ON DISABILITY SPECIALIZATION

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ABSTRACT

A growing body of legal scholarship studies the recognition of disability: whether an individual is perceived, viewed, or understood to be disabled within society or within our disability legal regime. This Article introduces the novel concept of "disability specialization," a phenomenon representing a major determinant of when disability is recognized, that has yet to be acknowledged within disability scholarship or academic scholarship in general. Disability specialization is the extent to which a disability support is either consumed en masse by the general public or specialized as a niche for disabled people. The concept of disability specialization is a basic feature of the disability experience, yet it is commonly misperceived within public discourse, disability rights law, and predominant representations of disability. This misperception erases a major swath of the disability experience and has material societal and legal consequences, implicating anything from plastic use policy, to voting ballots, to motorized scooter regulation. As a case study, this Article devotes particular attention to the social and legal treatment of disabled people relying on Emotional Support Animals (ESAs). It argues that misperception surrounding disability specialization fuels the hostile public skepticism directed towards ESA handlers and motivated the exclusion of disabled ESA handlers from federal disability rights protections. This Article discusses both intentional access barriers, such as those faced by disabled ESA handlers, as well as the more covert but nevertheless pervasive and significant implications of misperception surrounding disability specialization. In light of such implications, the Article introduces a prescription for change, including both specific policy recommendations and a broad framework for moving forward. Disability specialization must be grappled with: within discussions of recognition and disability scholarship more broadly, within public policy, and within our systems for promoting disability access.

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INTRODUCTION

On January 11, 2021, the Department of Transportation (DOT) eliminated coverage for Emotional Support Animals (ESAs) under the Air Carrier Access Act (ACAA), thereby removing federal disability rights protections for disabled ESA handlers.[1] The ESA exclusion launched a wave of reaction from the public in the years and months leading up to its enactment.[2] The Notice of Proposed

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[1] 14 CFR § 382.3 (2024) ("Service animal means a dog, regardless of breed or type, that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Animal species other than dogs, emotional support animals, comfort animals, companionship animals, and service animals in training are not service animals for the purposes of this part").

[2] *See Traveling by Air with Service Animals Advanced Notice of Proposed Rulemaking (ANPRM)*, REGULATIONS.GOV, https://www.regulations.gov/docket/DOT-OST-2018-0068/comments (last visited Jan 16, 2023) [https://perma.cc/G9B3-EPGK]; Amanda M. Foster, *Civil Rights Law-Inclusion of Emotional Support Animals As Service Animals Under the ADA: Creating*

Rulemaking (NPRM), combined with the DOT's earlier proposals for the ESA exclusion received a total of over 32,000 public comments.[3] Commentary was highly polarized. Some voiced vehement opposition to the exclusion, noting the crucial role of ESAs as a psychiatric support.[4] Many encouraged the DOT to exclude ESAs from ACAA coverage, expressing concern about people faking their disability, or about risk associated with ESAs on planes.[5]

The ESA rejection—both societally and legally—serves as a quintessential case of common misperception surrounding what this Article names *disability specialization.* The disability specialization of a support is the extent to which that support is either consumed by the general public or specialized for disabled people. The concept of disability specialization is a fundamental feature of the disability experience but is widely misconstrued within public discourse, our social institutions, and within disability rights law. Disability specialization has not yet been acknowledged within disability scholarship despite its direct

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the Right to Use Dogs to Assist People Living with Mental Health Issues, 43 W. NEW ENG. L. REV 7, 23 (2021) ("Going back to July 2018, over 32,000 comments were made to the DOT related to rulemaking associated with traveling by air with service animals. . . . These comments were made by emotional support animal users, service animal users, mental health professionals, air carrier employees, air travelers, and veterans diagnosed with post-traumatic stress disorder.").

[3] Foster, *supra* note 2, at 23.

[4] *See, e.g.*, Gabrielle Ruiz, Comment on Proposed Rule Regarding Traveling by Air with Service Animals, https://www.regulations.gov/comment/DOT-OST-2018-0068-19304 ("I don't think emotional support animals should be banned from flights since millions of Americans rely on them for everyday life. ESAs, like mine are prescribed by healthcare professionals in order to ease stress, anxiety, depression and PTSD.") [https://perma.cc/CM5G-GS5S]; Harry William, Comment on Proposed Rule Regarding Traveling by Air with Service Animals, https://www.regulations.gov/comment/DOT-OST-2018-0068-18993 ("There are many people like me, and I think they will face problems. If necessary, I can also quit flying without my Emotional Support Animal, as it is essential for me.") [https://perma.cc/5NKA-C3HX]; Autistic Self Advocacy Network, Comment on Proposed Rule Regarding Traveling by Air with Service Animals, https://www.regulations.gov/comment/DOT-OST-2018-0068-19232 ("Without the calming effect of the emotional support animal, some autistic people and other people with mental disabilities may be unable to board the plane at all. . . . [T]herefore, inability to travel with an ESA may result in our inability to travel at all.") [https://perma.cc/PVB3-5XQS].

[5] *See, e.g.*, Jennifer Devereaux, Comment on Proposed Rule Regarding Traveling by Air with Service Animals, https://www.regulations.gov/comment/DOT-OST-2018-0068-3331 ("[A]nimals not trained for service in places of public accommodation pose a risk if not managed responsibly.") [https://perma.cc/A8GD-DUJB]; Skye Freeborn, Comment on Proposed Rule Regarding Traveling by Air with Service Animals, https://www.regulations.gov/comment/DOT- OST-2018-0068-8246 ("I feel that passengers have completely taken advantage of bringing pets on by easily purchasing medical vests for their animals and printing out lookalike documents.") [https://perma.cc/MH7Z-UQCP]; Paula Berscheid, Comment on Proposed Rule Regarding Traveling by Air with Service Animals, https://www.regulations.gov/comment/DOT-OST-2018-0068-22270 ("Yes, limit service animals to dogs. Other Passengers are often allergic to hair, dander, feathers, etc, of other types of animals.") [https://perma.cc/QUM9-BGFG]; American Association of Airport Executives, Comment on Proposed Rule Regarding Traveling by Air with Service Animals, https://www.regulations.gov/comment/DOT-OST-2018-0068-4138 ("The majority of AAAE members believe the ACAA regulations should conform to the DOJ's ADA regulations, which do not recognize emotional support animals, because ESAs are not trained to the same degree as all other service animals.") [https://perma.cc/9CQG-Y3Y6].

relevance to current disability discourse. A growing body of legal scholarship is concerned with the *recognition* of an individual's disability, and the implications of such recognition for our disability legal regime.[6] Even as disability specialization represents a major determinant of when disability is recognized, the concept of disability specialization is yet to be discussed within disability scholarship. While the concept of disability specialization has not penetrated academic scholarship, it is talked about in an unnamed fashion among disabled people—in online forums, in community spaces—simply because it is part of our everyday lives.[7] I write this Article as a white, neurodivergent disabled person, whose identity, functionality, and mode of operating is intimately affected by disability specialization and surrounding understandings of this phenomenon.[8]

This Article highlights the material implications of societal misperception surrounding disability specialization—that is, the material effects that such a misunderstanding has on the lived experiences of disabled people and their access to the supports that they need.

Of import, this Article discusses the *legal* implications of misperception surrounding disability specialization. This misperception implicates our federal

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[6] *See infra* Section I.A.

[7] This Article uses "identity-first" language, rather than "person-first language," consistent with *one* (but certainly not the only) dominant approach to disability language among disabled people and disability communities. *See, e.g.*, Erin E. Andrews, Anjali J. Forber-Pratt, Linda R. Mona, Emily M. Lund, Carrie R. Pilarski & Rochelle Balter, *#SaytheWord: A Disability Culture Commentary on the Erasure of "Disability"*, 64 REHABILITATION PSYCHOL. 111, 112 (2019) ("Those who identify as part of contemporary disability culture often elect to identify as 'disabled people,' deliberately affirming and reclaiming disability identity. . . . Culturally disabled people endeavor to defy the notion that disability is intrinsically negative and undesirable by using identity-first terminology."); Lydia X. Z. Brown, *The Significance of Semantics: Person-First Language: Why it Matters,* AUTISTIC HOYA (Aug. 04, 2011), https://www.autistichoya.com/2011/08/significance-of-semantics-person- first.html ("In the autism community, many self-advocates and their allies prefer terminology such as 'Autistic,' 'Autistic person,' or 'Autistic individual' because we understand autism as an inherent part of an individual's identity.") [https://perma.cc/S4QK-XFVX]; Kathleen Downes, *I Know I'm A Person. Thanks for the Reminder!: The Problem with Obligatory Person First Language,* THE SQUEAKY WHEELCHAIR (Oct. 20, 2014), http://www.thesqueakywheelchairblog.com/2014/10/i-know-im-person-thanks-for-reminder.html ("I am not afraid to call myself disabled, because to me, there is no shame in using it.") [https://perma.cc/2AC9-D7RG]; Emily Ladau, *What Should You Call Me? I Get to Decide: Why I'll Never Identify with Person-First Language*, *in* CRIPTIQUES 47, 48–49 (Caitlin Wood ed., 2014) ("[M]y disability is very much a part of what makes me human and what makes me whole. It gives me a sense of pride; I want it to be noticed and acknowledged.").

[8] Positionality statements are increasingly common throughout the social sciences. Kendall A. King, *Promises and Perils of Positionality Statements,* ANNUAL REV. OF APPLIED LINGUISTICS, 1, 1 (2024). They are part of reflexive practice, through which authors reveal their personal lens or relationship to a topic, countering the notion of an unbiased, objective researcher. *Id.* Authors often use these statements for self-accountability purposes, and to confront unequal power relationships within research. Jasmine K. Gani & Rabea M. Khan, *Positionality Statements as a Function of Coloniality: Interrogating Reflexive Methodologies,* 68 INT'L STUD. Q. 1, 3 (2024). Positionality statements have been met with the critique that they reinforce rather than reduce unequal power dynamics within research. *Id.* at 6-9. In this Article, the author uses a positionality statement simply to explain the author's use of terms such as "our" in making first-person assertions about disabled people and disability specialization.

disability rights regime and our policy-making process more broadly. This Article devotes considerable attention to the case study of ESAs as a quintessential instance of legal access barriers that result from common misperceptions surrounding disability specialization.

Part I of this Article introduces the concepts central to this Article. It reviews academic discourse surrounding disability recognition, introduces the concept of disability specialization, and articulates the misperceptions surrounding disability specialization within predominant understandings of disability. Part II discusses the *implications* of misperception surrounding disability specialization, with particular attention devoted to the overt societal skepticism towards, and legal barriers affecting ESA handlers. Part II also reviews the more covert, but nevertheless pervasive and significant implications of common misperception surrounding disability specialization. Part III offers a prescription for moving forward in light of these implications. It includes specific policy recommendations and an overall vision for change. Finally, the Article argues that disability specialization must be considered within academic scholarship, public representations of disability, and our legal infrastructure.

I. DISABILITY SPECIALIZATION AND SURROUNDING PERCEPTION

A. Recognition of Disability: Attitudes, Perception, and Knowledge

"If we are interested in trying to understand disability, and in trying to formulate disability policies that are both adequate and morally sensitive, we would do well to recognize that energy expended in the attempt to isolate 'the facts' of disability from the prevailing moral and social attitudes that influence our understanding of the meaning and salience of these facts is energy misdirected."[9]

\- N. Ann Davis

A growing body of legal scholarship focuses on the social and political recognition of disability status.[10] Distinct from the disability itself, "disability recognition" involves *attitudes, perceptions, and knowledge* of an individual's disability. Certain manifestations of disability are easily recognized as such, whereas others lack what Jasmine Harris calls "known or visible markers of disability."[11]

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[9] Ann Davis, *Invisible Disability*, 116 ETHICS 153, 155–56 (2005).

[10] *See, e.g.*, Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681, 1687 (2021); Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 179 (2020); Karen M. Tani, *Disability Benefits as Poverty Law: Revisiting the 'Disabled State'*, 170 U. PA. L. REV. 1687, 1720 (2022); Jamelia Morgan, *On the Relationship Between Race and Disability*, 58 HARV. C.R.-C.L.L. Rev. 201, 222 (2023). Note that "disability recognition" or "recognition" is not an already named area of disability scholarship. This article uses these terms to describe commonality across a spread of scholarship, as further articulated in this section.

[11] Harris, *supra* note 10, at 1687.

Recognition, or lack thereof, of an individual's disability status is often discussed in terms of visibility. Ann Davis discusses the "invisible disability," describing "individuals with conditions, illnesses, and structural or biomechanical anomalies that are life limiting but not readily discernible to others."[12] She notes that people with invisible disabilities may "appear 'normal' to people with whom they have casual interactions,"[13] and therefore may have to "approach strangers to inform them that they are disabled and to explain what sort of help is needed."[14] The Invisible Disability Project defines the invisible disability as "any physical, mental, or emotional impairment that goes largely unnoticed."[15] The visibility of a person's disability is by no means objective. To the contrary, visibility is a concept that describes the *perspective* of the viewer and the viewer's *ability to recognize* a person's disability. As Davis states, "[w]hen we say that something is invisible, we do not mean to claim that the thing is invisible to everyone, or to anyone in any circumstances. What we do mean is that it is (or would be) invisible to a particular set of perceivers under a particular set of conditions.... To say that something is invisible tout court is to invoke the viewpoint of perceivers."[16]

Discourse surrounding recognition often discusses an active attitude of *skepticism* that an individual's disability is fake, or not legitimate. This attitude of skepticism has been discussed in contexts such as the media,[17] in university settings,[18] and in historical contexts such as the United States Civil War pension system.[19] Davis discusses a "skeptical stance" directed towards people with invisible disabilities, which she describes as "a posture of suspicion,"[20] which "might be thought to stem principally from their worries about being deceived by other people, and thus manipulated by them."[21] Doron Dorfman discusses a similar skepticism as "fear of the disability con," which he describes as "the moral

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[12] Davis, *supra* note 9, at 153.

[13] *Id.* at 153–54.

[14] *Id.* at 154.

[15] *Invisible Disabilities Defined*, INVISIBLE DISABILITY PROJECT, https://www.invisibledisabilityproject.org/ (last visited Jan. 16, 2023) [https://perma.cc/EHT3-UW8R]. *See also in·vis·i·ble dis·a·bil·i·ty*, INVISIBLE DISABILITIES ASSOCIATION, https://invisibledisabilities.org/what-is-an- invisible-disability/ (last visited Jan. 16, 2023) (defining an invisible disability as "a physical, mental or neurological condition that is not visible from the outside, yet can limit or challenge a person's movements, senses, or activities") [https://perma.cc/73ZA-7P5Z].

[16] Davis, *supra* note 9, at 156.

[17] Elizabeth England-Kennedy, *Media Representations of Attention Deficit Disorder: Portrayals of Cultural Skepticism in Popular Media*, 41 J. POP. CULT. 91 (2008).

[18] Patricia J. McAlexander, *Learning Disabilities and Faculty Skepticism*, 13 RES. & TEACH. DEV. EDUC. 123 (1997).

[19] Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO STATE L.J. 109, 207 (2001) ("As illustrated by Study I's content analysis of the operation of the Civil War pension system, today's media coverage reflects skepticism and cynicism about the definition and legitimacy of disabilities claimed and covered by the law.").

[20] Davis, *supra* note 9, at 180.

