

BEING EXCEPTIONAL
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Abstract:

This Essay contributes to the discourse of difference by problematizing the sameness/difference trope through the lens of the exceptional. It explores the nature of being exceptional with an expectation that its nature is contingent and variable. At the heart of understanding what constitutes exceptional is its implicit comparison with the average. While exceptional is defined to include both individuals who achieve in extraordinary ways as well as individuals with a physical or mental impairment, the two definitions are consonant in that both describe individuals who deviate from expected norms. Relying on the insights from pragmatism, this Essay considers community habits exceptional individuals must confront in forming their choices. In this way, it further adheres to the lessons from pragmatism for norm change. The strategies individuals use to alter the effects of being perceived as exceptional contributes to the overall discourse in equality and equal protection and potentially constitute the individual action that formulates change. It examines some approaches to the ADA derived from civil rights and from economic perspectives and the relevant matrix of choices available to the exceptional to understand the potential for productive change. With this foreground, it examines the choice of exceptional individuals to cover or convey matters of their identity. This Essay pays particular attention to these choices in seeking accommodations under the Americans with Disabilities Act (ADA). Ultimately, this Essay strives to participate in the conversation seeking to maximize human potential.

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I. Introduction

Being exceptional is exemplified by someone who deviates from expected norms. The dictionary defines exceptional to include both individuals who perform at extraordinary levels, as well as individuals with disabilities (American Heritage, 2002). In both ways, exceptional is defined in comparison to the perceived average. People often strive to be regarded as exceptional in the performance of specified activities or as a matter of general status, but the label is one that may also be imposed, independent of individual choice of pursuit. Exceptional, denoting someone with a disability, is a significant aspect of human existence (Gustafson, 2006). The human body, as with human existence, is in constant fluctuation and is unpredictable. The nature of any given disability is fluid and mercurial. The term disability is itself discursive--used sometimes to denote diagnosable physical or psychological impairment,¹ sometimes to denote social disadvantage, and sometimes to denote non-normative difference. Perhaps because of the discursive nature of disability, society often conflates it with difference or disadvantage. This conflation is incongruous given that the alternate definition is being one who surpasses

¹ The distinction between mental and physical is sometimes sophisticated as mental impairments are physically based and some physical impairments psychologically based (Breedlove, Rosenzweig, and Watson, 2002). Nevertheless, “feelings and beliefs among persons with the same and different impairments and disabilities in a variety of areas, including rehabilitation and medical needs, employment experiences, and family concerns... [foster] political organizing and collective action within what has come to be known as the disability community” (Putnam, 2005, p. 188). While this Essay’s reference to the physical is not intended to have any medical or scientific bases, it does proceed with the understanding that physical impairment and disability are social constructs, like all other categories of subordination.

expectations. Further, being regarded as exceptional in one sense does not preclude one from being so regarded in some other sense.

The average has become the ideal (Davis, 2006); the unstated and un-interrogated average, white, male, heterosexual, financially stable, able-bodied individual presumably represents norms in conversation or written analysis. Yet, perceptions of the average are context dependent and socially defined through multi-dimensional lenses, including disability, race, gender, and other socially construed, historically affirmed, aspects of identity. This multi-dimensional lens corresponds, imperfectly, with the various facets of identity. Accepted as neutral and objective, the unstated norm makes more pronounced “the other” (Davis, 2006). Being exceptional, and the self-identifying choices, may not be divorced from the other aspects of identity, nor from how other aspects contribute to external perceptions of the normative or average. Exceptional individuals, must contend with the stereotypes, biases, obstacles, and barriers related to perceptions about their own deviation from the average, sometimes in conjunction with assessment about other aspects of their identities.

Regardless of whether one’s personal trait is visible or otherwise obvious to others in society, every individual chooses how to navigate social perceptions of self by highlighting or obscuring aspects of her identity. Kenji Yoshino identifies the social strategy of “covering,” where an individual minimizes one or more, typically socially “disfavored,” aspect of her identity to “fit in” (2006). If the need to cover arises from difference and the perceived need for self-preservation, then its ubiquity is unsurprising. According to Yoshino, the real and perceived need to cover is a product of the failure in civil rights protections (2006). Yoshino identifies two exceptions to the expectations of covering, both cases where individuals may seek legal protection and accommodations for their distinctive needs based in religious observance or

for an identified disability (2006). However, Yoshino also asserts that everyone engages in covering, including individuals entitled to seek exemption (2006).

For purposes of this Essay, covering is synonymous with an individual's efforts to obscure an aspect of her identity. Further, since there is social pressure, as well as subconscious individual aims, to be regarded as "normal," covering also describes the efforts of talented individuals, who achieve beyond normative expectation, to downplay or omit their achievements under selected circumstances in order to be perceived as average. Covering, along with the pursuit of the normative ideal is central to this discussion, focused on the identity choices of exceptional individuals. Instead of covering, an individual may choose to highlight, promote or "convey" aspects of her identity, simply as a matter personal confidence or for personal advancement. Additionally, an individual may highlight a "disfavored" characteristic as a public statement of personal esteem, as a deliberate stance as role modeling, or as a form of activism and advocacy. Of course, a person may be as perceived as exceptional regardless of her choosing. Nevertheless, even for an individual who cannot change or otherwise avoid outward expression or external perception, she can control the degree of "covering" or "conveyance" affecting those perceptions. In fact, the possibility or perhaps pervasion of doubly exceptional individuals suggests a matrix by which individuals chose to cover/convey as a coding activity, strategically influencing the norm recognition (Dillard, et. al, 1989; Roth, et. al, 1980).

