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Kay Schriner and Richard K. Scotch

The ADA and the Meaning of Disability

For nearly a decade, the Americans with Disabilities Act (ADA)[1] has been the main protection for people with disabilities against discrimination in employment, public accommodations, public transportation, and telecommunications.[2] The act, approved in 1990 by bipartisan majorities of 377 to 28 in the House of Representatives and 91 to 6 in the Senate,[3] is a comprehensive statement of public policy: People with disabilities should not be unfairly excluded from employment, public accommodations, and other aspects of public life, and the federal government should act to protect them.[4]

One might expect that if the ADA represented a consensus in 1990, it would still enjoy widespread support today, and in fact, there have been no serious attempts in Congress to repeal or significantly limit the act. However, while popular criticism of the ADA persists,[5] the legal system has become the primary arena for challenges to the ADA's broad focus and underlying assumptions. Complaints filed under the ADA have been making their way through the administrative agencies responsible for implementation and the courts for several years now, and since 1999, the Supreme Court has issued several key decisions concerning the ADA, some of which involve the act's definition of disability. In this essay, we suggest that much of the larger disagreement over the Americans with Disabilities Act can be characterized as a clash of perspectives about the meaning of disability.

Disability as a Sociopolitical Construct

Opinions about the Americans with Disabilities Act depend to a large extent on how one defines disability and the nature of the problems faced by people who have disabilities. The ADA was the culmination of a two-decade shift in federal disability policy.[6] For over a hundred years, disability has been defined in predominantly medical terms as a chronic functional inca-

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pacity whose consequence was functional limitations assumed to result from physical or mental impairment.[7] This model assumed that the primary problem faced by people with disabilities was the incapacity to work and otherwise participate in society. It further assumed that such incapacity was the natural product of their impairments, and to some extent their own "secondary" psychological reactions to their impairments.[8] The corollary to this assumption was that the role of government in assisting people with disabilities was both to provide financial support to this deserving group, who could not support themselves through no fault of their own, and to help in the repair and rehabilitation of their damaged bodies and minds and any psychosocial incapacity accompanying the damage.[9]

In the late 1960s, a fundamental transformation occurred in federal disability policy that rejected a primarily medical/clinical model of disability and substituted a sociopolitical or minority group model.[10] Under this model, people with disabilities may be seen as a minority group subject to unfair discrimination, and the role of government is to protect their civil rights to political, economic, and social participation by eliminating that discrimination.[11] In such a formulation, the opportunities accorded people with disabilities are limited far more by a discriminatory environment than by their impairments.

In the sociopolitical model, disability is viewed not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations. All of these, in turn, reflect overly narrow assumptions about what constitutes the normal range of human functioning.[12] Thus, the consequences of physical and mental impairments for social participation are shaped by the expectations and attitudes of the larger society. Michael Oliver, a leading British disability studies scholar, writes:

> All disabled people experience disability as social restriction, whether those restrictions occur as a consequence of inaccessibly built environments, questionable notions of intelligence and social competence, the inability of the general population to use sign language, the lack of reading material in Braille or hostile public attitudes to people with non-visible disabilities.[13]

Assumptions about how people perform everyday tasks, or about what people can and cannot do without assistance, are built into human environ-

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ments in ways that can create barriers for those who do not conform to such expectations. If architecture and technology are based on limited images of "normal" physical functioning, they constrain individuals who must pursue alternative ways of performing various tasks. Stairs can limit the entry of people who use wheelchairs; printed words limit those who are blind. Similarly, organizational routines and public policies may limit participation through their assumptions about "normal" functioning. Fixed work schedules may exclude people whose conditions make it difficult for them to start work at 8:00 A.M., or who must take more frequent time off. Eligibility requirements for public assistance may assume that potential beneficiaries either are disabled and cannot work, or can work and therefore are not disabled. Thus, people with disabilities are frequently marginalized by the constraints of a constructed social environment in which assumptions of the inability to participate become self-fulfilling prophecies.

Building on this social model of disability is the assertion that, because they collectively occupy a stigmatized social position, people with disabilities occupy a social status analogous to that of racial and ethnic minorities.[14] People with disabilities share many of the stigmatizing experiences and characteristics of other groups commonly recognized as minorities. They are subject to prejudiced attitudes, discriminatory behavior, and institutional and legal constraints that parallel those experienced by African Americans and other disadvantaged and excluded groups.[15] People with disabilities are victimized by negative stereotypes that associate physical or mental impairment with assumed dependence on others and a general incapacity to perform social and economic activities.[16] Such stigmatizing assumptions can result in exclusion and social isolation through deprivation of access to employment, public facilities, voting, and other forms of civic involvement.[17] Because of these factors, people with disabilities are denied the opportunity to fully participate in society, a form of exclusion that public policy has defined as discrimination.[18] Using the Civil Rights Act of 1964 as its legislative model, the ADA seeks to eliminate this discrimination.[19] The sociologist Paul Higgins writes of the broad goals of the ADA:

> Rather than (primarily) looking to individual characteristics to understand the difficulties experienced by people with disabilities, rights encourage us, even require us, to evaluate our practices that may limit people with disabilities. Rights empower people with disabilities. With rights, people with disabilities may legitimately contest what they perceive to be illegitimate treatment of them. No longer

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> must they endure arrangements that disadvantage them to the advantage of nondisabled citizens.[20]

The ADA can be seen as more than a specific protection from discrimination—it is also a policy commitment to the social inclusion of people with disabilities. In 1986, the National Council of the Handicapped, a presidentially appointed advisory body, issued a report titled *Toward Independence* that helped lay the groundwork for the development of the ADA.[21] The report stated that

> [existing] handicap nondiscrimination laws fail to serve the central purpose of any human rights law—providing a strong statement of a societal imperative. An adequate equal opportunity law for persons with disabilities will seek to obtain the voluntary compliance of the great majority of law-abiding citizens by notifying them that discrimination against persons with disabilities will no longer be tolerated by our society.[22]

Similarly, in the introduction to her authoritative, edited volume written immediately after the ADA's passage, Jane West wrote:

> The ADA is a law that sends a clear message about what our society's attitudes should be toward persons with disabilities. The ADA is an orienting framework that can be used to construct a comprehensive service-delivery system. . . . The ADA is intended to open the doors of society and keep them open.[23]

The Consequences of a Sociopolitical Model of Disability

Because of the ADA's reliance on a sociopolitical model of disability, it does not employ a simple conception of who is to be considered to have a disability and under what circumstances the treatment given a person with a disability should be considered discriminatory. The sociopolitical model provides a complex view of disability and disability-related discrimination by focusing upon the relationship between an individual's impairment and the nature of the environment in which that individual must function. For example, the employment provisions of the ADA define a qualified person with a disability in terms of her ability to perform the essential functions of a job with or without reasonable accommodation.[24] This definition relies

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on an analysis of the characteristics of the job as well as the characteristics of the person seeking the job.[25] As the statute is applied, the perceptions and expectations associated with disability and work help to shape judgments about the capacity of persons with a disability to perform adequately within specific environments.

