Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?

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I.
INTRODUCTION

One late afternoon in October 1987, I sat across the table from Robert Burgdorf discussing how the Americans with Disabilities Act (ADA) should be drafted. Burgdorf, a staff person for the National Council on the Handicapped, had drafted a first version of the bill based on numerous field hearings the Council had held over the previous years, and based on his own extensive knowledge of disability anti-discrimination law. In his draft of the bill, Burgdorf had provided legal redress for any individual who had experienced discrimination "because of a physical or mental impairment, perceived impairment, or record of impairment."

I, and several other legal and political advocates, believed the manner in which Burgdorf proposed extending anti-discrimination coverage to people with disabilities was politically unwise and legally unnecessary.[1] Why use a new definition of disability in the ADA? Why not use the definition of "handicap" that the courts had been applying for years under sections 501, 503, and 504 of the Rehabilitation Act of 1973.[2]

Under the definition that applied in existing law, a handicap was "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," a "record of such an impairment," or "being regarded as having such an impairment."[3] Courts deciding cases under that definition had decided that individuals with a wide range of serious medical conditions could invoke the

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1. I was a legislative counsel with the AIDS Project of the American Civil Liberties Union in Washington, D.C. from 1988 to 1991. During passage of the ADA, I was one of the chief lawyers negotiating and drafting the Americans with Disabilities Act on behalf of the disability community, through my work with the Consortium for Citizens with Disabilities Rights Task Force.

2. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 (1998)).

3. *Id.*

protections of the law. Indeed, courts had rarely even parsed the language of the definition to decide whether a plaintiff was a "handicapped individual" under the law. Rather, the definition was understood to include any medical condition that was non-trivial, and the courts had applied the law's coverage in that manner.[4]

There were, of course, a few cases under the existing law in which courts had questioned whether some conditions were handicaps. These rare cases included individuals with bad backs, acrophobia, and crossed eyes.[5] But even those cases did not seem problematic in light of recent legal developments. Just two years earlier, in the case of *School Board of Nassau County v. Arline*,[6] the Supreme Court had offered a very broad interpretation of the third prong of the definition of "handicapped individual" ("being regarded as having such an impairment").[7] The Supreme Court's opinion seemed to indicate that whenever an individual had been discriminated against *because* of an impairment, the entity engaging in the discrimination *regarded* that individual as being limited in the very life activity in which the person had been discriminated against. Thus, under the Supreme Court's interpretation in *Arline*, the third prong of the definition in the existing law was sufficiently broad to capture any individual who had been discriminated against because of *any* impairment.[8]

Arrayed against the fact that there seemed to be little legal need to change the definition of "disability" for the ADA was the simple political fact that any change in the law would be viewed as radical, unnecessary, and complicated. Making radical change is not ordinarily Congress' forte. Indeed, one of the best "selling points" of the ADA was that Congress would simply be extending to the private sector the requirements of an existing law, Section 504 of the Rehabilitation Act. The existing law covered entities that received federal funds; the new law would cover additional entities that did not receive such funding. Beyond that change in scope, advocates would argue, Congress was doing very little that was radically different.[9]

The legal and political advocates prevailed, and the definition of disability in the ADA was taken directly from the definition that applied to Sections 501, 503, and 504 of the Rehabilitation Act. Congress felt comfortable relying on a definition that had fifteen years of experience behind it, and disability rights advocates felt comfortable that the same individuals with the wide range of impairments who had been covered under existing disability anti-discrimination law would be covered under the ADA.

Fast forward ten years to October 1997. I am sitting across the table from an Assistant Solicitor General, discussing the pending Supreme Court case of *Bragdon v. Abbott*. The question in the case is whether a woman with asymptomatic HIV

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4. *See infra* Section III.

5. *See infra* notes 88-117 and accompanying text.

6. 480 U.S. 273 (1987).

7. *See id.* at 282-84.

8. *See infra* notes 134-40 and accompanying text.

9. *See* Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 37 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) [hereinafter *Antidiscrimination Requirements*] (describing how the substantive requirements of the ADA were borrowed from Section 504 of the Rehabilitation Act of 1973).

infection has a physical impairment that substantially limits one or more of her major life activities. I explain to the Department of Justice lawyer how courts applying the definition of "handicap" under Section 504 of the Rehabilitation Act had adopted a broad view of that definition, and had held that individuals with a range of serious medical conditions, including asymptomatic HIV infection, were covered under the law. I explain, in significant detail, how Congress patterned the ADA on Section 504, and indeed, how Congress was particularly aware that the ADA would protect people with HIV infection. I discuss the conceptual reasons for why, as a matter of anti-discrimination law, it makes sense for the definition of disability to be understood broadly.

"All this is quite interesting," says the lawyer from the Solicitor General's office. "But I wonder if that's what Congress *wrote* in the law."[10]

What *did* Congress write in the ADA and why? The ADA has been in effect for over seven years and the outcomes of the cases have been unexpected and remarkable. In case after case, challenges have been raised as to whether the plaintiff meets the statutory requirement of having a physical or mental impairment that substantially limits a major life activity. The courts have carefully parsed every word and every term in the definition, and have concluded that individuals with a range of impairments—from epilepsy to diabetes to manic-depression—do not have disabilities under the ADA.[11] The Supreme Court entered the fray in the *Bragdon* case and, carefully parsing the words of the definition, held that a woman with HIV infection met the statutory requirements of that definition.[12] But the Supreme Court also held a year later that whether an impairment substantially limits an individual's major life activity must be assessed after taking into account drugs or devices that such an individual might use to mitigate the effects of the impairment.[13] That decision threw into question coverage for thousands of individuals with impairments whom I, and other advocates who worked on the ADA, presumed Congress had intended to cover when it passed the ADA.

So what happened? How did those of us who helped draft the ADA so completely misread how the courts would apply its definition of disability? This article is intended as a modern-day "Guide for the Perplexed" on that issue.[14] I tell the story of how those of us who helped draft the ADA decided to recommend the use of statutory words that may not have completely and accurately reflected Congressional intent; I explore the role that agencies, the bar, and the courts played in shaping the course of statutory interpretation in this area; and I offer some ideas on how to get out

10. The Solicitor General ultimately decided to argue in the *Bragdon* case that people with HIV infection were covered under the ADA. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 10, Bragdon v. Abbott, 524 U.S. 624 (1998) (No. 97-156).

11. *See infra* Section V(B) and accompanying text.

12. Bragdon v. Abbott, 524 U.S. 624 (1998).

13. Sutton v. United Airlines, Inc., 527 U.S. ___, 119 S. Ct. 2139 (1999); Murphy v. United Parcel Serv., 527 U.S. ___, 119 S. Ct. 2133 (1999); Albertsons, Inc. v. Kirkingburg, 527 U.S. ___, 119 S. Ct. 2162 (1999).

14. *Cf.* MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED (Shlomo Pines trans., Univ. of Chicago Press 1963) (also translated as "Guide for the Perplexed").

of the convoluted mess that is the state of interpretation today regarding the definition of disability under the ADA. To understand this story requires an understanding of how the concept of "disability" has changed over the years, and yet has stubbornly remained the same. The concept of disability, government's relationship to people with disabilities based on those concepts, and the human desire to see people with disabilities as "other" than themselves, are all essential components of this story.

II.
THE CONCEPT OF DISABILITY IN FEDERAL LAW: FROM THE 1700S TO THE 1970S

A. Colonial America - the 1960s

The Americans with Disabilities Act is a civil rights law that treats disability in the same manner that the Civil Rights Acts of 1964 and 1968 treat race, religion, gender or ethnicity. Under such laws, these characteristics are viewed as elements that are ordinarily irrelevant for purposes of making determinations regarding employment, housing, or the provision of goods and services.[15]

The concept that disability is a characteristic deserving of civil rights protection is, however, a relatively recent and revolutionary idea. For decades, people with disabilities were viewed as objects of pity or revulsion, and later, as medical technology increased, as objects of rehabilitation and cure. The government's relationship to people with disabilities reflected these common, public attitudes regarding disability.

In colonial America, people with disabilities were viewed primarily in terms of their dependency. Wherever possible, people with disabilities were cared for by their relatives, who often hid them out of shame.[16] For those who had no family support, colonial governments established "poor laws" which provided subsistence to people who were poor, elderly, or disabled. All such individuals were viewed primarily in terms of their dependency on community support.[17] Indeed, the key qualification to receiving aid was *dependency*—the inability to provide for oneself. The aid itself was generally offered on an individual basis, allowing recipients to remain in their own homes or the homes of neighbors.[18]

As society expanded and changed, governmental support for dependent people with disabilities also expanded. By the 1820s, the small communities that had supported people with disabilities in private homes were rapidly disappearing.[19] In

15. *See* Pub. L. 88-352, 78 Stat. 241 (1964); Pub. L. 90-284, 82 Stat. 73 (1968).

16. *See* U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 18 (1983) [hereinafter ACCOMMODATING THE SPECTRUM]; DAVID ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER IN THE NEW REPUBLIC xiii (1971). The history of disability from the 1700s to the 1900s benefits from the work of Grail Walsh, an associate at Covington & Burling who assisted me in writing a brief on *Bragdon v. Abbott* on behalf of 59 civil rights and disability rights groups. *See* Brief of the AIDS Action Council *et al.* as Amicus Curiae Supporting Respondent, Bragdon v. Abbott, 524 U.S. 624 (1998).

17. *See* ROTHMAN, *supra* note 16, at 4-5.

18. *See id.* at 30-31; GARY ALBRECHT, THE DISABILITY BUSINESS: REHABILITATION IN AMERICA 96 (1992).

19. *See* ROTHMAN, *supra* note 16, at 57.

response, state and local governments began constructing large almshouses, in which people who were poor, old, sick, disabled, or simply idle drifters were given a disciplined daily regimen and an exacting routine.[20]

Starting in the 1830s, states also began to erect asylums for people who were mentally ill. New medical science had determined that insanity was curable, and doctors believed the best treatment for those who were mentally ill was to remove them completely from the community at the earliest sign of irregularity.[21] The insane asylums were thus designed to "cure" people who were mentally ill by depriving them of stimulus or emotion.[22]

Although various reform movements sprung up during the 1800s to address deplorable conditions in the almshouses, by the end of the 1800s people with physical disabilities were living in yet more almshouses, which they shared with abandoned children, drifters, petty criminals and a growing number of immigrants who were poor.[23] Whatever route they took to the almshouse, all inmates were subject to the same public judgment: these people were helpless, useless, and indolent.[24] Although people with disabilities, including mentally ill individuals who were institutionalized, might also have garnered feelings of pity and compassion, the overriding assumption with regard to such individuals was that they were unable to *function* effectively in society.

This approach to people with disabilities meant that people with a range of medical conditions, who were able to function in society despite their medical conditions, were not considered "disabled." They might well have been considered "sick" or "ill," of course, but they were not considered *disabled*. The sine qua non of disability was *inability to function* in society. Hence, individuals with disabilities were to be pitied, excluded, and/or cared for outside the mainstream of society.

By the end of World War I, a new governmental approach to disability had emerged—an approach that focused on work rehabilitation and reintegration into society. In 1918, Congress passed the Smith-Sears Veterans' Rehabilitation Act, the first federal statute to mandate vocational rehabilitation programs for disabled veterans.[25] Two years later, Congress passed the Smith-Fess Act, which extended

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20. In the nineteenth-century almshouse, inmates were awakened in common rooms by a loud bell and took their meals in a large mess hall under a half-hour time limit. During the day they were put to work to discourage idleness, and their comings and goings were strictly monitored. *See id.* at 186-87, 191-92. This ordered regimen presented a sharp contrast with the few public almshouses which had been constructed during the late 1700s in the larger towns. These earlier establishments functioned as large, crowded households, in which the inhabitants structured their own lives and were subject to minimal supervision. *See id.* at 42-43; ACCOMMODATING THE SPECTRUM, *supra* note 16, at 19.

21. *See* ROTHMAN, *supra* note 16, at 130-31.

22. *See id.* at 137-38.

23. *See id.* at 198-200, 290-91.

24. *See id.* at 292.

25. Vocational Rehabilitation Act, ch. 107, 40 Stat. 617 (1918). *See* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 20 (1984); ACCOMMODATING THE SPECTRUM, *supra* note 16, at 21. These programs were administrated by state departments of education with partial funding from the federal government. *See* SCOTCH, *supra* at 19-20. This law had been preceded by laws that provided vocational training, and some rehabilitation, to soldiers and veterans. *See* National Defense Act, Pub. L. 64-85, §27, 39 Stat. 166

vocational rehabilitation programs to civilians with physical disabilities.[26] Numerous states enacted their own vocational rehabilitation programs as well,[27] private industry entered the effort over time,[28] and various advocacy groups were established to support greater access to education and employment for people with disabilities.[29]

This governmental and private approach towards rehabilitating people with disabilities has been termed the "medical model" of disability.[30] Unlike the exclusionary model of earlier years, the paramount goal of this model was to reintegrate the person with the disability into the mainstream of society. The model presumed, however, that integration required changing the *person* with the disability, not changing any aspect of the surrounding *society* that might have made it difficult for the person to function in that society. Moreover, the model presumed that to the extent a person with a disability could not be reintegrated into society, on society's existing terms, that person would remain excluded from much of mainstream society.[31]

While earlier conceptions of disability had thus focused on a person's dependency and complete inability to function in society, a new definition of disability emerged for purposes of the medical and rehabilitation model. This definition focused on the impact the person's disability had on his or her capacity to *work*, and on whether such a person would benefit from vocational rehabilitation programs in terms of employability. This made sense as a means of establishing eligibility for the new rehabilitation programs being funded under the law. Thus, for example, the Vocational Rehabilitation Amendments of 1954 defined a "physically disabled individual" as "any individual who is under a physical or mental disability which *constitutes or results in a substantial handicap to employment*, but which is *of such a nature* that vocational *rehabilitation services may reasonably be expected to render him fit* to engage in a remunerative occupation."[32] This definition remained essentially unchanged through all the various reauthorizations of the Vocational Rehabilitation Act.[33]

(1916) (providing vocational training for enlisted men); Smith-Hughes Vocational Education Act, Pub. L. 64-347, 39 Stat. 929 (1917) (expanding vocational education). *See also* SCOTCH, *supra* at 19-20; ALBRECHT, *supra* note 18, at 102.

26. Pub. L. No. 66-236, 41 Stat. 735 (1920). *See* SCOTCH, *supra* note 25, at 20; ACCOMMODATING THE SPECTRUM, *supra* note 16, at 21.

27. Within the year and a half following enactment of the Veterans' Rehabilitation Act, 34 states enacted their own vocational rehabilitation programs. *See* SCOTCH, *supra* note 25, at 21.

28. *See* ALBRECHT, *supra* note 18, at 81, 141-43.

29. The first such organizations included Disabled American Veterans, formed in 1920, and the American Foundation for the Blind, formed in 1921. *See* SCOTCH, *supra* note 25, at 33. The number of advocacy organizations increased after World War II. *Id.* at 34.

30. *See* ALBRECHT, *supra* note 18, at 72-73; *see also* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1348 (1993).

31. *See* ALBRECHT, *supra* note 18, at 72. Jonathan Drimmer criticizes the medical model as one in which a person's disability acts as "a fundamental negation of her personhood as well as her citizenship, and all she can strive for is to minimize the 'symptoms' of her disability through rehabilitation in an effort to participate in the community to the greatest degree allowable." Drimmer, *supra* note 30, at 1348.

32. Pub. L. No. 565, § 11, 68 Stat. 652, 660 (1954) (emphasis added).

33. *See* Pub. L. No. 93-112, §7(6), 87 Stat. 355, 361 (1973) (codified as amended at 29 U.S.C. §706(8) (1998)).

For individuals who could not be rehabilitated into the workforce the government developed disability cash supports.[34] In 1956, Congress established Social Security Disability Insurance (SSDI), a federal program that provided long term financial support to individuals who had paid into the Social Security system during employment but were no longer able to work.[35] In 1972, Congress established the Supplemental Security Income program (SSI),[36] also designed to provide cash supports for disabled individuals. SSI was limited to low-income individuals and was not dependent on previous employment by such individuals. In both programs, in order to receive cash benefits, individuals had to have a "medically determinable physical or mental impairment" that made them unable "to engage in any substantial gainful activity."[37]

The medical, rehabilitation, and support models of disability—which, of course, co-existed with continuing models of pity and exclusion regarding disability—began to be challenged in the 1960s as the modern civil rights movements for African-Americans and for women gathered momentum. These movements were premised on the principle that all individuals deserve to be treated equally and with dignity in our society, regardless of race, gender, or religion.[38] During this time, people with disabilities started an "independent living" movement,[39] demanding more autonomy in their lives as well, and rejecting society's attitudes of pity, charity, or rehabilitation.[40]

When Congress began its reauthorization of federal rehabilitation programs in 1972, the rehabilitation/medical model of disability still prevailed in both the country and Congress for purposes of governmental action. Yet traces of a new attitude towards people with disabilities existed as well.[41] Section 501 of the Rehabilitation Act of 1973 required every department in the executive branch to develop "an *affirmative action program plan* for the hiring, placement, and advancement of handicapped individuals,"[42] with the Equal Employment Opportunity Commission (EEOC) to develop and recommend "policies and procedures which will facilitate the

34. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions between the ADA and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1005 (1998).

35. Social Security Amendments of 1956, Pub. L. No. 84-880 §103(a), 70 Stat. 807, 815-24 (1956).

36. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972).

37. 42 U.S.C. § 423(d)(1)(A) (1994) (SSDI); 42 U.S.C. § 1382c(a)(3)(A) (1994) (SSI).

38. *See* SCOTCH, *supra* note 25, at 34-37.

39. At the University of Illinois in the late 1960s, four students with disabilities who were originally housed in an off-campus facility moved closer to campus by modifying a building to provide them access. In 1970, 12 students with disabilities at U.C. Berkeley secured a governmental grant to help students with disabilities live as full participants in campus life. The program provided services ranging from residential counseling to wheelchair repair. The Berkeley experiment was widely imitated, and the independent living movement grew. *See* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 46-58 (1993).

40. *See* SCOTCH, *supra* note 25, at 34-37.

41. The rehabilitation program itself was expanded to promote independent living among all individuals with disabilities, regardless of whether they intended to enter the mainstream of employment. *See* SCOTCH, *supra* note 25, at 49.

42. Pub. L. No. 93-112, § 501, 87 Stat. 355, 391 (1973) (codified as amended at 29 U.S.C. § 791(b) (1998) (emphasis added).

hiring, placement, and advancement in employment of individuals who have received rehabilitation services."[43] Section 503 of the bill provided that, in any procurement contract exceeding $2,500, the federal agency entering into the contract was required to include a provision that "in employing persons to carry out such contract the party contracting with the United States shall take *affirmative action* to employ and advance in employment qualified handicapped individuals."[44] The Department of Labor (DOL) was authorized to issue regulations under that section.[45]

While such provisions could be seen as a continuation of a "help the handicapped" model, similar provisions regarding affirmative action had been enacted by the executive branch with regard to race and gender in the *civil rights* context.[46] Moreover, while coverage for people with disabilities had not been included in the Civil Rights Acts of 1964 and 1968,[47] a new section of the Rehabilitation Act did include an explicit anti-discrimination provision. This section, Section 504, provided that: "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[48]

B. Section 504 of the Rehabilitation Act of 1973

Section 504 was patterned directly on almost identical provisions in Title VI of the Civil Rights Act of 1964 (prohibiting discrimination based on race in any program or activity receiving federal financial assistance),[49] and Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex in any educational program or activity receiving federal financial assistance).[50] Indeed, as Richard Scotch

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43. *Id.* (codified as amended at 29 U.S.C. 791(c) (1998)). Courts consistently interpreted the affirmative action requirement in Section 501 to encompass an anti-discrimination component. *See, e.g.*, Southeastern Community College v. Davis, 442 U.S. 397, 410-11 (1979); Fedro v. Reno, 21 F.3d 1391, 1398 (7th Cir. 1994) (Rovner, J. dissenting) (citing cases); Fuller v. Frank, 916 F.2d 558, 563 (9th Cir. 1990).

44. Pub. L. No. 93-112 (codified as amended at 29 U.S.C. § 793(a) (1998)) (emphasis added). In later amendments the amount of the procurement contract was increased to $10,000. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 505(a), 106 Stat. 4344, 4427 (1992). As with Section 501, courts consistently interpreted the affirmative action requirement in Section 503 to encompass an anti-discrimination component. *See, e.g.* Southeastern Community College v. Davis, 442 U.S. 397, 410-11 (1979); Trinity Indus., Inc. v. Herman, 173 F.3d 527 (4th Cir. 1999); Martin Marietta Corp. v. Maryland Comm'n on Human Relations, 38 F.3d 1392 (4th Cir. 1994); Board of Governors of Univ. of N.C. v. United States Dep't of Labor, 917 F.2d 812, 815 (4th Cir. 1990).

45. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 503(a), 87 Stat. 355, 393. Pursuant to Executive Order, the Secretary of Labor was authorized to issue regulations under this section. Exec. Order No. 11,758, 3 C.F.R. § 841 (1971-1975).

46. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65).

47. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 42 U.S.C.).

48. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a) (1998)). This provision is colloquially referred to as "Section 504." A similar civil rights provision had been passed as early as 1948 when Congress enacted a law prohibiting discrimination on the basis of handicap in the civil service. *See* Pub. L. No. 80-617, 62 Stat. 351 (1948) (codified as amended at 5 U.S.C. § 7203). Few actions, however, appear to have been brought under this provision before the late 1970s.

49. Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (1964) (codified as amended at 42 U.S.C. § 2000d (1994)).

50. Pub. L. No. 92-318, § 901(a), 86 Stat. 235, 373 (1972) (codified as amended at 20 U.S.C. § 1681(a) (1994)).

documents, staff members of the Senate Labor and Public Welfare Committee simply borrowed the language for Section 504 from that of Title VI and Title IX (the latter being a provision that several of the staff people had worked on the previous year), without giving much thought to what anti-discrimination protection based on handicap would mean in practice.[51]

Extensive thought as to what discrimination based on handicap meant, and, indeed, what the term "handicap" should be understood to include, took place over the following four years as government agencies worked to develop implementing regulations for Sections 501, 503, and 504 of the Rehabilitation Act.[52] In particular, attorneys writing the regulations implementing Section 504 for the Department of Health, Education and Welfare (HEW) broke significant new theoretical ground with regard to anti-discrimination protection based on handicap.[53] The work of these attorneys, who included Martin Gerry, John Wodatch, Ann Beckman, and Ed Lynch, reflected beliefs about people with disabilities that stood in stark contrast to the beliefs that historically underlay either the exclusionary model, the charity model, or the rehabilitation/support model of disability.

First, HEW attorneys did not believe people with disabilities should be seen as objects of pity, charity, or rehabilitation. At bottom, these attorneys did not believe people with disabilities were so radically *different* from any other group in society.[54] Presumably, these attorneys assumed people with disabilities included the same range of people with strong abilities and weak abilities as any other group of people. Thus, they believed people with disabilities deserved the same right to participate in the mainstream of society, and the same respect, as did any other individual in society.

Second, these attorneys assumed many people with disabilities were *better able to function* in society, including in the employment arena, than was often presumed by members of society, including employers. It was not that people with disabilities did not have physical or mental impairments. Rather, it is that such impairments did not always or necessarily impair individuals to such an extent that engaging in work would be impossible and that receiving disability cash supports would be the only alternative. Under this view, it was myths, fears, and stereotypes about people with disabilities that often hampered such individuals' involvement and advancement in society, not the objective reality of any impact their physical or mental impairment had on their ability

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51. *See* SCOTCH, *supra* note 25, at 51-54.

52. Richard Scotch provides a detailed and engrossing description of both the politics and substance of the regulation-writing process. *Id.* at 60-81.

53. *See* Chai R. Feldblum, *The (R)evolution of Physical Disability Antidiscrimination Law: 1976-1996*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 613 (1996) [hereinafter *(R)evolution*].

54. This point would be made very clearly by the Commission on Civil Rights several years later in ACCOMMODATING THE SPECTRUM. *See* ACCOMMODATING THE SPECTRUM, *supra* note 16, at 93-94 (arguing that the handicapped-normal dichotomy is in reality a continuum in which all members of society are placed in accordance with social context); *see also* ROBERT L. BURGDORF, JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 2 (1995) (asserting that there exists a "spectrum of abilities" and not "two separate and distinct classes" made of those that are disabled and those that are not). Robert Burgdorf and Christopher Bell were the authors of ACCOMMODATING THE SPECTRUM on behalf of the U.S. Commission on Civil Rights. Both would go on to play major roles in the development of the ADA.

to function, perform, or contribute to society.

Finally, the attorneys writing the Section 504 HEW regulations recognized that actual limitations that flow from an individual's physical or mental impairment often result from the manner in which society itself is structured, and are not inherently derivative of the impairment itself. For example, people who use wheelchairs will be more limited in their ability to advance in employment, or to use goods or services, if society builds most of its buildings with steps rather than ramps. People with slight hearing impairments will be more limited in employment and the enjoyment of goods and services if telephones are manufactured without built-in amplifiers. This limitation in employment and enjoyment of services flows not simply from such individuals' physical inability to climb stairs or hear clearly, but rather, flows from the interaction between the physical limitations of such individuals and society's choices regarding architectural and device design.[55] As a result of this understanding, the attorneys developing the Section 504 regulations created an obligation on recipients of federal funds to affirmatively change some of the limitations created by society itself.[56]

One of the many issues addressed by the attorneys drafting the HEW regulations was the definition of "handicap." It became apparent to them that the definition included in the various vocational rehabilitation acts was too narrow for the civil rights purposes of Section 504. As noted above, the 1973 Rehabilitation Act defined a handicapped individual as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . . ."[57] While this definition makes sense as a means of identifying those individuals who are eligible to participate in *vocational rehabilitation* programs, it was a completely inadequate definition for purposes of establishing coverage of individuals under a *civil rights* statute. For example, this definition would exclude a wide range of individuals who experienced discrimination based on some physical or mental impairment that did not constitute, as a result of any objective impact of the impairment, "a substantial handicap to employment." It would also exclude the range of individuals who experienced discrimination based on an impairment that neither needed nor would benefit from vocational rehabilitation services.

