

2022

## Evolving Beyond Reasonable Accommodations Towards "Off-Shelf Accessible" Workplaces and Campuses

Karla Gilbride

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/jgspl>



Part of the [Civil Rights and Discrimination Commons](#), [Disability Law Commons](#), and the [Health Law and Policy Commons](#)

---

### Recommended Citation

Karla Gilbride (2022) "Evolving Beyond Reasonable Accommodations Towards "Off-Shelf Accessible" Workplaces and Campuses," *American University Journal of Gender, Social Policy & the Law*: Vol. 30: Iss. 3, Article 1.

Available at: <https://digitalcommons.wcl.american.edu/jgspl/vol30/iss3/1>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Journal of Gender, Social Policy & the Law by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

# EVOLVING BEYOND REASONABLE ACCOMMODATIONS TOWARDS “OFF- THE-SHELF ACCESSIBLE” WORKPLACES AND CAMPUSES

KARLA GILBRIDE\*

I. How We Got Here: The History of Reasonable Accommodations as a Legal Concept .....	299
II. Creating a Less Disabling Environment: Designing Products and Processes with Diverse Users in Mind .....	304
III. The Limitations and Costs of a Purely Accommodations-Based Approach to Disability in the Workplace and Education .....	310
IV. Practical Suggestions for Creating “Off-the-Shelf Accessible” Workplaces and Schools, and How Government and Advocates can Help Speed the Transition .....	314
V. Conclusion .....	319

One of the hallmarks of the Americans with Disabilities Act (“ADA”), which prohibits discrimination in the workplace on the basis of disability, is that it defines “discrimination” to include “not making reasonable accommodations to the known mental or physical limitations of an otherwise qualified individual with a disability.”<sup>1</sup> This concept of reasonable accommodation was seen as innovative in two ways. It recognized that employers must sometimes take affirmative steps or make adaptations to afford individuals with disabilities an equal opportunity to apply for and

---

\* Karla Gilbride is the co-director of the Access to Justice Project at Public Justice, where she litigates cases involving structural barriers that make it difficult for people harmed by corporate or governmental misconduct to use the civil court system to win redress and hold powerful actors to account. Throughout her career Ms. Gilbride has frequently litigated cases under the Americans with Disabilities Act, including cases involving requests for reasonable accommodation, and she is also familiar with the concept as a person who has been blind since birth. The author is grateful to Albert Elia, Shiri Azenkot of Cornell University, and Richard Ladner of the University of Washington, who each contributed valuable ideas during the preparation of this article.

1. 42 U.S.C. § 12112(b)(5)(A) (2012).

perform jobs. And it identified the failure to take such affirmative steps as a type of discrimination that would be just as actionable under the statute as a refusal to hire or other adverse employment action taken because of a person's disability. In contrast to the first generation of civil rights laws that simply prohibited unequal treatment based on race, national origin, sex, and age, the ADA recognized that a one-size-fits-all approach does not always yield fair outcomes and that sometimes equity requires treating differently situated people differently.<sup>2</sup>

However, this Article argues that the reasonable accommodations framework, which has transcended employment to dominate nearly every context in which people with disabilities interact with society (including K-12 and post-secondary education), has had unintended, harmful consequences. Further, this Article argues that those consequences have hindered the ADA's goals of integrating people with disabilities "into the economic and social mainstream of American life."<sup>3</sup>

By requiring that employers and educational institutions consider the accessibility of their work and learning environments *only* when a person with a disability arrives on the scene, the legal framework of reasonable accommodations reinforces the notion that inaccessible spaces, products, and ways of doing things are the default, to be altered if and only if a "special" person comes along who requires that something be done differently. Unfortunately, this after-the-fact approach to accessibility all too often stigmatizes workers and students with disabilities, has created unhelpful incentives and has led to far more litigation about the reasonableness of particular accommodations than actual progress in reducing the staggeringly high unemployment rate among people with disabilities.<sup>4</sup>

This Article calls for moving beyond the reasonable accommodations framework while not dispensing with it entirely. Part I traces the concept of reasonable accommodations from its origin in the Rehabilitation Act to the Fair Housing Amendments Act to the ADA. Part I will also describe how this concept has come to permeate other areas of law affecting individuals with disabilities. Part II discusses alternative approaches such as universal

---

2. Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 597-98 (2004).

3. H.R. Rep. No. 101-485, pt. 2, at 22 (1990) *as reprinted in* 1990 U.S.C.C.A.N. 303, 304.

4. See Michelle Maroto & David Pettinicchio, *Twenty-Five Years After the ADA: Situating Disability in America's System of Stratification*, 35 DISABILITY STUD. Q. 1, 5 (2015) (reporting that the proportion of working-age adults with disabilities who were employed has actually decreased in the twenty-five years since the ADA was enacted).

design and inclusive design that consider how to build accessibility into products and the environment from the beginning and will profile a few successful examples of such “off-the-shelf accessibility.” Part III describes the advantages of “off-the-shelf accessibility” over reasonable accommodations from the perspective of individuals with disabilities in schools and the workforce, from the perspective of employers and educational institutions, and from the perspective of society as a whole. Finally, Part IV offers recommendations for how employers and schools can move from a purely accommodations-based paradigm to embracing more “off-the-shelf accessibility” and suggests law reforms and policy proposals to facilitate and accelerate that shift.

### I. HOW WE GOT HERE: THE HISTORY OF REASONABLE ACCOMMODATIONS AS A LEGAL CONCEPT

Though the concept of reasonable accommodations is now closely associated with disability, it originated in a different context altogether. Its first appearance in legislation was in Title VII of the Civil Rights Act of 1964, in the definition of “religion,” stating that employers must “reasonably accommodate to an employee’s or prospective employee’s religious observance or practice” unless doing so would cause an “undue hardship on the conduct of the employer’s business.”<sup>5</sup>

However, the term’s meaning was fleshed out in far greater detail in regulations implementing the 1973 Rehabilitation Act (“Rehabilitation Act”). The Rehabilitation Act required federal agencies and government contractors to take affirmative steps to employ and promote individuals with disabilities. It also prohibited discrimination against qualified individuals with disabilities in programs or activities receiving financial assistance from the federal government.<sup>6</sup> The Office of Personnel Management (“OPM”) then issued regulations under the Rehabilitation Act calling on the federal government to become a “model employer” of individuals with disabilities.<sup>7</sup>

---

5. 42 U.S.C. § 2000e(j) (2012); *see also* 29 C.F.R. § 1605.3(a) (implementing regulation by the Equal Employment Opportunity Commission (“EEOC”).

