

ABSTRACT  
Michèle Alexandre

*Serving Two Masters<sup>1</sup>: A Vulnerability-Based Approach to Rectify the ADA's Persistent Failures Regarding Mental Health*

Vulnerability is a state of being common to all humans. One need only look to various stages of life and the randomness of chance to know this to be the case. Vulnerability is also so ever-present that it provides a basis for understanding others like no other characteristic can. We all love, we will all die, we all have gotten sick at some point, and we all worry about the physical limitations to come in old age. For this reason, our relationships with one another are all charged with relational dependency. At some point, we do, or, will end up needing someone, whether at home, work, or the public space.

That fact is the power of vulnerability theory for law and society. Vulnerability theory postulates humans as inherently dependent on each other and exposed to limitations at any given time and in any given position. As such, it mandates for equity seekers to accept dependency as an inherent component of legal reform and advocates that the State be made responsive of that reality:

Vulnerability is—and should be understood to be—universal and constant, inherent in the human condition . . . Vulnerability initially should be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise. Individuals can attempt to lessen the risk or mitigate the impact of such events, but they cannot eliminate their possibility. Understanding vulnerability begins with the realization that many such events are ultimately beyond human control.

Our embodied humanity carries with it the ever-constant possibility of dependency as a result of disease, epidemics, resistant viruses, or other biologically-based catastrophes. Our bodies are also vulnerable to other forces in our physical environment: There is the constant possibility that we can be injured and undone by errant weather systems, such as those that produce flood, drought, famine, and fire. These are “natural” disasters beyond our individual control to prevent.<sup>2</sup>

This approach to equity stands in contrast to the accepted approach to anti-discrimination, which is generally focused on comparing distinct statuses and identities. Though many have argued this approach—referred to as “formal equality”—is limited, it still prevails. And, nowhere are the limitations of formal equality more evident than in the disability context. It is so, particularly, in judicial interpretation of the American with Disabilities Act (“The ADA”), especially in cases involving mental impairments.

The American with Disabilities Act is the culmination of longstanding grassroots efforts to afford needed protections to persons with disabilities. Prior to its enactments, other statutes, like the Rehabilitation Act, offered limited protections to persons with disabilities. However, none were as comprehensive as the ADA.

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<sup>1</sup> This expression is used here to highlight the conflict between the overt anti-discrimination goals of the ADA and its lack of adequate provisions for mental impairments. It is a reprise of Derrick Bell's *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* (1976), in which Bell diagnosed civil rights attorneys as having attempted to serve the goal of integration at the expense of educational equality.

<sup>2</sup> Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1 (2008)

In its various sections, covering private employment, state services and public accommodations, Congress attempted to rectify the effects of the chronic and devastating stigmatization of vulnerable bodies. At its core, the Act is designed to protect persons with physical as well as mental impairments.

Despite this progress, much work remains in the context of mental illness. Of the 50 million Americans reported as disabled, not nearly enough focus has been placed on the types of accommodations needed for the mentally impaired. Additionally, experts estimate that the number of the population impaired by mental illness might be higher due to economic and racial hurdles. Consequently, despite the ADA, understanding and approaches to mental illness have remained superficial.

Further, current ADA jurisprudence and its own legislative history reveal an ingrained bias against mental illness. This original bias along with continuing social incomprehension of mental health limits the ADA's effectiveness. As a result, ADA cases covering mental impairments tend to fail at the summary judgment stage. In cases like these, reasonable accommodation claims and employers' defenses touching on qualifications or health and safety tend to be viewed as so burdensome that plaintiffs seldom prevail.

To address these limitations, this paper considers a vulnerability-based approach to interpreting mental health cases. As such, this proposal encapsulates a two-step consideration designed to promote awareness of mental disability issues as universal and to remedy the ADA's neglect of mental illness. First, it considers policy and legislative amendments to the ADA that incorporates a sharper focus on mental illness in ADA regulations, using the lens of vulnerability theory. Second, it proposes a reconsideration of judicial approach to requests for accommodation and the qualification requirement.

At its core, the article posits the ADA as a tangible and logical site to implement vulnerability theory in concrete ways. To test the vulnerability-based approach, the article will focus, as a start, on cases involving plaintiffs with depression. As the rate of depression is currently at its highest, courts' failure in this context requires close examination. Communities of color also suffer disproportionately more from these spikes in mental illnesses. The crisis in loneliness in the western world indicates that issues of mental illness, if unaddressed, will simply fester.

To support its arguments, the paper is divided in the following parts: Part I discusses the link between the ongoing crisis in access to health care for mental health patients and the limited ADA jurisprudence in that context. Part II covers the legislative history of the ADA and the vestiges of mental health bias still present in interpreting the Act. Part III highlights this pattern in cases involving requests for reasonable accommodation or claims of discrimination by plaintiffs with depression. Part IV demonstrates how a vulnerability-based approach could be better suited for comprehensive resolution of these issues.