[21] *Id.* at 181.

panic about people using 'fake disabilities' to exploit disability rights, anywhere from academic accommodations to parking privileges."[22]

In addition to this suspicion of disability fakers, is what can be called "legitimacy skepticism," or skepticism that an individual has a condition that is not severe enough to be a legitimate *disability* or to create a legitimate disability *need*. Lightman, Vick, Herd, and Mitchell illustrate legitimacy skepticism directed towards government assistance applicants with "episodic disabilities," stating that such applicants "are often denied eligibility because of the questionable legitimacy of their shifting medical conditions" and that "they are judged as 'not disabled

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[22] Doron Dorfman, *Suspicious Species*, 2021 U. ILL. L. REV. 1363, 1366 n.5 (2021) [hereinafter Dorfman, *Suspicious Species*]; *see also* Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 L. SOC. REV. 1051, 3 (2019) [hereinafter Dorfman, *Fear of the Disability Con*] (describing fear of the disability con as "the cultural anxiety that individuals fake disabilities to take advantage of rights, accommodations, or benefits"); Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109, 131 (2001) (stating that "[v]eterans with disabilities were marked in newspapers either as not in need of pension benefits or as taking advantage of the system" and pointing to a "series of articles entitled 'The Pension Carnival' . . . [with] titles such as 'Staining a Nation's Honor-Roll with Pretense and Fraud' and 'Favorite Frauds for Tricking the Treasury: Particular Cases of Masqueraders, Rogues, Perjurers, Fake-Veterans, and Bogus Widows in the Merry Game of Swindling the Government.'"). Modern fear of the disability con is well illustrated through public reaction surrounding accessible parking spots. Eden Strong illustrates her personal experience of such skepticism. *See* Eden Strong, *I Always Park in the Handicap Spot, But I Can Walk Just Fine*, YAHOO! NEWS (Sept. 8, 2016), https://www.yourtango.com/2016292902/i-always-park-handicapped-spot-can-walk-just-fine [https://perma.cc/PBF5-LEBE]. As Strong explains,

> I am legally handicapped. You just can't SEE my handicap. I don't walk with a limp or anything 'obvious.' You can't see my strength wasting away from a genetic disorder [it resembles Ehlers-Danlos Syndrome], which ravages my joints and steals my muscle tone…. you can't possibly understand what it feels like to not be able to push a shopping cart with more than a few items in it before your shoulders begin to scream in pain and beg for mercy. *Id.*

Strong discusses the level of skepticism she has received for walking to and from her car parked in a handicapped spot, discussing a woman who threw a coffee cup at her car and screamed,

> 'Get the f*ck out of the handicapped spot, you loser!' . . . 'You have legs, so use them! I watched you walk in and out of that building and you are a lazy excuse for a human being! I've taken down your license plate number and have called the police. YOU ARE GOING TO HELL!' *Id.*

This misinformed skepticism of supposed parking cons is perhaps most startling at the institutional level. For example, a CBS investigative article describes alleged disability fakers at a gym because cameras "caught many active people — working out . . . — moments after they parked" in an accessible parking spot. *CBS2 Investigation Looks Into Use Of Disabled Parking Placards*, CBS LOS ANGELES (Jan. 31, 2013), https://losangeles.cbslocal.com/2013/01/31/cbs2-investigation-reveals-rampant-fraud-in-use-of-disabled-parking-placards/ [https://perma.cc/NW9S-EUBZ]. CBS here is failing to understand a basic reality that not only may a person be capable of working out despite a mobility impairment, but furthermore they may be working out precisely *because* of it, in order to care for themselves and their condition. *See e.g.*, *Multiple Sclerosis and Exercise: Why MS Patients Should Stay Active*, NEUROSCIENCE BLOG (May 1, 2017), https://www.pennmedicine.org/updates/blogs/neuroscience-blog/2017/may/multiple-sclerosis-and-exercise#:~:text=When%20you%20have%20MS%20and,give%20your%20mood%20a%20boost ("When you have MS, exercise is one of the most important parts of treatment.") [https://perma.cc/P9P8-TN2B].

enough' within the existing parameters of assistance."[23] An interview subject of Kattari, Olzman, and Hanna alludes to legitimacy skepticism, stating, "I know what I need. I know I need a cane. I know I can't walk this far… I don't have to explain it to you and you should just respect the fact that I know what I need…"[24] The interview subject appears to be reacting to experiences of legitimacy skepticism, in this case skepticism that the interview subject has a legitimate need for their cane.

Common to the discussion of disability recognition is the premise that perceptions and attitudes surrounding disability have material and substantial implications for a disabled person's access to resources and entitlements. Davis highlights the access implications of invisibility, stating that "[w]hen individuals are not seen as disabled, it can be more difficult for them to secure the assistance or accommodation they need to function effectively."[25] Katari, Olzman, and Hanna illustrate that skepticism may serve as an access barrier to people with invisible disabilities, when such skepticism is adopted by those with the authority to determine who is entitled to needed disability supports.[26] People with invisible disabilities "may also have issues in accessing the services, support structure, and even physical spaces that they need, given assumptions about what their bodies and minds are able to do, and whether those given the power to make the distinction decide whether they are 'disabled enough.'"[27] Note that while the visibility literature tends to focus on barriers associated with invisibility, this literature by no means seeks to diminish the substantial and somewhat distinct access barriers for people whose disabilities are immediately visible.[28]

An emerging body of legal scholarship applies questions of disability recognition to our legal regime. Harris explores the legal implications of visible disability, noting that "as people with disabilities participate in the adjudication of their rights and those of others, the *appearances* of disability (and emotions they trigger) directly affect how those rights are interpreted."[29] Harris explores laws

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[23] Ernie Lightman, Andrea Vick, Dean Herd & Andrew Mitchell, *'Not disabled enough': Episodic disabilities and the Ontario Disability Support Program*, DISABIL. STUD. Q. (Aug. 1, 2009), https://dsq-sds.org/index.php/dsq/article/view/932/1108 [https://perma.cc/AAX3-PMCS]; *see also* Shanna K. Kattari, Miranda Olzman & Michele D. Hanna, *"You Look Fine!": Ableist Experiences by People With Invisible Disabilities*, 33 AFFILIA 477 (2018) (discussing the regular subjection by people with invisible disabilities to judgments regarding whether they are "disabled enough").

[24] Kattari, Olzman & Hanna, *supra* note 23, at 484.

[25] Davis, *supra* note 9, at 154.

[26] Kattari, Olzman & Hanna, *supra* note 23, at 478.

[27] *Id.*

[28] *E.g.*, Davis, *supra* note 9, at 155 ("In contesting the claim that things are de facto less difficult for those whose based disabilities are invisible than they are for those whose disabilities are visible, I am not asserting that appearance-based stigmatization does not have serious consequences or ones that are less significant than people have supposed."); Kattari, Olzman, & Hanna, *supra* note 23, at 478 ("Therefore, it is possible that members of this community experience ableism in different ways than those who have apparent disabilities."); *see generally* Jasmine E. Harris, *The Aesthetics of Disability,* 119 COLUM. L. REV. 895 (2019).

[29] Harris, *supra* note 28, at 935 (emphasis added).

protecting the *privacy* of an individual's disability status, versus the *publicity* of disability, to address the question: "how do we [] attend to the information deficits in society about disability that undermine antidiscrimination efforts?"[30] Legal scholarship is increasingly focused on questions surrounding *legal recognition* of disability, particularly as a mediator for who receives disability entitlements.[31] Belt and Dorfman explain that "the ADA, unlike the Civil Rights Act, mandates that claimants have a legally recognized disability before they can receive legal redress for discrimination, rather than merely requiring discrimination on the basis of disability."[32] They discuss the medicalization of who receives such legal recognition, pointing to "the history of offering comparatively enhanced recognition and benefits to people designated as medically worthy."[33] Karen M. Tani discusses the role of employment in the legal recognition of social security disability status, explaining that "historically, a working-age adult would be recognized as 'disabled' only if the market had no use for them."[34]

While not without exception, scholarship addressing the visibility of disability has often pointed to the disability itself as a determinant of when disability is recognized. Such discourse discusses disability *type* as a determinant of recognition (that some disabilities, particularly physical disabilities, are more visible or commonly recognized than others),[35] as well as disability *symptoms* as a determinant of recognition (that some symptoms are more visible or commonly recognized than others).[36] In discussing skepticism towards people with assistance

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[30] Harris, *supra* note 10, at 1687.

[31] *See* Belt & Dorfman, *supra* note 10, at 179; Tani, *supra* note 10, at 1719, Morgan, *supra* note 10, at 222.

[32] Belt & Dorfman, *supra* note 10, at 179.

[33] *Id.* at 178.

[34] Tani, *supra* note 10, at 1718.

[35] *See* Harris, *supra* note 28, at 967 ("Certain disabilities may be more apparent than others; wheelchair users, for example, are the quintessential models used in public spaces and by the media to represent disability [think disability parking placards or diversity marketing materials that include a wheelchair user]. Psychosocial, intellectual, or developmental disabilities, in some cases, may offer non-normative physical or behavioral markers that can trigger affective responses [such as facial features of Down Syndrome] but, more often, do not present any visible markers."); Carmit-Noa Shpiglman & Neta HaGani, *The Impact of Disability Type and Visibility on Self- concept and Body Image: Implications for Mental Health Nursing*, 26 J. PSYCHIATRIC & MENTAL HEALTH NURSING 77, 78 (2019) ("[I]t is important to understand the impact of disability type and its visibility on the individual's self-concept and body image."); Davis, *supra* note 9, at 153–54. ("People who suffer from severe depression, chronic pain, or posttraumatic stress disorder (PTSD); people who are violently allergic to common household chemicals; those who have a seizure disorder, chronic fatigue syndrome (CFS), or severe fibromyalgia; and those who have sustained a mild traumatic brain injury (MTBI) may all appear 'normal' to people with whom they have casual interactions. Yet they may still be disabled . . . ."); Patricia J. McAlexander, *Learning Disabilities and Faculty Skepticism*, 13 RES. & TEACH. DEV. EDUC. 123, 128 (1997) ("[A]s more students with learning disabilities speak out to describe their condition . . . I believe that teachers will come more fully to understand and accept the reality of these invisible handicaps . . . ."); Harris, *supra* note 10, at 1729 (citing data showing that non-physical disabilities are largely "less apparent").

[36] *See* Carmel Parker White, Mark B. White, & Candyce S. Russell, *Invisible and Visible Symptoms of Multiple Sclerosis,* 40 J. NEUROSCIENCE NURSING 85, 85 (2008) ("In recent years,

animals, Dorfman discusses "the marginalization of people with mental disabilities and chronic illnesses, whose disabilities are usually considered less visible, compared with people with more clear physical or sensory disabilities."[37] The discussion of visibility and recognition has not acknowledged what this Article refers to as *the specialization* of the disability experience, meaning the extent to which a disability support is consumed by the general public. Although the phenomenon of disability specialization is a major determinant of when an individual's disability is visible, and when an individual's disability is recognized as such, the concept has not yet penetrated academic scholarship.

To be clear, this Article is far from the first to expand discussion of disability recognition beyond the literature on the visibility of disability types and symptoms. Of note are movements highlighting the racialized gaps in disability recognition. Disability Critical Race Studies ("DisCrit") focuses on the intersection of race and disability, noting that discourse surrounding both these identities leaves out people living at the intersection of these identities, namely disabled people of color.[38] An emerging area of legal scholarship scrutinizes the failures of our disability rights regime to recognize and account for disabled people of color and multiply marginalized disabled people.[39] Jamelia Morgan argues that "individuals from negatively racialized groups are both (1) not recognized as disabled or (2) regarded as not disabled enough."[40] In tandem with DisCrit is public disability activism surrounding the erasure of disabled people of color. Disability activist Vilissa Thompson started the campaign

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increased attention has been given to the invisible symptoms of multiple sclerosis (MS), such as fatigue, pain, depression, and anxiety."); *in·vis·i·ble dis·a·bil·i·ty*, *supra* note 15 (defining invisible disability as "a physical, mental or neurological condition that is not visible from the outside, yet can limit or challenge a person's movements, senses, or activities" and describing these "symptoms" as "invisible").

[37] Dorfman, *Suspicious Species*, *supra* note 22, at 1368.

[38] *See* Subini A. Annamma, David Connor, & Beth Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY EDUC. 1, 4 (2013) ("In the field of CRT, for instance, it has been noted that the topics of dis/ability and special education are not sufficiently represented or simply omitted, despite many overlapping interests and concerns that hold the promise of potentially strong allegiances between researchers . . . . Similarly, there remains a vital task of fully accounting for race and critiquing the deployment of whiteness within the field of DS . . . ." (citations omitted)).

[39] *See* Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 684 (2021) ("This article argues that the absence of a critical racism/ableism analysis is subsuming the goals of disability equality under the ADA. In particular, the single-issue focus on disability is erasing the complex experiences that multiply marginalized disabled people experience, creating a revolving door of inequities that are compounded in disabled communities of color."); *see also* Jamelia N. Morgan, *Toward a DisCrit Approach to American Law, in* DISCRIT EXPANDED: REVERBERATIONS, RUPTURES, AND INQUIRIES 13, 14 (Subini A. Annamma, Beth A. Ferri & David J. Connor eds., 2022) ("An intersectional approach to and examination of disability law reveals how the ADA, despite its broad protections, leaves disabled people of color in particular underprotected.").

[40] Morgan, *supra* note 10, at 222.

#DisabilityTooWhite in 2016, to highlight that disability activism and media coverage of disability fails to account for disabled people of color.[41]

While certainly not the only determinant of when disability is recognized, the phenomenon of disability specialization nevertheless represents a major determinant of disability recognition that has yet to be identified or discussed within disability scholarship. This Article names and introduces the concept of disability specialization, and identifies the misperception surrounding this phenomenon that has caused it to go largely unrecognized both societally and within our disability legal regime.

B. On Disability Specialization

A product or service is *disability specialized* when it exists to provide a disability related benefit. In other words, a support has disability specialization when it is specialized for disabled people.[42] A wheelchair is the paradigmatic example of a disability specialized support. Wheelchairs have specialized features like wheels and a motor that distinguish wheelchairs from general consumption chairs, and these features are there to assist wheelchair users in moving from one location to another. Similarly, an educational practice is disability specialized if it is in some way distinct from general education pedagogy in order to help disabled students in school.

Nonspecialized supports lack disability specialization. Disabled writer, speaker, and model, Charis Hill, describes nonspecialized supports in a November 2020 tweet asking, "#DisabledTwitter, what's something nondisabled people see as unnecessary-but-useful, but is *necessary* for you?"[43] The plastic straw is a paradigmatic example of a nonspecialized support. In recent decades, it has been a mass market product, consumed regularly by nondisabled people, but it is

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[41] Vilissa Thompson (@VilissaThompson), Twitter (May 18, 2022), https://twitter.com/vilissathompson/status/1526926208360923137?s=46&t=_JKoC9k-zh3GWz5n8Qlt7g ("Today's the 6th anniversary of #DisabilityTooWhite! Can't believe it has been that long… very grateful that the term has been embraced by so many & allowed public, truthful discussions to be had about racism, anti-Blackness, & erasure in the #disability community.") [https://perma.cc/B42B-TQ88]; s*ee also* Carrie Elizabeth Mulderink, *The Emergence, Importance of #DisabilityTooWhite Hashtag,* Disability Stud. Q. (Apr. 4, 2020), https://dsq-sds.org/index.php/dsq/article/view/6484/5565 ("Activist Vilissa Thompson created the hashtag #DisabilityTooWhite in 2016. Thompson, a person of color with a disability, needed to resist how the disability rights movement and disability empowerment groups and disability media coverage in particular often leaves out the experiences of people of color with disabilities.") [https://perma.cc/4U4T-QTDG].