Pragmatism emphasizes the role of habits in constituting social meaning, norms and reality (Schmidt, 2014; Dewey, 1922; Peirce, 1940 [1877]). This centrality is demonstrated in Peirce's community of philosophy, Dewey's habit formation and Mead's concept that the self only materializes through social interaction (Schmidt, 2014). Because social meaning originates in habits, norm change can only occur through action (Peirce, 1940 [1877]). Individual self-

definition, necessarily accomplished in reference to the community, is an essential element affecting norm change. Classical pragmatism was influenced by Darwin; the ideas of habits, community, and the nature of norm change resonate for Darwin as well as pragmatists (Gronow, 2011). Relying on the insights of pragmatism, Schmidt outlines a framework for purposeful creativeness as an integral part of norm change (2014). He points out that habits “provide the contextual understanding of the problem and play a crucial role in acting as resources for the development of new habits” (Schmidt, 2014, p. 820).

Being exceptional includes having a willingness to *be* different. Consistent with Mead’s concept that mind and self only emerge through social interaction (Mead, 1967), the most exceptional individuals affirm their entire beings and claim their standing within society. Very few individuals reach this level of exceptionalism; all others strive to navigate the normative expectations in their pathways to self-actualization. “The subject is embedded in praxis and sociality prior to any form of conscious intentionality of action.” (Schmidt, 2014, p. 819; Joas, 1993, p. 59). This endeavor has the ability to impact social perceptions and reality. Dworkin refers to this endeavor as “ethical individualism” (2000, p. 6). Regarding these human actions, the insights from classical pragmatism are directly applicable.

It is the ability of individuals to adapt and, in the process, affect not only the formation of self, but also the social environment in which the self exists (Mead, 1967). “It implies a view of evolution in which the individual affects its own environment as well as being affected by it” (Mead, 1967, p. 214). Necessarily, each individual influences the opinions of others “so that the problem becomes how to fix belief, not in the individual merely, but in the community.” (Peirce, 1940 [1877], p. 13). Citing Hans Joas, Schmidt points out that the individual creativity

emphasized by Mead “provides a point of origin for emergence of new norms as expressed in novel habits (Schmidt, 2014, p. 821; Joas, 1996).

The strategies individuals use to alter the effects of being perceived as exceptional contributes to the overall discourse in equality and equal protection. This perspective is an important voice in the conversation, lest it be utterly controlled by those who create and reinforce subordination in its categories. “Pragmatism’s unique contribution is its emphasis on reflexivity – the potential for the actor to reflect on his or her practices – and deliberation in the reconstitution of action that establishes new modes of appropriate behavior” (Schmidt, 2014, p. 821). Specifically, the perspective of exceptional individuals making identity choices in the context of seeking accommodation, may influence interpretation of the ADA by employers and judges or may have some relevance for future amendments or other legislative efforts.

Some scholars include the Americans with Disabilities Act (ADA) as part of a broader civil rights schema and assert that ADA accommodations hold promise for new directions (e.g. Karlan & Rutherglen, 1996; Calloway, 1995). These advocates celebrate the ADA as a means for social justice and seek its extension to other areas. Unfortunately, judicial readings of the first iteration of the ADA were quite narrow, prompting Congress to amend and clarify its intentions that interpretations of the ADA ought to be broad (ADAAA). Nevertheless, initial court construal of the ADA set the tone, arresting the original intentions of the ADA and muting any derivative theories for civil rights. For example, the ADAAA explicitly limits protections for individuals who rely solely on the “regarded as” provision to seek accommodations (42 U.S.C. §12201(h); *Darcy v. City of New York*, 2011).

Before the revisions, it was conceivable that the “regarded as” provision could be extended to cover women or minority men for claims of discrimination on the basis of being

“regarded as” impaired in the performance of major life activities (Karlan & Rutherglen, 1996). Under the ADAAA, In order to meet the requirements of “being regarded as having such an impairment,” an individual must establish that she has been subjected to discrimination because of an actual or perceived disability (42 U.S.C. §12102(3)(A)), making interpretation of this provision analogous to other areas of civil rights canons (cf. *Washington v. Davis*, 1976; In *Personnel Administrator of Massachusetts v. Feeney*, 1977) and making the “regarded as provision” an empty vehicle to extend the ADA framework (42 U.S.C. §12201(h)). Rather than civil rights advocates looking to the promise of ADA innovations, instead, disability rights advocates should be prepared to encounter more hurdles erected in comparable contexts.

Some commenters seek to limit the applicability of the ADA on the view that it unfairly transfers wealth from corporate actors to otherwise unemployable individuals or that accommodations unduly burden employers. These commenters seek to limit the reach of the ADA and protect business prerogative. Ironically, this view is based in the same ideas embraced by advocates of social welfare justifications for the ADA as a device to reduce welfare. These supporters view the ADA as a productive device to reduce the number of individuals receiving welfare payments (Krieger, 2010; Bagenstos, 2004; Rosen, 1991; Issacharoff & Nelson, 2001; Diller, 2000) by ensuring employers hire individuals they otherwise may pass over (Verkerke, 2003).

Supporters of corporate profit maximization frequently resort to a torts-based approach as a means of limiting required accommodations and the associated costs. However, those who borrow from tort to analyze accommodations generally overlook the broad foundational tort goals of loss spreading, deterrence, or corrective justice, as well as the specifics of secondary and

enterprise liability. This to say that, in the context of the ADA, tort is advanced to limit costs, but is not sufficiently advanced as justification for the imposition of responsibility.

Both the civil rights framework and the derivation of theory from torts doctrine are considerations of which exceptional individuals are generally aware and inform their choices to cover or convey. These choices may confirm concepts of the normative, or average, while simultaneously having the ability to shape, or in some instances, counteract them. Since identity is not mono-faceted, this essay explores identity choices within conflicting incentive structures. Race, gender, and sexuality as examples of significance are an important part of the analysis of personal identity navigation. The religious aspect of identity and the relevant accommodations sought are not directly examined in this essay, even while the discussions in this essay may be quite relevant to religious accommodations,² particularly in an era of burgeoning bias towards adherents of the Muslim faith and the often presumed national and ethnic membership of those individuals.³

This Essay contributes to the discourse of difference and problematizes the sameness/difference trope. It uses exceptional in a manner intended to be unifying, even though such usage may collapse difference and make comparison illogical. Nevertheless, at its core, this essay is a step towards a rational re-conception of categories. Thus, the identity choices

² Under the First Amendment free exercise clause, religious adherents are not guaranteed accommodation from laws of general applicability that do not directly target religion (Employment Division, Department of Human Resources of Oregon v. Smith, 1990).

