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Corrective Justice and Title I of the ADA

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Several recent studies have shown that plaintiffs bringing employment discrimination lawsuits in federal court under Title I of the Americans with Disabilities Act ("ADA") win only approximately five percent of their cases. This Article argues that this phenomenon is attributable, at least in part, to the ADA's flawed definition of the term "disability." It suggests abandoning the current definition and adopting a new approach, one that would reshape the ADA's protected class so that it more closely resembles a discrete and insular minority, such as those traditionally protected by the civil rights laws. While Title I of the ADA embraces the goals of participatory and distributive justice for all individuals with disabilities, these objectives should be subordinated to the goal of providing corrective justice for those who commonly suffer discrimination. "Individuals with disabilities" should be redefined to mean those with mental or physical impairments that have been targeted for systematic discrimination by public policy or widespread private practice. The ADA should further authorize the Equal Employment Opportunity Commission ("EEOC") to develop an exclusive list of covered impairments and categories of conditions that are known to be associated with discrimination, such as mental illness, disfigurement, and paralysis. The proposed definition and the list of covered categories would provide much clearer guidance to

plaintiffs, employers, and the courts, and would significantly enhance the efficacy of Title I of the ADA.

INTRODUCTION

In 2001, the American Bar Association's ("ABA") Commission on Mental and Physical Disability Law published a study on Title I of the Americans with Disabilities Act,[1] which prohibits employment discrimination against qualified individuals with disabilities.[2] The study revealed that employers prevailed in 95.7% of the final Title I case decisions—meaning cases that have gone through the appeals process, if any, or were not yet changed on appeal as of April 2002.[3] Professor Ruth Colker published a similar study in 1999 concluding that defendants prevailed in 94% of cases at the federal district court level and in 84% of cases in which losing plaintiffs appealed their judgments.[4]

Another scholar, Louis S. Rulli, published a study of all reported ADA cases litigated in the Eastern District of Pennsylvania during 1996, 1997, and 1998.[5] Much like the other researchers, Rulli found that employers prevailed in 94.2% of Title I cases, experiencing their highest win rate in 1998.[6] He noted that "[p]laintiffs stumbled most often by not being able to satisfy the definition of disability, despite clearly possessing physical or mental impairments."[7]

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1. 42 U.S.C. §§ 12111-12117 (2000).
2. *Id.* § 12112(a).
3. Amy L. Allbright, *2001 Employment Decisions Under the ADA Title I—Survey Update*, 26 MENTAL & PHYSICAL DISABILITY L. REP. 394, 394-98 (2002). Prior ABA surveys, conducted for the years 1992-2000, revealed similarly high employer win rates. *Id.* According to the ABA, in the years 1992 through 1997, plaintiffs lost 91.6% of the 1,200 cases litigated. *See id.* at 397 (excluding from the database lower court decisions that were overruled on appeal). Likewise, employee-plaintiffs lost 94.4%, 95.7% and 96.4% of cases in 1998, 1999, and 2000, respectively. *Id.*
4. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999) [hereinafter Colker, *A Windfall for Defendants*]. In a subsequent study, Colker analyzed appellate cases in greater detail to determine which factors might predict ADA appellate outcomes. Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 244-78 (2001) [hereinafter Colker, *Winning and Losing*] (examining a database of 720 published and unpublished cases available on Westlaw and finding that employers obtained full reversal in 42% of the cases they appealed and had damages reduced in an additional 17.5% of cases, while plaintiffs who appealed pro-employer judgments obtained reversals in only 12% of cases).
5. Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 365-66 (2000).
6. *Id.* at 366. The author notes that defendants were slightly less successful in Title II and Title III cases, prevailing in 91.7% and 85.7% of cases, respectively. *Id.* at n.149.
7. *Id.*

