# DISABILITY AND THE DIGNITY OF SERVICE

JASMINE E. HARRIS[†]



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## I. INTRODUCTION

Public service may not be a right, but perhaps it should be.[1] The lifeblood of a representative democracy is its representativeness.[2] While many acknowledge the importance of representation in leadership, when it comes to disability, our society has inadequately addressed the barriers to public service for people with disabilities.[3]

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1. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 588–89 (1972) (J. Marshall, dissenting) ("In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the 'property' right that I believe is protected by the Fourteenth Amendment and that cannot be denied 'without due process of law.' And it is also liberty—liberty to work—which is the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment.").

2. *See, e.g.*, Michele L. Swers & Stella M. Rouse, *Descriptive Representation: Understanding the Impact of Identity on Substantive Representation of Group Interests*, *in* THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS, 242–45 (George C. Edwards, Frances E. Lee, & Eric Schickler eds., 2011) (discussing the literature on descriptive representation and its impact on democratic legitimacy). Political theorists continue to debate the distinctions and value differences between "descriptive representatives"—"those who 'stand for' a particular group because they share characteristics with the group such as race or gender"—"and substantive representatives"—those "who 'act for' a group by providing representation of the group's interests." *Id.* at 243.

3. Since the initial drafting and presentation of this paper, a political transition from President Joseph R. Biden to President Donald J. Trump has shifted executive priorities, most immediately with respect to efforts around diversity, equity, and inclusion (DEI). *See* Exec. Order No. 14185, 90 Fed. Reg. 8763 (Jan. 27, 2025). This Executive Order and surrounding rhetoric raise questions about the executive branch's commitment to disability representatives in both the public service sector and the private sector. *See, e.g.*, Gus Alexiou, *What Does President Trump's DEI Rollback Mean For Disability Inclusion?*, FORBES (Jan. 24, 2025), https://www.forbes.com/sites/gusalexiou/2025/01/23/what-does-president-trumps-dei-rollback-mean-for-disability-inclusion/ [https://perma.cc/6SYZ-KZ4X] ("References to disability within this particular news buzz would appear to be conspicuous by their absence with a far greater emphasis being placed on gender and race . . . [yet d]isability—despite being one of the largest intersectional and non-partisan diversity segments of all—has always been something of a poor cousin within the corporate DEI world and has often faced an uphill task to bring itself to the boardroom table."). By extension, disability has played a much less visible role in government DEI efforts. *See* Denis Boudreau, *Disability Inclusion—the Missing Piece in DEI Efforts*, MEDIUM (Aug. 14, 2023), https://dboudreau.medium.com/disability-inclusion-the-missing-piece-in-dei-efforts-6dd7d312f89 [https://perma.cc/S3MT-43B4]; Andrew Pulrang, *3 Mistakes to Avoid When Including Disability in Your DEI Programs*, FORBES (Aug. 27, 2021), https://www.forbes.com/sites/andrewpulrang/2021/08/27/3-mistakes-to-avoid-when-including-disability-in-your-dei-programs/ [https://perma.cc/QM5G-2BGT]. In April 2025, AmeriCorps made broad cuts to its funding and workforce reasoning that these "award[s] no longer effectuate[] agency priorities." Maryland v. Corp. for Nat'l & Cmty. Serv., 1:25-CV-01363-DLB, 2025 U.S. Dist. LEXIS 106572, at *9–10 (D. Md., June 5, 2025). For example, the agency placed approximately 85 percent of its administrative staff on leave, notified all members of the National Civilian Conservation Corp.—a residential

There are manifold possible examples that span service in federal, state, and local governments. Rather than seeking to cover the waterfront, this Essay focuses on a discrete set of instances related to federal service and posits a deceptively simple premise and a suggestion for further discussion and analysis. Specifically, gaps, ambiguities, and challenges in law pose barriers to people with disabilities[4] serving in positions of public trust, including in programs such as the Peace Corps and AmeriCorps,[5]

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program for young adults engaged in service programs nationwide—that their service would be terminated, reduced its workforce from 700 to 116 employees, and terminated more than 1,000 grants to state AmeriCorp programs. *Id.* In response, twenty-four states and the District of Columbia sought a preliminary injunction in federal court to enjoin AmeriCorps from effectively "dismantling" the agency and exceeding its authority under the U.S. Constitution. *Id.* On June 5, 2025, the district court granted plaintiffs' request for a preliminary injunction, in part, and held that "[b]efore AmeriCorps could make any significant changes to service delivery, it first had to engage in notice-and-comment rulemaking. It did not. As a result, the States have been irreparably harmed." *Id.* at *11. This Essay is not intended to respond to existing and future attacks on the Trump Administration's actions with respect to the administrative state writ large or more locally with respect to disability inclusion; however, arguments such as those related to federal requirements under the Rehabilitation Act may inform more targeted responses to existing and future challenges to the federal government's responsibilities under existing disability laws.

4. Disability is a broad umbrella term that includes physical, mental, psychosocial, and psychiatric disabilities, any of which can be more or less apparent. *See, e.g.*, Jasmine E. Harris et al., *The Disability Docket*, 72 AM. U. L. REV. 1709, 1713–14 (2023) (defining "disability" as "a complex and contested term, with socio-legal meanings that, by design, do not always track more medicalized definitions . . . [and, broadly to] refer to an impairment experienced at the individual level and constructed at the societal level"). Deploying such a "relatively capacious definition" moves beyond legally restrictive conceptions of disability that have limited the scope of those wishing to claim legal protections or benefits and expressing clear social messages about "legitimate" and "illegitimate" claims to disability. *See generally* Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681 (2021); Katie R. Eyer, *Claiming Disability*, 101 B.U.L. REV. 547 (2021). Discussions of disability and public service here include disabled people seeking employment as public servants and those who may become disabled during the course of their service.

5. Though I focus on Peace Corps and AmeriCorps, such programs have roots in earlier public service and workforce programs such as President Franklin D. Roosevelt's New Deal-era Civilian Conservation Corps. Importantly, these programs are not legally interdependent and each represent a new, separate program, not a revision to an existing program. *See generally* MELISSA BASS, THE POLITICS AND CIVICS OF NATIONAL SERVICE: LESSONS FROM THE CIVILIAN CONSERVATION CORPS, VISTA, AND AMERICORPS (2013). I will not discuss Volunteers in Service to America (VISTA), President Lyndon B. Johnson's domestic Peace Corps, which influenced the development of President William Clinton's AmeriCorps. Earlier programs persist as conceptual models for new federal public service programs. For example, most recently, responding to President Joseph R. Biden's Executive Order 14126, Investing in America, Investing in American Workers, the U.S. Environmental Protection Agency partnered with AmeriCorps to create the Environmental Justice Climate Corps. Exec. Order No. 14126, 89 Fed. Reg. 73559 (Sept. 6, 2024); *Biden-*

which are designed to convey and model this country's ideals to domestic and foreign audiences,[6] and even in our own federal courts, which are, of course, central to the administration of justice.[7]

After describing these examples—meant to be illustrative of broader issues of inclusion and barriers to public service—this Essay calls for legal and administrative fixes and envisions a new and higher standard of inclusion for persons with disabilities in public service: dignity. The rationale is straightforward; the ability to serve one's country and community is so important that an even higher standard and greater expectation of inclusion should apply to public service. We should set forth and enforce a more stringent expectation for the inclusion of people with disabilities in these public service programs. Reducing barriers is insufficient because these roles are so important to the functioning of our democracy; the onus of inclusion and accommodation should be clearer, higher, and immediate to ensure disabled persons' ability to serve. This demands a clear legal blueprint stating the rights and values involved to manage expectations of public institutions and those seeking to serve, to

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*Harris Administration Launches Nationwide Environmental Justice Climate Corps*, U.S. ENV'T. PROT. AGENCY (Sept. 25, 2024), https://www.epa.gov/newsreleases/biden-harris-administration-launches-nationwide-environmental-justice-climate-corps [https://perma.cc/A236-RBJ5].

6. Notably, these programs are not without critique regarding their politicization, both domestically and internationally, and differences in their form, construction, and mission. For example, debates and public critiques of these programs that were a tool, at least in rhetoric, of anti-communist foreign policy, neoliberalism, and proselytizing. *See, e.g.*, Charles J. Wetzel, *The Peace Corps in Out Past*, 365 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 3 (May 1966) (quoting 107 CONG. REC. 19493 (1961) (statement of Rep. Horan) ("[T]his federalization of the missionary movement[.]") (internal quotations omitted)). This paper does not advance or resolve the merits of these critiques. Regardless of the need for reform, redesign, or elimination of these programs, they currently exist and exclude, at times in contravention of the law, and this has expressive and practical significance limiting the choices of disabled people contrary to the goals of antidiscrimination/antisubordination legislation, and existing advocacy and justice movements.

7. Other examples of federal public service exist and warrant a similar analysis including U.S. Congress, President, and military where physical and mental acuity are heralded institutional values. In these spaces, representativeness along other axes of identity, such as a race, face ongoing challenges. *See, e.g.*, Students for Fair Admissions v. U.S. Naval Acad., 707 F. Supp. 3d 486 (D. Md. Dec. 20, 2023), *appeal docketed*, No. 24-2214 (4th Cir. 2024) (denying plaintiff Students for Fair Admissions's motion for a preliminary injunction to enjoin U.S. Naval Academy from considering race in admissions because at the preliminary injunction stage, Students for Fair Admissions failed to meet its burden to show it was likely to succeed on the merits of proving Naval Academy's use of race in admissions is unconstitutional). How should we think about these other examples in light of public conceptions of disability as "deficits" that seem to be in tension with existing norms of military strength and prowess? Full discussion of these considerations is beyond the scope of this paper.

express shared norms for society at large, and to direct rigorous enforcement to ensure public accountability and meaningful access.