³ President Trump issued an executive order banning immigration from nations with large Muslim populations (Thrush, 2017), notwithstanding the order's conflict with Constitutional strictures (International Refugee Assistance Project V. Trump, 2017; Liptak, 2017) and despite Islam being the world's second largest religion with only 20% of adherents from countries in the Middle East (Berkley Center for Religion, Peace & World Affairs).

exceptional individuals make regarding whether to cover or convey is a perspective from which to examine norm change. Part II endeavors to address how the ADA affects the rights and identity choices of exceptional individuals. This effort considers the systemic nature of disability discrimination, the appropriateness of a civil rights rubric, as well as a workplace efficiency rubric for informing choice to publicly convey identity in the workplace and beyond. The elements that inform individual identity are important for developing prospective civil rights strategies. These choices have the potential to influence interpretations of the vague ADA language describing both disability and the circumstances requiring accommodation through social awareness acceptance of relevance. Thus, Part II focuses more directly on the promise of the ADA. It evaluates approaches to the ADA, including it within a broader civil rights dialogue. It further evaluates the application of tort theory and doctrine in the accommodations terrain and provides a framework for understanding both the limitations and broader applicability of the ADA. Notably, the same themes important in understanding exceptionalism--multi-dimensional realities requiring context specific analyses--are also important for interpreting the ADA. Ultimately, reviewing approaches to the ADA is meant to discover better means for maximizing human potential and for furthering the goal of human flourishing.

Part III interrogates concepts of the average and its role in defining difference. It explores definitions of exceptional as well as relevant situational designations. The focus here is on exceptional individuals, but also includes other aspects of identity that are socially constructed as outside the norm. This Part ultimately examines the difficult identity choices, to cover or convey, routinely confronted by exceptional individuals.

II. The Landscape of Difference

I have realized that, just as with the identification of racism or sexism, identification of a personal disability does not require me to ensure the comfort of others. (Fenton 2011, 70)

Being exceptional inherently is complex, and only is coherent in comparison to presumed average. The nature of difference may be subtle or imperceptible to external observers and thus the nature of physical impairments experienced by some individuals may not be fully apparent or apprehended accurately. Especially for an exceptional individual with “silent” or hidden differences, she may occasionally have the choice of whether or not to cover or convey the nature of the any difference. Exceptional individuals with more prominent difference also must decide how to navigate choices in identity, but for obvious distinction, are more limited in their ability to influence external perceptions.

Yoshino believes that covering portends the end of civil rights because it is a forced assimilation, extinguishing group-based protections (2006). He notes a potential exception to covering, where the law provides protections such as those offered under the ADA. Focusing on individuals who may claim these exemptions and choose to not cover, but instead convey, may be helpful for understanding the actions of individuals without such protections. Ultimately, the focus on individual choices may point to avenues for furthering civil rights. The importance of self is obtained through the performance of a social function, fulfilling the duty to direct the community by “finding out what is to be done and going about to do it” (Mead, 1967, p. 315-16).

A. Average/Normal/Regular

Average, “normative,” “ordinary,” or “regular,” the apparent ideal and the measure against which all else is judged (Davis 2006), too often denote mediocre (Davis, 2006). Yet, the belief that norms are objective is the primary basis for the differential treatment of exceptional individuals. Without a specific context, the unstated and un-interrogated average,⁴ white, male,

⁴ In contrast to pragmatist epistemology, discourse theorists, like Wittgenstein or Foucault, prioritize “the unarticulated and unreflective basis of rule-following” (Schmidt, 2006, p. 821), whereby, discourse analysis is

heterosexual, Protestant, financially stable, able-bodied individual is the assumptive norm in conversation or written inquiry (Minow, 1990, p. 51). “The normative prescription of habits is not usually articulated and instead inhere in their execution, forming and, often unexamined, foundation from which individuals act.” (Schmidt, 2014, p. 819). Presumed neutral and objective, the unstated norm makes the “other” more pronounced (Davis, 2006). Paradoxically, “normal,” is unstable and defies description and, like disability, is contingent. The presumption of objectivity, essential for a norm, is “manifested in architecture that is inaccessible to people who use wheelchairs, canes, or crutches to get around,” (Minow, 1990, p. 59) in the comprehension of only one language (Groce, 1985), or in the illusion that an employee does not have a personal life, family, or caretaker responsibilities.

There are myriad studies confirming characteristic-based patterns of differential treatment for hiring, in employment settings, in access to housing, and in education (e.g., Reeves, 2014; Roscigno & Karafin, 2009; Bertrand & Mullainathan, 2004; Paludi & Strayer, 1985). Education, often sets the stage for the acceptance of identity-based, differential treatment. Even in early and primary education, learning disability classifications were created through the efforts of “largely white, middle-class parents in the late 1950s and early 1960s to gain resources for . . . their ‘under-achieving’ children,” (Kelman & Lester, 1997, p. 4) and were not used exclusively to address disability. This is to say, accommodations for learning disabilities were originally created to counteract what would otherwise be characterized as “average.” Used as a political tool for social engineering, learning disability is a label disproportionately imposed on black boys privileged over practice (Neumann, 2002). Discourse, a system for the formation of statements. (identifying Wittgenstein and Foucault as the seminal thinkers in discourse analysis). While this Essay focuses on habits, foundational to pragmatism, it cannot escape notice that it engages in discourse to endorse practice for transformation.

for the purpose of tracking, a form of intra-school segregation (Fenton, 2013). This example also points to a dynamic whereby one subordinated status is used to sustain another. Thus, the complex nature of identity and subordinated status may be mutually confirming, but most especially, may reaffirm the status quo.

