological conditions that result in an extremely low level of basic functioning and are categorically disabling, as no amount of social accommodation would facilitate less impairment to functioning. Some cases include the genetic diseases Lesch-Nyan syndrome, Tay-Sachs disease, and Duchenne muscular dystrophy, where one or more major life functions are seriously affected at birth or during early childhood.

Impairments that fall in the middle of the spectrum are more difficult to assess for the social construction of disability. Here internal assessments about one's ability to function weigh heavily in determining whether a disability is socially constructed. Some individuals with carpal tunnel syndrome, for example, may believe that with requisite social supports they are able to function fully in society. Others with the same condition, with or without the social supports, may view themselves as disabled, though perhaps less so than someone with Tay-Sachs disease or another systemically degenerative disease. In some cases, disabling conditions are considered enriching or beneficial, based upon social structure, and are desired.

If conditions and diseases in the middle of the spectrum contain a biological element, the alternative modes of functioning model could be recast as one that measures deviation from normal functioning just as easily as one that measures socially induced impairment. Arguably for cases that do not involve complete social impairment, the alternative modes of functioning model does not add much in terms of contemplating who is disabled. At most it serves as a reminder that not every disease that impairs normal species functioning should be considered categorically disabling or eradicated: What is relevant is the degree of impairment of functioning, and this may depend, in part, upon environment.

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78. These individuals may be inspired by studies correlating height to adult income. See, e.g., Haakon E. Meyer & Randi Selmer, Income, Education Level and Body Height, 26 ANNALS HUM. BIOLOGY 219-27 (1999).

79. This assumes, of course, that no treatments for these conditions are developed.

80. Consider the arguments of some deaf individuals that being deaf enables one to participate in the rich culture and traditions of the deaf community. See supra note 66 and accompanying text. Similarly, being born with achondroplasia (dwarfism) may be advantageous in terms of child birthing and rearing as well as parent-child bonding when the parents are also achondroplastic dwarfs.
In the accommodation context, a person is already determined to be disabled and entitled to a remedy, and the sole question is what mode of functioning should be supported to attain a given outcome. The normal species model supports only normal functioning. The alternative modes of functioning model eschews this functional determinism by considering accommodation that supports various methods of functioning to reach an outcome. A warehouse worker with a back problem, for example, may lift heavy objects with a mechanical device instead of wearing a back brace. The environment is adapted to the person instead of adapting the person to the environment. It is in this context that the alternative modes of functioning model holds much promise. We will return to this matter in Section IV.B.

C. Manner of Functioning Versus Functional Outcomes

Often the normal species and alternative modes of functioning models are confused. As Silvers and others correctly argue, using normal species functioning as a baseline may confuse three different categories of actions, each of which has varying implications for how one views disability: "standardizing biological states," promoting familiar modes of functioning, and striving for particular outcomes. Standardizing biological states involves accommodations that allow individuals to function in biologically similar ways to other individuals. In other words, the mode of functioning is emphasized over the result of functioning. An individual might undergo particular surgery or drug treatment to enable her body to function in a similar way to most individuals' bodies, such as separating webbed fingers or toes so that each digit functions independently.

Promoting familiar or normal modes of functioning entails accommodations that allow individuals to execute functions in ways that are most familiar, while not necessarily involving biological standardization. Encouraging, though not requiring, Hannah the computer programmer to use upper arm prostheses rather than her fleshy feet to type is an example. Obviously there may be overlap between the first two categories that Silvers presents, if biological standardization is involved in promoting familiar modes of functioning. If, for example, after learning that Hannah is more efficient and physically comfortable typing with her feet, the employer only allows office modifications to support typing with her artificial limbs, the accommodation moves toward biological standardization.

The important difference, though, is between Silvers's first two categories and her third. The first two emphasize a manner or mode of functioning, the third

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81. See Satz & Silvers, supra note 12, at 183.
82. I am grateful to Anita Silvers for this example.
functional outcomes. Silvers rightly argues that normal species functioning looks to manner or mode of functioning rather than functional outcomes. An alternative modes of functioning approach does not require any particular mode of functioning, only a certain functional result.

Instruments commonly used in other contexts to measure loss of functioning confuse functional outcomes with manner of functioning. Consider one health status index, which measures "physical activity" and "mobility." According to the index, a person who walks without assistance is given four points for physical activity and five points for mobility for being able to use public transportation without special accommodation. An individual employing a tool of assist to walk is given three and four points, respectively (assuming assistance is needed to board transportation). A person using a wheelchair scores two points for physical activity. Her mobility ranking is three points if she needs assistance leaving her home and boarding public transit, and the sidewalks outside of her house are not wheelchair accessible. She could score as high as five points if modifications are made to her home, outside environment, and public transport.

The index assumes that one is less able to travel using a wheelchair than walking upright (two versus four points on the physical activity scale). However, those who wheel may travel just as effectively, if not more so, than those who walk. The mobility scale defines disability relative to social states that do not foster alternative modes of functioning, such as public mechanisms of transportation missing equipment for wheelchair use and sidewalks that step

83. These include Activities of Daily Living scales, which are found most notably in the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) and some health status indexes. The purpose of these scales is to provide physicians with guides for measuring impairment. While they are not intended for use in estimating damages, the AMA Guides are used in over forty state workers compensation programs for this purpose. Gené Stephens Connolly, Hidden Illness, Chronic Pain: The Problems of Treatment and Recognition of Fibromyalgia in the Medical Community, 5 DePaul J. Health Care L. 111, 115 (2002). These guides are also widely criticized for embedded stereotypes about relevant tasks. Ellen Smith Pryor argues that the examples in the AMA Guides are blatantly stereotypical, focusing on mopping, shopping, cooking, and child rearing for women and sports for men. Ellen Smith Pryor, Flawed Promises: A Critical Evaluation of The American Medical Association's Guides TO THE EVALUATION OF PERMANENT IMPAIRMENT, 103 Harv. L. Rev. 964, 967-75 (1990) (book review).
84. See Dan W. Brock, Life and Death 303 (1993); see also Amundson, supra note 68, at 107 (discussing this particular index as ignoring level of functioning).
85. See sources cited supra note 84.
86. See sources cited supra note 84.
87. See sources cited supra note 84.
88. See sources cited supra note 84.
89. See sources cited supra note 84.

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down to the street instead of slope. Simply adding curb cuts and ramps to buses and trains would change an individual’s mobility ranking, for then those who wheel and those who walk would score the same (five) points.

Confusing functional outcomes with manner of functioning undervalues effective, alternative modes of functioning that attain the same functional result as normal modes of functioning. As a result, accommodation may be diverted to standardizing biological states or promoting familiar modes of functioning as opposed to enabling functional outcomes. Careful attention must be paid to the purpose of disability inquiries in order to determine whether it is the manner (normal species functioning model) or the outcome of functioning (alternative modes of functioning model) that is at stake. The Supreme Court has failed to examine disability inquiries with full appreciation of this distinction and its consequences.