By contrast, Professor Colker found that plaintiffs litigating cases under Title VII of the Civil Rights Act of 1964 ("Title VII")[8] obtained reversals in 34% of the cases they appealed, a much higher rate than the 12% pro-plaintiff reversal rate under the ADA.[9] A study of sexual harassment cases concluded that plaintiffs won 54.1% of cases decided on *pretrial* motions, 45.7% of bench trials, and 54.6% of jury trials.[10] At the appellate level, both plaintiffs and defendants who appealed won 27% of the cases.[11] A study of Age Discrimination in Employment Act ("ADEA")[12] litigation revealed that overall, defendants won only 25.8% of cases and plaintiffs prevailed in 8.7% of cases, while approximately 58% of cases were resolved through settlement.[13] Thus, ADEA plaintiffs obtained favorable decisions in over 20% of cases that did not settle.[14]

In a well-known article entitled *The Selection of Disputes for Litigation,*[15] George L. Priest and Benjamin Klein argue that cases which are fully litigated rather than resolved through settlement are commonly close cases that are difficult to decide.[16] They explain that "[w]here either the plaintiff or defendant has a 'powerful' case, settlement is more likely because the parties are less likely to disagree about the outcome."[17] Because most adjudicated disputes are close cases, the plaintiff win rate in court should approach fifty percent.[18]

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8. 42 U.S.C. §§ 2000e to 2000e-17 (2000) (prohibiting employment discrimination based on race, color, national origin, religion, and gender).

9. Colker, *Winning and Losing*, *supra* note 4, at 248 & 253.

10. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 570 (2001).

11. *Id.* at 574.

12. 29 U.S.C. §§ 621-634 (1999).

13. George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 513 (1995).

14. Rutherglen, *supra* note 13, at 513. *See also* Theodore Eisenberg & Stewart J. Schwab, *Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals* (July 16, 2001) *available at* http://www.naacpfstf.org/double-standard.pdf (last visited Apr. 4, 2003). The study finds that with respect to employment discrimination cases litigated in federal court, defendants win 43.61% of cases they appeal after a plaintiff's trial victory and 44.74% of cases they appeal after a plaintiff's pretrial victory. *Id.* Plaintiffs win only 5.8% of cases they appeal after a defendant's trial victory and 11.03% of cases they appeal when a defendant has obtained a pretrial victory. *Id.* The study does not provide a more specific analysis relating to different categories of claims, such as race, age, and disability.

15. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

16. *Id.* at 17.

17. *Id.*

18. *See id.* (describing the statistical reasoning for why plaintiffs' win rate should approach fifty percent).

In light of this theory, the ADA plaintiffs' success rate of only five percent is all the more startling.[19]

This Article provides an assessment of the efficacy of Title I of the ADA, with particular focus on the statute's definition of "disability." It poses several fundamental questions. First, what are the statutory goals of the law? Second, are the very low plaintiff win rates indicative of any flaw in the ADA that requires its revision? Finally, what alternatives exist for revising the ADA and which are the most reasonable options?

With these fundamental questions in mind, one should consider the ADA's statutory goals. The statute purports to promote participatory justice[20] by requiring that society reshape practices that exclude individuals with disabilities.[21] It also purports to promote distributive justice[22] by mandating a redistribution of resources in the form of reasonable accommodation to facilitate job performance for individuals with disabilities.[23] These two goals, however, should be subordinated to a related, but distinct objective: corrective justice.

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19. Allbright, *supra* note 3, at 394.

20. *See* Elizabeth Anderson, *What Is the Point of Equality*, 109 ETHICS 287, 312 (1999) (arguing that all competent adults have equal abilities to act as moral agents in society); Anita Silvers, *Reconciling Equality to Difference: Caring (F)or Justice for People with Disabilities*, 10 HYPATIA 30, 47-53 (1995) (hypothesizing that exclusion of disabled persons is a result of lack of social and political power rather than any natural inferiority); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 173 (1990) (defining social equality as requiring the "full participation and inclusion of everyone in a society's major institutions").

