Not Able Enough, Not Disabled Enough

Dr. Angélica Guevara *

Individuals who are not able enough and not disabled enough have languished in the shadows as they often are unable to openly embrace their disabilities given the stigma and trivial treatment of some non-apparent disabilities. They face the reality that the law and policies have manifested an ability/disability binary system where a person is either deemed able-bodied or disabled because of the stereotypes that disabilities are (1) readily apparent and (2) experience the effects of their disability to a high level at every moment. Our legal system gives little to no thought of the people who fall outside of these binaries. This Article discusses the group of individuals who are neither able enough to keep a job nor disabled enough to qualify for social security benefits. While there are many non-apparent disabilities, this Article focuses on disabilities that are on the rise, namely depression, anxiety, and post-traumatic stress disorder (PTSD). In addition, the Article touches upon the increased use of Social Network Sites (SNS) as a result of the COVID-19 pandemic's stay-at-home orders contributing to depression, anxiety, and PTSD, compounding the number of Americans whose non-apparent disabilities render them not able enough but not disabled enough and therefore remain without access to government benefits. As these non-apparent disabilities have become more prevalent in the workforce, this group must become more openly discussed. Consequently, this Article implores federal lawmakers to look at those falling through the cracks of our inadequate disability laws and policies.

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INTRODUCTION

Consider a scenario:

> EMPLOYER: "We must terminate your employment for excessive absenteeism. The warning letter we gave you last year addressing your attendance did not seem to help; you have been absent three times a month this year. Such absences affect the company and we have to let you go."
>
> EMPLOYEE: "As previously mentioned, I suffer from depression and anxiety, making it hard to function some days, especially on the days when my PTSD is triggered. Finding the right medication and therapist has been a struggle, but I am confident I am getting closer to a solution."[1]

Unfortunately, current federal disability law fails those with non-apparent disabilities like this employee. Even if the employer is empathetic to the employee's circumstances, they may have no choice but to terminate a disabled employee, citing business necessity. The failure to protect disabled workers—especially those with increasingly common non-apparent disabilities—is a pressing concern. About 27% of Americans have some type of disability, and about 12.8% of these individuals have cognitive disabilities that are non-apparent.[2] Those with cognitive disabilities may have trouble concentrating, remembering, or making decisions. The pandemic has likely only added to these numbers. As a result of the COVID-19 pandemic, many Americans lost loved ones, jobs, and homes, which only contributed to non-apparent disabilities like depression, anxiety, and PTSD.[3] In addition, the increased use of SNS as

1. A hypothetical was more appropriate to use here because disability antidiscrimination laws tend to overwhelmingly benefit the employer, which makes it challenging to find an appropriate case.

2. *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html [https://perma.cc/CC69-YZYU] [hereinafter *Disability Impacts All of Us*, CDC].

3. Mark É. Czeisler et al., *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic—United States*, 69 MORBIDITY AND MORTALITY WKLY. REP. 1049, 1053 (2020); E. Alison Holman et al., *The Unfolding COVID-19 Pandemic: A Probability-Based, Nationally Representative Study of Mental Health in the United States*, 6 SCIENCE ADVANCES 1, 3 (2020); Jean M. Twenge & Thomas E. Joiner, *U.S. Census Bureau-Assessed Prevalence of Anxiety and Depressive Symptoms in 2019 and During the 2020 COVID-19 Pandemic*, 37 DEPRESSION AND ANXIETY 954, 955 (2020); Yuwei Qi et al., *Increases in Symptoms of Depression and Anxiety in Adults During the Initial Phases of the COVID-19 Pandemic are Limited to Those with Less Resources: Results from the Lifelines Cohort Study*,

a result of the COVID-19 stay-at-home orders further amplified these disabilities.[4]

The rise in non-apparent disabilities has forced employers to address mental health head on. The conversation is no longer centered around those who had a history of mental health issues; instead employers are having to consider how workplaces impact mental health.[5] As a result, companies increased investment in employees' mental health by "including extra paid time off, company-wide mental health days, and mental health training."[6] Accommodations for employees increased, allowing employees to take more breaks and allocate time to see a therapist, which is a start.[7] A more sustainable hybrid workforce developed, fulfilling both the employers' and the employees' needs: in short, employers had to adjust to the increase in mental health disabilities.[8]

The problem is that some Americans have disabilities that do not fit neatly into the current ability/disability binary established and perpetuated by current laws and policies, since their condition may vary in severity at different points in time. The law itself cannot deal with fluctuating conditions and the system is not built for individuals with flare-ups who sometimes may be able to work but at other times cannot. More specifically, these conditions are not severe enough to qualify as a disability for disability benefits and too severe for an individual to stay employed. In fact, the Social Security Administration (SSA) requires the disability to be "so severe that it prevents [an individual] from working full time for at least a year."[9] To highlight the problem with the ability/disability binary, this Article will demonstrate the shortcomings of federal disability laws, policies surrounding social security insurance benefits (SSI), and social security disability insurance (SSDI).

Having non-apparent disabilities such as depression, anxiety, and PTSD makes it challenging to maintain gainful employment or qualify for

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154 J. PSYCHIATRIC RSCH. 151, 156 (2022) (describing the impact of the pandemic on those with less capital).

4. *See, e.g.*, Sunkyung Yoon et al., *Is Social Network Site Usage Related to Depression? A Meta-Analysis of Facebook–Depression Relations*, 248 J. AFFECTIVE DISORDERS 65, 71 (Apr. 1, 2019) (describing the link between SNS and anxiety and depressive disorders pre-pandemic).

5. Kelly Greenwood & Julia Anas, *It's a New Era for Mental Health at Work*, HARV. BUS. REV. (Oct. 4, 2021), https://hbr.org/2021/10/its-a-new-era-for-mental-health-at-work [https://perma.cc/N7TL-3TFX].

6. *Id.*

7. *Id.*

8. Maral Babapour Chafi et al., *Post-Pandemic Office Work: Perceived Challenges and Opportunities for a Sustainable Work Environment*, 14 SUSTAINABILITY 294, 295 (2022).

9. *Mental Disorders and Social Security Disability*, DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/disabling-conditions/mental-disorders [https://perma.cc/LGG2-3SJP].

benefits because of either skepticism or fluctuating symptoms, which brings the issue of "severity" into play.[10] Under the Americans with Disabilities Act (ADA) an employer cannot conduct medical examinations and make inquiries of employees and job applicants in an effort to discover disabilities,[11] unless the employer meets its burden under the business necessity exception. To meet this business necessity exception, the employer must demonstrate that (1) the asserted business necessity is vital to its business and (2) the medical examination or inquiry genuinely serves the asserted business necessity.[12] If the disability is mild enough, it may warrant requesting reasonable accommodations; however, if it is severe enough to interfere with business necessity, the employer can fire the employee.[13] On that account, the Article ends with a proposed ideological and practical fix. The ideological fix shifts the law from viewing people with disabilities under the medical model of disability that views and categorizes people with disabilities as defective to the social model of disability that views disabilities as part of human variation, creating a legal and social system where all stand to benefit. Lastly, the Article proposes a practical fix for the current laws and policies using an advocacy approach.

I. TERMS AND DEFINITIONS

This section briefly defines relevant terms and offers some examples of non-apparent disabilities. The following terms are defined: illness, disability, non-apparent disabilities, universal design, neurodiverse, and human variation, followed by examples of non-apparent disabilities such as depression, anxiety, and PTSD.

10. The "severity" of a disability concept operates under the medical model of disability. Under the social model of disability, the severity concept is nonexistent. *See infra* Part III (defining the medical and social models of disability).

11. Americans With Disabilities Act of 1990, 42 U.S.C. § 12112(d).

12. 42 U.S.C. § 12113(a).

13. *Id.*; *see also* Stephen F. Befort, *Direct Threat and Business Necessity: Understanding and Untangling Two ADA Defenses*, 39 BERKELEY J. EMP. & LAB. L. 377, 390–92 (2018) (explaining that employers have a business necessity defense to an ADA discrimination charge when they do not extend jobs to or retain disabled individuals on account of the business necessity of excluding them from consideration.); *see generally* James J. Gupko, *Defining the Proper Scope of the Business Necessity Defense in Title VII Litigation*, 30 CATH. UNIV. L. REV. 653 (1980) (describing the business necessity defense in a Title VII racial discrimination context).

Illness / Impairment

Illness is separate from disability. An illness is something in the individual that needs treatment.[14] Please note illness and impairment are used interchangeably in this Article. Physicians define *impairment* as "lacking part of or all of a limb, or having a defective limb, organism or mechanism of the body."[15] Put another way, "[i]mpairment is, in fact, nothing less than a description of the physical body."[16] Therefore, an injury/impairment is treated differently from disability because disability refers more broadly to an individual's social and legal treatment.

Disability

Disability describes a "capacious" sociopolitical category of "people with a range of physical, emotional, sensory, and cognitive conditions."[17] *Disability,* as defined by disability scholars, is "the disadvantage or restriction of activity caused by a contemporary social organism which takes no or little account of people who have physical [or mental] impairment and thus excludes them from the mainstream of social activities."[18] The word disability is often erroneously conflated with

14. Robert J. Ursano, *Disease and Illness: Prevention, Treatment, Caring, and Health*, 8 PREV. CHRONIC DIS. (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3221570/; *see also* Ria Mukherji, *Chronic illness is not widely viewed as disability. This needs to change*, HARVARD GRADUATE SCHOOL OF EDUC., https://osa.gse.harvard.edu/chronic-illness-not-widely-viewed-disability-needs-change [https//perma.cc/LGG2-3SJP] (discussing how illness and disability is treated as different, but recognizing that often they are the same).

15. IMPLEMENTING THE SOCIAL MODEL OF DISABILITY: THEORY AND RESEARCH 101 (Colin Barnes & Geof Mercer eds., 2004).

16. MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 35 (1995).

17. SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 11–12 (1998) (describing the difference between definitions of "disability," including its medical definition, which has a negative connotation, and its definition as a social/political category, which relates to the identity of "a group bound by common social and political experience"); *see* Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 409 (2011); *see also* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 50 (2009) (explaining the importance of a pan-disability identity when unifying a group for a political movement).

18. MICHAEL OLIVER, THE POLITICS OF DISABLEMENT 12 (1990) [hereinafter OLIVER, POLITICS]; *see also* Mike Oliver, *The Politics of Disability*, 4 CRITICAL SOC. POL'Y 21, 22–23 (1984); Deborah Marks, *Models of Disability*, 19 DISABILITY & REHAB. 85, 85–86 (1997) (discussing the difficulty of defining disability due to the constantly changing nature of qualifying factors); TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS REVISITED 106 (2d ed. 2014) (proposing that the social model may cause disabled individuals to define themselves in comparison or contrast with non-disabled individuals) [hereinafter SHAKESPEARE, DISABILITY RIGHTS AND WRONGS]; JANE CAMPBELL & MIKE OLIVER, DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE 19–20 (1996) (describing the shift to the

illness. For the purpose of this Article, the word disability will be used to refer to both an illness and a disability depending on context in an effort to use a term most people are familiar with. Sectors of the disability community are moving towards coalition building across disability categories.[19] Disability comorbidity is common because rarely does a disability impact the body and not the mind; therefore, joining the body and the mind under the disability umbrella is ideal. The body cannot move without the mind. Thus, disabilities impacting mental health are just as important as physical ones and are encompassed within the definition of disability.

Non-Apparent

A *non-apparent* disability is not apparent but may become apparent after some observation over a period of time. Some non-apparent disabilities can become "intermittently apparent."[20] Margret Price, a renowned disability scholar, uses the stimming[21] in some autistic individuals as an example of a disability that appears intermittently.[22] This Article uses the term non-apparent to supersede the notion of "visible" or "invisible"[23] disabilities, as the terms are inherently ableist in assuming an objective standard of perception defined by sight.

Neurodiverse

With the increased number of people with depression, anxiety, and PTSD, more people and companies are interested in neurodiversity.[24] Traditionally, neuro-differences and those diagnoses marking such distinctions qualify under the umbrella and social category of

social model and subsequent positive change in the political mobility of organizations founded by disabled individuals).

19. *See* ALISON KAFER, FEMINIST, QUEER, CRIP 150 (2013) (describing the benefits and limitations of disability coalition-building).

20. Margaret Price, *The Bodymind Problem and the Possibilities of Pain*, 30 HYPATIA 268, 272 (2014).

21. MARGARET PRICE, *Defining Mental Disability, in* DISABILITY STUDIES READER 306 (4th ed., 2013) ("*Stimming* . . . is a self-soothing repetitive activity that may be practiced by persons with a variety of disabilities, including autism, obsessive-compulsive disorder, or anxiety.").

22. Price *supra* note 20, at 272 (articulating that stimming does not fit into normative social behavior and it is intermittently visible not invisible).

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

24. *See* Rob Enslin, *Strengthening our Workplace with Neurodiverse Talent*, GOOGLE CLOUD BLOG (July 26, 2021) https://cloud.google.com/blog/topics/inside-google-cloud/google-cloud-launches-a-career-program-for-people-with-autism [https://perma.cc/UHAQ-TR5G].

neurodiverse. Margaret Price states that "neuroatypical and neurodiverse mark a broader territory than psychiatric discourse: these terms include all whose brains position them as being somehow different from the neurotypical run of the mill."[25] According to the Department of Labor and Autistic Self Advocacy Network:

> "[N]eurodivergent" refers to people "whose brain functions differ from those who are neurologically typical, or neuro-typical." This includes disabilities such as autism, attention deficit hyperactivity disorder (ADHD), dyslexia, Tourette's syndrome, anxiety, obsessive-compulsive disorder, depression, intellectual disability, and schizophrenia.[26]

Those with depression, anxiety, and PTSD have different brain functions than neurotypical individuals; thus, they fall under this category. Unfortunately, society treats the neurotypical brain as the superior norm rather than embracing human variation.[27]

Human Variation

Taking human variation into account means acknowledging that there is no such thing as a standard way of being, and that "the presence or absence of a disability [does not] predict [the] quality of life" of any individual.[28] The focus of any institution that seeks to address disability then becomes focused on fixing the systems to become accessible instead of "'fixing' the individual so that he or she can better fit into existing systems."[29] Had individuals historically valued the utility of human variation, then perhaps the so-called able body would not be the standard today.[30]

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25. PRICE *supra* note 21, at 303.

26. *Tapping the Power of Neurodiversity in the Workplace*, U.S. DEP'T OF LAB., OFF. OF DISABILITY EMP. POL'Y, https://www.dol.gov/agencies/odep/publications/business-sense/2021/december [https://perma.cc/7BVT-EX5R].

27. Throughout the Article, the terms "able body" or "able-bodied" include both the physical and mental attributes of the body.