The primary contribution of this Essay, therefore, is descriptive as it brings to light examples of administrative and doctrinal deficits in two areas of public service—service corps and the federal judiciary—designed to serve the American people, including disabled people, while assuming that public servants would not also be individuals with disabilities. Distinctions across examples certainly exist. The point here is to begin a more detailed conversation about public service and disability that recognizes the values at stake and takes seriously the possibility of programmatic redesigns, while prescriptively seeking to develop higher standards of review and accountability to ensure meaningful access to public service.

## II. PEACE CORPS

Peace Corps, initially established by Executive Order[8] and codified in the Peace Corps Act of 1961,[9] was a central component of President John F. Kennedy's foreign policy agenda.[10] The Corps sought to win the hearts and minds of the Global South during the Cold War by exporting American public service workers as model ambassadors.[11] The rhetoric of American leadership in service echoes in one of the most often quoted lines from President Kennedy's inaugural speech: "[A]sk not what your country can do for you—ask what you can do for your country."[11]

Congress describes the central mission of the Peace Corps in the Peace Corps Act of 1961:

> [To] make available to interested countries and areas men and women of the United States qualified for service abroad and willing to serve, under conditions of hardship if necessary, to help

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8. Exec. Order. No. 10924, 26 Fed. Reg. 1789 (Mar. 1, 1961).

9. The Peace Corps Act of 1961, Pub. L. No. 87–293, 75 Stat. 612 (1961) (established the Peace Corps and was signed into law by President John F. Kennedy on September 22, 1961).

10. Though Senator John F. Kennedy first proposed the idea at the University of Michigan Student Union while on the campaign trail. *See About the Agency: The Founding Moment*, PEACE CORPS, https://www.peacecorps.gov/about-the-agency/history/founding-moment/ [https://perma.cc/SD7N-FWQV].

11 *See Peace Corps*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM (Nov. 7, 2024), https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/peace-corps [https://perma.cc/CF72-GVYB].

11. President John F. Kennedy, Inaugural Address (Jan. 20, 1961), https://www.archives.gov/milestone-documents/president-john-f-kennedys-inaugural-address [https://perma.cc/6MD2-JWN8].

> the peoples of such countries and areas in meeting their needs for trained manpower, particularly in meeting the basic needs of those living in the poorest areas of such countries, and to help promote a better understanding of the American people on the part of the peoples served and a better understanding of other peoples on the part of the American people.[12]

The Peace Corps champions three key goals: (1) "[t]o help the countries interested in meeting their need for trained people"; (2) "[t]o help promote a better understanding of Americans on the part of the peoples served"; and (3) "[t]o help promote a better understanding of other peoples on the part of Americans."[13] Former Peace Corps Director Carrie Hessler-Radelet describes the Peace Corps as "still the gold standard for Americans who are drawn to volunteering abroad—who are interested in not just imagining a better world, but rolling up their sleeves and doing something about it."[14]

The Peace Corps Act creates important distinctions that leave disabled people seeking to serve vulnerable to exclusion. On the one hand, the statute generally classifies public servants here as "volunteers" and not "employees" or "officers" "in the service or employment of . . . the United States for any purpose."[15] Yet, on the other hand, the statute has carveouts, such as designating public servants as "employees" of the United States for liability purposes pursuant to the Federal Tort Claims Act and other specifically enumerated statutes.[16] These carveouts importantly do not include disability antidiscrimination statutes.[17] This is significant because volunteers are subject to termination at will.[18] Enumerated qualifications to volunteer include language proficiency and the statute prohibits partisan

12. 22 U.S.C. § 2501(a).

13. *Our Mission*, PEACE CORPS, https://www.peacecorps.gov/what-we-do/our-mission/ [https://perma.cc/YD88-QWDR]; *See also* § 2501(a).

14. Interview by the Fletcher Forum with Carrie Hessler-Radelet, former Director of the Peace Corps, *in Partnerships, Progress, and Peace Corps*, 41 FLETCHER F. WORLD AFFS. 129, 132 (2017).

15. 22 U.S.C. § 2504.

16. *See id.* § 2504(i) (deeming volunteers as employees of the U.S. Government for the following purposes: "tort claims; absentee voting; general average contributions for transportation of baggage; check cashing and currency exchange; claims for overpayment of pay; passport fees").

17. *Id.*

18. *Id.* § 2504(j).

appointments.[19] The position's nondiscrimination provision notably omits disability as a protected category.[20]

This lack of clear regulatory structure generates costs—such as time, administrative burdens, self-accommodation, and emotional toll—for potential Peace Corps volunteers with disabilities.[21] For example, in *Wisher v. Coverdell*,[22] the Court held that the Peace Corps Act explicitly stated that Peace Corps volunteers were not federal employees and would not be treated as "employees" under any statute except for those listed, which does not include the Rehabilitation Act of 1973.[23] As a result, plaintiff's claim for relief under § 501 of the Rehabilitation Act—proscribing disability employment discrimination by federal agencies—failed.[24] While the Court recognized a cause of action for disability discrimination under § 504 of the Rehabilitation Act, the Court explained that even § 504 does not offer a "private right of action" in this instance because Peace Corps was acting as a "regulator" and not as an "employer." Instead, plaintiff must seek relief under the Administrative Procedures Act (APA).[25]

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19. 22 U.S.C. §§ 2521, 2521a.

20. *See* § 2504(a) ("In carrying out this subsection, there shall be no discrimination against any person on account of race, sex, creed, or color."). Disability is included in the regulations and guidance as a basis for protection.

21. *See, e.g.*, Wisher v. Coverdell, 782 F. Supp. 703, 706 (D. Mass. 1992). Plaintiff, after serving two years in the Peace Corps, had spent over a year applying and interviewing for additional positions when she was advised that she would not be medically cleared and that her name had been withdrawn from consideration. *Id.* at 705–06. After her appeal was denied, she submitted a formal complaint three years later that Peace Corp had discriminated against her on the basis of her medical condition. *Id.* at 706.

22. *Id.* at 707 (noting that the "statute does not make an exception for discrimination laws, including the Rehabilitation Act, although Congress clearly knew how to make an exception when it so intended").

23. 22 U.S.C. § 2504(i). Although this case involved a volunteer's qualifications to serve in the United Nations Volunteer (UNV) program, the Peace Corps served as the home country sponsor organization and its medical clearance regulations were incorporated into the UNV's qualification process. *Wisher*, 782 F. Supp. at 705–06. Specifically, as the sponsor, the Peace Corps was responsible for reviewing a list of candidates and recommending them to UNV which adds selected candidates to a list of qualified volunteers. *Id.* at 705. UNV's acceptance is conditioned on medical clearance by an Occupational Health Nurse which is based on the Peace Corps's medical clearance guidelines in the regulations. *Id.* If the candidate is not cleared, their case is presented to a medical review board. *Id.*

24. *Id.* at 706–07.

25. *Id.* at 707–10. Here, the Peace Corps regulations set forth a four-step complaint process: "(1) contact the appropriate counselor [(pre-complaint mediation)], (2) file a complaint with the Peace Corps EO Director [of the Office of Civil Rights and Diversity], (3) appeal to the Director of the Peace Corps, and (4) file a . . . [complaint in U.S.] district court." Mendez v. Gearan, 947 F. Supp. 1364, 1366 (N.D. Cal. 1996) (explaining the requirements of 45 C.F.R. § 1225 (1981)).

The governing remedial statute matters with respect to the procedural path of the complaint,[26] remedies available,[27] and, importantly, appellate review, and applicable standard of review of the agency's factual findings and conclusions.[28] For example, the standard of review of an administrative decision under the APA is much more deferential to the administrative agency than under employment antidiscrimination statutes.[29] Consider this in light of Peace Corps's statement that "due to

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26. Depending on the form of relief, a party may be required to exhaust their administrative options before proceeding to litigation. For example, a party that seeks to file a disability discrimination claim against their employer under Title I of the Americans with Disability Act must first file a charge of discrimination with the EEOC before they can file a lawsuit. *See Filing a Charge of Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/filing-charge-discrimination [https://perma.cc/8CD6-HUGD]. The Supreme Court, however, has recently weighed in on how the exhaustion requirement operates across multiple claims. *See* Perez v. Stugis Public Schools, 598 U.S. 142 (2023) (holding parents are not required to exhaust administrative proceedings under IDEA before seeking relief under the ADA or § 504 of the Rehabilitation Act if the type of relief that they are seeking is unavailable under the IDEA).

27. For example, the Administrative Procedure Act does not provide for monetary damages as a remedy for federal agency action. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof . . . [and] relief other than money damages."). By contrast, a plaintiff may recover monetary damages under the Americans with Disabilities Act or § 504 of the Rehabilitation Act under certain conditions. *See* Tennessee v. Lane, 541 U.S. 509 (2004) (affirming that disabled plaintiffs have a private cause of action under the ADA against a state for deprivations of fundamental rights such, in this case, access to courts); Cummings v. Premier Rehab Keller, 596 U.S. 212 (2022) (holding that emotional distress damages are not recoverable in a private action to enforce § 504 of the Rehabilitation Act or § 1557 of the Affordable Care Act).