[42] This Article uses the term "support" as a catch-all term encompassing products, services, resources, and so on.

[43] Charis Hill ♿ (they/them) (@BeingCharisBlog), Twitter (Nov. 28, 2020, 1:05 PM), https://twitter.com/BeingCharisBlog/status/1332747538554785792?s=03 [https://perma.cc/WK4K-NPW5]. Disabled Twitter is a term used to describe the network of disabled people who tweet about their lives and experiences navigating the world with a disability, and often use X (formerly known as Twitter) as a form of disability activism. Those on Disabled Twitter commonly tweet objections to ableism and to their treatment by nondisabled people.

nevertheless relied on by many disabled people to consume liquids. As Disability Rights Washington stated in an open letter:

> Many people with physical disabilities such as cerebral palsy and multiple sclerosis require the use of plastic straws in order to hydrate. Other types of straws simply do not offer the combination of strength, flexibility, and safety that plastic straws do. Metal straws become hot or cold and offer a risk of injury. Some people… will bite through paper straws, and they dissolve if the person takes too long to drink.[44]

Disabled people use nonspecialized supports all the time to meet disability-related needs. Charis Hill's tweet to #DisabledTwitter demonstrates this regular feature of navigating a disability. Hill's tweet generated over two hundred posts from Twitter users, chiming in with lists of items they need for disability reasons, that for non-disabled people are "unnecessary-but-useful."[45] One person listed "air conditioning or I'd faint constantly . . . ."[46] Another stated "Food delivery. Trash pickup. Washer and dryer in unit. During moderate to severe bipolar mood shifts, I will forget to eat, not be able to cook or clean, struggle to wash, etc."[47] A recent Vox article by disabled writer s.e. smith illustrates the commonality of certain nonspecialized supports within the disability experience. As the article explains, "People with disabilities themselves often end up filling the gaps for those who haven't or can't access professional services. They swap tips and tricks for products that have worked for them…. This kind of innovative repurposing of tools for accessibility purposes is common in disability spaces."[48]

Nonspecialized supports are not a new phenomenon. Historian Bess Williamson describes disabled people in the 1960s using nonspecialized supports in her account of the *Toomyville Junior Gazette*, a magazine for polio survivors. As she describes:

> People with disabilities balanced the frustration of contending with the design of mass-market products and furnishings with

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[44] Disability Rights Washington, Facebook (June 26, 2018), https://www.facebook.com/disabilityrightswa/photos/a.519865841447842.1073741835.113848822049548/1397155980385486/?type=3&theater [https://perma.cc/8ML2-4QGL].

[45] Charis Hill ♿ (they/them), *supra* note 43.

[46] zen or zennifer (she/her) (@ZenMeoww), Twitter (Nov. 28, 2020, 2:21 PM), https://twitter.com/ZenMeoww/status/1332766601851129862 (@ZenMeoww shared additional context through personal communication with the author that she has Postural Orthostatic Tachycardia Syndrome (POTS) and Ehlers-Danlos Syndrome (EDS)) [https://perma.cc/P52P-Q8SF].

[47] A.E. (@AceOnFire77), Twitter (Nov. 28, 2020, 6:06 PM), https://twitter.com/AceOnFire77/status/1332823248485167106 [https://perma.cc/QDE2-7SQE].

[48] s.e. smith, *Products Mocked as "Lazy" or "Useless" Are Often Important Tools for People with Disabilities*, Vox (Sept. 20, 2018, 8:30 AM), https://www.vox.com/the-goods/2018/9/20/17791354/products-people-disabilities-sock-slider-banana-slicer-lazy?fbclid=IwAR1Xvy9juzIKM0uNjh-Zk043TsVMZZf3NSXanSsHedeQ2NvJ5_fEm0UcKeA [https://perma.cc/C6YB-JRB5].

> pride and delight in finding the right tools for a given job. . . . This kind of individual decision-making, based on one's relative strength and coordination, as well as personal taste, engaged people with disabilities in an intensive form of shopping. The women homemakers—as well as some bachelors and husbands—who wrote to the Gazette took careful note of brand names, noting specific models of automatic can openers, electric knives, and mixers they found most promising for persons with limited hand strength. For those who fumbled with glass and ceramic dishware, new plastics offered more than just colorful or airtight storage: "Bless Tupper Ware [sic]" wrote one contributor, "you can drop it and it doesn't fly open and spill contents."[49]

As Williamson's narrative illustrates, disabled people have historically made use of nonspecialized supports to meet their disability-related needs.

Disability specialization exists along a spectrum, with some products existing somewhere in between specialized and non-specialized. Some products have "Universal Design," meaning they are designed both to be disability-accessible and to be used by the general public, regardless of disability status.[50] Products with a Universal Design fall somewhere in between specialized and non-specialized supports. They are general consumption products; however, they also exist to meet disability related needs.[51] Similarly, wheelchair ramps are disability specialized supports; however, they do not seem quite as disability specialized as wheelchairs themselves, as ramps are also commonly used by able-bodied people.

Disability specialization is volatile, meaning that supports can become more or less disability specialized over time. Supports can decrease in disability specialization if they become increasingly utilized by nondisabled people and increasingly produced for the general public. Consider weighted blankets, which have gained wide scale, mass market popularity in recent years.[52] Before their mass-market popularity, weighted blankets were a disability specialized product, used primarily for and by people with mental conditions such as autism to address

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[49] Bess Williamson, *Electric Moms and Quad Drivers: People with Disabilities Buying, Making, and Using Technology in Postwar America,* 52 AM. STUD. 5, 16–17 (2012).

[50] Bess Williamson, *Disability in American Industrial Design of the Late Twentieth Century*, 46 WINTERTHUR PORTFOLIO 213, 214 (2012) ("The underlying claim of universal design was that addressing the concerns of people with disabilities in everyday products would bring design solutions for all—and thus, design solutions that could compete successfully in a mass marketplace").

[51] For example, Bess Williamson discusses a 1978 Cuisinart food processor with universal design. *Id.* at 224–25. The processor was a mass-market product but was also designed to provide benefits for those with conditions such as arthritis and visual disabilities. *Id.* This product would fall somewhere in between specialized and non-specialized, given that it was both designed to provide disability-related benefits, but was also a general consumption product.

[52] Sian Babish, *Why Weighted Blankets Became the 'It' Present for the Holidays,* N.Y. DAILY NEWS (Jan. 10, 2020), https://www.nydailynews.com/2020/01/10/why-weighted-blankets-became-the-it-present-for-the-holidays/ [https://perma.cc/3QER-26MM].

symptoms including anxiety and sensory sensitivities.[53] Occupational therapist Tina Champagne began using weighted blankets in adult acute care mental health facilities in 1999.[54] In recent decades, companies like SensaCalm sold weighted blankets primarily to parents of disabled children.[55] Weighted blankets only gained widescale popularity in the late 2010s.[56] In 2017, Gravity Blanket launched a mass-market kickstarter, raising over 3 million dollars for its weighted blanket in two weeks.[57] By 2018, the market had further expanded with Target producing an affordable weighted blanket, and by 2019, over two dozen companies were producing weighted blankets.[58] By 2020, the weighted blanket had a global market value of $381.44 million.[59] This shift in the weighted blanket market from a niche disability product to one of mass-market appeal is a clear instance of decreased disability specialization, in this case a shift from a highly disability specialized product to a largely nonspecialized product.

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[53] Tina Champagne, Brian Mullen & Debra Dickson, Presentation at the 2007 American Occupational Therapy Association's Annual Conference, https://www.nasmhpd.org/sites/default/files/V_2_B_ChampaignWeightedBlanket.pdf ("The therapeutic use of weight has been utilized and explored by occupational and physical therapists [rehab professionals] for many years. OT's using a sensory integrative approach first utilized and promoted the use of weighted vests and weighted blankets with children and adolescents with learning disabilities and pervasive developmental disorders."); Sarah Riccio, *The Truth (and Surprising Controversy) Behind the Weighted Blanket Trend,* SLEEPOPOLIS (July 27, 2023), https://sleepopolis.com/news/controversy-weighted-blanket-trend/ ("[T]hose with autism, Aspergers, PTSD, and other sensory processing disorders have historically used weighted blankets to alleviate anxiety and calm the nervous system.") [https://perma.cc/XW5H-FGJW]; Shelby Pope, *The Allure of the Weighted Blanket,* BRAINFACTS.ORG (Nov. 30, 2018), https://www.brainfacts.org/thinking-sensing-and-behaving/sleep/2018/the-allure-of-the-weighted-blanket-112918 ("Weighted blankets and other forms of deep pressure stimulation have a long history in the autism community.") [https://perma.cc/RZC7-5EYM].

[54] Champagne, Mullen & Dickson, *supra* note 53.

[55] Ashley Fetters, *The Problem with This Year's Most Comfortable Holiday Fad,* ATLANTIC (Dec. 17, 2018), https://www.theatlantic.com/health/archive/2018/12/weighted-blanket-history-holiday-gift/578347/.https://www.theatlantic.com/health/archive/2018/12/weighted-blanket-history-holiday-gift/578347/ [https://perma.cc/K6YV-B2L6].

[56] Samantha Hurst, *Unbelievable: Weighted Blanked "Gravity" Surpasses $3 Million in Two Weeks on* Kickstarter, CROWDFUND INSIDER (May 11, 2017), https://www.crowdfundinsider.com/2017/05/100177-unbelievable-weighted-blanket-gravity-surpasses-3-million-two-weeks-kickstarter/ [https://perma.cc/U5BL-PF8P]; *Weighted Blankets: From Fad to Mainstream*, CHI MERCY HEALTH (Apr. 17, 2019), https://chimercyhealth.com/medical-news/weighted-blankets-from-fad-to-mainstream/ [https://perma.cc/N38K-9WRP] [hereinafter CHI Mercy Health]; Dalvin Brown, *Weighted Blankets: Here's how the Trendy Bedding Got so Popular*, USA TODAY (Jan. 26, 2019), https://www.usatoday.com/story/news/nation/2019/01/26/weighted-blankets-makers-weigh-products-sudden-success/2558957002/ [https://perma.cc/RR5W-QUTY].

[57] Hurst*, supra* note 56.

[58] CHI Mercy Health, *supra* note 56.

[59] *2021-2027 Global and Regional Weighted Blanket (Gravity Blanket) Industry Status and Prospects Professional Market Research Report Standard Version*, MARKET REPORTS WORLD (Aug. 3, 2021), https://www.marketreportsworld.com/2021-2027-global-and-regional-weighted-blanket-gravity-blanket-industry-status-and-prospects-professional-market-18832319 [https://perma.cc/PFU7-W8LP].

The popularization of a disability specialized support might be considered an iteration of the "curb-cut effect," which occurs when a product or system initially intended to support a particular group becomes popular or beneficial to a larger community.[60] The plastic straw underwent a similar process before becoming a quintessential nonspecialized support. Plastic straws began as a disability specialized product, as they were initially utilized by hospitals so that patients could drink while lying in bed.[61] Plastic straws were popularized for the general public because they were more durable and less expensive to produce than paper straws, and by the 1960s, infrastructure existed for their mass-market production.[62]

Like the weighted blanket and plastic straw, the absentee ballot has dramatically decreased in specialization, particularly in 2020, as states expanded absentee ballot systems due to the outbreak of coronavirus.[63] To vote absentee in excuse states, voters must fall into one of the qualifying excuse categories, which includes voters who cannot go to a polling site due to illness or disability.[64] Absentee ballots in excuse states, while not fully disability specialized, might be called partially disability specialized. They are used both by people who demonstrate a disability-related need for an absentee ballot and by certain people regardless of disability status, such as those who are out of the county on election day.[65] In contrast to excuse states, absentee ballots in no-excuse states are nonspecialized. In these states, any eligible voter can vote absentee, regardless of their reason.[66] Because of the COVID-19 pandemic, 2020 saw a major shift in the disability specialization of absentee ballots. In response to the coronavirus outbreak, 23 states and Washington D.C. either shifted their absentee ballot systems to no excuse voting or added fear of the coronavirus as a qualifying excuse for an absentee ballot,[67] thereby significantly reducing the disability specialization of these absentee systems.

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[60] *See generally* Angela Glover Blackwell, *The Curb-Cut Effect*, 15 STAN. SOC. INNOVATION REV. 28 (2017).

[61] Alice Wong, *The Rise and Fall of the Plastic Straw: Sucking in Crip Defiance,* CATALYST (Apr. 1, 2019), https://catalystjournal.org/index.php/catalyst/article/view/30435/24783 [https://perma.cc/WVV3-MTVW]; Sarah Gibbons, *A Brief History of How Plastic Straws Took over the World*, NAT'L GEOGRAPHIC (Jan. 2, 2019), https://www.nationalgeographic.com/environment/article/news-plastic-drinking-straw-history-ban [https://perma.cc/64EK-CBVR].

[62] *Id.*

[63] Kate Rabinowitz & Brittany Renee Mayes, *At Least 84% of American Voters Can Cast Ballots by Mail in the Fall*, WASH. POST (Sept. 25, 2020), https://www.washingtonpost.com/graphics/2020/politics/vote-by-mail-states/ [https://perma.cc/4UD3-C3R3].

[64] *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options,* NAT'L CONF. OF STATE LEGISLATURES (Sept. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#excuses [https://perma.cc/4UD3-C3R3].

[65] *Id.*

[66] *Id.*

[67] Rabinowitz & Mayes, *supra* note 63.

Supports can also increase in disability specialization over time. For example, a support may become more specialized if it becomes legally restricted or loses popularity among the general public. While plastic straws have been paradigmatic nonspecialized supports in the 21st century, they are now increasing in disability specialization due to environmental politics and resulting bans or restrictions on plastic straws. In 2018, Seattle became the first major city to ban plastic straws,[68] and in 2019, California became the first state to require restaurants to provide plastic straws only upon request.[69] As of 2020, cities and states across the United States, particularly in a number of blue states, have legally restricted the use of plastic straws.[70] Similarly, in Europe, the EU's 2019 Directive on Single-use Plastics "prohibit[s] the placing on the market" of plastic straws in EU member states.[71] These restrictions on plastic straws have led to a significant increase in the disability specialization of plastic straws, particularly in jurisdictions that explicitly limit their usage to disability-related need. Seattle, for example, provided an exception to plastic straw restrictions "when needed by customers due to medical or physical conditions and for whom flexible compostable paper straws are unsuitable."[72] Similarly, the EU's directive exempts plastic straws "intended and used for special medical purposes."[73] Like the disability excuse for absentee ballots, these disability exemptions on plastic straw bans transform plastic straws

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[68] *Straws And Utensils*, SEATTLE PUBLIC UTILITIES, http://www.seattle.gov/util/cs/groups/public/@spu/@foodyard/documents/webcontent/1_074388.pdf (last visited Jan. 28, 2024) ("Food service businesses are prohibited from using plastic straws and plastic utensils in Seattle. The temporary exemption for plastic straws and plastic utensils will expire, and the use of compostable straws and compostable utensils will be required, effective July 1, 2018.") [https://perma.cc/9UTT-BYV7]; *Seattle Becomes First U.S. City To Ban Plastic Utensils and Straws,* CBS NEWS (July 2, 2018, 6:45PM), https://www.cbsnews.com/news/seattle-becomes-first-u-s-city-to-ban-plastic-utensils-and- straws/ [https://perma.cc/SBE5-E3UB].