Assume, for example, that an individual has been discriminated against because of his or her diabetes, epilepsy, or cancer. None of these impairments necessarily constitute, on their own, any "substantial handicap" to employment. Rather, it is often the fact that an employer does not want to hire a person with such an impairment that

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55. *See Antidiscrimination Requirements, supra* note 9, at 36.

56. These requirements included making reasonable accommodations in employment; providing auxiliary aids and services, and modifying policies and procedures in benefit programs; and creating physical access to buildings. Each of these requirements also came with qualifications: modifications that required an undue hardship or an undue burden, or that fundamentally altered the nature of the program, were not required. *See, e.g.*, 42 Fed. Reg. 22,676 (1977) (promulgating HEW final rule); *see also* Feldblum, *Antidiscrimination Requirements*, *supra* note 9, at 45-47, 49-50; Feldblum, *(R)evolution*, *supra* note 53, at 614.

57. Pub. L. No. 93-112, § 7(6), 87 Stat. 355 (1973).

constitutes the "handicap" to employment. Moreover, none of these physical impairments are the kind that would ordinarily benefit from traditional vocational rehabilitation programs.

The HEW attorneys drafting the Section 504 regulations could have asked Congress to delete any definition of "handicapped individual" for purposes of Section 504, and to instead amend the section to prohibit discrimination against any individual with a "physical or mental impairment." Such a change would have brought Section 504 into conformity with the Civil Rights Act of 1964. After all, there is no definition of race or sex or religion in Title VII.[58] Presumably, this is because employers are expected to know what such terms mean, and are then precluded from making employment decisions *based* on such characteristics. The term "physical or mental impairment" could have been as easily understandable as the terms "religion" or "race" or "sex."

If Section 504 had been amended to prohibit discrimination based on physical or mental impairment, almost any person would have been able to invoke the protection of the law. (Most people presumably have some physical or mental impairment, albeit perhaps a minor one.) The limiting factor in Section 504 would then have been the same limiting factor that exists in Title VII: although every person has a race or a sex or a religion (or a non-religion), and thus every person is covered under Title VII, no person may successfully invoke Title VII unless he or she is able to prove the discriminatory action occurred *because of* the particular characteristic covered by the law.[59] The same limiting factor of proving causation would have applied in Section 504 litigation.

An argument can certainly be made that not every person with a physical or mental impairment experiences discrimination. People who wear eyeglasses, or have a sore throat, or have calluses on their feet do not ordinarily experience discrimination in the workplace or in society generally. But neither do most white people, or most men, or most heterosexuals experience discrimination on the basis of their race, gender, or sexual orientation. Nevertheless, as a society, we have not passed laws that prohibit discrimination *solely* against those individuals whose race, or gender, or sexual orientation have historically been the object of stigma and discrimination. Rather, our civil rights laws prohibit the use of a *characteristic* that the legislature has decided should ordinarily be irrelevant in decision-making. Once that characteristic has been identified, no decision may be made on that basis (unless otherwise justified by the law) regardless of who possesses that characteristic.

The same approach could have been used with regard to physical and mental impairment. Imagine that everyone in society is on a spectrum of impairments: at the left side of the spectrum are people with calluses on their feet; in the section close to that end are people who wear glasses or have high blood pressure; further along in the spectrum are people with cancer or epilepsy or diabetes or HIV infection, and at the right end of the spectrum are people who are blind, deaf, or use wheelchairs. The

58. *See* 42 U.S.C. § 2000e (1994) (definitions under Title VII).

59. *See id.* at § 2000e-2(a), (m) (prohibited discrimination under Title VII).

traditional view is that people at the right end of the spectrum are "disabled," with the concomitant societal view that such individuals are distinctly *different* from everyone else in society and are less likely to be able to function in the workplace and in society generally.

There is no reason, however, why Congress could not have decided that the term "disability" fails to capture the true range of individuals in our society, because all people actually lie along a spectrum of impairments, some more limiting than others. A possible legislative determination in a civil rights law could then have been that no impairment, whether mildly limiting or severely limiting, should be the basis for decision-making in employment or society generally, except when such an impairment makes an individual unqualified for a job or ineligible for a service.

It is true that the impetus for Title VII was the discrimination faced primarily by African-Americans and women, not discrimination faced by men or white people. Similarly, the impetus for Section 504 was the discrimination faced by individuals with impairments in the middle to right end of the spectrum, not individuals with very mild impairments on the left side of the spectrum. Nevertheless, the actual coverage of Title VII is extended to a *characteristic* (race, gender, national origin) that the legislature has decided should ordinarily be removed from the decision-making process. The analogous approach with regard to Section 504 would have been a prohibition of discrimination based on a physical or mental impairment.[60]

While changing the scope of Section 504 to prohibit discrimination based on any physical or mental impairment might have been the cleanest legal approach, the HEW lawyers and other disability rights advocates at the time must have believed such an approach would have seemed too radical. Such attorneys were primarily seeking to extend anti-discrimination protection to individuals in the middle to right end of the spectrum who traditionally faced discrimination. So these lawyers developed a three-part definition of "handicapped individual" they believed would capture this range of individuals. The definition these lawyers recommended that Congress adopt starts us down our path of the definition of disability under federal anti-discrimination law.

III.
COVERAGE OF PEOPLE WITH DISABILITIES UNDER FEDERAL ANTI-DISCRIMINATION LAW: THE 1970S AND 1980S.

A. The 1974 Rehabilitation Act Amendments and Implementing Regulations

One year after Congress passed the Rehabilitation Act of 1973, it took up a series of amendments to that Act.[61] In a section entitled "Technical and Clarifying Changes," the Report of the Senate Labor and Public Welfare Committee addressed the problem that had been identified by the HEW lawyers with regard to the definition of

60. The same analysis would not have been true for the affirmative action components of Sections 501 and 503. Those provisions could logically be restricted to individuals whose impairments have traditionally precluded them from employment opportunities.

61. The Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617.

"handicapped individual."[62] The Report noted that the existing definition of handicapped individual "has proven to be troublesome in its application to provisions of the Act such as sections 503 and 504 because of its orientation toward employment and its relation to vocational rehabilitation services."[63] As the Report observed:

> It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individual" in those sections was not to be narrowly limited to employment (in the case of section 504), nor to the individual's potential benefit from vocational rehabilitation services under titles I and III (in the case of both sections 503 and 504) of the Act.[64]

In amending the Rehabilitation Act, Congress did not repeal the existing definition of handicapped individual. Rather, Congress simply added a new definition designed to apply solely to Titles IV and V of the Act, which included sections 501, 503, and 504. Thus, the 1974 Act amended the definitions section of the Rehabilitation Act to read as follows:

> (A) *Except as otherwise provided in subparagraph (B)*, the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . . .
>
> (B) *For purposes of Titles IV and V of this Act*, the term "handicapped individual" means any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.[65]

The Senate Report devoted only a few paragraphs to explaining how this definition was to be applied. The new definition was truly presented as a technical change, with little explication. But armed with this new definition of "handicapped individual" for purposes of sections 501, 503, and 504 of the Rehabilitation Act, the governmental agencies with implementation authority for those sections (the EEOC, the Department of Labor, and HEW, respectively) proceeded to develop guidance for the definition of "handicapped individual" in their regulations. The regulations issued by HEW in 1977 received the most attention, and indeed, formed the basis of coordination regulations issued by the Department of Justice several years later for use by all federal agencies.[66]

The HEW regulations first defined a physical or mental impairment broadly:

> Physical or mental impairment means—

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62. S. R. No. 93-1297, 93rd Cong., 2nd Sess., *reprinted at* 1974 U.S.C.C.A.N. 6373, 6388.

63. *Id.*

64. *Id.*

65. H.R. 17503, 93rd Cong. 2nd Sess. (1974) (codified as amended at 29 U.S.C. § 706(8) (1998)) (emphasis added).

66. In 1978, Congress amended Section 504 of the Rehabilitation Act to bring within that section's anti-discrimination mandate any "program or activity conducted by any Executive agency." Pub. L. No. 95-602, sec. 119, 92 Stat. 2955, 2982 (1978). The Department of Justice (DOJ) was given authority in 1980 to issue coordination regulations for all other federal agencies. *See* Exec. Order 12,250, Nov. 2, 1980, *reprinted at* 28 C.F.R. pt. 41, App. A.

> (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin and endocrine;
>
> (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[67]

In an Appendix to the regulations, HEW noted it had not "set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list."[68] The agency did, however, offer examples of conditions that would be covered as impairments, including: "orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug and alcohol addiction."[69]

Under the new statutory definition, a physical or mental impairment had to "'substantially limit' one or more major life activities" in order to qualify as a handicap. Based on its assessment that a precise definition of "substantially limits" would not be possible, HEW chose not to define the term and to rely instead on a common-sense interpretation.[70] The agency also chose not to define "major life activities." Instead, it set forth an illustrative list of major life activities: "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[71] The agency stressed that the term "major life activities" included, but was not limited to, these illustrative functions.[72]

The HEW regulations explicitly assumed the new definition of "handicapped individual" would cover individuals beyond those with "traditional handicaps." Indeed, in response to commentators to the proposed regulations, who argued HEW should have limited the definition of handicap to more traditional and serious impairments, the agency responded: "The Department continues to believe . . . that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps."[73]

The broad definition of handicap reflected in HEW's regulations and guidance was consistent with the beliefs regarding people with disabilities held by the attorneys drafting those regulations. The qualifying phrase in the statute, "substantially limits a major life activity," was thus understood by these attorneys as simply precluding coverage of very minor impairments such as infected fingers or the common cold. That is, people whose impairments lay at the far left of the spectrum would not be

67. 45 C.F.R. § 84.3(j)(2)(i).
68. 45 C.F.R. pt. 84, App. A at 334.
69. *Id.*
70. 45 C.F.R. § 84(3)(j).
71. 45 C.F.R. § 84.3(j)(2)(ii).
72. *Id.*
73. 45 C.F.R. pt. 84, App. A. at 352.

covered under the first prong of the new definition. By contrast, any mental or physical impairment that affected an individual's life in any significant way was understood to be covered under the new definition.

Although the HEW regulations received the most attention at the time of their issuance, the regulations issued by the Department of Labor to implement Section 503 for federal contractors, and to implement Section 504 for entities receiving federal funds through the Department of Labor,[74] deserve special attention for purposes of this paper. In both those regulations, the Department of Labor imported into the definition of handicap the assumption that, for an impairment to meet the statutory definition of substantially limiting a major life activity, the impairment would necessarily affect the person's ability to *work*.

Thus, the DOL regulations implementing Section 503 defined a "handicapped individual" as follows:

> "Handicapped individual" means any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. *For purposes of this part, a handicapped individual is "substantially limited" if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a handicap.*[75]

In an Appendix to the regulations, the agency noted that "life activities" could include "communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing etc."[76] However, the agency added that "[f]or the purpose of [S]ection 503 of the Act, primary attention is given to those life activities that affect employability."[77]

The agency's additional guidance on "substantially limits" again emphasized the effect a physical or mental impairment would have on an individual's capacity to work:

> The phrase "substantially limits" means the degree that the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing, retaining, or advancing in employment would be considered substantially limited.[78]

DOL's regulations implementing Section 504 followed more closely the format used by HEW in its regulations. Thus, for example, the agency used HEW's definition of "physical or mental impairment," and included HEW's illustrative list of such impairments.[79] Unlike HEW, however, the agency again provided a definition of "substantially limits" that focused, in part, on the impact of an individual's impairment

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74. 43 Fed. Reg. 49,240 (1978), *codified at* 41 C.F.R. pt. 60-741 (1998). The regulations issued by the EEOC to implement Section 501 were essentially identical to those issued by HEW with regard to the definition of "handicap." *Id.*

75. *Id.* at 49,276, *codified at* 41 C.F.R. § 60-741.2 (1997) (emphasis added).

76. *Id.* at 49,282, *codified at* 41 C.F.R. § 60-741.2(p) (1997).

77. *Id.*

78. *Id.* This guidance has since been amplified and codified at 41 C.F.R. § 60-741.2(q) (1997).

79. 45 Fed. Reg. 66,709-10, *codified at* 29 C.F.R. § 32.3 (1998).

on that person's employability:

> *Substantially limits* means the degree that the impairment affects an individual becoming a beneficiary of a program or activity receiving Federal financial assistance or affects an individual's employability. A handicapped individual who is likely to experience difficulty in . . . securing, or retaining, or advancing in employment would be considered substantially limited.[80]

The assumption on the part of the Department of Labor that an individual's impairment should limit his or her ability to work, or should make such an individual a beneficiary of federal programs, in order for that individual to meet the statutory definition of "substantially limits a major life activity" might have made sense for purposes of Section 503, which requires federal contractors to engage in *affirmative action* in hiring persons with handicaps.[81] But the Department of Labor never explained why this assumption should be imported into the *non-discrimination* component of Section 503,[82] or into the non-discrimination provision of Section 504. It appears as if the drafters of the DOL regulations held a different concept of disability than did the drafters of the HEW regulations. The DOL's view was more consonant with an earlier view of disability, which assumed people with disabilities were more likely to become beneficiaries of governmental programs or were more likely to be unable to function effectively in the workplace than their non-disabled counterparts. While people with severe disabilities may experience such effects, the view of disability reflected in DOL's regulations was clearly more constricted than the view expressed in HEW's regulations.

B. Early Case Law Under the Rehabilitation Act

With the issuance by HEW in 1977 of the regulations implementing Section 504, cases challenging discrimination against handicapped individuals began to be brought across the country against entities that received federal financial assistance. A striking feature of these cases, particularly when contrasted with cases brought under the ADA, is that courts rarely analyzed whether the plaintiff in the case was, indeed, a "handicapped individual." Just as courts hearing employment discrimination cases under Title VII never analyzed whether the plaintiff in a case was "really a woman," or "really black," courts hearing Section 504 cases rarely tarried long on the question of whether a plaintiff was "really a handicapped individual." Rather, as with Title VII cases, courts hearing Section 504 cases tended to focus on the essential causation requirement: i.e., had the plaintiff proven the alleged discriminatory action was taken solely *because of* his or her handicap.[83]

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80. *Id.* at 66,710, *codified at* 29 C.F.R. § 32.3 (1998).

81. *See* 43 Fed. Reg. 49,277, *codified at* 41 C.F.R. § 60-741.4(a) (1998).

82. Moreover, as noted, the EEOC's regulations implementing Section 501, which also includes an affirmative action component, did not include the same focus on the impairment's effect on an individual's employability.

83. *See, e.g.*, Ross v. Beaumont Hosp., 687 F. Supp. 1115, 1118-19 (E.D. Mich. 1988) (finding that adverse action suffered by the employee was not solely based on handicap); Bailey v. Tisch, 683 F. Supp. 652, 657-58 (S.D. Ohio 1988) (same); Anderson v. University of Wis., 665 F. Supp. 1372, 1391-92 (W.D. Wis. 1987) (finding that denial of readmittance to law school was not based on plaintiff's disability); Nisperos v. Buck, 720 F. Supp. 1424, 1427,

A second focus for courts in Section 504 cases, which was different from courts hearing most Title VII cases, was whether the plaintiff was qualified or eligible for the job or benefit in question, despite his or her handicap.[84] These cases arose when there was no dispute that the adverse action had been taken *because* of a plaintiff's handicap, but the contested question was whether the adverse action was, nonetheless, justified. Again, in these cases, the courts rarely spent any time or effort determining whether the plaintiff was "really a handicapped individual." Instead, the courts moved directly to the question of whether the plaintiff was qualified.[85]

Thus, individuals with a wide range of physical or mental impairments—impairments that were not so severe that they limited the individuals' ability to work or otherwise function in daily life—were allowed to proceed with claims under Section 504.[86] As a district court noted in 1984, "[v]ery few cases spend much time on the issue [of who is a handicapped individual], as the issue usually requires little analysis."[87]

1432-33 (N.D. Cal. 1989) (finding that adverse action suffered by the employee *was* based on his disability). The analog in Title VII cases would have been whether the adverse action was taken *because of* race, color, religion, sex, or national origin.

84. Although there is a "bona fide occupational qualification" (BFOQ) allowance in Title VII, see 42 U.S.C. § 2000e-2(e), employers rarely acknowledge they have taken sex, religion, or national origin into account on the grounds that the characteristic is a necessary BFOQ. *See* BARBARA LINDEMANN AND PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 253-55, 382-83, 393-416 (3d. ed. 1996).

85. *See, e.g.*, Daubert v. U.S.P.S., 733 F.2d 1367, 1372 (10th Cir. 1984) (holding that plaintiff was not "otherwise qualified" for his job); Doe v. New York Univ., 666 F.2d 761, 765 (2nd Cir. 1981) (holding plaintiff was not "otherwise qualified" to attend medical school); Pushkin v. Regents of the Univ of Colo., 658 F.2d 1372, 1391 (10th Cir. 1981) (discussing and upholding trial court's rejection of testimony that plaintiff was not "otherwise qualified" for his job); Doherty v. Southern College of Optometry, 659 F. Supp. 662, 670 (W.D. Tenn. 1987) (not "otherwise qualified"); *Nisperos,* 720 F. Supp. at 1428-29 (finding that plaintiff was "otherwise qualified" for his job); Wolff v. South Colonie Cent. Sch. Dist., 534 F. Supp. 758, 762 (N.D.N.Y. 1982) (not "otherwise qualified").

86. Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) (birth defects); Cushing v. Moore, 970 F.2d 1103 (2d Cir. 1992) (drug addiction); McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992) (sterility); Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991) (Parkinson's disease); Fuller v. Frank, 916 F.2d 558 (9th Cir. 1990) (alcoholism); Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) (epilepsy); Coley v. Secretary of Army, 689 F. Supp. 519 (D. Md. 1987) (osteoarthritis in hip); Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985) (manic depressive syndrome); Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402 (5th Cir. 1983) (depressive neurosis); Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983) (learning disability); Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982) (diabetes); *Pushkin,* 658 F.2d 1372 (multiple sclerosis); Prewitt v. U.S.P.S., 662 F.2d 292 (5th Cir. 1981) (limited mobility of arm and shoulder); Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980) (Crohn's disease); New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979) (hepatitis B carrier); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) (vision in only one eye); *Bailey,* 683 F.Supp. 652 (heart disease); Bolthouse v. Continental Wingate Co., 656 F. Supp. 620 (W.D. Mich. 1987) (cerebral palsy and schizophrenia); *Doherty,* 659 F. Supp. at 679 (retinitis pigmentosa); Ackerman v. Western Elec. Co., 643 F. Supp. 836 (N.D. Cal. 1986) (asthma); Dancy v. Kline, 639 F. Supp. 1076 (N.D. Ill. 1986) (chronic lower back syndrome with disc disease); Fynes v. Weinberger, 677 F. Supp. 315 (E.D. Pa. 1985) (asbestosis); *Daubert,* 733 F.2d 1367 (degenerative spinal condition); *Wolff,* 534 F. Supp. 758 (congenital limb deficiency); Strathie v. Department of Transp., 547 F. Supp. 1367 (E.D. Pa. 1982) (impaired hearing and use of hearing aids); Ward v. Mass. Bay Transp. Auth., 550 F. Supp. 1310 (D. Mass. 1982) (artificial leg); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980) (absence of kidney); *Ross,* 687 F. Supp. 1115 (narcolepsy). These case examples are taken from BURGDORF, *supra* note 54, at 137-140.

87. Tudyman v. United Airlines, 608 F. Supp. 739, 744 (C.D. Cal. 1984). In support of this proposition, the *Tudyman* court cited the following cases: Longoria v. Harris, 554 F. Supp 102 (S.D. Tex. 1982) (amputee); Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418 (E.D. Pa. 1982) (football player with kidney removed); Vickers v.

Although it was rare for a court hearing a handicap discrimination case to question whether the plaintiff was "really handicapped," there were a few cases in the 1980s where such questions did arise. These cases tended to fall into two categories. The first were cases in which courts concluded that plaintiffs did not have a real *impairment,* but rather simply had an unusual physical characteristic. Thus, for example, in *de la Torres v. Bolger,*[88] the court concluded left-handedness was "a physical characteristic, not a chronic illness, a disorder or deformity"; in *Tudyman v. United Airlines,*[89] the court concluded muscular build was not an impairment; and in *Steven v. Stubbs,*[90] the court concluded transitory illnesses with no permanent effect on the plaintiff's health was not an impairment.[91]

The second type of case in which a plaintiff's coverage under the law was questioned or denied were those in which courts focused on whether a plaintiff's impairment affected his or her ability to *work.* While these cases were the exception rather than the rule in Rehabilitation Act cases, it is useful to review these cases in some detail in light of the importance this approach would take in judicial interpretations of disability under the ADA.

The leading case in this area is *E.E. Black, Ltd. v. Marshall,*[92] a case brought under Section 503 of the Rehabilitation Act. Individuals did not have a private right of action under Section 503 at that time, and thus this case arose out of a charge filed with the State of Hawaii Department of Labor and referred to the U.S. Department of Labor.[93] George Crosby, the claimant, was denied employment by a general construction contractor after a pre-employment physical examination revealed he had a congenital back anomaly. The contractor's physician informed E.E. Black, Ltd., the prospective employer, that Crosby was a poor risk for heavy labor and Crosby was not hired.[94] Crosby filed a complaint which was referred to DOL.

Crosby's complaint was investigated by DOL's Office of Federal Contract Compliance Programs (OFCCP). OFCCP concluded E.E. Black had violated Section 503 and it issued an administrative complaint against the company. The complaint was heard by an Administrative Law Judge (ALJ) who ruled that DOL had proven Crosby was perceived to have an impairment and that he had experienced difficulty in obtaining employment because of that perception. However, the ALJ ruled the Department had not proven that "the perceived impairment substantially limited a

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Veterans Admin., 549 F. Supp 85 (W.D. Wash. 1982) (tobacco smoke-sensitive employee); Bey v. Bolger, 540 F. Supp 910 (E.D. Pa. 1982) (hypertensive cardiovascular disease). Of course, each of the impairments at issue in those cases would now be subject to searching analysis under the ADA line of cases. Indeed, the analysis subsequently engaged in by the *Tudyman* court would help support this future trend. *See infra* note 108.

88. 781 F.2d 1134, 1138 (5th Cir. 1986).

89. 608 F. Supp. at 746.

90. 576 F. Supp. 1409, 1414 (N.D. Ga. 1983).

91. These courts also all rejected arguments that the plaintiffs were covered under the "regarded as" prong of the definition of handicapped individual. These cases were decided prior to the Supreme Court's opinion in *School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987), in which the Court provided further guidance regarding that prong of the definition. *See infra* notes 132-38 and accompanying text.

92. 497 F. Supp. 1088 (D. Haw. 1980).

93. *Id.* at 1092.

94. *Id.* at 1091-92.

major life activity of Mr. Crosby—in this case, employment," and hence the ALJ concluded Crosby was not a "handicapped individual" protected under Section 503.[95] According to the ALJ, Congress was not attempting to protect people with just any impairment, but "merely the most disabling."[96]

The OFCCP filed exceptions to the ALJ's order with the Assistant Secretary of Labor, Donald Elisburg. Elisburg reversed the ALJ's order, finding that Crosby was a "handicapped individual" under the law. Taking a more expansive view of the statutory phrase "substantially limits one or more . . . major life activities," the Assistant Secretary explained that:

> [Protection] under the Act is extended to every individual with an impairment which is a current bar to employment which the individual is currently capable of performing . . . . It is sufficient that the impairment is a current bar to the employment of one's choice with a federal contractor which the individual is currently capable of performing.[97]

E.E. Black filed for judicial review of the Assistant Secretary's decision, arguing (among other things) that the Assistant Secretary had adopted an incorrect standard for determining when an impairment substantially limits a major life activity. In beginning his analysis of this claim, the district court judge stated the following:

> As noted, 29 U.S.C. § 706(7) partially defines a handicapped individual as one who "has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment . . . ." That section also provides that a handicapped individual is one who has a "physical or mental impairment which substantially limits one or more of such person's major life activities . . . ." 41 C.F.R. § 60-741.2 provides that "a handicapped individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a handicap.[98]

Of course, as the discussion above will have alerted any careful reader of statutory text, the first definition of handicapped individual that the district court quotes does not even apply to individuals charging discrimination under Section 503.[99] Nevertheless, perhaps one can understand the judge's confusion in light of the fact that DOL's regulation implementing Section 503 had itself imported an analysis of limitations in employability into the statutory language of "substantially limits a major life activity"[100]—language that (ironically) had been formulated by Congress

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95. *Id.* at 1093 (citing U.S. Dep't of Labor v. E.E. Black, Ltd., No. 77-OFCCP-7R (U.S. Dep't of Labor, Sept. 13, 1978)).