6. 29 U.S.C. §§ 791(b), 793(a), 794(a) (2012). In 1978, a new section was added to the Rehabilitation Act, 29 U.S.C. § 794a(a)(1), creating a private right of action to enforce 29 U.S.C. § 791. This addition was intended to strengthen the act, which had not had its intended effect of increasing employment of people with disabilities within the federal government in the first five years after its enactment. *See* Prewitt v. U.S. Postal Serv., 662 F.2d 292, 302–04 (5th Cir. 1981) (recounting the history of the Rehabilitation Act and explaining its purpose).

7. 29 C.F.R. § 1613.703; *see* Hall v. U.S. Postal Serv., 857 F.2d 1073, 1077 (6th Cir. 1988) (detailing the transfer of responsibility for these regulations to the EEOC).

The OPM regulations went on to state that federal agencies “shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.”<sup>8</sup> The regulation listed factors relevant to assessing whether a particular accommodation posed an undue hardship. These included “the overall size of the agency’s program” in terms of employees, facilities, and budget; the “composition and structure of the agency’s workforce”; and the “nature and cost of the accommodation.”<sup>9</sup>

During the 1980s, many cases involving federal employees and applicants for federal employment seeking reasonable accommodations made their way through the courts. In some instances, like the case of a man with dwarfism who sought employment at the U.S. Postal Service as a distribution clerk, the court concluded that no reasonable accommodation was possible without causing undue hardship to the agency.<sup>10</sup> In other cases, like that of a registered nurse who the Veterans Administration did not hire to work at one of its hospitals because of her history of drug addiction, the court held the agency’s failure to provide reasonable accommodations constituted discrimination against the plaintiff.<sup>11</sup>

Meanwhile, as these cases were percolating through the courts, Congress, for the first time, codified the concept of reasonable accommodation of disability into a federal statute when it passed the Fair Housing Amendments Act (“FHAA”) in 1988, amending the Fair Housing Act passed twenty years

---

8. *Crane v. Lewis*, 551 F. Supp. 27, 30–31 (D.D.C. 1982) (quoting 29 C.F.R. § 1613.704(a)); *see* 29 C.F.R. § 1613.704(b) (listing examples of reasonable accommodations as “(1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.”).

9. *Treadwell v. Alexander*, 707 F.2d 473, 478 (11th Cir. 1983) (quoting 29 C.F.R. § 1613.704(c)).

10. *See Dexler v. Tisch*, 660 F. Supp. 1418, 1427–29 (D. Conn. 1987) (holding that having a taller co-worker assist the plaintiff with certain tasks would be an undue hardship to the agency by spreading its employees too thin and that accommodating him with a stepstool would pose safety risks and reduce his efficiency compared to other employees because of the time spent stepping up and down and moving the stool from place to place).

11. *See Wallace v. Veterans Admin.*, 683 F. Supp. 758, 765–67 (D. Kan. 1988) (concluding that the plaintiff offered evidence that less than two percent of the nurse’s time was spent administering narcotics and that her restriction from doing so could be accommodated by assigning her patients that did not need to have narcotics administered).

earlier, to include disability and familial status as protected traits.<sup>12</sup> These amendments defined three new forms of discrimination relevant to people with disabilities, two pertaining to reactive changes to the status quo and one about the concept of universal design explored in the next section.

First, the FHAA defined discrimination to include “a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises” with the caveat that the tenant might have to restore the premises to their original state before leaving.<sup>13</sup> Another form of actionable discrimination under the FHAA is “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person [with a disability] equal opportunity to use and enjoy a dwelling.”<sup>14</sup> Finally, Congress termed it discrimination under the FHAA to design and construct multi-family housing for first occupancy after March 13, 1991, that did not include certain essential features of accessible design.<sup>15</sup>

Both the provision requiring landlords to allow disabled tenants to modify their homes at their own expense and the provision requiring reasonable accommodations to rules, policies, practices, and services have been the subjects of substantial litigation. Disputes over the latter provision often involve requested accommodations to no-pet policies so that individuals with disabilities can keep service or emotional support animals with them in their homes.<sup>16</sup>

Finally, in 1990, the concept of reasonable accommodation reached full

---

12. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1620-21 (1988) (codified as 42 U.S.C. §3604) (prohibiting discrimination against “handicapped persons” in the sale and rental of housing); *see also* Pub. L. No. 90-284, 82 Stat. 83 (1968) (codified as 18 U.S.C. §§ 241–44) (establishing previously that it was unlawful to discriminate in sale or rental of housing only on the grounds of race, color, national origin, and religion); Housing Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 728-29 (1974) (codified as 42 U.S.C. §§ 3605, 3606, 3631) (adding sex as a protected trait).

13. 42 U.S.C. § 3604(f)(3)(A) (2012).

14. 42 U.S.C. § 3604(f)(3)(B) (2012).

15. 42 U.S.C. § 3604(f)(3)(C) (2012) (listing design features such as doors wide enough for wheelchairs to pass, light switches and thermostats at an accessible height, and bathroom walls that would structurally support the later installation of grab bars).

16. *See, e.g.,* *Overlook Mut. Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850, 857–59 (S.D. Ohio 2009) (denying homeowner association’s motion for summary judgment because emotional support animals as well as individually trained service animals could be reasonable accommodations under the FHAA).

maturity in Title I of the ADA.<sup>17</sup> Title I of the ADA represented a substantial expansion of the Rehabilitation Act's bar on employment discrimination against individuals with disabilities. Title I broadened that nondiscrimination obligation beyond federal agencies, contractors, and funding recipients to include all public- and private-sector employers with more than fifteen employees.<sup>18</sup> Like the FHAA, the ADA lists failure to make reasonable accommodations as a form of unlawful discrimination. Also, the ADA defines discrimination to include "denying job opportunities to a job applicant or employee who is an otherwise qualified individual with a disability" because of the need to provide reasonable accommodations to that applicant or employee.<sup>19</sup>

A Westlaw search for federal cases involving the term "reasonable accommodation" within five words of "ADA" yielded 5,912 results. What is particularly notable about this large number of decisions is that many do not involve employment, even though the term "reasonable accommodation" only appears in Title I of the ADA.<sup>20</sup> The ADA's other two major sections are Title II, which pertains to programs and activities of state and local governments (such as public schools),<sup>21</sup> and Title III, which relates to places of public accommodation like stores and restaurants, as well as private companies providing transportation services like taxis.<sup>22</sup> The term "reasonable accommodation" appears repeatedly in cases brought under Titles II and III even though neither those statutory sections nor their implementing regulations use it.