21. *See* 42 U.S.C. § 12101(a)(8) (2000) (stating that "[t]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self sufficiency for such individuals").

22. *See* Richard J. Arneson, *Disability, Discrimination, and Priority*, *in* AMERICANS WITH DISABILITIES 18, 25-27 (Leslie Pickering Francis & Anita Silvers eds., 2000) (describing the responsibility-catering, welfarist, and prioritarian conceptions of distributive justice); *see also* Dan Brock, *Health Care Resource Prioritization and Discrimination Against Persons with Disabilities*, *in* AMERICANS WITH DISABILITIES 223, 232-34 (Leslie Pickering Francis & Anita Silvers eds., 2000) [hereinafter Brock, *Health Care*] (discussing prioritization of resource allocation to those who are worst off); Dan Brock, *Justice and the ADA: Does Prioritizing and Rationing Health Care Discriminate Against the Disabled?* 12 SOC. PHIL. & POL'Y 159, 159-60 (1995) [hereinafter Brock, *Justice and the ADA*] (stating that a theory of justice's conclusions regarding the distribution of benefits and burdens are dependant on the principles applied to them); Amartya Sen, *Equality of What?*, *in* EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES 307, 327-29 (Stephen Darwall ed., 1995) (arguing that resources should be devoted to the disabled based on a concept of "basic capability equality"); David Wasserman, *Distributive Justice*, *in* ANITA SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 147, 147 (1998) [hereinafter DISABILITY, DIFFERENCE, DISCRIMINATION] (noting that disabled individuals receive goods and services on the basis of their disability as a result of legislative entitlements and civil rights in the United States).

23. *See* 42 U.S.C. § 12112(b)(5)(A) (2000) (establishing that unlawfully discriminatory practices include failure to provide reasonable accommodations to otherwise qualified individuals with disabilities).

Title I of the ADA should be viewed primarily as combating existing discrimination against people with disabilities and providing redress for those who suffer systematic discrimination because of their physical or mental impairments.[24]

This Article argues that the definition of the term "disability" is severely flawed and hinders the achievement of corrective justice.[25] The definition provides little guidance to litigants and to the courts concerning who can be deemed an individual with a disability and obligates courts to engage in the burdensome task of individually assessing each plaintiff's functionality level.[26] This process leads to inconsistent court decisions concerning which conditions constitute disabilities, to personal and invasive questions by fact-finders regarding plaintiffs' daily life activities, and to an ever-narrowing judicial interpretation of the scope of the protected class.[27] Unlike the groups protected by other civil rights statutes,[28] individuals with disabilities, as currently defined, do not constitute a "discrete and insular minority" and are not easily identifiable as a class.

Moreover, the ADA's amorphous definition of disability is costly to both private litigants and to the public. Plaintiffs are misled into filing marginal suits with little or no chance of actual success in court; employers must absorb the expense of defending a multitude of cases brought by those with questionable disability status; and the public must support the administrative and court costs of processing such litigation.

To provide better guidance to plaintiffs, employers, and the courts, the ADA's protected class should be reshaped so that it is more easily discernable and more like other classes that have gained civil rights protection because of their histories of exclusion and marginalization.[29] This Article proposes a new categorical system for redefining the ADA's protected class and bolstering the law's efficacy.[30] It suggests that "individuals with disabilities" be redefined as those with mental or physical impairments that have been targeted

24. *See* discussion *infra* Part I.A.
25. *See* discussion *infra* Part III.A.3.
26. *See* 42 U.S.C. § 12102(2)(A) (2000) (defining a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual").
27. *See* discussion *infra* Part I.C.2.
28. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000) (protecting persons from discrimination on the basis of race, color, religion, sex and national origin); The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1) (1999) (protecting persons from discrimination on the basis of age).
29. *See* discussion *infra* Part III.
30. *See* discussion *infra* Part III.A.2.