Prerequisite for countless forms of employment, higher education plays a significant role in the perpetuation of identity perceptions. Leaving aside evidence of cultural bias in evaluations of criteria or ideals of merit, underlying admissions decisions in most Universities and Colleges, are manipulated to achieve a specific class composition, intended to replicate the perceived average society, in all aspects (Roithmayr, 1997). Controversial since its inception, Affirmative Action has successfully ensured admissions of women and minority men (Thomas, 1990). Given considerably less notice, and causing much less outrage, special consideration is routinely given to those within the presumed norm, for example, legacies and athletes (Espenshade, Chung & Walling, 2004). Yet, more telling is the phenomenon that might be deemed affirmative action for Caucasians in relation to Asian students. “A 2009 Princeton study showed Asian-Americans had to score 140 points higher on their SATs than whites” even though the relative numbers are not reflected in elite institution admissions (Lam, 2017). This example makes clear that merit is not always the most important consideration, but the most important illusion. It also makes apparent that what constitutes the normative is designed to reaffirm itself and in accordance with entitlement (Fenton, 2007).

B. Exceptional

That one person can be exceptional within multiple realities is a valuable starting point for grasping the complexities of identity. Even remaining within the conferred definitions, a single individual may be exceptional in more than one regard; that is, she may have

extraordinary capacities while simultaneously managing a physical or mental impairment. The coexistence of exceptional traits may be quite obvious, as in the case of a successful athlete who must use prostheses to compensate for a physical difference, Aimee Mullins comes to mind (Rosenbaum & Zak, 2012), or the first amputee to be certified as a navy diver and the first African American to achieve Master diver rank, Carl Brashear (Naval Institute). Concurrent exceptional traits may also exist with one or more hidden, silent, or less obvious characteristic as in the case of a high performing intellectual who manages a psychological disorder; prominent examples here include John F. Nash, Jr. (Goode, 2015) or possibly Ludwig van Beethoven (Mai, 2007; Goodnick, 1998). There are innumerable examples across history and from all walks of life, of individuals in general society, spanning the extremes.

Exceptional individuals may be deemed so because of natural ability and talent, or because of personal drive and determination (Grant, 2008; McClelland, 1985). Even this distinction may be one that prompts envy from the real and perceived advantages of difference. Yet, much achievement is anonymous, accomplished by individuals remote from the lime light. Exceptional individuals sometimes choose to cover their abilities and achievements, to be perceived as average and to fit in or otherwise not attract attention (Solomon, 2012). This may be especially true for young prodigies, but the dynamic of social pressure also applies to adults who are genius (Solomon, 2012). It may also apply for high achievers under more routine considerations, such as identification of educational degrees or other achievements, lest one be considered a braggart and a bore (Berman, et. al 2015). Thus, though we often think that covering is only done by those who do not meet the predefined normative standard, covering may also be a device used by those who exceed it.

For an exceptional individual with a “silent” or “hidden” disability, it may be a genuine choice whether to reveal a disability, whether or not in conjunction with a request for an accommodation (Colella, 2001). For this individual, the matrix of choices is more complex. If this individual is able to perform beyond expectations, even without accommodation, knowing that her success could lead to the denial of accommodation for others with a similar impairment, she has at least two choices: She may either cover and hide her condition or convey and advocate on her own behalf and for others similarly situated. “Self-sacrifice means a self-maiming which asks for compulsory pay in some later possession or indulgence” (Dewey, 1922, p. 139). For exceptional individuals who have a visible physical, or otherwise noticeable impairment, the options for covering are less available and imperfect. For instance, lip-reading may enable someone who is deaf to “cover” an inability to hear, but may mean a more imperfect communication than realized between two hearing individuals (Dodd, 1987; cf., Murray, C.D., 2005; Nelson, et. al, 2003). Where such options exist, the personal or financial costs may be high, but she still has some choice in how she presents herself to the world and to what degree she attempts to replicate normative ideals (Balbridge & Veiga, 2001; Goffman, 1997) and, correspondingly, seek accommodation under the ADA.

Success, for many who have one or more subordinated identity characteristics, frequently means operating and achieving at levels beyond the “normative.” While “exceptional” commonly is used as a compliment, it may also serve to denigrate for perceived arrogance or superiority, or merely for the fact of deviation from the believed norm. Further, achievement past the “normative” and that which surpasses the expectations embedded in stereotype need not be mutually exclusive and may be one in the same, yet social perceptions too often emphasize the latter. “For a time, a self, a person, carries in his own habits against the forces of the

immediate environment, a good which the existing environment denies” (Dewey, 1922, p. 55). Expectations and labels as exceptional may be informed by multifarious aspects of identity in coordination and, thus, a delineation as “exceptional” may, in fact, be deprecation.

In certain social contexts and when an exceptional individual identifies with more than one socially subordinated status, such as race, gender, sexuality, or disability (also a form of exceptional), some tributes may denote denigration, even when intended as compliments. When a coworker, supervisor, or person in a position of authority describes someone as exceptional in a manner such as: “I forgot you were ___;”⁵ or perhaps states, “you’re not like other ___ people;” “You are cooler than/smarter than/not as threatening as other ___ people,” the description may sound like a compliment, yet, the inherent comparative effectively perpetuates stereotype and thereby denigrates both the person purportedly complimented and the referent community (Minow, 1990). Since an inherent part of the definition of exceptional is an unstated deviation from the perceived norm, such a compliment necessarily is a combination of praise and deprecation. With average as the standard, in any context where an individual is identified as outside the norm, exceptionalism may be a tool for subordination.

C. Exceptional Choices

When conveyance of an exceptional aspect of someone’s identity is optional, resort to covering may be seductive in a society that seems to revere the average. If this individual chooses to cover a trait that otherwise would entitle her to seek an accommodation, her success in meeting average expectations, in and of itself, makes her exceptional. Nevertheless, if an individual chooses not to disclose the existence of a disability to her employer, she will not have

⁵ This Essay uses blank spaces here to suggest a variety of potential identities, including, but not limited to race, gender, religious affiliation, sexuality, physical capacity, each context dependent.

protection under the ADA. No matter how appealing personal privacy may be, an individual with a non-apparent, physical impairment must reveal it to justify accommodations (ADA).