28. Generally, there is a baseline presumption for judicial review of agency action unless there is clear and convincing evidence otherwise. *See* § 702; Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). The applicable standard of review is then dependent on the type of agency action. When reviewing an agency's formal adjudication or rulemaking, the court applies the "substantial evidence" test. *See* Universal Camera Corp. v. Nat'l Labor Rel. Bd, 340 U.S. 474 (1951). When reviewing an agency's informal adjudication or rulemaking, the "hard look" test instead applies. *See* Motor Vehicles Mfr. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983). Lastly, for judicial review of agency statutory interpretation, the recent *Loper Bright* opinion overruled *Chevron* and changed the standard of review by instructing courts to exercise independent judgment in deciding the best meaning of statute. *See* Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) (overruling Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

29. The extent of such deference remains an open question in the wake of recent case law. *See Loper Bright*, 603 U.S. at 371, 412–13, 464 (holding that the Administrative Procedure Act requires courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority," and that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous," thereby overruling prior precedent, overturning Chevron).

the comprehensive and individualized nature of our initial assessments, less than 10 percent of decisions are reversed upon appeal."[30] In addition, given the time required to move through the appeals process, the agency advises appellees that "[i]t is likely that the appeal process will conclude after your scheduled departure date" in which "case, the Placement Office would work" on a potential new assignment.[31]

In addition to its procedural and remedial uncertainties, the *Wisher* case offers an interesting set of facts that help illustrate the overly risk averse, undifferentiated medical clearance process that improperly screens out qualified potential public servants. The plaintiff—a previous volunteer for the Peace Corps whose service had concluded—wished to continue her public service through the United Nations Volunteers Program (UNV). At the time, the Peace Corps's medical clearance guidelines stated that a person diagnosed with chronic hepatitis B, categorically, was medically unfit to serve.[32] Plaintiff's medical exam concluded that she had mild chronic hepatitis B with no evidence of any progression towards scarring or cirrhosis, and no serious impairment of her liver. The evaluating physician advised her not to donate blood and to be sure that any long-term sexual partner was vaccinated. The Occupational Nurse determined plaintiff was not qualified to serve because of her chronic hepatitis B, despite the mild case and absence of restrictions from her medical evaluator. Her appeal to the medical review board and reconsideration affirmed her disqualification on two grounds: first, that she was "potentially infectious to others" and Peace Corps should not send "chronically infected individuals to a host country," and second, that they believed her medical situation "might progress" to cirrhosis, the rate of progression "might be unpredictable," and that potential host nations may "lack the medical facilities to treat plaintiff."[33] Although not explicitly stated, her disqualification was based on a risk averse analysis predicated on a categorical ban for individuals with chronic hepatitis B.

During the bench trial in this case,[34] plaintiff proffered a medical expert who testified that she did not present a danger to others because hepatitis B could only be transmitted through sexual activity or blood transfusions, and she could avoid both of those avenues of transmission.

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30. *Medical and Health FAQs*, PEACE CORPS, https://www.peacecorps.gov/faqs/medical-and-health/ [https://perma.cc/C23R-TAPQ].

31. *Id.*

32. Wisher v. Coverdell, 782 F. Supp. 703, 705 (D. Mass. 1992).

33. *Id.* at 706.

34. The case had a strange procedural posture where the agency originally proceeded through the remedial process afforded plaintiffs under the Rehabilitation Act as if she could maintain that cause of action and levied their challenge to the structure of her suit on the eve of trial.

Her expert also testified that "the remoteness of potential assignments is not a danger to plaintiff's health because the type of illnesses plaintiff may be at risk of developing are diseases that progress slowly and would not require immediate medical attention."[35]

A review of the bases for the determination that plaintiff was not qualified to serve shows that the agency relied heavily on the overbroad regulation disqualifying those with chronic hepatitis B. The court's decision describes how the medical review board did not have evidence from either the first evaluator indicating she was qualified or the expert's review and determination of the risk of harm. Plaintiff argued that this failure to develop a reasoned record of review showed that APA review would be inappropriate in the case. While the court ultimately held that plaintiff did not have a private right of action under the Rehabilitation Act, it also found that the agency failed to create a record of its decision and, thus, "[it] is equally true that the court cannot accept the Peace Corps'[s] decision that plaintiff is not medically qualified without being able to examine the evidence and reasoning upon which the Board relied. Judicial review in such a case would be meaningless."[36]

A subsequent case, *Mendez v. Gearan*,[37] wrestled with similar core legal questions about private right of action and subject matter jurisdiction between the APA and the Rehabilitation Act but came to a different conclusion with respect to fitness to serve.[38] The *Mendez* Court explained the difficulties inherent in making such distinctions with respect to monetary damages and sovereign immunity. The court held that:

> [W]hen presented with a cause of action that can be brought under either the APA or the Rehabilitation Act, courts must determine the appropriate statute to apply by examining whether the claim primarily requires a focus on facts, policies, or statutes the agency

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35. *Id.* at 711.

36. *Id.* It is interesting to juxtapose these medical clearance cases with cases like *Bragdon v. Abbott* that were making their way through the appeals courts and focused on overly broad risk assessments and direct threat in the private context (*Bragdon* was filed in 1995 and heard by the U.S. Supreme Court in 1998). *See* Abbott v. Bragdon, 912 F. Supp. 580, 585 (D. Mass. 1995); Bragdon v. Abbott, 524 U.S. 624 (1998).

37. Mendez v. Gearan, 947 F. Supp. 1364, 1367 (N.D. Cal. 1996) ("§ 504 and the APA provide overlapping rights of action for injunctive relief for plaintiffs alleging discrimination on the basis of a disability by a federal agency. . . . The two statutes have very different procedural means for having a claim reviewed and this Court must determine whether one statute, at times, provides a more efficient and fair means to resolve a claim than the other.").

38. *Id.* at 1365. Thus, the core issue was whether the Court had subject matter jurisdiction to hear the case if the APA and not the Rehab Act was the appropriate remedial pathway.

> customarily considers and interprets, or questions of law or fact more appropriately analyzed in the first instance by a court.[39]

More specifically:

> Unlike a claim that primarily challenges the basic policies of an agency, the analysis of whether the plaintiff is otherwise qualified and excluded solely because of her disability does not require the examination of the whole operation of the Peace Corps—a task for which the Peace Corps would be uniquely qualified. Instead, a reviewing court would explore what this individual is retained to do, whether her disability affects her ability to accomplish those tasks, and whether the Peace Corps can accommodate her disability . . . . The agency's ability to assist a court in reviewing this type of case is minimal.[40]

The court then reasoned that Peace Corps lacks special expertise in the Rehabilitation Act and special insights into the nature of plaintiff's disability. Peace Corps's relevant expertise "would be limited to the type of work the plaintiff has been retained to accomplish and how it believes the disability would affect the carrying out of the required tasks," tasks which, the court noted, would not require an administrative hearing or similar procedure because courts, rather than agencies, routinely gather this type of information. The court determined that the case involved both a request for individual relief (an order requiring Peace Corps to certify the plaintiff as medically eligible for service) and structural relief (an injunction preventing Peace Corps from using its current medical clearance criteria concerning psychological conditions). Thus, the court held that it would be "inefficient" to use the APA's standards in a case against a federal agency when the case principally concerns § 504 of the Rehabilitation Act, "a statute unrelated to the agency's expertise."[41]

A 1981 statutory amendment to § 2502 titled "Integration of Disabled People" underscores the Agency's focus on disabled people as subjects of service and not public servants. Instead of addressing gaps in regulation or protection or adding disability as a protected status in its nondiscriminatory clause for volunteers, the amendment recognizes the

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39. *Id.* at 1369.

40. *Id.* at 1370.

41. *Id.* The Court held that because "the weight of plaintiff's complaint oriented towards addressing her individual concerns"—the "primary purpose" was to secure her medical clearance for service—that the case was "more appropriately" brought under § 504 of the Rehabilitation Act than the APA. *Id.* at 1370–71.

pervasiveness of disability in the world and seeks to make addressing disability a priority for the agency's substantive programs. The amendment exclusively focuses on creating programs that target and serve the over four hundred million disabled people globally but says nothing about targeting disability by focusing on disabled public servants within the agency itself.[42]

While debates continue over the proper governing statute for resolution of disability related complaints, after *Mendez* and thirty-two years after *Wisher*, other cases continue to challenge categorical or undifferentiated medical clearance denials of fitness to serve on the basis of disability.[43] *Doe v. Spahn*, a putative class action against Peace Corps, did not challenge individual determinations of fitness to serve based on disability but averred that the agency systematically maintains "a deficient medical clearance process that includes policies and practices that are contrary to Section 504 of the Rehabilitation Act of 1973."[44] Examples of allegations of Peace Corps's putative discriminatory policies and practices include: (1) publication of a list of "health conditions that are difficult to accommodate," despite efforts to individually assess applicants, including one hundred medical conditions that are "typically not supported" and one hundred medications that "trigger medical ineligibility";[45] (2) application of "unlawful screening guidelines to determine whether invitees are medically qualified";[46] (3) practice of "[m]edically disqualifying invitees who are symptomatic of dozens of medical conditions, recently changed their medication, or who have ongoing treatment for disabilities";[47] (4) "failure and refusal to conduct individualized assessments for invitees with disabilities when conducting its medical clearance process";[48] and (5) "failure and refusal to consider reasonable accommodations for invitees with disabilities when conducting its medical clearance process."[49] Peace Corps removed the list of medical conditions and medications that would categorically "trigger medical ineligibility" or raise significant concerns

42. International Security and Development Cooperation Act of 1981, Pub. L. No. 97–113, § 603, 95 Stat. 1542 (1981). President Biden's Executive Order addresses disability hiring, offices of DEI, and equal opportunity hiring. Exec. Order No. 14035, 86 Fed. Reg. 34593 (2021).

43. *See, e.g.*, Ettema, Peace Corps Docket No. PCV-11-04, Final Agency Decision (Oct. 2012) (finding that Peace Corps relied on medical conditions listed without conducting an individualized assessment of applicant's circumstances).

44. First Amended Complaint ¶ 20, Doe v. Spahn, No. 1:21-cv-03409 (N.D. Cal. Oct. 12, 2021).

45. *Id.*

46. *Id.* ¶ 23.

47. *Id.* ¶¶ 23, 42.

48. *Id.* ¶¶ 2, 30, 39, 40.