[69] Jeff Daniels, *California Governor Signs Bill to Reduce Plastic Straw Use, Cut Waste 'Choking Our Planet',* CNBC (Sept. 20, 2018, 6:42 PM), https://www.cnbc.com/2018/09/20/california-gov-jerry-brown-signs-bill-to-reduce- plastic-straw-use.html (citing Assembly Bill No. 1884) [https://perma.cc/9ULS-HP9S].

[70] Chuiyan Mo, *Single-Use Plastic Regulations in the United States: An Overview*, COMPLIANCE GATE (Dec. 22, 2020), https://www.compliancegate.com/single-use-plastic-regulations-united- states/ [https://perma.cc/L8YB-P2AF]; *Eco Hotels: Take a Trip Without Single-Use Plastics,* ORBITZ, https://www.orbitz.com/blog/noplastics/?affcid=orbitz- (last visited Jan. 16, 2023) [https://perma.cc/Z6EJ-2CNS].

[71] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the Reduction of the Impact of Certain Plastic Products on the Environment, 2019 O.J. (L 155) 10.

[72] SEATTLE PUBLIC UTILITIES, DIRECTOR'S RULE SW-500.1 (2018), https://www.seattle.gov/util/cs/groups/public/@spuweb/@policy/documents/webcontent/1_064356.pdf.

[73] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the Reduction of the Impact of Certain Plastic Products on the Environment, 2019 O.J. (L 155) 17 (exempting plastic straws that "fall within the scope of Directive 90/385/EEC or Directive 93/42/EEC").

into disability specialized products, existing solely for disability related purposes.[74]

The plastic straw and absentee voting system provide useful examples of how truly volatile disability specialization can be. The plastic straw began as disability specialized, dramatically shifted to a paradigmatic nonspecialized support, only to move back towards disability specialization in recent years. Absentee ballot systems may undergo a similar cycle, depending on state responses to public health concerns. As demonstrated by the plastic straw and absentee ballot system, disability specialization is volatile to the point of multi-directionality–that is, the disability specialization of a support can shift back and forth over time.

C. Misperception Surrounding Disability Specialization

False presumptions surrounding disability specialization are apparent from the recognition of certain disability specialized supports, in contrast to the lack of recognition of nonspecialized disability supports. The white cane's history illustrates the societal and institutional recognition of a disability specialized support. White canes were promoted as tools for blind people in the twentieth century through organized movements in a number of different countries. [75] Starting in 1931, Guilly d'Herbemont lead a movement to promote white canes for blind people in France, prompting a similar initiative in the United Kingdom.[76] That same year, in the United States, the Lion's Club launched a national initiative in favor of white canes for blind individuals.[77]

In the twentieth century, the white cane was societally and legally recognized as a disability specialized product. In May 1931, BBC suggested through radio broadcast that all blind people in the United Kingdom should receive white canes that would be universally recognized as a symbol for the blind.[78] In 1936, Detroit

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[74] Of course, these laws raise the question of whether plastic straws will actually continue to be accessible to disabled people in such jurisdictions. The Seattle ordinance, for example, while providing this exemption for disabled people, certainly does not require entities to continue providing plastic straws for this disability purpose, which raises the question of whether entities will continue to provide plastic straws at all in light of this sweeping ban. Even if entities do continue to provide plastic straws upon request, disability activists have called into question the accessibility of an "upon request" system for providing plastic straws. *See, e.g.*, Faima Bakar, *The Straw Ban Might Cut Down Plastic Waste but It's Not Fair on Disabled People,* METRO (July 19, 2018), https://metro.co.uk/2018/07/19/the-straw-ban-might-cut-down-plastic-waste-but-its-not-fair-on-disabled-people-7732506/ ("By making them available only upon request you've put someone's quality of life in the hands of someone with little knowledge of disability." (quoting disability activist Imani Barbarin)) [https://perma.cc/6CU5-9ZAQ].

[75] Ewa Borkowski, *Colour and Fashion: Evolution of the Mobility Cane*, 2 INT. J. ORIENTATION & MOBILITY 65, 65 (2009).

[76] *Id.*

[77] *Id.*

[78] *Id.*; Philip Strong, *The History of the White Cane*, NJ COUNCIL OF THE BLIND, https://www.njcounciloftheblind.org/brochures/history_of_white_cane.htm (last visited Jan. 16, 2023) [https://perma.cc/R2UD-76N3].

passed an ordinance recognizing the white cane as a symbol for the blind and celebrated the ordinance by presenting white canes to blind individuals in front of Detroit City Hall.[79] In 1937, Michigan passed a law establishing protections for blind individuals traveling on the street with white canes.[80] Thanks to advocacy by organizations such as the National Federation for the Blind,[81] President Johnson, in 1964, proclaimed October 15th of each year to be White Cane Safety Day.[82] In his proclamation, Johnson stated, "A white cane in our society has become one of the symbols of a blind person's ability to come and go on his own. Its use has promoted courtesy and opportunity for mobility of the blind on our streets and highways."[83]

Indeed, the white cane's ability to trigger social recognition is in and of itself one of its key disability specialized features. During the 1920s and 30s, blind people utilized white canes specifically to signal blindness to others, holding white canes in fixed diagonal positions.[84] Only following World War II were white canes designed to provide benefits to blind people apart from their ability to trigger recognition.[85] Doctor Richard Hoover designed the "Hoover," or "long cane," which provided blind people with the ability to detect obstructions within their path, while also continuing to provide a signaling function.[86] To this day, one of the standard forms of white canes serves the purpose of winning recognition for the disabled individual.[87] Referred to as an Identification, or ID cane, this white cane serves the function of alerting others that the user is visually impaired.[88]

Unlike specialized supports, like the white cane, non-specialized supports tend not to be recognized as a disability support. While obvious for many disabled people, the broader public is often not aware that disabled people rely on everyday objects and resources to meet their access needs. S.e. smith's Vox article educates readers on the subject, including as a sub-headline "Some of the most useful products for people with disabilities weren't developed with them in mind."[89]

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[79] Strong, *supra* note 78.

[80] *Id.*

[81] *White Cane Awareness Day*, NATIONAL FEDERATION FOR THE BLIND, https://nfb.org/programs-services/blind-equality-achievement-month/white-cane-awareness-day (last visited Jan. 16, 2023) [https://perma.cc/2FWH-RPRR].

[82] Strong, *supra* note 78.

[83] *Id.*

[84] *Id.*

[85] Borkowski, *supra* note 75, at 65–66.

[86] *Id.*

[87] Bill Winter, *10 Fascinating Facts About the White Cane*, PERKINS SCHOOL FOR THE BLIND, https://www.perkins.org/stories/10-fascinating-facts-about-the-white-cane#:~:text=There's%20the%20standard%20mobility%20cane,they%20have%20a%20visual%20impairment (last visited Jan. 16, 2023) [https://perma.cc/V9FH-F5HG].

[88] *Id.*

[89] Smith, *supra* note 48.

Public discourse surrounding objects defined as "useless" or associated with "laziness" reflects societal ignorance of nonspecialized supports. Eman Rimawi-Doster describes this ignorance on Disability Twitter, pointing to "easy-to-use tools for the kitchen that ppl call lazy…."[90] As smith discusses,

> Things like banana slicers, egg separators, jar openers… and much more are the subject of constant amusement on the internet: "Who uses these kinds of things?" "You don't need an avocado slicer." These products are typically positioned as "useless" … [however, p]roducts like the banana slicer, pizza shears, or similar items… can be especially useful for people who can't safely or comfortably use knives. That can include people with disabilities who have impairments that make it hard to grip and direct their movements…[91]

Products discussed by smith and Rimawi-Doster are nonspecialized supports, as they are general consumption products. However, disabled people use these products to meet disability-related needs. Public discourse that brands these products as useless and for lazy people amounts to a failure to recognize nonspecialized supports.

This lack of recognition afforded to nonspecialized supports exists at the institutional level. In July of 2018, Starbucks announced it would stop providing plastic straws to its customers.[92] The announcement sparked a wave of outrage among disability activists across the country because of its effect on those who need plastic straws to hydrate. Disability activists planned protests and released public statements objecting to the decision.[93] Disabled Twitter was enflamed with rage at Starbuck's announcement, highlighting the implications of such change for the disabled community.[94] Starbuck's decision to halt the provision of plastic

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[90] Eman Rimawi-Doster (@Eman_Rimawi), TWITTER (Nov. 29, 2020, 2:17 PM), https://twitter.com/Eman_Rimawi/status/1333127987894636547?s=20 [https://perma.cc/C2XC-BBLV].

[91] Smith, *supra* note 48.

[92] *Starbucks to Eliminate Plastic Straws Globally by 2020*, STARBUCKS STORIES (July 09, 2018), https://stories.starbucks.com/press/2018/starbucks-to-eliminate-plastic-straws-globally-by-2020/ [https://perma.cc/7P48-SKZ4].

[93] Imani Barbarin, *The #StrawBan is the Latest Policy Abled Allies Are Choking On*, CRUTCHES & SPICE (July 17, 2018), https://crutchesandspice.com/2018/07/17/the-strawban-is-the-latest-policy-abled-allies-are-choking-%20on/ [https://perma.cc/K2VT-HY6W]; Molly Enking, *Disability Rights Groups Voice Issues with Starbucks' Plastic Straw Ban as Company Responds*, PBS (July 18, 2018), https://www.pbs.org/newshour/health/disability-rights-groups-voice-issues-with-starbucks- plastic-straw-ban-as-company-responds [https://perma.cc/3RCS-NZE6].

[94] *See e.g.*, nix (@silverswansong), TWITTER (July 9, 2018, 2:12 PM), https://twitter.com/silverswansong/status/1016384609901268992 ("i cannot use metal/glass/bamboo/pasta/corn straws during tics. i will injure myself due to #Tourettes. i eat paper due to #PicaDisorder. i bite down hard regularly during tic storms. this = mulch. i cannot use paper/card straws.") [https://perma.cc/M84J-AE9R]; Keah Brown (@Keah_Maria), TWITTER (July 15, 2018, 8:31 PM), https://twitter.com/Keah_Maria/status/1018654357078802433 ("So many people in here & in the world hate[]disabled people. That's crystal clear with the discussion of

straws was an institutional failure to recognize plastic straws as a nonspecialized support, one that is necessary for many disabled people to consume liquid.

Media discourse surrounding weighted blankets underscores the extent of the general public's ignorance about nonspecialized supports. In recent years, online news sources began publishing articles concerned about the "appropriation" of weighted blankets from "special-needs" communities. An article in *The Atlantic* discussed "a story of appropriation—a story about the sale of the special-needs community's promise of life-changing comfort to the meditation-app-using, Instagram-shopping masses."[95] Another article opens with the header, "The Truth (And Surprising Controversy) Behind the Weighted Blanket Trend."[96] The article highlights that "many feel that weighted blankets were appropriated from the special-needs community, and re-marketed as a hip fad."[97]

Unfortunately, neither of these articles cite to the perspective of a disabled person to clarify whether any "special-needs" people are in fact concerned about alleged appropriation. As a response to the *Atlantic* article, autistic author and founder of NOS Magazine, Sara Luterman, wrote an article entitled, "You Can't 'Culturally Appropriate' a Weighted Blanket."[98] Luterman explains, "As an autistic person, did I ask for this defense? No. But I sure got it."[99] She notes, "nondisabled people using amenities originally designed for disabled people does nothing but improve our lives. It's called the 'curb-cut effect'."[100] Luterman explains, "When I bought my weighted blanket years ago, it cost a little less than $400… Now I can get a weighted blanket, in an adult size, on sale at Target for as low as $79.99… If that's cultural appropriation, please, appropriate away."[101] Luterman illuminates the degree of ignorance underlying articles concerned about the appropriation of weighted blankets. Such articles not only misapply the concept of appropriation, but also demonstrate an entire lack of awareness, in this case by public news sources, about the existence of nonspecialized disability supports.[102] They fail to understand that disabled people often rely on mainstream products to meet their disability needs, and that such a phenomenon is not only unproblematic

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#StrawBan its so sad.") [https://perma.cc/V95N-U9CD]; Alice Wong (@SFdirewolf), TWITTER (July 10, 2018, 9:59 PM), https://twitter.com/SFdirewolf/status/1016864506822029315 ("Hey @Starbucks! How about offering both types of straws? I still need a plastic straw w/ your new lids because I cannot lift a drink (see profile pic). Your whole menu is about customization & options. 1 venti accessibility w/ a shot of customer service please! #StrawBan") [https://perma.cc/PDD2-FF5L].

[95] Fetters, *supra* note 55.

[96] Riccio, *supra* note 53.

[97] *Id.*

[98] Sara Luterman, *You Can't "Culturally Appropriate" a Weighted Blanket*, SLATE (Jan. 10, 2019), https://slate.com/human-interest/2019/01/weighted-blanket-appropriation-autism-controversy.html [https://perma.cc/Y9GL-ZTQP].

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] Fetters, *supra* note 55; Riccio, *supra* note 53.

but is core to the disability experience. As Luterman reveals, it can also lead to products being much more affordable.[103]

Unlike public recognition of disability specialized supports, there is often a complete lack of awareness that disabled people rely on nonspecialized supports, let alone that nonspecialized supports are a staple feature of the disability experience. This recognition gap amounts to societal and institutional misperception surrounding disability specialization. That is, an inherent misperception exists at the social and institutional level that only disability specialized supports can meet disabled people's needs, not supports consumed by the general public. This misperception has nonsensical and problematic implications, as it ties up the recognition of a disabled person's needs, and even the recognition of their disability status, with the consumption trends of the general public. Whether a product or service will be recognized as a needed support for disabled people depends on whether nondisabled people happen to consume that support at a specific point in time. Should nondisabled people use a product that serves as a support for a disabled person, the disabled person risks losing recognition that they legitimately need the support for their disability, and perhaps risks losing recognition that they are disabled.

To be clear, this Article's contention is not that the consumption of disability supports by nondisabled people is problematic. Instead, the section's contention is that *misperception* and *ignorance* surrounding the phenomenon of nonspecialized supports impacts the recognition of disabled people. Ignorance surrounding disability specialization means the recognition of disabled people is dependent on general public consumption trends.

II. THEORETICAL, SOCIETAL, AND LEGAL IMPLICATIONS OF MISPERCEPTION SURROUNDING DISABILITY SPECIALIZATION

A. Introduction

Common to disability recognition discourse is the contention that perceptions and attitudes surrounding disability have material and substantial implications for a disabled person's access to resources and entitlements.[104] Harris states that the "known or visible markers of disability…effectively define the scope of legitimate claims to disability rights."[105] Despite the growing attention to the role of disability perceptions and recognition in shaping disability rights and accessibility, the literature has yet to consider how disability specialization contributes to this phenomenon. This section uses Emotional Support Animals (ESAs) as a case study of access barriers intentionally built into our disability rights regime. This Article is far from the first to discuss assistance animals to study topics

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[103] Luterman, *supra* note 98.

[104] *See supra* Section I.A.

[105] Harris, *supra* note 10, at 1687.

surrounding recognition and disability rights.[106] Dorfman notes that "'moral panic' regarding fake assistance animals directly affected the way in which the law developed regarding this issue."[107] While this body of research has analyzed assistance animals to explore topics of skepticism, recognition, and disability law, this research has not considered the role of disability specialization and surrounding ignorance as an influencing factor. Disability specialization is a major piece of the picture that has not yet been addressed. As this section discusses below, the regulatory history of assistance animal law reveals how misperception surrounding disability specialization explicitly motivates the exclusion of disabled people relying on ESAs from federal assistance animal entitlements.