96. *Id.*

97. *Id.* at 1094 (quoting U.S. Dep't. of Labor v. E.E. Black, Ltd., No. 77-OFCCP-7R (U.S. Dep't of Labor, Feb. 26, 1979)). The Assistant Secretary also found that Crosby was a qualified handicapped individual, because he was capable of performing the job he was seeking. *Id.* at 1096. The Assistant Secretary ordered Black to offer Crosby a job as an apprentice carpenter and to stop using "non-job related physical qualifications" to screen out qualified handicapped individuals. *Id.*

98. *Id.* at 1099.

99. One of the first, and most significant, lessons taught to any reader of legislative text is *never* to gloss over initial phrases such as "*Except as provided for in subsection (b).*" The district court judge in the *E.E. Black* case, however, seemed to have missed precisely that phrase.

100. 41 C.F.R. § 60-741.2.

specifically to create a *second* definition of "handicapped individual" for Sections 501, 503, and 504 that would be distinct from the first definition.

In any event, the district court judge in *E.E. Black* essentially split the difference between the ALJ and the Assistant Secretary. He characterized the Assistant Secretary's approach as too extreme, noting that such an approach would "include within the coverage of the Act any individual who is capable of performing a particular job, and is rejected for that particular job because of a real or perceived physical or mental impairment."[101] This, the court concluded, could not have been the result intended by Congress. As the court explained:

> If it were, Congress would not have used the terms *substantial* handicap or *substantially* limits—they would have said "any handicap to employment" or "in any way limits one or more of such person's major life activities." The Assistant Secretary's definition ignores the word substantial. Such a definition contravenes the statutory language and is therefore invalid.[102]

Of course, as noted above, the term "employment" is used in the statute only as part of the *first* definition of "handicapped individual," which does not apply to Section 503. With regard to the statutory term that does apply to Section 503 ("substantially limits"), the HEW regulations *had,* indeed, interpreted that requirement to mean essentially "in any way limits" one or more of such person's major life activities—the alternative rejected by the district court. But since the court was applying DOL's Section 503 regulations, not HEW's Section 504 regulations, the effect of the individual's impairment on that person's ability to advance in employment took front and center stage in the court's analysis.

The court also rejected the ALJ's definition of "substantially limits a major life activity" as too restrictive. This approach, according to the court, would "drastically reduce the coverage of the Act" by excluding any person whose impairment was unlikely "'to affect his employability *generally.*'"[103] As the court explained:

> A person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities. The definitions contained in the Act are personal and must be evaluated by looking at the particular individual. A handicapped individual is one who "has a physical or mental disability which for *such individual constitutes or results in a substantial limitation to employment* . . . ." It is the impaired individual that must be examined, not just the impairment in the abstract.[104]

What a lovely piece of statutory interpretation. Unfortunately, as noted above, the judge is interpreting a definition which, by the explicit terms of the statute, never even applies to any individual bringing a claim under Section 503 of the Rehabilitation Act. Of equally significant import, because the judge has used the wrong statutory definition, he has also imported a concept of *individualized assessment* of the person with the impairment at the initial stage of determining whether the plaintiff is a

101. E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1099 (D. Haw. 1986).

102. *Id.* (emphasis in original).

103. *Id.* (citing ALJ's language).

104. *Id.* (emphasis added).

"handicapped individual" under the statute. Such an individualized assessment, at that stage of the case, was completely foreign to most Section 504 cases of the time.

The fascinating point is that the type of individualized assessment required by the district court made perfect sense for the particular definition the court was applying, but *only* in the context in which such a definition was *accurately* applied as a statutory matter. To determine whether an individual is eligible to participate in a vocational rehabilitation program, it is necessary to make an individualized assessment of whether that person's impairment constitutes a substantial limitation to employment, and whether that person is likely to benefit from vocational rehabilitation. By contrast, a civil rights provision does not necessarily require a searching, individualized assessment of whether a person is really a "handicapped individual," any more than Title VII requires a searching, individualized assessment of whether a plaintiff is really a woman or an African-American.

Of course, in a law prohibiting discrimination based on handicap—in cases where there is no dispute that handicap was the basis for the action—a court must engage in an individualized assessment to determine whether taking the handicap into account was, nonetheless, justified. Thus, the second definition of "handicapped individual" in the Rehabilitation Act, which applies solely to Sections 501, 503 and 504, includes a different type of individualized assessment than that contemplated by the definition that applies to the rest of the Act. In the second definition, it is the concept of "qualified" handicapped individual that requires an individualized assessment, rather than the term "handicapped individual."

Notwithstanding the minor, technical difficulty that the court in *E.E. Black* was using the wrong statutory definition, the district court judge proceeded to lay out several factors courts should use in engaging in the "case-by-case determination of whether the impairment or perceived impairment of a rejected, qualified job seeker constitutes, for that individual, a substantial handicap to employment."[105] The important factors, according to the court, would be the number and types of jobs from which the impaired individual would be disqualified and the geographical area to which the individual reasonably would have access.

Crosby himself fared well under the court's analysis. The judge decided that, "in evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process."[106] The judge noted that Crosby had been disqualified from all of E.E. Black's apprentice carpenter positions because of the heavy lifting involved. "Had all firms offering similar positions involving heavy lifting used the same criteria as Black, Mr. Crosby would have been disqualified from all such jobs."[107] Hence, Crosby was clearly "substantially limited in his goal of becoming a journeyman" (which required 8,000 hours in the field).[108]

105. *Id.* at 1100.
106. *Id.*
107. *Id.* at 1102.
108. *Id.*

While the mistaken approach in *E.E. Black* never became the norm in cases brought under Sections 501, 503, and 504, a few courts—notably the courts in *Jasany v. United States Postal Service*[109] and *Forrisi v. Bowen*[110]—subsequently relied on the *E.E. Black* analysis to rule that plaintiffs were not covered as "handicapped individuals" under Section 501 or 504 of the Rehabilitation Act. These cases created a small body of precedent that, many years later, judges in ADA cases would turn to in rejuvenating an approach that would focus on an individual's ability to work in deciding whether an individual had a "disability" for purposes of the ADA.

A prime example of the impact of *E.E. Black* was the Fourth Circuit's opinion in *Forrisi v. Bowen.*[111] Forrisi had been hired as a utility systems repairer and operator by a government agency. The job required the occupant to climb stairways and ladders during emergencies and for routine maintenance. Forrisi told his supervisor that his acrophobia precluded him from climbing to certain heights, but that he could still do the job if his employer made some adjustments to accommodate his fears. Instead, the government agency terminated Forrisi because he was "'medically unable to perform the full range of the duties of [his] position.'"[112]

Quoting *E.E. Black*, the court of appeals noted that:

> The question of who is a handicapped person under the Act is best suited to a "case-by-case determination," . . . as courts assess the effects of various impairments upon varied individuals . . . . The inquiry is, of necessity, an individualized one—*whether the particular impairment constitutes for the particular person a significant barrier to employment.* Relevant to the inquiry are "the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training."[113]

Note how the Fourth Circuit uses the phrase "whether the particular impairment constitutes for the particular person a significant barrier to employment" with no apparent awareness that this qualifying requirement is part of the *first* definition of

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109. 755 F.2d 1244 (6th Cir. 1985). The Sixth Circuit addressed the case of a person with a mild case of strabismus (crossed eyes), who contended the only job he could not do because of his impairment was to operate the particular machine at the post office he had been hired to operate. Again, in praise of *E.E. Black*, the court of appeals noted that the court in that case "carefully considered the definition of a handicapped individual in 29 U.S.C. § 706(7)," and concluded that "an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not *substantially* limiting within the meaning of the statute." *Id.* at 1248. Interestingly enough, the court of appeals correctly observed that the *E.E. Black* court had analyzed the *second* definition of handicapped individual (subsection (B)(i)) in conjunction with the *first* definition (subsection (A)). *Id.* at 1248 n.2 (emphasis in original). The problematic aspect of that analysis, however, was not commented upon by the Sixth Circuit. Instead, the court noted that "*Black* represents the most comprehensive examination by a court to date of the §706(7) definition of 'handicapped.'" *Id.* at 1249.

110. 794 F.2d 931 (4th Cir. 1986); *see also* Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984), holding that muscular build was not an impairment. The Court in *Tudyman* went on to hold, however, that the plaintiff was not a handicapped individual under Section 504 because "[a] person who exceeded the maximum weight for a United flight attendant because he is an avid body builder is not limited in a major life activity—he is only prevented from having a single job." *Id.* at 746.

111. 794 F.2d 931 (4th Cir. 1986).

112. *Id.* at 933.

113. *Id.* (quoting *Jasany*) (emphasis added).

handicapped individual, which by the explicit terms of the statute, is not intended to apply to any individual bringing a claim under Section 501. Moreover, unlike the DOL regulations, the EEOC regulations implementing Section 501 had never imported a requirement that an individual's impairment must adversely affect his or her employability to satisfy the "substantially limits a major life activity" component of the *second* definition. Nevertheless, the combination of DOL's importation of such a requirement into its Section 503 regulations, and the *E.E. Black* court's sloppy textual analysis of the definition of handicapped individual managed to create a few rulings under both Sections 501 and 504 that focused the key inquiry for coverage on an individualized assessment of whether an impairment affects an individual's ability to *work* generally.

Despite this line of cases, most claims brought under Section 504 were not subject to searching inquiries regarding the person's coverage as a "handicapped individual," and very few cases focused on whether the person's impairment constituted, for him or her, a substantial barrier to employment.[114] Indeed, the only other time the words of the definition of "handicapped individual"—a "physical or mental impairment that substantially limits one or more major life activities"—were subject to searching analysis under Section 504 was in the context of government attorneys considering whether people with AIDS and asymptomatic HIV infection were handicapped individuals under the law. The analysis engaged in by such attorneys could have been a warning shot to advocates about the problems inherent in the definition of "handicapped individual." Instead, agency and Congressional actions regarding coverage of people with AIDS and HIV infection ultimately served only to reinforce the false sense of security that surrounded the definition of handicap.

C. Coverage of AIDS and HIV Infection

In most of the early cases that raised claims of discrimination based on AIDS or HIV status, the courts accepted, with very little (or no) analysis, the claim that the plaintiffs were individuals with a "handicap" for purposes of Section 504 coverage.[115] In this regard, plaintiffs with AIDS and HIV infection were treated similarly to plaintiffs in other Section 504 cases. As noted above, in those cases, the focus was on whether discrimination had occurred *because* of the plaintiff's handicap, and if so, whether the discrimination was nevertheless justified. In most cases dealing with AIDS/HIV there was rarely a dispute between the parties as to whether the adverse action had occurred because of the plaintiffs' medical condition. Rather, the contested point was whether that adverse action was *justified* because of safety or some other asserted concern. On this issue, some plaintiffs won[116] and some lost.[117] It was a rare

114. A Westlaw online search revealed that from 1980 to 1989, 930 cases were filed under Section 504 of the Rehabilitation Act. Only 22 of those cases cited *E.E. Black*.

115. *See, e.g.*, Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376, 381-82 (C.D. Cal. 1987) (concluding summarily that HIV is covered, citing Rehabilitation Act regulations and New York precedent); Local 1812, Am. Fed'n of Govt. Employees v. U.S. Dept. of State, 662 F. Supp. 50, 54 (D.D.C. 1987) (finding, with no analysis, that HIV is covered and focusing instead on whether HIV-infected employees were "otherwise qualified.").

116. *See, e.g., Thomas*, 662 F. Supp. at 382 (enjoining school district from excluding boy with HIV); Ray v.

case, however, for a court even to focus on whether the plaintiff was HIV-infected, had AIDS-Related-Complex (ARC), or had AIDS.[118]

The first time an extensive parsing of the definition of "handicapped individual" occurred with regard to people with AIDS and HIV infection was in March 1986, when Ronald E. Robertson, the General Counsel of the Department of Health and Human Services (HHS), asked DOJ for a legal ruling concerning coverage under Section 504 of people with had AIDS or ARC, or of people who tested positive for AIDS antibodies. As Robertson noted in his letter to DOJ, the Office of Civil Rights at HHS had "received complaints in which workers employed in hospitals or clinics allege that they have been discriminated against by their employers because they fall within or are regarded as falling within these categories."[119]

DOJ's response to HHS was delivered officially as a memorandum from Assistant Attorney General Charles J. Cooper on June 25, 1986, and became known as the "Cooper Opinion." The opinion itself was written by Gary Lawson, an attorney in DOJ's Office of Legal Counsel.[120] In answering the question posed by HHS, Lawson—a lawyer who believed in strict textual analysis—focused on the statutory definition of "handicapped individual" in a more searching manner than almost any court considering a Section 504 claim had previously done. Indeed, the Cooper Opinion itself observed that "[i]n most section 504 cases . . . the defendant usually concedes that the plaintiff is handicapped and was treated differently for that reason, but defends his action on the ground that he had good reason to single out the plaintiff for different treatment. . . ."[121]

The Cooper Opinion concluded that AIDS is a "physiological disorder or condition" affecting the "hemic and lymphatic" systems—and therefore is an impairment. The opinion also concluded that this impairment "substantially limits the major life activity of resisting disabling and ultimately fatal diseases," and hence that AIDS is a handicap for purposes of Section 504.[122]

School Dist. of De Soto County, 666 F. Supp. 1524, 1538 (M.D. Fla. 1987) (enjoining school district from excluding children with HIV).

117. *See, e.g., Local 1812*, 662 F. Supp. at 54 (finding that, although disabled, HIV positive employees not "otherwise qualified" to work in countries where adequate healthcare unavailable); Leckelt v. Board of Com'rs of Hosp. Dist. No. 1, 909 F.2d 820, 830 (5th Cir. 1990) (finding that nurse's failure to disclose HIV status rendered him not "otherwise qualified" due to concerns of transmission to patients).

118. The human immunodeficiency virus ("HIV") was identified as the cause of AIDS in 1983. EVE K. NICHOLS, MOBILIZING AGAINST AIDS 14, 101 (1989). An antibody test to identify the presence of HIV in the blood was developed in 1983 and patented on May 28, 1985. *Id.* at 103. "AIDS-Related-Complex" is a term formerly used "to describe a variety of chronic symptoms and physical findings found in HIV-infected people whose conditions did not meet the CDC [Centers for Disease Control] case surveillance definition of AIDS." *Id.* at 321.

119. Memorandum from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to Persons with AIDS, June 25, 1986, *reprinted at* BNA Daily Labor Report No. 122, at D-1, D-1 [hereinafter Cooper Opinion"].

120. The following year, Gary Lawson served as a law clerk for Justice Antonin Scalia during the Supreme Court's 1986-87 Term, the same year I clerked for Justice Harry A. Blackmun. It is based on this relationship that I am aware Lawson authored the Cooper Memo.

121. Cooper Opinion, *supra* note 119, at D-10.

122. *Id.* at D-7. Lawson also noted that "AIDS by definition involves the presence of an opportunistic disease, such as *P. carinii* pneumonia, that frequently will entail substantial limitations on major life activities." *Id.*

The Cooper Opinion also concluded, however, that the mere "ability to transmit a disease" is not itself a handicap.[123] Starting with the hypothetical of a carrier of a disease who is himself immune to the disease, the opinion easily concluded that such a person does not have an impairment. As Lawson explained: "An immune carrier does not have a 'physical or mental impairment' because the carrier's condition—the presence within his body of the active infectious agent—has no adverse physical consequences for him."[124] The opinion then concluded that, even if such a carrier had an "impairment" and suffered some minor disabling effects as a result of that impairment, that person would still not have a "handicap" for purposes of the statute because the carrier's impairment would not *substantially limit* any major life activity. Again, as Lawson explained: "The carrier is fully capable of performing all major life activities, including those listed in the HHS regulations, i.e., 'caring for [him]self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'"[125]

Lawson also rejected the argument that an individual with such an impairment, who was discriminated against *because* of the impairment, would fall under the third prong of the definition of a "handicapped individual" as someone "regarded" as having such an impairment. Larson rejected what he termed a "bootstrapping" argument that "a condition qualifies as an impairment whenever an employer regards it as relevant to the plaintiff's job qualifications."[126] As Lawson argued: "[T]he condition must either *be* an impairment . . . or must be regarded by the employer as an impairment—i.e., the condition falsely perceived by the employer, if real, would constitute an 'impairment' and thus meet the statutory definition."[127]

The implications of the Cooper Opinion were thus as follows: a person who was HIV infected, or had AIDS or ARC, and was discriminated against because of an entity's fear of that person's communicability, was not protected under Section 504 because "communicability alone is not a handicap" and Section 504 prohibits discrimination based solely on the basis of handicap.[128] Nor was such a person protected under the third prong of the definition of handicap (the "regarded as" prong), as long as the perception of the entity was that the person might communicate an infectious disease (something which is not itself a handicap). By contrast, if as a factual matter, discrimination occurred against a person with AIDS or ARC because the entity believed the person could not participate in a program or job "as a result of the disabling effects of the disease," that person would be covered.[129] Likewise, people who were HIV infected, or even people who were HIV negative, could be covered

123. *Id.* at D-8.

124. *Id.*

125. *Id.* at D-8, D-9.

126. *Id.* at D-6.

127. *Id.*

128. Section 504 at the time provided that "no otherwise qualified handicapped individual . . . shall, *solely by reason of his handicap*, be . . . subjected to discrimination in any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (emphasis added).

129. Cooper Opinion, *supra* note 119, at D-10.

under the "regarded as" prong of the definition if the entity perceived the person as having "'no capacity to resist disease,'" rather than if the entity perceived the person as being capable of communicating a disease.[130]

Six months after the Cooper Opinion was issued, the Supreme Court heard arguments in the case of *School Board of Nassau County v. Arline*.[131] At issue in that case was whether the definition of "handicapped individual" included individuals with contagious diseases (a point contested by the school board) and whether the ability to transmit a contagious disease could ever be considered a handicap under Section 504 (a point contested by the Department of Justice relying on the Cooper Opinion).

The Supreme Court answered both questions in the affirmative. First, the Court found nothing in the statutory definition of "handicapped individual" to indicate that contagious diseases were intended to be excluded. Then, with a mere four sentences of analysis, the Court concluded that Gene Arline, the respondent in the case who had been fired from her job as a schoolteacher in 1979 because she had several relapses of tuberculosis, was a "handicapped individual" under Section 504. The Court's analysis was as follows:

> According to the [physician's] testimony . . . Arline suffered tuberculosis 'in an acute form in such a degree that it affected her respiratory system,' and was hospitalized for this condition . . . . Arline thus had a physical impairment as that term is defined in the regulations, since she had a 'physiological disorder or condition . . . affecting [her] . . . respiratory [system].'. . . This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a 'record of . . . impairment' within the meaning of 29 U.S.C. Sec. 706(7)(B)(ii), and is therefore a handicapped individual.[132]

A majority of the Justices thus felt that Arline was a "handicapped individual" under Section 504 because she had a *record* of an impairment that resulted in hospitalization. Indeed, the school board's attorney conceded during oral argument that Arline's hospitalization in 1957 for tuberculosis demonstrated she had a record of an impairment,[133] and this concession was key to the Justices' decision immediately following oral argument that Arline was a "handicapped individual" under the Act. With regard to Arline's ability to claim *coverage* under Section 504, the discussion could have ended at that point. Gene Arline was a "handicapped individual" able to invoke Section 504's coverage, just like she was a woman who could claim coverage under Title VII. The next significant question should then have been whether the school board was justified in firing Arline because of her tuberculosis—a question partly presented in the second part of the case that dealt with the parameters of "otherwise qualified" under Section 504.

But in writing the opinion, Justice Brennan turned as well to petitioners'

130. *Id.* at D-10 and n. 74.

131. 480 U.S. 273 (1987).

132. *Arline*, 480 U.S. at 280-81.

133. *Id.* at 281.

argument that "Arline's record of impairment is irrelevant in this case, since the school board dismissed Arline not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others."[134] Petitioners' legal reasoning (borrowed from the Cooper Opinion) was that it had discriminated against Arline not on the basis of *handicap*, which was prohibited by section 504, but rather on the basis of *contagiousness,* a characteristic to which section 504 did not speak.

Although petitioner's claim went to the question of what was discrimination "by reason of . . . handicap," both petitioner's argument and the Court's response were phrased in terms of who is a "handicapped individual" under the law. As the Court explained:

> We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this. Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.[135]

Because the Court addressed the petitioners' claim in the context of the definition of a "handicapped individual," it turned to the *third* prong of that definition as support for its conclusion. The Court explained that "Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual," a concern evidenced by the fact that Congress had extended coverage to individuals "who are simply 'regarded as having' a physical or mental impairment."[136] The Court noted that a Senate Report provided as an example of this category a person with a visible physical impairment "'which in fact does not substantially limit that person's functioning.'"[137] As the Court explained: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the

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134. *Id.*

135. *Id.* at 282. Of course, given that the statute required proof of discrimination "because of *handicap*," and because there was no definition of "handicap" in the statute, only a definition of "handicapped individual," perhaps the Court in *Arline* was compelled to return to the definition of handicapped individual to conclude that discrimination on the basis of handicap had occurred.

136. *Id.* The general lack of attention paid by courts to the phrase "substantially limits a major life activity" can be seen in the Court's paraphrasing of the third prong of the definition. The third prong of the definition covers an individual "regarded as having *such* an impairment," which has been read in cases brought under the ADA to require that the individual be regarded as having an impairment that substantially limits some major life activity. *See, e.g.*, Nielsen v. Moroni Feed Co., 162 F.3d 604, 611 (10th Cir. 1998) (finding that plaintiff fired because he was regarded as a drug user failed in his suit because he did not establish that he had a disability that substantially limited any major life activity); Colwell v. Suffolk County Police Dept., 158 F.3d 635, 646 (2d Cir. 1998) (finding plaintiffs failed to meet threshold of showing employer regarded them not only as disabled, but as "having an impairment that substantially limited a major life activity"); Deas v. River West, 152 F.3d 471, 481-82 (5th Cir. 1998) (same). By contrast, the Court in *Arline* did not even include those terms ("substantially limits a major life activity") in its paraphrase of the third prong of the definition. Although the Court immediately noted that an impairment could substantially limit an individual's ability to work because of the reactions of others, it never clearly and explicitly placed this analysis within the statutory terms of the definition.

137. *Arline*, 480 U.S. at 282 (quoting S. Rep. No. 93-1297, at 64).

impairment."[138]

The Court did not engage at any length with the statutory definition of "handicapped individual" as a means of answering the Solicitor General's argument. Rather, the Court simply pronounced that:

> The argument [of the United States] is misplaced in this case, because the handicap here, tuberculosis, gave rise both to a physical impairment, and to contagiousness. This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.[139]

In light of the current trend in ADA cases, in which courts spend pages analyzing whether a particular "physical impairment" sufficiently qualifies as a "disability," the simplicity and breeziness with which the Supreme Court interchangeably uses the terms "physical impairment" and "handicap" in this sentence is almost breathtaking in its naivete. For example, the Court seems to assume HIV-infected individuals would be covered under the first prong of the definition if and when medical science determines their condition to be a "physical impairment." What major life activity that impairment would limit, and how those activities would be *substantially* limited, is not addressed at all by the Court.[140]

The second alternative proposed by the Court—that contagiousness on its *own* could generate coverage for the HIV-infected individual under the third prong of the definition—was indeed the basis of the latter part of its opinion with regard to Gene Arline. The Court presumed Arline met the statutory definition of being limited in a major life activity, even if the school board had discriminated against her *solely* because of fear of her contagiousness, because an individual could have an impairment which does not "diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[141]

During oral argument in *Arline*, the Solicitor General expressly rejected this type of reasoning, noting that such an approach would allow plaintiffs to make "a totally circular argument which lifts itself by its bootstraps."[142] This was the argument rejected by Larson in the Cooper Memo that "a condition qualifies as an impairment whenever an employer regards it as relevant to the plaintiff's job qualifications."[143] The Court responded that "[t]he argument is not circular, however, but direct."[144] As

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138. *Id.* at 283.

139. *Id.* (emphasis in original).

140. Of course, this approach on the part of the Court is not necessarily surprising. In light of the general, widespread practice of the time, in which courts deciding Section 504 cases did not subject plaintiffs to searching inquiries regarding whether a particular impairment substantially limited a major life activity, and given that the only life activities the clerks could probably come up with revolved around sex and procreation, the better part of discretion would have seemed to counsel for shorthand, rather than explicitness.

141. 480 U.S. at 283.

142. *Id.* at 283 n. 10 (quoting Solicitor General's comments during oral argument).

143. Cooper Opinion, *supra* n. 119, at D-6.

144. *Arline*, 480 U.S. at 283 n. 10.

the Court explained: "Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work."[145]

Viewed with the hindsight of the past seven years of judicial interpretation of the definition of disability under the ADA, the Court's opinion in *Arline* can be challenged as woefully inadequate. On one hand, the Court failed to explain its reasoning in a manner that would have forestalled some of the adverse judicial analysis under the ADA. For example, the Court could have explained why Arline's hospitalization in 1957 qualified as a record of an impairment that "substantially limited a major life activity," and in doing so, could have established broad meanings for each of those terms.[146]

In addition, while the Court set forth a broad interpretation of the third prong of the definition, it never expressly rejected the few cases under the Rehabilitation Act, such as *Jasany* and *Forrisi*, that had adopted a significantly crimped version of the third prong. In those cases, the courts had rejected the plaintiffs' reliance on the third prong of the definition, ruling that to be "regarded as" disabled, the plaintiffs were required to demonstrate that the employer regarded them as unable to work in a wide variety of jobs.[147] This was completely contrary to the fact situation in *Arline,* in which Gene Arline had been terminated from simply one job. But the Court's failure to address prior outlier Section 504 cases meant that cases such as *Jasany* and *Forrisi* came to be relied on heavily by courts deciding coverage under the third prong in ADA cases, while the Supreme Court's opinion in *Arline* on this issue was essentially ignored.[148]

On the other hand, the *Arline* opinion could also be seen as problematic because it failed adequately to warn advocates (and hence, ultimately Congress) of the possible need to rethink the use of such terms as "substantially limits" and "major life activities" if the goal was to achieve broad coverage of individuals with a range of physical or mental impairments. To the contrary, the Court's broad reading of the third prong of the definition seemed to put to rest any residual fears that might have existed among advocates in light of the *E.E. Black* line of cases. It certainly did so for this author, as was evident in my response to Bob Burgdorf's proposed new definition

145. *Id.*

146. In recent cases under the ADA, courts have rejected that hospitalization for an impairment automatically qualifies as substantially limiting a major life activity. *See infra* note 311 and accompanying text.