Because of this reliance upon knowledge of the environment, the application of the ADA to specific situations may not embody a clear, abstract, behavioral standard of differential treatment. While the statute provides a number of specific examples of disability-related discrimination[26] and of reasonable accommodation,[27] the complexity of disability[28] and of workplaces[29] may mean that the ADA will lead to a wide variety of resolutions based on specific combinations of individual impairments, potential environmental obstacles, and possible adaptations by the person with the impairment. The application of ADA criteria will almost inevitably vary among individuals and across various social settings, and may pose unusual problems of interpretation for federal regulators and the courts. Paul Hearne, the director of the National Council on Disability from 1988 to 1989, writes, "The required type of accommodation will obviously vary with the individual employee, the requirements—and the purposes—of a particular job, and the environment of each workplace."[30]

The ADA was intended by its framers to change assumptions about how specific physical or mental impairments affect functioning.[31] Yet if the marginalization of people with disabilities is the result of social processes that are embedded in our culture, then it is not surprising that governmental and legal institutions as well have employed a traditional medical model of disability.[32] Public officials and the courts frequently mirror well-established limiting assumptions about people with disabilities.[33] The statute's broad definitions of who has a legitimate disability, what constitutes discrimination on the basis of disability, and what remedies are appropriate in countering such discrimination may be at odds with popular understandings of who should be treated as "truly" disabled, what their problems are, and what protections they deserve from regulators and the courts.

Further, the flexibility written into the statute may have led to a greater reliance on popular and limited conceptions of what people with various impairments can and should be allowed to do. Donald O. Parsons wrote shortly after the ADA's passage:

> The human factor is likely to affect judicial behavior. . . . Cases that are either factually ambiguous or highly emotional are likely to be

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> determined primarily by judicial preference. . . . How a judge views such cases will vary from judge to judge.[34]

The Conservative Critique: Economic and Moral Dimensions of Disability

Critics in Congress, academia, and the media have attacked the ADA's mandates, expressing skepticism over the validity of the claims of those seeking protection from discrimination related to disability and the efficacy of a civil rights (as opposed to a market) approach to improving the status of people with disabilities.[35] To critics, the ADA is a case of ill-considered social engineering in which an overly broad category of putative victims claimed unreasonable accommodations from society. For example, Dick Armey, Republican House Majority Leader since 1994, has called the ADA "a disaster," predicting, "Under my majority leadership, the disabilities act will be revisited and will be written properly so its focus and intent goes to people with genuine disabilities."[36]

As discussed above, the medical model of disability characterizes people with disabilities as having pathological individual attributes, typically linked to incapacity and dependence, which in turn may lead to social and economic isolation. This model can accommodate recognition of discrimination as a problem associated with disability, but it emphasizes that people with disabilities must "overcome" the limitations of their impairments in order to function in society. By focusing on adaptations required from people with disabilities, the medical model implies far less from employers or other social gatekeepers in terms of accommodation since the environment is taken as given.[37] With regard to employment, the model suggests that people with disabilities ought to adapt themselves to the demands of productivity set in the marketplace. Efficiency concerns of firms should outweigh claims of disabled job applicants, despite any social costs (or in the language of economics, negative externalities) that might be generated for society at large. One leading critic, Carolyn Weaver, has written of the ADA:

> The legislation thus includes in the protected population people who, in an economic sense, are not as productive or do not make the same contribution to the profitability of the firm as other people with the same qualifications. (These are the people who can perform only the

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> essential functions of the job and who can do so only with accommodation.) While promoting the employment of this much broader group may be a highly desirable social goal, the antidiscrimination–reasonable accommodation approach is a costly and inefficient way of doing so and is likely to have highly undesirable distributional consequences.[38]

The conservative critique of the ADA is not solely based on grounds of economic efficiency, however. Beyond the issue of productivity is a recurrent concern about the moral legitimacy of claims made by individuals with disabilities on employers and public officials. The issue of moral basis for disability policy is a recurrent historical theme in American social welfare policy. Deborah Stone writes that the popular conception of disability "is best understood as a moral notion. . . . Disability . . . is an essential part of the moral economy."[39] Similarly, Theda Skocpol writes, "Institutional and cultural oppositions between the morally 'deserving' and the less deserving run like fault lines through the entire history of American social provision."[40]

Political conservatives have traditionally expressed concerns in social policy debates that "undeserving" people might benefit from public programs.[41] The ADA's legislative history establishes a broad and comprehensive definition of disability, including people with HIV/AIDS, most psychiatric conditions, and those with a history of substance abuse.[42] Conservative critics expressed great discomfort with this broad definition. For example, a publication of the Republican National Committee has included the ADA's regulations among those that are well intentioned but spiraling "out of control," at least in part because of their inclusion of "drug abusers, the obese and the 'emotionally disturbed'" among those protected.[43]

Frequently there is a moral dimension to this concern. Individuals who have conditions that are associated with engaging in morally questionable behavior or who are perceived as representing a lack of self-control or poor character may be seen as unworthy of public support. Even for some within the disability community, individuals with these conditions are not considered to be in the same moral category as people with visual or hearing impairments, or those who use wheelchairs. Some critics would even question the legitimacy of coverage for individuals with back problems, the impairment (along with spinal conditions) most often cited in early ADA complaints,[44] because the diagnosis of such problems is often based on self-reports of pain and the inability to perform certain tasks.[45]