B. ESAs — a Case Study of Misperception Fueling Intentional, Legal Access Barriers

1. Case Study Overview

An ESA is an animal that lacks training to provide a disability-specific benefit, but nevertheless provides psychological assistance by its mere presence.[108] An ESA, for example, might help an individual with an anxiety disorder avoid panic attacks because its presence alone reduces the individual's anxiety.[109] ESAs are distinct from psychiatric service animals, which are

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[106] Doron Dorfman has extensively researched this subject, focusing on what he calls "fear of the disability con," directed towards assistance animal handlers, as well as the implications of this skeptical attitude for the formulation and enforcement of assistance animal law. *See generally,* Dorfman, *Suspicious Species*, *supra* note 22.

[107] *Id.* at 1367. *See also,* Man Chi Coco Tsang, Em Bould, Aislinn Lalor & Libby Callaway, *'Community Members Aren't Aware that Assistance Animals Come in all Shapes and Sizes, and Help People with all Kinds of Disabilities' – Experiences of using assistance animals within community living in Australia*, 18 DISABILITY & REHAB.: ASSISTIVE TECH. 942, 949 (2023) ("[T]o ensure better inclusion of assistance animal users, public education is needed to promote community awareness of the types of animals that meet the definition of an 'assistance animal', and thus have public access rights."); Lana Kerzner, Chelsea Temple Jones, Beth Haller & Arthuer Blaser, *Rights and Representation: Media Narratives about Disabled People and their Service Animals in Canadian Print News*, 9 CAN. J. DISABILITY STUD. 38, 39–40 (2020) ("Disabled people who use service animals in Canada experience discrimination in important facets of life, as described vividly in media stories, people with disabilities having been denied access to restaurants, taxicabs, public transportation, and housing . . . . Many people do not know they have rights, let alone how to pursue rights-related remedies. This confusion also contributes to discriminatory conduct…").

[108] As defined by the ADA National Network, ESAs "provide companionship, relieve loneliness, and sometimes help with depression, anxiety, and certain phobias, but do not have special training to perform tasks that assist people with disabilities." *Service Animals and Emotional Support Animals*, ADA NAT'L NETWORK, https://adata.org/publication/service-animals-booklet (last visited Jan. 16, 2022) [hereinafter ADA NAT'L NETWORK] [https://perma.cc/J5UC-H4EU]. ESAs are often described as providing assistance by their "mere presence." *See e.g.*, C.W. Von Bergen, *Emotional Support Animals, and Pets on Campus,* 5 ADMIN. ISSUES J. 15, 21 (2015) ("Such animals, by their very nature and mere presence, and without specific training, may relieve and/or help reduce psychologically or emotionally induced pain in persons with certain medical conditions.").

[109] Erika Hagensen, The Arc of the United States & United Cerebral Palsy, Comment Letter on Proposed Rules to Promote Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (Aug. 18, 2008),

specifically trained to perform tasks that provide psychiatric assistance.[110] A psychiatric service animal might, for example, be trained to remind its handler to take medication, or to operate a K- 9 rescue phone if a handler is experiencing a psychological crises.[111]

Service animals provide a strong example of a disability specialized support, as they are trained to provide a disability-specific benefit.[112] Emotional support animals (ESAs), on the other hand, provide a paradigm example of a nonspecialized support. ESAs lack disability specialization, as they are the same animals owned by the general public, and they are not trained to provide any specialized disability-related support. While not specialized to do so, ESAs provide many disabled people with legitimate disability-related benefits. ESAs can help depressed people get out of bed and participate in work or social activities.[113] ESA's can also decrease dependence on psychotropic medication.[114] Erika Hagensen, Director of Disability Rights and Family & Technology Policy at The Arc and United Cerebral Palsy Disability Policy Collaboration, explains the benefits of ESAs to individuals with a range of disabilities, stating, "[Emotional support] animals perform a variety of critical functions that accommodate the needs of many individuals with psychiatric disabilities, including alleviating symptoms of post-traumatic stress disorder, anxiety disorders and panic disorders by calming the handler and reducing physical and mental effects such as anxiety, fear, flashbacks, hyper vigilance, hallucinations, intrusive imagery, nightmares, muscle tension, trembling, nausea, and memory loss." [115]

Disabled people with ESAs have historically qualified for protections under certain disability rights statutes. The federal Fair Housing Act (FHA) requires the accommodation of "assistance animals," which encompasses ESAs.[116] Under the

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https://www.regulations.gov/comment/DOJ-CRT-2008-0015-2652 ("[Emotional support] animals perform a variety of critical functions that accommodate the needs of many individuals with psychiatric disabilities, including alleviating symptoms of post-traumatic stress disorder, anxiety disorders and panic disorders. . . .") [https://perma.cc/54GC-QNKJ].

[110] ADA NAT'L NETWORK, *supra* note 108 ("[A] Psychiatric Service Dog is a dog that has been trained to perform tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and lessen their effects.").

[111] *Id.*; *e.g.*, Joan Froling, *Service Dog Tasks for Psychiatric Disabilities*, INTERNATIONAL ASSOCIATION OF ASSISTANCE DOG PARTNERS (Sept. 29, 2023), https://www.iaadp.org/psd_tasks.html [https://perma.cc/KXP4-L8RP].

[112] 28 C.F.R. § 36.104 (2023); 14 CFR § 382.3 (2023).

[113] Kristin M. Bourland, *Advocating Change Within the ADA: The Struggle to Recognize Emotional-Support Animals as Service Animals*, 48 U. LOUISVILLE L. REV. 197, 206 (2009).

[114] *Id.*

[115] Hagensen, *supra* note 109, at 2.

[116] Fair Housing Act of 1968, 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204 (2022); U.S. DEP'T OF HOUSING & URBAN DEV., ASSESSING A PERSON'S REQUEST TO HAVE AN ANIMAL AS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT 3 (2020) ("Assistance animals are not pets. They are animals that do work, perform tasks, assist, and/or provide therapeutic emotional support for individuals with disabilities. . . . A housing provider may exclude or charge a fee or

FHA, housing providers can request information establishing that an individual has a disability and a disability-related need for an animal.[117] Prior to 2021, people with ESAs also received protections under the ACAA.[118] The law required air carriers to allow ESAs into aircraft passenger cabins for individuals who had documentation from a licensed mental health professional meeting standards established by ACAA regulations.[119]

Disabled people who rely on ESAs no longer receive protections under the ACAA, due to what this Article calls the *disability specialization requirement.*[120] In accordance with this requirement, service animals protected under federal law must be "individually trained to do work or perform tasks for the benefit of a qualified individual with a disability."[121] In other words, because of this requirement, an animal must be disability specialized to qualify for certain federal disability rights protections. The ACAA is not the first statute to adopt the disability specialization requirement. The requirement originates under the Americans with Disabilities Act (ADA), which places the same requirement, word for word, on protected "service animals."[122] The DOT pulled the specialization requirement directly from the ADA "to align the definition of a service animal under the ACAA with the DOJ's definition of a service animal under the ADA."[123]

2. Skepticism Towards ESA Handlers

Despite the crucial role of ESAs to many disabled individuals, significant skepticism exists regarding whether ESAs provide a legitimate disability support. The Washington Post released an article expressing this skepticism, stating that "the proliferation of emotional-support animals suggests that a cult of personal fragility is becoming an aspect of the quest for the coveted status of victim." [124]

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deposit for pets in its discretion and subject to local law but not for service animals or other assistance animals." (citations omitted)).

[117] U.S. DEP'T OF HOUSING AND URBAN DEV., *supra* note 116, at 9 ("Certain impairments, however, especially including impairments that may form the basis for a request for an emotional support animal, may not be observable. In those instances, a housing provider may request information regarding both the disability and the disability-related need for the animal.").

[118] 14 C.F.R. § 382.117(e) (2020), *removed by* Traveling by Air with Service Animals, 85 Fed. Reg. at 79742, 79776 (Dec. 10, 2020).

[119] 14 C.F.R. § 382.117(e) ("If a passenger seeks to travel with an animal that is used as an emotional support or psychiatric service animal, you are not required to accept the animal for transportation in the cabin unless the passenger provides you current documentation . . . on the letterhead of a licensed mental health professional . . . .").

[120] *See* 14 C.F.R. § 382.3 (2023).

[121] *Id.* § 382.

[122] 28 C.F.R. § 36.104 (2022) ("Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability.").

[123] Traveling by Air with Service Animals, 85 Fed. Reg. 79742, 79744–45 (Dec. 10, 2020).

[124] George F. Will, *Emotional-support Animals on Planes Signal a Cult of Victimhood*, WASH. POST (Feb. 07, 2018, 7:42 PM), https://www.washingtonpost.com/opinions/a-snake-on-a-

National Swell conveys similar skepticism, claiming that "there is little evidence of the long-term effectiveness of emotional support animals for the treatment of mental problems" and that their benefits have not been established "more than just being cute, cuddly and generally happiness inducing."[125] The internet is flooded with panic about fake ESAs.[126]

These articles make clear that skepticism towards ESAs is fueled by misperception surrounding disability specialization. Consider an article entitled, "Can you get rid of a tenant's fake emotional support animal?"[127] In discussing such alleged fraud, the article explicitly conflates the disability specialization of animals with the legitimacy of the owner's disability status and needs. It states that "[h]ighly-trained service animals have been part of American culture for decades. The Americans with Disabilities Act (ADA) enshrined the right of those with physical and emotional disabilities to work with animals that can help them overcome their condition."[128] While commending the legitimate disability status for "highly-trained" service dogs, the article explicitly associates fraud with "untrained pets."[129] As the article emphasizes,

> "Unfortunately, emotional support animals often get lumped in with true service animals. Unlike service animals, emotional support animals require no training. It has become increasingly common for those with untrained pets to try to claim their four-legged friends as emotional support animals as a means of bringing animals to a property they otherwise could not."[130]

In discussing what purportedly evidences fraud, the article affords the presumption of disability legitimacy to "highly trained", i.e., disability specialized animals, and explicitly presumes disability fraud based on the untrained, i.e., nonspecialized, nature of ESAs.

This conflation of specialization with legitimacy is a common pattern within discourse concerned about ESA fraud. *The Guardian* reported that "[s]ervice

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plane-for-emotional-support/2018/02/07/3931607c-0b69-11e8-8b0d-891602206fb7_story.html [https://perma.cc/QWM7-92MS].

[125] *Emotional Support Animals Are Not Service Animals. Here's Why It Matters*, NATION SWELL, https://nationswell.com/service-animal-fraud-esa/ (last visited Jan. 28, 2024) [https://perma.cc/KXT6-UFWJ].

[126] A google news search of "fake emotional support animals" yields more than 9,840,000 results, with headlines including, "Can you get rid of a tenant's fake emotional support animal?" "Experts Want to Stop Fake Emotional Support Animals," "Questionable emotional support animal letters flood internet," "Travelers need to stop faking disabilities. It's hurting people who DO have them," and "How a Fake ESA Letter Ruined My Vacation."

[127] *Can You Get Rid of a Tenant's Fake Emotional Support Animal?*, HART KIENLE PENTECOST (Aug. 31, 2020), https://www.hartkinglaw.com/blog/2020/08/can-you-get-rid-of-a-tenants-fake-emotional-support-animal/ [https://perma.cc/N577-YSLD].

[128] *Id.*

[129] *Id.*

[130] *Id.*

animals can only be highly trained" whereas ESAs "need no formal training."[131] The article disaggregates disability legitimacy based on this distinction, noting that "a service dog is a $20,000 super-animal that can smell oncoming seizures or lead the blind, and currently an ESA is more like a pet who doesn't actively sabotage its owner's mental health."[132] The conflation of disability specialization with legitimacy even appears in an article by Psychology Today, which describes the legal status of ESAs as "particularly loosey-goosey" and highlights that "[u]nlike a 'service dog,' an emotional support animal can be a member of any species, does not have to be trained to do anything, and can be your personal pet."[133]

Discourse concerning "fake emotional support animals" associates disability fakers with those whose animals are "untrained pets." Such discourse builds in the presumption that the legitimacy of disability is somehow affected by the disability specialization of a support. The trained dog, i.e., the specialized animal, is presumed to be a legitimate disability support, whereas the fact that an animal is an ordinary "pet" owned by the general public, that it lacks any specialized disability training, is supposed to evidence fraud. In other words, public skepticism towards ESA handlers is fueled by the false premise that the nonspecialized nature of an animal is reason to question its legitimacy as a disability support, and the legitimacy of the owner as disabled.

3. Legal Overview: Antidiscrimination Statute, Service Animal Protections, and the Disability Specialization Requirement

Title III of the ADA (Title III) governs public accommodations and services operated by private entities.[134] Title III covers private entities including hotels, restaurants, grocery stores, and forms of public transportation such as buses and rails.[135] Section 12182 of Title III prohibits disability discrimination by Title III entities and includes a requirement that Title III entities modify their policies and practices to avoid disability discrimination ("the modifications requirement").[136] The provision states that discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or

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[131] Adrienne Matei, *The Number of Fake Emotional Support Dogs Is Exploding – Why?*, GUARDIAN (Aug 13, 2019, 1:00 AM), https://www.theguardian.com/lifeandstyle/2019/aug/12/fake-emotional-support-animals-service-dogs [https://perma.cc/2WAR-HVN9].

[132] *Id.*

[133] Hal Herzog, *Emotional Support Animals: The Therapist's Dilemma*, PSYCH. TODAY (July 19, 2015), https://www.psychologytoday.com/us/blog/animals-and-us/201607/emotional-support-animals-the-therapists-dilemma [https://perma.cc/7Q6U-GPM3].

[134] *See generally* 42 U.S.C. §§ 12181–89.

[135] 42 U.S.C. § 12181(7) (listing "public accommodations for purposes of this subchapter"); 42 U.S.C. § 12181(10) (defining "specified public transportation" as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis").

[136] 42 U.S.C. § 12182 (b)(2)(A)(ii).

accommodations to individuals with disabilities."[137] A modification may be considered necessary, not only when a disabled individual is unable to *access* a public accommodation, but also when a disabled individual is unable to *equally enjoy* a public accommodation.[138] Title III modifications have been found necessary to ensure equal enjoyment when disabled movie-goers had "to crane their necks and twist their bodies in order to see the screen, while non-disabled patrons [had] a wide range of comfortable viewing locations from which to choose."[139] Similarly, Title III modifications were necessary, in part, when doing so allowed a Disneyland attendant to "feel more comfortable and dignified."[140]

The Air Carrier Access Act (ACAA) governs disability discrimination by, as the name suggests, air carriers such as airplanes.[141] Nondiscrimination provisions of the ACAA mirror the ADA's modification requirement. Like the ADA, the ACAA establishes a general prohibition on discrimination,[142] which includes a requirement that air carriers "modify [their] policies, practices, and facilities" for disabled individuals.[143] Entities must provide such modifications "when needed to provide nondiscriminatory service to a particular individual with a disability."[144]

Regulations implementing this modification requirement under both the ADA and ACAA establish protections against discrimination for disabled individuals who use "Service Animals" in places of public accommodations. Under 28 C.F.R. § 36.302I(1), Title III entities must "modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability."[145] The antidiscrimination regulation promulgated under the ACAA also requires covered entities to accommodate disabled people requiring service animals.[146]

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[137] *Id.*

[138] Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 127 (2005) ("Entities that provide public accommodations or public transportation… must make 'reasonable modifications in polices, practices, or procedures, when such modifications are necessary' to provide disabled individuals full and *equal enjoyment*." (emphasis added) (quoting §§ 12182(b)(2)(A)(ii), 12184(b)(2)(A))); Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126, 1133 (9th Cir. 2003) (holding that theaters were required to provide disabled patrons with an experience comparable to that of able-bodied patrons); Baughman v. Walt Disney World Co., 685 F.3d 1131, 1136 (9th Cir. 2012) ("If [Disney] can make Baughman's experience less onerous and more akin to that enjoyed by its able-bodied patrons, it must take reasonable steps to do so."); Alumni Cruises, LLC v. Carnival Corp., 987 F. Supp. 2d 1290, 1304 (S.D. Fla. 2013) ("Thus, for public accommodations to fulfill the promise of the ADA, they 'must start by considering how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience.'" (quoting *Baughman*, 685 F.3d at 1135)).