III. FUNCTIONING AND SUPREME COURT JURISPRUDENCE

It is uncontroversial that judicial construction of the ADA limits disability protections. Nevertheless, established Supreme Court tests are not what severely restrict coverage under the Act. The Court’s undirected and improper use of normal functioning to inform disability analysis is what prevents most protection, both at the disability threshold stage (which the Court currently interprets as including eligibility for remedy) and with regard to accommodation.90

When normal functioning informs disability analysis, an individual is not disabled or entitled to a remedy if she functions in a manner or mode that is normal for our species. An individual may be disabled and entitled to a remedy if she functions in a non-species-typical way. For example, a secretary who is less efficient than other workers because she takes breaks throughout the day to monitor her blood sugar and give herself insulin for diabetes may be disabled and eligible for relief. A secretary who takes the same number of breaks and maintains an identical work schedule due to a preference for a more relaxed work day would not be considered disabled and entitled to a remedy. If normal functioning fails to inform disability analysis, the manner or mode of functioning no longer matters, and the Court looks to functional outcomes. If the secretary with diabetes functions effectively with a self-adjusted schedule by working longer hours, she may not be considered disabled or entitled to a remedy. Thus, looking to functional outcomes rather than normal species functioning, the two

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90. Recall that in the last five Supreme Court opinions addressing “substantially” as part of the “substantial impairment of a major life activity” test, four plaintiffs were found not to be disabled. See supra note 27 and accompanying text. In addition, “major life activity” has been narrowly construed. See supra notes 28-33 and accompanying text.
secretaries might be treated the same.

Under the plain language of the ADA, if an individual is found to be disabled under the Act, she may be entitled to accommodation; the nature of accommodation also varies depending upon whether normal species functioning is considered relevant. If normal species functioning informs accommodation, only species-typical modes of functioning will be supported. Alternative modes of functioning are supported by analysis that looks to functional outcomes.

In the disability threshold context, the Supreme Court has in all but one case failed to invoke normal species functioning in determining whether an individual is entitled to protection under the ADA. In other words, normal species functioning is not considered when determining whether an individual has a substantial impairment of a major life activity. When the Court fails to consider normal species functioning, an individual who functions effectively in a non-species-typical manner is not disabled. When the Court considers normal species functioning, an individual who functions atypically is disabled.

In Bragdon v. Abbott, a Title III public accommodation case, the Court held that reproduction is a major life activity, finding that an HIV infected woman could not reproduce in a normal fashion. In an opinion authored by Justice Kennedy in which Justices Stevens, Souter, Ginsberg, and Breyer joined, the Court found that Abbott could not reproduce normally because she posed about a twenty percent risk of infecting her partner, and there was an eight percent risk of perinatal transmission. In reaching its decision, the Court relied, in part, on an agency opinion authored by the Office of Legal Counsel of the DOJ, stating, "HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child." Chief Justice Rehnquist (joined by Justices Scalia, Thomas, and O'Connor, in part), dissented on the ground that Abbott did not establish that she was substantially limited in a major life activity, and that opinion refers to major life activities as those that "are repetitively performed and essential in the day-to-day existence of a normally functioning individual." Thus, both the majority and the dissent appeal to normal functioning to determine elements of the definition of disability.

91. 524 U.S. 624, 641 (1998). The majority opinion also engages in a lengthy discussion of HIV, or presymptomatic AIDS, to determine that it is Abbott's low CD4/CD8 counts that result in biological impairment. Id. at 633-38. Variation from species normality typically plays a role in the Court's determination of the "physical or mental impairment" component of the disability threshold test. See infra Subsection IV.B.1.
93. Id. at 642-43 (citations omitted).
94. Id. at 660.
One year later, in a trilogy of cases decided by the Court, normal functioning is deemed irrelevant to determining eligibility under the disability threshold test. Compare Bragdon with Albertson's, Inc. v. Kirkingburg, a case involving a truck driver with monocular vision suing under Title I for employment termination. Justice Souter, joined by Justices Kennedy and Ginsburg and the dissenters in Bragdon, found that deviation from normal functioning did not indicate disability; Kirkingburg was not disabled, despite monocular vision. The Court specifically rejected the Ninth Circuit’s appeal to normal species functioning:

The Ninth Circuit concluded that ‘the manner in which [Kirkingburg] sees differs significantly from the manner in which most people see’ because, ‘to put it in its simplest terms [he] sees using only one eye; most people see using two.’ The Ninth Circuit majority also relied on a recent Eighth Circuit decision, whose holding it characterized in similar terms: ‘It was enough to warrant a finding of disability . . . that the plaintiff could see out of only one eye: the manner in which he performed the major life activity of seeing was different.’ . . . But in several respects the Ninth Circuit was too quick to find a disability . . . By transforming ‘significant restriction’ into ‘difference,’ the court undercut the fundamental statutory requirement that only impairments causing ‘substantial limitations’ in individuals’ ability to perform major life activities constitute disabilities.95

The effect of attributing different roles to normal species functioning in disability threshold analysis is illustrated by these two cases. In Bragdon, the Court is concerned with normal functioning because Abbott could not reproduce in a manner that is normal for our species; she was therefore limited in the major life activity of reproduction. The Court did not, for example, consider means of assisted reproduction available to Abbott, such as artificial insemination (with drug treatment), to lessen substantially the risk of perinatal HIV transmission and to avoid the risk to her partner altogether. Nevertheless, in Kirkingburg, the Court found that the plaintiff was not disabled, even though he failed to see in a manner that is typical for our species.96 Here, it is not the manner of functioning that matters, but functional outcome, that is, whether Kirkingburg was substantially limited in functioning despite his impairment. The Court, citing Sutton v. United Air Lines, Inc.97 another case in the trilogy, found that Kirkingburg’s abilities must be assessed after mitigating measures for his monocular vision.98 The Court then reasoned that since Kirkingburg’s brain compensated for the vision defect, he was functional in a non-species-typical

96. Id. at 563-67.
manner.\textsuperscript{99}

The Court's position in \textit{Kirkingburg} on functional outcomes is mirrored in the other two cases forming the Court's 1999 trilogy, with support from the same justices: \textit{Sutton},\textsuperscript{100} involving twin sister pilots with severe myopia who used special eye glasses to see, and \textit{Murphy v. United Parcel Service},\textsuperscript{101} pertaining to a mechanic who took drugs to manage severe hypertension. The language about functional outcomes is also followed in \textit{Toyota Motor Manufacturing, Kentucky v. Williams}, where Justice O'Connor wrote for a unanimous court, holding that a woman with severe carpal tunnel syndrome who was able to perform certain manual household tasks was not disabled.\textsuperscript{102}