The core paradox for an exceptional individual is that if she can manage without accommodation, her employer may believe that she does not need one; yet, if she requests an accommodation, her employer may determine that she is unable to do the job (Balbridge & Veiga, 2001, p. 93). Relatedly, because ad hoc assessments are the means for granting accommodations, an employer may grant whatever is needed and requested by some employees, while granting to other employees with similar needs the bare minimum, sufficient to meet legal requirements. When an employer grants full accommodation, it is sometimes because the productivity of the requesting employee exceeds expectations or because her contribution otherwise is valued. When an employer grants the minimum, potentially no accommodation, without assistance an employee must still meet workplace average expectations.

By detailing the challenges and barriers experienced on the pathway of her success, an exceptional individual may garner further accolades and solidify her status as exceptional. Further, she may be taking one step in raising awareness necessary for procuring social change. Simultaneously, she may be indicating that an accommodation previously granted by her employer is no longer, or never was, necessary. In the process, she may jeopardize her employer's willingness to provide an accommodation she legitimately needs, or more broadly, affect her employer's perceptions regarding the requirements of similarly situated individuals. This is to say that exceptional individuals who exceed expectations for average performance with minimal or no accommodation may make the ability of other individuals with the same impairment unable to obtain necessary accommodation, for the comparison. In this scenario, an exceptional individual may feel the need to engage in reverse-covering (Yoshino, 2006) to

highlight difference to obviate her subordinated status and ensure the continued availability of accommodation, for self or others. Regardless, exceptional individuals may be in the wrenching position of simultaneously reinforcing stereotype while reducing available remedies.

For exceptional individuals who inhabit multiple identity spaces, the variables to navigate are more labyrinthine. For example, a common understanding in the plight to combat stereotype is that women and minority men “must work twice as hard to be considered half as good” (Whitton, 1963). Assuming this is true, even perceptibly, an individual already identified in one or more socially subordinated category, confronted with necessity of requesting an accommodation and correspondingly revealing an impairment, may resist the option for fear of confirming stereotype, associated with one or more of those categories, regarding lack of ability or slothfulness, and necessitating that she work exponentially harder to satisfy a perception of average. This may be so, even under circumstances where such revelations would indicate demonstrably superior capabilities because of the fact of accomplishment in the face of great challenges.

Thus, some exceptional individuals must cope with the “double bind” of having to work harder and achieve more, while nevertheless, being perceived as inferior or otherwise undeserving (Radin, 1991). Conversely, for some exceptional individuals, the challenges and barriers placed in their pathways, navigating multiple aspects of identity, may induce them to stoically encounter additional challenges as simply supplementary. In these cases, the individual may decide not to request an accommodation that would otherwise be regarded as necessary and reasonable. Even more perniciously, revelation of a physical or mental impairment may contribute to real and perceived weakness, effectively making that individual a more attractive target for predators (Jones & Remland, 1992). In these cases, an exceptional individual must also

calculate the implications for personal safety. Of course, individual choice varies in accordance with time and circumstance. From the sheer fact of confronting these complex questions, regardless of her choices, an individual is exceptional.

Yet, the contrary reality for exceptional individuals, inhabiting multiple identity spaces, is that employers, schools and other institutional entities readily and prominently boast these individuals in an “all-purpose” way to establish a workplace compliance/non-discrimination/open environment reputation. The “all-purpose body,” already exceptional as someone succeeding in the face of perceived difference, may be asked to further meet more expectations, not only through performing marketing, administrative, or policy tasks, but also in the expectation that she represent the presumed “unitary voice” of one or more, underrepresented community. This phenomenon suggests that there are intangibles valuable to an employer, appropriately considered as a variable included in a cost-benefit assessment of accommodations. This also presents another occasion for negotiating identity, typically for the benefit of the exceptional individual. That is, being exceptional in one fashion may present an opportunity to seek accommodation for other exceptional attributes without resistance from the employer or even to seek general workplace change.

An individual’s choice to cover or convey is part of the ongoing endeavor to define self and is essential in furthering community change (Mead, 1967). “The thing actually at stake in any serious deliberation is . . . what kind of person one is to become, what sort of self is in the making, what kind of a world is in the making” (Dewey, 1922, 217). A person can only develop self in relation to others and to the community. The self is a reflection of the community to which it belongs because she captures social mores into her own conduct (Mead, 1967). A person’s self conception is inherently tied to the perception of, and treatment by, other

individuals in society (Minow, 1990). This reality “is not in the least incompatible with, or destructive of, the fact that every individual self has its own peculiar individuality, its own unique pattern” (Mead, 1967, p. 201). Individual action is what defines self and concomitantly forms social habits and community (Dewey, 1922; Peirce, 1940 [1877]).

As part of her personal appraisal, an individual may have to confront a conflict of interest from the potential application of multiple legal frameworks (cf., Crenshaw, 1991), conflicts in doctrinal application from distinct legislation as well as a conflict of motivation in choosing to act in furtherance of one or any other. “In addition to the general psychology of habit, . . . we need to find out just how different customs shape the desired, beliefs, purposes of those who are affected by them” (Dewey, 1922, p. 63). A single individual may choose to cover or convey alternate aspects of their identity, independently or simultaneously, to suit or counter a given situation. The complexity of being an individual, much less an exceptional one, is reflective of the complexity comprising society.

III. Approaches to the ADA

Understanding complexity inherent in individuals’ choices in navigating the various aspects of their identities may be useful for interpreting and applying the ADA. The ADA defines an individual with a disability as a person who has “a physical or mental impairment that substantially limits one or more major life activities,” has a recorded history of such an impairment, or is regarded by others as having such an impairment (ADA). Non-provision of reasonable accommodations constitutes discrimination under the ADA as does denial of employment opportunities to qualified individuals who require accommodation (ADA § 35.108). As originally passed, the ADA did not provide much guidance regarding the finding of disability (Lanctot, 1997) save detailing the conditions excluded from the definition (42 U.S.C. § 12211

(1994)). Because of the lack of guidance, courts interpreted the ADA narrowly (Bagenstos, 2000; Bagenstos, 2003; Barry, 2013). Congress responded by clarifying that the ADA ought to be applied broadly (ADAAA). After the amendments, judicial interpretations of the ADA improved, but the ADA continue to be imperfect and to lack clarity (Areheart, 2011). Under these circumstances, accommodations under the ADA have largely been met through ad hoc, individualized assessments (Barry 2013; Travis, 2012).