[139] *Oregon Paralyzed Veterans of America*, 339 F.3d at 1133.

[140] *Baughman*, 685 F.3d at 1131.

[141] 14 C.F.R. § 382.1 (2024).

[142] 14 C.F.R. § 382.11 (2024).

[143] 14 C.F.R. § 382.13(a) (2024).

[144] *Id.*

[145] 28 C.F.R. § 36.302(c)(1) (2024).

[146] 14 C.F.R. § 382.72 (2024).

Both Title III and the ACAA limit the inquiry that covered entities may perform to confirm that an individual qualifies for service animal protections. Both laws prohibit covered entities from inquiring into an individual's disability status, each stating that covered entities may not "ask about the nature or extent of a person's disability."[147] To determine whether an individual qualifies for service animal protections, an entity covered by either the ADA or the ACAA is permitted to ask only two questions.[148] The entity may ask (1) if the individual's animal is required because of a disability, and (2) what work or task the animal has been trained to perform.[149]

Title III and the ACAA place two significant limitations on which animals qualify for service animal protections. First, regulations under both laws restrict service animals to dogs.[150] Disabled individuals relying on animals other than dogs are not protected under either statute.[151] The second limitation placed on service animals is what this Article calls the *disability specialization requirement*. In accordance with this requirement, service animals under both the ADA and the ACAA must be "individually trained to do work or perform tasks for the benefit of an individual with a disability."[152] Stated differently, for disabled individuals to access service animal protections, their animals must have a disability specialization.

The specialization requirement does not do any work to exclude nondisabled people from service animal protections, as this work has already been done. Title III has provisions defining disability, and excludes all individuals from coverage who do not fall within this definition of disability.[153] Like Title III, separate ACAA provisions provide an extensive definition of who qualifies as an "[i]ndividual with a disability," and exclude people who do not qualify as disabled from ACAA protections."[154] Rather than allowing covered entities to refuse modifications to nondisabled people, all that the specialization requirement does under the ADA and ACAA is enable Title III entities to refuse modifications to individuals, including those who legally qualify as disabled, purely because their animals are non-specialized.

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[147] 28 C.F.R. § 36.302(c)(6) (2024); 14 C.F.R. § 382.73(a)(1) (2024).

[148] 28 C.F.R. § 36.302(c)(6) (2024); 14 C.F.R. § 382.73(a)(1) (2024).

[149] 28 C.F.R. § 36.302(c)(6) (2024); 14 C.F.R. § 382.73(a)(1) (2024).

[150] 14 C.F.R. § 382.3 (2024) ("*Service animal* means a dog, regardless of breed or type . . . ."); 28 C.F.R. § 36.104 (2024) (limiting service animals to "any dog"). Note that the ADA also extends protections to miniature horses. *See* 28 C.F.R. § 35.136(i)(1) (2024) ("A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability").

[151] 14 C.F.R. § 382.3 (2024); 28 C.F.R. § 36.104 (2024). While the animal species limitation raises serious concerns worth addressing, these concerns are not the focus of this Article.

[152] 14 C.F.R. § 382.3 (2024); 28 C.F.R. § 36.104 (2024).

[153] *See* 42 U.S.C.A. § 12102.

[154] *See* 14 CFR § 382.3 (2024).

4. Policy Considerations Cannot Justify the Disability Specialization Requirement

a. Policy Rationale 1: Disability Fraud

Consider the classic rationale that the disability specialization requirement helps screen out nondisabled people faking their disability to get their pets into places of public accommodations. There is a question of how much fraud actually exists and to what extent the concern about fraud is fueled by "moral panic" over the disability con on planes and trains.[155] While countless stories lament the great rise in people asserting the need for ESAs,[156] such numbers do not tell us how many of these individuals are actually disabled and simply lack the resources or the need for a specially trained animal.

Even assuming that some massive amount of disability fraud exists and that such fraud merits policy action, it is unclear how disability specialization would help address the issue. While covered entities are permitted to question people about the training of their animals for screening purposes, it seems unlikely that this question actually weeds out individuals lying about a disability-related need. People are perfectly capable of lying about a dog's disability specialization. As stated by the co-leader of a guide dog organization, "The law is pretty ambiguous in that it says the dog has to be trained to perform a task . . . But it doesn't say how you prove that dog is trained . . . . And so people can just say what they want about the dog."[157]

Screening for disability specialization cannot plausibly be understood as a better screening method than alternatives that avoid systematically excluding disabled people from federal disability rights protections. Instead of authorizing covered entities to ask about the disability-related *specialization* of a dog, regulations under the ADA and the ACAA could authorize covered entities to ask

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[155] *See generally* Dorfman, *Suspicious Species*, *supra* note 22 (examining how "moral panic" around the use of service animals by people who do not have disabilities has affected the development of laws regarding service animals).

[156] *See The Growing Trend of Emotional Support Animals*, SCIENCE DAILY (Aug. 6, 2019), https://www.sciencedaily.com/releases/2019/08/190806131437.htm (noting that "the growing trend presents an ethical challenge for therapists asked to certify emotional support animals for their patients") [https://perma.cc/3H7A-FG2F]; Samantha Bomkamp, *Emotional Support Animals — from Dogs to Peacocks, Real or Fake — Present Challenges for Businesses*, CHICAGO TRIBUNE (Feb. 9, 2018), https://www.chicagotribune.com/business/ct-biz-emotional-support-animals-20180211-story.html ("Nevertheless, the number of companies that say they provide [emotional support animal] certifications is growing and with that, businesses say, the ranks of people trying to pass their pets off as support animals for illegitimate reasons are increasing as well.") [https://perma.cc/3XV8-QVG6]; Matei, *supra* note 131 ("While no governing body keeps track of the figure, a study from the University of California at Davis determined the number of ESAs registered by animal control facilities in the state increased 1,000% between 2002 and 2012.").

[157] Scott Maben, *Fake Service Animals Cause Problems for the Disabled, Business Owners*, SPOKESMAN-REV. (Sept. 27, 2015), https://www.spokesman.com/stories/2015/sep/27/fake-service-animals-cause-problems-for-the/ [https://perma.cc/4Q7R-3T6V].

animal handlers what disability-related *benefit* their animal provided. The former question is not meaningfully better than the latter for purposes of preventing fraud. The covered entities would simply ask individuals what benefit their animal *provides* instead of asking what benefit their animal is *trained* to provide. While the two questions are not meaningfully different in terms of screening for fraud, they are meaningfully different in terms of disability access. A question about disability specialization excludes disabled people from federal disability rights protections, whereas a question about disability-related benefits does not.

b. Policy Rationale 2: Misbehaving Animals, and other Negative Externalities

In justifying its adoption of the disability specialization requirement, the DOT cited heavily to considerations of negative externalities, such as concerns about misbehaving ESAs and risks for passengers with animal allergies.[158] Consider the following hypothetical argument regarding negative externalities:

> Dogs with disability specialization are more likely to behave in public. If covered entities could not screen out non-specialized animals, they would not be able to prevent disruptive animals from entering their businesses. They would also be forced to let more animals into public spaces, which would place other members of the public at risk, for example individuals with dog allergies.

Covered entities could still exclude disruptive animals from their business without screening for disability specialization. Entities covered by the ACAA and Title III are already able to exclude disruptive animals from their premises under provisions unrelated to the specialization requirement.[159]

One rationale for the specialization requirement might be to help Title III entities screen out misbehaving dogs before they become a problem in the first place. However, Title III entities do not need to screen based on disability specialization to achieve this goal. The DOJ could instead authorize Title III entities to inquire into an animal's behavior. The ACAA has taken this very route to address negative externality concerns.[160] Under the ACAA, air carriers may

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[158] Traveling by Air with Service Animals, 85 Fed. Reg. 79742, 79748 (Dec. 10, 2020) ("[A]fter reviewing the comments submitted during both the ANPRM and NPRM, we find persuasive the view of advocates who commented that task trained service animals are also generally provided enhanced training in how to behave in public, while emotional support animals may not have received this degree of training. We also find persuasive the information provided by airlines and other stakeholders indicating that emotional support animals, or animals being presented to the airline as emotional support animals, are responsible for a significant percentage of the incidents of animal misbehavior onboard aircraft.").

[159] 28 C.F.R. § 36.302(c)(2)(i) permits Title III entities to exclude a service animal if "[t]he animal is out of control and the animal's handler does not take effective action to control it;" or "[t]he animal is not housebroken." 28 C.F.R. § 36.302(c)(2)(i) (2024).

[160] 14 CFR § 382.27(b)(3) (2024); 14 CFR § 382.75(a)–(b) (2024).

require disabled passengers to attest to an animal's training and good behavior, certify the animal's good health, and for some flights, attest to the animal's ability to avoid relieving itself in an unsanitary manner.[161]

The negative externality argument also misses the point. In this case, if the quantity of service animals created a risk of harming people with animal allergies, then the DOJ and DOT should develop regulations to ensure that covered entities accommodate both individuals with service animals and individuals who are allergic to them, instead of restricting accommodations for one group.[162]

5. The Requirement's Underlying Motivation is Misperception Surrounding Disability Specialization

The legislative history of the regulations reveals that the disability specialization requirement, first formulated under the ADA, was motivated by a misperception surrounding disability specialization. The DOJ's Notice of Proposed Rule Making (NPRM), where it first proposed that the specialization requirement would exclude ESAs, reflects this motivation.[163] Explaining the concept of ESAs, the DOJ states:

> It is important to address the concept of comfort animals or emotional support animals . . . . The increased use of comfort animals is primarily by individuals with mental or psychiatric impairments, many of which do not rise to the level of disability. Comfort animals are also used by individuals without any type of impairment who claim the need for such an animal in order to bring their pets into facilities of public entities. The difference between an emotional support animal and a psychiatric service animal is the service that is provided, i.e., the actual work or task performed by the service animal. Another critical factor rests on the severity of the individual's impairment. For example, only individuals with conditions that substantially limit them in a major life activity qualify for coverage under the ADA, and only those individuals' use of a service animal will be covered under the ADA. 42 U.S.C. 12102(2) and 28 CFR 35.104. Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working . . . individuals with minor

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[161] 14 CFR § 382.27(b)(3) (2024); 14 CFR § 382.75(a)–(b) (2024).

[162] To the extent that animals create a risk of negative externalities when in public, there is a question of how these risks should be mitigated. This question is beyond the scope of this Section. This Section does not aim to propose policy solutions to animal-related risks, but rather to show that such risks cannot justify regulations based on disability specialization.

[163] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34520 (June 17, 2008).

> impairments may mistakenly conclude that any type of impairment qualifies them for ADA coverage.[164]

The DOJ's statement is filled with the same unfiltered disability skepticism visible in public discourse surrounding ESA fraud. In "address[ing] the concept of comfort animals or emotional support animals,"[165] the DOJ spends the majority of its statement scrutinizing disability status. The DOJ's skepticism is unambiguously rooted in misperception surrounding disability specialization. The DOJ conflates disability legitimacy with disability specialization, using the two concepts almost interchangeably. In explaining the difference between ESAs and service animals, the DOJ claims that a "critical factor rests on the severity of the individual's impairment." This statement is simply legally inaccurate, as the definitional distinction between the two categories has nothing to do with the severity of an impairment and everything to do with disability specialization. By presuming that "the severity of the individual's impairment" distinguishes the two categories of animal, the DOJ is explicitly conflating disability specialization with disability legitimacy. The DOJ imbeds an entirely unsupported presumption that people whose animals are disability specialized are disabled enough for the ADA, whereas those whose animals lack specialization are individuals "without any type of impairment" who are conning the system, or have only "minor impairments" which do not qualify as a disability under the ADA.

The DOJ's misinformed skepticism towards nonspecialized animals extends to the explanatory text of its final rule governing service animals.[166] The DOJ discusses disabled people who rely on ESAs within their homes, coming to the determination that such individuals do not require their ESAs in Title III settings. It states that:

> Commenters asserted the view that if an animal's 'mere presence' legitimately provides such benefits to an individual with a disability and if those benefits are necessary to provide equal opportunity given the facts of the particular disability, then such an animal should qualify as a 'service animal.' …The Department understands this approach has benefitted many individuals under the FHA and analogous State law provisions… where emotional support animals provide assistance that is unique to residential settings. The Department believes, however, that the presence of such animals is not required in the context of public accommodations, such as restaurants, hospitals, hotels, retail establishments, and assembly areas.[167]

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[164] *Id.* at 34522.

[165] *Id.*

[166] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, 56267 (Sept. 15, 2010).

[167] *Id.* at 56269.

Again, the DOJ expresses unfiltered disability skepticism towards nonspecialized animals, this time focusing on disability-related need, by claiming that the presence of ESAs "is not required in the context of public accommodations." The DOJ's disclaiming of disability-related need is a disconcerting display of ignorance surrounding nonspecialized animals. The DOJ does not identify what the distinction between residential settings and places of public accommodations is based on, and one struggles to imagine what data could possibly inform the distinction that places of public accommodations, in particular, are settings where ESAs are not needed. Public settings covered by Title III of the ADA are paradigm triggers for people with a wide variety of psychological disorders.[168] There is, in fact, a clinical disorder defined largely by fear of public settings, called agoraphobia.[169] The DOJ's conclusion that ESAs are not needed in Title III settings can only be boiled down to pure misinformed disability skepticism towards those with nonspecialized supports.

The regulatory history for the disability specialization requirement displays in plain view that the requirement's exclusion of disabled ESA handlers was motivated by misperception surrounding disability specialization visible within common understandings of disability and within public discourse surrounding ESAs. In the explanatory text for the original requirement under the ADA, the DOJ unapologetically characterizes people using ESAs as lacking an ADA qualifying disability, either due to fraud, or due to a condition which is too minor to constitute disability.[170] The DOJ later claims, with no explanation or apparent reason, that people using ESAs do not need their ESAs in Title III entities.[171] The ignorance underlying such skepticism is unambiguous. It is evident that the DOJ's exclusion of ESA handlers from ADA coverage is rooted in the same misperception reflected within public discourse surrounding ESA fraud—a conflation of specialization with legitimacy, and a presumption that nonspecialized animals are not a legitimate disability support, and that people who use them are not legitimately disabled.