These cases illustrate the effect of considering normal species functioning in disability analysis. In \textit{Bragdon}, deviation from normal reproductive functioning grounds the Court's finding that Abbott was impaired in the major life activity of reproduction and entitled to disability protections. Failing to invoke this baseline in \textit{Kirkingburg}, \textit{Sutton}, \textit{Murphy}, and \textit{Toyota} limits protections for persons with disabilities. In each of these cases, the plaintiff does not function in a manner that is normal for the species but mitigates or compensates for impairment, personally or with medical aids, and is found to be lacking a substantial impairment of a major life activity. Similar outcomes are found in Supreme Court jurisprudence under the precursor to the ADA, the Rehabilitation Act,\textsuperscript{103} and in lower court ADA jurisprudence.\textsuperscript{104}

To draw out the second component to the problem, it is necessary to return to the hypothetical in the introduction about Hannah the computer programmer. Recall that Hannah would like office modifications to allow her to type with her fleshy feet. Suppose her employer fears that this would make other employees

\begin{itemize}
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{100} \textit{Sutton}, 527 U.S. 471.
\item \textsuperscript{101} 527 U.S. at 519-21 (1999) (affirming the lower court's holding that "petitioner's hypertension is not a disability because his doctor had testified that when petitioner is medicated, he 'functions normally doing everyday activity that an everyday person does'").
\item \textsuperscript{102} 534 U.S. 184 (2002).
\item \textsuperscript{103} See, \textit{e.g.}, \textit{Se. Cnty. Coll. v. Davis}, 442 U.S. 397, 409-10, 413 n.12 (1979) (holding that a nursing college under section 504 of the Rehabilitation Act was not required to accommodate a student with a serious hearing impairment who could participate in the normal clinical training program by using an assistant).
\end{itemize}
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and clients uncomfortable and prefers to alter her office to enable Hannah to use her upper arm prostheses. Remember that under current agency and judicial construction of the Act, regardless of whether the employer is willing to engage the employee in an interactive process, the employer retains the right to determine the nature of the accommodation, so long as it is reasonable.105 Arguably, office adjustments to accommodate upper arm prostheses would be reasonable, even if the employee would not be quite as happy or efficient in the workplace as a result.

Thus, under current construction of the ADA, an employer may determine the manner in which an employee functions in the workplace. While it is largely an empirical matter whether employers, over the years, will choose to support normal or alternative modes of functioning, the EEOC’s recommended process is not required by the Court. Given the history of oppression of individuals who function in atypical ways and recent, though sparse, relevant jurisprudence about accommodation, there is a valid concern that employers will choose to make reasonable accommodations that further only species-typical functioning.106

Generally speaking, the Court has very narrowly construed the reasonable accommodation mandate of Title I.107 In US Airways, Inc. v. Barnett,108 the Court held that a mail room job provided as a reasonable accommodation to a disabled employee could be offered to a nondisabled employee under the company’s seniority system, even if no other accommodation was available to the disabled employee. Due to the seniority system, the position was not “vacant” for accommodation purposes.109 While the holding in this case may be limited to collectively bargained seniority systems, the Court’s narrow construction of the reasonable accommodation mandate does not inspire hope that accommodations supporting non-species-typical modes of functioning will be provided to

105. See supra Part I.

106. This may result from ignorance of non-species typical alternatives or from a desire to “normalize” disabled employees. The accommodation provision is concerned with outcomes, that is, employing disabled individuals who are able to fulfill the essential functions of their job regardless of how they do so, for example, by constructing buildings that allow disabled individuals access whether they walk, wheel, scoot, etc.

107. To date, the Supreme Court has so narrowly construed the disability threshold test that few cases have made it through to reasonable accommodation analysis. Further, since the Court groups the inquiry of whether someone is disabled with whether they are entitled to a remedy, analysis surrounding whether accommodations should be made, and if so, what they should be, is often muddled with disability eligibility questions, making it difficult to determine how courts approach reasonable accommodation.


109. Id. at 399, 403.
employees under Title I. Further, the nature of accommodation is discussed only in passing in non-employment contexts by the Court, where language suggests a preference for normal modes of functioning.

Thus, there are two parts to the problem of how a baseline of normal functioning is used under current law. Lack of use under the disability threshold test excludes persons with disabilities from protection under the ADA. Use under the accommodation mandate may not speak to preferred, more efficient non-species-typical modes of functioning and further stigmatization of individuals who function in atypical ways by regarding such methods of functioning as ineffective or inferior.

IV. FUNCTIONING-BASED DISABILITY ANALYSIS

Functioning-Based Disability Analysis suggests that in order to consider properly the role of normal species functioning in disability analysis and to overcome the problems discussed in Part III, it is necessary to separate disability inquiries about eligibility, entitlement, and the nature of accommodation. One must then consider whether normal species functioning should inform each inquiry. Philosophical understanding of normal functioning helps clarify relevant factors and suggests that the normal species functioning baseline should be applied to questions of eligibility and entitlement but not to determine the nature of accommodation.

A. Proposed General Disability Inquiries

Inquiries about disability status, entitlement, and the nature of

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110. The dissent, authored by Justice Scalia, with whom Justice Thomas joins, even more narrowly construes reasonable accommodation by stating the accommodation should not be made, as the majority suggests, to "accommodate[e] the disabled employee," but rather to "accommodate[e]... the known 'physical or mental limitations' of the employee." Id. at 413 (emphasis removed). In other words, Scalia would like to limit accommodations to those that mitigate the impairment itself rather than workplace obstacles. Such accommodations may not support alternative modes of functioning. As addressed supra in Part II, accommodation that seeks to change the individual usually supports normal species functioning.

111. See PGA Tour v. Martin, 532 U.S. 661, 671-72, 683 (2001) (discussing, under Title III, how a golf cart accommodation enables a disabled golfer to function closer to the typical walking golfer); Olmstead v. L.C., 527 U.S. 581, 608-11 (1999) (Kennedy, J., concurring) (explaining that, under Title II, community-based treatment or more normal, integrated treatment for the mentally ill as advocated by the majority may not serve the needs of some severely mentally disabled individuals who require more assistance and supervision).
accommodation are distinct factual questions.112 While they must be separated in order to clarify the proper role of normal species functioning, the exact wording of the inquiries is not important. This Article offers three general inquiries as a guide for the courts.

The three general inquiries this Article proposes for Functioning-Based Disability Analysis are:

(Q1) Is person X disabled?
(Q2) If person X is disabled, is she entitled to resources?
(Q3) If person X is disabled, and she is entitled to resources, how should those resources be used?

This analysis may take on a slightly different shape if a plaintiff is seeking injunctive relief rather than an accommodation. In these instances, Q2 and Q3 may be read to speak generally to a remedy rather than to resources. “Remedy” may also apply to resource claims.

Under established Supreme Court tests, Q1 is akin to the disability threshold test. That is, a person is disabled if she has a substantial impairment of a major life activity, a record of such a disability, or is regarded as disabled. While it is important to emphasize that this question contains three important sub-queries, namely, (1) whether a disability is a physical or mental impairment and (2) whether it “substantially limits” (3) a major life activity, this Article argues that the normal species functioning baseline should be applied in a similar manner to each of these elements.