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Similar doubts may be raised about the moral legitimacy of the ADA by complaints that are based on conditions that some may perceive as frivolous expressions of self-indulgent victimhood such as obesity or chemical sensitivity. While people portrayed in media accounts as sad, angry, or troubled may have bona fide disabling conditions under the ADA's definitions, there may be little public sympathy for their claims. Media coverage of individuals claiming discrimination because they are fat, or phobic, or sensitive to environmental chemicals may color public perceptions of disability discrimination, regardless of the legal validity of the complaints or their ultimate disposition. The focus of criticism and stories in the media may create an image among the public about who benefits from the law that may overshadow the empirical reality of the great majority of disability discrimination and its victims.[46]

Do such concerns, based on perceptions shaped by the lenses of a limited, skeptical, and stigmatizing model of disability, constitute a backlash to the Americans with Disabilities Act? The act is still in place, unamended and intact, and there has been no serious attempt to repeal it, even at the zenith of conservative power in Congress. Similarly, there have been media accounts that cast a skeptical light on the act,[47] but these may be no worse than traditional coverage of disability rights issues. A few media horror stories have not led to any major public outcry against the ADA or people with disabilities. From a larger social standpoint, then, there may be a reservoir of good will toward the concepts underlying the ADA and toward protecting people with disabilities from discrimination and unfair treatment. Despite some high-profile grumbling from political conservatives, the Americans with Disabilities Act appears to enjoy strong support among the public and two of the three branches of government.

The ADA and the Courts

The courts, however, are a different matter. The decade-long period of judicial interpretation of the ADA has raised serious doubts about its potential to accomplish the far-reaching results envisioned at its passage. Among other problems, we have seen many persons with disabilities refused coverage under the ADA and challenges mounted to the federal government's incursion into state affairs. To some degree, these events are part of a larger move to rebalance federal-state relations.[48] But they also reflect a deep and abiding misunderstanding of (and perhaps hostility toward) the ADA's formulation of disability discrimination and the nature

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of the remedies it would impose. The developments of the last ten years now suggest that the ADA is insufficient to accomplish the social change required to ensure equal opportunity for persons with disabilities, particularly in the contemporary legal climate.

A primary concern is the inability of disabled individuals to get their day in court. In case after case, courts have ruled that plaintiffs are not covered under the ADA's three-prong definition, which provides coverage to individuals with "a physical or mental impairment that substantially limits one or more of the major life activities," who have "a record of such an impairment," or who are "regarded as having such an impairment." Quite unexpectedly, courts have applied narrow interpretations of the definition, with the end result being what one commentator has referred to as "the incredible shrinking protected class."[49]

The instances of definitional narrowing are legion. Many of these cases involve the application of the ADA's first definitional prong. The presence of a serious physical or mental impairment often is insufficient to convince a court that the individual is covered by the act. Rather, courts are examining in great detail the effect such an impairment has on the individual's capacity to function. In contrast to case law under the Rehabilitation Act (on which the ADA's disability definition was based and under which individuals with impairments typically easily met the threshold definition), plaintiffs are routinely being carefully scrutinized to determine their status. In one instance, for example, a law firm that had terminated a legal secretary for poor performance was granted summary judgment on the basis that she was not a covered individual under the ADA. The court held that the secretary's condition (ulcerative colitis of the rectum that caused "frequent and painful diarrhea, stomach cramps, and rectal bleeding") was not an impairment that substantially limited a major life activity, despite the plaintiff's contention that her condition affected her ability to care for herself and eliminate bodily waste.[50] In another, a plaintiff with a serious arm injury that affected her ability to lift, hold, and manipulate objects was ruled not disabled because the effect of her impairment was not substantial.[51] Neither plaintiff was given the opportunity to have her case heard on the merits.

The failure of the courts to find plaintiffs covered by the ADA at times appears simply absurd. The Fifth Circuit court held in *Robinson v. Global Marine Drilling Co.* that a man whose lung capacity was 50 percent of normal due to asbestosis was not substantially limited in a major life activity, though the plaintiff experienced shortness of breath when climbing stairs or ladders. Breathing is a major life activity, said the court, but "[s]everal

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instances of shortness of breath when climbing stairs do not rise to the level of substantially limiting the major life activity of breathing."[52] The Fifth Circuit overturned a jury verdict in Robinson's favor because he was not covered by the ADA.

Often plaintiffs are denied coverage under the ADA because courts interpret the "substantially limited" provision as applied to the major life activity of working to mean that a plaintiff must be restricted in the ability to perform a *whole class* of jobs, not just the specific job at issue. This tendency started with a few cases decided under the Rehabilitation Act and intensified following passage of the ADA. Under this analysis, a plaintiff would have to show that he or she was "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."[53]

A typical example is that of Allan Redlich, a law professor whose stroke in 1983 left him partially paralyzed. Redlich claimed that the law school had discriminated against him because of his disability when it granted him lower pay raises following his stroke. The court granted summary judgment to the university, holding that the professor was not substantially limited in working. Relying on the plaintiff's own evidence regarding his ongoing teaching, research, and service activities, the court ruled that he was not "significantly restricted in his ability to perform the class of job in which he was engaged, that of law professor."[54]

Other discrimination claims have foundered on the question of what constitutes a major life activity. Courts have placed great emphasis on the requirement that the life activity that is affected by an impairment is in fact *major.* One plaintiff diagnosed as mildly mentally retarded and learning disabled experienced a "breakdown" because of the stress caused when her employer required employees to reorganize into teams, with each member bearing new responsibility for the performance of all team tasks rather than the one discrete task each had been previously assigned. The company subsequently claimed that the employee, Denise Anderson, was not "disabled" as defined by the ADA because her impairment did not cause a substantial limitation in a major life activity—despite her claim that her mother tended to her business affairs because of her incapacity. The court ruled that taking care of one's business affairs "might be a sub-category of the major life activity of taking care of one's self" but "is not a stand-alone major life activity."[55]

In other instances, courts refuse to define a person as covered by the ADA by virtue of being "regarded as" having an impairment that substan-

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tially limits major life activities. One plaintiff with breast cancer alleged that her employer "regarded" her as having a disability based on statements made by her supervisor, including that her breasts were not worth saving and that she glowed in the dark.[56] The court disagreed, saying that while such comments were "beneath contempt," they did not prove that the employer considered the woman to have a substantially limiting impairment, and thus she was not covered under the ADA's "regarded as" prong. In another instance, Mayerson reports that her client, a man wearing a hearing aid, was not allowed to pursue his claim of discrimination because the court ruled that his employer did not regard him as disabled, even though the employer admitted that the plaintiff was not hired "because he wore a hearing aid."[57]