28. Kanter *supra* note 17, at 414 (citing Harriet McBryde Johnson, *Unspeakable Conversations*, N.Y. TIMES (Feb. 16, 2003), https://www.nytimes.com/2003/02/16/magazine/unspeakable-conversations.html [https://perma.cc/8LYZ-WJQ9]); *see also* HARRIET MCBRYDE JOHNSON, TOO LATE TO DIE YOUNG: NEARLY TRUE TALES FROM A LIFE 7, 47–75 (2005). In this memoir, Johnson stated that the Jerry Lewis muscular–dystrophy telethon first sent her the message that her neuromuscular disease would eventually kill her. Johnson opposed the "pity-based tactics" of the annual Lewis muscular–dystrophy telethon. *See also* Dennis Heyesi, *Harriet Johnson, 50, Activist for Disabled, Is Dead*, N.Y. TIMES (June 7, 2008), https://www.nytimes.com/2008/06/07/us/07johnson.html.

29. *See* Kanter *supra* note 17, at 410.

30. See, e.g., Louis Ariotti, *Social Construction of Anangu Disability*, 7 AUSTRL. J. RURAL HEALTH 216, 216 (1999); GEORGE S. GOTTO IV, *Persons and Nonpersons: Intellectual Disability, Personhood, and Social Capital Among the Mixes of Southern Mexico*, in 1

After the 2020 Census, the Centers for Disease Control (CDC) reported that 26% of Americans live with some disability, with the highest numbers reported in the South.[31] The percentages are likely even higher, given that there are people with temporary disabilities and non-apparent disabilities who have not yet accepted their disability or feel comfortable enough to disclose it.[32] Moreover, the percentage of people with disabilities has increased in the aftermath of the COVID-19 pandemic.[33] Those recovering from moderate to severe symptoms of COVID-19 continue to sustain long-term health effects, rendering some temporarily or permanently disabled.[34] Others may struggle with a multitude of mental health issues,[35] such as depression, anxiety, and PTSD, due to losing a

DISABILITIES: INSIGHTS FROM ACROSS FIELDS AND AROUND THE WORLD 193, 193–207 (Catherine A. Marshall et al. eds., 2009).

31. *Disability Impacts All of Us*, CDC *supra* note 2; Robert Gebelhoff, *The South has Greatest Prevalence of Disabled Adults, New Government Data Show*, WASH. POST (July 30, 2015, 5:52 PM), https://www-washingtonpost-com.proxyiub.uits.iu.edu/news/to-your-health/wp/2015/07/30/the-south-has-greatest-prevalence-of-disabled-adults-new-government-data-show/ [https://perma.cc/A687-EDMY].

32. The Census primarily considers disabilities related to vision, hearing, mobility, and cognitive function. *Why We Ask: Disability*, U.S. CENSUS BUREAU, https://www2.census.gov/programs-surveys/acs/about/qbyqfact/Disability.pdf [https://perma.cc/RLX4-NJ43]. *See also How Disability Data are Collected from the American Community Survey*, U.S. CENSUS BUREAU, https://www.census.gov/topics/health/disability/guidance/data-collection-acs.html [https://perma.cc/DTW3-ZNT5] (last revised Nov. 21, 2021) (noting that before 2010, the American Community Survey "focused on the presence of specific conditions, rather than the impact those conditions might have on basic functioning").

33. Melissa Healy, *Coronavirus Infection May Cause Lasting Damage Throughout the Body, Doctors Fear*, L.A. TIMES (Apr. 10, 2020, 3:03 PM), https://www.latimes.com/science/story/2020-04-10/coronavirus-infection-can-do-lasting-damage-to-the-heart-liver [https://perma.cc/ZYG3-EGW2]; *see also* Julie Steenhuysen, *Scientists Just Beginning to Understand the Many Health Problems Caused by COVID-19*, REUTERS (June 26, 2020, 6:12 AM), https://www.reuters.com/article/us-health-coronavirus-effects/scientists-just-beginning-to-understand-the-many-health-problems-caused-by-covid-19-idUSKBN23X1BZ [https://perma.cc/K9UE-EGNJ]; George Citroner, *What We Know About the Long-Term Effects of COVID-19*, HEALTHLINE (Apr. 21, 2020), https://www.healthline.com/health-news/what-we-know-about-the-long-term-effects-of-covid-19 [https://perma.cc/5X6Z-X495].

34. Healy *supra* note 33; *see also* Steenhuysen *supra* note 33; Citroner *supra* note 33.

35. *See New Poll: COVID-19 Impacting Mental Well-Being: Americans Feeling Anxious, Especially for Loved Ones; Older Adults Are Less Anxious*, AM. PSYCHIATRIC ASS'N (Mar. 25, 2020), https://www.psychiatry.org/newsroom/news-releases/new-poll-covid-19-impacting-mental-well-being-americans-feeling-anxious-especially-for-loved-ones-older-adults-are-less-anxious [https://perma.cc/KFF6-NJ7H]. At the time of this poll, 48% of Americans were anxious about getting the coronavirus, 40% were anxious about becoming seriously ill or dying from the virus, 62% percent were anxious that a loved one might contract the virus, and 57% of Americans were concerned about the negative impact on their finances. *Id. See also* Neil Greenberg et al., *Managing Mental Health Challenges Faced by Healthcare Workers During COVID-19 Pandemic*, 368 BRITISH MED. J. 1211, 1211 (2020); *Coping with Stress*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/mentalhealth/stress-coping/cope-with-stress/index.html [https://perma.cc/YH7F-HAP9] (noting current events can cause stress).

loved one, a job,[36] a business, or a home. These mental issues may also have resulted from the fallout of the virus, as many could not earn money given the stay-at-home orders implemented across different states to reduce the spread of COVID-19.[37] In fact, the U.S. Bureau of Labor Statistics (BLS) reported that in 2021 there were 1.2 million more people sixteen years and older who identified as having a disability than in 2020.[38]

A. Non-Apparent Psychiatric Disabilities

Depression, anxiety, and PTSD fall under the umbrella of mental health and, more specifically, psychiatric disabilities. These three disabilities are discussed in this Article because they often go hand-in-hand.[39] The ability/disability binary laws and policies do not adequately protect these fluctuating disabilities. To better understand the magnitude of this legal and policy failing, each of these disabilities is described below. Definitions and symptoms are provided to show the gap between the National Institute of Mental Health (NIMH) definition of anxiety and that of the Social Security Administration (SSA). The tedious listings of symptoms purposefully drive home how challenging it is to determine a person's categorization—a task that may overwhelm the reader of this Article—and for someone applying for benefits.

1. Depression

Different subcategories of depressive disorders were first developed in the seventeenth century.[40] Researchers understood the existence of a

36. Heather Long, *U.S. Now Has 22 Million Unemployed, Wiping Out a Decade of Job Gains*, WASH. POST (Apr. 16, 2020, 7:16 PM), https://www.washingtonpost.com/business/2020/04/16/unemployment-claims-coronavirus/ [https://perma.cc/EH5U-6DWT].

37. Sarah Mervosh et al., *See Which States and Cities Have Told Residents To Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/TD7H-C9S6].

38. *Labor Force Statistics From the Current Population Survey*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/cps/definitions.htm#disability [https//perma.cc/DDJ4-8L2D].

39. Allan V. Horwitz, *How an Age of Anxiety Became an Age of Depression*, 88 MILBANK Q. 112, 124–28 (2010) (discussing how anxiety became depression). Furthermore, the attacks on 9/11, the 2008 housing market crash, and the recent pandemic have caused instances of all three disabilities to increase. Jitender Sareen, *Posttraumatic Stress Disorder in Adults: Impact, Comorbidity, Risk Factors, and Treatment*, 59 CAN J. PSYCH. 460, 460 (2014) (referencing the increase in diagnosis after 9/11); Olivia Guerra & Ejemai Eboreime, *The Impact of Economic Recessions on Depression, Anxiety, and Trauma-Related Disorders and Illness Outcomes—A Scoping Review*, 11 BEHAV. SCI. 1, 3–4 (2021) (referencing the increase of diagnosis after the 2008 housing market crash and the pandemic); *see generally* Autumn Kujawa et al., *Exposure to COVID-19 Pandemic Stress: Associations with Depression and Anxiety in Emerging Adults in the United States*, 37 DEPRESSION & ANXIETY 1280 (2020).

40. ALLAN V. HORWITZ et al., *History of Depression*, in THE OXFORD HANDBOOK OF MOOD DISORDERS, 11, 11–23 (R.J. DeRubeis & D.R. Strunk eds, 2017).

melancholic or psychotic form of depression, but they debated categorizing neurotic or nonpsychotic depression until 1980, when the diagnosis of major depression as a unitary category was introduced in the DSM-III.[41] In 2013, the DSM-5 depressive diagnosis first fused adaptive responses to loss with pathological depression.[42] This convergence occurred right before the catastrophic loss of loved ones Americans experienced during the pandemic,[43] significantly impacting individuals' ability to function.

Before the pandemic, it was already challenging enough for anyone struggling with these disabilities to disclose them to friends or family members because these disabilities have been trivialized, readily dismissed, and greatly misunderstood.[44] Some with depression begin to internalize the stigma, unable to deal with the realities of life.[45] In addition, disabilities are internalized differently based on cultural backgrounds. In fact, extra effort is now being devoted to reaching some communities of color, in particular because of the sociocultural structures preventing them from seeking help for depression.[46] Furthermore, some erroneously believe a depression diagnosis is something only the rich and privileged can afford to have, even though some studies show that those of lower economic status are more likely to be depressed.[47] However, unlike wealthier individuals, blue-collar workers cannot take time off to "deal" with such illnesses, especially when living paycheck to paycheck. The stigma surrounding disabilities has prevented people from disclosing their

41. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III 6 (3rd ed. 1985). The DSM is the Diagnostic and Statistical Manual of Mental Illness, a reference book for the American Psychiatric Association. This is the main guide that mental health providers in the U.S. use to provide a diagnosis. There have been various versions, the latest one being DSM-5.

42. HORWITZ *supra* note 40; American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-V (5th ed. 2013).

43. Shannon Sabo & Sandra Johnson, *Pandemic Disrupted Historical Mortality Patterns, Caused Largest Jump in Deaths in 100 Years*, U.S. CENSUS BUREAU (Mar. 24, 2022), https://www.census.gov/library/stories/2022/03/united-states-deaths-spiked-as-covid-19-continued.html#:~:text=Deaths%20in%20the%20United%20States,in%20mortality%20in%20100%20years [https://perma.cc/Y5D3-5GXC].

44. *See generally* Leslie Lim, DEPRESSION: THE MISUNDERSTOOD ILLNESS 1 (2008).

45. Rachel A. Smith & Amanda Applegate, *Mental Health Stigma and Communication and Their Intersections with Education*, 67 COMMC'N EDUC. 382, 382–93 (2018).

46. Rosalyn Denise Campbell & Orion Mowbray, *The Stigma of Depression: Black American Experiences*, 25 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 253, 254–55 (2016).

47. Catherine K. Ettman et al., *Is Wealth Associated with Depressive Symptoms in the United States?*, 43 ANN EPIDEMIOL 25, 28 (2020); *see generally* ANXIETY AND DEPRESSION ASSOCIATION OF AMERICA, *Low-Income & Its Effects on Mental Health*, https://adaa.org/find-help/by-demographics/low-income.

disability or seeking help and has led to stereotypes viewing people with disabilities with pity, as ill, or as helpless.[48]

Regrettably, CDC guidelines during the pandemic further exacerbated some individuals' depression. The CDC restricted social interactions by asking people to stay six feet apart from others.[49] Spontaneous and organic conversations were temporarily off the table. Businesses no longer renewed their building leases because they realized working from home was more economical.[50] Those who enjoy social interactions began to miss the office as others embraced the reality that working from home was here to stay.[51]

Since the pandemic, depression has become more widely understood. The National Institute of Mental Health (NIMH) describes the various forms of depression and symptoms, risk factors, and treatments as:

> Depression (also called a major depressive disorder or clinical depression) is a common but serious mood disorder. It causes severe symptoms that affect how [an individual feels, thinks, and handles] daily activities, such as sleeping, eating, or working. Here are five types of depression, *major depression*, which includes symptoms of depression most of the time for at least two weeks that typically interfere with one's ability to work, sleep, study, and eat, *persistent depressive disorder* (also called dysthymia), which often includes less severe symptoms of depression that last much longer, typically for at least two years, *perinatal depression*, which occurs when a woman experiences major depression during pregnancy or after delivery (postpartum depression), *seasonal affective*

48. LENNARD J. DAVIS, THE DISABILITY STUDIES READER 150, 160 (5th ed. 2017); *see generally* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1994).

49. The original CDC post can no longer be found on the website. *COVID-19 Safety*, CTRS. DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/easy-to-read/prevent-getting-sick/prevention.html#:~:text=Stay%20at%20least%206%20feet,mask%20must%20cover%20your%20nose. Other articles discussed the rule and its costly impacts. *See* Emily Anthes, *Three Feet or Six? Distancing Guidelines for Schools Stirs Debate*, N.Y. TIMES (Mar. 16, 2021), https://www.nytimes.com/2021/03/16/health/coronavirus-schools-social-distance.html [https://perma.cc/RS6J-WPF4].

50. *See* Konrad Putzier & Peter Grant, *Record High Office Lease Expirations Pose New Threat to Landlords and Banks*, WALL ST. J. (Apr. 13, 2022), https://www.wsj.com/articles/record-high-office-lease-expirations-pose-new-threat-to-landlords-and-banks-11649764801 [https://perma.cc/59CR-BZNL]; *see generally* Nicholas Bloom, *How Working from Home Works Out*, STAN. INST. ECON. POL'Y RSCH. 1 (2020), https://siepr.stanford.edu/publications/policy-brief/how-working-home-works-out [https://perma.cc/5SFT-ZZBV] (offering policy proposals for work-from-home policies).

51. *Id.* at 6–7.

> *disorder*, which comes and goes with the seasons, typically starting in late fall and early winter and diminishing during spring and summer and lastly, *depression with symptoms of psychosis***,** which is a severe form of depression where a person experiences psychosis symptoms, such as delusions (disturbing, false fixed beliefs) or hallucinations (hearing or seeing things that others do not see or hear).[52]

According to these descriptions, depression could vary from one day to the next and between individuals. Depression is one of the disabilities that remains under-addressed by federal law and policy.

2. Anxiety

Anxiety is discussed in tandem with depression because they often occur together.[53] While distinct conditions can occur on their own, people who are depressed are often anxious and worried. According to the NIMH, panic disorder, generalized anxiety disorder, agoraphobia, specific phobia, social anxiety disorder (social phobia), PTSD, obsessive-compulsive disorder, and separation anxiety disorder,[54] are all categorized under anxiety. Anxiety is far more than temporary worry or fear. Rather, anxiety, worry, and fear do not disappear, but rather increase over time to interfere with life activities, job performance, and relationships.[55] Two main anxiety disorders described are general anxiety, and social anxiety. General anxiety disorder symptoms include: "Feeling restless, wound-up, or on-edge; [b]eing easily fatigued; [h]aving difficulty concentrating; [b]eing irritable; [h]aving headaches, muscle aches, stomachaches, or unexplained pains; [d]ifficulty controlling feelings of worry; [h]aving sleep problems,

52. *Transforming the Understanding and Treatment of Mental Illnesses: Depression*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/depression [https://perma.cc/286B-KTMH]; *see also* LESLIE LIM, DEPRESSION: THE MISUNDERSTOOD ILLNESS 1 (2008).