for systematic discrimination by public policy or widespread private practice.[31] The ADA should further authorize the EEOC to develop a list of impairments and categories of conditions that are known to have been associated with discrimination, such as mental illness, disfigurement, and paralysis.[32] The list, which would appear in the federal regulations, would be periodically reviewed and updated, and those whose conditions meet the listed criteria would be presumed disabled.[33]

Part I of this Article analyzes the ADA's statutory goals and its current definition of the term "disability." In addition to discussing the statutory text, it describes the EEOC's interpretive guidelines and relevant court decisions and identifies several serious concerns raised by the statutory language and mandate. Part II provides an assessment of empirical and other evidence concerning the efficacy of the ADA. Part III evaluates a number of alternatives that could address the law's shortcomings and develops specific recommendations for revisions of the ADA's definition of disability.[34]

I. TITLE I OF THE ADA: ITS GOALS AND ITS PROTECTED CLASS

A. *The Statutory Goals: Participatory Justice, Distributive Justice, and Corrective Justice*

Several theorists focus on disability rights, and the ADA reflects their philosophies. Elizabeth Anderson, Anita Silvers, and Iris Marion Young argue that justice requires social inclusion and respect for all persons, regardless of their physical or mental limitations.[35] They also propose that to treat individuals with disabilities equally, society must reshape practices that are exclusionary.[36]

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31. *See* discussion *infra* Part III.A.1.
32. *See* discussion *infra* Part III.A.2.
33. *See* discussion *infra* Part III.A.2.
34. Throughout this Article, the terms "individual with a disability" and "disabled" are used interchangeably because no consensus exists as to which is more appropriate. British activists, for instance, use the term "disabled people," emphasizing that these individuals are above all else people and are disabled only because society views them as such and subjects them to marginalization. American activists prefer the term "people with disabilities," emphasizing that a disability does not change the inner person and that it constitutes only one characteristic, among many, of a person. *See* Arneson, *supra* note 22, at 9-10. Activists in both countries find the term "the disabled" troubling because it suggests that individuals with very different characteristics can be lumped together as an inferior class and thereby stereotyped. *Id.*
35. Anderson, *supra* note 20, at 312; DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 22, at 47-53; YOUNG, *supra* note 20, at 173.
36. Anita Silvers, *People with Disabilities*, *in* THE OXFORD HANDBOOK OF PRACTICAL ETHICS 300, 311-12 (Hugh LaFollette ed., 2003).

Silvers offers one mechanism for applying the participatory justice theory to policy decisions. Silvers proposes that specific social practices be assessed using a test referred to as "historically counterfactualizing."[37] This test "involves asking whether a practice would be the same if the disabled individuals it marginalizes were the majority, not a powerless minority, of people."[38] If the answer is negative, the practice should be changed.[39] To illustrate, if the majority of Americans were in wheelchairs, most buildings would have been built with ramps and elevators long before the ADA required these practices.

The ADA embraces participatory justice as one of its explicit goals. The statute's "Findings and Purposes" section states that "[t]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[40] Accordingly, the statute mandates that employers may not exclude qualified individuals with disabilities from the workplace because of their disabilities.[41]

Other theorists contend that equality of social opportunities is a tangential issue, and that justice requires primarily a redistribution of goods so that the disabled receive additional resources to compensate for their limitations.[42] Amartya Sen, for example, emphasizes the need for "basic capability equality" and believes that distributive justice requires allocating enough resources to those with limitations so that they can achieve essential abilities.[43] Richard Arneson believes that prioritization of resources should depend on two factors:

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37. *Id.* at 312.

38. *Id.* at 312-13.