147. *See* Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) (holding that an employer does not necessarily regard an employee as handicapped "simply by finding the employee to be incapable of satisfying the singular demands of a particular job," but rather, must perceive the employee's impairment "to foreclose generally the type of employment involved."); *see also* Tudyman v. United Airlines, 608 F. Supp. 739, 746 (C.D. Cal. 1984). ("For the same reason that the failure to qualify for a single job does not in and of itself constitute a limitation on a major life activity, refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped individual.").

148. Of course, for the Court to have expressly rejected cases such as *Jasany* and *Forrisi* would have required two things: first, that the Court was aware of these cases, a doubtful proposition in itself; and second, assuming the Court was aware of these cases, that Justice Brennan could have continued to hold a majority for his opinion had he played out an analysis of the third prong that rejected those cases clearly.

of disability for the ADA.[149]

The Court's decision in *Arline* received publicity primarily as a statement of coverage of people with AIDS under federal anti-discrimination law and it generated a political response on that basis. While the Justices firmly believed they had deferred on the question of whether people with asymptomatic HIV infection were covered under Section 504 (and they had, in fact, done so), the opinion was a solid rejection of the Cooper Opinion that had been problematic both for people with AIDS and people with asymptomatic HIV infection. Thus, it was perhaps not surprising that three days after the Supreme Court issued its opinion in *Arline,* Senators William Armstrong and Robert Dole introduced a bill to amend the definition of "handicapped individual," for purposes of Sections 503 and 504, to exclude any individual with a "contagious disease."[150] The bill was referred to the Senate Labor and Human Resources Committee ("Labor Committee"), chaired by Senator Edward Kennedy (D-MA), which took no action on the bill.

Several months later, however, the Labor Committee began consideration of the Civil Rights Restoration Act of 1987 (CRRA), a bill designed to restore the broad meaning of "program or activity" under laws such as Section 504.[151] During consideration of the CRRA by the committee, Senator Gordon Humphrey (R-NH) offered an amendment to exclude individuals with "contagious diseases" from coverage under Section 504.[152] The goal of the amendment, which was defeated in the Committee by a vote of 2-14, was to overturn the Supreme Court's decision in *Arline*.[153]

When the full Senate began consideration of the CRRA several months later, Senator Humphrey again stood poised to offer his amendment on the Senate floor. Instead, however, Senators Humphrey and Tom Harkin, Chair of the Senate Subcommittee on Disability, reached a compromise. The two Senators jointly offered an amendment, patterned directly on a provision that had been added by the Senate a decade earlier with regard to drug addicts and alcoholics, stating that individuals with contagious diseases who posed a *direct threat* to others would not be covered under Section 504.[154] This provision was understood by advocates for people with AIDS and

149. *See supra* Section I and *infra* Section IV(A). Lest I be seen as criticizing the *Arline* decision too harshly, I should make clear that I served as a law clerk to Justice Harry A. Blackmun the year *Arline* was decided and was significantly involved in that case. My observations on *Arline* come now with the benefit of hindsight, something I clearly did not have at the time.

150. S. 673, 100th Cong., 1st Sess., 133 CONG. REC. 5,027-28 (1987).

151. *See* 133 CONG. REC. 3,744 (1987) (statement of Sen. Kennedy introducing S. 557, the Civil Rights Restoration Act of 1987). In *Grove City College v. Bell*, 465 U.S. 555 (1984), a case brought under Title IX of the Education Amendments of 1972, the Supreme Court interpreted the term "program or activity" in a severely restrictive manner. As a result, three other laws that used the identical term of "program or activity," including Section 504 of the Rehabilitation Act, were in danger of having the scope of their coverage severely restricted.

152. S. Rep. No. 64, 100th Cong., 2d Sess. 28 (1988), *reprinted at* 1988 U.S.C.C.A.N. 3, 29-30.

153. *Id.*

154. *See* 134 CONG. REC. 383-84 (1988). After HEW issued its implementing regulations to Section 504 in 1977, a controversy erupted over the agency's coverage of alcoholics and drug addicts as individuals with handicaps. A year after the regulations were issued, the House of Representatives excluded alcoholics and drug addicts from coverage under Section 504. H.R. REP. NO. 95-1149, at 22 (1978). After debate in the Senate, however, a compromise

HIV as a codification of the Supreme Court's decision in *Arline*, designed to allay fears that Section 504 would require employers to hire individuals with contagious diseases who posed clear risks to others.[155]

The compromise provision drafted by the advocates specifically included the term "contagious disease *or infection.*"[156] Many Members of the House of Representatives were pleased that HIV-infected individuals were impliedly referenced in the provision, thus signaling Congress' assumption that such individuals were otherwise covered under Section 504's definition if they did not pose a direct threat to others.[157] But continuing the usual mode of ignoring the actual statutory terms of the definition, no Member identified any particular major life activity that HIV infection would substantially limit, nor did anyone explain how such an activity would be substantially limited. Rather, the Members simply noted that the amendment's plain language clearly presumed such individuals would be covered by the law if they did not pose a "direct threat" to others.[158]

A repeat of the debate on the CRRA occurred a few months later on the Fair Housing Amendments Act of 1987 (FHAA). The Fair Housing Act of 1968, as amended, prohibited discrimination in the sale or rental of private housing on the basis of race, religion, color or sex.[159] The main thrust of the FHAA was to strengthen the enforcement mechanisms of the law for these protected classes. In addition, the FHAA included, for the first time, people with handicaps under the civil rights coverage of the Fair Housing Act.[160]

The Report of the House Judiciary Committee to the FHAA explained that the definition of handicap in the FHAA was almost identical to that used for purposes of Section 504, and that the definition of handicap should "be interpreted consistent with regulations clarifying the meaning of the similar provision found in Section 504 of the Rehabilitation Act."[161] The Report noted that such regulations had not attempted to set

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provision was enacted which maintained coverage for alcoholics and drug addicts, but required that such individuals not pose a "direct threat" to others. 124 CONG. REC. 30,322-27 (1978); H.R. CONF. REP. NO. 1780, 95TH CONG., 2D SESS. at 102 (1978).

155. *See* 134 CONG. REC. at 2,860-62 (1988) (statement of Sen. Harkin); *id.* at 2930 (statement of Rep. Hawkins); *id.* at 3,043-44 (statement of Rep. Hoyer). *See generally* Chai Feldblum, *Civil Rights Restoration Act of 1988: Coverage of Contagious Diseases Under Section 504* (memorandum prepared on behalf of the American Civil Liberties Union, AIDS Project) (on file with author). Although one may well question how this provision was a compromise for Senator Humphrey who opposed coverage for people with AIDS and HIV, *cf.* 134 CONG. REC. 1,794 (statement of Sen. Humphrey), the fact remains that he agreed to the provision, perhaps under the illusion that it met his goals. Advocates could argue that the compromise existed in the fact that a special statutory provision on people with contagious diseases and infections was now added to the law, within a potentially confusing statutory definition.

156. *Id.* at 425 (introduction of amendment) (emphasis added).

157. *See, e.g. id.* at 2,937-38 (statement of Rep. Owens); *id.* at 2,936-37 (statement of Rep. Weiss); *id.* at 2,939 (statement of Rep. Waxman); *id.* at 3,043-44 (statement of Rep. Hoyer); *id.* at 2,947-48 (statement of Rep. Edwards).

158. Similarly, Members of Congress who *opposed* coverage for people with AIDS and HIV infection, and who bemoaned the fact that such individuals would now remain covered under Section 504, never specifically noted what major life activity would be limited for people with AIDS or HIV infection. *See, e.g.*, 134 CONG. REC. 4,757 (1988) (statement of Rep. Dannemeyer); *id.* at 4,767-68 (statement of Rep. McEwan).

159. Pub. L. No. 90-284, 82 Stat. 73, 81 (1968).

160. Pub. L. No. 100-430, § 6(a), 102 Stat. 1619, 1620 (1988).

161. H.R. REP. NO. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2183.

forth a definitive list of covered physical and mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, and because some conditions may not even have been discovered when the legislation was passed. In an example of the prominence of AIDS in the debate at the time, the only physical impairment addressed specifically by the House Report was AIDS and HIV infection. As the Report noted, "AIDS and infection with the Human Immunodeficiency Virus (HIV) are covered under this Act, although such conditions were not even discovered when Section 504 was passed in 1973."[162]

During passage of the FHAA, little attention was paid by disability rights advocates to the definition of handicap under the bill. Rather, the focus again was on successfully defeating efforts to exclude people with contagious diseases from coverage under the law.[163] In August 1988, both the House of Representatives and the Senate passed the FHAA, and in September 1988, President Ronald Reagan signed the bill into law.[164] Disability rights advocates were thrilled. Passage of the FHAA marked the first time a federal anti-discrimination law had covered handicapped individuals in the private sector, and it was viewed as an example of the great strides that were being made for individuals with a wide range of physical or mental impairments on the federal level.

In the meantime, analysis of the definition of "handicapped individual" continued to occur solely in the context of AIDS and HIV infection. A new legal memo from the Department of Justice, the "Kmiec Opinion," reaffirmed coverage of people with AIDS and HIV infection under federal anti-discrimination law.[165] This memo, like the Cooper Memo before it, carefully parsed the terms of the definition of "handicapped individual" to arrive at its conclusion. Thus, this analysis (like the earlier DOJ analysis) could have raised a red flag for advocates concerning the potential difficulty inherent in the terms of the definition. Instead, the memo served to reinforce a false sense of security with the existing definition.

The Kmiec Opinion concluded that:

> [S]ection 504 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past, or perceived effect of HIV infection that substantially limits a major life

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162. *Id.* at 22 n.55, *reprinted at* 1988 U.S.C.C.A.N. at 2183 n. 55.

163. Such efforts were again successfully rebuffed through inclusion of a "direct threat" provision in the law. *See id.* at 28, *reprinted at* 1988 U.S.C.C.A.N. at 2189; 134 CONG. REC. 16,496-97 (1988).

164. Pub. L. 100-430, 102 Stat. 1619 (1988).

165. Memorandum from Douglas W. Kmiec, Acting Asst. Att'y General, Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in 8 Fair Empl. Prac. Manual (BNA) No. 641 at 405:1 [hereinafter Kmiec Opinion]. The President's Counsel requested the DOJ memo in response to a recommendation from the Presidential Commission on the Human Immunodeficiency Virus Epidemic. The Commission recommended:

> The DOJ . . . should issue a follow-up memorandum expressing support for the *Arline* decision and withdrawing its earlier opinion that fear of contagion is not a basis for Section 504 coverage. In addition, the DOJ memorandum should take the lead in endorsing lower court rulings by clarifying that persons who are HIV-infected yet asymptomatic, as well as persons with symptomatic HIV infection are covered by Section 504.

REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 123 (June 1988).

> activity so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth in *Arline*.[166]

Much of the nuance of the Kmiec Opinion's subsequent analysis of "substantially limits a major life activity" was lost on legal observers at the time, most of whom focused primarily on what appeared to be the bottom line of the opinion: "we conclude that *all* HIV-infected individuals *who are not a direct threat* to the health or safety of others and are *able to perform the duties* of their jobs *are covered by [S]ection 504.*"[167]

The Kmiec Opinion thus seemed to answer definitively and affirmatively the question of whether asymptomatic HIV-infected individuals were covered under Section 504. In reality, however, the Kmiec Opinion subjected the question of whether asymptomatic HIV-infected individuals were covered under Section 504 to the type of searching inquiry that *currently* characterizes most judicial opinions under the ADA—but which was quite foreign at the time to judicial opinions dealing with claims under Section 504. Hence, the Opinion's careful, and at times, tortuous analysis of how people with asymptomatic HIV infection could legitimately be viewed as meeting the statutory requirement of "substantially limits a major life activity" got swept away by the apparent blanket conclusion that "all" HIV-infected individuals who are "otherwise qualified" are covered by the law.

The key question which the Kmiec Opinion addressed was "whether the physical impairment of HIV infection substantially limits any major life activities."[168] The Opinion first noted that it could certainly be argued that asymptomatic HIV infection does not directly affect any of the major life activities listed in the HHS regulations (caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning). But the Opinion observed that "at least some courts would find a number of other equally important matters to be directly affected. Perhaps the most important such activities are procreation and intimate personal relations."[169]

The Opinion noted that the major life activity of procreation was the "fulfillment of the desire to conceive and bear healthy children."[170] Thus, the Opinion explained:

> HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child. Because of the infection in their system, they will be unable to fulfill this basic human desire. There is little doubt that procreation is a major life activity and that the physical ability to engage in normal procreation—procreation free from the fear of what the infection will do to one's child—is substantially limited once an individual is infected with the AIDS virus.[171]

The Kmiec Opinion emphasized that "this limitation—the physical inability to

166. Kmiec Opinion at 405:1-2.
167. *Id.* at 405:11 (emphasis added).
168. *Id.* at 405:5-6.
169. *Id.* at 405:6.
170. *Id.* (quoting 29 U.S.C. § 706(8)(B)(iii)).
171. *Id.* at 405:7.

bear healthy children—[is] separate and apart from the fact that asymptomatic HIV-infected individuals will choose not to attempt procreation."[172] The Opinion characterized that choice as a "secondary decision," similar to "many major life decisions" that "infected individuals will make differently." It placed that decision in the same category as it placed the fact that "an asymptomatic HIV-infected individual's intimate relations are also likely to be affected by HIV infection." As the Opinion explained, "[t]he "life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus."[173]

Presaging an argument that would be raised ten years later during the Supreme Court argument in *Bragdon v. Abbott*,[174] the Kmiec Opinion then noted the following:

> Finding limitations of life activities on the basis of the asymptomatic individual's responses to the knowledge of infection might be assailed as not fully persuasive since it depends upon the conscience and good sense of the person infected. The causal nexus, it would be argued, is not between the physical effect of the infection . . . and life activities, but between the conscience or normative judgment of the particular infected person and life activities. Thus, it might be asserted that there is nothing inherent in the infection which actually prevents either procreation or intimate relations.[175]

The Kmiec Opinion offered three responses to this charge. First, in a footnote, it noted that the argument was "disingenuous at least insofar as infection physically precludes the normal procreation of healthy children."[176] Second, it postulated that "in any case where the evidence indicates that the plaintiff HIV-infected individual *has* in fact changed his or her behavior,"—for example, "where the plaintiff represents that procreation has been foregone"—'the court might well find a limitation of major life activity."[177] Third, the Opinion essentially skirted the argument completely by stating: "Moreover, courts may choose to *pass over such factual questions* since the Supreme Court has stated an *alternative rationale* for finding a life activity limitation based on the reaction of others to the infection.[178]

The alternative rationale was, of course, the one based on the third prong of the definition of a handicapped individual, as formulated by the *Arline* Court: "that a handicapped individual includes someone who is regarded by others as having a limitation of major life activities whether they do or not."[179] As the Court had explained, even an impairment that does not in fact substantially limit a person's functioning could "nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[180] As the Kmiec Opinion

172. *Id.*

173. *Id.*

174. *See* Bragdon v. Abbott, 524 U.S. 624, 639 (1998) (discussing impact of decision about whether to reproduce); 524 U.S. at 658-660 (Rehnquist, J. dissenting) (same).

175. Kmiec Opinion at 405:7.

176. *Id.* at 405:7, n. 13.

177. *Id.* at 405:7 (emphasis added).

178. *Id.* (emphasis added).

179. *Id.*

180. *Id.* (quoting School Board of Nassau County v. Arline, 480 U.S. 273, 283 (1987).

explained, the effect of the Court's interpretation in *Arline* is that "the perceived impairment need not directly result in a limitation of a major life activity, so long as it has the indirect effect, due to the misconceptions of others, of limiting a life activity (in *Arline*, the activity of working)."[181]

Again presaging a difficult argument that would later dominate judicial interpretations under the ADA, and offering its rebuttal of such an argument, the Kmiec Opinion (in a footnote) observed that the *Arline* Court "appears not to accept the distinction between being perceived as having an impairment that itself limits a major life activity *(the literal meaning of the statutory language)* and having a condition the *misperception of which results in limitation of a life activity.*"[182] But, the Opinion notes, the Court *did* present a valid justification for departing from the statute's literal terms:

> The only justification for departing from that [literal] meaning [of the statute] occurs . . . in footnote 9, where the Court relied on legislative history which does indicate that at least some Members of Congress believed that the perception of a physical disability by others *does not have to include the belief that the perceived condition results in a limitation of major life activities, but simply that the perception of the condition by others in itself has that effect.*[183]

The Kmiec Opinion then noted that a district court in California recently had concluded that "if an individual or organization limits an HIV-infected individual's participation in a [S]ection 504 covered activity because of fear of contagion, a major life activity of the individual is substantially limited."[184] In that case, *Doe v. Centinela Hospital*,[185] an HIV-infected individual had challenged his exclusion from a specific drug rehabilitation program. As the Kmiec Opinion again observed, the aspect of the Supreme Court's opinion in *Arline* on which the district court in *Centinela Hospital* rested "departs from the literal meaning of the statutory text in favor of legislative history."[186] Nevertheless, the Opinion concluded, "we do not question that the district court in *Centinela Hospital* fairly reads *Arline* to support a finding that the reaction of others to the contagiousness of an HIV-infected individual *in itself* may constitute a limitation on a major life activity."[187]

The Kmiec Opinion thus spent six pages carefully parsing out how individuals might be covered under the statutory definition, with no guarantee whether this coverage would ultimately be derived by the courts from the first prong or the third prong of the definition of "handicapped individual." Despite these nuances of the Opinion, however, disability rights advocates hailed it as a clear ruling that all people with AIDS and asymptomatic HIV infection were covered under Section 504.[188] The

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181. *Id.* at 405:8.

182. *Id.* at 405:8 n.14 (emphasis added).

183. *Id.* at 405:8 n.14 (emphasis added).

184. *Id.*

185. 1988 WL 81776 (C.D. Cal. 1988).

186. Kmiec Opinion, *supra* note 165, at 405:8 n. 15.

187. *Id.* (emphasis added).

188. *See, e.g.*, Chai R. Feldblum, *AIDS and HIV Infection*, *in* ONE NATION INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990S 466, 472-73 (Reginald C. Govan & William L. Taylor eds., 1989) (describing Kmiec

actual, more tortured, analysis of the Kmiec Opinion regarding coverage of people with asymptomatic HIV infection would lie dormant for almost seven years. At that point, the judicial trend of subjecting *all* plaintiffs with impairments in ADA cases to more searching inquiries regarding whether their impairment "substantially limited a major life activity" would spill over into HIV cases and ultimately erupt in the Supreme Court case of *Bragdon v. Abbott.*

IV.
THE ADA: DEFINITION OF DISABILITY

A. Passage of the ADA

Back in 1989, I and other disability rights advocates—blissfully unaware of what the future would hold for the definition of disability—were working to convince Congress to extend protection to people with disabilities in the areas of private employment, private businesses, and activities of state and local governments. Work on the Civil Rights Restoration Act had restored a broad interpretation to the scope of Section 504; work on the Fair Housing Amendments Act had been the first step into extending disability anti-discrimination protection to the private sector. The time seemed ripe for applying that extension to additional areas of the private sector.

An early version of such a law, the Americans with Disabilities Act of 1988 (ADA), had been drafted by Robert Burgdorf of the National Council on the Handicapped, had been introduced by Senator Lowell Weicker (R-Conn.) and 13 Senate co-sponsors, and had received a joint hearing by the Senate Labor and Human Resources Committee and the Subcommittee on Select Education of the House Committee on Education and Labor.[189] But that bill had been drafted and offered at a politically inopportune time: civil rights and disability rights advocates were busy working for passage of the FHAA, and the time was not yet ripe for a new disability rights bill. Thus, no action was taken on the bill by the time the 100th Congress recessed in October 1988.[190]

Opinion as concluding that all people with asymptomatic HIV infection are covered under Section 504). This approach to the Kmiec Opinion made sense as a litigation strategy, and was at least presumably consistent with the Opinion's bottom line. Indeed, in several cases alleging discrimination based on asymptomatic HIV infection under Section 504, the Kmiec Opinion was cited for the simple proposition that people with HIV infection are covered under Section 504.

189. Joint hearing before the Subcommittee on the Handicapped of the Committee on Labor and Human Resources of the United States Senate and the Subcommittee on Select Education of the Committee on Education and Labor House of Representatives, S. Hrg. 100-926, September 27, 1988. The bill was introduced on April 28, 1988 in the Senate, S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. 9,375 (1988), and the identical bill was introduced the following day in the House of Representatives, H.R. 4498, 100th Cong., 2d Sess., 134 CONG. REC. 9,600 (1988).

190. Long-term disability rights and civil rights advocates in Washington, D.C. were skeptical of the political wisdom of introducing this first version of the ADA. However, the National Council on Disability and its staff did not have a history of working with the mainstream political civil rights groups and Congress. Hence, once it became clear that the National Council on Disability intended to move forward with a proposed bill, despite political advice to the contrary, disability advocates in D.C. (including me) worked with Burgdorf to suggest some modifications to the bill. As a general matter, however, the bill was presumed by seasoned disability advocates to be politically infeasible, both with regard to its timing and its substance.

A second version of the ADA, drafted primarily by Robert Silverstein from Senator Tom Harkin's staff, was introduced by Senators Tom Harkin (D-Iowa), Edward Kennedy (D-Mass.), Robert Dole (R-Kan.) and thirty-one other Senators in May 1989.[191] This draft served as the basis for the final ADA passed by Congress a little over a year later, in July 1990. Silverstein's version of the ADA hewed much more closely than Burgdorf's to the language and structure of the Section 504 regulations.

The reason for Silverstein's approach was largely political. While Burgdorf had written a bill that addressed a range of problems that had arisen under Section 504 case law, and that consistently created greater burdens on employers, businesses, and the government than had existed under Section 504, the political disability rights advocates found that bill to be unrealistic and infeasible to pass in Congress. Hence, the bill drafted by Silverstein used the Section 504 regulations as its guide, and diverged from those regulations in only a few, select circumstances.

One difference between the bills was the proposed definition of "disability." In Burgdorf's version, discrimination was prohibited "on the basis of handicap," which was defined as "because of a physical or mental impairment, perceived impairment, or record of impairment." These terms were then defined as follows:

> (2) *Physical or Mental Impairment*—The term "physical or mental impairment" means—
>
> (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body, including the following:
>
> (i) the neurological system;
>
> (ii) the musculoskeletal system;
>
> (iii) the special sense organs, and respiratory organs, including speech organs;
>
> (iv) the cardiovascular system;
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> (v) the reproductive system;
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> (vi) the digestive and genitourinary systems;
>
> (vii) the hemic and lymphatic systems;
>
> (viii) the skin;
>
> (ix) the endocrine system; or
>
> (B) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (3) *Perceived Impairment*—The term "perceived impairment" means not having a physical or mental impairment as defined in paragraph (2), but being regarded as having or treated as having a physical or mental impairment.

191. S. 933, 101st Cong., 1st Sess., 135 CONG. REC. 8,505 (1989). An identical bill was introduced in the House of Representatives by Congressman Steny Hoyer and 45 cosponsors. H.R. 2273, 101st Cong., 1st Sess., 135 CONG. REC. 8,709 (1989).

> (4) *Record of Impairment*—The term "record of impairment" means having a history of, or having been misclassified as having, a physical or mental impairment.[192]

Silverstein's version of the ADA, by contrast, used a definition of disability that mirrored almost exactly the definition of handicap in the Section 504 regulations:

> (2) *Disability*—The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.[193]

Political advocates for people with disabilities in Washington preferred Silverstein's approach because, as a strategic matter, it seemed smarter to use a definition of disability that had fifteen years of experience behind it, rather than to attempt to convince Congress to adopt a new, untested definition.[194] Moreover, although there had been, as noted above, a few adverse judicial opinions under Section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act. Finally, to the extent those cases were troubling, the Supreme Court's decision in *Arline*, with its expansive interpretation of the third prong of the definition of "handicap," seemed to ensure that *any* person who had been discriminated against because of *any* condition would automatically be covered under that prong of the definition—because the limitation caused by the exclusionary action would itself result in the necessary limitation on a major life activity. Indeed, the Kmiec Opinion had clearly explained how this interpretation of the third prong, while possibly inconsistent with a literalist reading of the statutory text, was nonetheless the interpretation adopted by the Court in *Arline*.[195]

Burgdorf was skeptical that this legal reasoning would take care of all problems that might arise under the existing definition of disability, and indeed, wrote a memo arguing for his position.[196] But Burgdorf had little political capital to draw on in convincing other advocates of his position. The orginal ADA he had drafted had not reflected any understanding of the political realities of Capitol Hill on a range of issues, from the definition of "undue hardship" for reasonable accommodations to its coverage of insurance practices. The essence of "legislative lawyering" is the capacity to combine a rigorous understanding of the law with a sophisticated grasp of politics.[197]

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192. S. 2345, §§ 3 (2)-(4), 134 CONG. REC. 9,379 (1988).