For example, in *Gorman v. Bartch*, a wheelchair user who the Kansas City Police Department arrested and injured during his trip to jail brought claims under Title II, arguing that the police department discriminated against him by failing to transport him to jail in a wheelchair-accessible vehicle.<sup>23</sup> The Eighth Circuit reversed the district court's grant of summary judgment in the police department's favor on the threshold question of whether Title II

---

17. 42 U.S.C. § 12111 et seq. (2012).

18. 42 U.S.C. §§ 12111(5)(A), 12112(a) (2012).

19. 42 U.S.C. § 12112(b)(5)(A)–(B) (2012); *see also* 42 U.S.C. § 12111(9) (defining "reasonable accommodation" with a list that tracks the list of reasonable accommodations in the EEOC's earlier regulation implementing the Rehabilitation Act).

20. *E.g.*, *Gorman v. Bartch*, 152 F.3d 907, 910 (8th Cir. 1998); *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 110 (3d Cir. 2018). These cases are described in more detail in footnotes twenty-three through twenty-eight and their accompanying text.

21. 42 U.S.C. § 12132 (2012).

22. 42 U.S.C. §§ 12182, 12184 (2012).

23. 152 F.3d 907, 910 (8th Cir. 1998).

applied to Mr. Gorman's arrest and transportation to jail, adding that further proceedings would be necessary on remand to determine if the department "can show they made reasonable accommodations of [Gorman's] disability or if additional accommodation would have been an undue burden."<sup>24</sup>

Similarly, in *McGary v. City of Portland*, the Ninth Circuit considered a Title II claim brought by a man with AIDS who requested more time to clean up trash in his yard to avoid a citation from the city for creating a nuisance.<sup>25</sup> In distinguishing between what it saw as three different theories of discrimination, the Ninth Circuit noted that "[a] plaintiff need not allege either disparate treatment or disparate impact to state a reasonable accommodation claim."<sup>26</sup>

In *Berardelli v. Allied Services Institute of Rehabilitation Medicine*, the Third Circuit considered a Title III claim against a private elementary school that refused to allow a seizure alert dog to accompany a child with epilepsy during the school day.<sup>27</sup> In explaining the progression of disability rights law from the Rehabilitation Act to the ADA, the Third Circuit stated that Title III "codified the concept of 'reasonable accommodations'." The language from Title III it quoted did not define the term "reasonable accommodation," (which does not appear anywhere in Title III) but did mirror the definition of "reasonable accommodation" in a pivotal Supreme Court opinion interpreting the Rehabilitation Act.<sup>28</sup>

The concept of "reasonable accommodation" has become the fulcrum around which much disability discrimination law turns, even under the statutory provisions that do not use the term themselves. The concept has also found its way out of the law and into common usage. Business websites include information about accommodating disabled customers,<sup>29</sup> and schools speak of accommodating disabled students.<sup>30</sup> But there is an alternative

---

24. *Id.* at 913.

25. 386 F.3d 1259, 1260–61 (9th Cir. 2004) (reversing district court order, which had dismissed complaint because plaintiff could not point to a nondisabled neighbor who was granted an extension).

26. *Id.* at 1266.

27. See *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 110 (3d Cir. 2018) (holding that district court had committed reversible error by failing to provide jury instructions on Department of Justice regulations regarding service dogs).

28. *Id.* at 114–15 (comparing 42 U.S.C. § 12182(b)(2)(A) with *Alexander v. Choate*, 105 S. Ct. 712, 714 (1985)).

29. See *Accessibility Statement*, CREWS BANK & TR., <https://www.crews.bank/accessibility> (last visited Jan. 26, 2022).

30. See *Reasonable Accommodations Explained*, AM. PSYCH. ASS'N, <https://www.apa.org/pi/disability/dart/toolkit-three> (last visited Jan. 26, 2022).

paradigm to all of the focus on accommodation: the concept of universal design.

## II. CREATING A LESS DISABLING ENVIRONMENT: DESIGNING PRODUCTS AND PROCESSES WITH DIVERSE USERS IN MIND

Ronald Mace, an architect who used a wheelchair for most of his life after contracting polio at age nine, coined the term “universal design” in 1985 to describe “a way of designing a building or facility, at little or no extra cost, so that it is both attractive and functional for all people, disabled or not.”<sup>31</sup> Mace further developed the universal design concept with his colleague, Ruth Hall Lusher. They described universal design’s objective as “design[ing] most manufactured items and building elements to be usable by a broad range of human beings including children, elderly people, people with disabilities, and people of different sizes.”<sup>32</sup> Mace and Lusher believed this objective was both eminently achievable and far preferable to “responding only to the minimum demands of laws which require a few special features for disabled people.”<sup>33</sup>

People who subscribe to the principles of universal design, or the related discipline of inclusive design, reject the archetype of an “average user” and instead embrace the reality that humans come in all shapes, sizes, and ages, have different gender, racial, and cultural identities, differ in their strength, agility, and mobility, and perceive information differently because of differences in vision, hearing, cognitive ability, literacy and language fluency, and distractions in the environment.<sup>34</sup> Inclusive design, the term more commonly used in the United Kingdom, responds to this diversity of users by suggesting that a wide range of stakeholders be consulted throughout the design process and included on design teams to share their lived experiences and mitigate unconscious bias.<sup>35</sup>

---

31. *Center for Universal Design, About the Center: Ronald L. Mace*, N.C. STATE UNIV. CTR. FOR UNIVERSAL DESIGN, [https://projects.ncsu.edu/design/cud/about\\_us/usronmace.htm](https://projects.ncsu.edu/design/cud/about_us/usronmace.htm) (last visited Jan. 26, 2022).

32. RUTH LUSHER & RONALD MACE, DESIGN FOR PHYSICAL AND MENTAL DISABILITIES, IN *ENCYCLOPEDIA OF ARCHITECTURE: DESIGN ENGINEERING AND CONSTRUCTION*, 755 (Wiles & Packard ed., 1989).

33. *Id.*

34. Daniel Jenkins & Lisa Baker, *Designing for Diversity*, UX COLLECTIVE (June 6, 2019), <https://uxdesign.cc/designing-for-diversity-13ce6780690a>.