39. *Id.* Professor Silvers further elucidates her argument as follows:

> Historical counterfactualizing helps us to identify disadvantage that is the arbitrary artifact of social arrangements controlled by the standard of normality. It facilitates distinguishing arrangements that do no more than conform to the dominant group's tastes and preferences from arrangements that have more to recommend them. Tastes and preferences are transitory. The practices they elicit need not be perpetual. Exclusionary practices dominate . . . because most often they are comfortable for the majority and disadvantage only a minority of people. Although the majority may be discomforted if restrictive practices are altered to become more inclusive, their social participation is not threatened by such change. Thus, on balance, such social reform is less burdensome for members of the majority than enduring exclusion is for members of the minority.

Id. at 313.

40. 42 U.S.C. § 12101(a)(8) (2000).

41. *See id.* § 12112(a).

42. *See, e.g.*, Arneson, *supra* note 22, at 25-27; Brock, *Justice and the ADA*, *supra* note 22, at 159-60; Brock, *Health Care*, *supra* note 22, at 232-34; Sen, *supra* note 22, at 327-29; DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 22, at 147.

43. Sen, *supra* note 22, at 328.

(1) how badly off each person would be compared to others if no further resources were allocated to her; and (2) how much individuals will benefit from further allocations, as compared to others who might receive them.[44]

The ADA likewise embraces the objective of distributive justice. It speaks of enabling individuals with disabilities to achieve "independent living" and "economic self-sufficiency."[45] The law also requires employers to absorb the cost of providing reasonable accommodations to qualified individuals with disabilities for purposes of facilitating job performance.[46]

This Article argues for emphasis of a related but distinct goal: corrective justice. Title I of the ADA should be viewed primarily as combating existing discrimination against people with particular impairments and providing redress for those who suffer systematic discrimination because of their disabilities.[47] The emphasis, therefore, is not upon providing opportunities for anyone with physical or mental limitations, but upon counteracting known patterns of discrimination.

This objective, too, correlates with the language of the ADA, which describes individuals with disabilities as "a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."[48] The goal of corrective justice provides a clearer conception of the ADA's purpose than the other two above-mentioned goals and answers the question of who should benefit from the promotion of participatory and distributive justice. Those individuals with limitations that are generally targeted for discrimination and exclusion are the most needy and deserving and, according to the ADA's text, are also the intended statutory beneficiaries.[49] Corrective justice is at the root of the other federal anti-discrimination statutes as well, as they are designed to provide remedies for those who have long suffered

44. Arneson, *supra* note 22, at 26.
45. 42 U.S.C. § 12101(a)(8) (2000).
46. *Id.* § 12112(b)(5)(A). Arguably, it is unfair to place this burden on employers because they are not responsible for causing disabilities. Business advocates would likely contend that a better way to meet the goal of distributive justice is to place the burden on society at large through taxation and social programs.
47. *See* discussion *infra* Part III.A.3.
48. 42 U.S.C. § 12101(a)(7) (2000).
49. *Id.* § 12101(a)(7), (b).

discrimination because of their race, color, national origin, religion, sex, and age.[50]

The goal of corrective justice is inherent in the civil rights model in general and the ADA in particular. Unfortunately, the statutory definition of the term "disability" does not enable the achievement of this objective. The shortcomings of the definition are analyzed in the following section.

B. The Definition of "Disability" Under the ADA, Federal Regulations, and Judicial Interpretation

Title I of the ADA, which addresses employment discrimination, prohibits employers from discriminating against qualified individuals with disabilities because of their disabilities.[51] The law also requires that employers provide reasonable accommodations to qualified applicants and employees unless doing so would pose an undue hardship for the employer.[52]

The ADA provides a three-part definition of the term "disability":

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of . . . [an] individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.[53]

The statute protects not only those with actual disabilities, but also those who are not currently disabled although they have a past record

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50. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000) (prohibiting unlawful employment discrimination based on race, color, religion, sex or national origin); *see also* The Age Discrimination in Employment Act, 29 U.S.C. § 623 (2000) (prohibiting employment discrimination based on age); The Equal Pay Act ("EPA"), 29 U.S.C. § 206(d) (2000) (prohibiting wage discrimination based on sex); discussion *infra* Part III.A.3 and note 256.