The Supreme Court has added to the problem with their decisions regarding the use of mitigating measures. The question of mitigating measures arises when an individual with an impairment uses medication, devices, or equipment to improve functioning. The use of mitigating measures was discussed during the writing of the ADA, and Congress indicated its intent that plaintiffs' disability status be determined without regard to the use of such measure.[58] But in three cases involving the use of mitigating measures, the Supreme Court held that the determination of whether plaintiffs are disabled under the ADA must take into account the use of such measures—in direct contradiction of congressional intent. In *Sutton v. United Airlines, Inc.,* the Court considered the case of twin sisters with severe myopia who wore corrective lenses but were denied employment as pilots by United Airlines because they failed to meet the visual acuity requirement. The Court held that they were not substantially limited in a major life activity—as determined in an individualized assessment of their status when wearing corrective lenses. In other words, "disability under the Act is to be determined with reference to corrective measures."[59] Two companion cases proceeded along similar lines. In *Murphy v. United Parcel Service,*[60] a mechanic who took medication for high blood pressure was determined not to have a disability because his medical condition was controlled. In *Albertson's, Inc. v. Kirkingburg,*[61] the Court held that an employer's reliance on federal regulations specifying vision requirements for commercial drivers should not be interpreted as meaning that the employer regarded an employee with monocular vision as having a disability under the "regarded as" prong of the definition.

Observers have interpreted these various rulings as related to more general trends within the federal courts and to the courts' experience with other federal disability legislation. Some courts are applying rules of textu-

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alism to their readings of the Americans with Disabilities Act in ways that effectively reduce its reach, contrary to the intent of Congress. This has been especially apparent in the disability definition cases. The training of defense attorneys following the passage of the ADA may partly account for this trend. Chai Feldblum argues that because many of these attorneys were unfamiliar with the more generous interpretation of the Rehabilitation Act's definition of disability (on which the ADA's definition was based), they were more likely to parse the three-prong definition—especially in light of the ADA regulations that emphasized individualized assessment and the importance of the substantial limitation and major life activity provisions.[62]

But the trend toward textualism—in which courts rely on the "plain meaning" of the statute itself with little or no regard for the explanations of statutory language likely to be found within the legislative history—exacerbates the problem by limiting the knowledge base on which courts can rely to understand the intentions of Congress when it passes broad remedial legislation such as the ADA. This no doubt has contributed to the poor showing of plaintiffs in the courts; a recent study by the ABA's Commission on Mental and Physical Disability Law shows that defendants prevailed in 92 percent of the cases.[63]

It may also be that courts' experience with disabled individuals themselves is a reason for the unexpected reactions some people with disabilities have encountered. The traditional disabled plaintiff appearing in federal court is the individual seeking disability insurance benefits where the evidence presented concerns that person's *inability to work,* which in turn secures an economic benefit from the insurance program. Courts' experience with this type of claim may explain their tendency to evaluate the disability status of a plaintiff in terms of work capacity. When courts are used to hearing plaintiffs proclaim their inability to work (a showing necessary to qualify for income from the program), they may be more likely to apply a work-based evaluation in ADA cases as well, and thus the tendency of the courts to assess the major life activity in terms of work ability.[64]

The courts' history with disability insurance applicants may also help account for the apparent hostility of some courts toward plaintiffs for rights-based claims under the Americans with Disabilities Act. Some plaintiffs, argues Fordham law professor Diller, have been seen as "whiners making excuses."[65] Rather than perceiving these issues as involving protections against disability-based discrimination in the workplace, courts have tended to view ADA cases as "requests for special benefits made by employees who are performing poorly."[66]

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The upshot of case law over the last decade is that courts have a troubling proclivity to find that "no one has a disability."[67] At the very least, it is quite possible that an individual with say, epilepsy, will be considered as having a disability in one court but not another.[68] With these unforeseen applications of the ADA, plaintiffs face daunting challenges in proving that they are covered individuals under the act. We are thus left wondering how the ADA's other provisions would be interpreted in these cases. Given that civil rights statutes historically have been broadly interpreted by the courts, in part to ensure that the complaints of aggrieved persons will be heard, it is disappointing that disabled plaintiffs were not given the opportunity to prove their allegations of discrimination. Halting the process at the threshold question of coverage has kept many disabled persons from arguing their cases in the courts, despite Congress's intention that they be permitted to have their claims heard.

Arguing the cases on the merits would be far preferable to dismissing them outright on the basis of an overly narrow application of the ADA's definition of disability. Then we might be able to determine what workplace arrangements can and must be modified to accommodate a wider range of human characteristics. Is it not more relevant to debate the business necessity of say, vision requirements for airline pilots than whether applicants using corrective lenses are "disabled" under the ADA? Is it not more important that we contest the applicability of a blood pressure requirement for truck drivers than whether the driver who medicates his high blood pressure is "disabled"? The law professor's claim of discrimination may have been dismissed due to his failure to provide sufficient evidence, as Chai Feldblum has suggested,[69] but at least we would have to confront the professor's argument that the lower pay raises he received constituted disability discrimination. Similarly, Arlene Mayerson's deaf client should have had the opportunity to define the employer's decision to not hire him "because he wore a hearing aid" as discriminatory and thus illegal under the ADA.

In addition to the narrow issue of statutory interpretation regarding the class of individuals protected by the ADA, there is also the broader question of what conduct violates the constitutional guarantee to equal protection under the law. Recent shifts in constitutional interpretation are calling into question a basic premise of the ADA—that the failure to provide reasonable accommodations to persons with disabilities constitutes disability discrimination and thus violates the Fourteenth Amendment. In the 1985 *Cleburne* decision, the Supreme Court followed its practice of deferring to state legislatures in treating some groups of individuals differently than

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others, but held that such classifications must be "rationally related to a legitimate state interest."[70] Conduct reflecting "mere negative attitudes" and "vague, undifferentiated fears" would violate the Fourteenth Amendment's equal protection clause.[71]

In hearings on the ADA, Congress expanded on the analysis of disability-based discrimination. Hearing testimony from numerous sources, including the U.S. Commission on Civil Rights, the Advisory Commission on Intergovernmental Relations, and the congressionally appointed Task Force on the Rights and Empowerment of Americans with Disabilities, Congress accumulated an extensive record of discriminatory conduct based on discomfort and aversion, stigmatization, stereotyping, and paternalism.[72] Finally it fashioned a broad remedy that would affect both the private and public sectors.