35. See Eloise Cleary, *Design: Where the D Stands for Diversity*, CTR. INCLUSIVE DESIGN (Sept. 10, 2021), <https://centreforinclusivedesign.org.au/index.php/featured/2021/09/10/design-where-the-d-stands-for-diversity/>; see also Simeon Keates, P. John Clarkson & Lee-Anne Harrison, *Towards a Practical Inclusive Design Approach*, CU '00 ACM CONF. OF UNIVERSAL USABILITY 45 (2000) (critiquing an initial design of a

While striving for a similar breadth of usability, universal design focuses more on the attributes that the finished products of universal design should have than who is included in the design process. The seven principles of universal design, compiled by Mace and six of his colleagues in 1997, strive for “products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design” by emphasizing the following:

- Equitable Use: the design is usable and marketable to people with diverse abilities.
- Flexibility in Use: the design accommodates a wide range of individual preferences and abilities.
- Simple and Intuitive Use: use of the design is easy to understand, regardless of the user’s experience, knowledge, language skills, or current concentration level.
- Perceptible Information: the design communicates necessary information effectively to the user, regardless of ambient conditions or the user’s sensory abilities.
- Tolerance for Error: the design minimizes hazards and the adverse consequences of accidental or unintended actions.
- Low Physical Effort: the design can be used efficiently and comfortably and with minimum fatigue.
- Size and Space for Approach and Use: appropriate size and space are provided for approach, reach, manipulation, and use regardless of user’s body size, posture, or mobility.<sup>36</sup>

One of the most often cited examples of universal design in the physical environment is curb ramps, which were first deployed in Kalamazoo, Michigan, in 1945 through the advocacy of a disabled veteran and lawyer named Jack Fisher.<sup>37</sup> These design features initially added to make travel more accessible for people with disabilities, immediately proved helpful to people pushing baby strollers, cyclists, and people wheeling luggage. Most pedestrians use them when they are available.<sup>38</sup> Other examples abound. Television closed captions benefit those who are hard of hearing as well as people in noisy environments like bars or airports, and language learners who find the dual presentation of spoken and written language helpful. Automatic

---

customer service kiosk to be used at British post offices based on large segments of the population that would have had difficulties using it).

36. *The Principles of Universal Design*, CTR. UNIVERSAL DESIGN (Apr. 1, 1997), [https://projects.ncsu.edu/ncsu/design/cud/about\\_ud/principlestext.htm](https://projects.ncsu.edu/ncsu/design/cud/about_ud/principlestext.htm).

37. Steven E. Brown, *The Curb Ramps of Kalamazoo: Discovering our Unrecorded History*, 19 DISABILITY STUD. Q. 203, 205 (1999).

38. Angela Glover Blackwell, *The Curb Cut Effect*, 1 STA. SOC. INNOVATION REV. 27, 28 (2017).

door openers benefit people with limited manual dexterity, reach, or strength, and wind up assisting anyone whose arms are full of groceries.

Universal design has applications that go far beyond physical spaces and products. A particularly salient modern example is the design of online interfaces and websites. Jim Berners-Lee, who coined the term “World Wide Web” in 1989, later founded the World Wide Web Consortium. This international organization sets standards for web-based technology with a mission of making the benefits of the web “available to all people, whatever their hardware, software, network infrastructure, native language, culture, geographical location, or physical or mental ability.”<sup>39</sup> One of the projects of the World Wide Web Consortium is the Web Accessibility Initiative (“WAI”), which offers “strategies, standards [and] resources to make the Web accessible to people with disabilities.”<sup>40</sup>

The WAI has developed the Web Content Accessibility Guidelines, a detailed set of standards for making web pages and applications more accessible to people with disabilities. These guidelines include providing text alternatives for non-text content; providing captions and other options for multimedia; providing content that can be presented in different ways, including with assistive technologies, without losing meaning; making all functions available using the keyboard without the need for a mouse; making it easier to use inputs other than keyboards (for people who operate computers using their voice or with a mouth wand); making text readable and easily understandable; and providing feedback on forms to help people correct errors.<sup>41</sup> Many of these standards make the web easier for all people to use, such as high contrast between text and background that assists users in low-light settings and clear instructions that help people with cognitive impairments and those with low literacy.<sup>42</sup> But not all WCAG standards follow this “curb cut effect.” Some standards recommend coding that allows websites to function seamlessly with assistive technologies like screen readers that verbalize the text on the screen or magnification programs that enlarge it without having any effect on the visual appearance of the page for

---

39. *Facts About W3C*, W3C, <https://www.w3.org/Consortium/facts#history> (last visited Jan. 26, 2022); *W3C Mission*, W3C, <https://www.w3.org/Consortium/mission> (last visited Jan. 26, 2022).

40. *Making the Web Accessible*, W3C WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI> (last visited Jan. 26, 2022).

41. *WCAG 2.1 at a Glance*, W3C WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/standards-guidelines/wcag/glance> (last visited Jan. 26, 2022).

42. *Accessibility, Usability, and Inclusion*, W3C WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/fundamentals/accessibility-usability-inclusion> (last visited Jan. 26, 2022).

those not using these assistive technologies.<sup>43</sup>

Universal design principles have also been applied in the educational setting through the discipline of Universal Design for Learning (“UDL”), sometimes also called Universal Design of Instruction. The educational research and development organization CAST developed the UDL guidelines, which they describe as “a set of concrete suggestions that can be applied to any discipline to ensure that all learners can access and participate in meaningful, challenging learning opportunities.”<sup>44</sup> These guidelines emphasize providing multiple means of representation (the “what” of learning), multiple means of action and expression (the “how” of learning), and various means of engagement (the “why” of learning).<sup>45</sup>

Sheryl Burgstahler, a professor at the University of Washington who helped establish the Center for Universal Design in Education, developed a detailed checklist to ensure that all aspects of instruction, from physical spaces to pedagogy to information technology, are accessible, usable, and inclusive.<sup>46</sup> A cornerstone of Burgstahler’s theory of Universal Design of Instruction is that teachers be proactive in anticipating the diverse characteristics of the students who may enroll in their classes and plan their materials, lessons, and methods of assessment accordingly, rather than waiting to be told of a student’s disability and need for accommodation and then responding to it.<sup>47</sup> The technical standards developers of the Web Access Initiative also emphasize the importance of considering accessibility early in the design process, noting that addressing accessibility becomes “increasingly difficult” at later stages of the development process once much of the basic coding infrastructure is already built.<sup>48</sup>

A powerful example of this proactive/reactive distinction is Apple, which, since 2009, with the launch of the iPhone 3GS, has included the Voiceover

---

43. *Id.*

44. *About Universal Design for Learning*, CAST, <https://www.cast.org/impact/universal-design-for-learning-udl> (last visited Jan. 26, 2022).

45. *The UDL Guidelines*, CAST, <https://udlguidelines.cast.org> (last visited Jan. 26, 2022).

46. Sheryl Burgstahler, *A Checklist for Inclusive Teaching*, WASH. UNIV.: DISABILITIES, OPPORTUNITIES, INTERNETWORKING, AND TECH. (DO-IT), <https://www.washington.edu/doiit/equal-access-universal-design-instruction> (last visited Jan. 26, 2022).