53. *The Comorbidity of Anxiety and Depression*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/blogs/nami-blog/january-2018/the-comorbidity-of-anxiety-and-depression [https://perma.cc/MEB7-V25P] (stating that 60% of those with anxiety will also have symptoms of depression); *see* Bellinda King-Kallimanis et al., *Comorbidity of Depressive and Anxiety Disorders for Older Americans in the National Comorbidity Survey-Replication*, 17 AM. J. GERIATRIC PSYCH. 782, 783 (2009); *see also* Norman Sartorius et al., *Depression Comorbid with Anxiety: Results From the WHO Study on Psychological Disorders in Primary Health Care*, BRIT. J. PSYCH. 38, 40 (1996).

54. *Any Anxiety Disorder*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/any-anxiety-disorder#part_2575 [https://perma.cc/Y6BS-2XNL]; *Anxiety Disorders*, NAT'L INST. MENTAL HEALTH https://www.nimh.nih.gov/health/topics/anxiety-disorders [https://perma.cc/5WZ6-LBEM] [hereinafter NIMH *Anxiety Disorders*].

55. *Id.*

such as difficulty falling or staying asleep."[56] Social anxiety disorder is a persistent fear of being watched.[57] Those with social anxiety may experience "[b]lushing, sweating, or trembling; [p]ounding or racing heart; [s]tomachaches; [r]igid body posture or speaking with an overly soft voice; [d]ifficulty making eye contact; [f]eelings of self-consciousness or fear that people will judge them negatively."[58] These individuals essentially fear social situations that may get in the way of attending work and daily activities.[59] Again, like depression, anxiety is a disability that can vary daily and from individual to individual, something the laws and policies inadequately address with their ability/disability categorization.

3. Post-Traumatic Stress Disorder (PTSD)

PTSD often occurs alongside depression and anxiety. According to NIMH, PTSD occurs in people "who have experienced a shocking, scary, or dangerous event."[60] PTSD requires "[a]t least one re-experiencing symptom; [a]t least one avoidance symptom; [a]t least two arousals and reactivity symptoms; [a]t least two cognition and mood symptoms."[61] Re-experiencing symptoms that can interfere with daily living include but are not limited to flashbacks, bad dreams, or frightening thoughts.[62] Symptoms "usually begin within three months" of the traumatic incident, "but . . . sometimes emerge later."[63] Unlike the requirements for a diagnosis of depression or anxiety under NIMH, PTSD requires more than a month of symptoms and must be severe enough to interfere with relationships or work.[64] The course of the illness varies, again showing how this non-apparent disability is unpredictable. Some people may recover within six months, while others may have chronic, years-long PTSD. Importantly, a doctor with experience assisting people with mental illnesses, such as a psychiatrist or psychologist, must diagnose PTSD.[65]

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56. *Id.*

57. *Id.*

58. NIMH *Anxiety Disorders supra* note 54.

59. *Id.*

60. *Post-Traumatic Stress Disorder*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/ topics/post-traumatic-stress-disorder-ptsd [https://perma.cc/6X8W-BXPK] [hereinafter NIMH PTSD].

61. *Id.*

62. *Id.*

63. *Id.*

64. NIMH PTSD *supra* note 60.

65. *Id.*

Similar to depression and other stigmatized mental health diagnosis, PTSD is trivialized.[66] Regrettably, people living in inner-city violence may have similar trauma as war veterans.[67] Given the stigma, many students and adults traumatized by violence do not adequately deal with their PTSD. The dominant approach to depression, anxiety, and PTSD demonstrates the struggle of legitimating a range of traumas as traumas. Recently, the COVID-19 pandemic became a turning point for the public discussion and legal treatment of these three disabilities because it became evident that anyone could become disabled.[68]

B. Increase in Non-Apparent Disabilities

The COVID-19 pandemic increased the number of people with disabilities. Aside from COVID-19, the increase in Social Networking Sites (SNS) use also contributed to increased levels of depression, anxiety, and PTSD.[69] Undoubtedly, the pandemic and SNS use created a degree of separation and detachment from others.[70] Psychiatrists and psychologists know the validity of anxiety, depression, and PTSD. Still, it was not until the pandemic that employers confronted the realities of these non-apparent disabilities impacting the workforce.[71] The pandemic forced a collective reckoning with the social dimensions of normalcy and ableism, which revealed the realities of how we approach vulnerability and disability.

1. The Recent Pandemic

Elevated adverse mental health conditions were reported during the pandemic. Before the pandemic, the U.S. Department of Health and Human Services reported about 20% of Americans struggled with mental health. According to the CDC, three months into the pandemic, about 40%

66. Scott Parrott & Nicholas Eckhart, *Stigma in the News: The Representation and Trivialization of Stigma in US News Publications*, 36.4 HEALTH COMM. 440–47 (2021).

67 Cynthia Gillikin, et al., *Trauma Exposure and PTSD Symptoms Associate with Violence in Inner City Civilians*, 83 J. OF PSYCH. RSCH. 1–7 (2016); *see also* David F. Duncan, Growing *Up Under the Gun: Children and Adolescents Coping with Violent Neighborhoods*, 16 J. PRIMARY PREVENTION 343, 346 (1996); *see also* Jocelyn R. Smith & Desmond U. Patton, *Posttraumatic Stress Symptoms in Context: Examining Trauma Responses to Violent Exposures and Homicide Death Among Black Males in Urban Neighborhoods*, 86 AM. J. ORTHOPSYCH. 212, 220 (2016) (assessing symptoms of PTSD in Baltimore youth); *see generally PTSD: National Center for PTSD*, U.S. DEP'T VETERANS AFFS., https://www.ptsd.va.gov/understand/common/common_veterans.asp [https://perma.cc/J6VM-W9CM].

68. *See* Greenwood & Anas *supra* note 5 (discussing the shift in mental health awareness and approaches to supporting sufferers in the workplace after the COVID-19 Pandemic).

69. Igor Pantic, *Online Social Networking and Mental Health*, 17 CYBERPSYCH. BEHAV. SOC. NETWORKING 652, 652–53 (2014).

70. Mervosh et al. *supra* note 37.

71. Greenwood & Anas *supra* note 5.

of U.S. adults reported struggling with mental health.[72] Aside from exposure to COVID-19 pandemic stress, incidences of depression and anxiety also increased as loved ones died and economic instability grew. According to Penn State Social Science Research, "1 in 8 U.S. deaths from 2020 to 2021 came from COVID-19—leaving millions of relatives reeling from distinctly difficult grief."[73] Family members could not be by their loved ones' sides as they died of COVID-19. Others were unable to attend funerals to mourn the loss of loved ones. Restaurant owners lost their businesses for lack of patrons, as some employees lost their employment in the most efficient (but inhumane) Zoom call.[74] If one did not lose their employment outright for contracting COVID-19 and developing debilitating disabilities,[75] many lost their jobs in failing businesses due to the economic effect of the pandemic. In addition, the government's failure to address the collective sorrow all Americans experienced was damaging. Even if an individual did not lose a job, a home, or a loved one, they did lose a sense of stability, safety, social connections, and financial security.[76] While those allowed the time and space to cope with loss, heal, and move on, many affected by the pandemic were not afforded time and space.[77]

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72. Substance Abuse and Mental Health Services Administration, Key Substance Use and Mental Health Indicators in the United States: Results from the *2019 National Survey on Drug Use and Health*, U.S. DEP'T OF HEALTH AND HUM. SERV., https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR090120.htm [https://perma.cc/3C3B-PZXB] (explaining that before the pandemic, about 20% of Americans reported struggling with mental health issues); *see* Czeisler et al. *supra* note 3, at 1051 (2020); *see also* Giancarlo Pasquini and Scott Keeter, *At Least Four-in-Ten U.S. Adults Have Faced High Levels of Psychological Distress During COVID*-19 Pandemic, PEW RSCH. CTR., https://www.pewresearch.org/fact-tank/2022/12/12/at-least-four-in-ten-u-s-adults-have-faced-high-levels-of-psychological-distress-during-covid-19-pandemic/ [https://perma.cc/59HK-RKZB].

73. Emily Smith-Greenaway, *1 in 8 U.S. Deaths from 2020 to 2021 Came from COVID-19—Leaving Millions of Relatives Reeling from Distinctly Difficult Grief* (July 12, 2022), https://ssri.psu.edu/news/1-8-us-deaths-2020-2021-came-covid-19-leaving-millions-relatives-reeling-distinctly-difficult [https://perma.cc/VRE9-FYQ8].

74. Julie Creswell, *Mass Firing on Zoom is Latest Sign of Weight Watchers Unrest*, N.Y. TIMES (May 22, 2020), https://www.nytimes.com/2020/05/22/business/weight-watchers-firings-zoom.html [https://perma.cc/6RKB-7AJG].

75. 42 U.S.C. § 12101; *see also* William C. Sanderson et al., *The Nature and Treatment of Pandemic-Related Psychological Distress*, 50 J. CONTEMP. PSYCHOTHERAPY 251, 263 (2020) (under the law, the employee must perform the necessary tasks that are classified under a business necessity. Some employees with long COVID were unable to perform such tasks due to, but not limited to, symptoms of depression, anxiety, and PTSD); *see also* Befort *supra* note 13 at 380 (explaining that employers have a direct threat defense when they do not extend jobs to or retain disabled individuals that pose a danger to others' health that cannot be reduced with a reasonable accommodation; these employees are not protected by the ADA); *see generally* Gupko, *supra* note 13.

76. Kirsten Weir, *Grief and COVID-19: Mourning our Bygone Lives*, AM. PSYCH. ASS'N (Apr. 1, 2020), https://www.apa.org/news/apa/2020/grief-covid-19 [https://perma.cc/W4E3-GUC9].

77. *Id.*

Unfortunately, society seems to treat these losses as ambiguous and unpredictable, making it all the more challenging to explain to an employer if depression or anxiety results.

Research shows that untreated, prolonged grief "impacts . . . job loss, self-esteem and belief in a just world,"[78] impacting future behavior in the workforce and personal life. Those suffering from collective grief may not experience any of these symptoms directly, but still may experience a decrease in productivity. These individuals are not disabled enough to gather the courage to ask for slight accommodations for fear of being seen as lazy or accused of faking it. While there are people who try to game the system by faking disabilities, it is extremely rare in psychiatric disabilities.[79] Even so, people with psychiatric disabilities cannot help but internalize the idea that others believe they are faking a disability and conning the system. Regrettably, 60% of Americans with disabilities believe others think they are faking the disability.[80] The "fear of the disability con" creates an additional barrier for people with disabilities to exercise their disability rights and receive services.[81]

In the end, regardless of whether a person has a disability or not, employees are not robots. At times, companies value employees according to their productivity instead of their humanity. The ability/disability binary means some people are not able enough to maintain employment and not disabled enough to qualify for Social Security Disability Insurance (SSDI).[82] Embracing human variation would mean allowing for greater flexibility in the social construction of productivity. During the pandemic many Americans worried about providing basic necessities, such as keeping a roof over their heads and food on the table. These valid worries are manageable for some but overwhelming enough to induce a panic attack in others. Given that individuals from different backgrounds will experience and manage anxiety differently, it is unrealistic to think that one form of accommodation will fit all disability cases. The root of the problem is how laws and social systems view people with disabilities, which is under an able-body standard where a person is either disabled or

78. *Id.* (citing Anthony Papa & Robyn Maitoza, *The Role of Loss in the Experience of Grief: The Case of Job Loss*, 18 J. LOSS & TRAUMA 152 (2013)).

79. *See* PsychDB, *Malingering*, https://www.psychdb.com/teaching/malingering [https://perma.cc/YFP4-D7U7] (citing BENJAMIN JS & VIRGINIA AS, KAPLAN & SADOCK'S SYNOPSIS OF PSYCHIATRY (10th ed., Lippincott Williams & Wilkins 2007), which found that 1% of people fake psychiatric disabilities).

80. Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 L. & SOC'Y REV. 1051, 1091 (2019); *see also* Doron Dorfman, *Pandemic "Disability Cons,"* 49 J. L. MED. & ETHICS 401, 401–09 (2021).

81. *Id.* at 405.

82. *See infra* Part II(C).

not. People with disabilities, like anyone else, are subject to human variation.

2. Social Network Sites

SNSs are mentioned here because they contribute to the number of people with non-apparent disabilities.[83] This is true especially concerning increased rates of depression, a phenomenon exacerbated by the isolation of the COVID pandemic.[84]

Today, some may feel they know an individual—or have some connection with them—after reading their posts on the big six sites: Facebook, LinkedIn, X, Instagram, YouTube, or Snapchat. Unfortunately, there is no way of knowing whether an individual's social media posts are truthful. This is because people can lie about anything and argue they are not harming anyone since there is no immediate tangible harm. Regardless, people who lie or misrepresent on social media usually won't face consequences for their deception as they may in the physical world. In fact, the victims of catfishing may have no legal recourse, but have long-term effects on their mental health.[85] Social media makes it easier for someone to say hurtful things because they don't see the reaction of the person on the receiving end.[86] These negative online interactions can be more hurtful for someone who is already has a psychiatric disorder.

Problems also arise out of increased screen time. While technological advances ideally make life easier, the increase in screen time after the advent of smartphones drew a mass increase in depressive symptoms and suicide rates among adolescents.[87] In 2010, the iPhone was

83. Igor Pantric, *Online Social Networking and Mental Health*, 17 CYBERPSYCH. BEHAV. SOC. NETW., 652–657 (2014).

84. Ida Kupcova et al., Effects of the COVID-19 pandemic on mental health, anxiety, and depression, 11 BMC PSYCHOL. 108 (2023)

85. *See generally* Armida Derzakarian, *The Dark Side of Social Media Romance: Civil Recourse for Catfish Victims*, 50 LOY. L.A. L. REV. 741 (2017); *see also* Lauren Reichart Smith et al., *Follow Me, What's the Harm? Considerations of Catfishing and Utilizing Fake Online Personas on Social Media*, 27 J. LEGAL ASPECTS SPORT 32 (2017) (examining catfishing in the sports context); Amana Kaskazi, *Social Network Identity: Facebook, Twitter and Identity Negotiation Theory*, ICONF. 2014 PROCS. (2014), https://core.ac.uk/download/pdf/19961131.pdf [https://perma.cc/22FX-Q8GR]; *see also* MTV, *Catfish*, https://www.mtv.com/shows/catfish-the-tv-show [https://perma.cc/8SYM-F2VK] (discussing a television show where the premise is tracking down catfishes and confronting them); *see also* MTV, Catfish UK, https://www.mtv.com/shows/catfish-uk-the-tv-show [https://perma.cc/QEP5-A8KX].

86. Gaia Vince, *Why Nice People Become Mean Online*, CNN HEALTH (Apr. 3, 2018, 8:28 AM), https://www.cnn.com/2018/04/03/health/good-people-bad-online-partner/index.html [https://perma.cc/r67a-kgal].