49. *Id.*

about fitness to serve sometime after filing the initial complaint referencing the lists.[50]

Yet a recent complaint against Peace Corps's medical clearance process offers a window into the continued exclusion of qualified people with disabilities (or of those with a record of one or more disabilities), the harms of exclusion, and the stakes. A potential public servant, Pat,[51] received a conditional acceptance to the Peace Corp and prepared for his mission less than six months later. "This has been my dream," Pat expressed in his complaint. Pat disclosed in the medical clearance process diagnoses of anxiety and obsessive-compulsive disorder—two mental disabilities with relatively common incidence in the U.S. population—for which he had taken two well-established medications for almost ten years with great success.[52] Pat submitted letters from his treating physicians in support of his application. After a two-year intensive application process, the Peace Corps denied Pat's medical clearance in less than one day with no reason provided.[53] Sometime later, the Peace Corps shared the reason for denial with Pat as:

> [The agency's inability] to provide you with a level of health care that we deem necessary and appropriate during service due to your active prescriptions . . . due to increased drug to drug interactions which can increase serum serotonin levels and require close monitoring as this can be a life-threatening condition. Unfortunately, Peace Corps countries cannot consistently provide

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50. First Amended Complaint ¶ 20, Doe v. Spahn, No. 1:21-cv-03409 (N.D. Cal. Oct. 12, 2021). *See also id.* Ex. A. In response to Defendant's Motion to Dismiss and Motion for Change in Venue, the case was transferred to the District of Columbia. *Id.* Order Transferring Case to D.C. A Stipulation for the dismissal of the lawsuit was entered on February 16, 2022.

51. The name of the complainant has been changed for confidentiality reasons and shared with the author conditioned on anonymity. Complaint on file with author [hereinafter Pat Complaint].

52. Pat Complaint at 1 (on file with author). For information on the incidence of disabilities, *see, e.g.*, Jessica Booth & Sabrina Romanoff, *Anxiety Statistics And Facts*, FORBES (Oct. 23, 2023), https://www.forbes.com/health/mind/anxiety-statistics/ [https://perma.cc/C6B5-UKDM ] ("[A]nxiety is [t]he most common mental illness in the U.S. . . ."); *see also Obsessive-Compulsive Disorder Statistics*, NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/obsessive-compulsive-disorder-ocd [https://perma.cc/F9X9-U8MX] (explaining that the prevalence of OCD in the U.S. adult population ranges from 1.2% to 2.3%); Hannah Brock et al., *Obsessive-Compulsive Disorder*, STATPEARLS (2024), https://www.ncbi.nlm.nih.gov/books/NBK553162/ [https://perma.cc/NMV7-GUQW] (finding that OCD affects 1–3% of the global population).

53. Pat Complaint at 1.

psychiatric monitoring due to limited mental health resources in host countries.[54]

The medical clearance decision was purportedly based on an individualized risk assessment that included "records by clinical staff in the Office of Medical Services," "evidence[-]based standards, including guidance from the Centers for Disease Control and Prevention (CDC)," and "an assessment of the limited health care resources and in-country transportation and infrastructure challenges where Peace Corps Volunteers are assigned."[55] However, when Pat asked for a copy of the "evidence[-]based standards" upon which this decision was based, he received a response from the Peace Corps that "it was [his] responsibility to rebut the general, but unidentified 'evidence-based standards,'" by "submitting a provider letter or medical documentation that addresses the reasons given" in the denial of clearance. There was no detailed explanation.[56] Pat, nevertheless, submitted evidence from at least two medical providers; in addition, Pat submitted his own narrative regarding a tailored, individualized risk assessment based on evidence on likelihood of drug interactions that might threaten his health. Pat's evidence included the positive experience to date on the medications without incident. The medical providers recommended the use of telehealth to check in during Pat's time as a volunteer and a plan for medication management (Pat was not receiving counseling at the time of his application to Peace Corps so this is solely about medication management).[57]

That the Peace Corps's process did not give due weight to Pat and his treating team's opinions regarding risk assessments, like *Wisher* three decades earlier,[58] suggests that the medical clearance process remains flawed. The agency's risk aversion combined with its immense discretion, the lack of transparency, and little regulation around its decisions unnecessarily excludes people like Pat from public service. As *Does v. Spahn* alleged, this is not simply a matter of highly fact-specific decisions and the complexities of disability; instead, these examples suggest a persistent pattern and practice of screening out applicants with disabilities which may be due to core designs of the program and assumptions about who can and should serve.

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54. Pat Complaint, Ex. 2 (agency denial letter).

55. *Id.*

56. Pat Complaint, Ex. 1 (timeline of Peace Corps application and clearance process).

57. Pat's Complaint facilitated discussion and, in the end, resulted in a grant of medical clearance for them. (confidential e-mail on file with author).

58. Although some physiological conditions like the early hepatitis B example, these cases mostly focus on mental health (psychiatric and psychosocial disabilities).

## III. AMERICORPS

Congress, through the National and Community Service Act of 1990 (NSCA), created the Corporation for National and Community Service (CNCS) to fund and regulate national public service programs.[59] AmeriCorps, a federal domestic service program, "provides opportunities for Americans of all backgrounds to serve their country, address the nation's most pressing challenges, and improve lives and communities."[60]

Only the National Civilian Community Corps (NCCC) program, one of AmeriCorps's many sub-programs, has a required medical clearance process for its applicants.[61] The clearance officials include one screening nurse and a selection/placement officer recruit who medically screen and place over 1,200 NCCC applicants annually.[62] Interestingly, in 2004, AmeriCorps's medical screening unit and the general counsel's office reviewed copies of the Peace Corps Medical Screening Guidelines. One AmeriCorps medical screener noted that strict adherence to Peace Corps guidelines would restrict access to the AmeriCorps programs: "If I used the PC [Medical Screening] Guidelines as anything more than a reference, no one would get into our program."[63]

That said, AmeriCorps shares many of the same legal and policy deterrents to disabled people serving as program "participants." First, structurally, participants are not "employees" and thus have a more ambiguous antidiscrimination safety net.[64] The NSCA defines "participant" as "an individual in an approved national service position"

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59. 42 U.S.C. § 12651. The NSCA, an example of federal spending clause legislation, is broader than AmeriCorps and addresses grants to states for public service.

60. *About AmeriCorps*, AMERICORPS, https://americorps.gov/about [https://perma.cc/X54V-YK6G].

61. PEACE CORPS OFF. OF INSPECTOR GEN., FINAL PROGRAM EVALUATION REPORT PEACE CORPS' MEDICAL CLEARANCE SYSTEM IG-08-08-E, at 55 (2008), https://www.oversight.gov/sites/default/files/documents/reports/2017-09/PC_Medical_Clearance_System_Report_IG-08-08-E.pdf [https://perma.cc/R96X-HV8W] ("[O]ne of AmeriCorps'[s] many programs, the National Civilian Community Corps (NCCC) program, medically screens its applicants (restricted in age from 18–24) prior to service.").

62. *Id.*

63. *Id.*

64. *See, e.g.*, Moise v. Miami-Dade Cty., No. 17-20993-CIV, 2018 WL 4445111 (S.D. Fla. Aug. 22, 2018) (discussing and applying economic realities tests and concluding that AmeriCorps volunteer was not an "employee" under the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA) and Fair Labor Standards Act (FLSA)); Twombly v. Ass'n of Farmworker Opportunity Programs, 212 F.3d 80, 84 (1st Cir. 2000) ("Since 1991, the NCSA has provided that participants in an approved AmeriCorps program . . . 'shall not be considered employees of the program.'") (internal citation omitted).

or "an individual enrolled in a program that receives assistance under this subchapter."[65] Congress made clear in the NSCA, as it did in the Peace Corps Act, that "a participant . . . in a program that receives assistance . . . shall not be considered a Federal employee and shall not be subject to the provisions of law relating to Federal employment" with very narrow exceptions, specifically, for purposes of worker's compensation and tort claims.[66] Furthermore, participants are also not considered employees of the program they enroll in.[67] In *Rodriguez v. Corp. for Nat'l & Cmty. Serv.*, the district court, interpreting the provisions of the NSCA, held that the plaintiff was not an "employee" of the service host organization "as a matter of law" with respect to the plaintiff's Americans with Disabilities Act (ADA) and Rehabilitation Act claims.[68]

Second, AmeriCorps's medical clearance program has also improperly screened out qualified disabled applicants. The ACLU filed a complaint against the CNCS on behalf of Susie Balcom, a twenty-two-year-old AmeriCorps alumna who received additional offers to continue her service, as well as a putative class of applicants for service positions with AmeriCorps who either had, or who were regarded as having, a mental health disability as part of the CNCS health screening process.[69] Balcom completed the medical clearance (mental health evaluation) and disclosed receipt of three counseling sessions for anxiety, the result of an unwanted sexual groping by a co-worker.[70] AmeriCorps then rescinded her offer, finding her unfit to serve in a one-year service position as a "support team leader," responsible for coordinating trainings and other logistics for the AmeriCorps office in Mississippi.[71] Balcom argued that the medical screening process violated the Rehabilitation Act, and CNCS's civil rights policy, specifically by "(1) requiring intrusive and unnecessary medical and mental health inquiries; and (2) discriminating

65. 42 U.S.C. § 12511(30)(A).

66. 42 U.S.C. § 12655n(b)(1).

67. *Id.*; § 12511(30)(B).

68. Rodriguez v. Corp. for Nat'l & Cmty Serv., No. EP-09-CA-041-FM, 2009 U.S. Dist. LEXIS 67534, at *14 (W.D. Tex. June 23, 2009); *See also* Self v. I Have a Dream Found., 552 F. App'x 782, 784 (10th Cir. 2013) (finding that AmeriCorps "participant" not an "employee" for purposes of the ADA).