Under current Supreme Court jurisprudence, if an individual is considered disabled and discriminated against on the basis of her disability, she is entitled to resources, unless one of the two affirmative defenses is relevant (undue hardship or direct threat) or, under Title I, the worker cannot fulfill the essential functions of her job. Q2 separates this finding from the disability threshold test (Q1) and is thereby a departure from current judicial construction of the ADA. Q1 and Q2 are two distinct inquiries. An individual may be disabled under the Act yet not entitled to an accommodation if she functions in an unimpaired fashion in a given situation, assuming that there is no other disability-based discrimination.

The second stage of disability analysis is where courts should assess mitigating measures. Currently the Court considers mitigating measures at the stage this Article calls Q1, categorizing most plaintiffs as not disabled and denying them protection under the Act. Nevertheless, these individuals are often considered too impaired by their employers to work. This is the case where there are perceived safety concerns about functioning, even when they do not arise to

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112. I am grateful to Jules Coleman for his insights on this matter. Broader exploration of Coleman’s related works in torts warrants examination elsewhere.
Q3 aligns with the reasonable accommodation mandate of the ADA. Under the language of the Act, the nature of accommodation is to be determined by the entity under scrutiny; under Title I, this would be the employer, Title II the service provider, and Title III the place of public accommodation. Under Title I, an employer may engage an employee in an interactive process in order to determine a preferred accommodation, though this is not required by the Act and adopted in only some judicial circuits.

B. Proper Consideration of Normal Species Functioning

In this Section, the application of the normal species functioning baseline is examined with respect to each disability inquiry. This Article argues that the normal species functioning baseline should be applied to the first and second inquiries (Q1 and Q2) but not to the third (Q3). Legal and philosophical discussion of functioning helps explain why the normal species functioning baseline should be applied to inquiries about whether a person is disabled and entitled to an accommodation under law but not to determine the nature of accommodation.

1. Definition of Disability

Q1 encompasses the disability threshold test, that is, whether an individual has: (1) a physical or mental impairment that (2) substantially limits (3) a major life activity. The application of the baseline must be assessed with regard to each element of the disability threshold test; this Article argues that it should be applied to all three parts. Applying the normal species functioning baseline to the disability threshold test (Q1):

Those who function effectively in a manner that is normal for our species are not disabled, while those who function effectively but in a non-species-typical manner (due to disease or biological defect) are disabled.

Application of the normal species functioning baseline to "a physical or

114. See supra note 40 and accompanying text.
115. Functioning-Based Disability Analysis also bears on the non-functional prongs of the ADA, that is, protections that stem from having a record or history of a disability or being regarded as having a disability. For the reasons discussed infra, normal species functioning should be applied to inquiries about whether an individual is disabled and entitled to a remedy but not to the nature of accommodation.
mental impairment” is strongly supported by the EEOC regulations and the legislative history of the ADA. This statutory requirement is interpreted by the EEOC and Congress to assume a medial model of disability, implicitly rejecting a social, or alternative functioning model. The EEOC interprets the phrase to mean “any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss” to a major body system or “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” These categories, taken directly from a House Report, all stem from biological defect or anomaly. The same report further states that “environmental, cultural, and economic disadvantages are not in themselves covered.” Courts have almost uniformly interpreted this aspect of the disability threshold test to invoke a medical model of disability.

The normal species functioning baseline allows distinctions to be drawn between individuals seeking accommodations for various needs. It provides a rough measure for promoting equality among the disabled by promoting a normal opportunity range. While a more expansive category might be desired, it raises the problems discussed in Section II.B, most notably, difficulty in limiting the protected class. In Sutton, the Court assumes the number of Americans in the protected class to be roughly forty-three million. While it is disputed that this number, taken from the Preamble of the ADA, was intended to establish a ceiling, the alternative modes of functioning model would exceed substantially this number by allowing any individual, with or without biological defect and disabled by their environment, to be a potential member of the protected class.

118. Id. at 51-52.
119. As noted in Part I, it remains unclear whether courts will extend mental impairment to include conditions of uncertain biological origin or social cause. See supra note 24 and accompanying text.
121. 42 U.S.C. § 12101(a)(1) (2000) (stating that “[s]ome 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older”).
122. Sutton, 527 U.S. at 494 (Ginsburg, J., concurring); id. at 495 (Stevens, J., dissenting); see also Feldblum, supra note 5, at 154 (“I can attest that the decision to reference 43 million Americans with disabilities in the findings of the ADA was made by one staff person and endorsed by three disability rights advocates, that the decision took about ten minutes to make, and that its implications for the definition of disability were never considered by these individuals. Moreover, it was my sense during passage of the ADA that this finding was never considered by any Member of Congress, either on its own merits or as related to the definition of disability.”).
This would arguably fly in the face of what Congress intended. Invoking the normal species functioning baseline at the first stage of disability analysis would limit the protected class, as disability would be measured relative to a biological baseline of what is normal for our species.

There is a question, though, as to whether the normal species functioning baseline should be applied to “substantially limits” and “major life activity,” given the social influences on what one recognizes as significant life activities and a “substantial limit[ation]” of those activities. The plain language of the statute is not helpful here, and the EEOC Regulations and Congressional Record seem to reject an alternative modes of functioning approach. The EEOC regulations define “a substantial impairment of a major life activity” with reference to “the average person in the general population.” In this context, “substantially” and “major life activity” are not separated. This aligns with Congress’s account of “a substantial impairment of a major life activity”: “A person is considered an individual with a disability for purposes of the first prong of the definition when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.” It is left largely to the courts to determine the role of social influence upon “substantially” as separate from “major life activity.”

It is here that the Supreme Court abandons the medical model in part. In the 1999 trilogy, the Court finds no substantial impairment in three different contexts, due to the individual’s ability to mitigate a particular disability. Eligibility for disability protections is assessed not according to the degree of biological impairment as compared to the rest of the species but only after tools of assist and other mitigating measures are employed. This appears to look to the alternative modes of functioning model, or to functional outcomes. There is a strong argument to be made, though, that the Court does not intend to invoke the alternative modes of functioning model at this stage and is simply engaging in its mitigation analysis too early. As argued in Section IV.A, consideration of mitigating measures should come into play at the next level of inquiry, the question whether someone is entitled to resources. Because the Court combines these inquiries, the analysis is confused. Further indication that the Court may not wish to look to the alternative modes of functioning model at the disability threshold stage is that, when contemplating the meaning of “major life activity,”

123. 29 C.F.R. § 1630.2(j)(1)(i) (2005). An individual with a substantial impairment of a major life activity is “significantly restricted as to the condition, manner or duration under which [she] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” Id. at § 1630.2(j)(1)(ii) (emphasis added).

it returns to speaking of a biological majority. In *Toyota Motor Manufacturing, Kentucky v. Williams*, the Court interprets major life activities to be those that are of “central importance to most people’s daily lives.”

Thus, current regulations and statutory and common law give us no reason to invoke the alternative modes of functioning model at this level of disability analysis.