The Americans with Disabilities Act thus was based on precedent and legislative fact-finding. Consistent with Fourteenth Amendment jurisprudence, Congress believed it had acted appropriately and constitutionally to remedy a long history of disability-based discrimination at the hands of the states and other actors. Recently, however, the ground of constitutional interpretation has shifted, with more emphasis placed on the rights of states to govern their own affairs without the heavy hand of federal interference. In a series of cases, the Supreme Court has reshaped the relationship between the national and state governments. Federal action is now constrained by requirements that, first, there be a showing of unconstitutional conduct by the states that justifies federal law, and, second, that federal action is congruent and proportional to the constitutional violation. Congress may enact legislation "both to remedy and to deter violation[s] of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[73] The congruence and proportionality test applies to the size of the swath; the "bigger the jelly center (constitutional violations), the bigger the donut (swath) can be."[74]

In *University of Alabama v. Garrett,* the Supreme Court applied these tests in deciding whether Congress had the authority to abrogate states' Eleventh Amendment immunity to private lawsuits for money damages brought under Title I of the ADA. The Court held that Congress had failed to compile a record of disability discrimination that would justify the imposition of the ADA's requirements on the states. The majority cited the small number of instances of states' employment-related discrimination in the legislative record and concluded that these failed to meet the standard it has set for demonstrating the presence of unconstitutional conduct by

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the states. The incidents considered by Congress "taken together fall far short of even suggesting the pattern of unconstitutional discrimination" required.[75] The Court went further. Even if it were to find the record satisfactory, there would still be questions regarding the congruence and proportionality of the ADA's requirements for reasonable accommodations. The provision of reasonable accommodations to ensure equal access to the workplace "far exceeds what is constitutionally required" because it "makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' on the employer."[76] In the context of employment, states could "quite hard headedly—and perhaps hard-heartedly" enforce job qualifications that "do not make allowance for the disabled."[77] It "would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities. . . ."[78]

The Court's decision in *Garrett* appears to depart from the formulation of unconstitutional state conduct found in *Cleburne* and related cases. *Cleburne* has emphasized that disability-based distinctions based on negative attitudes and fear raise concern about the rationality of such distinctions and thus their constitutionality, but *Garrett* strongly suggests that the current Court is less troubled by these attitudinal indicators. Negative attitudes and fear may *accompany* irrational conduct, but "their presence alone does not a constitutional violation make."[79] A claim of irrational distinction will have to "negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.' "[80]

This conclusion seems to indicate a misunderstanding of the nature and extent of disability discrimination. The "rationality" of job performance standards and other employment-related practices may be apparent only to those who possess the very attitudes and fears that the Court now says are constitutional. Arguing for the presence of, for example, rigid physical examination requirements that are entirely irrelevant to job performance of the jobs in question may be justified as rational by those who believe myths about the incapacities of persons with impairments. A requirement that individuals with amputated limbs wear prostheses before they can be hired, even when it might not be required to meet job demands, may appear rational to an observer who finds negative reactions to the absence of limbs unobjectionable.[81] The majority does not deny that there is discriminatory behavior. Indeed, the opinion notes that Congress's general findings regarding the presence of disability discrimination were supported by the record assembled during debate on the ADA.[82] The Court simply

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refuses to elevate it to its proper place as unconstitutional inequality before the law.

By apparently retreating from *Cleburne,* the *Garrett* Court seems to grant a pass to states to make distinctions that might be justified before an uninquisitive court. The rational basis test requires the Court to be deferential toward the people's legislative representatives who consider a range of facts and views in their policy deliberations. But in *Cleburne,* a city's denial of a special use permit for a group home for individuals with intellectual impairments was subjected to a close inspection to determine the motives of city officials. Finding that their conduct rested on irrational prejudice, the denial was found to be an unconstitutional violation of the Fourteenth Amendment.

In *Garrett,* the Court directed its deference differently, showing considerably more deference to *state* legislatures than it did to the *federal* legislature. The double standard did not go unnoticed by the minority, who said that "it is difficult to understand why the Court, which applies minimum rational-basis review to statutes that *burden* persons with disabilities . . . subjects to far stricter scrutiny a statute that seeks to *help* those same individuals."[83] In any event, the *Garrett* decision suggests that the judiciary will be less likely to scrutinize the motive of states than it was under *Cleburne.*

The *Garrett* decision is perhaps an unfortunate harbinger of legal things to come. If abandoning "hardheaded" and "hard-hearted" conduct that may also reflect negative attitudes and fear is not required to accommodate people with disabilities, the likelihood is that the lives of people with disabilities will not be much improved, at least not at the behest of the courts under the Americans with Disabilities Act. This conduct is precisely the sort Congress meant to address by the ADA, and the courts' narrowing of its scope renders it less effective. Clearly, raising the consciousness of the current Court about the nature and extent of disability-based discrimination is an unfinished task.

The Policy Implications of the Human Variation Model

The potential utility of the Americans with Disabilities Act to improve the lives of people with disabilities depends on its full and faithful interpretation by the courts, but, with or without that, we must also consider the potential of the ADA to reach all the barriers encountered by individuals with disabilities in their quest for equality and integration. Resting our col-

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lective hopes on a civil rights strategy could have paid off—in theory at least. The ADA's disparate impact prohibition and reasonable accommodation requirement, properly understood, offer the possibility for significant reconstruction of social attitudes and practices as well as the built environment. But for it to accomplish the far-reaching change that is necessary would require a much more receptive judiciary than currently exists and, given the difficulty of using the law to produce a change of heart, probably a more receptive public as well. Moreover, the inherent limitations of the sociopolitical/civil rights model—as applied in the context of American political and legal tradition—pose conceptual and practical obstacles to the transformation of society.