47. *See id.*; *see also* SHERYL E. BURGSTAHLER, *CREATING INCLUSIVE LEARNING OPPORTUNITIES IN HIGHER EDUCATION: A UNIVERSAL DESIGN TOOLKIT*, 179–88 (2020) (discussing examples of how teachers responded to challenges in their classes by changing the way they taught their class for all students instead of coming up with individualized accommodations for particular students).

48. *Accessibility, Usability and Inclusion*, *supra* note 42.

screen reader as a preloaded option sold with all of its devices.<sup>49</sup> While screen readers had already existed for decades at that point, they had typically been separate, often expensive software programs that blind people and those with learning and cognitive disabilities bought for themselves or had schools or employers purchase for them as an accommodation so that they could participate in school or do their job.<sup>50</sup> But with the inclusion of Voiceover in 2009, anyone could purchase an iPhone from anywhere and immediately get it to start talking without any specialized add-ons or accommodations. Soon, other product developers responded to this competitive pressure. For example, Google developed the built-in Talkback screen reader for Android phones,<sup>51</sup> and Microsoft made significant improvements to its built-in Windows screen reader, Narrator.<sup>52</sup> Apple's decision to include Voiceover in all of its products as a matter of course is an illustration of what the rest of this Article will describe as "off-the-shelf accessibility."

Of course, neither including access features in universally available products nor considering the diverse backgrounds and needs of potential students in designing curricula and course materials will eliminate the need for specialized assistive technology and other accommodations. For example, Apple's operating system also includes settings for interfacing with external Braille displays used by some blind people and many people who are deaf-blind, for whom Voiceover alone is not a usable solution.<sup>53</sup> And Burgstahler's Universal Design of Instruction checklist includes a section about how to secure accommodations "for students whose needs are not fully met by the instructional content and practices."<sup>54</sup> But Burgstahler's model views the need for accommodations as an indicator of systems design failure and, accordingly, something to be minimized. She recounts an example of a student who reported that the door handle to exit the women's restroom was

---

49. Shelly Brisbin, *A Timeline of iOS Accessibility: It Started with 36 Seconds*, MACSTORIES (July 11, 2021), <https://www.macstories.net/stories/a-timeline-of-ios-accessibility-it-started-with-36-seconds>.

50. See Becky Gibson, *A Brief History of Screen Readers*, KNOWBILITY (Jan. 6, 2021), <https://knowbility.org/blog/2021/a-brief-history-of-screen-readers>.

51. J.J. Meddaugh, *A New Day for TalkBack: Android Screen Reader Gets a Major Update*, AM. FOUND. FOR THE BLIND: ACCESS WORLD, <https://www.afb.org/aw/22/5/17556> (last visited May 28, 2022).

52. Robin Christopherson, *Microsoft Narrator Turns 21; We Celebrate a Coming of Age*, ABILITYNET (Feb. 17, 2021), <https://abilitynet.org.uk/news-blogs/microsoft-narrator-turns-21-we-celebrate-coming-age>.

53. Scott Davert, *Using a Braille Display on iOS: an Introduction*, APPLEVIS (Nov. 17, 2021), <https://www.applevis.com/guides/using-braille-display-ios-introduction>.

54. Burgstahler, DO-IT, *supra* note 46, at 4.

too high for her to reach from her wheelchair.<sup>55</sup> An immediate accommodation was provided of having a staff member accompany the student to the restroom to open the door for her.<sup>56</sup> But in the meantime, a work order was submitted to the building manager, who agreed to have a new, lower door handle installed in that restroom and every other restroom in the building.<sup>57</sup> This solution did not stop at accommodating the student in question; it also made the space more inclusive going forward for others with mobility disabilities.

Some critical disability theorists have faulted universal design for its very universality, suggesting that it has abandoned its roots in the lived experience of disabled architects and engineers to focus on marketing slogans about design that is good for everyone.<sup>58</sup> But from another vantage point, situating disability as just one of the multiple dimensions on which people differ—recognizing that a person with a disability is not defined by that identity alone but also has racial, gender, cultural and socioeconomic identities that affect their experiences and interactions with the world—is more consistent with the recent shift among many activists from a disability rights narrative to a movement for disability justice, with a heightened commitment to intersectionality.<sup>59</sup> In their recognition that products and systems can be designed in more than one way, and that some designs are more accessible than others, universal and inclusive design approaches also resonate with the social model of disability developed by social work professor Mike Oliver. Oliver theorized that while individuals can have mobility, cognitive and sensory impairments, those impairments are not inherently disabling; rather, he theorized, physical barriers, exclusionary practices, and low societal expectations cause disability.<sup>60</sup>

From this somewhat abstract starting point, the Article will now turn to a more concrete discussion of some of the drawbacks to the reasonable accommodations paradigm in the workplace and academia. It will note the potential for off-the-shelf accessibility to offer a more forward-thinking and

---

55. Burgstahler, *supra* note 46, at 18.

56. *Id.*

57. *Id.* at 18–19.

58. Aimi Hamraie, *Universal Design and the Problem of "Post-Disability" Ideology*, 8 DESIGN AND CULTURE 285, 298 (2016).

59. Hailey Hudson, *Moving from Disability Rights to Disability Justice*, WORLD INST. ON DISABILITY, <https://wid.org/2021/09/08/moving-from-disability-rights-to-disability-justice> (last visited Oct. 11, 2021).

60. Mike Oliver, *The Individual and Social Models of Disability* (July 23, 1990), <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Oliver-in-soc-dis.pdf>.

truly inclusive alternative.

### III. THE LIMITATIONS AND COSTS OF A PURELY ACCOMMODATIONS-BASED APPROACH TO DISABILITY IN THE WORKPLACE AND EDUCATION

Reasonable accommodations are an essential component of an accessible workplace or educational institution. One thing that makes them genuinely revolutionary as a legal concept is that they recognize individuality—unlike the canonical “ordinary person” standard of tort law, reasonable accommodations start from the premise that every person with a disability is unique.<sup>61</sup> Moreover, EEOC regulatory guidance codifying the reasonable accommodations standard under the ADA also recognizes that with this individuality comes expert knowledge, stating that where multiple accommodations are possible or the person with the disability wishes to provide their own accommodation, “the preference of the individual with the disability should be given primary consideration.”<sup>62</sup> In other words, in describing how the accommodation process should work, the EEOC gave the force of law to the common-sense notion that people with disabilities know what they need to perform a job successfully.