This Part, will focus on theories ascribed to the ADA and its application. It divides the approaches to the ADA into two categories. First, for some scholars, accommodations are a valuable tool for comparison in the difference discourse and a hope for advancing civil rights and social justice (e.g., Bagenstos, 2000; Karlan & Rutherglen, 1996; Calloway, 1995). At the heart of these theories is a view of ADA accommodations as a device that might be extended to other individuals in other protected classes. An examination of the ADA in comparison to the Civil Rights Act is instructive, both for gauging the parameters for accommodations under the ADA as well as any separate legal limitations that an exceptional individual may need to consider in deciding to cover or convey. Of great significance, with the nature of individuated assessment, receipt of an ADA accommodation forewarns individuals to potential bias in the process.

Second, a different set of commentators view the accommodations framework as a social engineering scheme for wealth redistribution (e.g., Issacharoff & Nelson, 2001; Weaver, 1991). These commenters focus on compliance issues and limiting the corporate costs associated with providing accommodations. These commentators hope to minimize the impact of the ADA on employers, often through the appropriation of tort schema. To facilitate the individualized assessments used to determine required ADA accommodations, analogy to tort methodology and theory, requiring assessment under specific context, has proven effective (Schwab & Wilborn,

2003). A tort approach results in ad hoc assessments. Bias is inherent in this approach as it promotes the rationalization of minor distinctions among similar cases. This section also explores the tort rationales for mandating broad corporate responsibility for accommodations under the ADA.

As the perspective of the accommodation seeker ought to be a more prominent component of the literature discussing work-place compliance (Cramton & Hodge, 2003), this Part uses the considerations of these two approaches for understanding personal choices which affirm or avoid identity. It focuses on such choices by exceptional individuals with the intention of furthering an antidiscrimination objective. Coincidentally, the themes affecting identity and choices for exceptional individuals are inherently relevant for analyses of the ADA.

A. ADA as Civil Rights

Because they could identify its anti-discrimination objectives as fundamentally consistent as with other civil rights legislation (Bagenstos, 2000; Karlan & Rutherglen, 1996; Calloway, 1995, scholars initially predicted that the ADA would bring new direction for civil rights. Both the ADA and the Civil Rights Act (The Civil Rights Act of 1964) attempt to eliminate group-based subordination, derived from myths and stereotypes, contributing to differential treatment and segregation in employment and beyond. (H.R. REP. No. 101-485, 1990, p. 40; Lanctot, 1997; Bagenstos, 2000).

While seeming opposites, both accommodation and anti-discrimination require that employers eschew categorical generalizations, with the aim of treating each person as an individual (Bagenstos, 2000). Notwithstanding the appeal of a colorblind ideology, prohibitions on discrimination entail a conscious awareness to eliminate barriers with the goal of maximizing human potential. ADA accommodations more directly require a conscious awareness of

difference, also with the deliberate intent to maximize human potential (Schwab & Willborn, 2003; Bagenstos, 2000). “Constitutionalism agrees with versions of democratic theory that hold respect for equal human dignity, defined to include a wide degree of individual liberty, to be the fundamental value of any truly just society” (Murphy, 2007, p. 6-7). This awareness is especially important to effectuate an appropriate accommodation.⁶ Once a qualifying disability is identified under the ADA, a reasonable accommodation is required, while for individuals in other protected classes, accommodation is not mandated. This distinction is the at the heart of how the ADA may be regarded as the more effective (Strauss, 1986).

Both the ADA and the Civil Rights Act assist “otherwise qualified individuals” (*compare* 42 U.S.C. § 2000e-2(e) to 42 U.S.C. §12112 (a).) in confronting social barriers or obstacles. One might compare Affirmative Action, a tool used to further the goals of the Civil Rights Act, to accommodation, a tool used to further the goals of the ADA. However, unlike claims of discrimination under the Civil Rights Act, requests for accommodation do not require proof of prior wrong doing or intentional misconduct. ADA accommodations have the potential to be more effective and could be viewed appropriately as the natural extension of existing civil rights protections. In this view, accommodations should be available to members of all protected classes in overcoming obstacles and barriers (Bagenstos, 2000). However, defining the relevant obstacles and barriers for the analogous requests for accommodation in contexts independent of disability, traditionally defined, may prove elusive.

⁶ The conscious awareness of difference, as with the alternative deliberate disregard of difference, are necessary to address inequality, yet may simultaneously exacerbate the associated problems. Minow describes this paradox as the dilemma of difference (1990).

Despite the ADA encompassing both an anti-discrimination component and an accommodation requirement (Karlan & Rutherglen, 1996), most reviewers rely on an act/omission distinction to find a fundamental incongruence between these measures (Rosen 1991; Kelman, 2001; Bagenstos, 2000; but see, Jolls, 2001; Rabin-Margalioth, 2003; Bagenstos, 2000). Application of the two approaches under similar circumstances demonstrate instances where there are advantages from accommodation over affirmative action, and some instances where the advantages are reversed, and occasions when neither is effective (Schwab & Willborn, 2002; Karlan & Rutherglen, 1996). One significant difference entails cost considerations, central for determining required accommodations under the ADA (Schwab & Willborn, 2002). While this contrast is prominent, it may be illusory as interpretations of Title VII also avoid the imposition of costs on employers (Schwab & Willborn, 2002).⁷ Furthermore, deference to employers on accommodation costs is comparable to the requirement that individuals in a protected class demonstrate “discriminatory purpose” when seeking redress (Washington v. Davis, 1976; In Personnel Administrator of Massachusetts v. Feeney, 1977).