69. *Balcom v. AmeriCorps - Challenging Employment Discrimination Based on Mental-Health Conditions*, ACLU D.C., https://www.acludc.org/en/cases/balcom-v-americorps-challenging-employment-discrimination-based-mental-health-conditions [https://perma.cc/B2Q6-P3EP].

70. *Balcom v. AmeriCorps*, ACLU (Sept. 16, 2019), https://www.aclu.org/cases/balcom-v-americorps [https://perma.cc/B72A-MMMZ].

71. *Id.*

against qualified applicants based on the information they provide."[72] The complaint alleged that "CNCS discriminates against applicants based on disability, by imposing a greater burden of disclosure, inquiry, and scrutiny on applicants with physical or mental health conditions through its medical clearance process." The complaint stated that the "health information form" is overinclusive and intrusive and once applicants identify medical or mental health issues, applicants receive additional inquiries and scrutiny, requests for additional information, including release forms for CNCS to access their medical records.[73] To help contextualize the claims here, in the context of the character and fitness for admission to the state bar, courts have held that similar overly broad and intrusive questions not closely tailored to the functions of the job violate disability civil rights laws.[74]

The ACLU and the Corporation for National and Community Service entered into a detailed settlement agreement the terms of which included CNCS's agreement to overhaul its health screening process focused on whether applicants could perform the core functions of service with or without reasonable accommodations.[75] AmeriCorps also agreed to institute a new formal system for applicants and volunteers to request reasonable accommodations.[76] There is no indication from my research that AmeriCorps has implemented these changes, or that the exclusionary norms that may operate undetected by line decision-makers to influence their decision-making have been addressed.

## IV. ADMINISTRATION OF JUSTICE

Neither the Americans with Disabilities Act nor the Rehabilitation Act of 1973 apply to the federal judicial branch.[77] This means that disabled

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72. *Formal Individual and Class Complaint*, ACLU (Oct. 10, 2017), https://assets.aclu.org/live/uploads/legal-documents/AmeriCorps_complaint.pdf [https://perma.cc/B9AC-RG68].

73. *Id.* at 3.

74. Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 431, 442 (E.D. Va. 1995); Ellen S. v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1493–94 (S.D. Fla. 1994).

75. *Executed Settlement Agreement – Balcom v. AmeriCorps*, ACLU (Sept. 16, 2019), https://www.aclu.org/cases/balcom-v-americorps?document=executed-settlement-agreement-balcom-v-americorps#legal-documents [https://perma.cc/3CSD-PBWC].

76. *Id.*

77. Americans with Disabilities Act of 1990, Pub. L. No. 101-366, 104 Stat. 327 (1990); Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 355 (1973); *see also Disability Access*, THE U.S. CT. OF APPEALS FOR THE TENTH CIR., https://www.ca10.uscourts.gov/clerk/disability-access [https://perma.cc/6NZH-VJZL] ("The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act do not apply to the federal judiciary. However, pursuant to Judicial Conference policy, the

employees of the federal judiciary—including judges, court staff, administrators, and law clerks[78]—do not have a clear legal entitlement to reasonable accommodations. Instead, federal courts will "endeavor" to provide accommodations as a policy matter but not as a legal requirement.[79] This is not to say that the judiciary does not provide accommodations; rather, the absence of a legal framework creates a sea of discretion rather than an analysis in line with doctrinal standards and, at a minimum, federal circuit norms.

Two principal remedial processes exist for disability (or other forms of) discrimination experienced by employees of the federal judiciary: a workplace complaint under the Model Employment Dispute Resolution Plan (MEDRP)[80] or a disciplinary action for misconduct against the individual judge under the Judicial Conduct and Disability Act (JCDA), both of which present notable gaps in protection and deterrents to would-be disabled public servants. Under the MEDRP, for example, employees

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United States Court of Appeals for the Tenth Circuit *will endeavor* to provide reasonable accommodations to persons with communications disabilities.") (emphasis added).

78. *Model Dispute Resolution Plan*, U.S. CTS. app. at 1 (Mar. 8, 2022), https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a-model-eeo-plan.pdf [https://perma.cc/LTB4-LS8A] (defining "employees" in the Employment Dispute Resolution Plan as "*All employees of a Court.* This includes Unit Executives and their staffs; judicial assistants and other chambers employees; law clerks; federal public defenders, chief probation officers and chief pretrial services officers and their respective staffs; court reporters appointed by a Court; and paid and unpaid interns, externs, and other volunteer employees") (emphasis added).

79. *Fact Sheet for Workplace Protections in the Federal Judiciary*, THE FED. CTS. OF THE U.S., https://www.uscourts.gov/about-federal-courts/workplace-conduct/fact-sheet-workplace-protections-federal-judiciary [https://perma.cc/3MXS-3CFP] ("In 2018, at the request of the Chief Justice, the Director of the Administrative Office created the Federal Judiciary Workplace Conduct Working Group to examine the sufficiency of safeguards currently in place within the Judiciary to protect judicial employees from inappropriate conduct in the workplace."). The Working Group produced a report with findings and recommendations that included revisions to the Model Employment Dispute Resolution (EDR) Plan, Codes of Conduct, and Judicial-Conduct & Judicial-Disability (JC&D) Rules. DIR. OF THE ADMIN. OFF. OF THE U. S. CTS., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [https://perma.cc/XNY3-37GH]. The report resulted in the creation of a national Office of Judicial Integrity. *Id.* In addition, the circuits set up offices for Circuit Directors of Workplace Relations to complement existing Employment Dispute Resolution (EDR) Coordinators housed in all local courts. *Id.*

80. *See* U.S. CTS., *supra* note 78. Note that each Circuit may tailor the plan but the model represents the floor prohibitions and processes. *Id.* at 12.

have three options for resolution: two informal avenues ("Informal Advice" and "Assisted Resolution") and filing a Formal Complaint.[81]

Disability is a "protected category" under the MEDRP but the operating rules under the employment plan and the rules of judicial conduct are not always clear on what this means and may sometimes present inconsistencies.[82] The Code of Conduct for U.S. judges instructs judges to refrain from workplace conduct:

> [T]hat is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct . . . harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others.[83]

Similarly, among the possible examples of "cognizable misconduct" under the Rules for Judicial Conduct-Judicial-Disability Proceedings are "(A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or (C) creating a hostile work environment for judicial employees" and "intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability."[84] A major innovation of disability laws like the ADA, however, was a remedial structure that recognized the nature of disability discrimination was more often "unintentional," the product of "benign neglect," "ignorance," and faulty norms of disability. Failure to provide reasonable accommodations to a qualified individual with a disability, for example, amounts to disability discrimination irrespective of intent. This rule may conflict with Section 220.10(a)(2)(C) of the Judiciary Workplace Conduct and Protections Policy which states a

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81. *Model Employment Dispute Resolution Plan*, 12 GUIDE TO JUDICIARY POL'Y app. 2A (Sept. 17, 2019), https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a_oji-2019-09-17-post-model-edr-plan.pdf [https://perma.cc/N7HG-9FW8].

82. STEPHEN BREYER ET AL., THE JUD. CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL MISCONDUCT AND DISABILITY ACT OF 1980 app. at 1 (2006), https://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf [https://perma.cc/XQ7S-CTXR] [hereinafter BREYER REPORT] ("[P]rotected category: race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age (40 years and over), or disability.").

83. CODE OF CONDUCT FOR U.S. JUDGES Canon 3(b)(4) (U.S. CTS. 2019), https://www.uscourts.gov/administration-policies/judiciary-policies/ethics-policies/code-conduct-united-states-judges#d [https://perma.cc/7TTG-XX55].

84. *Id.*

broader understanding that "wrongful conduct" includes "discrimination" under the ADA and the Rehabilitation Act "including failure to provide a reasonable accommodation for a qualified disability."[85]

Limited remedies under the MEDRP also serve as a potential deterrent for disabled public servants. For example, monetary damages, costs, and fees are unavailable.[86] The scope of the complaint process is similarly narrow—limited to "whether the Employing Office is responsible for the alleged conduct"—because the presiding judicial officer lacks jurisdiction to impose disciplinary action against individuals.[87] The MEDRP provides for notice and an opportunity for a hearing before an independent officer who must find by a preponderance of the evidence (more likely than not) that a substantive right protected by the rules has been violated.[88] However, even if the hearing officer finds wrongful conduct in an EDR process, the appointing official or someone with delegated authority determines whether further action is required to "correct and prevent wrongful conduct and promote appropriate workplace behavior."[89] Possible corrective action includes counseling, training, reassignment, reprimand, suspension, probation, or demotion, or termination of employment.[90] Complainants can appeal a decision to the circuit courts' Judicial Council which is highly deferential and affirms the decision if supported by "substantial evidence and the proper application of legal principles" on the record created by the presiding judicial officer.[91]

Alternatively, federal employees of the judiciary may pursue a complaint against an individual judge for disability discrimination under the Judicial Conduct and Disability Act (JCDA). The JCDA establishes a self-regulating body (the Judicial Conference) to police judicial conduct and fitness questions related to incapacity because of disability.[92] While a

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85. GUIDE TO JUDICIARY POL'Y § 220.10(a)(2)(C) (U.S. CTS. 2023), https://www.uscourts.gov/file/document/workplace-conduct-and-protections-policy-guide-vol-12-ch-2 [https://perma.cc/8C32-9UQA].

86. The narrow exception to recovering costs relates to the Back Pay Act.

87. U.S. CTS., *supra* note 78, at 11 n.3.

88. *Id.* at 9.

89. *Id.* at 11 n.3.

90. *Id.* at 9.

91. *Id.* at 11.