193. S. 933, § 3(2), 135 CONG. REC. 8,510 (1988).

194. *See* Feldblum, *Antidiscrimination Requirements*, *supra* note 9, at 37.

195. *See supra* notes 134-40 and accompanying text.

196. *See* Memorandum from Robert L. Burgdorf, Jr., Esq., to Legal Committee of the Consortium for Citizens with Disabilities (CCD) Rights Task Force (March 2, 1989) (on file with the author). I was Chair of the Legal Committee of the CCD Rights Task Force at the time.

197. *See* Chai R. Feldblum, Five Circles Theory and the Concept of Legislative Lawyering, *available at*

An individual who is able to demonstrate both these capacities stands a good chance of influencing the content of legislation; conversely, the opinions of an individual who is viewed as lacking one or the other of such capacities will be devalued by political decision makers. In the case of choosing a definition of disability for the ADA, the combined legal and political judgment was that adopting the existing definition of handicap from the Section 504 regulations was the best choice.

It should be noted, however, what the decision to adopt the Section 504 definition of disability was *not*. It was not a considered, deliberate decision to *narrow* the class of covered individuals from the wide-ranging group of individuals who had been covered under Section 504.[198] Indeed, whether to use the Section 504 definition of disability was hardly a topic of conversation in negotiations on the ADA.[199] Rather, the decision was arrived at by a small group of individuals, early in the process of drafting the ADA, who made the legal judgment that the existing definition would cover most people with impairments along the spectrum of physical and mental impairments, and the political judgment that using any other definition would unnecesarily slow down passage of the bill.

The first committee report to accompany the ADA, the Senate Labor and Human Resources Committee Report, dealt with the definition of disability in a manner consistent with how the definition had been applied under Section 504. The Report did not discuss at length how different impairments might substantially limit major life activities. Rather, the Report noted that "major life activities" included functions "such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"[200]—the same activities originally listed in HEW's Section 504 regulations.

The Senate Report seemed to indicate that the only impairments that would not meet the statutory definition of "substantially limits a major life activity" would be "minor, trivial impairments," or physical limitations that are not different from those of the average person. As the Report explained:

> Persons with minor, trivial impairments, such as a simple infected finger, are not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.[201]

The Report also pointed out that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable

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Georgetown University Law Center's website (last visited November 1, 1999) <http://www.law.georgetown.edu/clinics/flc/five_circles.html>.

198. *Cf.* Samuel R. Bagenstos, *"Disability," Stigma, and the Americans with Disabilities Act*, U. VA. L. REV. (forthcoming 2000) (arguing that "disability" in the ADA is best understood as covering a particular subordinated group, and that this understanding gives meaning to the "substantially limited" language in the ADA definition of disability).

199. Personal knowledge of author.

200. S. Rep. No. 116, 101st Cong., 2d Sess. 22 (1988).

201. *Id.* at 23.

accommodations or auxiliary aids."[202] This sentence was not expanded upon in any way; it was simply put forth as an almost self-evident conclusion.

The Senate Report also indicated its approval of the Supreme Court's analysis in *Arline* regarding the purpose and scope of the third prong of the definition. It noted that the third prong is designed to "protect individuals who have impairments that do not in fact substantially limit their functioning," but that, as the *Arline* Court noted, "could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[203] As an example of individuals who would be covered under this prong, the Senate Report suggested those "who are rejected for a particular job . . . because of findings of a back abnormality on an x-ray, notwithstanding the absence of any symptoms."[204]

The Senate Report summarized coverage under the third prong as follows:

> A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes toward disability *is being treated as having a disability which affects a major life activity.* For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, *or because of the employer's perception that the applicant had a disability which prevented that person from working*, that person would be covered under the third prong.[205]

The first two sentences of this paragraph are consistent with the *Arline* Court's analysis, and the Kmiec Opinion's observation of that analysis, that notwithstanding a literalist reading of the third prong of the definition, a covered entity need not regard an individual as being limited in any major life activity *other* than the activity from which the entity has excluded the person. That is, the entity's exclusionary *action* itself automatically results in the entity regarding that individual as being limited in the major life activity from which the individual has been excluded. By contrast, the last phrase in the paragraph—"or because of the employer's perception that the applicant had a disability which prevented that person from working"—would ultimately become one of the main ways courts deciding ADA cases would restrict the scope of the third prong.[206]

The Senate Report clearly presumed that individuals with a wide range of

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202. *Id.*

203. *Id.* at 23 (quoting School Board of Nassau County v. Arline, 480 U.S. 273, 283 (1987)).

204. *Id.* at 24. This type of individual precisely mirrored Mr. Crosby in the *E.E. Black* case, but unfortunately the Senate Report neither cited nor directly rejected the reasoning in that case. *See* notes 92-108 and accompanying text. In addition, the Senate Report created confusion by adding, as an example, individuals with "medical conditions that are under control" (such as controlled diabetes or epilepsy), despite the fact that the Report had already noted that mitigating measures should not be taken into account when determining coverage under the first prong of the definition.

205. *Id.* at 24 (citing *Arline*, 480 U.S. at 283; Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989); Doe v. Centinela Hosp., 1988 WL 81776 (C.D. Cal. 1988)) (emphasis added).

206. *See infra* Section V(C).

medical conditions would be covered under the ADA. However, the nature of presumptions are such that they do not require much explication. Thus, the Senate Report did not discuss, at any length, the fact that particular physical or mental impairments would be considered disabilities.[207] The only physical impairment the Report explicitly addressed was HIV infection. That was because AIDS advocates (including myself) wanted the legislative history to clearly state that such individuals were covered under the *first* prong, rather than the third prong, of the definition. Rather than explain explicitly, however, the type of major life activities that would be substantially limited for such individuals, the Report simply chose to reference the Kmiec Opinion:

> A physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a "substantial limitation of one or more major life activities. . . . As noted by the [Kmiec Opinion], a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term "disability."[208]

When the ADA was considered by the full Senate in September 1989, it was clear that Senators were aware of the wide range of physical and mental impairments that would be covered under the ADA. Sponsors of the ADA had emphasized that the law's coverage would be similar to the coverage that existed under Section 504, and that individuals with a range of "non-traditional" handicaps would thus be covered. For example, it was understood that individuals with medical conditions such as epilepsy, diabetes, cancer, AIDS, HIV infection, and mental illnesses would all be covered under the law. While some Senators were unhappy with the bill's coverage of people with AIDS and HIV infection,[209] the only individuals excluded from the ADA were those addicted to drugs,[210] transvestites,[211] and a group with selected mental and sexual disorders.[212]

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207. The presumption that a range of impairments would be covered as disabilities, however, can be deduced from the examples scattered through the Senate Report with regard to the substantive aspects of the bill. *See, e.g.*, S. Rep. No. 116, 101st Cong., 2d Sess. 22 (1988) (discussing Downs Syndrome, epilepsy, hearing impairment, mobility impairments, loss of limbs, developmental disabilities and other impairments throughout report).

208. S. Rep. No. 116, 101st Cong., 2d Sess. 22 (1988). This statement in the Senate Report was intentionally more definitive than the Kmiec Opinion, and it glossed over the potential problems the Kmiec Opinion had identified with regard to coverage of HIV infection under the first prong of the definition. *See supra* notes 168-188 and accompanying text.

209. *See, e.g.*, 135 CONG. REC. 19,864-67, 19,870 (1989) (statements of Sen. Helms criticizing coverage of HIV infection under the Act).

210. 42 U.S.C. § 12114 (1994). These individuals were excluded three times, under three separate amendments. *See generally* Chai R. Feldblum, *The Americans with Disabilities Act: Definition of Disability*, 7 LAB. LAW. 11, 21-23 (1991) [hereinafter *Definition of Disability*].

211. 42 U.S.C. § 12208 (1994). *See* 135 CONG. REC. 19,864 (1989) (containing colloquy regarding amendment to exclude transvestites from coverage under the Act).

212. 42 U.S.C. § 12211(b) (1994) (excluding transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, psychoactive substance use disorders resulting from current illegal use of drugs).

Senator Armstrong initially offered an amendment that would have excluded over 100 emotional disorders listed in the DSM-III. 135 CONG. REC. 19,853 (1989); 135 CONG. REC. 19,884-85 (1989); *see also id.* at 20,571-76

When the House of Representatives took up consideration of the ADA from October 1989 to May 1990, the fact that the ADA would cover such a wide range of individuals became one of the favorite attack points of the National Federation of Independent Businesses (NFIB), a lobby group representing small businesses. NFIB circulated material stating that "over 900 disabilities" would be included under the law, and calling on Congress to list all the covered disabilities in the law.[213] Several Members of Congress also focused on the fact that the third prong of the definition would cover *anybody* who was simply regarded as having a disability.[214]

Negotiations on the ADA in the House of Representatives proceeded systematically through four different Committees.[215] The first Committee to deal with the bill was the House Education and Labor Committee. On the issue of the definition of disability there was little discussion or controversy, and the House Labor Report reads almost identically to the Senate Labor Report in that area.[216] The one fix made by the House Labor Report was to clarify that because mitigating measures should not be taken into account in determining whether a person has a disability, people with controlled conditions would be covered under the *first* prong of the definition: "persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication."[217] With regard to the third prong of the definition, the House Labor Report essentially repeated the Senate Labor Report.

The next two House committees to deal with the ADA, the Energy and Commerce Committee and the Public Works and Transportation Committee, focused

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(statement of Sen. Armstrong subsequent to the Act's passage). After negotiations between Senator Hatch and representatives of the disability community, which took place off the Senate floor, the list was narrowed to a few types of emotional illnesses.

213. Contending that "[i]t is simply ridiculous to expect individual business owners to know which disabilities are covered and therefore must be accommodated," the NFIB lobbied strongly for an inclusive list. *See* BURGDORF, *supra* note 54, at 148 (citing *Americans With Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary,* 101st Cong., 1st Sess. 89-90 (1990)). The number of disabilities to be included, 900, was taken from congressional floor debates over the definition of disability to be included in the bill. *Id.* (citing 136 Cong. Rec. H2621 (daily ed., May 22, 1990) (remarks of Rep. McCollum).

214. For example, Congressman Dannemeyer asked this author if he would be covered under the ADA because people "sincerely questioned . . . [his] thinking capacity." My reply was: "You would have to prove that you were considered to be mentally disabled in order to get under the protection. I don't know if you want to come into court and do that." *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 74 (1989).

215. *See* Chai R. Feldblum, *Medical Examinations and Inquiries under the Americans with Disabilities Act: A View From the Inside*, 64 TEMP. L. REV. 521, 529-531 (1991) (describing consideration and passage of the ADA in the House of Representatives) [hereinafter *Medical Examinations*].

216. *See* H.R. Rep. No. 485(II) (1990), *reprinted at* 1990 U.S.C.C.A.N. 303, 334. Like the Senate Report, the House Labor Report states that people with HIV infection are covered under the first prong of the definition. But while the House Labor Report similarly relied on the Kmiec Opinion, it stated more clearly that HIV-infected individuals are covered under the first prong of the definition "because of a substantial limitation to procreation and intimate sexual relations."

217. *Id.* As noted above, the Senate Labor Report created some confusion by noting that such individuals would be covered under the third prong of the definition, as well as under the first prong. *See supra* note 204 and accompanying text.

primarily on transportation issues and did not address the definition of disability issue.[218] Thus, with regard to issues such as the definition of disability, those committees simply borrowed the relevant sections from the committee report prepared by the Education and Labor Committee.

The final committee to address the ADA, the House Judiciary Committee, took a fresh look at a number of the general issues in the bill. Again, there was little discussion or controversy over the presumed broad definition of disability. But Christopher Bell, an attorney working at the time as a Special Assistant to Evan Kemp, the Chairman of the EEOC, felt strongly that the issues raised by the *E.E Black* case and its progeny needed to be addressed. He found a forum in the House Judiciary Report, which became the only report to focus in any great detail on the major life activity of "working."[219]

Bell felt strongly that if an individual had an impairment that manifested itself *only* at work, and only at very *unique* types of work or places of work, that individual should not be considered a person with a disability under the *first* prong of the definition. In other words, Bell assumed that most serious impairments (like epilepsy, diabetes, impairments of limbs etc.) would be covered under the first prong of the definition as substantially limiting some major life activity *other* than working. But if there was some impairment that would limit an individual *only* at work, and not elsewhere, then in that limited and rare situation, Bell believed, the "class of jobs" analysis of the *E.E. Black* court would be appropriate: i.e., a person with such an impairment should be considered "substantially limited" in the major life activity of "working" *only* if the unique impairment actually precluded the individual from a *wide range* of jobs.

Essentially reflecting Bell's position, the House Judiciary Report included the following analysis in its discussion of the first prong of the definition:

> A person with an impairment who is discriminated against in employment is also limited in the major life activity of working. However, a person who is limited in his or her ability to perform only a particular job, because of circumstances unique to that job site or the materials used, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in the major life activity of working if he has a mild allergy to a specialized paint used by one employer which is not generally used in the field which the painter works.
>
> However, if a person is employed as a painter and is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures, the person would be substantially limited in a major life activity, by virtue of the resulting skin disease or seizure disorder. . . . In such a case, a reasonable accommodation to the employee may include assignment to other areas where the particular paint is not used.[220]

218. *See* Feldblum, *Medical Examinations*, *supra* note 215, at 530.

219. *See* H.R. Rep No. 485(III) (1990), *reprinted at* 1990 U.S.C.C.A.N. 445.

220. *Id.* at 29, *reprinted at* 1990 U.S.C.C.A.N. 445, 451.

It is striking, in light of later case development under the ADA, how easily the House Judiciary Report assumed a person with a severe allergic reaction resulting in skin rashes or seizures would be considered to be substantially limited in some major life activity other than working. But, perhaps, such an assumption was not surprising given the line of Section 504 cases on which Congress could rely.

Bell also believed, however (or, at least, did not disagree), that an individual rejected from a job because of myths or stereotypes surrounding his or her disability could be covered under the *third* prong of the definition, regardless of whether the employer's views were shared by others in the field. Thus, in its discussion of the third prong of the definition, the House Judiciary Report states:

> [A] person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field, and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.[221]

In July 1990, the Senate and House of Representatives passed the final version of the ADA, and the bill was signed into law by President George Bush on July 26, 1990.[222] The type of anti-discrimination protection that had existed up until that point in Section 504 was now the law of the land for the private sector at large.[223]

B. Implementing Regulations

The ADA required both the EEOC and DOJ to issue regulations implementing the ADA within one year of the Act's passage. Although advocates were not overly perturbed, at the time, between the slightly different approaches taken by the EEOC and DOJ to the definition of disability, the significance of those differences would become apparent over time.[224]

The DOJ regulations were written under the leadership of John Wodatch, who had worked on the Section 504 regulations fourteen years earlier. Not surprisingly, the DOJ regulations on the definition of disability mirrored almost exactly the comparable Section 504 regulations. Thus, the regulations provided definitions for the terms "disability," "physical or mental impairment," "major life activity," "has a record of such an impairment," and "is regarded as having such an impairment"—all of which were almost identical to the definitions provided in the Section 504 regulations.[225] The agency did include a few sentences in its guidance regarding the determination of whether an impairment "substantially limits" a major life activity, adapted from the Senate Labor Report to the ADA. For example, the DOJ explained: "A person is

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221. *Id.* at 30, *reprinted at* 1990 U.S.C.C.A.N. 445, 453.

222. Pub. L. No. 101-336, 104 Stat. 327 (1990).

223. *See, e.g.*, Ann Devroy, *In Emotion-Filled Ceremony, Bush Signs Rights Law For America's Disabled*, WASH. POST., July 27, 1990, at A18; *A Law For Every American*, N.Y. TIMES, July 27, 1990, at A26; G. Jerry Shaw & William Bransford, *Disabilities Law: Historic and Litigious*, LEGAL TIMES, July 30, 1990, at 24.

224. *See* 56 Fed. Reg. 35,726 (July 26, 1991) (*codified at* 29 C.F.R. pt. 1630) (EEOC regulations); 56 Fed. Reg. 35,544 (July 26, 1991) (*codified at* 28 C.F.R. pt. 36) (DOJ regulations).

225. *Compare* 28 C.F.R. § 36.104 *with* 56 Fed. Reg. 35,726 (July 26, 1991) (*codified at* 29 C.F.R. pt. 1630).

considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."[226] But as a general matter, the DOJ guidance primarily emphasized that the definition of disability had a long history under previous laws.[227]

The guidance to the DOJ's regulations also adopted the clarification from the House committee reports regarding mitigating measures. As the guidance explained: "Persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication."[228]

Like the legislative history to the ADA, the only physical impairment specifically addressed by the DOJ regulations was HIV infection. True to the actual language of the Kmiec Opinion (and unlike the approach to the Kmiec Opinion taken by the legislative history), DOJ's guidance presumed people with HIV infection were covered either under the first prong or the third prong of the definition of disability.[229]

Nothing in DOJ's regulations suggested that courts would be required to engage in an individualized assessment, as a general matter, with regard to whether a particular plaintiff had a "disability." Indeed, such individualized assessments were essentially non-existent under the Section 504 case law relied on by the DOJ. DOJ's guidance did presume that such assessments would be relevant in those limited situations where a person had a type of impairment that could vary with regard to its severity. But with regard to most impairments, in which general empirical determinations of severity could be made, the DOJ regulations did not contemplate that courts would be engaging in an individualized assessment of each plaintiff with regard to the existence of a disability.

EEOC's regulations were guided, in contrast, by Christopher Bell. As had been evident during passage of the ADA, Bell did not believe that every person with a physical or mental impairment should be considered a person with a disability under the first prong of the definition. Hence, the EEOC regulations introduced, for the first time in disability jurisprudence, the concept that an individualized assessment would be required, in most cases, to determine whether a person had a disability under the ADA. As the EEOC explained in its guidance:

> Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of an individual's major life activities. . . .

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226. 28 C.F.R. pt. 36, App. B at 610-11. *But see* S. Rep. No. 116, 101st Cong, 2d. Sess 22 (1988).

227. *See* 28 C.F.R. pt. 36, App. B, at 609 (1999).

228. *Id.* at 611.

229. DOJ's regulation also included "HIV disease (symptomatic and asymptomatic)" among its list of covered impairments. 28 C.F.R. § 36.104. Because most lawyers at the time considered this list as equivalent to a list of covered disabilities, DOJ's regulation was construed by many as assuming that HIV infection was covered under the first prong of the definition.

> The determination of whether or not an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather *on the effect of that impairment on the life of the individual.* Some impairments may be disabling for particular individuals but not for others. . . .[230]

While EEOC's guidance stressed the need for individualized assessments with regard to disability, it included one sentence referring to the fact that certain impairments should be presumed to be substantially limiting, without an individualized assessment. The guidance observed: "Other impairments, however, such as HIV infection, are inherently substantially limiting."[231] While the EEOC did not explain how HIV infection was inherently substantially limiting, it presumably relied on the conclusion of the Kmiec Opinion that every person with HIV is necessarily limited in the major life activity of bearing a healthy child.

The emphasis by the EEOC on the need for individualized determinations of the existence of a disability was reflected, as well, in the content of its regulations. Unlike the Section 504 regulations, the EEOC regulations included, for the first time, a definition of the term "substantially limits":

> (1) The term substantially limits means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[232]

The regulations then set forth "factors [that] should be considered in determining whether an individual is substantially limited in a major life activity," including:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long-term impact, or the expected permanent or long term impact of or resulting from the impairment.[233]

The EEOC did presume that a number of impairments would meet the requirement of substantially limiting a major life activity given that the ameliorating effects of devices or medication were to be ignored when engaging in the required individualized assessment. As the EEOC noted, the "determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[234]

Most advocates did not pay much attention at the time to the EEOC's emphasis on requiring individualized assessments regarding the existence of a disability.

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230. 29 C.F.R. pt. 1630, App. at 349 (1999) (emphasis added).

231. *Id.*

232. 29 C.F.R. § 1630.2(j)(1) (1999).

233. *Id.* at § 1630.2(j)(2).

234. 29 C.F.R. pt. 1630, App., at 351 (1999).

Obviously, the statutory definition required that an impairment "substantially limit" a "major life activity," and in some, unique circumstances, that definition might well require an individualized assessment. But most advocates presumed that all significant medical conditions would continue to meet this statutory requirement, without any extensive analysis by the courts, based on the type of generalized understandings of various impairments that had been evidenced by courts hearing Section 504 cases.

The EEOC also added, for the first time, specific regulations regarding the major life activity of "working." The regulations provided that:

> (3) With respect to the major life activity of working—
>
> (i) the term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[235]

The regulations also stated that, in addition to the general factors noted above for determining whether an impairment substantially limits a major life activity, the following additional factors could be considered in determining whether an individual was substantially limited in the major life activity of "working":

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which an individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).[236]

Advocates were not at all pleased that the EEOC had expended such a significant amount of regulatory language on "substantially limited in the major life activity of working." Advocates involved in passage of the ADA presumed this section was added because of Chris Bell's unique interest in clarifying when and how individuals with rare impairments could (or could not) be substantially limited in the life activity of working. Thus, this entire regulatory section was designed for a situation that was going to occur very rarely—that is, when an individual had an impairment that was so unique it manifested itself *only* at work. And although the agency had noted in its guidance that "[i]f an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited

235. 29 C.F.R. § 1630.2(j)(3)(i) (1999).

236. *Id.* at § 1630.2(j)(3)(ii).

in working,"[237] advocates were concerned this admonition might get lost amidst the extensive regulatory language and guidance.

But while advocates were not pleased with the EEOC's emphasis on the major life activity of working, and not pleased that the guidance for that section included citations to *Forrisi*, *Jasany*, and *E.E. Black*,[238] at least the EEOC had clarified that these cases applied solely to those extremely rare situations in which an impairment limits an individual *only* at work. Moreover, in its guidance to the third prong of the definition, the EEOC had copied the language from the House Judiciary Report to note that "[a]n individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field . . . ."[239] Thus, this language implied that even a person with a rare, unique impairment could be covered under the third prong of the definition if the person were discriminated against *because* of that impairment.

While advocates did not focus significantly on either the EEOC's or DOJ's regulations as they applied to the definition of disability, a phenomenon occurred during 1990 and 1992 that should have alerted advocates to the heightened attention that would be paid to this issue. The ADA's employment provisions were scheduled to become effective two years after enactment of the law.[240] There existed, however, an active and interested bar of management and plaintiff lawyers who dealt with Title VII employment claims. These lawyers began to stream, in the hundreds, to one- and two-day seminars devoted to explaining the provisions of the ADA.[241] Each seminar began with an hour or two devoted solely to the "definition of disability," with panelists painstakingly walking the audience through the three-prong definition.

In seminars in which I was responsible for the segment concerning the definition of disability, I described the definition in the broad manner in which it had been applied by courts under Section 504. Moreover, I was always careful to explain the breadth of the third prong of the definition, as explicated by the Supreme Court in the *Arline* decision. But for most panelists, and most lawyers in the audience, who were seeing this definition for the first time, the history of Section 504 case law was absent from their consciousness. They focused, instead, on the plain language of the EEOC regulations and guidance, which exhorted them to subject every claim of disability to a searching individualized assessment.[242] Moreover, since so much of the EEOC's regulation focused on the major life activity of working, that aspect of the regulation always received a significant amount of time in the seminars. The fact that lawyers

237. 29 C.F.R. pt. 1630, App., at 351(1999).

238. *Id.* *See* discussion of these cases *supra* notes 88-114.

239. 29 C.F.R. pt. 1630, App., at 352 (1999).

240. Title I of the ADA became effective two years after the law's enactment. 42 U.S.C. § 12118 (1994). This was one of the compromises made with Bush Administration negotiators by the Senate during consideration of the ADA.

241. I estimate that I spoke at approximately 50-75 of such sessions between 1990 and 1992.

242. Because the target audience for these seminars was the Title VII bar, almost all these seminars focused exclusively on employment. Hence, the EEOC regulations served as the relevant text for the seminars, rather than the DOJ regulations which applied to public accommodations and state and local governments.

were to be concerned with an impairment's effect on the life activity of working *only* in those rare situations where the impairment affected *no other* life activity was often lost in the detailed focus on the EEOC's regulatory language.