An objective of both the ADA and the Civil Rights Act is to combat group-based subordination. At the same time, employer cost minimization (Karlan & Rutherglen, 1996), is an objective also supported within anti-discrimination jurisprudence. Nevertheless, the fine-grained approach necessary in disability accommodations has never been extended to individuals in other anti-discrimination contexts (Karlan & Rutherglen, 1996). On the other hand, since bias is

⁷ While Title VII shies away from imposing costs on employers (EEOC v. Univ. of Tex. Health Sci. Ctr., 1983; Fesel v. Masonic Home of Del., 1978), “[w]hen employers can prove that employees of a particular sex will be less productive because of discriminatory customer preferences, they win the cases” (Schwab & Willborn, 2003, p. 1236).

inherent the fine-grained, ad hoc approach to accommodations, the process itself may be a means of permeating discrimination and enabling differential treatment of similar cases.

Even though hope for an extension of ADA accommodations to members of other subordinated groups is not wholly unrealistic, advocates should nevertheless worry that previous civil rights jurisprudence will have a limiting effect on the promises of the ADA. Individuals who must navigate scrutiny of their own identities are aware of the legal machinations that may provide protections or limitations in their endeavors.

B. *Profit Maximization and Tort Calculations*

Under the ADA, accommodation seekers, must justify their requests as facially “reasonable.” To acquire accommodation under the ADA, a requesters proposal must first be “reasonable on its face” (U.S. Airways v. Barnett, 2002). In response to such a request, an employer may assert impracticality only if he can demonstrate “undue hardship” under the circumstances (Id.). If this is the case, then the employer need not provide the requested accommodation. When the test for required accommodation is based in a “reasonableness” evaluation and includes an “undue hardship” standard, suggesting a cost/benefit analysis, the appropriation of tort analyses is perhaps obvious (Schwab & Wilborn, 2003; Karlan & Rutherglen, 1996).

Since "reasonable requires something less than the maximum possible care" (Vande Zande v. Wisconsin Dept. of Admin., 1995, p. 542), a tort-inspired approach benefits employers. Moreover, an “undue hardship” standard evokes a cost/benefit analysis, an established method for evaluation in negligence doctrine. Scholars often attribute cost/benefit analyses to economics (Epstein, 1995; Posner, 1972), and typically view it as a means for protecting business interests (Mitchel, 2003). “The internalization of norms through habituation may seem highly efficient

because it reduces the cost of compliance,” even if the norms created are dysfunctional for society (Posner, 2004, p. 293).

As with the requirement to demonstrate a “discriminatory purpose” for Title VII relief, the requirement to justify costs of accommodations presume that “existing social and economic arrangements are natural and neutral... From this viewpoint, any departure from the status quo risks nonneutrality and interference with free choice.” (Minow 1990, 52). Furthermore, “once a practice becomes habitual, the benefit-cost ratio of compliance becomes strongly positive, so that an interruption is felt as a real cost even when the actual harm from the interruption is trivial” (Posner, 2004, p. 126). So embedded are the views of what constitutes the normative, some analysts consider accommodations under the ADA as a form of wealth redistribution (Weaver, 1991; Epstein, 1992; Posner, 1983). Some have gone so far as to suggest that the ADA accommodations provision is mandated charity (*U.S. Airways v. Barnett* (Scalia, J.), 2002), instead of as a means of reducing dependence (Bagenstos, 2004; Krieger, 2003; Wax, 2003; Issacharoff & Nelson, 2001; Diller, 2000; Rosen, 1991). A fear of mandatory redistribution or of “good Samaritan” obligations further influence the limitation on required accommodation (Tucker, 2001).

Notwithstanding broader interpretations driven by its 2008 amendments act, the ADA continues to be inexact in the parameters for required accommodations, necessitating the persistence of an individualized approach (Barry 2013; Travis, 2012). From an approach based in negligence, ad hoc evaluations readily follow but also permit differential treatment by finely made distinctions, allowing bias as an integral input. However, employers routinely make individualized accommodations for workers, regardless of disability (Jolls, 2001; Stein, 2000; Blanck, 1999; Blanck, 1997); typically, accommodations provided to individuals with a

disability are not more burdensome or costly than accommodations made to any other individuals within the workforce (Jolls, 2001). This reality sharpens the nature of being exceptional and the norms relevant for creating socially constructed difference. It also brings into focus the fact that difference is in perception. An exceptional individual is aware of the potential resentments spurred by the conference of accommodations (Colella, 2001). “Breach of custom or habit is the source of sympathetic resentment, while overt approbation goes out to fidelity to custom maintained under exceptional circumstances” (Dewey, 1922, p. 76).

By creating preferences for individuals with disabilities over other workers with more favorable productivity profiles, the ADA “creates labor market preferences for individuals with disabilities” (Schwab & Wilborn, 2002, p. 1211-12). Stein points out that from an employer’s perspective, there is no real difference between:

(1) a worker with a disability who does not require an accommodation but who is less productive than a nondisabled peer; (2) the equally productive disabled worker provided with a reasonable accommodation; or (3) the comparatively hyper-productive worker with a disability provided with a proportionately hyper-reasonable accommodation expense (Stein, 2000, p. 133).

However, only the second worker has assured ADA protection (Stein, 2000).

Verkerke argues that the ADA promotes efficiency by matching accommodations to skill sets (2003). ADA accommodations are efficient only with complete information so that an employer can appropriately match an employee with a job function. Accommodations allow an employer to avoid inefficiencies related to high turnover, nonproductive workers, and poor hiring decisions (Verkerke, 2003). “A market system tends to magnify differences in innate ability, driving a wedge between the natural lottery and income.... A system of wealth maximization ratifies and perfects and essentially arbitrary distribution of wealth.” (Posner, 2004, p. 101-102). Verkerke specifically points out that discriminatory hiring practices cause increased business

costs and serious inefficiencies emanating from the arbitrary behaviors associated with economic Darwinism (Verkerke 2003; Sloth and Whitta-Jacobsen 2011; Clark 1991). Uncritical cost benefit analyses set the stage for economic Darwinism.