Applying the alternative modes of functioning model at the level of “substantial” and “major life activity” is problematic for the same reasons it is troublesome to apply it to “the physical or mental impairment” prong. Put simply, it is too difficult to know who to exclude from the class of disabled individuals when sorting through distributive justice claims, if major life activities are not defined relative to a majority of our species. Applying the alternative modes of functioning model to “substantial” would also likely encounter the difficulty that individuals who are particularly creative in overcoming impairments, or who are very resilient or able to work harder for the same level of functioning, would not be considered disabled. These individuals would not be entitled to a remedy unless they are no longer able to compensate for their disability, holding them hostage to their self-mitigating measures.

On the other hand, individuals who function effectively in atypical ways may resent being characterized as disabled. Under the current judicial construction of the ADA, where the question of disability and entitlement to resources are considered together as a threshold matter, this view is understandable. Characterizing someone as disabled sends the message that she is entitled to resources, presumably based upon need. This may be offensive to an individual who believes herself to be self-sufficient. Treating the inquiries separately undercuts this concern. Under the proposed scheme, taking offense would require an objection to the formal protections afforded the disabled as a protected class, protections an individual need not invoke.

2. *Entitlement to Resources*

Currently the Court does not separate Q2 from Q1, though these are distinct factual inquiries. Applying the normal species functioning baseline to Q2:

Those who function in a species-typical fashion are not entitled to resources. Conversely, those who function in a non-species-typical way (due to disease or biological defect) may have claims to resources.

126. Objections to membership in a protected class do not arise in other civil rights contexts, such as race and gender. Obviously, however, in these contexts eligibility for protection does not involve impaired capacities.
127. See *supra* Section IV.A.
Resource claims are limited depending upon available public or private resources as well as, under current judicial construction of the Act, the ability of an individual to mitigate her disability. The defenses of undue burden and direct threat also may affect claims to resources. While resource availability is inherently a social constraint, it pertains not to entitlement to a remedy (or to the alternative modes of functioning model) but rather to the availability of a remedy. Consideration of mitigating measures, though, does pertain to entitlement to a remedy and invokes models of functioning. The Court looks to functional outcomes (the alternative modes of functioning model) when considering mitigation rather than the manner of functioning to determine entitlement to resources. Thus, under current law, when mitigating measures are considered, an individual who does not function in a manner that is normal for the species may have a lesser claim to resources because of an ability to function effectively in an atypical manner.

Applying the normal species functioning model to resource claims without considering mitigation allows resource distribution to those who function in atypical ways. Applying the model to resource claims when mitigation is considered, an individual may still be entitled to resources to promote her normal opportunity range. This would likely be the case in instances of partial or difficult mitigation of disability, situations involving those who are hyper-vulnerable to changes in their environments, or circumstances where company policies label workers as safety risks on the basis of disability, even though there is no or limited risk after mitigation. Under current jurisprudence, the latter two categories of individuals are not protected. In order to sue, hyper-vulnerable individuals are forced to wait until changes in their environment render them disabled. In its famous trilogy of cases, the Court finds the plaintiffs not disabled after mitigation but unable to meet the safety requirements of their employers; it is unclear, though, whether these safety precautions are reasonable or a source of disability discrimination in themselves.

Under current judicial construction of the ADA, one could not adopt the alternative modes of functioning model in response to Q2 without also adopting it for at least one of the prongs of the statutory definition of disability encompassed by Q1, as discussed above. This Article rejects the alternative modes of functioning model at Q1. Nevertheless, it is worth noting that if one were to adopt the alternative modes of functioning model for Q1 and Q2, the same arguments about over-inclusiveness and under-inclusiveness would apply. It is difficult to know where to draw lines, as a matter of justice as well as practice, around a class of disabled individuals whose disabilities are believed to be wholly or mostly a matter of social construction. Further, those individuals

128. See supra Subsection IV.B.1.
who exert much effort to overcome impairments would encounter a significant hurdle at the remedy stage if they appeared to be functioning effectively, assuming they could even establish a "substantial" disability under Q1. This is a much higher hurdle to establish disability than the one faced under the normal species functioning approach, even taking into account mitigating measures. 

One problem with looking to normal functioning in the context of remedy is an individual who functions in an atypical manner is entitled to resources even if she functions to the same level without resources as someone who functions in a species-typical fashion. Arguably, this is in keeping with the spirit of the ADA, which only seeks to protect individuals who are disabled under the statutory definition of disability or who are discriminated against on the basis of being regarded as disabled under this definition. Individuals disadvantaged for other reasons were excluded by Congress.129 It is important to remember that the civil rights grounded in the ADA need not give rise to an accommodation. This is recognized in the statutory definition of "qualified individual with a disability" under Title I, which states that if an individual is disabled, she is qualified for employment, so long as she can fulfill the essential functions of her job "with or without reasonable accommodation."130

3. Nature of Accommodation

Applying the normal species functioning baseline to Q3:

Resources must support species-typical ways of functioning. If the normal species functioning baseline is not applied to Q3, disabled persons may be accommodated in a manner that best supports preferred and more effective modes of functioning, regardless of whether these modes of functioning are normal for the species.

Legal, moral, and policy arguments support the conclusion that a person with a disability should determine her own accommodation.

a. Essential Functions Test

As already discussed, the interactive process advocated by the EEOC strongly supports, though does not require, that a disabled employee be able to choose her own accommodation.131 In addition, Congress, courts, and the EEOC have already embraced the idea of functional outcomes versus manner of functioning in the essential functions context. The essential functions test of Title

131. See supra notes 39-43 and accompanying text.
I, which requires that a qualified individual with a disability be able to fulfill the essential functions of her job “with or without reasonable accommodation,” is interpreted by the EEOC to mean that an employee must be able to obtain a certain functional result.132 The clearest articulation of this view is found in the EEOC’s Technical Assistance Manual, which states that:

In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the purpose of the function and the result to be accomplished, rather than the manner in which the function presently is performed. An individual with a disability may be qualified to perform the function if an accommodation would enable this person to perform the job in a different way, and the accommodation does not impose an undue hardship. Although it may be essential that a function be performed, frequently it is not essential that it be performed in a particular way.133

Similarly, the Technical Assistance Manual states that formal job analysis to identify the essential functions of a job must “take into account the fact that people with disabilities often can perform essential functions using other skills and abilities [than those specifically enumerated in the analysis].”134 It continues, “[t]he job analysis may contain information on the manner in which a job currently is performed, but should not conclude that ability to perform the job in that manner is an essential function, unless there is no other way to perform the function without causing undue hardship.”135 In making accommodations, employers should focus upon ways in which an individual might fulfill an essential job function rather than the manner in which they currently do so.136 The Technical Assistance Manual provides three examples of atypical functioning fulfilling essential functions: developing computer programs directly on the computer rather than by hand, listening to audiotapes to learn technical manuals rather than reading them, and using tools of assist to lift cartons into truck-trailers rather than lifting them by hand.137

The Congressional Record also supports the proposition that the essential

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133. EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICAN’S WITH DISABILITIES ACT § 2.3(a) (1992) (emphasis added).
134. Id. at § 2.3(b).
135. Id.
136. Id. at § 3.5 (“In considering an accommodation, the focus should be on the abilities and limitations of the individual . . . on ways that [a] person might be able to do the job function, not on the nature of her disability or how persons with this kind of disability generally might be able to perform the job.”).
137. Id. at § 2.3(b).
functions test is concerned with functional outcomes rather than the mode of functioning. The distinction was made by Representative Fish when he introduced amendments to the bill that became the ADA. He stated:

_The essential function requirement focuses on the desired result rather than the means of accomplishing it._ For example, in one case under the Rehabilitation Act, the employer required each employee to be able to perform the job with both arms. _Prewitt v. U.S. Postal Service_, 662 F.2d 292 (5th Cir. 1981). The plaintiff was unable to do this because his disability resulted in limited mobility in his left arm. The court found that the essential function of the job was the ability to lift and carry mail which the employee had proven that he could do, not the ability to use both arms. Moreover, the court found that the employer was required to adapt the work environment to determine whether the employee with the disability could perform the essential requirements of the job with reasonable adaptations.