Misperception surrounding disability specialization implicates our legal disability rights infrastructure. The ESA case study demonstrates this

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[168] *See, e.g.*, Marlynn Wei, *8 Tips to Reduce Commuter Anxiety,* PSYCH. TODAY (Jan. 5, 2015), https://www.psychologytoday.com/us/blog/urban-survival/201501/8-tips-reduce-commuter-anxiety [https://perma.cc/Y2JF-W2V8]; Jennie Kermode, *Anxiety Disorders and Public Transport,* DISABLED TRAVEL ADVICE (May 18, 2021), https://www.disabledtraveladvice.co.uk/anxiety-disorders-public-transport.html [https://perma.cc/K5NH-QLK9]; Gerald Myhill, *What Going to a Local Store Is Like With a Panic Disorder*, MIGHTY (May 24, 2017), https://themighty.com/2017/05/panic-anxiety-shopping-trip [https://perma.cc/59FT-FRSS].

[169] *Agoraphobia*, BETTER HEALTH CHANNEL, https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/agoraphobia (last visited Jan. 16, 2023) [https://perma.cc/2EDD-6BUG].

[170] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34522 (June 17, 2008).

[171] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, 56260 (Sept. 15, 2010).

misperception fueling active skepticism towards disabled people, and motivating access barriers intentionally built into our federal disability rights regime.

C. Covert, Pervasive Implications of Misperception

The ESA case study illustrates overt implications of the misperception surrounding disability specialization. This misinformation fuels skepticism towards disabled people, to the point of access barriers explicitly built into disability rights law. In the absence of such overt implications, misperception surrounding disability specialization has covert, pervasive and perpetual implications for disabled people, and for our representations and understanding of disability.

Resulting from this misperception is what Susan Wendell calls the "lack of realistic cultural representation of experiences of disability."[172] For so many disabled people, our disability is implicated throughout our day, manifesting as new and unique needs in each unique context. While specially designed supports may address some disability needs, they only address so much. The rest of the time, disabled people rely on the precut vegetables or microwavable dinners that allow us to feed ourselves on a regular bases; we rely on that one in a thousand job with the schedule, responsibilities, workplace rules, etc. which just happen to line up with how we work and what we need; we rely on that one teacher whose methods just happen to match our style of learning and thinking. Disabled people *need* this product, this job, this teacher, and not because they intentionally accommodate our disability, but because, simply put, we otherwise will not be able to make the meal, perform the job, learn the material, or at least not do so on a sustainable and reliable basis. Disabled people function when our world is just so. Disability does not just involve specialized tools and trained disability professionals, but also the particular systems, items, people, environments, etc. that just so happen to meet our needs. This major swath of the disability experience is not accounted for within predominant understandings and representations of disability.

Ignorance surrounding disability specialization effectively erases a major dimension of the disability experience. Such erasure effects disabled people beyond the written text of disability rights law. Even when those using nonspecialized supports experience no skepticism, lack of awareness surrounding nonspecialized supports can have material access implications for disabled people. This is evident in Starbuck's decision to stop providing plastic straws, thereby compromising disabled people's access to a critical disability support.[173] Starbuck's decision was likely not based on skepticism or hostility towards disabled people, but more likely reflected societal ignorance of the plastic straw as a disability support. Even without hostility, a passive lack of awareness of a

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[172] SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 43 (1996).

[173] *See* Enking, *supra* note 93.

nonspecialized support almost eliminated the accessibility of a major global food chain for many disabled people, requiring a groundswell of disability advocacy across the United States to shift Starbuck's position.[174]

Even when no institution cuts off the supply of disability supports, the failure to recognize nonspecialized supports can make all the difference between disabled people securing the supports that they need, and not doing so. In some cases, this ignorance has the effect of shaming disabled people away from the supports that they need. Consider discourse around products for "lazy people."[175] Because this discourse fails to recognize the role of such products as nonspecialized supports, and instead stigmatizes these products, "lazy people" discourse often causes disabled people to avoid their own needs. s.e. smith discusses the effects of such discourse, noting that "the shaming around such items tends to push people with disabilities to try to do without."[176] Again, in this case, no one is actively attempting to block disabled people from getting what they need. Nevertheless, this ignorance surrounding disability specialization has the effect of blocking disabled people from getting what they need.

This ignorance surrounding disability specialization, and the resulting misconstruction of the disability experience, can actually prevent disabled people from recognizing their own needs. When we are given a concept of disability which leaves out the nonspecialized element of this identity, then our own understanding of disability does not allow us to recognize an entire slice of our disability needs. This self-recognition gap has material access implications. It can be the difference between our getting what we need, because we understand that we need it, and our not getting what we need, simply because we do not recognize it as a need. At worst, rather than recognizing our disability need as such, we understand it as laziness, or selfishness, or superficiality, or some form of character failing, and therefore we actively avoid what we need.

III. ACCOUNTING FOR DISABILITY SPECIALIZATION

A. Policy Recommendations

1. Disentangling Specialization from Disability Policy

Misperception surrounding disability specialization should be extracted from our disability policy regime. The most straightforward policy recommendation to follow is the elimination of disability specialization as a variable from disability rights and benefits policy. In short, the disability specialization of a need should have no bearing on a disabled person's entitlements to disability related protections and supports. Disability law should be specialization neutral.

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[174] *Id.*

[175] *See, e.g.*, Smith, *supra* note 48.

[176] *Id.*

Service animal policy provides a useful example of how we can disentangle disability specialization from disability rights. Simply put, disability specialization should not affect service animal coverage under any municipal, state or federal law. The disability specialization requirement for service animals under both the ADA and ACAA, codified respectively as 28 C.F.R. § 36.104 and 14 CFR § 382, should be replaced with specialization neutral language.[177]

Rather than a requirement that dogs be "individually trained to do work or perform a task for the benefit of an individual with a disability," service animals under both the ADA and the ACAA should be required to "provide a disability related benefit for an individual with a disability," or to "meet a disability related need for an individual with a disability." Any state laws which include a disability specialization requirement for covered service animals or assistance animals should make this same revision. Language which requires an animal to have *training* to benefit a disabled person should be modified to simply require that the animal provide *a disability-related benefit* for a disabled person.

Specialization neutral mechanisms should be used to address any policy concerns which might be offered as justification for the exclusion of disabled ESA handlers from disability protections. For example, to ensure that covered entities under the ADA and ACAA have a means of discerning whether animal handlers are disabled individuals entitled to protections, the two questions which covered entities may ask should simply be revised slightly so that they are specialization neutral.[178] The first permitted question does not need to change as it is already specialization neutral. Covered entities may already ask whether the individual's animal is required because of a disability, a question which does not inquire into the specialization of the animal.[179] The second permissible question, however, should be revised to ensure specialization neutral service animal entitlements. Rather than the ADA and ACAA each permitting covered entities to ask what work or task the animal has been *trained* to perform,[180] each statute should permit covered entities to ask what disability related *benefit* the animal provides. The ACAA already permits airlines to require disabled passengers to attest to a service animal's good behavior, certify the animal's good health, and for some flights, attest to the animal's ability to avoid relieving itself in an unsanitary manner.[181] Such language is already specialization neutral, and allows covered entities to address concerns surrounding behavior and sanitation.

Like service animal law, any law extending disability entitlements or protections should remain neutral with regards to disability specialization. For example, New York City's motorized scooter law includes disability protection

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[177] 42 U.S.C. §§ 12181–89; 49 U.S.C. § 41705.

[178] 28 C.F.R. § 36.302(c)(6); 14 C.F.R. §382.73(a)(1).

[179] 28 C.F.R. § 36.302(c)(6); 14 C.F.R. §382.73(a)(1).

[180] 28 C.F.R. § 36.302(c)(6); 14 C.F.R. §382.73(a)(1).

[181] 28 C.F.R. § 36.302(c)(6); 14 C.F.R. §382.73(a)(1).

which is not specialization neutral.[182] The protection extends only to "mobility aids *designed for use* by disabled persons," and this protection has specifically been adjudicated to exclude a nonspecialized support, namely, Segways.[183] This motorized scooter disability exemption should be modified to remain specialization neutral. Rather than exempting "mobility aids *designed for use* by disabled persons," it should exempt "devices which provide mobility aid to disabled persons" or "devices required by disabled persons for mobility aid."

Disability related policy, across the board, should be similarly neutral on the subject of disability specialization. The specialization of a person's needs should not be material to their coverage under any disability law at the municipal, state or federal level, including both disability benefits and disability rights law. Disability specialization is not an acceptable determinant of entitlement to any disability related protections, and should remain immaterial to such entitlements.

2. *Disability Skepticism as Legal Bias*

From the regulatory history of service animal law, we see that disability skepticism can shape policy governing disabled people. As previously discussed, such skepticism explicitly motivated the exclusion of ESA handlers from federal disability rights protections. Disability skepticism can shape not only the formulation of disability policy, but also its implementation and enforcement. It can "restrict the design and implementation" of the disability rights regime.[184]

The history of the ADA Amendments Act (ADAAA) illustrates the extent to which misinformed disability skepticism can influence the enforcement of disability rights policy—in this case within the judiciary branch. In 2008, Congress passed the ADAAA[185] to correct a series of Supreme Court decisions which narrowed eligibility for ADA protections.[186] As stated in the ADAAA's

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[182] N.Y.C. Admin. Code § 19-176.2.

[183] New York City v. Harrison, Office of Administrative Trials and Hearings Appeal Board, No. 1701086 (Dec. 14, 2017), https://archive.citylaw.org/wp-content/uploads/sites/42/oath_hearings/1701086.pdf.

[184] Dorfman, *supra* note 22, at 1051.

[185] ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (2008).

[186] In particular, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its two companion cases, all decided on the same day, restricted ADA coverage through a narrow construction of "disability" under the ADA. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Service, 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999). The plaintiffs in *Sutton*, who were twins with myopia, were rejected from airline positions because they failed to meet the airline's standards for uncorrected vision. Sutton, 527 U.S. at 475–76. Despite the twins' rejection on the bases of their uncorrected vision, the Supreme Court found the plaintiffs not to be disabled because corrective eyewear ameliorated the effects of their myopia. *Id.* at 488–89. Under *Sutton,* courts were required to consider the ameliorative effects of mitigating measures when evaluating an individual's disability status. *Id.* at 482. The two companion cases decided later that day applied *Sutton*'s mitigating measures rule in finding each plaintiff not to be disabled. Murphy*,* 527 U.S. at 151; Albertson, 527 U.S. at 565–66. Soon after *Sutton* and its companion cases, the Supreme Court issued another opinion even further restricting the meaning of "disability" under the ADA. Toyota Motor Manufacturing v. Williams, 534 U.S. 184, 203 (2002). In *Toyota,* the Court

Findings, "the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."[187] In discussing this restriction of ADA eligibility, the ADAAA highlights the inappropriate scrutiny of disability status within the judiciary branch. It states that "as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities."[188] It explicitly condemns such scrutiny, stating that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[189]

House Representative Betty Sutton, in the Congressional Record for the House consideration and passage of the ADAAA, articulates the judicial practice which the ADAAA was intended to correct.[190] As she states,

> …the intent of Congress was to allow individuals with disabilities to fully participate in society, free from the fear of discrimination. Yet Supreme Court interpretations have shifted the focus from whether an individual has experienced discrimination to whether an individual could even be considered ''disabled enough'' to qualify for the protections of the law.[191]

What Congresswoman Sutton describes, and what the ADAAA explicitly condemns, is inappropriate disability skepticism which exerted enormous influence over the enforcement of disability rights within the judiciary branch. Such disability skepticism had such a strong influence over judicial enforcement of the ADA that it prompted an amendment to the ADA itself.

Despite the intent of the ADAAA to discourage inappropriate disability skepticism, decisionmakers are still susceptible to the cultural skepticism and misinformation to which so many of us are exposed. The ADAAA was passed in 2008,[192] and ESA handlers were nevertheless explicitly excluded from service animal coverage under the ADA two years later, in 2010.[193] Ten years following the 2008 amendments to the ADA, judges have been found to frequently make

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established narrow interpretations of "substantially limits" and "major life activities" within the ADA's definition of disability. *Id.* It stated that a "demanding standard" must be applied to these terms. *Id.* at 147.

[187] ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (2008).

[188] *Id.*

[189] *Id.*

[190] 154 CONG. REC. H6025 (daily ed. June 25, 2008) (statement of Rep. Betty Sutton).

[191] *Id.*

[192] ADA Amendments Act of 2008, Pub. L. No. 110-325 (2008).

[193] 28 C.F.R. § 36.104 (2024).

incorrect findings of "Not Disabled" under the ADA, in conflict with the ADAAA's broadened definition of disability.[194]

While legal bias is not always discernible from the text of such ADA findings of "Not Disabled", every so often, judges explicitly display their bias. *Rader v. Upper Cumberland Human Resource Agency* reveals this bias in discussing a plaintiff with episodic pain.[195] As the opinion states, "[t]he reference to 'incapacitating pain' on May 20, 2013, and 'episodic flare-ups' that result in such pain is not supported by specific citation to the record. What the record does show is that, shortly after supposedly suffering 'incapacitating pain,' plaintiff took a 20-minute walk across town to have coffee with his uncle."[196] This opinion is a striking display of misinformed skepticism. It is reminiscent of the panic surrounding disability cons triggered by ignorance that a person with an accessible parking placard may also be able to walk unaided to and from their car.[197] Similarly, the court here is apparently unaware that an individual might have a flareup of pain and nevertheless be capable of a 20-minute walk following this flareup. If anything, one would think that an unbearable flareup of pain would provide quite compelling motivation for an individual to get out of the house for a short walk and a cup of coffee. That the opinion in fact points to this sequence of events as evidence that the plaintiff was not disabled is a blatant display of misinformed skepticism creating legal bias.

Another ADA finding of "Not Disabled" demonstrates what appears to be a line of caselaw built on ignorance surrounding disability specialization.[198] The court found the plaintiff not disabled, reasoning that:

> "[I]f the impact of an impairment can be eliminated by changing the address at which an individual works, that impairment is neither permanent nor long term." The Circuit's reasoning in Haynes applies with equal force here . . . the plaintiff's depression and anxiety would abate if he worked elsewhere, and as a result, the plaintiff has failed to establish a permanent or long-term impairment that qualifies as a "disability" under the ADA.[199]

To begin, the reasoning of this opinion is simple legal error. The court appears unaware that since enactment of the ADAAA, almost 10 years prior, an

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[194] Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 385 (2019).

[195] Rader v. Upper Cumberland Hum. Res. Agency, 171 F. Supp. 3d 751, 759 (M.D. Tenn. 2016).

[196] *Id.*

[197] *See* Strong, *supra* note 22.

[198] *See* Belton v. Snyder, 249 F. Supp. 3d 14, 24 (D.D.C. 2017).

[199] *Id.* at 24–25 (*quoting* Haynes v. Williams, 392 F.3d 478, 483 (D.C. Cir. 2004)).

impairment does not need to be long-term to be considered a disability.[200] The court here seems unaware of the ADA's amendment altogether, as it does not cite to the ADAAA at any point in the decision, and it relies on *Haynes* for precedent, a pre-ADAAA holding.[201] Apart from plain legal error, this opinion appears to be resting on a problematic display of ignorance surrounding disability specialization. If the impact of an individual's mobility impairment were abated by installing a ramp, the court would undoubtedly not rely on this fact to claim that the mobility impairment was impermanent. On the other hand, when the plaintiff's impairment is abated through simply a new location lacking any specific disability design or features, such a change is apparently not enough of a disability need for the plaintiff's condition to be considered a permanent or legitimate disability.[202] This failure to take seriously the need for a change of location as a legitimate disability need reeks of legal bias in the form of ignorance surrounding disability specialization.