V.
JUDICIAL INTERPRETATIONS OF THE DEFINITION OF "DISABILITY" UNDER THE ADA: THE 1990S

We now fast forward six years ahead to 1997. In that year, the editors of the National Disability Law Reporter surveyed ADA cases and found that, in 110 cases in 1995 and 1996, the question had been raised as to whether the plaintiff met the statutory definition of disability under the ADA.[243] Of equal import, the survey found that in only *six* of those cases had the judges definitively found the plaintiffs met the statutory definition.[244] The editors also noted that challenges to a plaintiff's coverage under the law were appearing with increasing frequency, as compared to earlier years of ADA litigation.[245] By 1997, legal commentators had also begun to comment on the judicial trend of concluding that individuals with a wide range of serious impairments—from epilepsy to diabetes to cancer—did not meet the statutory definition of "disability."[246] As one commentator opined: "what was once touted as 'the most comprehensive civil rights legislation passed by Congress since the 1964 Civil Rights Act' has become increasingly narrowed to the point where it is in danger of becoming ineffective."[247]

By 1999, two years later, the Supreme Court had weighed in with several decisions concerning the definition of disability under the ADA. In *Bragdon v. Abbott,*[248] a slim 5-4 majority of the Court concluded that a woman with asymptomatic HIV infection was covered under the Act, but only after a painstaking parsing of the terms of the definition. And in *Sutton v. United Airlines, Inc.,*[249] a seven-person majority of the Supreme Court ruled that mitigating measures should be taken into account in determining whether an individual has a disability—in direct contravention

243. Thomas D'Agistino, NATIONAL DISABILITY LAW REPORTER, DEFINING "DISABILITY" UNDER THE ADA: 1997 UPDATE ii (1997).

244. *Id.*

245. Such challenges arose in only 60 decisions in the prior four-year period, only 12 of which involved plaintiffs found to have been disabled. *Id.*

246. *See* Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act,* 68 U. COLO. L. REV. 107, 123-31 (1997); James G. Frierson, *Heads You Lose, Tails You Lose: A Disturbing Trend in Defining Disability,* 1997 LAB. L.J. 419 (1997). Additional legal commentary on the definition of disability would be forthcoming as well. *See, e.g.*, Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability,* 42 VILL. L. REV. 409 (1997); Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent,* 42 VILL. L. REV. 587 (1997); Mary Crossley, *The Disability Kaleidoscope,* 74 NOTRE DAME L. REV. 621 (1999); Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990,* 77 N.C. L. REV. 1405 (1999); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants,* 34 HARV. C.R.-C.L. L. REV. 99 (1999).

247. Locke, *supra* note 246 at 109.

248. 524 U.S. 624 (1998).

249. 527 U.S. ___, 119 S. Ct. 2139 (1999).

of both the legislative history to the ADA and the law's implementing regulatory guidance.

So what happened? How did a statutory definition that received almost no focused attention during passage of the ADA become the principal means of restricting coverage under the ADA? Although the reasons for advocates to have adopted the Section 504 definition of disability may be understandable, it is worth assessing what happened to make our decision so dismally wrong.

The bottom line is that statutory text matters, sometimes even too much. In *Rector, Holy Trinity v. United States*, the Supreme Court announced that "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[250] This is the most oft-repeated phrase when courts wish to diverge from the plain meaning of a law. But a court's decision to diverge from the plain meaning of a statute, in order to accord more closely with the court's understanding of legislative intent, requires a capacity to understand that legislative intent.

In the area of disability, the instinctive understanding displayed by most courts is that "disability" is synonomous with "inability to work or function," and that people with disabilities are significantly different from the norm.[251] Hence, it has been difficult for courts to grasp that Congressional intent under the ADA may have been to capture a much broader range of individuals with physical and mental impairments. The combination of an old view of "disability" as synonomous with "unable to function," EEOC regulations that emphasize individualized assessments of the impact of impairments on particular individuals, a sophisticated management bar trained in seminars to carefully parse the statutory text of the definition, and finally, the terms of the definition itself, have all resulted in a reading of the ADA that has radically reduced the number of people who can claim coverage under the law.

An analysis of cases under the ADA reveals that courts have arrived at this restricted definition of disability through three principal methods.

First, courts analyze whether a plaintiff is substantially limited in the major life activity of *working*, even when the plaintiff's impairment should logically be understood as limiting some activity *other* than working. The courts then consistently conclude that the plaintiffs do not have a disability because they are not limited in a broad enough range of jobs to be considered "substantially limited" in "working."

Second, regardless of the major life activity the plaintiff has identified, courts invest significantly more meaning in the terms "substantially limits" and "major life activity" than ever occurred under Section 504 litigation. Under this extra scrutiny, courts require that impairments be so severe that they do more than simply "affect" a life activity—they must seriously hamper that life activity. Moreover, for some courts, the unambiguous words of the statute require that they take into account the mitigating

250. 143 U.S. 457, 459 (1892).

251. Such an instinctual view of disability on the part of courts is perhaps understandable when one considers that most cases in which courts heard disability cases prior to the ADA would have been in claims for disability payments under Social Security. In those cases, plaintiffs were required to demonstrate that their disabilities make them unable to work. *See supra* notes 35-37 and accompanying text.

effects of medication or devices used by the individual to control the impairment in determining whether there is a substantial limitation on the person's life activity. This approach was ultimately affirmed by the Supreme Court in *Sutton*. Finally, not every important life activity is considered by the courts to be sufficiently "major" to meet the statutory definition.

Third, the assumption that the third prong of the disability definition would protect individuals with a range of impairments who are not covered under the first and second prongs never materialized in ADA cases. To the contrary, the literalist reading of the third prong of the definition that the DOJ concluded the *Arline* Court had *rejected*—i.e., that an individual must be perceived as having a limitation in a major life activity other than the activity for which the individual has been excluded by the defendant—reappeared with vigor in lower court decisions interpreting the ADA. Moreover, to the extent the major life activity cited by the plaintiff in the third prong was that of working, courts required that the plaintiff demonstrate that the employer regarded the individual as unable to work in a range of jobs. That approach to the third prong was accepted by the Supreme Court in *Sutton*, with no recognition or analysis of how that position conflicted with its prior opinion in *Arline*.

A. Major Life Activity of Working

The majority of ADA cases concluding that plaintiffs do not meet the statutory definition of disability rely on the fact that such individuals are not limited in the life activity of "working." Courts have relied on this conclusion even when the plaintiffs' impairments could have been viewed as limiting some activity other than working. In other words, the section of the EEOC's regulations designed to address the rare situation where a person's impairment affects *only* his or her capacity to work has been transformed by a significant number of courts into a standard to be applied *whenever* determining whether an individual has a disability.

The case of a law professor upset with the lowly increments of his salary provides a good example of how the major life activity of working has been misapplied by the courts.[252] Allan Redlich had a stroke in 1983, which impaired the use of his left leg, arm, and hand. Redlich alleged that he had received lower salary increases since his stroke in 1983 because of "discriminatory bias against him as a disabled individual."[253] There was no dispute in the case that Redlich's limbs had been significantly affected by the stroke. Indeed, Redlich alleged he had "lost all use of [his] left hand, arm, and leg and walked with a limp."[254] Given that the law school was seeking summary judgment, the court had to accept Redlich's allegations as true.

The typical manner in which a case of this kind would have unfolded under Section 504 in the 1980s would have been as follows. The court would have concluded, in about one sentence, that Redlich had a handicap. The court might have

252. *See* Redlich v. Albany Law Sch. of Union Univ., 899 F. Supp. 100 (N.D.N.Y. 1995).

253. *Id.* at 102. Redlich also explained he had not discovered the disparity in the salary increases until 1994, because of the Dean's absolute policy of secrecy regarding faculty salaries. *Id.*

254. *Id.* at 106.

explained this conclusion by stating that Redlich had a physical impairment that substantially limited his ability to lift things and walk, or even more likely, it would have simply stated that the defendant did not dispute Redlich had a handicap.

The issue for summary judgment, then, would have been whether Redlich had adduced sufficient evidence, such that a material issue of fact existed, with regard to whether he had experienced discrimination in his salary *because of* his handicap. Based on the facts of the case, it is doubtful Redlich would have survived summary judgment on that question. The court in this case found the defendant had "articulated a valid non-discriminatory reason for its employment decisions regarding the incremental salary increases of the plaintiff."[255]

Under ordinary Section 504 jurisprudence, therefore, this case would probably have resulted in summary judgment for the defendant, based on the grounds that no reasonable jury could find that the challenged employment action occurred because of Redlich's handicap. Under ADA jurisprudence, however, the district court reasoned as follows. The court easily concluded that Redlich "had a physical impairment and/or record of a physical impairment."[256] The next step was for the court to "determine whether there is a material factual issue as to whether such impairment substantially limited a major life activity."[257] The court listed the nine major life activities referenced in both HHS' Section 504 regulations and the EEOC's ADA regulations (e.g., caring for one's self, performing manual tasks, walking, seeing etc.), and announced that "[t]he relevant 'major life activity' at issue in this case is 'working.'"[258] The court then explained that the regulations to the ADA define "substantially limits" with respect to "working" as "'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'"[259]

Given this framework, the court easily concluded it could find "no material factual issue as to whether the physical impairment of the plaintiff *substantially* affected the major life activity of working, such that he was significantly restricted in his ability to perform the class of job in which he was engaged, that of law professor."[260] Indeed, the court drew on all the evidence Redlich and his witnesses had submitted for the record regarding his ability to publish, teach a full class load, and participate in faculty governance.[261]

The legal analysis in *Redlich* is not an aberration or an outlier in ADA litigation. To the contrary, this approach has been used by the courts in case after case brought under the ADA.[262] This type of analysis—in which courts focus on the impact of an

255. *Id.* at 108.

256. *Id.* at 106.

257. *Id.*

258. *Id.*

259. *Id.* (citing 29 C.F.R. § 1630.2(j)(3)(i) (1995)).

260. *Id.* at 107 (emphasis in original).

261. *Id.*.

262. Astonishingly enough, it is often the *plaintiff's* lawyer who inappropriately claims a limitation in working, rather than in some other life activity. *See* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 (5th Cir. 1996) (holding that plaintiff with breast cancer whose position was eliminated but was transferred to a different position was not

impairment on an individual's ability to work in a range of jobs, and not on the host of other life activities an impairment might more logically affect—is pervasive in cases brought under Title I of the ADA. It is as if the legislative change in the definition of "handicapped individual" never occurred in 1974, and as if the *first* definition of that term—i.e., an individual who has a "disability which for such individual constitutes or results in a substantial handicap to employment"—is the operative definition for employment cases under the ADA.[263]

The resonance of the requirement that an individual be unable to work, in a whole range of jobs no less, in order to meet the ADA's definition of disability reflects the staying power of the historical image of a "disabled person" as a person who is unable to work and unable to function in society. This image may well make intuitive sense to people because society does, indeed, provide cash payments for those who qualify for disability benefit plans. The idea, however, that the ADA was designed to prohibit discrimination against people with disabilities who *can* work, and hence, for example, are *not* seeking disability cash benefits, does not seem to have penetrated the minds of many judges.[264]

The power of the historical image of the disabled, non-functional person is apparent in many cases where courts have concluded that the plaintiff is not a person with a disability under the ADA. Usually this image is subliminal, animating the court's analysis without any express recognition of its existence or effect. At times,

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substantially limited in the major life activity of working even though plaintiff's "ability to work was affected"—based on her description of the "nausea, fatigue, swelling, inflammation, and pain she experienced as a result of the treatment and medication."); Bolton v. Scrivner, Inc., 36 F.3d 939, 944 (10th Cir. 1994) (affirming summary judgment in favor of employer where plaintiff who suffered work-related injuries to his right shoulder and both feet and was limited in his ability to lift weights or stand for long periods of time; court found plaintiff had a "relatively severe impairment of long term duration, producing a permanent or long term impact," *id.* at 944 n.3, but was nevertheless not "restricted from performing a class of jobs."); Olson v. GE Astrospace, 101 F.3d 947, 953 (3rd Cir. 1996) (holding that plaintiff who had been hospitalized for depression and was subsequently laid off during a reduction-in-force but not rehired for a new opening was not "disabled . . . within the meaning of the ADA . . . . [T]he evidence that was apparently offered to demonstrate Olson's fitness as an employee ironically establishes that he was not substantially limited in a major life activity. Therefore he can not establish that he is disabled." While the appellate court noted the irony in its analysis, the court was oblivious to the fact that this irony existed *solely* because it and the district court had inappropriately assessed the impact of Olson's impairment on the life activity of working, rather than the impact of his impairment on such life activities as sleeping or cognitive thinking. *See id.*).

263. Commentators, government agencies, and some courts have highlighted the fact that judges often misapply the EEOC's guidance on "substantially limited in working." *See, e.g.*, Robert L. Burgdorf, Jr., *"Substantially Limited" Protection*, *supra* note 246, at 439-468 (1997); Elizabeth A. Crawford, *The Courts' Interpretations of a Disability Under the ADA: Are They Keeping Our Promise to the Disabled?*, 35 HOUS. L. REV. 1207, 1238-1241 (1998). Despite this recognition, a review of court decisions in 1999 demonstrates that such misapplication continues with vigor. *See, e.g.*, Broussard v. University of Cal. Berkeley, 192 F.3d 1252 (9th Cir. 1999) (finding plaintiff not substantially limited in the major life activity of working); Sorensen v. University of Utah Hosp., 194 F.3d 1084 (10th Cir. 1999) (same); Hurley v. Modern Continental Const. Co., Inc., 54 F. Supp. 2d 85, 93-94 (D. Mass. 1999) (same); Amro v. Boeing Co., 65 F. Supp. 2d 1170 (D. Kan. 1999) (same); Seaman Unified School Dist. No. 345 v. Kansas Com'n on Human Rights, 1999 WL 777505 (Kan. App. 1999) (same).

264. Of course, this problem is compounded by the fact that the main cases in which judges have encountered people with disabilities revolve around the receipt of disability benefits. In addition, since many individuals who have received disability benefits often want to return to work and/or wish to challenge a discriminatory action that precipitated their leaving work, the confusion continues to reign. *See* Cleveland v. Policy Management Sys. Corp., 526 U.S. 795 (1999) (holding that SSDI benefit claims and ADA lawsuits do not inherently conflict).

however, the image becomes express. For example, the First Circuit Court of Appeals in *Katz v. City Metal Co.*[265] reversed a district court ruling that a plaintiff who had a heart attack and alleged he was impaired in his ability to "breathe, walk, perform manual tasks, care for himself and work,"[266] was, as a matter of law, not disabled under the ADA. As quoted by the appellate court, the district court had ruled as follows:

> The question is whether it produced a permanent disability that he can't perform his work. It's obvious he's a salesman, and he's still selling.... In order for the Plaintiff to recover in this case, the Plaintiff must make a showing that he has some type of permanent impairment, physical impairment in one or more of life's major activities. There's been no showing of that in this case.
>
> The only evidence is that he had a blocked artery that was opened by a balloon angioplasty.... People recover from heart attacks and go on with life's functions. I know, I've done it, and I had an artery that was completely blocked and not reopened. Because I went through a rehab program ... now I can perform. I'm playing tennis. I'm doing aerobic exercises every other day. I can perform fully in my life's functions as a Judge where there's a lot more stress than some other vocations....
>
> I have decided it as a matter of law. I have decided the Plaintiff failed to prove that he had a permanent disability resulting from his heart attack.[267]

District court judges are not usually this blatant in expressing their personal views (and hence, perhaps, not as likely to be overturned by appellate courts). But the perspective expressed by the district court judge in *Katz* is quite real, and is shared by many individuals in the general public. For example, in *Foreman v. Babcock & Wilcox Company*,[268] in which the Fifth Circuit affirmed a ruling that an individual with a pacemaker was not a person with a disability, the appellate court quoted at length from the deposition testimony, including this exchange:

> Q. [To the supervisor]: Let me ask you this. At that time did you consider Earl [the plaintiff] disabled, unable to return to employment?
>
> A. No. Absolutely not. Any medical statements that we had said that he only had restrictions being around ... electrical equipment. Beyond that, the doctors' statements said he could perform any other function. Earl, himself ... said he was strong as an ox, strong in the back, that he could do anything. And that he, himself, felt he could do any job either inside or outside of B&W, for that matter. I had no reason to believe he was disabled. I have known lot [sic] of people who have had pacemakers. Never considered them disabled.[269]

The plaintiff in *Foreman* had requested a modification of his job (to avoid electrical equipment) that, based on the facts of the case, would probably have required modifying the essential functions of his job and thus would not have been required under the ADA. Rather than rule, however, that the employer was not in violation of

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265. 87 F.3d 26 (1st Cir. 1996).

266. *Katz*, 87 F.3d at 30.

267. *Id.* (quoting unpublished district court opinion).

268. 117 F.3d 800 (5th Cir. 1997).

269. *Foreman*, 117 F.3d at 807.

the ADA because Foreman was not *qualified* for the job, the court instead ruled that Foreman was not a person with a disability. Thus, an option that is not easily available under Title VII (i.e., to rule that a plaintiff is not really a woman or not really African-American) is used frequently by courts in ADA cases to dismiss cases without reaching their merits.

In cases in which the courts are more sympathetic to the merits of a plaintiff's claim, the courts go out of their way to bend their circuit precedent to accommodate the particular plaintiff. Yet, even in those cases, the courts get caught in the web of "substantially limited" in the life activity of "working." For example, in *Webb v. Garelick Mfg. Co.*,[270] Jim Webb brought suit after being terminated from his management position. Two years prior to his termination, Webb was diagnosed with focal dystonia in his right hand, "an untreatable, severe [and painful] condition that is aggravated and accelerated by writing and other repetitive, precision hand motions."[271] Within a year he was experiencing pain in both hands. Webb's company ignored all his requests for accommodation and ultimately fired Webb on the grounds that he was unable to perform his job.[272]

The district court held that Webb was not disabled because "Webb's impairment did not prevent him from working in other occupations in the general labor pool"; his impairment "only precluded him from those occupations involving handwriting and other repetitive hand motions."[273] The Eighth Circuit expressed its discomfort with the district court's "sweeping holding," which "suggests that a plaintiff can never demonstrate disability as long as there is any other job she can perform."[274]

The appellate court did not, however, focus on how Webb's impairment substantially limited his major life activity of *writing* and of performing a range of *manual tasks*. Instead, the court explained that a plaintiff under the ADA "need not demonstrate that her impairment restricts her ability to perform all jobs," but simply must show that her impairment "prevents performance of a certain class of jobs."[275] Citing *Jasany* for the proposition that "[a] person's expertise, background, and job expectations are relevant factors in defining the class of jobs used to determine whether an individual is disabled," the appellate court concluded the district court should have conducted an individual assessment of whether Webb was "significantly restricted in his ability to perform that class of jobs as compared to the average person with his supervision and production skills. If the court determines that Webb has been so restricted, then Webb is disabled within the meaning of the ADA."[276]

Imagine being the lawyer who now must first make the individualized assessment case that her client's impairment restricts him in the ability to perform a *range* of jobs, and must then turn around and explain why her client is, nonetheless,

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270. 94 F.3d 484 (8th Cir. 1996).
271. *Webb*, 94 F.3d at 486.
272. *Id.*
273. *Id.* at 487.
274. *Id.*
275. *Id.*
276. *Id.* at 488.

fully *qualified* for the position that he is "significantly restricted in his ability to perform,"[277] with perhaps just a few reasonable accommodations that will not impose an undue hardship on the employer. The "Catch-22" inherent in this approach is obvious. A more common-sense approach, yet one that is almost never used or accepted by the courts, is for the lawyer to demonstrate that her client's impairment limits him in the life activity of *writing*. She can then turn around and argue that, despite that limitation, her client can still perform a job that includes writing, as long as some reasonable accommodations are made.

Of the many cases I have read in which the EEOC's regulation on "substantially limited in working" has been invoked by the courts, I have found only one that possibly meets the scenario Chris Bell painted as the reason for having the EEOC regulation focus on "working" in the first place: a situation in which an individual has an impairment that manifests itself *solely* in the workplace.[278] By contrast, in most cases in which the courts have considered whether a plaintiff's impairment substantially affects his or her ability to do almost all jobs (in the worst cases), or a limited class of jobs (in the more sophisticated cases), the impairment actually limits a life activity *other* than working.

It is a rare court that, like the Seventh Circuit in *Homeyer v. Stanley Tulchin Associates*,[279] reverses a district court's motion to dismiss, and admonishes the defendant that:

> It cannot be . . . that every plaintiff that merely links an existing disability to the workplace is limited to an "ability to work" analysis, for then every "disability" claim asserted in an action against an employer would collapse into an "ability to work" analysis. . . . Homeyer did not allege that her "disability" was only tied to the workplace; rather, she alleged that her breathing was generally impaired by her respiratory condition and was aggravated by the ETS [environmental tobacco smoke] at [her workplace]. . . . Given Homeyer's allegations, she should be given the opportunity to prove that she is "disabled" because her ability to breathe, separate and apart from her ability to work, is impaired.[280]

The common-sense *Homeyer* analysis is the exception, rather than the rule, in ADA litigation today. Moreover, even when courts apply such an approach, they highlight some of the additional obstacles that stand in the way of ADA plaintiffs getting in the courthouse door. For example, in *Katz v. City Metal Co.*,[281] discussed above, Katz was a scrap metal salesman who had a heart attack and was terminated five weeks later. Katz was discharged from the hospital after a one-week stay, and went to his office the following week. According to the appellate court's description, "Katz was unable to walk to the company's office on the second floor," and the cold

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277. *Id.*

278. *See* Byrne v. Board of Educ., 979 F.2d 560 (7th Cir. 1992) (discussing teacher allergic to the fungus aspergillus fumigatus, which existed in some, but not all, of the school buildings).

279. 91 F.3d 959 (7th Cir. 1996) (The district court dismissed the case based on the conclusion that an individual with chronic severe allergic rhinitus and simusitis can "plead no facts demonstrating she was 'disabled' within the meaning of the ADA.").

280. *Homeyer*, 91 F.3d at 962 n.1.

281. 87 F.3d 26 (1st Cir. 1996).

weather "restricted his breathing which, in turn, made walking more difficult."[282] Because Katz was on temporary disability leave, he went to Miami to recuperate—where he soon received a phone call informing him he was terminated.[283]

During the trial, the district court stated that Katz might not need the testimony of his doctor to prove he was disabled, and refused to grant a continuance to allow Katz's doctor to testify. The district court ultimately granted the defendant's motion for judgment as a matter of law based on the conclusion that Katz was not disabled because "he's still selling."[284]

The First Circuit admonished the district court that it need not have considered the "permutations" of the EEOC's requirements with regard to being substantially limited in working, since the EEOC advises that "if an individual is substantially limited in a major life activity other than working, or is so regarded, 'no determination shall be made as to whether the individual is substantially limited in working.'"[285] The appellate court then noted that it had "no doubt that a rational jury could conclude, even without expert testimony, that Katz had a condition affecting the cardiovascular system and therefore that he had a physical impairment under the ADA."[286] But, the court then noted: "We think, however, that it is a very close question whether Katz offered sufficient evidence to prove that that impairment 'substantially limited' his major life activities . . . his scheduled expert medical witness having proved unavailable."[287] The immediate effects after surgery were not sufficient, according to the court, because Katz needed to prove that "those limitations were permanent or persisted on a long-term basis."[288]

The First Circuit's approach in *Katz* highlights a second obstacle plaintiffs under the ADA now face under the first prong of the definition. Even if such plaintiffs do not get caught in the bizarre web of "limited in working," they face searching inquiries by the courts as to whether their impairments really *substantially* limit their major life activities, and whether the life activities they identify are *major* enough. Moreover, given the Supreme Court's decision in *Sutton* that any medicine or devices used to mitigate the effects of an impairment must be taken into account in determining whether an impairment substantially limits a life activity, this hurdle has become even harder to overcome.

B. "Substantially Limits" and "Major Life Activities"

In cases brought under the Rehabilitation Act, courts rarely considered what it meant for an impairment to substantially limit a major life activity, and rarely considered what made a life activity sufficiently major. By contrast, in cases brought under the ADA, courts have applied these statutory words with a

282. *Id.* at 29.

283. *Id.*

284. *Id.* at 30. Katz finally was hired for a job selling bonds for the State of Israel. *Id.* at 29.

285. *Id.* at 31 n. 3 (quoting 29 C.F.R. pt. 1630, App., at 403 (1995)).

286. *Id.* at 31.

287. *Id.*

288. *Id.* at 32.

vengeance. A review of a few representative cases provides a glimpse of how the unmitigated "plain meaning" reading of ADA's statutory text has caused results surprising to those of us who helped draft these words.

A typical example is *Dutcher v. Ingalls Shipbuilding*.[289] Tamela Dutcher sustained serious injury to her right arm in a gun accident. After extensive repair surgery, Dutcher began training as a welder, hoping to prevent deterioration in the use of her arm. Soon after being hired as a welder, Dutcher requested a transfer to the fab shop, "an assignment involving little or no climbing, because of difficulties she experienced due to the injury to her arm."[290] Dutcher's request was denied. She finally secured a position in the fab shop (due, the court makes clear to us, to her father's influence with the welding superintendent), and was subsequently laid off during a general reduction-in-force. When Dutcher was recalled to work, and required to undergo a physical exam, she was not reinstated to her job due to her disability. By the time Dutcher returned with a medical statement allowing her to work, all the welders in her classification had been laid off again.[291] Dutcher sued, claiming disability discrimination, and the district court granted summary judgment for the employer on the grounds that Dutcher's impairment did not qualify as a disability.[292]

The court of appeals noted that "[a] physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA."[293] After quoting the EEOC's regulatory definition of "substantially limits," the court correctly noted it would "first examine whether Dutcher's impairment substantially limits a major life activity other than working."[294] The court observed that Dutcher "has difficulty picking up little things from the floor, that she has trouble holding things high or real tight for long periods of time, and that she sometimes has problems turning the car's ignition."[295] Despite these assertions, the court concluded that Dutcher could "take care of the normal activities of daily living."[296] As the court explained:

> It is undisputed that [Dutcher] can feed herself, drive a car, attend her grooming, carry groceries, wash dishes, vacuum, and pick up trash with her impaired hand. . . . Dutcher admits that she has trained herself to "do everything . . . [she is] supposed to do" and that she can do "all of the basic things" she needs to do in life with her arm. Her medical expert testified that Dutcher can do lifting and reaching as long as she avoids heavy lifting and repetitive rotational movements. While her medical expert offered the opinion that her arm is impaired, this fact, as we noted above, is not disputed. More relevant to today's inquiry is that there was no evidence offered on which a jury could find that this impairment substantially limited a major life

289. 53 F.3d 723 (5th Cir. 1995).