Likewise, in a job requiring the use of a computer, the essential function is the ability to access, input, and retrieve information from the computer. It is not essential that the person be able to use the keyboard or visually read the computer screen, if the provision of adaptive equipment or software would enable the person with the disability—for example, impaired vision or limited hand control—to control the computer and access the information. The relevant question would be whether the acquisition of the equipment would be a reasonable accommodation, given the factors to be considered in making that determination.138

This passage is cited by the Third Circuit in _Skerski v. Time Warner Cable Co._, for a similar proposition, namely, that the requirement of a job detailing a method of performance may not be an essential function if the task it targets may be accomplished in an atypical way.139 In addition, at least two other circuits have acknowledged that accommodations for atypical functioning may allow an individual to fulfill the essential functions of her job. In _Gillon v. Fallon Ambulance Services_, the First Circuit found that a woman missing part of one arm due to a genetic defect was able to serve as an emergency medical technician


139. _Skerski v. Time Warner Cable Co._, 257 F.3d 273, 280-81 (3d Cir. 2001). In _Skerski_, a cable installer technician who suffered anxiety attacks at high elevations requested the use of a bucket truck to reach cable wires. The court remanded the case on the grounds that there were genuine issues of material fact as to whether climbing was a physical task job requirement but not an essential function, and, if so, whether the defendant's reassignment of Skerski to a warehouse position was a reasonable accommodation. Id. at 280-86.
with a partner to aid in lifting and carrying adults on stretchers. Similarly, the Eighth Circuit, in *Fenney v. Dakota, Minnesota, & Eastern Railroad Co.*, acknowledged that a "long call" procedure of advance warning allowed a man who lost his thumb and part of a finger and damaged his right arm to be an on-call locomotive engineer by affording him sufficient time to report to work.

b. Philosophical Argument from Moral Equivalence

Particular philosophical perspectives also lend support for the argument that accommodation to restore or promote normal species functioning should not be given priority over accommodation of alternative modes of functioning. There is a philosophical argument to be made about the moral equivalence between "treatment" (that is, amelioration of a defect to normal functioning) and other forms of compensation. If treatment to further normal species functioning is morally equivalent to other forms of compensation that support alternative modes of functioning, failing to provide compensation for these alternative forms of functioning may be unjust.

The literature on the moral equivalence of treatment and prevention is of some assistance in understanding the moral distinction between compensation, via facilitating alternative modes of functioning, and treatment or prevention offered to preserve normal species functioning. Treatment, after all, is not always fully restorative and may be used as a form of compensation to support alternative modes of functioning. In fact, treatments may be provided for the purpose of producing only marginal benefits for individuals with disabling conditions. There are, of course, limitations to this analogy, insofar as treatment may bring one back to normal species functioning, and compensation is understood to try to restore one to functionality in society, possibly outside of what is normal for the species.

As part of the treatment/prevention debate, philosopher Paul Menzel argues that treatment has a qualified moral priority over prevention. This is so, in part, because rational people may choose to avoid the greatest risk to their life by spending more in high-risk situations, that is, on treatment when they are sick, than in low-risk situations, such as prevention when they are well. This priority is

140. 283 F.3d 11 (1st Cir. 2003).
141. 327 F.3d 707, 710 (8th Cir. 2003) (allowing Plaintiff time to "bathe, dress, shave, prepare a meal, and drive himself to work on time").
142. PAUL T. MENZEL, MEDICAL COSTS, MORAL CHOICES: A PHILOSOPHY OF HEALTH CARE ECONOMICS IN AMERICA 151-83 (1983). Menzel is concerned with the emphasis of treatment over prevention in the allocation of medical resources. His conclusion is useful to the present discussion for understanding the priority of treatment (and by analogy compensation) relative to prevention of deviation from normal species functioning.
limited under a hypothetical choice situation, where individuals consider what is fair at the beginning of their lives, as well as a willingness-to-pay argument in circumstances where treatment is understood to make a less significant reduction to the high risk. Treatment may also be prioritized over prevention on the ground that those who are currently sick (a case could be made for individuals symptomatic as well as those asymptomatic for disabling disease or conditions) would fail to benefit from prevention and therefore would not consent to the moral equivalency between treatment and prevention. One exception to the priority of treatment over prevention, as Menzel notes, is for situations where prevention actually enables the subject’s ability to consent to the moral equivalence between treatment and prevention. In other words, prevention allows an individual the capacity to consent. In these cases, prevention should be morally equivalent to treatment for the condition at stake.

Menzel’s interpretation of the qualified moral priority of treatment over prevention is of relevance to discussing compensation of alternative modes of functioning versus prevention of deviation from normal species functioning. This is so because an analogy may be made between treatment and compensation, as compensation may be the outcome when treatment does not specifically reduce high risk (though here the risk is to functioning and is not necessarily as threatening). In these instances, prevention may have priority over compensation, were it not for the fact that those with disabling diseases or conditions are already affected. Given this factor, and with specific reference to the neonatal context, Menzel argues that prevention and treatment in this context are morally equivalent. He states:

[I]n assessing the importance of preventing congenital, chronically disabling diseases for future persons . . . the claim for prevention is as weighty as the claim for treatment of those in the present generation whom these disease afflict, and in any case, it is weightier than the claim to prevent other, equally cost-effective, preventable diseases which do not preclude their victims from sometimes having a rational self-interest in a policy of equivalence. The

143. *Id.* at 171.
144. *Id.* at 175, 179. Menzel argues that this is a question of justice and not self-interest. He compares it to a veto of moral priority when one is not sick, and argues that this veto is unjustified because it is based upon self-interest, presumably because the individual would desire priority for treatment if the tables were turned. It seems, however, that in both cases the parties are self-interested, though perhaps for stronger reasons in the first (i.e., when the person is sick) than in the second (i.e., when the individual is not yet sick). Regardless, a compelling interest may be enough to sustain the qualification.
145. *Id.* at 178-79.
146. This may present difficulties for the analogy regarding some of the finer points of Menzel’s analysis, but the basic idea still stands.
practical implications are immensely important. For example, treatment of defective newborns may properly take priority over many types of prevention, but it should not take priority over prevention of future, similar, neonatal defects. An appeal to a local health-planning council to expand a neonatal intensive-care unit, for example, should not be granted until equal-marginal-benefit-producing funds are devoted to educational programs to prevent future birth defects.  