But the concept of reasonable accommodation also has significant drawbacks. For one thing, an employer need only accommodate disability-based limitations of which it is aware; this places the burden on the employee or job applicant to disclose their disability and need for accommodation to begin the interactive accommodations process.<sup>63</sup> Not all applicants or employees will want to do this. An applicant may fear that once they disclose that they have a disability, they will face discrimination and may not obtain the job at all. Or, if the disability is not obvious, the applicant or employee may feel that disclosing it and perhaps providing supporting documentation to the employer is an invasion of their privacy.<sup>64</sup> Finally, the person may have impairments that would qualify as a disability under the ADA but may not identify themselves as disabled, realize the law covers them, or understand that they have a right to request accommodations. And even some people who do understand the law and their rights under it may still be hesitant to request accommodations because of the social stigma associated

---

61. Eli K. Best, *Atypical Actors and Tort Law's Expressive Function*, 96 MARQ. L. REV. 461, 505 (2012).

62. 29 C.F.R. § 1630 app. (2021).

63. *See id.*

64. *See id.* (“When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.”).

with doing so.<sup>65</sup>

One predictable response to at least some of these concerns is that there should be no stigma associated with requesting accommodations. The more people request them, the more the process will be normalized and the stigma eliminated. But while there is certainly no intent in this Article to suggest that anyone should be ashamed or embarrassed by their disability, upon further scrutiny, this appeal to normalization-by-accommodations-request appears to be a variation on the oft-discredited theme that members of any historically oppressed group should be responsible for ending their own oppression, such as Black people being asked to educate their white colleagues about why certain remarks offend them or women being asked to dress modestly to discourage sexual assault. Instead of placing the burden on people with disabilities to explain their needs every time they start a new class or apply for a new job, educating everyone they come into contact with along the way, imagine if the burden instead lay with employers to anticipate the needs of those who might come to work there in the future and if we expected them to design the application process and the physical layout of the office in a way that reflects that anticipation. Cheryl Burgstahler painted a vivid picture of the message such a proactively designed space would communicate to a person with a mobility disability who happened upon it:

Imagine a prospective engineering student who uses a wheelchair attends an open house in a new makerspace on a post-secondary campus. Pleasantly surprised, he can easily maneuver into and within the space, reach equipment controls and imagine himself engaging with other students there. The message seems to be “We expected you to come to our makerspace. You are welcome here.”<sup>66</sup>

Another drawback to the reasonable accommodations process is that it can delay an employee’s start date. Suppose the workplace as constituted when the disabled applicant is hired doesn’t have workspaces ready-made to accommodate someone in a wheelchair. In that case, a new desk may need to be purchased, or a library may need to be cleared out so that the new employee can be located there, where the table is at a height that will accommodate him. Suppose these changes cannot be made right away. In that case, the employee must either wait without pay until the workplace is ready for him or work from home or in some other makeshift arrangement until the accommodations get sorted out. All of this last-minute scrambling could have been avoided if the employer already had at least some offices

---

65. Stacy M. Branham & Shaun K. Cane, *The Invisible Work of Accessibility: How Blind Employees Manage Accessibility in Mixed-Ability Workplaces*, 2015 *ASSETS* 163, 163.

66. Burgstahler, *supra* note 46, at 58.

with adjustable-height desks before this person was hired. Still, the law, which speaks only in terms of reasonable accommodations to specific disabled employees and applicants, does not require such pre-planning.

An employee who is blind or has dyslexia and uses a screen reader may similarly have to wait for that software to be purchased and configured on her system. But sometimes, purchasing a screen reader is not enough. Many employers require their employees to use proprietary software programs that are not “off-the-shelf accessible.” Such inaccessible programs can be configured to work with an employee’s screen reading software through a process called scripting, but that process can take months.<sup>67</sup> Suppose the scripting does not even begin until the new employee has been hired. In that case, that person must remain in limbo without performing the job for which, with accommodations, everyone agrees she would be qualified. And all that time, the only thing the new employee’s future coworkers know about her is that she has a disability that requires some sort of complicated and time-consuming accommodation. In this way, the reactive nature of accommodations inhibits the employee’s productivity. It also makes disability the most salient fact about that person to their future colleagues, to exclude all other facets of their identity, not to mention introducing that facet of their identity in a negative context, as a “problem” to be overcome with extraordinary efforts.

The time delay involved in identifying and implementing an accommodation can be especially devastating in the educational context, where even a few weeks without course materials in an accessible format or a notetaker to help a disabled student follow what is happening during lectures can put that student at a disadvantage they can never recover from during the semester. Moreover, even if those accommodations are ultimately secured, the student spends the entire semester playing catch-up. The resulting stress makes the student less able to reach their full potential. In addition, it deprives their classmates of their full participation in the class, impoverishing the learning environment for everyone.

A related problem with workplace accommodations is that they reduce an employee’s job mobility, especially where they are time-consuming or difficult to obtain. For example, if an employee who has a chronic illness that makes it difficult for them to work in the office five days a week has an employer that grants their request for a flexible schedule or occasional telework, that person may be reluctant to leave the job for another

---

67. See Joe Lazzaro, *An Introduction to JAWS Scripting*, AM. FOUND. FOR THE BLIND (Nov. 2003), <https://www.afb.org/aw/4/6/14806>.

opportunity, even if it offers better pay or chances of advancement, out of concern that the subsequent employer may not grant the same accommodation. Similar constraints limit mobility in more literal ways as well. For example, an employer may accommodate a blind warehouse worker by laying down tactile markings on the floor indicating the path he should follow to perform his job's main functions and to reach other areas he visits every day, like the break room and the nearest restroom. But if tactile markings were not included in the entire warehouse, the blind employee would be discouraged from visiting coworkers in other areas or from applying for promotions that would change his job responsibilities. And what is worse, if another blind person applied to work at the same warehouse, the company would have a strong incentive to place that second blind worker in the same job as the first, so no new tactile markings would need to be laid down.

The final, and in some ways the most obvious, drawback of the reasonable accommodations framework is the word "reasonable," a subjective concept that will inevitably lead to disagreement. An employer considering the candidacy of a disabled job applicant who it knows it will have to accommodate may be influenced, consciously or unconsciously, by the perceived expense or inconvenience of those accommodations, and that linkage of the particular employee to the need for accommodations may prove fatal to his candidacy. The rejected applicant may sue under the ADA. Still, because most employers do not write down evidence of their discriminatory motives for plaintiffs' lawyers to find (and because bias often operates below the level of conscious awareness), such failure-to-hire cases are exceedingly difficult to prove. If the employer had made strides to be accessible before any particular applicant with a disability showed up, by contrast, the people involved in the interview process might have less apprehension about possible future accommodations and their cost—either because their feelings about disability were generally more positive or because an investment had already been made, causing them to view this hire as a return on that investment.