The limitations of the sociopolitical model of disability and its predecessors suggest that approaches such as the human variation model may be necessary for us to fully understand and address the obstacles of participation and integration faced by people with disabilities. The human variation model, as we have already indicated, may help us find a way out of the conceptual morass of disability by starting from the assumption that person-environment relationships and interactions are complex and in constant flux. An individual with an impairment may be disabled at one moment and not the next depending on the environment in which she finds herself. Impairments themselves can be temporary, permanent, or cyclical.[84] The relationship between impairment and life roles such as working also may vary from individual to individual. Two individuals with the same "objective" condition such as, say, arthritis may respond very differently, with one continuing to work and the other not. Systemic conditions too are varied and variable. Family structures and resources differ; one community may offer more support to individuals who need it than another, and some employers are more responsive to the needs of their employees and their families than are others. Macrosystem conditions such as the economic cycle can dictate patterns of unemployment and underemployment that more indirectly affect the ability of individuals with various impairments to participate in the workforce. When the labor market offers fewer full-time permanent positions and more contingent and part-time positions, the relative ability of the individual with a disability to work will be affected.[85]

A singular reliance on prohibitions to discrimination will almost certainly fail to reach all of the nooks and crannies where disadvantage is lodged in these complex person-environment relationships. Not every barrier is the result of prejudice and discrimination, or even unintentional differential treatment that creates an obstacle; impairments themselves often

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cause differences in functional abilities that are relevant to considerations of possible public policy responses. Even the broad definition of disability discrimination that requires reasonable accommodations and modifications and that prohibits disparate impact could not address all of the impediments faced by persons with impairments. In many cases, the less advantaged life circumstances of individuals with disabilities are caused by multiple factors that no doubt include these forms of discrimination but also include atypical physical and mental functioning. Responding to these many causal factors will require several coordinated approaches to address the full range of variables that might contribute to an optimal person-environment fit.

The ADA's reasonable accommodation and modification requirements are clearly among the approaches that are required to broaden the range of environmental niches for individuals. The ADA's essential message is that social institutions can and should embrace more flexibility in arranging workplaces and other environmental settings. When employers allow individuals with health conditions flexible work schedules to pursue medical treatment while still performing the essential functions of a job, it increases the probability that such persons can maintain employment. If employers were to permit persons with limited intellectual abilities to perform a specific job even when other employees were required to perform a wide range of jobs, it would create a niche in which those individuals could function and be valued. But when achieved by virtue of a legal mandate, such accommodation may come at a high price by creating confrontation where cooperation would be preferred. As we have stated elsewhere:

> A human variation perspective on employment suggests that lack of access to employment by persons with disabilities be resolved by cooperatively maximizing each individual's productivity rather than by staking out and defending legal entitlements to employment based on membership in a minority group. The perspective defines the problem of employing people with disabilities as one of having employers view individuals as potential contributors rather than as members of groups whose legal status threatens the autonomy of business judgments.[86]

We also may need to consider the possibility that there are limits to environmental flexibility.[87] Of course, the ADA recognizes this in its requirement that a disabled person be "otherwise qualified" and able to perform

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the essential functions of the job with reasonable accommodations if necessary. Employers are not required to employ individuals who cannot meet the needs of the firm.

There are numerous impairments that, in the context of the workplace, may so seriously interfere with an individual's ability to perform a particular job that no reasonable accommodation will suffice. Some conditions may so inhibit an individual's work performance that the person is unable to perform a job's essential functions. The determination of whether individuals are "otherwise qualified" when those individuals have mental illness are illustrative in this regard. Employers have not been required by the courts to continue to employ

> a programmer with depression whose workplace stress could not be controlled sufficiently by reducing her overtime and avoiding deadline-intensive work; a man with recurrent depression who had difficulty completing tasks on time, getting along with his boss, and supervising other people; a field representative with a bipolar disorder who acted inappropriately with co-workers and had requested a second extended medical leave of absence for treatment; a restaurant manager with depression who could only work the day shift and no more than 40 hours a week; a customer service representative whose panic attacks prevented her from using the telephone.[88]

In each case, the individual's ability to do the job (with reasonable accommodations if necessary) was the issue. Employers were not required to alter the workplace so much with respect to those particular jobs that it could accommodate the differences of these individuals.

When viewed from this perspective, the ADA's inherent limitations (quite apart from its interpretation by the courts) become starkly apparent. Employers and other covered entities are not required to make changes in their normal course of business that would pose undue burdens or fundamentally alter programs or activities. Indeed, the evidence thus far strongly suggests that not only are defendants winning many more ADA cases than would be expected, but also that those individuals who are benefiting are those whose impairments are less severe, not those persons whose more severe disabilities (such as mental illness and intellectual disability) make them among the most vulnerable members of the disability community.[89]

Improving the opportunities for integration and participation for these more severely impaired individuals will require social welfare policies of the type more traditionally thought of as disability policy. Though these

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must be reformed to reflect more contemporary notions about the *capabilities* of persons with disabilities (as in the new work incentives that may help disability insurance beneficiaries return to work) and the importance of the *environment* (as in programs to further integration by subsidizing home ownership among persons with intellectual disabilities), they are nonetheless an integral part of a modern disability policy agenda.

Approaches that would "incentivize" employment and other desirable outcomes may also be required. Burkhauser[90] has proposed tax credits for employers' and individuals' accommodation expenses to encourage the provision of accommodations in the workplace, as well as income subsidies for persons with disabilities who are in the labor force. These are possible policy choices that are conceptually independent of rights-based claims and thus have the advantage of avoiding the disputes such claims provoke (though they admittedly have disadvantages all their own).

Civil Rights and Social Change

The Americans with Disabilities Act is a potentially crucial protection for people with disabilities. Beyond the specific outcomes of legal proceedings, the ADA's mandates have led to significant expansion of access to the social, economic, and political mainstream by raising awareness about disability issues and by providing incentives to businesses and other covered entities to do the right thing. However, whatever legal protection from discrimination has been gained, it would be very difficult to argue that people with disabilities have achieved social or economic parity as the result of the ADA, or that having a disability is no longer a relevant factor in the life chances of many individuals.

But that might be far too much to expect from a civil rights law. People with disabilities face a variety of barriers to social participation, including limited human capital, social isolation, and cultural stereotypes.[91] While all of these can be directly linked to discrimination, none of them will be easily changed by an act of Congress. Fundamental and far-reaching social change will be necessary for people with disabilities to enjoy full access to American society.