87. Between 2010 and 2015 the national statistics on suicide deaths for those ages 13–18 indicate an increase in depressive symptoms and suicide rates. One study suggests:

marketed as a computer in the palm of our hands.[88] Naturally, the allure of such convenience[89] resulted in massive sales and fueled the advent of bigger and better smartphones and smartwatches. Technology can negatively impact daily life and result in addictive behaviors. As people are growing increasingly attached to their smartphone or smartwatch, many are experiencing obsessive behaviors related to technology; thus, signs of technology addiction have developed.[90] Society was ill-prepared for the advent of new, addicting technologies. The negative impacts felt by society broadly are magnified in those with psychiatric disabilities.

As a result, some of the initial inventors and innovators of these social media platforms have begun to restrict their children's screen time and use of the platforms.[91] In 2013, Tristan Harris, a Google Design Ethicist, created a viral presentation called "A Call to Minimize Distraction & Respect Users' Attention."[92] Harris went on to found the

> In two nationally representative surveys of U.S. adolescents in grades 8 through 12 (N = 506,820) and national statistics on suicide deaths for those ages 13 to 18, adolescents' depressive symptoms, suicide-related outcomes, and suicide rates increased between 2010 and 2015, especially among females. Adolescents who spent more time on new media (including social media and electronic devices such as smartphones) were more likely to report mental health issues, and adolescents who spent more time on nonscreen activities (in-person social interaction, sports/exercise, homework, print media, and attending religious services) were less likely. Since 2010, iGen adolescents have spent more time on new media screen activities and less time on nonscreen activities, which may account for the increases in depression and suicide. In contrast, cyclical economic factors such as unemployment and the Dow Jones Index were not linked to depressive symptoms or suicide rates when matched by year.

Jean M. Twenge et al., *Increases in Depressive Symptoms, Suicide-Related Outcomes, and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time*, 6 CLINICAL PSYCH. SCI. 3, 3 (2018).

88. Michael Castelluccio, *The iPhone and the Mobile Revolution*, 99 STRATEGIC FIN. 55, 55–57 (Oct. 1, 2017), https://www.sfmagazine.com/articles/2017/october/the-iphone-and-the-mobile-revolution [https://perma.cc/26NA-5EZU].

89. *See generally* Maged N. Kamel Boulos et al., *How Smartphones are Changing the Face of Mobile and Participatory Healthcare: An Overview, With Example from eCAALYX*, 10 BIOMEDICAL ENG'G ONLINE 1 (Apr. 5, 2011).

90. Hilarie Cash et al., *Internet Addiction: A Brief Summary of Research and Practice*, 8 CURRENT PSYCHIATRY REV. 292, 293 (2012); Tayana Panova & Xavier Carbonell, *Is Smartphone Addiction Really an Addiction?*, 7 J. BEHAV. ADDICTIONS 252, 253–54 (2018).

91. Olivia Rudgard, *The Tech Moguls Who Invented Social Media Have Banned Their Children From It*, INDEPENDENT.IE (Nov. 6, 2018, 2:30 AM), https://www.independent.ie/life/family/parenting/the-tech-moguls-who-invented-social-media-have-bannedtheir-children-from-it-37494367.html [https://perma.cc/CZ88-ERQW].

92. Tristan Harris, *A Call to Minimize Distraction & Respect Users' Attention* (2013), https://www.scribd.com/document/378841682/A-Call-to-Minimize-Distraction-Respect-Users-Attention-by-Tristan-Harris [https://perma.cc/N8FR-TLXG].

Center for Humane Technology (CHT),[93] established as a non-profit organization with the mission to "shift technology towards a more humane future that supports our well-being, democratic functioning, and shared information environment."[94] Among many other key issues, the organization focuses on technology's impact on mental health. They realize "technology is extracting our attention, weakening our memory, and driving addiction, loneliness, and depression."[95] The pandemic only heightened these issues.

Before the pandemic, people checked email and social media on their smartphones as a social norm.[96] Alerts linked to smartphones allow individuals to receive email and social media notifications anytime. The isolation of the pandemic undoubtedly reinforced and increased these addictive norms.[97] Smartphone addiction is real and has real consequences like any other form of addiction.[98] Technology usage impacts the psychological well-being of adolescents and adults, increasing incidences of anxiety and depression.[99]

During the pandemic, technology became the main form of social interaction.[100] Depression, anxiety, and PTSD were all exacerbated by the pandemic as people worldwide were compelled to work and learn from home, limiting in-person interaction while leading to greater SNS.[101] The pandemic starkly displayed the internet's capacity to allow people to create social networks and interact worldwide. It exposed the positive and negative effects of social media that researchers have been studying for

93. Matthew J. Dennis, *Digital Well-Being Under Pandemic Conditions: Catalysing a Theory of Online Flourishing*, 23 ETHICS & INFO. TECH. 435, 435–45 (2021); *see generally* Kelsey Flannery, *Honors Research Project, The Anti-Internet Crusade: A Rhetorical Analysis*, 15 COMMENTARY 1, 4–6 (2019) (describing Tristan Harris's founding of CHT).

94. CTR. FOR HUMANE TECH., *Home Page*, https://www.humanetech.com/ [https://perma.cc/SSK4-YZYQ].

95. CTR. FOR HUMANE TECH, *Key Issues*, https://www.humanetech.com/key-issues [https://perma.cc/65TU-B2A8].

96. L.D. Rosen et al., *The Media and Technology Usage and Attitudes Scale: An Empirical Investigation*, 29 COMPUTS. HUM. BEHAV. 2501, 2512–13 (2013).

97. *See* Cecilia Cheng & Yan-Ching Lau, *Social Media Addiction During COVID-19-Mandated Physical Distancing: Relatedness Needs as Motives*, 19 INT'L J. OF ENVIRONMENTAL RESEARCH AND PUB. HEALTH (2022).

98. *See* Sehar Shoukat, *Cell Phone Addiction and Psychological and Physiological Health in Adolescents*, 18 EXPERIMENTAL & CLINICAL SCI. J. 47, 48 (2019).

99. *See generally* Rosen et al. *supra* note 96, at 2501.

100. Marianne Levine, *Technology: Does it Breed or Kill Empathy?*, STAN. DAILY (Oct. 28, 2010, 2:02 AM), https://stanforddaily.com/2010/10/28/technology-does-it-breed-or-kill-empathy/ [https://perma.cc/EWM5-TTJ5].

101. *See generally* Bloom *supra* note 50; Rahul De' et al., *Impact of Digital Surge During Covid-19 Pandemic: A Viewpoint on Research and Practice,* 55 INT'L J. INFO. MGMT. (2020) (discussing increased use of modern technology during the pandemic and its impact).

years.[102] In 2018, seven out of ten adults used "social media to connect with others, receive news content, share information, and entertain themselves."[103] Then, after the stay-at-home orders were invoked by some Governors across the United States,[104] students and non-essential workers' use of virtual classrooms and conference rooms further diminished the interpersonal interactions conducive to behaviors that may positively impact mental health. The virtual world was no longer a complement to other forms of interaction but a replacement for them. As in-person social interactions diminished, rates of non-apparent disabilities increased. Individuals then began to look to the law for assistance, but the law was found lacking.

II. LAWS AND POLICIES

The pandemic did not stem the tide of injustices against people with disabilities, but rather exposed them to new forms of marginalization.[105]

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102. Mesfin A. Bekalu et al., *Association of Social Media Use with Social Well-Being, Positive Mental Health, and Self-Rated Health: Disentangling Routine Use From Emotional Connection to Use*, 46 HEALTH EDUC. & BEHAV. 69S, 69S (2019) (challenging the focus on dose-effects of social media in the literature) [hereinafter Bekalu, *Association of Social Media Use*]; Jenna L. Clark et al., *Social Network Sites and Well-Being: The Role of Social Connection*, 27 CURRENT DIRECTIONS IN PSYCH. SCI. 32, 33–34 (2017) (exploring positive and negative uses of social media); *see also* Helena Bruggeman et al., *Does the Use of Digital Media Affect Psychological Well-Being? An Empirical Test Among Children Aged 9 to 12*, 101 COMPUTS. IN HUMAN BEHAV. 104 (2019) (studying the effects of social media on children).

103. *See* Bekalu, *Association of Social Media Use supra* note 102.

104. Mervosh et al. *supra* note 37.

105. These injustices included state discrimination in Alabama and Pennsylvania against people with disabilities in their ventilator triage protocols, which compelled the HHS OCR to take swift action. To resolve the investigations, the two states updated their COVID-19 triage protocols for ventilator use. Arnall Golden Gregory LLP & Andrew Stevens, *HHS OCR Announces Resolution of First COVID-19 Civil Rights Investigation*, JD SUPRA (Apr. 28, 2020), https://www.jdsupra.com/legalnews/hhs-ocr-announces-resolution-of-first-78648/ [https://perma.cc/U7WG-2LT7]. During the COVID-19 pandemic, state officials viewed the lives of people with disabilities as less valuable, as evidenced by the discrimination that justified moving them to the back of the waiting list for a ventilator. Alabama Department of Public Health's website posted a state policy prioritizing who should receive the ventilators; people with disabilities were not a priority. The mother of Matthew Foster, a thirty-seven-year-old with Down Syndrome, said, "I am outraged and still am that any decision-maker or policymaker in our state would think so little of people with intellectual disabilities that they would actually say an IQ score determines whether you live or die." Alabama is not the only state with such policies. Liz Essley Whyte, *State Policies May Send People with Disabilities to the Back of the Line for Ventilators*, CTR. FOR PUB. INTEGRITY (Apr. 8, 2020), https://publicintegrity.org/health/coronavirus-and-inequality/state-policies-may-send-people-with-disabilities-to-the-back-of-the-line-for-ventilators/ [https://perma.cc/2HSH-LH4Y]. In California, there are more than 360,000 people with severe disabilities who rely on state-funded programs, and whose safety is compromised with the COVID-19 pandemic. *See* Daniel Moran & Anita Chabria, *Coronavirus Frays the Safety Net for People with Severe Disabilities, Leaving Many at Risk*, L.A. TIMES (Apr. 5, 2020, 7:00 AM), https://www.latimes.com/california/story/2020-04-05/coronavirus-services-disabled-families-california [https://perma.cc/K278-QSV4].

Moreover, as depression, anxiety, and PTSD increased during the pandemic and the number of people with permanent and temporary disabilities grew, the injustices and discrimination associated with those disabilities likewise became more widespread.[106] Such an increase compels a closer look at the effectiveness of our current SSDI and disability anti-discrimination laws to understand whether those diagnosed with these disabilities are truly assisted and protected. Under the current system, if an individual does not qualify for Supplemental Security Income (SSI) in their early years, then, after they enter the workforce, they can pay into SSDI. If an employee was born with a disability or acquired a disability in their lifetime, they are protected under federal disability antidiscrimination law when entering the workforce. If a person is not eligible for SSI and is not protected under federal disability antidiscrimination law, the employee's last resort is to apply for SSDI. In this section, SSI, federal disability antidiscrimination law, and SSDI will be discussed, respectively.

A. Supplemental Security Income

SSI is a needs-based program.[107] If a disability is severe enough, an individual may qualify for SSI, with the caveat that the individual must be fully disabled, meaning that the person cannot participate in any substantial gainful activity.[108] In addition, SSI limits how much an individual can have in assets and still be eligible for benefits,[109] which arguably inadvertently disincentives individuals from saving money. While an individual may have a savings account, the amount must not exceed $2,000 for an individual or $3,000 for a couple in "countable resources."[110] Some things do not count towards the resource limit. For

106. Maya Sabatello et al., *People with Disabilities in COVID-19: Fixing Our Priorities*, 20 AM. J. BIOETHICS 187, 189 (2020) (discussing how little attention has been given to the injustice people with disabilities are experiencing during the pandemic); *see also* Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, KAISER FAM. FOUND. (Feb. 10, 2021), https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/ [https://perma.cc/GVT9-YU8D] (discussing how more disabilities will result after the pandemic); s*ee also* Stephanie Pappas, *Despite the ADA*, *Equity is Still Out of Reach*, 51 AM. PSYCH. ASS'N (Nov. 1, 2020), https://www.apa.org/monitor/2020/11/feature-ada [https://perma.cc/FGE7-758F] (discussing how society creates compounding barriers to basic healthcare, parenting, and employment for disabled individuals).

107. *What Are Resources?* SOC. SEC. ADMIN, https://www.ssa.gov/ssi/spotlights/spot-resources.htm [https://perma.cc/D7JF-ER22] [hereinafter SSA *Resources*].

108. Christy Bieber, *SSI vs. SSDI: What's the Difference?*, FORBES ADVISOR (Apr. 21, 2023, 3:02 AM), https://www.forbes.com/advisor/legal/disability/ssdi/ssi-vs-ssdi/ [https://perma.cc/CKW5-6JDZ]

109. *Id.*

110. SSA *Resources supra* note 107.

example, an individual may have an Achieving a Better Life Experience (ABLE) account, a "tax-advantaged savings account for eligible people with disabilities," and still qualify for SSI.[111] The first $100,000 does not count for SSI qualifications in an ABLE account.[112] However, the individual must have been diagnosed with a permanent disability before age 26;[113] those who acquired their disabilities after 26 cannot benefit from placing their retroactive benefits into an ABLE account.[114] A recent amendment to the ABLE Age Adjustment Act will take effect in 2026, increasing this age bar to 46.[115]

Those who qualify for SSI are those whom our society considers permanently and severely disabled, such as those who are blind and those with apparent physical disabilities. These disabilities are more easily documented, consistent, and verifiable by a medical doctor, unlike the non-apparent disabilities discussed in this Article. This creates barriers to access or qualify for SSI benefits. Many of those impacted by the pandemic live this reality. Some recovering from COVID-19 became COVID long-haulers who still experience fatigue and memory loss, despite testing negative for the virus. These symptoms negatively impact work performance and create a feeling of vulnerability and lack of independence which naturally increases depression, anxiety, and PTSD. Through no fault of their own, it is easier for a Social Security Administrator to determine whether an individual qualifies for Social Security benefits by relying on verifiable documents from medical doctors.[116] These documents tended to survive scrutiny and administrative bureaucracy, while those with disabilities with less verifiable documentation likely have difficulty surviving administrative scrutiny.

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111. *ABLE Accounts – Tax Benefit for People with Disabilities*, INTERNAL REVENUE SERV., https://www.irs.gov/government-entities/federal-state-local-governments/able-accounts-tax-benefit-for-people-with-disabilities [https://perma.cc/8FB8-PNMS]; *Spotlight on Achieving a Better Life Experience (ABLE) Accounts — 2024 Edition*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/spotlights/spot-able.html [https://perma.cc/ZVGE-HXKH].

112. *Spotlight on Achieving a Better Life Experience (ABLE) Accounts — 2024 Edition*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/spotlights/spot-able.html [https://perma.cc/ZVGE-HXKH].

113. *Id.*

114. *Id.*

115. Social Security Administration Ticket to Work, *ABLE Accounts: What You Should Know*, SOC. SEC. ADMIN. (Aug. 22, 2023), https://choosework.ssa.gov/blog/2023-08-22-able-accounts-what-you-should-know.html [https://perma.cc/F8QV-V2WZ].