92. NAT'L ARCHIVES, *supra* note 81 ("The federal judiciary, like all institutions, will sometimes suffer instances of misconduct. But the design of any system for discovering (and assessing discipline for) the misconduct of federal judges must take account of a special problem. On the one hand, a system that relies for investigation upon persons or bodies other than judges risks undue interference with the Constitution's insistence upon judicial independence, threatening directly or indirectly distortion of the unbiased handling of individual cases that Article III seeks to guarantee. On the other hand, a system that relies for investigation solely upon judges themselves risks a kind of undue 'guild

formal process exists for resolution of a complaint against a judge, the intent of the JCDA was to incentivize "informal" dispute resolution which may pose barriers to disabled employees of the federal judiciary working in individual judicial chambers and fearing reprisal; for example, federal law clerks.[93] Despite the use of terminology such as a "complaint" most often associated with adversarial adjudication, the JCDA clearly defines the remedial process as "administrative [and] inquisitorial."[94] That said, there are procedural and substantive limits on the authority of this disciplinary body—it cannot remove an Article III judge, for example, as such action requires impeachment under Article II of the U.S. Constitution.[95] The Judicial Council can refer a case to the Judicial Conference of the United States with its findings of fact and conclusions regarding the allegations in the complaint.[96] Judges subject to complaints are afforded notice and due process as set forth in the statute and Judicial Conference Rules, with information remaining confidential except in limited circumstances.[97] Both the Judicial Committee and Council have subpoena power.[98] Additionally, when complaints are dismissed, a judge may recover costs and fees incurred in relation to the proceedings, lowering the costs and potential deterrents for bad judicial actors.[99]

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favoritism' through inappropriate sympathy with the judge's point of view or de-emphasis of the misconduct problem.").

93. *Id.* at 100 ("'Informal activity' connotes efforts by judges, especially chief judges, to deal with the behavior of a judge who may have become disabled, is seriously behind in his docket, or exhibits other actions or conditions that need to be remedied."); *Id.* at 7. ("Based primarily upon our interviews, we conclude that informal efforts to resolve problems remain (as the Act's sponsors intended) the principal means by which the judicial branch deals with difficult problems of judicial misconduct and disability. The main problems that the informal efforts seek to address are decisional delay, mental and physical disability, and complaints about the judge's temperament.").

94. GUIDE TO JUDICIARY POL'Y CH. 3: RULES FOR JUD.-CONDUCT & JUD-DISABILITY PROC. r. 3 cmt. (U.S. CTS. 2019), https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf [https://perma.cc/3XRK-8LNE] [hereinafter JUD. CONDUCT & DISABILITY RULES].

95. 28 U.S.C. § 354(a)(3)(A) ("*Under no circumstances* may the judicial council order removal from office of any judge appointed to hold office during good behavior.") (emphasis added). The Act provides for the removal of magistrate and bankruptcy judges. *See id.* §§ 354(a)(3)(B)–(C), (b)(2)(B); U.S. CONST. art. II, § 4.

96. 28 U.S.C. § 355(b).

97. 28 U.S.C. § 360.

98. 28 U.S.C. § 356.

99. 28 U.S.C. § 361.

Traditional standing requirements do not apply and afford any individual or organization the opportunity to file a complaint.[100]

Though processes are available to pursue workplace judicial misconduct and disability complaints, a working group on workplace conduct reported that "some employees . . . perceived all of these choices as highly risky."[101] In fact, the Working Group reported four specific risks: "(1) significant power disparities between judges and their employees, (2) life tenures for judges, (3) discipline for judges only through a formal process, and (4) law clerks and chamber employees' misinterpretation of the confidentiality clause."[102]

Thus far, I have focused on the ways in which current laws and norms disincentivize public service for disabled people in the United States in the federal judiciary, principally, disability employment discrimination experienced by federal disabled judicial public servants (such as judicial law clerks). What about disabled judges? Do existing laws and policies create barriers for disabled lawyers seeking to become federal judges?[103] What protections and legal pathways exist with respect to claims that disabled individuals are unfit to participate in the administration of justice on the basis of disability?

The Judicial Conduct & Disability Rules (of Ethics and Conduct), define "disability" as "a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office."[104] The definition of disability enumerates "examples of disability" as "substance abuse, *the inability to stay awake during court*

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100. 28 U.S.C. § 351(a) ("Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts . . . may file . . . a written complaint.").

101. FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 9 (Mar. 16, 2022), https://www.uscourts.gov/sites/default/files/report_of_the_workplace_conduct_working_group_-_march_2022_0.pdf [https://perma.cc/637G-RWUL].

102. U. S. GOV'T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL REQUESTERS, FEDERAL JUDICIARY: ADDITIONAL ACTIONS WOULD STRENGTHEN EFFORTS TO PREVENT AND ADDRESS WORKPLACE MISCONDUCT 26, (July 2024), https://www.gao.gov/assets/gao-24-105638.pdf [https://perma.cc/2GW2-U53V] [hereinafter GAO REP.].

103. We measure what matters and the absence of data on disability in the federal judiciary suggests that disability is not a part of the diversity tracking and may not be prioritized as such. *See* Ayanna Alexander & Madison Alder, *Judge Pick with Disability Raises Hopes for a Group Often Unseen*, BLOOMBERG L. (Oct. 7, 2022), https://news.bloomberglaw.com/social-justice/judge-pick-with-disability-shows-biden-push-to-diversify-bench [https://perma.cc/ZPG9-5LCG]; *See also Diversity on the Bench*, FED. JUD. CTR., https://www.fjc.gov/history/judges/diversity-bench [https://perma.cc/VH4Q-85Z9] (listing demographic categories tracked over time).

104. JUD. CONDUCT & DISABILITY RULES, *supra* note 101, r. 4(b), 4(c).

*proceedings*, or impairment of cognitive abilities that renders the judge unable to function effectively."[105] It is not clear why the rule enumerates disabilities (substance abuse) and then a possible marker of disability (though arguably so vague that it could just relate to the content of the proceeding or a host of other nondisability related reasons) and, finally, a more specific restatement of the disability provision in the statute—that there is a specific impairment (here, cognitive) that has the effect of limiting the judge's capacity to function (presumably "as a judge") effectively.

The Rules adopt a broad definition of disability to allow for significant discretion: "a fact-specific approach is the only one available."[106] Consequently, there are no job descriptions or functions for federal judges from which to extract a list of core/essential responsibilities for purposes of transparency and accountability.[107] The Rules are intended to address only "serious issues of judicial misconduct and disability."[108] The chief circuit judge oversees the misconduct and disability complaint process and has broad authority to investigate an allegation "and, if warranted, to identify a formal complaint."[109] The chief judge must sift through the complaint (informal or formal) and identify "any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues."[110] The Commentary to the Rules offers a representative example and window into the treatment of disability: where a complaint is limited to misconduct in fact-finding but notes times during the trial "when the judge was asleep, [it] must be treated as a complaint regarding disability."[111]

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105. *Id.* (emphasis added).

106. *Id.* r. 4 cmt. Disability laws and policies profess individualization as the key to antidiscrimination efforts to avoid categorical associations of disability and functional incapacity. *See, e.g.*, Americans with Disability Act, 42 U.S.C. § 12102(4)(A) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."); Rehabilitation Act of 1973, 29 U.S.C. § 705(20)(B) (defining "individual with disability" as "any person who has a disability as defined in section [3] of [the Americans with Disability Act]").

107. Although the Rules lack concrete qualifications for federal judges, their fitness to serve is theoretically evaluated and discussed during the nomination and confirmation process. *See* U.S. CONST. art. II, § 2 (declaring that Article III judges are nominated by the President and confirmed by the Senate).

108. JUD. CONDUCT & DISABILITY RULES, *supra* note 94, r. 4 cmt.

109. *Id.*

110. *Id.* r. 11 cmt.

111. *Id.*

The JCDA expresses a clear preference for informal resolution without going through a formal complaint process.[112] Should the chief circuit judge determine that the matter requires additional investigation, she may refer the matter to a special committee.[113] A special committee that has reason to believe (though no evidentiary standard or otherwise is provided) that a judge may be suffering from a disability may ask the subject judge to undergo a medical or psychological examination.[114] Interestingly, a judge who impedes "reasonable efforts to confirm or disconfirm the presence of a disability" may be subject to review by the special committee for misconduct.[115] "Cognizable misconduct" includes "refusing, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules."[116] The exercise of rights under the Fifth Amendment to the Constitution constitutes "good cause" under Rule 4(a)(5); however, "given the fact-specific nature of the inquiry, it is not possible to otherwise anticipate all circumstances that might also constitute good cause."[117]

For disabled lawyers seeking judicial appointments, the broad discretion and jurisdiction given to chief circuit judges to question their fitness on the basis of disability also includes the authority to engage outside experts who may subject judges to medical examinations and

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112. *Id.* r. 4 cmt. ("In practice . . . not all allegations of misconduct or disability will warrant resort to the formal procedures outlined in these Rules because they appear likely to yield to effective, prompt resolution through informal corrective action.").

113. *See* 28 U.S.C. § 353(c) ("[A special committee] shall conduct an investigation as extensive as it considers necessary."); 28 U.S.C. § 354(a)(1)(A) ("[A judicial council] may conduct any additional investigation which it considers to be necessary."). The special committee may also consider whether such a judge might be in violation of his or her duty to cooperate in an investigation under these Rules, a duty rooted not only in the Act's definition of misconduct but also in the Code of Conduct for United States Judges, which emphasizes the need to maintain public confidence in the judiciary. *See* CODE OF CONDUCT FOR U.S. JUDGES Canon 2(A), Canon 1 cmt. (U.S. CTS. 2019), https://www.uscourts.gov/administration-policies/judiciary-policies/ethics-policies/code-conduct-united-states-judges#d [https://perma.cc/7TTG-XX55]. *See also* Canon 3(B)(1) (requiring judges to "facilitate the performance of the administrative responsibilities of other judges and court personnel"); JUD. CONDUCT & DISABILITY RULES, *supra* note 94, r. 13 cmt. ("If the special committee finds a breach of the duty to cooperate and believes that the breach may amount to misconduct under Rule 4(a)(5), it should determine, under the final sentence of Rule 13(a), whether that possibility should be referred to the chief judge for consideration of action under Rule 5 or Rule 11.").