The experience of African Americans has implications for the potential of civil rights statutes to serve as vehicles for overcoming social disadvantage. While Jim Crow laws and legal segregation have been abolished, the research community is divided on the effects of equal opportunity policy for African Americans' incomes and access to employment.[92] Poorly edu-

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cated African Americans as a group are relatively worse off in terms of earnings or employment than they were thirty years ago, and the state of black-white relations remains far short of the goals of the civil rights movement of the 1960s.[93] In fact, one of the most contentious issues in the current debate over race relations is affirmative action. The concept of affirmative action requires employers and others to take positive steps to overcome the historic disadvantages experienced by members of minority groups and women. In some ways, the concept is analogous to the positive accommodations needed to make employment, education, public accommodations, and other institutional spheres truly accessible to Americans with disabilities.

Just as the economic and social challenges facing many African Americans are not likely to be resolved by civil rights laws alone, the social exclusion of people with disabilities will not be resolved by the ADA on its own. Access to good jobs, health insurance, personal assistance, community-based services, and accessible technologies will be enhanced, but not guaranteed, by laws such as the ADA. Antidiscrimination laws may be necessary, but not sufficient, for major institutional change.

Might we then expect that the ADA can at least end overt discrimination committed on the basis of disability? If the sociopolitical model of disability is correct, even this may be too great a burden to place on the legal system. The stigma associated with disability is so embedded and reinforced within our culture and social structure that only tremendous efforts will root it out.[94] As we have experienced in race and gender equity issues, changing cultural values and social relationships that have become institutionalized in the informal patterns of everyday life may be beyond the capacity of statutory mandates. As Donald L. Horowitz has pointed out, the courts have a built-in emphasis on formal relationships, and may lack the capacity to alter informal patterns of behavior.[95] Such an effort may be a more appropriate task for a broadly based social and political disability movement than for a law dependent on judicial and regulatory enforcement. Interpersonal contacts may help to break down pernicious stereotypes and arbitrary limitations on people with disabilities. Grassroots advocates may be better able to educate communities about the nature of the barriers faced by people with disabilities and how the participation of people with disabilities can be achieved with beneficial results. Legal protections from discriminatory practice are probably indispensable, but such guarantees cannot be the only strategy toward ending the discrimination and social exclusion faced by Americans with disabilities.

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NOTES

1. 42 U.S.C. § 12101 (1994).

2. A brief overview of the impact of the ADA is provided in Fred Pelka, The ABC-CLIO Companion to the Disability Rights Movement 18–22 (1997).

3. *See id.* at 20.

4. *See* Jane West, *The Social and Policy Context of the Act, in* The Americans with Disabilities Act: From Policy to Practice 3, 21 (Jane West ed., 1991).

5. *See, e.g.,* Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung, and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio,* 21 Berkeley J. Emp. & Lab. L. 223 (2000).

6. For a discussion of this transformation, see Richard K. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy (1984).

7. *See* Harlan Hahn, *Towards a Politics of Disability: Definitions, Disciplines, and Policies,* Soc. Sci. J., Oct. 1985, at 87, 88–89 [hereinafter Hahn, *Towards a Politics*]. For a discussion of the historical roots of disability as a clinical concept in public policy, see Deborah A. Stone, The Disabled State 90–117 (1984). For an extended summary and critical discussion of the medical model of disability, see Gary L. Albrecht, The Disability Business: Rehabilitation in America 67–90 (1992).

8. *See, e.g.,* Robert A. Scott, The Making of Blind Men 6–8 (1969).

9. For a history of the federal vocational rehabilitation system, see Edward D. Berkowitz, Disabled Policy: America's Programs for the Handicapped (1987).

10. *See* Scotch, *supra* note 6, at 8–9. For a general discussion of the minority group model, see Harlan Hahn, *Introduction: Disability Policy and the Problem of Discrimination,* 28 Am. Behav. Scientist 293 (1985) [hereinafter *Disability Policy*].

11. *See* Hahn, *Towards a Politics, supra* note 7, at 93–96.

12. For a discussion of the consequences of a mismatch between natural human variation and the limited expectations built into social environments, see Richard K. Scotch & Kay Schriner, *Disability as Human Variation: Implications for Policy,* 549 Annals Am. Acad. Pol. & Soc. Sci. 148, 154–57 (1997).

13. Michael Oliver, The Politics of Disablement: A Sociological Approach at xiv (1990), *quoted in* Len Barton et al., *Disability and the Necessity for a Socio-Political Perspective, in* 51 World Rehabilitation Fund Monograph 5 (International Exchange of Experts and Information in Rehabilitation eds., 1992).

14. *See* Hahn, *Disability Policy, supra* note 10, at 300–301.

15. *See generally* Frank Bowe, Handicapping America: Barriers to Disabled People (1978); John Gliedman & William Roth, The unexpected Minority (1980); Louis Harris and Associates, Inc., The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream (1986); National Council on the Handicapped, toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—with Legislative Recommendations (1986) [hereinafter Toward Independence].

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16. For an extensive review of stereotypes commonly associated with disability and their consequences, see IMAGES OF THE DISABLED, DISABLING IMAGES (Alan Gartner & Tom Joe eds., 1987).

17. *See id.*

18. For a discussion of how the civil rights framework became associated with the status of people with disabilities, see RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL CIVIL RIGHTS POLICY (1984).

19. *See id.* at 51–52.

20. PAUL C. HIGGINS, MAKING DISABILITY: EXPLORING THE SOCIAL TRANSFORMATION OF HUMAN VARIATION 199–200 (1992).

21. *See* TOWARD INDEPENDENCE, *supra* note 15, at 18–21; *see also* NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT (1997) (providing an account of the policy development process culminating in the enactment of the ADA).

22. TOWARD INDEPENDENCE, *supra* note 15, at 18.

23. Jane West, *The Social and Policy Context of the Act, in* THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE 3, 22 (Jane West ed., 1991).

24. 42 U.S.C. § 12111(8) (1994).

25. *See, e.g.,* Chai R. Feldblum, *Employment Protections, in* THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE 81, 88–90 (Jane West ed., 1991).

26. *Id.* at 90.

27. *Id.* at 93.

28. *See* Scotch & Schriner, *supra* note 12, at 154–57.