116. *Answers for Doctors & Other Health Professionals*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/answers-pub042.htm [https://perma.cc/4Q6B-VJ94] ("Generally, we will consider the opinion of a physician or other medical source who is treating the patient on a continuing basis more persuasive when it is well supported by the clinical and laboratory findings and consistent with other evidence in the patient's record.").

Unemployment benefits or SSDI are other potential paths for those with non-apparent disabilities who leave the workforce.[117] Perhaps the employee recently acquired depression, anxiety, or PTSD, or had their condition exacerbated significantly by the pandemic. The following sections discusses employment concepts that affect both the employer and employee—disability antidiscrimination law and SSDI policies. These laws and policies are central to an employee's livelihood should a disability prevent their hiring or if they are fired due to their disability but individuals with non-apparent disabilities may still struggle to access them.

B. Disability Antidiscrimination Law

On the whole, as previously mentioned, disability is a function of social treatment by society, separate from the illness itself.[118] The legal treatment of a disability holds specific requirements. The law requires someone to have or be treated as having "a physical or mental impairment that substantially limits one or more major life activities . . . ."[119] An illness may be a disability under the law if the illness impacts one or more major life activities.[120] The language used by Congress is broader than illness. Many disabilities, such as learning disabilities, are not illnesses and cannot be "treated" medically.[121] Federal disability antidiscrimination law did not recognize that disability is a determination of how an individual is treated socially, instead it relied on the medical model of disability.[122] By using the language mentioned above, the federal government outlined how those with disabilities are treated socially in

117. When disability antidiscrimination law is not applicable, an employee must rely on unemployment or SSDI for subsistence, assuming that their participation in the workforce disqualifies them for SSI. *See How Do I File for Unemployment Insurance?*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/unemployment-insurance [https://perma.cc/F4FQ-4J7J] (explaining eligibility for unemployment); *How You Qualify*, SOC. SEC. ADMIN., https://www.ssa.gov/benefits/disability/qualify.html#anchor0 [https://perma.cc/3ZYE-232Q].

118. Deborah Marks, *Models of Disability*, 19 DISABILITY & REHAB. 85, 85–86 (1997) (discussing the difficulty of defining disability due to the constantly changing nature of qualifying factors); s*ee* Harlan Lane, *Ethnicity, Ethics, and the Deaf-World*, 10 J. DEAF STUD. & DEAF EDUC. 291, 291 (2005).

119. 42 U.S.C. § 12102(1).

120. *See, e.g.*, Rehabilitation Act of 1973, 29 U.S.C. § 705 (20)–(21).

121. Larry B. Silver, *Is a Learning Disability Considered a Mental Illness?* LEARNING DISABILITIES ASS'N AM., https://ldaamerica.org/is-a-learning-disability-considered-a-mental-illness/ [https://perma.cc/K3US-ZPX4] (reporting that an LD is not a mental illness because they are neurologically based).

122. *See* Kanter *supra* note 17, at 419–20; *see also* BAGENSTOS *supra* note 17, at 50 (explaining the importance of a pan-disability identity when unifying a group for a political movement).

Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA).

Section 504 of the Rehabilitation Act of 1973 provided courts, educational institutions, and employers increased discretion as to which individuals and disabilities to accommodate to enter social spaces.[123] Under Section 504, a reasonable accommodation is any "change, adaptation or modification to a policy, program, service, facility, or workplace which will allow a qualified person with a disability to participate fully in a program, take advantage of a service, live in housing, or perform a job."[124] The law was supposed to prohibit discrimination against people with disabilities in institutions that received federal funding.[125] However, by applying subjective standards for what is considered a qualified individual with a disability, a reasonable accommodation, and undue hardship,[126] the law circumvents this protection by continually moving the mark.[127]

Recognizing that Section 504 was insufficient because it only protects people with disabilities in federally funded spaces, Congress passed the Americans with Disabilities Act (ADA) in 1990.[128] The ADA intended to protect individuals in all public spaces, since the scope was

123. 42 U.S.C. §§ 12111(9)–(10) (allowing the employer to determine what is considered a reasonable accommodation or an undue hardship); Donald Jay Olenick, *Accommodating the Handicapped: Rehabilitating Section 504 After "Southeastern*," 80 COLUM. L. REV. 171, 172–76 (1980).

124. *Reasonable Accommodations and Modifications*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications [https://perma.cc/RE4A-PLZF].

125. 42 U.S.C. § 12111(8)

> The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

See also RUTH COLKER & PAUL D. GROSSMAN, THE LAW OF DISABILITY DISCRIMINATION FOR HIGHER EDUCATION PROFESSIONALS 77–79 (2014) [hereinafter COLKER & GROSSMAN] (noting that the law of disability requires employers to "undo" barriers to enjoying services).

126. *See* 42 U.S.C. §§ 12111(8)–(10); *see also* COLKER & GROSSMAN *supra* note 125, at 77–78.

127. *See* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1102, 1110–11, 1114 (1995); *see also* Angélica Guevara, *The Need to Reimagine Disability Rights Law Because the Medical Model of Disability Fails Us All*, 21 WIS. L. REV. 269, 285–87 (2021).

128. Weber *supra* note 127, at 1089.

broadened beyond federally funded institutions.[129] Significantly, it banned disability-based discrimination in employment, education, transportation, and places that are open to the public.[130] Despite this reform, decades after the passage of the ADA, employment numbers of people with disabilities have not significantly improved.[131]

Since the language used in Section 504 was the foundation for the ADA, it renders the same effects of discrimination through "othering."[132] Both laws define individuals with disabilities using essentially the same definition: "a physical or mental impairment" that "substantially limits one or more major life activities" or "results in a substantial impediment to employment."[133] Unfortunately, by building upon the language used in Section 504, the ADA continued to view people with disabilities under the medical model of disability[134] that perpetuates an ability/disability binary by viewing people as defective because it follows an able-body standard.

Later, the 2008 ADA Amendment (herein, "Amendment") broadened the definition of "disability," protecting those who mitigate their disability by, for example, taking medication or using prosthetics, and regards them as also having a bona fide disability under the law.[135] The Amendment abrogated the Court's earlier decisions in cases such as *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*[136] and *Sutton v.*

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129. *See* 42 U.S.C. §§ 12112(a), 12132.

130. *Id.* at §§ 12132–12133 (requiring State and local governments to give people with disabilities an equal opportunity to benefit from all public "programs, services and activities," such as public education, employment, transportation, recreation, healthcare, social services, courts, voting, and town meetings).

131. *See* RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 69–70 (2005) (noting that the ADA did not significantly increase the number of people with disabilities in the workforce); BAGENSTOS *supra* note 17, at 50.

132. *See generally* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963) (discussing inequities that persist from the perspective of those living with disabilities).

133. 42 U.S.C. § 12102(1); Section 504 of the Rehabilitation Act 1973, 29 U.S.C. § 764.

134. OLIVER, POLITICS *supra* note 18, at 12 (discussing the importance of certain definitions and critiquing the medical approach to defining disability); *see also* MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 35 (1995) (discussing the "individual" and "social" models of disability); *see also* Guevara *supra* note 127, at 277–79.

135. 42 U.S.C. § 12102(4)(E)(i) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . .").

136. 534 U.S. 184 (2002). In this case, Ella Williams was terminated due to her poor attendance record, as she was suffering from carpal tunnel syndrome due to performing her assembly line duties for Toyota. *Id.* at 187–90. She filed suit under the ADA, alleging she was not given reasonable accommodations for her carpal tunnel. *Id.* at 190. Toyota then filed a motion for summary judgment, declaring no genuine issue to be tried since her carpal tunnel syndrome was not considered a disability under the ADA. *See id.* at 190–91. It did not substantially limit any of William's major life activities for she continued to perform manual

United Air Lines.[137] The Amendment had a significant impact in broadening the definition of disability, covering more people with disabilities, and giving them more legal recourse and protection—or so one thought. Although the Amendment covered more people, there is no getting around the subjective language of "reasonable accommodations" and "undue hardship," the determination of which is largely dependent on those in positions of power.[138] Even with this Amendment, the law still falls short of providing equity for people with disabilities because these loopholes allow institutions to get around providing accommodations.[139] Moreover, the pandemic's general impact compelled more attempts to access protections under disability antidiscrimination laws. Those attempting to access the protections of disability antidiscrimination laws inevitably discovered the harsh reality that disability cases are frequently

tasks (e.g., eating, bathing, etc.). *See id.* The Sixth Circuit Court of Appeals ruled in favor of Williams, finding that the carpal tunnel syndrome was a disability because it was substantially limiting her ability to perform her work. *Id.* at 191–92. The Supreme Court determined that the Court of Appeals did not use the proper standard in determining what is a disability under the ADA. *See id.* at 192–93. Thus, the Court of Appeals was wrong in only examining whether Williams could perform her work, limiting the class of manual tasks to those she would perform at work instead of determining whether her daily life activities outside of work were impacted. *Id.* at 199–203. The Court went on to say that, under the ADA, a disability had to be permanent or long-term. *Id.* at 196, 198. As such, *Toyota* established a narrow standard for determining whom the ADA covered, leaving people with mental or physical disabilities that "substantially limited a major life activity" mainly covered by Section 504. As a result, individuals with disabilities such as cancer, diabetes, HIV/AIDS, intellectual disabilities, amputations, epilepsy, and multiple sclerosis were not readily protected. *See* Kevin M. Barry, *Exactly What Congress Intended?* 17 EMP. RTS. & EMP. POL'Y J. 5, 11 (2013). After the 2008 ADA amendment, the condition no longer had to meet such a demanding standard requiring the disability to be permanent or long-term. *See* 42 U.S.C. § 12102(4)(D).

137. 527 U.S. 471 (1999). In this case, identical twins with myopia brought a lawsuit against United Airlines under the ADA when the airline did not hire them as commercial pilots. Their uncorrected vision did not meet the minimum requirements to have visual acuity of twenty/one hundred or better. *Id.* at 475–76. The Court held the twins were not disabled under the ADA because they could correct their eyesight with eyeglasses or contact lenses. *Id.* at 475. Ultimately, they were not regarded as disabled because the Court did not think they were not regarded as disabled or substantially limited in the major life activity of working. *Id.* at 481–94 (citing 42 U.S.C. § 12102). In the end, the Court in *Sutton* held that people who could mitigate their impairments (such as wearing eyeglasses to correct poor vision) were not "disabled." *Id*. at 475–76. Therefore, under *Sutton*, anyone mitigating their disability with medication or prosthetics was not considered disabled.

138. *See* 42 U.S.C. §§ 12112(9)–(10); Guevara *supra* note 127, at 289.

139. 42 U.S.C. §§ 12112(9)–(10) (stating that discrimination against a "qualified individual" includes "not making reasonable accommodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . . ." 42 U.S.C. § 12112(b)(5)(A)); COLKER & GROSSMAN *supra* note 125, at 81–87 (using judge Posner's opinion in *Vande Zande v. State of Wis. Dep't. of Admin.*, 44 F.3d 538 (7th Cir. 1995) to describe how the law defers to employers) (2014); *see also* GOFFMAN *supra* note 132, at 1–40; Guevara *supra* note 127, at 289.

unsuccessful in federal courts.[140] Evidently, the effects of these laws are limited.[141] The root of the issue is having to distinguish between people with and without disabilities in the first place, which stems from basing our laws and policies on the medical model.[142]

The language in Section 504 inadvertently created shortcomings with words such as "reasonable accommodations" and "undue hardship,"[143] giving discretion to the entity providing the accommodations and defining undue burden. This conflict of interest inevitably trickled into disability antidiscrimination law.[144] Again, this vague language has been used repeatedly in disability law, reinforcing the medical model of disability's "othering" language. Thus, this language has become rooted in assisting individuals with disabilities to fit into existing systems rather than in fixing the systems that disable and use an able-body standard.

It is generally unlawful to terminate an employee because of their disability.[145] An employer may not use employment requirements that ultimately exclude members of a protected class.[146] However, an employer

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140. *See* Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L REFORM 305, 361 (2001-02) (describing that disability cases are frequently unsuccessful).

141. *See* 29 U.S.C. § 794(a).

142. *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 35 (2009).

143. *See* COLKER & GROSSMAN *supra* note 125, at 77–78 (2014)

144. 42 U.S.C. § 12111(8). *See also* COLKER & GROSSMAN *supra* note 125, at 76–78 (2014)

> The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

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> In general. The term 'undue hardship' means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B). (B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—(i) the nature and cost of the accommodation needed under this Act; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility.

145. 42 U.S.C. § 12112(a).

146. *Griggs v. Duke Power Co*., 401 U.S. 424, 431 (1971).

can assert a defense after terminating someone, if the employment decision was job-related and consistent with business necessity.[147] Put simply, if an individual's disability prevents an individual from fulfilling the essential functions of their jobs, then they can be let go.[148] As such, business necessity is central to the predicament in which both the employee and the employer find themselves. For instance, a midsize company employs a person with depression and anxiety. After their six-month review, the employee is not meeting expectations. The employer gives this employee three more opportunities to meet the benchmarks, but the employee is not performing well because their depression and anxiety are too overwhelming. The midsize company has limited resources and must consider the profit margins even more than a big corporation; therefore, accommodating the employee's disability must be justified by the employee's productivity. Alternatively, the employee with a disability may desperately want to perform but is unable to because of a flare-up of the disability that is interfering with performance and therefore is unable to perform the essential job functions.[149] Either way, the employer justifies terminating the disabled employee by appealing to the business necessity of their profit margin. The employee cannot stay employed and must instead turn to government benefits for basic living expenses like SSDI.

C. Social Security Disability Insurance

SSDI benefits are federally funded and administered by the SSA.[150] Over 8.2 million people have received disability-worker benefits from the SSA.[151] Unlike SSI, which does not require previous participation in the workforce, SSDI requires the applicant to have worked for at least one-fourth of their adult life and five of the last ten years.[152] The money in the SSDI program comes from workers' and employers' social security taxes.[153] SSDI pays disability benefits to individuals if they meet strict

147. 42 U.S.C. § 12113(a).

148. *See Bates v. United Parcel Service*, 511 F.3d 974, 990 (9th Cir. 2007) (describing what is considered the "essential functions" of a job).

149. *See* 29 C.F.R. § 1630.2.

150. *Social Security Disability Insurance Benefits,* U.S. SOCIAL SECURITY ADMIN., https://www.benefits.gov/benefit/4382 [https://perma.cc/2A6Z-NJ7Z].

151. *Chart Book: Social Security Disability Insurance*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/social-security/social-security-disability-insurance-0 [https://perma.cc/HF4V-74VE] [hereinafter CBPP *Chart Book*].

152. National Council on Aging, *SSI vs. SSDI: The Differences, Benefits, and How to Apply* (Dec. 11, 2023), https://www.ncoa.org/article/ssi-vs-ssdi-what-are-these-benefits-how-they-differ [https://perma.cc/A93Q-3Y4M].