114. JUDICIAL CONDUCT & DISABILITY RULES, *supra* note 94, r. 13 cmt.

115. *Id.*

116. *Id.* r. 4 cmt. ("Rule 4(a)(5) provides that a judge's refusal, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules constitutes cognizable misconduct.").

117. *Id.*

testing.[118] The Judicial Committee and Council have broad investigative authority with relatively little regulation; as a result, significant discretion and deference, while important to maintaining judicial independence, risks overinclusive investigations, invasions of privacy and the subsequent weaponization of disability despite the statute's and rules' prohibition on the use of disability to challenge a judge's substantive judicial decision. Open standing to challenge judges on the basis of disability may have expressive value when combined with broad investigative discretion and signal to the public, litigants, and other judges, that disability is a valid cause for concern and its existence on the judiciary should be closely monitored and openly challenged. Data on discrimination at all levels of the federal judiciary should be routinely collected for analysis. With no statutory reporting requirements, there is no sense of how pervasive the problem is or how to disaggregate the discrimination complaints.[119] The GAO agrees.[120]

## V. TOWARDS A NEW NORM: THE DIGNITY OF PUBLIC SERVICE

Parts II, III, and IV above illustrate the existence of an incomplete and inadequate antidiscrimination safety net for disabled people seeking to serve in federal service programs and in U.S. Courts. The regulatory frameworks discussed suggest that disability is a risk to manage when it arises in exceptional circumstances rather than a pervasive social fact (one in four adults in the U.S.).[121] One could suggest specific fixes here and

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118. *Id.* r. 13 cmt. ("Rule 13(a) includes a provision making clear that the special committee may choose to consult appropriate experts or other professionals if it determines that such a consultation is warranted. If, for example, the special committee has cause to believe that the subject judge may be unable to discharge all of the duties of office by reason of mental or physical disability, the committee could ask the subject judge to respond to inquiries and, if necessary, request the judge to undergo a medical or psychological examination. In advance of any such examination, the special committee may enter into an agreement with the subject judge as to the scope and use that may be made of the examination results. In addition or in the alternative, the special committee may ask to review existing records, including medical records.").

119. There is some disaggregated data on complaints. Disability discrimination and harassment based on disability rank as the third highest category of complaints, following race and gender. GAO REP., *supra* note 102, at 32.

120. *Id.* at 29 ("Discrimination is the Most Frequent Allegation, but the Judiciary Does Not Collect Data on All Reported Workplace Misconduct . . . from fiscal year 2020 through fiscal year 2022, individuals filed 161 EDR claims, including both assisted resolutions and formal complaints. Each EDR claim can contain one or more allegations. Within the 161 EDR claims, there were 566 allegations of wrongful conduct.").

121. *CDC Data Shows Over 70 Million U.S. Adults Reported Having a Disability*, CTRS. FOR DISEASE CONTROL & PREVENTION NEWSROOM (Jul. 16, 2024), https://www.cdc.gov/media/releases/2024/s0716-Adult-disability.html

there. For example, we might create a unique category for these groups such as "temporary employees" so that they may fit into existing antidiscrimination laws such as the Rehabilitation Act of 1973. Of course, this would likely require Congressional action or creative agency regulation through guidance or proposed regulations, which present different challenges. An important caveat here: I recognize that labeling someone a federal "employee" also triggers other affirmative responsibilities and not just protections under antidiscrimination laws.[122] These measures may offer baseline economic and antidiscrimination safety nets and signal a greater commitment to disability in public service.

But is it enough to simply fix existing gaps in law and policy? If we were talking about the private sector, the implicit answer more likely would be yes. In fact, that is how we approach it when it comes to an employee in a private company—the law provides protections from discrimination, and we look to make sure they are effectively applied and enforced. When there are gaps in protection or where regulations appear murky, clarity becomes an organizing goal of advocates and perhaps an agency priority. But is that the same approach that we should take when we are talking about the public sector[123] and the types of roles that are quintessential to representing and administering the values of the United States?[124]

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[https://perma.cc/AR6E-A8M8]. Estimates of the prevalence of disability in the United States vary depending on the definition of disability used. *Id.*

122. For example, the employee label may implicate minimum wages or federal income taxes. *See* Fair Labor Standard Act, 29 U.S.C. § 201 (1938) (defining employee as "any individual employed by an employer" and excluding independent contractors); *Independent Contractor (Self-Employed) or Employee?*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee [https://perma.cc/M33R-8YSA] (explaining that "[i]t is critical that business owners correctly determine whether individuals providing services are employees or independent contractors" because employers generally must withhold income taxes for employees but not independent contractors).

123. Title II applies to state and local government programs and services and § 504 to those entities receiving federal funding.

124. *See Our Mission*, PEACE CORPS, https://www.peacecorps.gov/what-we-do/our-mission/ [https://perma.cc/YD88-QWDR] (describing one of goals of Peace Corps program as "to help promote a better understanding of Americans on the part of the peoples served"); *About AmeriCorps*, AMERICORPS, https://americorps.gov/about [https://perma.cc/PQN5-VBZM] (describing the mission of AmeriCorps to "improve lives, strengthen communities, and foster civic engagement through service and volunteering."); *The Federal Court of the United States*, UNITED STATES COURTS, https://www.uscourts.gov/ [https://perma.cc/M69Q-TXVS] (describing how "the U.S. Courts were created under Article III of the Constitution to administer justice fairly and impartially, within the jurisdiction established by the Constitution and Congress").

The importance of representation and representativeness in a democracy has received notable scholarly attention outside of the context of disability.[125] There is value to inclusion in its own right, but also there is value to diversity of perspective and lived experience, and there is a dignity that all should be able to experience in having the opportunity to serve and not just be served. My intervention does not add new reasons for why democracy or governance or our polity benefits from diversity in leadership or why representation matters for a whole host of reasons. Instead, I am thinking through the applicability and application of these arguments to disability and public service. If we think it is important that race or gender, as examples, be an intentional part of our public service workforce,[126] then why are we not applying this to disability in the same way with the same (or greater) efforts and insights? Why wouldn't we want to devise a system for volunteers and public servants that exceeded the protections in private employment rather than try to wedge these positions into already problematic categories? This area is ripe for discussion and reform. But piecemeal reforms, while perhaps a temporary bridge, will not do the trick precisely because of the problematic norms of disability that operate in ill-defined statuses rife with administrative discretion.

If disability is so important in representation, we should take affirmative steps to ensure the presence of disability in these spaces beyond preventing discrimination or simply shoring up the safety net to make it harder to discriminate and screen out disability. We should make it easier for people to serve; this can be done in several ways. Figure 1 below shows three possible buckets/tiers of potential prescriptive approaches beyond the status quo. These three tiers or approaches are not mutually exclusive. You can have an antidiscrimination patchwork, for example, and make fixes to improve it as legal challenges are trying to do.[127]

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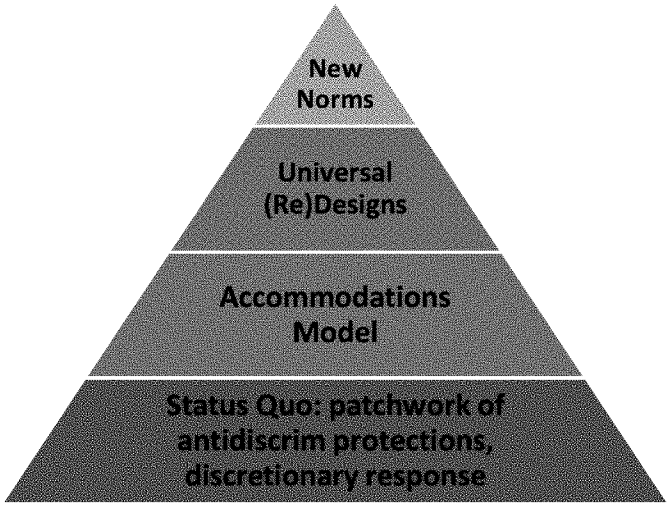
125. *See, e.g.*, Rangita de Silva de Alwis, *From Critical Mass to Critical Parity in Women's Leadership*, 10 U. PA. J.L. & PUB. AFFAIRS (2024) (arguing that achieving true gender parity in leadership requires moving beyond limited representation towards full parity); Tomiko Brown-Nagin, *Identity Matters: The Case of Judge Constance Baker Motley*, 117 COLUM. L. REV. 7 (2024) (exploring the relationship between identity and judging in the context of the first Black woman federal judge).

126. Again, this Essay predated the issuance of President Trump's Executive Order and guidance to roll back DEI efforts. That said, the arguments in this Essay remain relevant and salient.

127. *See, e.g.*, *supra* Parts II, III, and IV.

*Figure 1. Reimagining the Dignity of Service*




First, the *accommodations model*. We can address current gaps in protection from discrimination, including screening out through overly intrusive, broad tests and examinations on the basis of disability. This is what the lawsuits above are doing successfully often on a case-by-case basis with some impact litigation along the way.[128] However, we have not prioritized changing existing norms of risk and disability in public service or lowering access to service for all. In other words, "Pat, *you* can join Peace Corps and we will allow you to have telehealth check in appointments with your therapist and psychiatrist as an accommodation but what we say here for your case will not bind us for the next case." Perceptions of doctrinal tests within disability law that prioritize individual over categorial assessments can sometimes get interpreted to the extreme as barriers to impact litigation and structural reforms.[129] As a result, the goal is to increase the availability of individual accommodations to an existing process, plug the holes in the law where particularly egregious (and visible), and possibly lowering the administrative burdens associated with requests for reasonable accommodations.