Although the ADAAA established a definition of disability which was more inclusive than earlier Supreme Court readings of the term, these amendments did not account for the cultural disability biases to which decisionmakers are still susceptible. The formulation and implementation of our federal disability rights regime is still in the hands of decisionmakers who are impressionable based on common cultural skepticism surrounding disability, and based on common societal ignorance of disability which so often produces such skepticism—ignorance of disability specialization included.

Inappropriate disability skepticism is a form of bias with material legal consequences. This form of bias should therefore be treated as such within our policies designed to address bias—for example, within rules prohibiting bias by federal and administrative judges, or within administrative and judicial rules of evidence. This form of bias should include inappropriately heightened scrutiny into disability status and need, and inappropriate grounds for disability skepticism, including, but certainly not limited to, the nonspecialized nature of an individual's asserted need. It should cover a host of other invalid grounds for disability skepticism, including race, gender, or other axes of marginalization which might influence judgements about the legitimacy of a person's disability assertions.

As an example of such a policy, the ABA Model Code of Judicial Conduct should be modified to prohibit inappropriate disability skepticism by judges.[203]

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[200] 29 C.F.R. § 1630.2(j)(1)(ix) (2024) ("The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."); 29 C.F.R. § 1630.2(g)(1)(i) (2024) (defining disability as "A physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ."). *See* Buonocore Porter, *supra* note 194, at 395–96, for further discussion of this legal error.

[201] *See generally Belton*, 249 F. Supp. 3d. at 14. See Buonocore Porter, *supra* note 194, at 395–96 for further analyses of legal error in *Belton*.

[202] *Belton*, 249 F. Supp. 3d. at 24.

[203] MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS'N 2020).

Rule 2.3 addresses "Bias, Prejudice, and Harassment" by judges, and prohibits these forms of bias on the bases of disability, along with other identity categories including race, sex, gender, and national origin.[204] To address disability skepticism bias by judges, a comment should be added to Rule 2.3 specifying that bias on the bases of disability includes inappropriate disability skepticism. The comment should state the following:

> Prejudice, bias, or harassment on the bases of disability includes inappropriate skepticism pertaining to an individual's asserted disability status or disability related needs. Examples of such inappropriate disability skepticism include: 1. Skepticism based on the nonspecialized nature of an individual's disability supports, 2. …

This addition to the ABA's Rules of Judicial Conduct provides an example of language which should be incorporated into our rules and policies prohibiting decision-making bias. As decisionmakers may not be familiar with concepts such as disability skepticism, disability specialization, and nonspecialized supports, such policy additions should be accompanied by disability skepticism trainings, so that decisionmakers understand the meaning of these concepts, and know how to avoid this form of bias.

For better or worse, disabled peoples' rights are enforced, not only by public decisionmakers, but also by private individuals and entities covered by disability rights law.[205] We see this type of enforcement when restaurant or airplane employees decide whether to let a disabled person enter with their dog. Because the enforcement of disability rights, in practice, is so often by covered entities, skepticism bias training should also be directed to covered entities. People operating these entities should be taught, not only about the rights of disabled people, but also about invalid grounds for adopting skepticism towards people asserting such rights. Even if disability specialization were no longer required for service animal eligibility, public education about service animal law should still specify that a dog's resemblance to an everyday pet is an invalid and inappropriate ground for doubting the credibility of that animal's handler. Similarly, even if NYC's motorized scooter law became specialization neutral, public park officers should receive training that the mass market popularity of a wheeled device is not grounds for doubting a person's assertions of disability or medical necessity. Bias training should be within public educational resources not only about service

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[204] *Id.*

[205] Belt & Dorfman, *supra* note 10, at 180 (discussing "private policing by 'self-appointed guardian[s]' of the law that may deter disabled individuals from exercising their rights in public or even result in violent retaliation against suspected 'disability cons.'"); Dorfman, *Fear of the Disability Con, supra* note 22, at 3 (in the disability law context, "its regulations and policies primarily depend on private enforcement via society's members, specifically in everyday situations. . . .").

animals and motorized scooters, but more generally about disability related entitlements across the board.

B. An Access-Centered Vision for Change

Eliminating misperception surrounding disability specialization requires affirmative and intentional steps. The nonspecialized element of the disability experience needs to be intentionally included within representations of disability—within media coverage of disabled people, within education about disability, and within our legal systems.

Accounting for the concept of disability specialization should not simply mean the addition of some discrete list of common nonspecialized supports to our already existing representations of, and infrastructure for, disability. Although we will have made important progress if we do award mainstream disability recognition to plastic straws and ESAs, change should not end there, as disability needs cannot be reduced to a finite list.

There is a question of how our systems can accommodate the nonspecialized need, when by definition, it is less visible than the specialized need, when it blends in with the general public experience, and when it takes such varied form. The realities of the nonspecialized experience highlight the need for our systems to engage in ongoing learning from the intended beneficiaries of access infrastructure. If it is not possible to recognize all disability needs simply through observation or with a universal, finalized checklist for achieving accessibility, then it is necessary to continuously learn from disabled people themselves. Of note, it is necessary to intentionally build platforms and infrastructure to continue learning from disabled people of color, and of multiply marginalized disabled people,[206] who historically have not been accounted for within public representations of disability and within our disability rights regime.[207] This idea of ongoing learning from a range of disabled people underscores the need for our social and legal

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[206] *See* Subini Ancy Annamma & Tamara Handy, *Sharpening Justice Through DisCrit: A Contrapuntal Analysis of Education,* 50 EDUC. RESEARCHER 41, 41 (2020) ("[T]his article enumerates expansive conceptualizations of justice through centering multiply-marginalized communities of color."); *see also* Jina B. Kim & Sami Schalk, *Reclaiming the Radical Politics of Self-Care: A Crip-of-Color Critique*, 120 S. ATL. Q. 325, 327 (2021) ("We argue that a radical politics of self-care is inextricably tied to the lived experiences and temporalities of multiply marginalized people, especially disabled queer people, disabled people of color, and disabled queer people of color."); *see also About Us,* DISABLED WRITERS, https://disabledwriters.com/about-us/ [https://perma.cc/82A8-P2YG] (last visited Oct. 24, 2023) ("We are concerned about the lack of disability representation in media and pop culture, particularly with respect to multiply marginalized disabled people, such as disabled women of color and the transgender disability community. This resource aims to eliminate the 'I couldn't find anyone' barrier to hiring disabled writers and speaking with disabled sources.").

[207] Annamma, Connor & Ferri, *supra* note 38; Chin, *supra* note 39, Morgan, *supra* note 39; Thompson, *supra* note 41.

systems to move towards an "access-centered" approach to disability.[208] Such an approach understands that "access is a constant process that changes in each space and with each individual."[209] As Leah Lakshmi Piepzna-Samarasinha explains, "Access is complex. It is more than just having a ramp or getting disabled folks into the meeting. Access is a constant process that doesn't stop."[210]

An access-centered framework, applied to the political landscape, becomes a question of political participation. If our political systems are to continuously learn from disabled people and respond to their experiences, then our political systems need the infrastructure for their inclusion and participation within the political process. This Article is far from the first to highlight the importance of disabled political participation. As stated by Belt and Dorfman,

> What all those movements have been fighting for is to get a seat at the table and to include activist and patient perspectives … Disability rights activists have coined the phrase "nothing about us without us" to emphasize the importance of democratizing decision making processes related to this population.[211]

The subject of disabled political participation gained national attention in 2016, when Alice Wong of the Disability Visibility Project and other disabled activists led the #CripTheVote campaign.[212] #CripTheVote has worked to incorporate disability into the political landscape, and in particular to platform disabled people with multiply marginalized identities.[213] In recent years, a range of disability activists and activist organizations have worked to elevate the civic

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[208] Jess Dene Schlesinger, *What Access-Centered Means*, ACCESS-CENTERED MOVEMENT, https://accesscenteredmovement.com/what-access-centered-means/ (last visited Feb. 6, 2023) [https://perma.cc/59B9-YUEH].

[209] *Id.*

[210] LEAH LAKSHMI PIEPZNA-SAMARASINHA, CARE WORK, 47–48 (2018).

[211] Belt & Dorfman, *supra* note 10 at 183–84 (citing Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement's Path to De-Medicalization*, 41 HARV. J.L. & GENDER 1, 38 (2018); JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 16–17 (2000); KATHARINA HEYER, RIGHTS ENABLED: THE DISABILITY REVOLUTION, FROM THE US, TO GERMANY AND JAPAN, TO THE UNITED NATIONS 24 (2015); Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 647 (2017)).

[212] *#CripTheVote: Our Voices, Our Vote,* DISABILITY VISIBILITY PROJECT (Jan. 27, 2016), https://disabilityvisibilityproject.com/2016/01/27/cripthevote-our-voices-our-vote/ [https://perma.cc/945P-RYTX]; *see also* Imani Barbarin, *Come on Crips, Let's Get in Formation: #CripTheVote,* CRUTCHES & SPICE (June 28, 2016), https://crutchesandspice.com/2016/06/28/come-on-crips-lets-get-in-formation-cripthevote/ [https://perma.cc/VKH7-4DH6].

[213] Benjamin W. Mann, *Rhetoric of Online Disability Activism: #CripTheVote and Civic Participation,* 11 COMMC'N, CULTURE & CRITIQUE 604, 606 (2018) (quoting Sarah Kim, *Crip the Vote Hashtag Brings Attention to People with Disabilities,* TEEN VOGUE (Oct. 27, 2016), https://www.teenvogue.com/story/crip-the-vote-hashtag-persons-with-disabilities-election-campaign [https://perma.cc/3BXA-25XU]) ("#CriptheVote moves away from the precedent set by other disability movements, which focus on white, heterosexual men with disabilities.").

participation of disabled people.[214] Disabled community-organizer, activist, and policy researcher, Sandy Ho, has been a prominent voice promoting the civic engagement of disabled people, particularly those who are multiply marginalized, and highlighting the current barriers to participation within our political landscape.[215]

The realities of disability specialization by no means *introduce* the need for access-centered infrastructure within our communities and political landscape, but rather further underscore the critical importance of such infrastructure. In the case of plastic straws, an environmental campaign across the United States almost drastically compromised many disabled peoples' ability to consume liquid due to this failure to include disabled people within the conversation.[216]

The realities of disability specialization highlight the need for access-centered infrastructure *across* policy areas, not just within the context of disability rights policy. The plastic straw ban, on paper, is squarely an environmental policy, unrelated to disability rights law altogether, however this policy nevertheless significantly impacts disabled people. Given the realities of disability specialization and the nonspecialized experience, an unknown disability need might be implicated by any area of policy. Our political system therefore needs to actively and regularly include disabled people throughout the policymaking process. Access-centered infrastructure should be built into the basic framework, across the board, for formulating and implementing policy.

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[214] *E.g.*, *5/22 #DisabilityCivics Twitter Chat,* DISABILITY VISIBILITY PROJECT (May 1, 2019), https://disabilityvisibilityproject.com/2019/05/01/5-22-disabilitycivics-twitter-chat/ [https://perma.cc/TJH5-DF3J]; *Civic Engagement Toolbox for Self-Advocates,* AUTISTIC SELF ADVOCACY NETWORK, https://autisticadvocacy.org/policy/toolkits/civic/ [https://perma.cc/8M57-B3TF] (last visited Oct.. 15, 2023).

[215] *5/22 #DisabilityCivics Twitter Chat, supra* note 214 ("You are invited to participate in the #DisabilityCivics Twitter chat co-hosted by Sandy Ho of the Lurie Institute and Alice Wong of the Disability Visibility Project on May 22, 2019, 7 pm Eastern. We will have a conversation about civic participation of disabled people in the United States."); *Disability Civic Engagement*, INCLUDED: THE DISABILITY EQUITY PODCAST (Oct. 28, 2021), https://included.libsyn.com/28-disability-civic-engagement [https://perma.cc/KS2T-6B36] ("In this episode, we talk with Sandy Ho, a disability activist, policy researcher at the Lurie Institute for Disability Policy at Brandeis University, and co-founder of Disability and Intersectionality Summit"); Sandy Ho and other members of the Lurie Institute for Disability Policy published a report discussing the current barriers to civic participation, and recommendations in light of such barriers. Sandy Ho, Susan Eaton & Monika Mitra, *Civic Engagement and People With Disabilities: A Way Forward Through Cross-Movement Building,* LURIE INSTITUTE FOR DISABILITY POLICY (Apr. 2020), https://heller.brandeis.edu/sillerman/pdfs/reports/civic-engagement-and-people-with-disabilities-report.pdf [https://perma.cc/M668-GRE8]. The report notes barriers to include: social stigma and ableism, particularly for disabled people experiencing other forms of oppression, as well as the absence of intentional overlap of civic engagement and disability rights ecosystems. *Id.* at 24–32. In light of such barriers, the report's recommendations include platforms to elevate empowered narratives of disability, support for cross-movement collaboration, and the positioning of multiply marginalized disability leaders, and disabled-led organizations as valued members of the democratic process. *Id.* at 32–35.

[216] Gina Martinez, '*Disabled People Are Not Part of the Conversation.' Advocates Speak Out Against Plastic Straw Ban,* TIME (July 12, 2018, 11:48AM), https://time.com/5335955/plastic-straws-disabled/ [https://perma.cc/4D3J-FF7W].

CONCLUSION

Disability specialization is a basic feature of the disability experience, yet widely misperceived within predominant understandings of disability. This misperception is reflected within public discourse, and within our legal landscape. The unsettling output of this misperception is that disabled people's recognition is closely tied to the consumption trends of the general public.

Misperception surrounding disability specialization has material implications for the access afforded to disabled people. In the context of ESAs, we see this misperception feeding hostile skepticism towards ESA handlers as fakers, to the point of legal exclusions of disabled ESA handlers from disability rights protections. We see this same type of legal barrier within motorized scooter laws extending protections only to "mobility aids designed for use by disabled persons,"[217] and explicitly excluding a nonspecialized mobility aid.[218]

Misperception surrounding disability specialization has material implications even when active hostility or skepticism is not present. Ignorance of the nonspecialized experience can lead to serious access barriers. As we see from the campaign against plastic straws, it can leave disabled people without access to crucial supports. It can also leave disabled people unable to recognize their own needs, or shame disabled people away from obtaining what they need.

The growing literature interested in disability recognition, and the disability scholarship more broadly, needs to grapple with the realities of disability specialization as a major piece of the recognition equation, and as fundamental to the disability experience. The realities of disability specialization need to be accounted for within public representations of disability, within our community systems for ensuring disability access, and within our legal infrastructure. As a lowest hanging fruit, disability specialization should not be material to disability legal protections under any circumstance. The language built into disability entitlements should be modified to remain specialization neutral. Beyond the disentangling of specialization from disability entitlements, affirmative steps should be taken to account for the realities of disability specialization within the process of formulating and implementing policy. Inappropriate disability skepticism, including suspicion due to a nonspecialized need, should be prohibited within our policy to address decision-making bias. The realities of disability specialization further underscore the critical importance of access-centered infrastructure within our systems for promoting access and within our policymaking processes.

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[217] N.Y.C. Admin. Code § 19-176.2.

[218] New York City v. Harrison, Office of Administrative Trials and Hearings Appeal Board, Case No. 1701086 (Dec. 14, 2017), https://archive.citylaw.org/wp-content/uploads/sites/42/oath_hearings/1701086.pdf.