51. 42 U.S.C. § 12112(a) (2000). Specifically, the statute provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Id. The term "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8).

52. *Id.* § 12112(b)(5)(A). The provision states that unlawful discrimination includes:

> [N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

Id.

53. *Id.* § 12102(2).

of a disability and those whom an employer wrongly regards as being disabled.[54] The statutory text, however, does not provide any further details as to the meaning of the definition's terms. Phrases such as "physical or mental impairment," "substantially limits," and "major life activity" remain ambiguous and open to interpretation.[55]

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54. *See Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987) (articulating the rationale for including individuals who are regarded as disabled within the protected class in a case decided under the Rehabilitation Act of 1973, which prohibits disability discrimination by entities receiving federal funds). The Court reasoned that by amending the definition of "handicapped individuals" to include both those who are truly physically impaired and those who are incorrectly deemed impaired, Congress recognized that society's myths concerning disability and disease are just as debilitating as limitations caused by actual disabilities. *Id.*

55. The regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") do provide further explanation of the definitional terms. They define a "physical or mental impairment" as follows:

> (1) 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; or
>
> (2) any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (2001). Furthermore, the regulations define the term "major life activities" to mean "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 1630.2(i) (2001).

The question of when a condition that limits only an individual's ability to work becomes a disability under the ADA presents difficulty. The EEOC's regulations explain that

> (3) With respect to the major life activity of *working*—
>
> 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.

Id. § 1630.2(j)(3) (2001).

The regulations further instruct that in determining whether an individual is disabled with respect to the life activity of working, one should consider the following factors:

> (1) the geographical area to which the individual has reasonable access;
>
> (2) 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
>
> 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. . . .

Id. § 1630.2(j)(3)(ii) (2001).

Finally, the federal regulations explain that the "regarded as" prong of the definition of disability is meant to protect any individual who:

> Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

It is clear, however, that the definition of "disability" requires an individualized assessment of each plaintiff's level of functionality.[56] This mandate has generated a plethora of litigation, and in recent years several cases have reached the Supreme Court.

The Supreme Court's first decision concerning the ADA's definition of disability was hailed as a victory for plaintiffs. In the 1998 case of *Bragdon v. Abbott*,[57] the Supreme Court determined that the plaintiff's asymptomatic HIV infection rose to the level of a disability because it substantially limited her major life activity of reproducing and bearing children.[58] The Court, however, did not decide whether HIV constituted a disability per se, and therefore, the decision is quite narrow, applying only to those who are biologically able to reproduce and wish to do so but feel deterred by their HIV status.[59]

In the cases following *Bragdon*, the Supreme Court has been less sympathetic to plaintiffs and has narrowed considerably the scope of the disability definition. In *Sutton v. United Air Lines*, two severely myopic twin sisters brought complaints against United Air Lines because they were denied jobs after failing to meet the airline's minimum visual acuity requirement for uncorrected vision.[60] The Supreme Court decided that measures that correct or mitigate an impairment must be considered in determining whether a particular condition is a disability.[61] Consequently, the Court determined that because their vision could be fully corrected with glasses or contact lenses, neither sister had an eligible "disability" under the ADA.[62]

> Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

Id. § 1630.2(k) (2001).

It should be noted, however, that the Supreme Court has stated that the EEOC was not delegated authority to interpret the term "disability" as found in the ADA and has rejected some of the agency's interpretations. *See* Sutton v. United Airlines, 527 U.S. 471, 479, 482 (1999) (stating that no agency has been delegated the authority to interpret "disability," including the EEOC).

56. *See, e.g.*, Bragdon v. Abbot, 524 U.S. 624, 639 (1998) (assessing whether the plaintiff was substantially limited in her ability to reproduce).

57. 524 U.S. 624 (1998).

58. *Id.* at 641.

59. *Id.* at 642.

60. 527 U.S. 471, 475-76 (1999).