This has several implications for the analogy between treatment/prevention in the health care context and compensation/prevention for alternative modes of functioning in the disability context. If, to continue Menzel's example, the fetus is understood to have moral status, there are obvious limits to drawing an analogy between educational programs to prevent future birth defects, with respect to such practices as smoking and drinking during pregnancy, and preventing birth defects through prenatal testing and selective abortion. If the fetus does not possess moral status, however, one could argue that there is no morally relevant difference between prevention and compensation with respect to discrimination against the disabled. In this instance of moral equivalency, it seems that both treatment of disabled newborns as well as prevention of disabled births would be supported, so the claim to prenatal testing and selective abortion has equal force to the claim to material supports to raise disabled children.  

Making an analogy to Menzel's thesis in this manner, one could extend the moral equivalency argument to compensation for disabilities outside of the prenatal and neonatal context. This approach might lend support for funding for compensatory medical care that seeks to support alternative modes of functioning, rather than prioritizing accommodation that strives to normalize individuals by preventing deviations from normal species functioning. *Ceteris paribus*, extending the argument from moral equivalency in this manner lends tremendous weight to the voices of disabled individuals who prefer non-species-typical modes of functioning. The discussion now turns briefly to other theories of distributive justice that support distributing resources to facilitate non-species-typical modes of functioning.

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147. Menzel, *supra* note 142, at 177-78 (emphasis omitted).

148. If this analogy holds, there is no relevant moral difference between bringing an affected fetus or the "next child" (the next, hypothetical child, non-rigidly defined) to term. Although Menzel does not adopt the theory that Rawls presents in *A Theory of Justice*, *supra* note 55, if one was to apply this argument to Rawls, this would assume that the original contractors know of their existence and would not give treatment moral priority over prevention in an effort to preserve themselves. Further discussion of this point, however, is outside of the scope of this Article.
c. *Additional Arguments from Justice*

The dominant theories of just distribution, Rawlsian contractarianism (from which Daniels’s theory of normal species functioning is derived) and consequentialist schemes, also provide some support for distributing resources to aid alternative modes of functioning. Stated very generally, Rawls is concerned with just procedure of distribution (pure procedural justice), and consequentialists are concerned with best outcomes. The arguments are only very superficially surveyed here.

To begin, the notion of hypothetical consent used by Menzel could be applied to choice behind Rawls’s veil of ignorance, where individuals do not know their lot in life. In general, however, accommodating alternative modes of functioning under Rawlsian contractarianism is more difficult than under consequentialist schemes. This is because it is unclear what the difference principle, the conception that resources should be distributed to benefit the least advantaged, provides for individuals with disabilities. In addition, Rawls’s discussion of primary goods, the basic social goods that are distributed, takes little note of the diversity of needs between individuals. Since Rawls places emphasis on normal functioning by assuming that individuals are normal and fully functioning over a lifetime, an extension of his principles to a theory of the just distribution of health care services would likely use normal functioning as a baseline, as does Daniels’s theory. Further, as recognized by Ronald Dworkin, Robert Nozick, and Thomas Nagel, there is a social conscription of natural assets

149. As recognized by philosophically-minded Harvard economist Amartya Sen, “hard cases do exist, and to take disabilities, or special health needs, or physical or mental defects, as morally irrelevant [sic], or to leave them out for fear of making a mistake, may guarantee that the opposite mistake will be made.” Amartya Sen, *Equality of What?*, in *CHOICE, WELFARE, AND MEASUREMENT* 353, 366 (1982).

150. Rawls, *supra* note 55, at 440-46. Primary goods include the social bases of self-respect, rights and liberties, powers and opportunities, and income and wealth. These goods are considered primary because they are necessary for the fulfillment of all rational life plans. They avoid commitment to specific ways of life that a “thick theory of the good” would entail, and, as a result, are understood to represent Rawls’s “thin theory of the good.” Rawls’s contractors seek to maximize the amounts of primary goods available to citizens, though the concern is with pure procedural justice rather than just outcomes.

151. See John Rawls, *Social Unity and Primary Goods*, in *UTILITARIANISM AND BEYOND* 159, 168 (Amartya Sen & Bernard Williams eds., 1982) (Individuals are “normally active and fully cooperating members of society over a complete life”). Nevertheless, it might be possible to extend Rawls’s principles and adopt a baseline of functional output that is blind to one’s mode of functioning.
in Rawls in the sense that natural assets are treated as if they belong to society.\textsuperscript{152} As a result, Rawls's theory leans toward a common mode of functioning, such that natural assets can be measured across society. This makes it more difficult to accommodate non-species-typical modes of functioning, though Rawlsian contractarianism provides some support for atypical functioning, as is evident through Daniels's conditional extension of the fair equality of opportunity principle, encompassing the distribution of health care resources to compensate individuals who cannot be brought back to normal functioning.

Consequentialist theory offers direct consideration of alternative modes of functioning, although the distribution of resources for such purposes meets other constraints. Consider the theory of basic capability equality proffered by Amartya Sen.\textsuperscript{153} Stated very generally, Sen argues that "units" called capabilities are to be maximized across populations. These units comprise sets (capability sets) that reflect the actual functionings available to an individual. Pertinent to present purposes, this means that capability sets are defined relative to a person's ability (or disability). In other words, capabilities for functioning of that individual are accounted for directly. A person may choose to maximize her well-being by choosing a capability set with a particular level of functioning. It is possible that this level of functioning could be achieved by mechanisms normal for the species as well as those that fall outside of normal species functioning. If other individuals in that society value the same level of functioning, it may be equalized across the population considered, though there may be various means of attaining it.

Similarly, any mode of functioning that contributes to utility will be valued under a utilitarian consequentialist scheme, regardless of whether it is normal for the species. Utilitarianism, the theory of the greatest good for the greatest number, does meet some challenges in considering alternative modes of


functioning but is not undermined in this regard. For utilitarianism, there is a classic pure distribution problem. The disabled, who experience high satisfaction in their lives despite their disability, have weaker claims than those individuals without disabilities who live unhappy lives. This assumes, though, that accommodation addressing disability fails to increase sufficiently the happiness of the “happy disabled” to justify entitlement, but resources increase sufficiently the happiness of the “unhappy able-bodied” for this purpose, which may not be the case.154

Another commonly invoked argument against utilitarian or cost-utility approaches is that they create a situation of “double jeopardy” for individuals who develop serious illness or disability.155 It is viewed as double jeopardy in the sense that these individuals, often through “brute luck,”156 experience illness or disability and then subsequently have a lesser claim to resources as a result of those conditions. What this position reveals, though, is the tension between looking at distributive justice over a lifetime, as opposed to viewing it during certain periods of time.157 If the premise of justice over a lifetime is accepted, this form of double jeopardy does not constitute unjust treatment. The sick or disabled are offered an equal chance for treatment or resources over a lifetime.158

In sum, there seem to be strong normative reasons for considering alternative modes of functioning when compensating persons with disabilities. These justifications are derivative of dominant theories of distributive justice, with consequentialist frameworks offering the strongest support. As discussed in Subsection IV.3.b, justification may also be derived from the moral equivalency thesis of treatment and prevention. To fail to consider alternative modes of functioning emphasizes manner of functioning rather than functional outcomes and may reject valuable and preferred modes of functioning for persons with disabilities.