153. *What is Social Security Disability Insurance?*, NAT'L ACAD. SOC. INS., https://www.nasi.org/learn/social-security/what-is-social-security-disability-insurance/ [https://perma.cc/74TR-EWRN] [hereinafter *Social Security Disability Insurance?*].

eligibility requirements, which include "[being] unable to work because of a medical condition that is expected to last at least one year or result in death[, n]ot hav[ing] a partial or short-term disability[, m]eet[ing] SSA's definition of a disability[, and] be[ing] younger than your full retirement age."[154]

SSDI intends to provide a modest benefit to workers "who can no longer support themselves due to a serious and long-lasting medical impairment."[155] This benefit is dependent on a formula that considers a worker's earnings before they became disabled.[156] As of 2022, individuals must be "unable to earn more than $1,470 a month . . . and the condition must render the individual unable to work for at least 12 months."[157] Unfortunately, fewer than four out of ten applicants are accepted to receive benefits,[158] which forces many individuals to have to acquire legal representation to appeal the SSA decision.[159]

Contrary to popular belief, individuals do not need to quit a job before filing for SSDI. However, very few with non-apparent disabilities think to—or know to—apply for SSDI prior to termination. Individuals may feel stuck in limbo or mistakenly rely on the current arrangement with their employer. Some individuals may even believe that disability-related absenteeism has not affected their employment because they are still employed. Alternatively, individuals may also still be in denial about the severity of their disability. Employees cannot file for unemployment benefits if they live in a state where "just cause" is a reason for termination, such as absenteeism, even if the absenteeism originated from a disability. After termination, the individual's only option for prospective income will

154. *Social Security Disability Insurance Benefits,* BENEFITS.GOV, https://www.benefits.gov/benefit/4382 [https://perma.cc/5CBU-8GJ3]; CBPP *Chart Book supra* note 151; *Form SSA-16: Information You Need to Apply for Disability Benefits,* SOC. SEC. ADMIN., https://www.ssa.gov/forms/ssa-16.html [https://perma.cc/XU8J-A3F8] (describing the documentation necessary for disability benefits).

155. CBPP *Chart Book supra* note 151.

156. *Social Security Disability Insurance? supra* note 153.

157. *About SSDI in 2023,* DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/content/about-ssdi [https://perma.cc/S6KY-A54T].

158. CBPP *Chart Book supra* note 151.

159. Please note that undocumented individuals are excluded from this benefits program if they did not pay into the program, regardless of their previous jobs. On top of that barrier, a variety of materials are required, such as a birth certificate, proof of citizenship, or proof of permanent residency. An individual must also provide W-2 forms(s) and/or self-employment tax returns for the previous year. Assuming an undocumented applicant manages to overcome all of these hurdles, they still have to wait about five months to receive the SSDI benefits. As a result, those who are undocumented are vulnerable and thus more susceptible to homelessness because there is no social safety net to catch them.

likely be to file for SSDI,[160] which remains difficult to obtain for those with fluctuating non-apparent disabilities.[161] Even without a non-apparent disability, qualifying for SSDI remains quote difficult as seen by the fact that most who apply are denied on their first try.[162] On top of these administrative barriers, non-apparent mental health disabilities may prevent some from advocating for themselves. This scenario is all too familiar to individuals with non-apparent disabilities, particularly those with mental illnesses like depression, anxiety, or PTSD.[163]

Additionally, in some instances, the burden of "proof" is actually *higher* for non-apparent disabilities than it is for others and getting required documentation may be cost-prohibitive for many. Suppose the SSA determines that an individual meets the basic eligibility requirements. In that case, the extensive records of the medical condition are reviewed to determine final eligibility. Required records may include:

> [I]nformation on diagnosis, ideally from a psychiatrist or psychologist, brain scans or other evidence of physical abnormalities that document an organic cause for symptoms, if applicable, treatment records, documenting medications, therapy, and other management methods used and their effects, thoroughly documented episodes of increased symptoms or periods of decompensation, well-documented [e]ffects of symptoms on everyday abilities or 'activities of daily living' (ALDs).[164]

These documentation requirements render the SSDI requirements *higher* for non-apparent disabilities than those with apparent ones because the documentation must be done often and is ongoing; a simple document from a medical doctor is not enough. As opposed to, someone who is

160. Social Security's Disability Insurance benefits are "federally funded and administered by the U.S. Social Security Administration (SSA)." *Social Security Disability Insurance Benefits,* U.S. SOCIAL SECURITY ADMIN., https://www.benefits.gov/benefit/4382 [https://perma.cc/2A6Z-NJ7Z].

161. *See* PRICE *supra* note 21, at 304 (explaining that referring to mental disability as "invisible" or "hidden" is a "misnomer" because it "may become vividly manifest[ed]" and "is not so much invisible as it is apparitional, and its 'disclosure' has everything to do with the environment in which it dis/appears").

162. CBPP *Chart Book supra* note 151.

163. On the other hand, although trivialized by the general population over the years, the disability community slowly embraced many non-apparent disabilities. Steve Graby, *Neurodiversity: Bridging the Gap Between the Disabled People's Movement and the Mental Health System Survivors' Movement?*, MADNESS, DISTRESS AND THE POLITICS OF DISABLEMENT 231, 231–44 (Helen Spandler ed., 2015).

164. *Applying for Disability Benefits with a Mental Illness*, MENTAL HEALTH ASS'N MD. https://www.mhamd.org/information-and-help/paying-for-care/applying-for-disability-benefits-with-a-mental-illness/ [https://perma.cc/7NT5-3FDT].

paraplegic who can submit a document from a doctor attesting to the physical disability. Since a physical disability is apparent and easier to record, there is believability.

An SSA disability determination is disorder- and fact-specific, but always requires medical evidence of the disability.[165] Additionally, the SSA requires, "'extreme' limitation of one, or 'marked' limitation of two, of the four areas of mental functioning."[166] Those areas are: "[U]nderstand, remember, or apply information; interact with others; concentrate, persist, or maintain pace; and adapt or manage oneself."[167] Alternatively, for some disorders the applicant can show the mental disorder is "'serious and persistent'; that is, a medically documented history of the existence of the disorder over a period of at least two years."[168] The applicant must provide evidence of "both medical treatment, mental health therapy, psychosocial support(s), or a highly structured setting(s) that is ongoing and that diminishes the symptoms and signs of the mental disorder" and "marginal adjustment . . . minimal capacity to adapt to changes in your environment or to demands that are not already part of daily life."[169] Ultimately, the burden of proof lies on the applicant. In some instances, applicants must prove that they have been taking medication for their condition for two years or longer and have not seen any improvement.[170] These types of prerequisites may require significant time and cost to develop and obtain records that SSA may find sufficient. As a result, the employee may need to miss work to obtain these results from doctors. Otherwise, they must wait until termination to collect evidence of the disability, which only further delays assistance. In the way the system is currently set up, the need for evidence is vital to those with a mental illness.

Mental illnesses are considered disabilities by the SSA as long as they meet certain requirements. The disability evaluation under Social Security, also known as the Blue Book, outlines the requirements.[171] In addition to being listed in the Blue Book, the mental condition only rises to a recognized disability if it is "so severe that it prevents [an individual]

165. SOC. SEC. ADMIN, BLUE BOOK § 12.00(A)(1)(2), https://www.ssa.gov/disability/professionals/bluebook/12.00-MentalDisorders-Adult.htm [https://perma.cc/Z8JX-SBT4] [hereinafter SSA BLUE BOOK].

166. *Id.*, at § 12.00(A)(1)(2)(b).

167. *Id.*

168. *Id. supra* note 165, at § 12.00(A)(1)(2)(c).

169. *Id.*

170. *Id. supra* note 165, at § 12.00(C).

171. *Disability Evaluation Under Social Security,* SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/ [https://perma.cc/M5SF-WBQ9].

from working full time for at least a year."[172] There are eleven categories of mental disorders: "[N]eurocognitive disorders, schizophrenia spectrum, and other psychotic disorders; depressive, bipolar, and related disorders; intellectual disorder, anxiety, and obsessive-compulsive disorders; somatic symptom and related disorders, personality and impulse-control disorders, autism spectrum disorder, neurodevelopmental disorders, eating disorders and lastly, trauma and stressor-related disorders."[173] All eleven are listed here so that the reader understands the vast spectrum of mental illnesses that the SSA considers. A person with a non-apparent disability may not qualify even though they were diagnosed with one of these disabilities if, at the time of applying, there is not a severe flareup of their disability.

While a SSA Commissioner may be a medical doctor or clinician, they are often not,[174] making it challenging for them to understand the intricacies, gravity, and possible signs of some disabilities, especially those that fluctuate, and making policy decisions more unpredictable. As a result, individuals must advocate for themselves to convince the SSA that their disability is severe enough for aid. This takes more money, time, and energy than it would take to speak with a medical expert knowledgeable about the disability.

In addition to the bureaucratic hurdles that individuals must overcome, the disabilities themselves often pose an obstacle for advocating for oneself. Each one of these disabilities has intricacies that may prevent an individual from continuing with the application process. The individuals able to endure the process and procedures get rewarded by obtaining benefits. Those who are disabled enough to qualify but, because of their disability, could not rise in the mornings or leave their home are left behind.

Although depression, anxiety, and PTSD are disabilities that technically can qualify one for SSDI, that does not mean an individual automatically receives the benefits. SSA still must review the Residual Functional Capacity (RFC)[175] completed by a doctor that outlines work

172. *Is Mental Illness a Disability and Can I Get Benefits for it?*, DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/disabling-conditions/mental-disorders [https://perma.cc/43Q3-32TH].

173. SSA BLUE BOOK *supra* note 165, at § 12.00(A)(1).

174. *SSA Commissioners*, Subpage to *Social Security History*, SOC. SEC. ADMIN., https://www.ssa.gov/history/commiss.html [https://perma.cc/PFH4-WKU6] (listing previous SSA Commissioners with links to their biography).

175. *Program Operations Manual Systems (POMS)*, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0424510006 [https://perma.cc/6FLL-LLUL] ("RFC is an administrative assessment of the extent to which an individual's medically determinable impairment(s), including any related symptoms, such as pain, may cause physical or mental limitations or restrictions that may affect his/her capacity to do work-related physical and mental activities.").

limitations and the rest of the documentation. A mere diagnosis is often insufficient for those with depression, anxiety, or PTSD. However, a diagnosis may be enough for those who fall under the *Compassionate Allowance List*.[176] The *Compassionate Allowance List* (CAL) covers people with serious medical conditions, such as amyotrophic lateral sclerosis, many cancers, and Alzheimer's.[177] Applying for CAL helps administrators "reduce waiting time to reach a disability determination for individuals with the most serious disabilities."[178] Non-apparent mental health disabilities are largely left out of CAL,[179] so the uphill battle for benefits and against one's own self remains.

1. Depression Under SSA

Like all mental illnesses, depression can be considered a disability by SSA only if certain requirements in the Blue Book are met. Likewise, a mental condition only rises to the level of a recognized disability if it is "so severe that it prevents you from working full time for at least a year."[180] Social-psychologically oriented theories linking work environment, poverty, and depression are well-founded.[181] Therefore, it becomes a catch-22 when a person is unable to financially sustain themselves because they need money to counter their depression but cannot obtain the money through work, which further exacerbates their depression.

According to SSA, depressive disorder is characterized by five or more of the following: "[1] [D]epressed mood; [2] diminished interest in almost all activities; [3] appetite disturbance with change in weight; [4] sleep disturbance; [5] observable psychomotor agitation or retardation; [6] decreased energy; [7] feelings of guilt or worthlessness; difficulty concentrating or thinking; or [8] thoughts of death or suicide."[182] A

176. *Compassionate Allowances*, SOC. SEC. ADMIN., https://www.ssa.gov/compassionateallowances/ [https://perma.cc/752C-6VRD] [hereinafter *Compassionate Allowances*].

177. *Compassionate Allowances Conditions CAL Conditions*, SOC. SEC. ADMIN., https://www.ssa.gov/compassionateallowances/conditions.htm [https://perma.cc/3XW5-WHTP].

178. *Compassionate Allowances supra* note 176.

179. *Id.*

180. *Is Mental Illness a Disability and Can I Get Benefits for it?*, DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/disabling-conditions/mental-disorders [https://perma.cc/43Q3-32TH].

181. William W. Eaton et al., *Socioeconomic Status and Depressive Syndrome: The Role of Inter- and Intra-Generational Mobility, Government Assistance, and Work Environment*, 42 J. HEALTH & SOC. BEHAV. 277, 277–94 (2001) (including socioeconomic measures such as those used in most studies of status attainment, as well as measures of financial dependence, non-job income, and work environment).

182. SSA BLUE BOOK *supra* note 165, at § 12.04(A)(1).

depressive disorder must still satisfy the aforementioned requirements to qualify as a disability.[183]

The SSA must consider the Blue Book guide of claims when reviewing cases of depression, which contains a list of symptoms more specific than NIMH.[184] Those symptoms must also be present for at least twelve months, rather than NIMH's standard of two weeks.[185] This further demonstrates how laws and policies fail to address fluctuating disabilities by favoring severe ones. It is often challenging to predict if a fluctuating disability will last longer than twelve months as required for SSDI.[186] Grief may not significantly impact an individual enough to amount to depression. However, those who have more difficulty coping must still meet the SSA requirements for such grief to amount to disabling depression—a hefty requirement for those affected by grief resulting from losses during the pandemic.

Given the extensive requirements and variability in the disability, SSDI applicants with depression are commonly concerned they will not qualify. To receive disability benefits, an applicant must present reliable "evidence that [the] depression or bipolar disorder is so severe that [the individual is] unable to work or function well."[187] Depression and bipolar have a mixed track record, as "about two-thirds of applicants who apply for disability based on major clinical depression or bipolar disorder end up getting approved (many only after having to request an appeal hearing)."[188] The disorder "must have lasted or be expected to last for at least a year," a challenging prospect for those beginning treatment, and it also "must be at a level at which [an individual] would be unable to perform a job on a consistent and regular basis."[189]

While someone need not be depressed every day to qualify, "symptoms [must] occur frequently enough to prevent [the individual] from working."[190] This means tracking and documentation are a must, but they take time that many do not have given their pressing need. Depression can lead to death if not properly treated, making it dangerous to hide for

183. *Id.* at § 12.00.

184. *Depression and Social Security Disability*, DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/disabling-conditions/depression-and-social-security-disability [https://perma.cc/E49H-8R2Y].

185. *Id.*

186. CBPP *Chart Book supra* note 151.

187. Bethany K. Laurence, *Getting Social Security Disability Benefits for Depression or Bipolar Disorder*, NOLO, https://www.nolo.com/legal-encyclopedia/getting-social-security-disability-benefits-depression-bipolar-disorder.html [https://perma.cc/BFC7-UJ8M].

188. *Id.*

189. *Id.*

190. *Id.*

fear of being fired. This significantly reduces the amount of time an individual invests in tracking the depression, even though such tracking is imperative and pressing. Such documentation would have to take priority over a day in the office or a day in the SSDI offices, neither of which is optimal for someone struggling to manage their depression.