And once an employee is hired, the potential for dispute and acrimony under the accommodations model does not end. On the contrary, the EEOC interpretive guidance gives the employer the last word on what accommodations it can reject because they would pose an undue hardship and on which of multiple potential accommodations to provide.<sup>68</sup> If an employee with a disability does not believe they can safely or effectively

---

68. 29 C.F.R. § 1630 app. (2021) ("the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide").

perform their job with the accommodation the employer offers, protracted battles over the respective reasonableness of the employee's desired and the employer's proffered accommodation can ensue, often spawning toxic and adversarial workplace environments, not to mention costly litigation.<sup>69</sup>

And to the extent others in the workplace know what is going on with these accommodation skirmishes, they can lead to resentment, with requests for accommodation being perceived as requests for preferential treatment (a perception shared by a substantial number of judges).<sup>70</sup> Instead of disability being celebrated as a dimension of diversity that enriches the workplace, it is all too often seen as a locus of discord and disputes about fairness. But the topic of these disputes is not the disability itself. Nor do these disputes typically focus on whether the workplace conditions from which the disabled employee requested an exemption are realistic expectations from a universal design perspective—in terms of equity, flexibility, and minimal effort, for example. Rather, the disputes and discord turn on whether the particular modifications to standard workplace policies being sought or provided as an accommodation for that person's disability are fair and appropriate, or, in a word, “reasonable.”

Investing in “off-the-shelf accessibility” upfront can hopefully reduce the number of disputes over reasonable accommodation that wind up in court, saving employers litigation expenses and avoiding the harm such disputes cause the cohesiveness and culture of the workplace. However, the reasonable accommodations framework is familiar, after nearly 50 years of increasing prevalence in the law, whereas moving towards “off-the-shelf accessibility” may sound daunting and nebulous. But there are some concrete examples employers and schools who want to go beyond accommodation and be proactive about accessibility can follow to make their workplaces and campuses more inclusive, welcoming spaces for people with disabilities.

#### IV. PRACTICAL SUGGESTIONS FOR CREATING “OFF-THE-SHELF ACCESSIBLE” WORKPLACES AND SCHOOLS, AND HOW GOVERNMENT AND ADVOCATES CAN HELP SPEED THE TRANSITION

One of Branham and Cane's conclusions in their study of accessibility in the workplace was that disabled and non-disabled employees who took the

---

69. See, e.g., *Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784, 795–99 (10th Cir. 2020) (en banc) (surveying failure-to-accommodate caselaw from federal appellate courts).

70. Jamelia N. Morgan, *One Not Like the Other: An Examination of the Use of the Affirmative Action Analogy in Reasonable Accommodation Cases Under the Americans with Disabilities Act*, 46 CAP. U. L. REV. 191, 219 (2018).

same tour gave completely different answers to the question of what aspects of the workplace presented barriers.<sup>71</sup> Instead of making assumptions about what parts of its workplace or school require improvement, an employer or educational institution should start by acknowledging that they do not know what they do not know and consult someone with greater expertise.

One source of such advice is the Best Practices Collection maintained by Disability-IN, a nonprofit dedicated to promoting disability inclusion among businesses worldwide.<sup>72</sup> In conjunction with the American Association of People with Disabilities, Disability-IN administers an annual survey called the Disability Equality Index. Top-performing businesses' practices and success stories on the Index are collected in a publicly searchable database.<sup>73</sup>

This database reveals several concrete, proactive investments in accessibility that companies and schools can make. For example, Salesforce requires that all of its all-hands meetings be live-captioned and requires that all other meetings, regardless of size, follow internal guidelines for meeting accessibility.<sup>74</sup> Mastercard requires that all of its offices around the world contain sensory quiet rooms to accommodate people with neurological disabilities who need such spaces and any other employees who would find them helpful.<sup>75</sup> Based on the number of employees requesting adjustable-height desks as a reasonable accommodation, Florida Blue decided to install these units in all new employee offices.<sup>76</sup> And Accenture includes accessibility requirements in its requests for proposals, master service agreements, and contracts with software vendors as part of its commitment to "infuse accessibility upfront in the technology development and design journey" and ensure that all employee "interactions with software, devices,

---

71. Branham, *supra* note 65 at 168.

72. *About*, DISABILITY:IN, <https://disabilityin.org/who-we-are/about/> (last visited Jan. 4, 2021).

73. *DEI Best Practices Collection*, DISABILITY:IN, <https://disabilityin.org/what-we-do/disability-equality-index/dei-best-practices-collection/> (last visited Jan. 4, 2021).

74. *Salesforce Implements Accessibility Requirements for All-Hands Meetings and Properties*, DISABILITY:IN (July 31, 2021), <https://disabilityin.org/resource/salesforce-implements-accessibility-practices-for-all-hands-meetings-and-properties/>.

75. *Mastercard Implements Ergonomics Training, Reasonable Accommodation Supports and Sensory Quiet Rooms in Global Office Design Standards*, DISABILITY:IN (Aug. 1, 2021), <https://disabilityin.org/resource/mastercard-implements-ergonomics-training-reasonable-accommodation-supports-and-sensory-quiet-rooms-in-global-office-design-standards/>.

76. *Florida Blue's Centralized Accommodations Fund*, DISABILITY:IN (Aug. 1, 2021), <https://disabilityin.org/resource/florida-blues-centralized-accommodations-fund/>.

and services” are accessible.<sup>77</sup>

While the public availability of these resources is a helpful start, not all employers will seek them out without some sort of nudge. For example, in 2021, 319 businesses participated in the disability Equality Index to assess their accessibility practices, with participants skewing heavily towards large for-profit corporations.<sup>78</sup> To incentivize more small and medium-sized companies and nonprofits to use such auditing tools, federal and state governments, as well as private foundations, should provide grants to those who invest in purchasing new equipment, make renovations, or upgrade technology to proactively improve the accessibility of their workplaces. In addition, given that tax breaks are already available to help employers pay for reasonable accommodations for particular employees,<sup>79</sup> making similar funding available to finance “off-the-shelf accessibility” would be a tangible way of signaling the government’s support for a more universal design-oriented approach.

The federal government has already given one promising signal of support for such a shift with an executive order issued in June of 2021, which listed accessibility, along with diversity, equity, and inclusion, as goals for improvement within the federal workforce. That executive order required the creation of a government-wide Diversity, Equity, Inclusion, and Accessibility (“DEIA”) Strategic Plan and comparable DEIA plans at each federal agency.<sup>80</sup> One of the provisions of this executive order specifically calls on agencies to remove physical barriers in their workplaces “to reduce the need for reasonable accommodations.”<sup>81</sup> The executive order also calls for agencies to collect demographic data from their employees on “multiple attributes and identities to ensure an intersectional analysis.”<sup>82</sup>

Including disability alongside other diversity metrics in goals for recruitment, retention and promotion will help to shift employers’ thinking, both within federal agencies and hopefully among those who look to the federal government as a model, beyond perceiving disability merely as something that must be accommodated to comply with the law. This focus

---

77. *Driving the Technology Accessibility Advantage at Accenture*, ACCENTURE, <https://www.accenture.com/us-en/case-studies/about/driving-accessibility-advantage> (last visited Jan. 4, 2022).