290. *Id.* at 725.

291. *Id.*

292. It is questionable, based on the facts as recounted by the court, whether Dutcher should have prevailed on the merits of her disability discrimination claim. However, as with so many other cases, the court never reached the merits of the claim, but rather dismissed the case on the grounds that Dutcher did not have a disability.

293. *Dutcher*, 53 F. 3d at 726.

294. *Id.* (citing EEOC guidance).

295. *Id.* at 726 n. 11.

296. *Id.* at 726.

activity.[297]

In *Ryan v. Grae & Rybicki*,[298] Jessica Ryan was fired from her job as a legal secretary after repeated reprimands for poor work performance. Ryan sued, alleging discrimination based on her disability of ulcerative colitis of the rectum. As a result of her condition, Ryan had "experienced frequent and painful diarrhea, stomach cramps, and rectal bleeding."[299] The district court granted the employer's motion for summary judgment on the ground that Ryan was not disabled under the ADA. Alternatively, the court held that Ryan was terminated for a legitimate non-discriminatory reason.

The Second Circuit affirmed on the ground that Ryan did not have a disability under the ADA, thus removing the necessity (according to the appellate court) of reviewing the district court's alternative holding.[300] In prefacing its review of the first holding, the Second Circuit explained:

> Although almost any impairment may, of course, in some way affect a major life activity, the ADA clearly does not consider every impaired person to be disabled. Thus, in assessing whether a plaintiff has a disability, courts have been careful to distinguish impairments which merely *affect* major life activities from those that *substantially limit* those activities.[301]

Ryan argued that her colitis substantially limited her major life activity of "elimination of waste," as well as "her ability to care for herself."[302] The appellate court rejected both arguments. It assumed, without deciding, that elimination of waste was a major life activity, but concluded that Ryan was not "substantially limited" in that activity.[303] While the "nature and severity" of Ryan's impairment weighed in favor of finding a substantial limitation, the court concluded that the "duration" and "permanent or long-term impact" of the impairment (the two other factors required by the EEOC regulations) weighed against such a finding. While Ryan's colitis admittedly had "no cure and will trouble her for the rest of her life," the colitis "is symptomatic only at certain times, and can be asymptomatic for long periods."[304] Moreover, "any residual effects of her colitis may be felt only for three to four months a year." Thus, the court concluded, Ryan had failed to raise a triable issue of fact "whether her colitis will have significant residual effects on her ability to control her elimination of waste."[305]

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297. *Id.* The appellate court also concluded that Dutcher was not substantially limited in working because her injured arm "adversely affects only the functioning in a welding position requiring substantial climbing," and thus she had presented "no evidence that her disability prevents her from performing an entire class of jobs." *Id.* at 727. Ironically, the Fifth Circuit labeled Dutcher's "strongest argument" to be that her employer's actions "demonstrate that her impairment affects the major life activity of working." *Id.*

298. 135 F.3d 867 (2d Cir. 1998).

299. *Ryan*, 135 F.3d at 868.

300. *Id.* at 873. Of course, from the perspective of disability rights advocates, it would have been preferable for the appellate court to affirm the district court on the alternative holding that Ryan was not discriminated against *because of* her colitis, and to assume for purposes of the case that colitis was a covered disability.

301. *Id.* at 870 (emphasis in original).

302. *Id.* at 870-71.

303. *Id.* at 871.

304. *Id.*

305. *Id.*

The court of appeals also concluded Ryan had failed to raise a triable issue of fact as to whether her colitis substantially limited her ability to care for herself. Although the court noted that when her colitis was symptomatic "Ryan always must be near a restroom and at times soils herself," it observed that "even when her colitis is symptomatic, Ryan is still able to get dressed, groom herself and make her way to work."[306] Thus, the court concluded, "although [Ryan's] colitis affects her ability to care for herself in some respects, the severity of the limitation caused by her colitis is limited."[307] Again, the duration and expected long-term impact of the colitis weighed against a finding of substantial limitation.

Such individualized assessments necessarily result in individuals with the same impairment being covered as individuals with disabilities in some cases, but not in others. This fact was acknowledged by the Second Circuit, as it cited two cases in which colitis was found to be a disability and two cases in which it had not been so found.[308] Nevertheless, the Second Circuit noted that this was the appropriate approach under the ADA. Citing *Ennis v. National Ass'n of Business & Educational Radio Inc.*,[309] in which the Fourth Circuit concluded that whether HIV infection was a covered disability under the ADA required an individualized assessment, the Second Circuit admonished that "[b]ecause the determination whether an impairment 'substantially limits' a major life activity is fact specific, our decision does not mean that colitis may never impose such a limitation."[310]

Indeed, the varied results in cases under the ADA as to whether an impairment *substantially* limits a major life activity often seem to depend more on the court's belief in the *merits* of the plaintiff's underlying claim than on the specific effects of the plaintiff's impairment on his or her life.[311] There are plenty of cases, however, in

306. *Id.* (citing *Dutcher* for the proposition that "'caring for oneself' encompasses normal activities of daily living; including feeding oneself, driving, grooming, and cleaning home.").

307. *Id.*

308. *Id.* at 872 (citing Branch v. City of New Orleans, 1995 WL 295320 (E.D. La. 1995), *aff'd* 78 F.3d 582 (5th Cir. 1996) (colitis may be a disability); Jones v. Hodel, 711 F. Supp. 1048, 1049 (D. Utah 1989) (finding colitis a handicap); Ferguson v. Western Carolina Reg'l Sewer Auth., 914 F. Supp. 1297, 1299 (D.S.C. 1996), *aff'd* 104 F.3d 358 (4th Cir. 1996) (finding no disability); Caporilli v. City of Rome, 1992 WL 209327 (N.D.N.Y. 1992) (same)).

309. 53 F.3d 55, 59 (4th Cir. 1995).

310. *Id.*

311. *Compare* Farmer v. National City Corp., 1996 WL 887478 at *5 (S.D. Ohio 1996) (plaintiff terminated with seven other employees after departmental restructuring; court refuses to adopt a "per se" rule for coverage of cancer and concludes that plaintiff with prostate cancer "failed to identify any 'major life activity' which has been affected by either the cancer or the resulting impotence or incontinence."); Howard v. Navistar Int'l, 904 F. Supp. 922, 927-28 (E.D. Wis. 1995) (plaintiff with lateral epicondylitis of right elbow was accommodated numerous times by employer, complained throughout employment, and finally left the job and sued; court concludes that "the uncontroverted evidence shows that [plaintiff] is able to care for himself and perform all normal day-to-day activities (including shooting pool in a tavern pool league) without difficulty."); *and* Soileau v. Guilford of Me., 105 F.3d 12 (1st Cir. 1997) (plaintiff with depression terminated for negative attitude at work and failure to carry out duties; court concludes that even assuming "dubitante, that a colorable claim may be made that 'ability to get along with others' is a major life activity under the ADA," no substantial limitation of that life activity existed here because "the evidence does not establish that Soileau had particular difficulty interacting with others, except for his supervisor," and although plaintiff's "underlying disorder (dystymia) will be a life-long condition, Soileau has failed to adduce any evidence that his impairment—the acute, episodic depression—will be long term."); *with* Braverman v. Penobscot Shoe Co., 859 F. Supp. 596, 603 (D. Me. 1994) (plaintiff with prostate cancer terminated first day back at work following leave for radiation treatment; plaintiff argued that his major life activities had

which there are no blatant defects in the merits of the case, and yet the courts apply the same exacting scrutiny with regard to the definition of disability.[312] To this author, it seems as if courts began to apply such scrutiny in order to get rid of cases that were non-meritorious, but then built up a body of caselaw they were then forced to apply even in meritorious cases.

Strict, individualized scrutiny has also resulted in a number of courts rejecting the argument that hospitalization for an impairment is sufficient to prove that an impairment substantially limits a major life activity, the Supreme Court's analysis in *Arline* notwithstanding. As the Fifth Circuit explained in *Burch v. Coca-Cola Co.*,[313] in which the court rejected the argument that plaintiff's alcoholism was a disability, "[t]o accept [plaintiff's] reading [of *Arline*] would work a presumption that any condition requiring temporary hospitalization is disabling—a presumption that *runs counter to the very goal of the ADA*."[314]

The idea that the "very goal" of the ADA requires an individualized assessment of whether an individual's impairment is sufficiently limiting was recently endorsed by the Supreme Court in *Sutton*. In dealing with the question of mitigating measures, the Court explained that if medicine and other devices taken by an individual to mitigate the effects of his or her impairment were *not* taken into account, this would create a "system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals."[315] This, admonished the Court, would be "contrary to both the letter and the spirit of the ADA."[316]

The lower courts and the Supreme Court are perceiving a spirit of the ADA that was never envisioned by any of us who worked to enact that law. It is true that individualized assessments lie at the very core of disability anti-discrimination law. Because one of the causes of discrimination faced by people with disabilities is stereotypes regarding what people with disabilities are capable of doing, it is critical that each person with a disability be *individually* assessed to determine his or her capacity to do a job. Moreover, because an employer is obliged to make those

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been limited at time of termination because he "had just missed a significant amount of work due to radiation treatment, and the treatment had caused various intestinal, rectal, anal, and urinary difficulties;" court concludes that a "question of material fact obviously remains about whether this constitutes a substantial limit on [plaintiff's] major life activities."); *and* Mark v. Burke Rehabilitation Hosp., 1997 WL 189124 (S.D.N.Y. 1997) (plaintiff with lymphoma fired from medical staff position because he would not postpone a chemotherapy treatment in order to cover for another doctor during her vacation; plaintiff's hospitalization for cancer makes him disabled because he has a "record of a physical impairment"; the Court in *Arline* found that an impairment serious enough to require hospitalization is an impairment that substantially limits major life activities.).

312. *See, e.g.*, Matczak v. Frankford Candy & Chocolate Co., 950 F. Supp. 693, 696 (E.D. Pa. 1997) (plaintiff with epilepsy terminated following a seizure; although plaintiff's epilepsy "prohibits him from performing some manual tasks, such as climbing heights or working around machinery . . . none of these tasks seems to cause plaintiff's impairment to rise to the level that it can be said that they substantially limit his ability to perform life's functions.").

313. 119 F.3d 305 (5th Cir. 1997).

314. *Id.* at 317 (emphasis added). Other courts have similarly concluded that mere hospitalization is insufficient to establish a disability for purposes of the ADA. *See, e.g.*, Colwell v. Suffolk Co. Police Dept., 158 F.3d 635, 645-46 (2d Cir. 1998) (hemorrhage); Demming v. Housing & Redevelopment Auth., 66 F.3d 950, 955 (8th Cir. 1995) (cancer).

315. Sutton v. United Air Lines, Inc., 527 U.S. ___, 119 S. Ct. 2139, 2147 (1999).

316. *Id.*

reasonable accommodations that will allow an employee to be qualified for a particular job, disability law presumes the need for intensive individualized assessments whenever reasonable accommodations are at issue.[317] But while individualized assessments are thus critical in determining whether an individual with a disability is *qualified* for a job (including whether a reasonable accommodation is due to an individual in a particular case), the idea that an individualized assessment would be used to determine whether one person with epilepsy would be covered under the law, while another person with epilepsy would not, was completely foreign both to Section 504 jurisprudence and to the spirit of the ADA as envisioned by its advocates. The *words* of the ADA, however, can lend themselves to such an interpretation, and the fact that the EEOC's guidance expressly endorsed such an interpretation has cemented that approach in the courts.

A logical outgrowth of the lower courts' obsessive focus on whether an individual with an impairment is truly and actually *substantially limited* in a major life activity was the rejection by a number of district courts of the EEOC and DOJ's position that the mitigating effects of medication or devices on an impairment should not be considered when determining whether an individual's impairment substantially limits his or her major life activities.[318] By the time the Supreme Court dealt with this question, eight federal Courts of Appeals had concluded that mitigating measures should not be taken into account in determining whether an individual's impairment substantially limited the individual in a major life activity.[319] The Tenth Circuit, however, in *Sutton v. United Airlines, Inc.*,[320] had concluded to the contrary, creating a split in the circuit courts.

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317. *See* Chai R. Feldblum, *Employment Protections*, *in* THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE 81, 93-94 (Jane West ed., 1991) ("[t]he basic characteristic of a reasonable accommodation is that it is designed to address the unique needs of a person with a particular disability. . . . The underlying goal is to identify aspects of the disability that make it difficult or impossible for the person with a disability to perform certain aspects of a job, and then to determine if there are any modifications or adjustments to the job environment or structure that will enable the person to perform the job.").

318. *See, e.g.*, Deckert v. City of Ulysses, 1995 WL 580074 at *7 (D. Kan. 1995) (plaintiff with diabetes; "[t]he ADA creates a specific method through which the court is to determine the existence of a 'disability,' . . . and to the extent 29 C.F.R. Part 1630, App. would alter this definition by creating a 'checklist' of approved disabilities, it is invalid."); Schluter v. Industrial Coils, 928 F. Supp. 1437, 1444 (W.D. Wisc. 1996) (plaintiff with insulin-dependent diabetes; "the EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment 'substantially limits' their lives."); Murphy v. United Parcel Serv., 946 F. Supp. 872, 881 (D. Kan. 1996) (plaintiff with high blood pressure; "[b]ecause the plain language of the ADA conflicts with the EEOC's Interpretive Guidance, the court concludes [plaintiff's] impairment should be evaluated in its medicated state."); Wilking v. County of Ramsey, 983 F. Supp. 848, 854 (D. Minn. 1997) (plaintiff with depression; "the EEOC's interpretation is in direct conflict with the language of the statute requiring plaintiffs in ADA cases to show that an impairment 'substantially limits' a major life activity," and therefore "the beneficial effects of [plaintiff's] medication will be considered.").

319. *See* Bartlett v. New York State Bd. of Law Examiners, 156 F.3d 321, 329 (2d Cir. 1998) (learning disability); Washington v. HCA Health Serv. of Texas, 152 F.3d 464, 470-71 (5th Cir. 1998) (adult Stills disease); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-30 (7th Cir. 1998) (diabetes); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-66 (1st Cir. 1998) (diabetes); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (epilepsy); Doane v. Omaha, 115 F.3d 624, 627 (8th Cir. 1997) (blindness in one eye); Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996) (Graves disease); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (disabling mental condition).

320. *Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *aff'd* 527 U.S. ___, 119 S. Ct. 2139 (1999).

Although most of the previous cases had dealt with impairments such as epilepsy and diabetes,[321] which raised the question of whether a person with a serious, but controlled, medical condition should be considered "disabled," the *Sutton* case dealt with two sisters who had been denied the opportunity to be United Airlines pilots because they had uncorrected vision of 20/200 in the right eye and 20/400 in the left eye.[322] The *Sutton* case, therefore, raised the question of whether individuals who wore glasses and contact lenses should be considered persons with disabilities under the ADA. To the extent that disability had been traditionally perceived as synonymous with "inability to function," and to the extent that people with disabilities had been viewed as different, distinct, and "other" from "the rest of us," the plaintiffs in *Sutton* presented the hardest case for a court to understand that a disability anti-discrimination law might logically be intended to extend to individuals with the widest range of physical or mental impairments.

Indeed, the Supreme Court did not rise to that level of understanding. Relying exclusively on a plain reading of the statute,[323] the Court reasoned that three provisions of the ADA required it to conclude that plaintiffs should be viewed in their "corrected state" in determining whether their impairments substantially limited their major life activities. First, because "the phrase 'substantially limits' appears in the Act in the present indicative verb form," it was proper to read that language as "requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[324] Second, because the Act requires that an impairment substantially limit "the major life activities of *such individual*," the Court concluded that the law necessarily requires an "individualized inquiry."[325] Indeed, the Court explained, the EEOC had emphasized the need for such an individualized assessment, and yet its "directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA."[326] Finally, since Congress found that 43 million people would be covered under the ADA,[327] it was logically inconsistent to presume that Congress intended to cover the 100 million people estimated to have vision impairments.[328] Thus, the finding regarding the number of people covered under the law "is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."[329]

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321. *See supra* note 319.

322. *Sutton*, 119 S. Ct. at 2143.

323. *Id.* at 2146.

324. *Id.*

325. *Id.* at 2147 (citing Bragdon v. Abbott, 524 U.S. 624 (1998)).

326. *Id.* As the Court explained, "[f]or instance, under this view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes." *Id.*

327. 42 USC §12101(a)(1) (1994) ("Some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population grows older.").

328. *Id.* at 2147-49.

329. *Id.* at 2149. The Supreme Court's analysis in *Sutton* is addressed in detail in Wendy Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY. J. EMP. & LAB. L. 53

The Supreme Court's analysis in *Sutton* is a sobering reminder to those of us who labor in the fields of legislation that legislative intent can be easily obscured by legislative text. It is an obvious truism that statutory text is the most important and essential component of statutory interpretation.[330] But most lawyers involved in the drafting of legislation still presume the statutory text will be read in light of legislative intent, and that such intent will influence how the words are interpreted. This certainly remains the predominant trend of statutory interpretation across courts today.

The Supreme Court's reasoning in *Sutton*, however, reminds us that even clear legislative intent may be easily ignored by a court, with the simple, unassailable assertion that statutory text reigns supreme. For example, I can attest that the decision to reference 43 million Americans with disabilities in the findings of the ADA was made by one staff person and endorsed by three disability rights advocates, that the decision took about ten minutes to make, and that its implications for the definition of disability were never considered by these individuals. Moreover, it was my sense during passage of the ADA that this finding was never considered by any Member of Congress, either on its own merits or as it related to the definition of disability. By contrast, I can attest that the statement in three separate committee reports that mitigating measures should *not* be taken into account in determining the existence of a disability was extensively discussed by Congressional staff members, disability rights advocates, and some Members of Congress. Of course, none of these facts are relevant by the time a statute reaches the Supreme Court, where the *words* of the statute are at issue. As the *Sutton* case demonstrates, once a court decides statutory words are sufficiently clear, any legislative history pronouncement to the contrary is irrelevant.[331]

The Court's decision in *Sutton* has clearly resulted in limiting coverage for individuals whose impairments are mitigated through the use of medication or devices. It has also validated and reaffirmed the unfortunate approach of subjecting every plaintiff to an individualized assessment of whether his or her impairment sufficiently limits a life activity so as to rise to the level of a "disability" under the ADA.[332]

(2000).

330. Justice Frankfurter's imperative to law students was to "(1) read the statute; (2) read the statute; (3) read the statute!" HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 202 (1967).

331. "Because we decide that, by its terms, the ADA cannot be read in this manner [that individuals should be examined in their uncorrected state], we have no reason to consider the ADA's legislative history." *Sutton*, 119 S. Ct. at 2146.

332. *See* Taylor v. Phoenixville School Dist., 184 F.3d 296 (3rd Cir. 1999) (mental illness); Broussard v. University of California, at Berkeley, 192 F.3d 1252 (9th Cir. 1999) (carpal tunnel syndrome); Sorensen v. University of Utah Hosp., 194 F.3d 1084 (10th Cir. 1999) (multiple sclerosis); Muller v. Costello, 187 F.3d 298 (2nd Cir. 1999) (asthma); Ivy v. Jones, 192 F.3d 514 (5th Cir. 1999) (hearing impairment; vacating and remanding in light of *Sutton's* individualized assessment requirement); EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999) (blood cancer); Spades v. City of Walnut Ridge, 186 F.3d 897 (8th Cir. 1999) (depression); Haiman v. Village of Fox Lake, 55 F. Supp. 2d 886 (N.D. Ill. 1999) (heart condition); Hurley v. Modern Continental Construction Co., Inc., 54 F. Supp. 2d 85 (D. Mass. 1999) (idiopathic ventricular tachycardia); Dickerson v. United Parcel Serv., Inc., 1999 WL 966430 (N.D. Tex. 1999) (degenerative back disorder); Todd v. Academy Corp., 57 F. Supp. 2d 448 (S.D. Tex. 1999) (epilepsy); Whitney v. Apfel, 1999 WL 786369 (N.D. Cal. 1999) (depression); Piascyk v. City of New Haven, 64 F. Supp. 2d 19 (D. Conn. 1999) (pain in ankle and lower back from an injury); Hoffman v. Town of Southington, 62 F. Supp. 2d 569 (D. Conn. 1999) (medically unable to shovel snow); U.S. EEOC ex rel. Keane v. Sears, Roebuck & Co., Inc., 1999 WL 977072 (N.D. Ill. 1999)

While most courts hearing ADA cases have concluded that plaintiffs' impairments are not sufficiently *limiting* to be considered a disability, a few courts have also focused on whether the life activity at issue is sufficiently *major.* Indeed, the first case ever considered by the Supreme Court regarding the definition of disability under the ADA posed the question of whether reproduction was a major life activity, and if so, whether HIV infection substantially limited that activity.[333]

Justice Kennedy's interpretation of "major life activity" for the Court in *Bragdon* includes both expansive and restrictive components. On one hand, Justice Kennedy rejects the argument that major life activities are restricted to those that have "a public, economic, or daily character."[334] True to the strict textualist approach that characterizes all of the Court's ADA decisions, Justice Kennedy observes that "[t]he argument founders on the statutory language," and that "[n]othing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word 'major.'"[335]

But Justice Kennedy does invest the word "major" with major meaning. As he explains, quoting the First Circuit Court of Appeals: "'[t]he plain meaning of the word "major" denotes comparative importance' and 'suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance.'"[336]

Justice Kennedy's analysis for the Court implicitly assumes that not every plaintiff need prove that a particular life activity is major for him or her specifically, an assumption for which the dissent takes the majority to task given the requirement of conducting an individualized assessment of whether an individual has a disability.[337]

(neuropathy; diabetes); Robb v. Horizon Credit Union, 66 F. Supp. 2d 913 (C.D. Ill. 1999) (depression); Pacella v. Tufts University School of Dental Medicine, 66 F. Supp. 2d 234 (D. Mass. 1999) (monocular vision); Gonzalez v. National Bd. of Medical Examiners, 60 F. Supp. 2d 703 (E.D. Mich. 1999) (learning disability); Matuska v. Hinckley Twp., 56 F. Supp. 2d 906 (N.D. Ohio 1999) (severe depression, Post-Traumatic Stress Syndrome, athlete's foot); Person v. Wal-Mart Stores Inc., 65 F. Supp. 2d 361 (E.D.N.C. 1999) (keratoconus); Davis v. Computer Maintenance Serv., Inc., 1999 WL 767597 (Tenn. Ct. App. 1999) (diabetes). Ironically, the EEOC apparently continues to believe the Supreme Court's validation of an individualized approach is helpful to people with disabilities. *See* EEOC, Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified,' at 1 (on file with author). ("In all these cases [*Bragdon, Sutton, Murphy*], the Supreme Court emphasized that, consistent with EEOC's position, the determination of whether a person has a 'disability' *must be made on a case-by-case basis.*" (emphasis in original).

333. *See* Bragdon v. Abbott, 524 U.S. 624 (1998).

334. *Id.* at 638.

335. *Id.* Justice Rehnquist, writing for the dissent, focuses on the statutory language as well, but draws on an alternative dictionary definition of "major" as "greater in quantity, number, or extent." This definition, according to Justice Rehnquist, is most consistent with the major life activities described in the regulations: "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. §84.3(j)(2)(ii) (1994). Justice Rehnquist concedes that reproductive decisions are important in a person's life, as are "decisions as to who to marry, where to live, and how to earn a living." But, he concludes, " [of] [f]undamental importance . . . is not the common thread linking the statute's [sic] listed activities," but rather the fact that the activities are "repetitively performed and essential in the day-to-day existence of a normally functioning individual." *Id.* at 660.

336. *Id.*, quoting Abbott v. Bragdon, 107 F.3d 934, 939-40 (1st Cir. 1997).

337. *See* 524 U.S. at 658-59 (Rehnquist, J., dissenting) ("[T]he ADA's definition of a 'disability' requires that the major life activity at issue be one 'of such individual.' . . . [T]here is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction . . . . [R]espondent studiously avoids asserting even once that reproduction is a major life activity to her . . . . To the contrary, she argues that the 'major life

But despite the majority's deviation from the individualized assessment in this regard, its analysis presumes that the covered life activities will be intuitively understood as significant and important. Thus, reproduction, sleeping, eating, and thinking are all activities not listed in the regulations that would presumably easily fall within this intuitive understanding. Conversely, activities such as running, climbing, and swimming may be found by some courts not to be sufficiently "major."

As with strict analyses of the term "substantially limits," a strict analysis of "major life activity" can result in an individual being precluded from bringing an ADA claim, even when the individual's impairment seems to have been a factor in an adverse job decision. For example, in *Robinson v. Global Marine Drilling Co.*,[338] the Fifth Circuit concluded that a plaintiff with asbestosis, who had lung capacity that was 50% of the normal range, was not limited in a "major" life activity. Robinson worked for Global Marine for ten years as a rig mechanic and engineer, and was then laid off, along with most of the rig's crew, when the rig was taken out of service. After the layoff, Robinson's name was placed on a list of employees eligible to be recalled. All other crewmen on Robinson's rig were hired back except for Robinson. Moreover, the company had twenty to twenty-five openings for which Robinson was qualified, but never hired. Robinson's file contained a reference to his pulmonary problems. Robinson filed suit against Global Marine, and a jury found he had been discriminated against based on his disability.[339]

The Fifth Circuit reversed the jury verdict on the grounds that Robinson did not have a disability for purposes of the ADA. The only problem Robinson experienced, the court noted, was shortness of breath while climbing stairs (or climbing ladders on the ship). While breathing is a major life activity, the court reasoned, "'climbing is not such a basic, necessary function and this court does not consider it to qualify as a major life activity under the ADA.'"[340] Moreover, "[s]everal instances of shortness of breath when climbing stairs do not rise to the level of substantially limiting the major life activity of breathing."[341] Thus, because climbing was not a *major* life activity, and because shortness of breath in selected circumstances was not a *substantial limitation* of a concededly major life activity (breathing), Robinson was not a person with a disability under the ADA.