Second, the *universal (re)design model*. Here, we imagine what a more universally designed model of public service might look like. You

128. *Id.*

129. *See, e.g.*, Ruth Colker, *The Americans with Disabilities Act's Unreasonable Focus on the Individual*, 170 U. PA. L. REV. 1813 (2022) (arguing that "the requirement to claim status as an 'individual with a disability' to seek reasonable accommodations under the Americans with Disability Act undermines the advancement of structural reform that could promote broad conceptions of disability justice").

might change the way public service is performed, organized, and how it unfolds. It may look quite different, but this is the key point. It would allow more people with disabilities to enter public service directly without categorical exclusion on the basis of disability, with different screening requirements, fewer individual accommodations, and reduced administrative burdens and risk of participation falling on individuals. For example, as in the context of professional licensing in law, Peace Corps might ask a series of questions about any medical condition or disability that might impair Pat's ability to perform the essential functions of his position as a volunteer. This requires a clear understanding of the core tasks of volunteers generally and those that Pat may encounter in his specific placement.

What would universal design for public service look like? Legal and cultural changes, including investment in infrastructure and public spending on the value of universal design so that service was available to all. Existing disability antidiscrimination laws have cost-benefit analyses built in, and they may work for the private sector, like the availability of affirmative defenses, presumptions in favor of employers with respect to job descriptions and essential functions.[130] If public service is of such value to the country, then it is not enough to inconsistently import disability law's private sector mentality of cost-benefit analysis but rather to invent an entirely new one that is fit for the public sector (or, one may say, "fit for service").

For example, this could focus on more significant infrastructural changes in the U.S. programmatic model, screening, and recruitment that benefits all but designed with disabled public servants as anticipated users of the system. Continuing with the example of Pat and Peace Corps, perhaps there is room to engage host countries through grant programs and foreign aid to invest in mental health care to build local capacity or send a mental health team to mission sites as a standard programmatic design. Another possible design feature might establish a presumption of eligibility to serve. The burden of denial (including administrative costs) would be on the government to produce clear and more transparent findings of fact to surface assumptions and disability biases of the sort discussed above.[131]

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130. For example, employers can raise the so-called "direct threat" defense in situations where a person's disability may pose a "direct threat to the health and safety of others in the workplace" and "no reasonable accommodation [is] available that can negate that threat." *See Direct Threat Defense*, PUB. INT. L. CTR. OF PHILA., https://pubintlaw.org/wp-content/uploads/2014/11/Direct-Threat.pdf [https://perma.cc/F45L-2KSU].

131. Even the most universally designed program will still require accommodations given the person-specific nature of disability. However, universal designs can reduce the need for individual accommodations and be more efficient by recognizing certain structural

Third, *new norms* advancing the dignity of public service. By dignity, I refer to the inherent value and worth of every individual irrespective of ability or other factors.[132] Dignity as a governing value in the design of regulations considers the personhood, autonomy, and decisional agency of disabled people and presumes inclusion as a starting point.[133] The drafting and implementation of regulations advancing dignity, for example in the context of Peace Corps, might attend to existing power imbalances that place the disabled person in a position of vulnerability and risk undermining their inherent dignity. Pat had imperfect information in the appeals process, namely, no clear reason for denial at least in the first instance. A regulation seeking to advance Pat's dignity could require specific findings of fact disclosed to all applicant denials with the relevant text of agency regulations included (not just the citations). Similarly, Peace Corps's regulatory structure might include provisions that recognize the dignitary harms experienced by Pat such as the time and preparation for the initial assignment and the stigma associated with Pat's absence from the original service team. Or, placing a greater emphasis on the time and likely financial costs of appeal.

Articulating new norms such as dignity in the context of public service would force us to think about the flaws in the current cost-benefit analyses

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designs that might accommodate the most people and eliminate the administrative costs of individual review as well as the costs of individual provision/production of accommodations. For more discussion of universal design, *see e.g.*, Ruth Colker, *Universal Design: Stop Banning Laptops*, 39 CARDOZO L. REV. 483 (2017); Aimi Hamraie, *Designing Collective Access: A Feminist Disability Theory of Universal Design*, 33 DISABILITY STUDIES Q. 4 (2013); Diane Robinson & Zachary Zarnow, *Accessible Courts: Toward Universal Design in* NATIONAL CENTER FOR STATE COURTS: TRENDS IN STATE COURTS (2023).

132. This definition of dignity, while contested, has strong roots in international law. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . ."); U.N. GAOR, 61st Sess., 76th plen. mtg., U.N. Doc. A/RES/61/106 (Dec. 13, 2006) (incorporating the definition of dignity from the UDHR and using dignity as a governing principle throughout the convention from preamble and purpose to substantive Articles). I recognize competing definitions of dignity such as "contingent dignity" that perhaps better reflect the ways in which systemic and institutional choices can impede the realization of human dignity when the collective and individual values differ. However, given the aspirational nature of this section, I advance inherent dignity as the target.

133. One recent qualitative study found dignity to be a key value to disabled people. Kelsey Chapman et al., *Dignity and the Importance of Acknowledgement of Personhood for People With Disability*, 34 QUALITATIVE HEALTH RSCH. 141, 146 (2024) ("Examining both individual and collective experiences resulted in a critical overarching theme of acknowledgement of personhood and a series of related themes, including acknowledgement of modifying personal factors and indignity and lack of acknowledgement.").

that screen out disability when it does not consider the costs of exclusion imposed on disabled people, society, and democracy. Examples of costs imposed include additional "admin burdens"[134] disabled people face when having to challenge the government's overly risk averse, non-nuanced position on disability, the stress and time (just like Peace Corps discourages appeals by saying you will miss your service date if you appeal), and the forced disclosures built into dispute resolution. Already, public service comes with some costs.[135] The amorphous nature of "dignity" in U.S. law and society would surely complicate the operation of a new regulatory framework based on dignity even when coupled with strong intentions to advance it.[136] Tensions between individual and collective conceptions of dignity may arise as might questions regarding the prioritization or weight assigned to competing values such as safety (a regular defense and counter-balance to disability inclusion). Moreover, any governing value is understood and applied within existing institutions which may themselves be flawed.[137]

Rather than offer a prescriptive menu for exclusion from public service, this Essay introduces the problems and barriers in public service for disabled people and asks whether we can more intentionally articulate the values of public service to people with disabilities and society. Consequently, the design these programs could not only to make it easier for more disabled people to serve but make it an expectation that disabled people would be as represented in public service as they are in society at large. This does not mean a quota,[138] but rather a system with more than

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134. *See* Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329 (2020) (illustrating the "ways that disability law overlooks the costs of life admin for people with disabilities").

135. For example, the Social Security Administration counted income from Peace Corps towards eligibility and benefits for Supplemental Security Income and health insurance. *See Program Operations Manual*, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0301901550 [https://perma.cc/XEH3-ZHDN].

136. *See, e.g.*, Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35 (2010); Rachel Bayefsky, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1732, 1754–55 (2014) (discussing the requirement that accessible bathrooms be constructed to allow an individual with a disability the ability to use the restroom alone).

137. *See* Karen M. Tani, *The Limits of the Cost-Benefit Worldview: A Disability-Informed Perspective*, LPE BLOG (Oct. 12, 2021) https://lpeproject.org/blog/the-limits-of-the-cost-benefit-worldview-a-disability-informed-perspective/ [https://perma.cc/XU5B-DHZ9] ("We can commend the administrators in the Department of Justice who recognized the 'dignity' value of an accessible toilet while also wanting a deeper analysis of whether and how government analysts have grappled with a well-established societal preference for the 'able.'").

138. Nor is it sufficient to say there might be target percentages similar to the federal hiring priorities under the Rehabilitation Act § 501.

just access, presumptive inclusion and strong values of representation that may produce a more balanced and diverse public sector workforce. This project is part of a larger agenda to reimagine the law and regulations around volunteer and public service and make it more transparent, accessible, and workable.[139]

## VI. CONCLUSION

Our current antidiscrimination approach to disability and public service appears to be a chaotic game of whack-a-mole. The government is even more important for life, health, and democratic participation for people with disabilities than the private sector. Many disabled people have greater contact with government agencies than nondisabled people.[140] And yet, at least in the examples above, we do not have the same kind of consistency or transparency of regulation and protections against discrimination that we do in the private sector. These challenges will never be resolved by batting down one barrier at a time in the darkness of night. Instead, we need to develop an affirmative set of norms to reflect the importance of participation by disabled people in public service.

This Essay is not a survey of gaps across every federal public service position. Rather, it offers some examples of areas where the law is unclear and insufficient as a safety net precisely because disabled people were not expected to be in these spaces when they were first imagined and designed. That is, disabled people were considered targets of public service and recipients of public services instead of public servants themselves. In the third decade of the ADA, five decades after the Rehabilitation Act, we ought to understand those spaces where inclusion remains elusive and what the stakes are should we fail to attend to this for the overall mission of inclusion and as we seek to form a more perfect union.

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139. This is an undertheorized area of legal scholarship, and I hope to contribute to it. I have not found much in this area, but see Lauren Attard, Comment, *A Price on Volunteerism: The Public Has a Higher Duty to Accommodate Volunteers*, 34 FORDHAM URB. L.J. 1089 (2007).

140. For example, over one in four Supplemental Nutrition Assistance Program participants, or over eleven million people, have a functional or work limitation and/or receive disability benefits. *See* STEVEN CARLSON ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, SNAP PROVIDES NEEDED FOOD ASSISTANCE TO MILLIONS OF PEOPLE WITH DISABILITIES (2017), https://www.cbpp.org/sites/default/files/atoms/files/6-14-17fa.pdf [https://perma.cc/J5VE-7XQK].