154. Sen, Equality of What?, supra note 153, at 365. I am unable within the confines of this Article to address all of the possible defenses that a utilitarian may have to such a standard critique. See J. J. C. Smart & Bernard Williams, Utilitarianism: For and Against (1973).


156. “Brute luck” refers to risks that are not the product of “deliberate” choice, such as one’s genetic composition or disabling condition or illness (assuming that one did not deliberately choose to place oneself in peril). Ronald Dworkin, Equality of Resources, in Sovereign Virtue: The Theory and Practice of Equality 73-74 (2000).


158. This may not adequately address the situation of individuals born with serious disabilities or illnesses. Some cost-utility measurements, such as Quality Adjusted Life Years, however, take into account the length of remaining life in determining entitlement to resources and may mitigate this problem for individuals who experience long-term disability.
4. Alternative Modes of Functioning and Accommodation Revisited

There are a number of reasons it may be important to account for the social element of disability, or alternative functioning, in making accommodations. First, the alternative modes of functioning model supports non-species-typical modes of functioning that may allow disabled persons to function in a manner that is preferred and more efficient. At a minimum, the alternative modes of functioning model would stress an interactive process between an employer and employee that considers non-species-typical accommodation. At a maximum, it would require the employer to provide preferred, non-species-typical accommodation, so long as it is reasonable and does not create an undue hardship or direct threat under the terms of the ADA. Recent work in the area of accommodation suggests both that accommodations are economically efficient and that supporting alternative modes of functioning is not more costly than supporting normal modes of functioning.159

The alternative model of accommodation would also provide greater protection to individuals with biological defects who currently function well in society or at work but may be highly susceptible to changes in their environments. A diabetic’s hidden disability may require a certain work schedule that allows for regular blood sugar tests and insulin as well as the ability to keep food and insulin in the workplace and eat meals at regular times.160 A shift in workplace or a new schedule imposed by a management change could easily disrupt the ability of the worker to control her diabetes.161 Failing to consider the social aspects of disability places such individuals on the brink of functional impairment by requiring them to wait for a workplace change in order to have their interests considered.162 A person with such hyper-sensitivities may not, if forced to sue, be entitled to disability protection under current judicial construction of the ADA, since her condition may be self-controlled in certain environments. The alternative modes of functioning model as applied to accommodation would encourage a dialogue between individuals and employers before environmental changes, in hopes of avoiding later conflicts, accommodation requests after expenditures to alter environments, or litigation.


161. Id. at 134-35.

162. As Silvers aptly states, “[p]eople whose impairments make them extraordinarily vulnerable to being made dysfunctional by seemingly innocuous alterations in their environments are substantially limited simply in virtue of their hypervulnerability.” Id. at 135.
A JURISPRUDENCE OF DYSFUNCTION

By advocating an alternative modes of functioning model for the accommodation stage of disability analysis, focus is placed on functional outcomes rather than modes of functioning. As discussed with regard to the health status index in Section II.C, there are some health policy models that purport to look to functional outcomes. These models often confuse manner of functioning with functional outcomes, however.163

CONCLUSION

This Article examines a discrete part of the problem with American disability law today. It argues that the Supreme Court's failure to consider properly the role of normal species functioning has severely enervated protections for the disabled and frustrated the purpose of the ADA. Part of the trouble is attributable to the Court confusing three distinct levels of disability analysis: eligibility for disability protections, entitlement to resources, and the nature of accommodation. This Article proposes a three-part disability analysis distinguishing these considerations that allows one to consider, with regard to each inquiry, the role of normal species functioning. Philosophical works about the normal species functioning and alternative modes of functioning models help clarify the application of normal species functioning to these three inquiries and established Supreme Court tests.

Proper consideration of normal species functioning leads to what this Article terms Functioning-Based Disability Analysis. There is philosophical and legal support for the application of the normal species functioning baseline to all three

levels of the disability threshold inquiry. There is similar support for the application of the normal species functioning baseline to the question of entitlement to resources. When determining the nature of remedy, or accommodation, however, the normal species functioning model fails to consider more efficient, alternative methods of functioning that may not be typical for our species. A strong case can be made that the disabled should be able to choose the nature of their accommodation as a matter of justice. Regulations and case law from the essential functions context provide additional support.

This Article examines the elements of disability analysis at its most concrete level and the role of normal functioning at a more abstract level. It is necessary to move between these two levels of abstraction to locate exactly what is wrong with American disability law today. As current Supreme Court jurisprudence indicates, it is extremely difficult to assess the role of normal species functioning when the levels of disability analysis are conflated. Similarly, it is not possible to answer the questions raised at each level of analysis without direct consideration of whether it is relevant that some individuals function effectively in a manner that is different from most of our species.

This understanding of disability analysis and functioning is an integral part of disability law reform. Only after understanding the levels of disability inquiry and the role of functioning as applied to each is it possible to see resolution to the over-arching tension between the civil rights and social welfare models of disability law. This takes one to yet a higher, though vital level of abstraction, to which this Article ultimately speaks.

The relevance of functioning to each level of disability analysis casts light on whether disability law should embrace a civil rights or social welfare model. Normative and legal claims support applying normal species functioning to the questions of whether an individual is disabled and entitled to a remedy. Applying the normal species functioning model in this way supports the civil rights model of disability law. The normal species functioning model furthers, as a matter of justice, an individual's normal opportunity range. This promotes equality of participation in civil society for a protected class of persons, namely, those who do not function in a manner that is normal for our species.

When it comes to allowing a disabled individual to determine the nature of the accommodation that would be most effective for her, the normal species functioning model, the civil rights model, and the law as it stands, stop short. The civil rights model is silent on manner of functioning, so long as equality of participation is promoted. Under this model, like the normal species functioning model, a firm need not support alternative modes of functioning. Arguments from particular philosophical perspectives and law support the alternative modes of functioning model for determining the nature of accommodation. The alternative modes of functioning model, which is a social model, looks to
functional outcomes within certain environments as opposed to the manner of functioning. Similarly, a social welfare model has the flexibility to redistribute resources to those most in need with functional impairments, regardless of manner of functioning. Thus, while the civil rights model gives broad rights to the disabled in a variety of contexts, the social welfare model responds to certain kinds of functioning disadvantages, creating an entitlement to resources that may support alternative modes of functioning. Hannah should be able to use her fleshy feet.