29. *Id.* at 157–58.

30. Paul G. Hearne, *Employment Strategies for People with Disabilities: A Prescription for Change, in* THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE 111, 124 (Jane West ed., 1991).

31. *See* Jane West, *Introduction—Implementing the Act: Where to Begin, in* THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE xi, xi–xii (Jane West ed., 1991).

32. *See* 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, 561 (1997).

33. For a discussion of the need for a reconsideration of the assumptions built into law and public administration, see Hahn, *Disability Policy, supra* note 10, at 315.

34. Donald O. Parsons, *Measuring and Deciding Disability, in* DISABILITY & WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES 72, 73 (Carolyn L. Weaver ed., 1991).

35. *See generally* DISABILITY & WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES (Carolyn L. Weaver ed., 1991) [hereinafter DISABILITY & WORK]; *see also* LaCheen, *supra* note 5; *infra* text accompanying note 40.

36. Barbara Vobejda, *Disabled People See Budget-Cutting Fervor as Threat, New Attitude,* WASH. POST, Aug. 3, 1995, at A12.

37. *See* Hahn, *Towards a Politics, supra* note 7, at 89.

38. Carolyn L. Weaver, *Incentives versus Controls in Federal Disability Policy, in* DISABILITY & WORK, *supra* note 35, at 6–7.

39. Stone, *supra* note 7, at 143.

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40. Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States 149 (1992).

41. *See, e.g.,* Edward Berkowitz & Kim McQuaid, Creating the Welfare State: The Political Economy of Twentieth-Century Reform 12 (2d. ed. 1988).

42. *See* Feldblum, *supra* note 25, at 85–87.

43. Vobejda, *supra* note 36.

44. *See* Nancy R. Mudrick, *Employment Discrimination Laws for Disability: Utilization and Outcome,* 549 Annals Am. Acad. Pol. & Soc. Sci. 53, 67 (1997).

45. For a discussion of the difficulty of scientifically measuring pain and subjective accounts of incapacity as eligibility criteria, see Stone, *supra* note 7, at 134–39.

46. For an analysis of employment discrimination complaints under the ADA and comparable state statutes, see Mudrick, *supra* note 44.

47. *See* LaCheen, *supra* note 5.

48. Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission,* 62 Ohio St. L.J. 31 (2001).

49. 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 (1997).

50. Chai R. Feldblum, *Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About it?* 21 Berkeley J. Emp. & Lab. L. 149 (2000) (*quoting* Ryan v. Grae & Rybicki, 135 F.3d 867 (2d Cir. 1998)).

51. *Id.* at 148.

52. Quoted in *id.* at 156.

53. *Id.* at 142 (*citing* 29 C.F.R. § 1630.2(j)(3)(i) (1995)).

54. Redlich v. Albany Law School, 899 F.Supp. 100, 106, 107.

55. Anderson v. General Motors, 1997 U.S. Dist. LEXIS 7829, at *15.

56. Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996).

57. Arlene B. Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent.* 42 Vill. L. Rev. 587, 593 (1997).

58. Feldblum, *supra* note 50.

59. 527 U.S. 471, 488 (1999).

60. 199 S. Ct. 2133 (1999).

61. 119 S. Ct. 2162 (1999).

62. Feldblum, *supra* note 25.

63. Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model,* 21 Berkeley J. Emp. & Lab. L., 19, 20 (2000).

64. *Id.*

65. *Id.* at 50.

66. *Id.*

67. *Id.* at 25.

68. Feldblum, *supra* note 50, at 152.

69. *Id.* at 142.

70. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

71. *Id.* at 448, 449.

72. Gottesman, *supra* note 48, at 79–80.

73. Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality,* 62 Ohio St. L.J. 535, 539 (2001) (*quoting* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, S. Ct. 631 (2001)).

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74. *Id.* at 539.

75. Bd. of Trustees of the University of Alabama v. Garrett, 121 S. Ct. 955, 965 (2001).

76. *Id.* at 967.

77. *Id.* at 964.

78. *Id.* at 966.

79. *Id.* at 964.

80. *Id.*

81. Cited in respondents' brief in *Garrett,* 21–22 .

82. *Garrett,* 121 S. Ct. at 965, citing the act's findings.

83. *Id.* at 975.

84. Irving K. Zola, *Disability Statistics: What We Count and What It Tells Us: A Personal and Political Analysis,* 4 J. Disability Policy Studies 9 (1993).

85. Edward H. Yelin, *The Employment of People With and Without Disabilities in an Age of Insecurity,* 549 Annals of the American Academy of Political and Social Science 117 (1997).

86. Richard K. Scotch and Kay Schriner, *Disability as Human Variation: Implications for Policy,* 549 Annals of the American Academy of Political and Social Science 158 (1997).

87. Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity,* 62 Ohio St. L. J. 391 (2001).

88. American Bar Association Commission on Mental and Physical Disability Law, Mental disabilities and the Americans with Disabilities Act (2d ed. 1997)(footnotes omitted).

89. Nancy R. Mudrick, *Employment Discrimination Laws for Disability: Utilization and Outcome,* 549 Annals of the American Academy of Political and Social Science 53 (1997).

90. Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?* 549 Annals of the American Academy of Political and Social Science 71 (1997); Richard V. Burkhauser, *An Economic Perspective on ADA Backlash: Comments from the BJELL Symposium on the Americans with Disabilities Act,* 21 Berkeley J. Emp. & Lab. L. 367 (2000).

91. For a discussion of the barriers faced by people with disabilities, see Hahn, *Disability Policy, supra* note 10, at 304–9. For a discussion of barriers related to expanding employment for people with disabilities, see generally Edward H. Yelin, *supra* note 85, and William G. Johnson, *The Future of Disability Policy: Benefit Payments or Civil Rights?* 549 Annals Am. Acad. Pol. & Soc. Sci. 160 (1997).

92. *See, e.g.,* Paul Burstein, Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States Since the New Deal 182 (1985).

93. Among the best recent overviews of the persistence of economic and social disadvantage among African Americans are William Julius Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy (1987) and William Julius Wilson, When Work Disappears: The World of the New Urban Poor (1996).

94. *See* Scotch & Schriner, *supra* note 12, at 152.

95. *See* Donald L. Horowitz, The Courts and Social Policy 255–98 (1977).

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