78. *Disability Equality Index*, DISABILITY:IN, <https://disabilityin.org/what-we-do/disability-equality-index/> (last visited Jan. 4, 2022).

79. JOB ACCOMMODATION NETWORK, Tax Incentive Topics, <https://askjan.org/topics/taxinc.cfm> (last visited Nov. 4, 2021).

80. Exec. Order No. 14035, 86 Fed. Reg. 34593 (June 30, 2021).

81. *Id.* § 10(d).

82. *Id.* § 5(d).

on disability as an aspect of identity communicates that employees with disabilities enrich the diversity of the workplace with their unique perspectives and should be sought out for that reason.<sup>83</sup>

But employers and schools are not operating in a vacuum when they look to improve their accessibility infrastructure. Unless they develop their own software and manufacture all of their own office equipment in-house, which virtually no one does, they must purchase those items from third parties. There must be accessible options in the market from which they can choose. The federal government can play a role here as well by mandating minimum standards of accessibility for products sold in interstate commerce, just as they now mandate minimum product safety standards. Such federally mandated accessibility standards are not unprecedented: the 2016 Department of Health and Human Services (“HHS”) regulations implementing the Affordable Care Act included a requirement that any health programs or activities provided through information and communication technology be accessible to people with disabilities.<sup>84</sup>

This accessibility mandate, in conjunction with federal incentives for doctors and hospitals to transition to electronic medical records, has meant that to comply with federal antidiscrimination regulations, doctors and hospitals must find vendors capable of providing electronic medical records that will be off-the-shelf accessible. For guidance on which vendors to choose, they can look to the list of certified health Information Technology developers maintained by the federal Office of the National Coordinator of Health IT.<sup>85</sup> All “certified health IT” developers have met the “technological capability, functionality, and security requirements” of the HHS regulations, including those regarding accessibility.<sup>86</sup>

More recently, Senator Tammy Duckworth introduced the Website and Software Application Accessibility Act in the 117th Congress, which would take a large step towards universal design in the digital realm by requiring that all public-facing websites and software applications, as well as those used by employers and government entities, be operable, perceivable and

---

83. *Id.* § 1 (“Our greatest accomplishments are achieved when diverse perspectives are brought to bear to overcome our greatest challenges”).

84. 45 C.F.R. § 92.104(a) (2022).

85. *Quick Stats*, OFFICIAL SITE OF THE OFFICE OF THE NATIONAL COORDINATOR FOR HEALTH IT, <https://www.healthit.gov/data/quickstats> (last visited Jan. 4, 2022).

86. *Certified Health IT Developers and Editions Reported by Health Care Professionals Participating in the Medicare EHR Incentive Program*, HEALTH IT, <https://www.healthit.gov/data/quickstats/health-care-professional-health-it-developers> (last visited May 28, 2022).

understandable by people with disabilities.<sup>87</sup> Recognizing the essential role played by designers, and echoing the universal design-oriented language in the Fair Housing Amendments Act, this bill would also make it unlawful for any commercial provider to design or construct a website or software application that is inaccessible to the end user, and would authorize employers, public accommodations and governmental entities that maintain websites or procure software to sue the commercial providers responsible for those websites or software applications if they are not accessible.<sup>88</sup>

In the absence of federal certification standards and access requirements, advocates can perform some of the same functions of steering employers and schools towards doing the right thing and offer concrete suggestions of which products they should purchase and what policies they should adopt to maximize their accessibility. People with knowledge about accessibility practices can develop checklists, like the Universal Design of Instruction checklist developed by Sheryl Burgstahler. They can use the checklist for auditing their own school or make their tool available online for others to use. Advocates can also recommend that employers or schools wishing to improve their accessibility contract with a disability-owned business to perform the assessment, an approach Merck has taken in contracting with a disability-owned business to implement universal design principles throughout its offices.<sup>89</sup>

In addition to offering suggestions, advocates can hold employers accountable by asking questions about disability inclusion in whatever capacities they interact with those businesses: as potential employees at job interviews, as customers contacting customer service, or as concerned investors. For example, if interviewing at a law firm, ask if that firm has a hiring goal for people with disabilities and how many disabled people are in its senior leadership. As a prospective student taking a college tour, ask about the physical accessibility of dorms, science labs, and athletic facilities. And as a customer of an online retailer, take a minute to email customer service and ask if the website meets the WCAG Accessibility Guidelines. You may receive a response asking if you need reasonable accommodation. If so, you can politely respond that you are asking because you only give your business to companies that welcome all potential customers and wanted

---

87. See generally Websites and Software Applications Accessibility Act, S. 4998, 117th Cong. (2022). See also Websites and Software Applications Accessibility Act, H.R. 9021, 117th Cong. (2022) (An identical bill was introduced in the House by Congressman John Sarbanes).

88. See generally S. 4998; H.R. 9021.

89. *Universal Design at Merck*, DISABILITY:IN (Aug. 1, 2021), <https://disabilityin.org/resource/universal-design-at-merck/>.

to know if this is such a company.

## V. CONCLUSION

Codifying the concept of reasonable accommodation into law recognized a basic and profound truth about humans: that we are not all the same. Policies that treat everyone the same will be unfair or inappropriate as applied to certain people with specific traits. But the necessarily reactive nature of accommodations has prevented many of our workplaces and schools from embracing the full spectrum of that human difference—not just accepting or adapting to it by making on-demand modifications when necessary, but anticipating, preparing for, and inviting it. We can and should challenge ourselves, our employers, and our school administrators to make the shift and ask questions about accessibility when designing spaces, planning events, purchasing new products, or investing in new technologies. Governments and private funders can create incentives by offering money for accessibility infrastructure improvements, much like the incentives currently being offered to invest in renewable energy and energy efficiency upgrades.

We are capable of making many more facets of society “off-the-shelf accessible.” Doing so may be hard, and will certainly challenge conventional ways of thinking. But challenging conventional ways of thinking has led to most of the technological, scientific, and artistic breakthroughs in history. There’s no telling what life-altering innovations a broad-based commitment to universal design of workplaces, learning environments, and technologies could bring about.<sup>90</sup> Let’s find out, shall we?

---

90. Shira Ovide, *Disability Drives Innovation*, N.Y. TIMES (Oct. 14, 2021), <https://www.nytimes.com/2021/10/14/technology/audiobooks-innovation.html>.