Before the pandemic, according to the CDC, suicide rates increased 37% between 2000 to 2018.[191] For males, the age-adjusted suicide rate increased 3% from 2020 (22.0 per 100,000) to 2021 (22.7 per 100,000).[192] Moreover, "[r]ates for males in age groups 15–24, 25–34, 35–44, and 65–74 increased significantly, with the largest percentage increase (8%) for those aged 15–24 (from 22.4 to 24.1)."[193] Given these numbers, it is all the more pressing to have working laws and policies assisting these individuals rather than perpetuating their marginalization. Tragically, one may have the required documentation and still not qualify. Subjective accounts of a disability are easily dismissed because an SSA administrator must rely on verifiable evidence of the disability until better policies and procedures are put in place for those with such non-apparent disabilities.[194] Given such burdensome asks, it is inevitable people with depression will face marginalization. That marginalization could be avoided had our society built its laws and policies under the social model, which accounts for fluctuation in disabilities by embracing human variation, instead of the medical model, that relies on strict categorization and diagnosis.

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191. *Suicide Data and Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/suicide/suicide-data-statistics.html [https://perma.cc/X7RR-YTWK] (placing emphasis on *Data Table: Suicide Rates*).

192. Sally C. Curtin et al., *Vital Statistics Rapid Release*, 24 NVSS 1 (Sept. 2022), https://www.cdc.gov/nchs/data/vsrr/vsrr024.pdf [https://perma.cc/P9SU-DMXS] (placing emphasis on Figure 2).

193. *Id.*

194. For an example, see *Shields v. Sullivan*, 801 F. Supp. 151 (N.D. Ill. 1992). An Illinois federal court reversed and remanded a benefit denial, finding that an administrative law judge had not considered the claimant's possible mental impairment. *Id.* at 161. The claimant had submitted medical evidence of depression along with evidence that he had hypertension, arthritis, dizziness, and chronic pain in his back, neck, shoulder, and arm. *Id.* at 154, 156–58. Because the claimant presented evidence of a possible mental impairment, the administrative law judge should have followed a special analytic procedure but had not done so. *Id.* at 157. Furthermore, other expert input was needed on remand for a proper determination on depression. *Id.* at 159. The court did find, however, that the administrative law judge properly relied on a consulting physician's assessment of the claimant's RFC, and properly discounted the claimant's subjective allegations of pain. *Id.* at 160–61. Despite the reversal, holding the judge correctly discounted the claimant's pain shows how people in power still view disability subjectively, filtering in their own biases perpetuated by social stigma. *See also* 20 C.F.R. § 404.1520(a) (describing the process of disability assessment).

2. Anxiety Under SSA

Like depression, anxiety can be considered a disability by the SSA if it meets Blue Book requirements. Anxiety can fall under a few listings, including panic disorder, general anxiety disorder, and agoraphobia.[195] To qualify under "anxiety-related mental disorders," one must:

> provide medical evidence of persistent anxiety accompanied by three out of the following: motor tension, autonomic hyperactivity, apprehensive expectation, [or] vigilance and scanning. Otherwise, one must demonstrate a persistent, irrational fear of a specific object [or] situation resulting in avoidance of those circumstances, severe panic attacks at least once a week, obsessions or compulsions which cause distress, or repeated recollections of a traumatic experience . . . . Additionally, the Blue Book requires either a complete inability to function independently outside of one's home due to anxiety or at least two of the following: marked restriction of activities of daily living, marked difficulties in maintaining social functioning, marked difficulties in maintaining concentration, persistence, or pace, and lastly, repeated episodes of decompensation.[196]

Just as with depression, symptoms require time to track and self-advocacy, as well as living with the fear of not qualifying for the benefits, which can add to the impending doom they are trying to survive.

Furthermore, an anxiety disorder must affect the ability to function at work and home for at least twelve months to qualify for SSDI benefits.[197] When considering several diagnosed disorders that may both have varied and overlapping symptoms, the SSA will consider the total disabling effect of combined symptoms in determining whether a qualifying disability exists.[198] Disability determinations may differ because, while the SSA theoretically recognizes a disability, it may, in practice, be treated differently given all the requirements. It is difficult to obtain this information because an individual's medical records are confidential unless they disclose them voluntarily to the public. Disclosure is highly unlikely given the stigma attached to disability. To determine

195. *Social Anxiety and Social Security Disability*, DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/disabling-conditions/social-anxiety [https://perma.cc/4SWH-GL45].

196. *Id.*

197. SOC. SEC. ADMIN., SOCIAL SECURITY HANDBOOK § 602 (2024), https://www.ssa.gov/OP_Home/handbook/handbook.06/handbook-0602.html [https://perma.cc/BP8L-TWY3].

198. *Id.*

whether an anxiety disorder is disabling—medically or vocationally—the SSA will want to see that the individual has been receiving regular treatment for the anxiety.[199] Medical records submitted should contain progress notes showing [the individual] regularly reporting symptoms of anxiety.[200] Anxiety disabilities vary in both symptoms and severity. The documentation is burdensome to collect for those who are at times barely functioning.

3. PTSD Under SSA

PTSD can also be considered a disability by the SSA if "the criteria for Listings 12.15 or 112.15 Trauma- and stressor-related disorders are met by the applicant."[201] The listing numbers are included in this PTSD section because PTSD's more elusive requirements are challenging to predict and diagnose. As is the case with other mental health ailments, an applicant's PTSD must be so severe to prevent the ability to work.[202] The medical requirements in the Blue Book must also be met.[203] PTSD can be considered a disability under trauma and stressor-related disorders (Blue Book 12.15 for adults and Blue Book 112.15 for children).[204] In addition, sections A and B or A and C in the listing for trauma and stressor-related disorders must be met.[205] Like depression and anxiety, PTSD must be properly documented for a claim to be granted.[206] A doctor must fill out an RFC evaluation on behalf of the applicant that must address "the maximum" an individual with PTSD can do at work.[207]As with other mental disorders, PTSD can be the basis for a successful SSDI claim, but proper medical documentation, "including medical records, including hospital records and clinic notes from physicians, therapists, and counselors," is an important requirement.[208] If such expertise is required

199. *Id.*

200. *Id.*; Diana Chaikin, *Getting Social Security Disability Benefits for Anxiety Disorders*, NOLO, https://www.nolo.com/legal-encyclopedia/getting-social-security-disability-benefits-anxiety-disorders.html [https://perma.cc/6EAC-MJMV].

201. *Post-Traumatic Stress Disorder and Social Security Disability*, DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/disabling-conditions/post-traumatic-stress-disorder-and-social-security-disability [https://perma.cc/9MB4-YSJD] [hereinafter *PTSD*, DISABILITY BENEFITS HELP].

202. *Disability Evaluation Under Social Security,* SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/12.00-MentalDisorders-Adult.htm [https://perma.cc/M5SF-WBQ9].

203. *PTSD*, DISABILITY BENEFITS HELP *supra* note 201.

204. *Id.*

205. *Id.*

206. *Id.*

207. *PTSD*, DISABILITY BENEFITS HELP *supra* note 201.

208. *Id.*

to document PTSD, it is all the more challenging for individuals who do not treat people with PTSD to understand the magnitude of the illness, let alone the disability.

Our understanding of PTSD has broadened, as the people who qualify under this diagnosis also include some children living in violent neighborhoods,[209] despite public resistance to the fact. While it was unfortunate that the sudden onset of the pandemic caused a lot of trauma for both adults and children, it did cement PTSD as a widely acquirable disability. Still, lived experiences that create human variation remain vastly ignored by SSDI requirements. Again, given the vagueness and unpredictability of PTSD, it is challenging to document and prove to the SSA.

D. The Law is Inadequate

The law and disability programs are inadequate for those with non-apparent disabilities such as depression, anxiety, and PTSD and will continue to be inadequate because they are based on labeling people under an ability/disability binary. Mental disorders make up half of the beneficiaries of SSDI.[210] Given the strict standards, it is more likely that these mental disorders represent a small portion of the total number of qualified applicants and leave most people with these three completely uncovered. If the social model had been adopted early on, the issues of severity and categorization would be no more and the binary would be eliminated.

Additional barriers for those with non-apparent disabilities exist within the requirements themselves. Unlike SSI, SSDI has no asset limits. However, it does have a work history requirement. Individuals who qualify for SSDI do not have asset restrictions because they have paid taxes that have allowed them to be "insured" for SSDI eligibility. As a result, the amount an individual has in savings is irrelevant for SSDI.[211] However, monthly income is capped under SSDI: if individuals earn more than the set amount per month, they will be considered able to perform

209. David F. Duncan, *Growing Up Under the Gun: Children and Adolescents Coping with Violent Neighborhoods*, 16 J. PRIMARY PREVENTION 343, 346 (1996); *see also* Smith & Patton *supra* note 67, at 220 (assessing symptoms of PTSD in Baltimore youth).

210. Though those with physical impairments are the most prominent among SSDI beneficiaries who are 50 or older, "[m]ental disorders—including intellectual disability . . . mood disorders such as bipolar disease and severe depression . . . and other mental impairments—account for half of the beneficiaries under age 50."CBPP *Chart Book supra* note 151.

211. Bethany K. Laurence, *How Much Can I Have in Assets and Still be Eligible for SSI Disability Benefits?,* DISABILITYSECRETS, https://www.disabilitysecrets.com/how-much-can-i-have-in-assets-and-get-disability.html [https://perma.cc/2M8N-5HUF].

"substantial gainful activity"[212] and would no longer qualify for SSDI. Just because an individual with a non-apparent disability at times maintains the amount that qualifies as substantial gainful activity does not mean their disability allows them to earn such income regularly. In this case, if they later fall below the cap, the person can re-enroll in SSDI, which is easier to reinstate than to apply for the first time. Again, this assumes the individual could overcome the hurdles during the application process and obtain the benefit in the first place.

Similarly, an individual may qualify for short-term disability but must have initially been enrolled in a short-term disability program. Additionally, individuals must make enough to afford short-term disability insurance, which is unrealistic for many Americans living paycheck to paycheck. Lastly, not having any of these safety nets renders an individual more vulnerable while dealing with disability management.

III. FIXES

Legal scholars often present practical solutions while staying within legal frameworks that must define and place people into categories required for the law to apply to them. However, doing so never gets to the root of the problem that perpetuates the subordination of people with disabilities. One possible approach is ideological. By moving away from the medical model of disability toward the social model of disability, the legal frameworks surrounding disability could be impacted positively in the future. The second approach is practical and can impact people with disabilities today. The practical fix addresses fixes that can currently be implemented in the SSA and keeps mental disabilities' variable presentation in mind. This Article provides practical fixes but ultimately holds that ideological fixes are more pressing. Therefore, ideological fixes are discussed first.

A. Ideological Fixes

The ability/disability binary does not allow for human variation. All the requirements in laws and policies that condition aid on exhausting documentation and box-checking are proof of this. The ability/disability binary creates a divisive system where people fight to secure a portion of limited resources. Instead of an ability/disability binary that encourages those with disabilities to compete with one another, why not create a system where all could benefit because the humanity of every individual is acknowledged? To do so, we must first address the disability models

212. *Legal and Financial Requirements for SSDI*, DISABILITYSECRETS, https://www.disabilitysecrets.com/topics/legal-and-financial-requirements-ssdi.htm [https://perma.cc/682M-Z46F].

that showcase the ideology that cements the ability/disability binary in the first place.

Disability models influence the framework used to construct laws and policies. There are two primary disability models—the medical model and the social model. The medical model is cemented in the medical field, as doctors determine whether an individual has an impairment or loss of function necessary to qualify for disability benefits.[213] Unfortunately, this practice has not stayed confined to the medical profession—where it belongs—as the medical model has seeped into individuals' general psyche, resulting in the view that people with disabilities are damaged. It makes no difference that "[t]he medical profession takes the position that impairment is a purely medical phenomenon, while disability is a medical-administrative-legal phenomenon."[214] Therefore, those with disabilities should be treated differently. The American Medical Association understands this and has stated that the "medical judgment of impairment is separa[te] from the more subjective and value-laden judgment of disability[.]"[215] Sadly, the general public remains unaware of the difference between impairment and disability, which results in stigma.[216]

1. Medical Model of Disability

Under the medical model structure, the law requires drawing a distinction between impairment and disability. The medical model lends itself to considering disability as a "'personal tragedy . . .,' which suggests that a disability is some terrible chance event that occurs at random to unfortunate individuals."[217] Accordingly, this model fixes the "problem" of disability within the individual while simultaneously absolving society from giving disability further consideration. It also perpetuates stereotypes of people with disabilities as incomplete or damaged and who need fixing

213. *See* DEBORAH A. STONE, THE DISABLED STATE 108 (1984); BAGENSTOS *supra* note 17, at 4 ("Some activists come close to seeking an end to the disability welfare state that is the locus of much paternalism, while others seek expanded disability welfare benefits under a system that gives people with disabilities more choice and control.").

214. STONE *supra* note 215, at 108.

215. *Id.* at 108, 110.

216. *See* Harlan Hahn, *The Politics of Physical Difference: Disability and Discrimination*, J. SOC. ISSUES at 39 (Spring 1988) ("[A]lthough a 'minority-group' model has emerged to challenge the traditional dominance of the 'functional-limitations' paradigm for the study of disability, research on attitudes toward disabled people has not produced a theoretical orientation that reflects these developments.").

217. Kanter *supra* note 17, at 277–79 (explaining the medical model's failings as a framework for disability antidiscrimination law). The root of the problem is that the medical model perpetuates "othering," affecting us all, but further impacting People of Color. Id. at 270. An illness is separate from the disability. *Id.* at 276.

to accomplish daily tasks.[218] This model views the individual with pity, as defective, or as having an impairment that must be eliminated, treated, or cured.[219] One scholar wrote:

> Society, in agreeing to assign medical meaning to *disability*, colludes to keep the issue within the purview of the medical establishment, to keep it a personal matter and "treat" the condition and the person with the condition rather than "treating" the social processes and policies that constrict disabled people's lives.[220]

This model has a detrimental impact on those with non-apparent disabilities because when they disclose or the disability becomes apparent, the message received is that the disability is their personal problem to fix. Thus, any government assistance or accommodations the employer provides are seen as charitable acts.

Currently, laws and policies are based on the medical model of disability. They tailor assistance and solutions to fit the able-bodied world rather than normalizing human variation. For the law to apply under this medical model, a person is either disabled or not disabled without regard to fluctuating symptoms in disabilities that may render a body able one day and disabled the next.

2. Social Model of Disability

Unlike the medical model, the social model suggests that society disables individuals.[221] In other words, our society's structures create disabilities[222] when there is nothing deficient or wrong with an individual. The social model embraces the idea that there are many ways of existing in the world.[223] Michael Oliver developed the social theory of disability in

218. *See* OLIVER, POLITICS *supra* note 18, at 4–6 (1990).

219. *Id.*; *see* STONE *supra* note 213, at 107–17 (1984) (discussing the medical evaluation of impairment); DAN GOODLEY, DIS/ABILITY STUDIES: THEORISING DISABLISM AND ABLEISM 16 (2014) ("[D]isability is established in the *World Report* as a problematic dynamic phenomenon requiring the immediate response of nations states, their governments and their citizens.").