What is not often directly discussed as part of the calculations is the value of human capital. Most especially common perceptions on who is a worker has been subject to alteration in accordance with history, context and identity. Cost/benefit analyses are intended to assess costs, not lives (Posner, 2004; Kornhauser, 2000; Broome, 2000). During the era of enslavement,⁸ racially determined but without regard for gender, profit was found in these devalued bodies with physical and psychological impairments, while the contemporary “dominant paradigm conceive[s] of disabled bodies as having little economic value” (Erevelles 2011, 39.) The confluence of one subordinated category alters perceptions and the corresponding valuation of individuals in the work force. Sojourner Truth, an early critic of gendered perceptions in the workplace, pointed out that race destabilizes gender roles (Truth, 1851). For women subject to enslavement, there was not much question about her ability to work while being a parent, while modern-day critics are compelled to focus on the effects of parenting roles on the workplace.

Economics cannot be divorced from culture and political hierarchy. Thus, if tort doctrine and theory is a derivative source for analyzing the ADA, it should be used in a comprehensive manner. Tort also contemplates cost spreading, deterrence, and corrective justice (Weinrib, 1995). It also contemplates secondary and enterprise liability (Schwab & Wilborn, 2003). Even

⁸ The confluence of race and disability was pioneered during the era of slavery. “Racist ideologies defined male and female African Americans as fundamentally inferior specimens with deformed bodies and minds who were best confined to slavery” Kim Nielson (2012) 50. Black bodies were maimed, mutilated, and killed through the auspices of the institution of slavery, forcing survivors of this brutal institution into submission. Id.

cost/benefit also has strong foundations in social welfare and moral theory (Calabresi, 2008; Coleman, 1992; Seavey, 1942; Terry, 1915). If tort approaches and theory are appropriate as an evaluative tool in the ad hoc application of accommodations, they should also be appropriate in holding accountable the entities with a large a role in creating and perpetuating disability.

Precisely because they are significant creators of disability (Reville & Schoeni, 2004), employer and corporate responsibility is at the core of such tort fields as workers' compensation, products liability, and the corresponding field of medical malpractice. In a similar vein, as part of the department of labor, Occupational Safety and Health Act of 1970 (OSHA) is intended to reduce workplace hazards. While some employers may view the ADA as an inappropriate imposition on business, it is nevertheless true that tort devices are insufficient to hold accountable corporate actors for the harms they cause, even in their own workplaces (U.S. Census Bureau, 2015; Reville & Schoeni, 2003; Leigh & Robbins, 2004; Bureau of Labor Statistics, 2016). Perhaps the imperfections in tort and in the ADA are a reasonable trade-off, each cancelling out the missing pieces of the other.

IV. Conclusions–Norm Change

This essay's focus on the identity performance by, and agency of, exceptional individuals is a means to accept difference and accommodate variables to account for norms with the intention of maximizing human potential. The idea of maximizing human potential is harmonious with Aristotelian ideals of Eudaimonia, or human flourishing. Human flourishing is connected to the "exercise of rational activity and agency" (Hinchliffe, 2004, p. 536), which includes the wisdom to recognize human potential. The concept also apprehends the constituents of Eudaimonia exercising "a certain ability or cleverness which converts the mere apprehension of what is to be done into the actual doing of it" (Hinchliffe at 537).

The pragmatist's enterprise is in accord with these ideas as they explain that the means to challenge habitualized beliefs is for individuals to act and bring two or more habits into conflict, and then "release[] impulsive activities which in their manifestation require a modification of habit, of custom and convention" (Dewey, 1922, p. 87). In the face of institutional resistance, "the actor must determine not only what means to select to reach a given end, but also what exactly the end of goal of action should be in the new situation" (Schmidt, 2014, p. 820)).

Instead of resorting to positivist assumption, pragmatists teach that through deliberation and experimentation, "the development of new habits in the face of uncertainty is an inherently contingent and creative process that does not lend itself to prediction" (Schmidt, 2014, p. 820). This experimentation in pursuit of a common humanity, while appreciating individual difference, inherently is a "ragged, untidy process of groping for, and sometimes grasping, something of how the world is – is a human thing" (Haack, 2008, p. 34-35).

Along with pragmatism's focus on practice and community as the basis for meaning, a cover/convey matrix suggests strategic, interactive, game theory with aggregative influence on social norms (Dillard, et. al, 1989; Roth, et. al, 1980). Pragmatists would encourage practice that requires nondiscrimination in broader contexts, especially for individuals who convey, as well as practice designed to eliminating the need for "accommodations" as currently constructed. That is accommodations should be approached as if all are practical and benefit from economies of scale as a part of norm production. Since norm entitlement is contingent (cf. Marx, 1964 [1844]), abolition of the category in reference to individuals in favor of an associational focus, should bring greater equality as a foundational human inclination. Individuals should be free to define their own normal, selecting the combination of relevant accommodations for their individual needs. In other words, pragmatists would promote community habits that create a

“new normal,” (Dewey, 1922; Mead, 1967; Peirce, 1940 [1877]), with the ultimate goal to eschew a presumed categorical normal.

Interpretation and use of the ADA is fertile ground, both for understanding the choices of exceptional individuals, but also for finding means to maximize human potential, human flourishing. Human flourishing has both a social and economic dimension whereby an equal share in community resources is essential. (Dworkin, 1985). Even the doctrinal devices for cost/benefit analyses have strong foundations in social welfare and moral theory (Calabresi, 2008; Coleman, 1992; Seavey, 1942; Terry, 1915) and may contribute to creating equal access. “The equality in question attaches not to any property of people but to the importance that their lives come to something rather than being wasted.” (Dworkin, 2000, p. 5). Taking notice of how exceptional individuals make determinations regarding the conveyance of identity, as one element in the process of norm change, is a useful input in advocacy for future interpretations, amendments, new laws, and social inclusion of difference within its definitions of norms.

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