Part of what is so remarkable and disturbing about cases such as *Robinson* is the disjuncture between the type of people that advocates of the ADA presumed would be covered under the law, and the practical reality of the protection currently afforded by the law. Individuals with heart conditions or asbestosis or asthma, who have difficulty breathing or climbing, were presumed by advocates of the ADA to be covered under the law. The difficult political questions concerned inclusion of alcoholics, drug addicts, people with a range of mental illnesses, and people with AIDS and HIV

activity' inquiry should not turn on a particularized assessment of the circumstances of this or any other case.").

338. 101 F.3d 35 (5th Cir. 1996).

339. *Id.* at 35-36.

340. *Id.* at 37 (*quoting* Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 758 n.2 (5th Cir. 1996)).

341. *Id.* at 37.

infection in selected jobs.[342] Coverage was never questioned for individuals with serious illnesses—or indeed, for individuals with any physical or mental impairment beyond the trivial.

C. *"Regarded As Having" a Disability*

What about the safety valve of the third prong of the definition: being "regarded as having such an impairment"? Following the Supreme Court's decision in *Arline*, in which the "regarded as" prong was given a broad reading, it would have seemed any plaintiff who was denied a job because of an impairment would be able to argue that he or she was regarded as being substantially limited in working. Moreover, if the individual was denied some service or benefit other than employment, that person too would fall under the third prong of the definition, because he or she would then be viewed as being substantially limited in the major life activity of receiving whatever benefit or service he or she had been excluded from.

This analysis is concededly circular, because it is the defendant's action itself that creates coverage for the plaintiff. Moreover, a literalist reading of the statute could preclude this analysis. The statute requires that, to be considered a disabled individual, the individual must be "regarded as having *such* an impairment"—presumably, based on the statutory text, an impairment that "substantially limits a major life activity." Hence, under a strict reading of the statute, an individual may be covered under the third prong of the definition only when a defendant regards the plaintiff as having a type of impairment that substantially limits a major life activity. Thus, if a defendant employer refuses to hire an individual because of an impairment, but concomittantly believes the individual's impairment will not preclude her from working elsewhere, the defendant will not have regarded the individual as being substantially limited in the life activity of working. Similarly, if a defendant agency refuses to provide drug treatment services to an individual because of his impairment, but believes the individual can get drug treatment service elsewhere, that defendant will not have regarded the individual as being substantially limited in the life activity of receiving drug treatment services.

But this literalist reading of the third prong of the definition had been rejected by the Supreme Court in *Arline* in 1987.[343] Moreover, the Department of Justice's Kmiec Opinion in 1988 had expressly explained how the alternative, albeit circular, approach was consistent with the legislative intent of Section 504, as understood by the Supreme Court.[344] Indeed, the circular approach was the only way to provide coverage for individuals with certain impairments, such as cosmetic disfigurements, who were limited in life activities *solely* because of the responses and attitudes of others to their

342. *See* text accompanying *supra* notes 209-12.

343. Bragdon v. Abbott, 524 U.S. 624, 282-83 (1998), nn. 9 & 10.

344. Kmiec Opinion, *supra* note 165 at 405:8. The Kmiec Opinion had referred to the case of *Doe v. Centinela Hosp.*, 1988 WL 81776 (C.D. Cal. 1988) as an example of a provider of drug treatment services regarding an HIV-infected individual as being limited in receiving such services by virtue of the fact that it refused to deliver such services to the individual. *Id.* at 405:8 n. 15.

impairments.[345]

This circular, non-literalist reading of the third prong of the definition never caught on in the lower courts, however. Perhaps this approach seemed too radical to the lower courts, because it would have swept within the ambit of the law anyone who was treated adversely because of an impairment. Such an approach would clearly dissolve the line between "disabled" and "the rest of us," since all of us have some physical or mental impairment that might be used by an irrational employer or business as a basis for discrimination. Perhaps it was because the Supreme Court's decision in *Arline* never stated clearly enough that being fired from *one* job (as Gene Arline had been) was sufficient to establish that an employer regarded the fired employee as being substantially limited in the life activity of working.[346] Or perhaps it was because the EEOC regulations resurrected cases such as *Jasany* and *Forrisi*, which had expressly ruled that employers must regard employees as being unable to work in a range of jobs in order for such employees to come within the third prong of the definition.[347]

Whatever the reason, the broad coverage I and other disability rights advocates had presumed would be encompassed within the third prong of the definition of disability under the ADA never materialized. In employment cases, courts consistently reasoned that for plaintiffs to be covered under the third prong of the definition, they would have to demonstrate that the employer regarded them as being limited in a wide range of jobs, and could not extrapolate such a perception simply from the fact that plaintiffs had been fired from, or not hired for, a particular job.[348]

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345. *See id.*; *Arline*, 480 U.S. at 283 n. 10.

346. *See supra* text accompanying notes 131-148 for a description of the reasoning in *Arline*. It seemed to me, at the time, that the Court's opinion was crystal clear on this point. However, it apparently was not.

347. *See supra* note 230 (EEOC regulations); notes 109-10 (*Jasany* and *Forrisi*). Although the EEOC regulations referred to *Jasany* and *Forrisi* only with regard to the first prong of the definition, and only with regard to the rare situation of an individual limited solely in working, the lower courts hearing ADA cases drew extensively on those courts' analyses of the third prong of the definition as well.

348. *See, e.g.*, Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993) (plaintiff with insulin-controlled diabetes and plaintiff with impaired vision in left eye rejected from city driving jobs; impairments held not to be covered under first prong or third prong of definition; "[a]n employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general."); Ellison v. Software Spectrum, 85 F.3d 187, 192 (5th Cir. 1996) (plaintiff with breast cancer terminated and then rehired for another position; plaintiff not covered under first or third prong; "an employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes she is incapable of performing a particular job; 'the statutory reference to a substantial limitation indicates instead that an employer regards an employee as [substantially limited] in his or her ability to find work by finding the employee's impairment to foreclose generally the type of employment involved,'" quoting *Forrisi* and citing 29 C.F.R. § 1630.2(j)(3)(I) (2000)); Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 885 (6th Cir. 1996) (plaintiff with multiple sclerosis and some history of work problems claimed she was reassigned and "demoted" because of her disability; since "by her own admission," none of her impairments limited her activity in any way, she does not have a disability under the first prong; with regard to the third prong, "[w]hile the defendant may have perceived that Kocsis' health problems were adversely affecting her job performance, there is no evidence that defendant regarded Kocsis as being unable to care for herself or to perform all the duties of her job."); Ryan v. Grae & Rybicki, 135 F.3d 867 (2d Cir. 1998) (plaintiff with colitis fired from job as legal secretary for poor performance; plaintiff's impairment not a disability under first prong; plaintiff argued that defendant regarded her as being substantially limited in working, but claim rejected because she failed to present evidence that her employer "perceived her to be incapable of working in a broad range of jobs suitable for a person of her age, experience and training because of her disability.").

Similarly, in public accommodation cases, courts did not presume that a business or service provider who had denied goods or services to a plaintiff regarded that plaintiff as being limited in the life activity of receiving such goods or services. Instead, courts required that plaintiffs demonstrate they were regarded by such businesses or providers as being limited in some *other* life activity.[349]

By the time the Supreme Court was faced with the task of interpreting the third prong of the definition under the ADA, the parties in the cases before it did not even argue for the broad interpretation that advocates who worked on the ADA had always assumed was inherent in the third prong. In *Sutton*—the primary case in which the Court dealt with the third prong of the definition—the petitioners' attorneys argued that respondent United Airlines regarded their clients, two sisters who were not hired as pilots because they wore contact lenses, as substantially limited in working.[350] The attorneys *accepted* that United Airlines had to regard the sisters as being limited in a "class of jobs" in order for petitioners to claim coverage under the third prong of the definition, and that it was not sufficient for United Airlines to have rejected the sisters from one job.[351] Thus, petitioners' entire case rested on the argument that the position of global airline pilot constituted a class of jobs—an argument the Supreme Court rejected.[352]

By contrast, the amicus briefs in *Sutton* and *Murphy* filed by disability rights advocates who had worked on the ADA put forward an expansive view of the third prong that we presumed had been articulated in *Arline* and adopted by Congress in its committee reports.[353] This argument, however, was never made during oral arguments in the cases, and was never expressly addressed by the Supreme Court in its rulings. Indeed, in one of the true ironies of Supreme Court reasoning, Justice O'Connor's majority opinion in *Sutton* referred to the Solicitor General's oral argument in *Arline* in order to point out that being regarded as limited in working may result in a circular argument.[354] While that is certainly true, it is fascinating that Justice O'Connor's opinion displays no awareness that the Court in *Arline* had expressly *rejected* the Solicitor General's concerns with the circularity of that argument.

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349. *See id.*

350. Sutton v. United Airlines, Inc., 527 U.S. ___, 119 S. Ct. 2139, 2150 (1999).

351. *Id.*

352. *Id.* at 2151 ("[Petitioners] allege only that respondent regards their poor vision as precluding them from holding positions as a 'global airline pilot.' Because the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a *substantially limiting* impairment.").

353. *See, e.g.*, Brief Amicus Curiae of the ACLU in Support of Petitioners, Sutton v. United Air Lines, Inc., 119 U.S. 2139, 1999 WL 86517, 22-24 (filed by Louis Bograd and Chai Feldblum) (noting that, "[w]hen Congress included the third prong of the definition of disability in the ADA, it relied heavily on this Court's explication of that prong as set forth in *Arline*."); Brief of Senators and Representatives as Amici Curiae, *Albertsons, Murphy,* and *Sutton*, 1999 WL 86500, 16 (filed by Arlene Mayerson) (acknowledging that "[t]he 'regarded as' prong reflects the 'civil rights' approach to disability discrimination" and explaining Congressional intent to follow Court's understanding in *Arline*).

354. "We note . . . that there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems 'to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.' Tr. of Oral Arg. in School Bd. of Nassau County v. Arline, O.T. 1986, No. 85-1277, p. 15 (argument of Solicitor General)." *Sutton*, 119 S. Ct. at 2151.

It is fair to ask, of course, whether the expansive interpretation of the third prong advanced by some disability rights advocates is the appropriate public policy choice,[355] and whether Congress understood it was adopting such a broad view of disability when it enacted the ADA.[356] I believe a broad interpretation of the third prong does represent the best public policy choice. It is rare that an individual in today's society is denied employment or services because of a small, minor impairment. For example, people are not ordinarily fired, or turned away from restaurants, because they have calluses on their hands, moles on their cheeks, or a slight limp. Nevertheless, if for some reason, an employer or business chooses to discriminate against an individual *because of* such an impairment (and the individual can prove that causality), the employer or business should be put to the test of justifying that discrimination.[357] As to whether Congress perceived the same broad scope of the third prong that was understood by disability rights advocates, I presume we will discover the answer to that question soon enough if and when we return to Congress for a reaffirmation of its original intent in the definition of disability.

VI.
WHERE DO WE GO FROM HERE?

In the days following the Supreme Court's decisions in *Sutton*, *Murphy*, and *Kirkingburg* regarding the definition of disability under the ADA, I and other disability rights advocates bemoaned the rulings' consequences for individuals with a wide range of physical and mental impairments.[358] Certainly, in the area of employment, the rulings make it harder for plaintiffs to prevail since they must prove that their impairments (even with mitigating devices or medication) cause a substantial limitation in some life activity, and yet, at the same time, do not make them unqualified for the jobs they seek. In areas other than employment, where the "catch-22" of proving both substantial limitation and qualification is not as acute,[359] the challenge for plaintiffs will lie in proving that their impairments (even with mitigating

355. *See* Bagenstos, *supra* note 198 (rejecting expansive interpretation on policy grounds).

356. *See* Mayerson, *supra* note 246 (arguing that Congressional intent was to adopt a broad view of the third prong).

357. None of these impairments would limit any major life activity, and thus the individuals would not be covered under the first prong of the definition.

358. *See, e.g.*, Joan Biskupic, *Supreme Court Limits Meaning of Disability*, WASH. POST, June 23, 1999, at A1; Maggie Jackson, *Disabled Question Court Ruling*, AP ONLINE, June 23, 1999 (available at 1999 WL 17816865); Leonard H. Glantz, *Disability Definition Mess*, NAT'L LAW J., Aug. 23, 1999, at A15; Jackie Judd & Peter Jennings, *Supreme Court Gets Specific on Disabilities* (ABC News: World News Tonight television broadcast, June 22, 1999) (transcript available at 1999 WL 6801320); Nina Totenberg, *SCOTUS - Disabilities* (All Things Considered, National Public Radio broadcast, June 22, 1999) (available at NPR Online (visited Jan. 9, 2000) <http://search.npr.org/cf/cmn/cmnps05fm.cfm?SegID=51888>); Madeline Brand, *Americans with Disabilities Act* (Morning Edition, National Public Radio broadcast, June 29, 1999) (available at NPR Online (visited Jan. 9, 2000) <http://search.npr.org/cf/cmn/cmnps05fm.cfm?SegID=52167>); David Molpus, *Americans with Disabilities Act*, (Morning Edition, National Public Radio broadcast, June 28, 1999) (available at NPR Online (visited Jan. 9, 2000) <http://search.npr.org/cf/cmn/cmnps05fm.cfm?SegID=52120>); Antonio Mora, *Supreme Court Disability Ruling* (ABC Good Morning America television broadcast, June 23, 1999); *CNN Headline News* (CNN television broadcast, June 22, 1999, 8:30 p.m.).

359. The main qualification for enjoying the goods and services of most public accommodations is the ability to pay for such goods and services.

devices or medication) still result in substantial limitations in some major life activity. With ever-increasing scientific and medical knowledge, there may well be a shrinking number of individuals whose impairments meet this standard, although the discrimination faced by such individuals in employment or public accommodations may not be concomitantly reduced.

It is possible the lower courts will find a way to mitigate the full ramifications of the Supreme Court's decisions, at least in those cases in which the courts believe there is merit to the underlying challenges of discrimination. For example, courts may conclude that some people with diabetes are limited in the major life activity of eating, because the mitigating medication they take itself limits their eating patterns. Or courts may rule that some people with cancer or other serious illnesses are limited in the major life activity of making decisions about how much to work or where to live.[360] Finally, courts could return to the actual holding of the *Arline* case, in which Gene Arline was held to be a person with a handicap under Section 504 because she had been hospitalized twenty years earlier and hence had a "record" of a substantially limiting impairment. Every person with an impairment that is currently mitigated by devices or medication presumably had a moment in time when such an impairment was not mitigated in that manner. Under a technical, literalist reading of the ADA, that would be sufficient to bring the individual under coverage of the law as a person with a "record of such an impairment." While a plaintiff would still have to prove the discrimination occurred "because of the disability of such individual,"[361] a court might decide to accept evidence that the defendant acted on the basis of an impairment as sufficient to meet the causality requirement of the ADA.

All of these approaches, however, would essentially be Band-Aids on a relatively large, gaping wound. The Supreme Court's rulings seem to rest on the premise that anti-discrimination protection is necessary and appropriate for a limited group of individuals who have such severe impairments that these individuals are significantly and substantially limited in their life activities, even with the use of medication or devices. These individuals are presumably very different from "normal," non-disabled people, and hence deserve special protection through an anti-discrimination law.

This is a very different picture of disability from that envisioned by the lawyers who drafted the Section 504 regulations in the mid-1970s, or by the disability rights advocates who pressed for passage of the ADA in the late 1980s. Under the picture of disability envisioned by these individuals, people with disabilities have a spectrum of impairments—from mild to moderate to severe. Under this view, there is not a clear

360. In an amicus brief filed in the *Bragdon* case, we argued that people with asymptomatic HIV infection were limited in the life activity of making major life decisions. *See* Brief of the AIDS Action Council *et al.* as Amicus Curae Supporting Respondent at 26, Bragdon v. Abbott, 524 U.S. 624 (1998), 1998 WL 4725 (listing the following life decisions affected by HIV diagnosis: "[W]hat career to choose, what schooling to pursue, where to live, and whether to start a family . . . what and when to eat, or which gynecologist or primary care physician to choose."). The Supreme Court in *Bragdon* explicitly noted that while such arguments could be made, it was deciding the case in favor of respondent on the argument she had made below regarding a limitation in the life activity of reproduction. Bragdon v. Abbott, 524 U.S. at 635 (focusing on reproduction because it was the primary major life activity argued and discussed at the First Circuit).

361. 42 U.S.C. 12112(a) (1994) (employment). In public accommodations, the plaintiff would have to prove the discrimination occurred "on the basis of disability." 42 U.S.C. 12182(a) (1994).

dividing line between "the disabled" and "the non-disabled." Indeed, someone whose impairment is extremely trivial and mild could still be covered under this view if he or she was discriminated against because someone else had a strong, negative reaction to that particular, trivial impairment. Such an individual would be covered, as a "person with a disability," under the third prong of the definition. Most people with impairments that were moderate to severe, however, would be covered under the first prong of the definition.

The only unifying aspect under this view of disability is that the individual either has to have, or has to be perceived as having, an *impairment*—that is, some aberration in her physical or mental system. In this sense, impairment is like race or sex in anti-discrimination law: identification of a component that has sometimes been inappropriately used by employers and businesses, and subsequent preclusion by law of such a component in most circumstances. While the component may not be as serious a disadvantage in some circumstances as in others (for example, it may be more disadvantageous to be African-American than Caucasian, or to be a woman rather than a man), it is the component itself—in either its mild or severe incarnation—that is legally prohibited as an ordinary basis for decision-making.

While this was the view of disability held by many of us who worked on the ADA, the words used in the law failed to adequately capture that view. To the contrary, as numerous court decisions have demonstrated, the words we agreed upon lent themselves to an interpretation of disability more restrictive than many of us would have ever imagined. Congress, if it chooses to do so, can thus address this problem in one of two ways. It can retain the existing definition of disability, but add a series of constructions to those words that would remedy the restrictive rulings of the lower courts and the Supreme Court; alternatively, Congress could amend the definition of disability to mean a physical or mental impairment.

The first approach would require a substantial number of provisions and constructions. First, the term "substantially limits" would need to be defined as "having a measurable effect on." As noted above, the concept under the Section 504 regulations was that impairments that had a measurable effect on some life activity (and hence were not trivial impairments) should be covered. This new definition, essentially changing the plain meaning of the term, would restore that Section 504 approach.

Second, the statute would need to state explicitly that mitigating measures are not to be taken into account in determining whether an impairment has a measurable effect on a major life activity.

Third, the statute would need to address the definition of "major life activity" in order to ensure that courts did not preclude coverage of individuals with impairments on the grounds that the life activity on which the impairment had a measurable effect was not sufficiently "major." For example, the statute might provide that major life activities are "activities that are important in daily living, including (but not limited to) lifting, standing, walking, climbing, swimming, sleeping, working, breathing, seeing, hearing, procreating, engaging in sexual activity, making life decisions, and eating."

Fourth, the law would need to state explicitly that the effect an impairment has

on an individual's ability to engage in the major life activity of working should be considered only in cases in which the impairment has no measurable effect on any *other* major life activity. This statement would not be necessary as a legal matter, since the statute itself clearly provides that the impairment must substantially limit (i.e., have a measurable effect on) some major life activity. But the statement would probably be a necessary shock to the judicial system. The experience of cases decided under the ADA demonstrates that judges are quick to equate "disabled" with "unable to work." A clear legislative directive to the contrary may well be essential to counter this assumption.

Fifth, the statute would have to explain that an individualized assessment of an individual's disability is not required in cases where general medical evidence indicates that the impairment at issue (without mitigating measures) will have a measurable effect on some major life activity. Again, the point of such a legislative statement would be to send a corrective shock to a judicial system which is accustomed to engaging in individualized assessments in cases dealing with disability cash payments. A statutory statement precluding individualized assessments in circumstances where the absence of mitigating measures clearly results in functional limitations may significantly reduce some of the judicial energy currently expended on the question of disability.

Finally, the broad reach of the third prong of the definition would have to be explicated in the statute. To this end, the law would have to clarify that if a person is rejected from participating in a particular activity (work, receiving medical care, school) *because of* an impairment, that individual is regarded as being limited in that particular major life activity and is thus covered under the third prong of the definition.

All of these provisions and constructions would be necessary simply to put people with physical or mental impairments who experience discrimination because of such impairments on a par with individuals who experience discrimination because of their race, religion, or sex.

Alternatively, Congress could achieve the same result by prohibiting discrimination against individuals because they currently have a physical or mental impairment, because they previously had a physical or mental impairment, or because they are regarded as having a physical or mental impairment. While this definition would result in the technical inclusion of a number of people who might never need the ADA's anti-discrimination protection, the statute would mirror Title VII which similarly technically provides protection to a large number of people who might never need Title VII's anti-discrimination protection.

For example, if disability were defined as "a physical or mental impairment," a person with a bunion on her foot who is fired can prove she has an impairment (and hence is covered under the ADA), just as a man who is fired can prove he has a sex (and hence is covered under Title VII). Both individuals, however, would then have to prove they were fired *because of* their impairment or sex respectively. Of course, as a matter of practical reality, men are not ordinarily fired because they are men, and women with bunions are not ordinarily fired because they have bunions. But, as a matter of public policy, men *should* not ordinarily be fired simply because they are

men, and women with bunions *should* not ordinarily be fired simply because they have bunions. Thus, while neither Title VII nor the ADA was passed because of burning problems of discrimination against men or people with bunions, the resultant protection against discrimination based on gender or impairment should be equally available to any individual who has experienced discrimination on the basis of the identified component.

The practical reason for prohibiting discrimination based on the over-inclusive term "impairment," just as we prohibit discrimination on the basis of the over-inclusive terms "race" and "sex," can be seen from the judicial experience of the past seven years under the ADA. Courts and lawyers have spent an exorbitant amount of time and money parsing the question of whether a plaintiff is really "disabled," when the key policy questions are whether the person's impairment was the basis for an adverse action, and if so, whether the action was nonetheless justified. Any definition of the term "disability," even with all the provisions and constructions noted above, will still require time and effort spent in litigation on the question of whether a person sufficiently meets the statutory definition of disability. A better policy approach would be to adopt the over-inclusive term "impairment," and to direct judges to expend their energy remedying real cases of discrimination and dismissing non-meritorious cases on the basis of their lack of merit.

VII.
CONCLUSION

It is a sobering experience to read the hundreds of cases that have been litigated under the ADA since the law took effect. The number of issues that were the subject of discussion, negotiation, and drafting during the two year process in the development of the ADA is staggering; the papers reflecting the results of those negotiations fill many boxes in my storage area at the Georgetown University Law Center. Yet none of those boxes contain even a stack of paper reflecting conversations or discussions regarding the definition of disability under the ADA. Yes, the question was discussed; a significant modification from the Section 504 language was rejected; and work proceeded on the bill.

Ten years later, the definition of disability has taken center stage in judicial cases, and to a certain extent, in the public consciousness. Examples of people who are part of the mainstream of society (people who wear glasses or who have bad backs or who have high blood pressure) claiming to be people with "disabilities" seems shocking to the average American. "Those people can't be disabled," thinks the average American, "because I wear glasses and *I'm* certainly not disabled."

It is unfortunate that the words adopted by Congress in the ADA to define "disability" so easily lent themselves to the restrictive approach adopted by the lower courts. It is unfortunate solely because it is always difficult to ask Congress to fix an existing law, even when Congress might clearly agree the courts have misinterpreted Congressional intent. But it is not unfortunate that the definition of disability has penetrated the public consciousness. For too many years, members of the public have

considered people with disabilities to be individuals with such severe impairments that they are unable to function or have difficulty in functioning. Such individuals are to be pitied, are to be applauded if they "overcome" their impairments, and are to be included in programs and schools for "diversity" purpose—but above all else, they are to be considered as "other" and different from those without disabilities.

There is no doubt that society needs to make more extensive accommodations for individuals who cannot see, or cannot hear, or cannot walk up steps. But there is no reason to assume that such individuals are so significantly "other" than the rest of those of us who can see, or hear, or walk. Almost every person in our society has some physical or mental impairment. Most of those impairments do not mark the individual for others, nor do most of those impairments limit individuals in societal opportunities. But *some* of those impairments, *some* of the time, may indeed subject an individual to adverse societal action. At bottom, I believe the public's need to define a person who uses a wheelchair as "disabled," but a person who has arthritis as having a "medical condition," derives from the idea that disabled people lack value and are to be pitied. Thus, it is important for members of the public to draw a clear line between those who are disabled and those who are simply sick. The former can deserve the protection of the Americans with Disabilities Act: the latter, who are "us," are not disabled and hence do not deserve the protection of that law.

Some good may come from forcing people to question the validity of this assumption. The policy question that should be posed by the ADA is whether it is legitimate to use *any* physical or mental impairment as the basis for an employment decision, or the provision of goods and services, when the person with the impairment is qualified for the job, or eligible for the goods and services, despite the impairment. If the answer to that question is "no," then it should not matter where that impairment lies on the spectrum of impairments. Perhaps conceiving the protection of the ADA in this manner will ultimately help break down the myths, stereotypes, and fears that still surround the concept of disability in this country today.