220. *See* LINTON *supra* note 17, at 11.

221. *Id.* at 10 (1998).

222. *See id.*; ANNE LOUISE CHAPPELL, *Still Out in the Cold: People with Learning Difficulties and the Social Model of Disability*, *in* THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES 211, 214–19 (Tom Shakespeare ed., 1998); SHAKESPEARE, DISABILITY RIGHTS AND WRONGS *supra* note 18, at 106 ("[W]hat divides disabled from non-disabled people, in [the social model] formulation, is the imposition of social oppression and social exclusion.").

223. *See, e.g.*, TOM SHAKESPEARE, *Disability, Identity, and Difference*, *in* EXPLORING THE DIVIDE: ILLNESS AND DISABILITY 94, 94–113 (Colin Barnes & Geoff Mercer eds., 1996); CHAPPELL *supra* note 222; SHAKESPEARE, DISABILITY RIGHTS AND WRONGS *supra* note 18, at 101–06.

The Politics of Disablement, in which he brings to academia the idea that society causes disability, an idea rooted in the disability community.[224]

The social model of disability means the society into which individuals are born makes all the difference in how people experience and view disability. The social model maximizes an individual's potential because it challenges the view of normalcy and forces an individual to examine any subconscious bias and assumptions about any given disability, embracing universalism.[225] In doing so, decisions regarding and attitudes toward people with disabilities would change. For example, instead of having a ramp to bypass stairs, a building would not have stairs in the first place. If elevators stopped working in a building, anyone could use a ramp. In other words, society's designs would be more accessible to all. Furthermore, living under the social model of disability means law's reliance on medical and psychological diagnoses based on bias and prejudice would not exist. For example, for many years, being gay was considered a psychiatric disability,[226] and women who deviated from gender norms were diagnosed with hysteria.[227] These "able-body standards" were established by the medical field and embraced by the larger society. If the social model of disability were embraced instead, society would have normalized human variation in the past. We now have the opportunity to use the social model in order to provide the necessary adjustments today for all individuals to maximize their potential, prioritizing human dignity.

The social model of disability prompts an individual to think inclusively about people with disabilities, also known as universal design (UD).[228] For instance, the dropped curb assists people in wheelchairs,

224. *See generally* OLIVER, POLITICS *supra* note 18, at 12 (1990).

225. *See* Jerome E. Bickenbach et al., *Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps*, 48 SOC. SCI. & MED. 1173, 1173–84 (1999) (arguing that "universalism . . . serves disabled persons more effectively than a civil rights or 'minority group' approach").

226. *See generally* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (Princeton University Press 1987) (documenting why the Board of Trustees of the American Psychiatric Association decided to remove homosexuality from its official list of mental diseases).

227. *See generally* Cecilia Tasca et al., *Women and Hysteria in the History of Mental Health,* 8 CLINICAL PRAC. & EPIDEMIOLOGY IN MENTAL HEALTH 110 (2012) (describing how hysteria has been attributed to women for centuries).

228. *See Ronald L. Mace Papers 1974-1998*, NC STATE UNIV. LIBRS., https://www.lib.ncsu.edu/findingaids/mc00260/ [https://perma.cc/A9P6-Q5NG] (describing how Mace's childhood polio led him to realize the challenges of disability, leading him to pioneer universal design and create inclusive and aesthetically pleasing buildings that people could use regardless of ability. Mace thought inclusively by designing products that could be used fully by all able and disabled people); *see* PRICE *supra* note 20, at 88; PRICE *supra* note 21, at 306; JAY TIMOTHY

people with strollers, and bicycle users.[229] Universal Design's greater inclusion allows social participation for all, providing for unforeseen beneficiaries whether they have a disability or not. For example, many non-disabled individuals benefit from the handicap push-button that automatically opens doors, which were increasingly used in buildings during the coronavirus outbreak—it has a universal benefit.[230] More broadly, a universal design represents a worldview where environments are not tailored to marginal groups but rather to a "form of hope, a manner of trying."[231] Therefore, a person with a disability is "limited more by social attitudes and environmental barriers than any inherent 'defect' or 'deficiency' within the person that must be remedied."[232] A society that viewed the world through the social model of disability would embrace human variation and would construct a system that all could benefit from, adjusting for individual needs to maximize human potential.

In the end, categories should not exist because human variation—a universal experience—defies neat categorization. The law requires the categorization of individuals because categories are necessary to create standing for individual coverage under the law. It is best to move away from the legal fix into an ideological fix, which would ultimately render a legal fix irrelevant. Moving in this direction means employers would more readily provide accommodations for employees because there would not be accommodations that require legal enforcement, just adjustments to maximize human potential. This Article is not arguing that we should not see disabilities; doing so would be a similar mistake to taking a color-blind view on racism. Under the ideological fix scenario, it would not matter how "severe" or "mild" the ability or disability is because the dominant ideology would no longer be based on scarcity and instead, it would adjust for all disabilities. The universality of disability does not mean everyone's experiences are the same, it would mean a society where it would not matter what disability an individual has because all will be accommodated.

The ideology of production extensively contributes to the oppressive nature that views people with disabilities as not whole or in need of fixing. This section uses the theories of a philosopher, also known to some as the father of ideology, Louis Althusser as a basis for proposing reform. Althusser believed ideology perpetuates the relations of production that,

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DOLMAGE, ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUCATION 86 (2017) (explaining how the curb cuts to accommodate wheelchair users benefit others).

229. PRICE *supra* note 23, at 88 (quoting Jay Dolmage).

230. *See id.* (furthermore, when contextualized in any social instructional settings, "universal design is best understood through intentional verbs . . . applied in various ways—for example, . . . 'permit,' 'listen,' 'update,' 'guide,' 'clarify,' 'review,' and 'allow.'").

231. DOLMAGE *supra* note 228, at 116.

232. *See* Kanter *supra* note 17, at 409 (2011).

in this instance, perpetuate ableism. Althusser's theories are appropriate for devising solutions to the ableism of SSA, given that much of what perpetuates the current marginalization of people with disabilities stems from an ideology based on the idea that individuals with disabilities cannot produce, which reduces their worth to their production value.[233]

The dominant ideology propping disability laws and policies is ableist because they continue to treat people with disabilities as not whole or in need of fixing, following the medical model. The very establishment of having to define someone as disabled or not disabled creates the legal ability/disability binary that perpetuates ableist ideology, further marginalizing people with disabilities by embracing the idea of a right way of being. Nothing will ever change for people with disabilities if Americans continue to settle for current laws and policies that perpetuate an ableist ideology that treats people with disabilities under the medical model and sees people with disabilities as in need of fixing.

The medical model of disability, which treats disabilities as defective and in need of treatment, reinforces the able body[234] as the norm. This model perpetuates stigma and discrimination against people with disabilities by othering and limiting an individual's value to what can be reasonably accommodated. Some normative solutions for long-term change would entail using schools, churches, and the family to teach and implement the social model of disability, which in turn would shift the dominant ideology in these formative systems. For example, in the context of schools, if students are taught the social model of disability and then enter the workforce, they will create, design, lead, and teach with a non-othering mentality and create spaces of belonging for people with disabilities—maximizing human potential and capitalizing on all human dignity. Current examples of societies that create belonging for those deemed disabled in the Western world are the Anangu people in Australia and the Mixe people in southern Mexico, who embrace human variation

233. Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS, at 86–98 (Ben Brewster, trans., 1970) (2006) (describing Althusser's uses of capitalism, ruling class, and working-class in his explanation of ideology operating through RSA and ISA. This Article applies Althusser's ideology frame to an ableist system as he did with a capitalist system. It treats people in power as the ruling class, and employees as the working class). Althusser explained how sets of ideas which he called ideology was produced and reproduced through systems he defined as Repressive State Apparatuses (RSA) and Ideological State Apparatuses (ISA). RSA represents institutions such as government, courts, and police, owned by those in positions of power, or "the ruling class." ISA includes schools, churches, and the family. Therefore, the RSA and ISA are the apparatuses that maintain the dominant ideology and uphold ideas of ableism espoused through the RSA and ISA. *Id.*

234. As a reminder, throughout the Article, the terms "able body" or "able-bodied" include both the physical and mental attributes of the body.

because they value what any member of their community contributes.[235] An ideology that maximizes human potential in the Western world must be enforced in family homes and churches. The aspirations in this Article may be lofty for some, but an absolute necessity for others. The concept of disability severity would be irrelevant as human variation is embraced. Then, using RSA, like the courts, laws, and policies, society can embrace human variation by creating laws and policies that promote resources for all.

B. Practical Fixes

Given the way our legal system operates, it is understandable that someone must fit into a definition for the law to apply. Because merely reducing qualifications or disability thresholds would not disrupt the legal ability/disability binary, solutions that do not reorient our systems away from definitions will not be effective in that regard. Until ideology changes enough to disrupt the binary, however, a practical, advocacy-oriented solution is in order.

1. Leadership

Medical doctors, clinicians, specialists, scientists, etc., who are aware of the social model should serve as SSA commissioners or Congress should impose such a prerequisite before Senate confirmation.[236] For leadership to truly have the best interest of those with disabilities at heart, leadership should possess knowledge and expertise to inform better decisions that inevitably impact those served. Moreover, the ideology at the top of an organization inevitably trickles down to the bottom, making it more likely that the social model will be fully adopted by the system. In addition, the SSA should recruit and employ experts with all types of disabilities, not just sporadically consult them should an issue arise.

2. Personnel

Next, just as people with physical disabilities are sometimes provided with caregivers to assist with daily functions, people with non-apparent disabilities should also be provided with these services. The use of caregivers for non-apparent disabilities such as depression, anxiety, and PTSD should be readily embraced. Some individuals have trouble functioning with any of these three disabilities, let alone advocating for

235. *See, e.g.*, Ariotti *supra* note 30, at 219–22; GOTTO IV *supra* note 30, at 193–207.

236. 42 U.S.C. § 902(a)(1) ("There shall be in the Administration a Commissioner of Social Security (in this title referred to as the 'Commissioner') who shall be appointed by the President, by and with the advice and consent of the Senate.")

themselves. The mind controls the body, and although those with non-apparent disabilities may not have a disability directly impacting their limbs, they do have disabilities that limit or prevent mobility. It is in the best interest of the growing number of Americans diagnosed with these disabilities to allow them to acquire a caregiver or advocate to help navigate the system more efficiently.

Under federal caregiver support programs, family members or loved ones can be paid as caregivers. According to the U.S. Government, a caregiver is "someone who helps a person with special medical needs in performing daily activities. Tasks include shopping for food and cooking, cleaning the house, and giving medicine."[237] The caregiver can assist with additional documentation and details to present to the doctor and the SSA. Having an advocate would prevent many with these disabilities from spiraling downward and offer hope because someone is working on their behalf. This resource would greatly increase family ties while shifting the view that people with disabilities are a burden.

Various programs provide funding for caregiver services. For example, the Medicaid Self-Directed Care program lets qualified people manage their own health services.[238] It also lets them hire family members as caregivers in some states.[239] The Veteran-Directed Home and Community-Based Services program's flexibility allows veterans to choose the most useful goods and services, including hiring a family member or neighbor as a personal care aide.[240] VA Aid and Attendance benefits provide monthly caregiver payments for veterans who receive a VA pension.[241] Long-term care insurance may pay for family members as caregivers, depending on the insurance plan.[242] Operating under the rarity of faking disabilities, all who are not able enough to stay employed and not disabled enough to qualify immediately under the *Compassionate Allowance List*, should receive this caregiver service and a limited welfare monthly stipend until their application is reviewed. It is a small investment

237. *Get Paid as a Caregiver for a Family Member*, USA.GOV, https://www.usa.gov/disability-caregiver [https://perma.cc/P4Y5-HV4Z] [hereinafter *Paid Caregiver*, USA.GOV].

238. *Self-Directed Services*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/long-term-services-supports/self-directed-services/index.html [https://perma.cc/MC9A-FNUN].

239. *See* Joseph Caldwell et al., *Experiences of Individuals Self-Directing Medicaid Home and Community-Based Services During COVID-19*, 15 DISABILITY AND HEALTH J. at 3 (2022) ("Several participants also expressed benefits associated with hiring family members, states have flexibility to dictate which family members may be hired within self-directed programs.").

240. *Paid Caregiver*, USA.GOV *supra* note 237.

241. *VA Aid and Attendance Benefits and Housebound Allowance*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/pension/aid-attendance-housebound/ [https://perma.cc/63UL-E52X].

242. *Paid Caregiver*, USA.GOV *supra* note 237 ("Some long-term care insurance policies allow family members to get paid as caregivers").

to prevent possible homelessness and maximize potential in the long run. These are just a few of the many practical fixes to the law that are needed.

3. Adjudicatory Changes

Given the fluctuating nature of depression, anxiety, and PTSD, there should be such a consideration in the way SSA cases are considered. This could also set a precedent for other non-apparent disabilities with fluctuating symptoms. Each individual with a disability is at different stages of accepting their disability and in various parts of their journey in managing their disability, either through medication or therapy. Thus, allowing for special consideration for fluctuating disabilities allows the person to explain how their livelihood is interrupted when the disability flares up, even though it may not be so readily apparent at the moment. Otherwise, the current procedure incentivizes individuals to frame their current disability as more intense than it may currently present itself to ensure assistance for the days when the disability flares up since the next review will probably take years. Currently, if improvement is possible but unpredictable, SSA reviews cases every three years.[243] This concept of severity should not be the issue; instead, this Article proposes that the SSA should review these cases every year. If these cases were reviewed more frequently, then the system would allow for greater variance, diminishing at least in part the effect of the ability/disability binary embedded in the system.

sriate law, which leaves a lot of people unable to access the benefits they need. The sheer variability and unpredictability of disabilities like depression, anxiety, and PTSD do not easily allow them to fit neatly into the binary. A change is needed. The pandemic led to an increase in the number of people diagnosed with these non-apparent disabilities and these numbers should motivate those in Congress to act. Even if some individuals recover to some degree from the traumatic effects of COVID-19, solutions are still necessary because the next pandemic or the next new social disruption is likely around the corner, and we want to preserve human dignity.

Hopefully, the increased numbers will force the public to call for a change. With the high rates of diagnosis of depression, anxiety, and PTSD, maybe the public will finally see that society's view of disability and the treatment of people with disabilities impacts us all. Until human variation is embraced by both the public and government, and the medical concept

243. SOC. SEC. ADMIN., PUB. NO. 05-10053, HOW WE DECIDE IF YOU STILL HAVE A QUALIFYING DISABILITY 1 (2021), https://www.ssa.gov/pubs/EN-05-10053.pdf [https://perma.cc/T42F-B22Q].

of disability is a thing of the past, people with disabilities will continue to be marginalized. Even though disability is seen as a positive term used to unite the disability community, it is a term that could be rendered unnecessary in a society that embraces all of humanity by embracing its variation and adapting its laws around that variation. Laws and policies must embrace the social model, which would prevent individuals from falling through the cracks of an ability/disability binary legal system that does not account for the fluctuating symptoms of some non-apparent disabilities and instead maximizes everyone's human potential.