61. *Id.* at 482.

62. *Id.* at 488-89. The Court also determined that the plaintiffs failed to prove that they were disabled with respect to working because they were not precluded from a broad class of jobs. *Id.* at 491-93. Furthermore, they failed to prove that the employer regarded them as having a disability because the employer only considered them unable to hold the unique position of global pilot and did not perceive them as unable to work in any other type of job. *Id.*

In a companion case, *Murphy v. United Parcel Service*,[63] the Court reiterated its conviction that for purposes of determining whether an individual has a disability under the ADA, the condition must be assessed in light of any available medications or mitigating measures.[64] Thus, the Court found that the petitioner, a mechanic and driver with blood pressure exceeding Department of Transportation requirements, did not have a disability because when medicated, he functioned normally in daily activities.[65] The Court further found that the petitioner was not protected under the "regarded as" prong of the definition of disability because UPS only perceived him as unable to perform the specialized job of mechanic with driving responsibilities, not as being generally unable to work as a mechanic.[66]

In its most recent case concerning the question of what constitutes a disability under the ADA, the Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[67] found that despite suffering many limitations arising from carpal tunnel syndrome and other impairments, Ella Williams failed to prove that she was disabled in her capacity to perform manual tasks.[68] Despite the fact that the ailments prevented her from dancing, sweeping, and sometimes dressing without assistance and limited her ability to play with her children, garden, and drive long distances,[69] the Court, per Justice O'Connor, reasoned that because "she could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house," she was unable to show that her ailments caused changes in her life that severely limited her from performing tasks that are essential to most people's everyday lives.[70] Therefore, in applying this reasoning, the Court declared that Williams had failed to "establish a manual-task disability as a matter of law."[71]

The lower courts have been similarly restrictive in their interpretation of the term "disability." For instance, the courts have been loath to find that plaintiffs with cancer have a disability under

63. 527 U.S. 516 (1999).
64. *Id.* at 521.
65. *Id.* at 520-21.
66. *Id.* at 524-25. Note that in a third opinion issued the same day, *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 566-67 (1999), the Supreme Court held that the Ninth Circuit erred in finding that a truck driver with amblyopia had a disability without identifying his specific degree of visual loss.
67. 534 U.S. 184 (2002).
68. *Id.* at 202.
69. *Id.*
70. *Id.*
71. *Id.*

the ADA.[72] An example may be found in *Ellison v. Software Spectrum, Inc.*[73] where a patient diagnosed with breast cancer was treated with surgery and daily radiation therapy for six weeks and was able to continue working on a modified schedule without missing any days of work.[74] After her job was eliminated, she filed suit, but the Fifth Circuit found that she was not disabled.[75] Similarly, plaintiffs with diabetes,[76] epilepsy,[77] heart disease,[78] and many other conditions have experienced difficulty in convincing courts that their ailments should qualify as disabilities, often because their conditions are controlled with medication.[79]

C. *Concerns Raised by the Definition of the Term "Disability"*

1. *The vagueness of the terminology*

The ADA's definition of "disability" contains vague terms such as "*substantially* limits" and "*major* life activities."[80] This terminology provides little guidance to courts and litigants as to who precisely is a

72. *See, e.g.*, Gordon v. E.L. Hamm Assoc., 100 F.3d 907 (11th Cir. 1996) (holding that a patient with lymphoma did not have a disability); Schwertfager v. City of Boynton Beach, 42 F. Supp. 2d 1347 (S.D. Fla. 1999) (finding that an employee recovering from breast cancer surgery failed to prove she had a disability); EEOC v. R.J. Gallagher Co., 959 F. Supp. 405 (S.D. Tex. 1997) (holding that a patient with leukemia did not have a disability), *aff'd in part, vacated in part*, 181 F.3d 645 (5th Cir. 1999). For an analysis of the courts' treatment of cancer cases, see Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399 (2001).

73. 85 F.3d 187 (5th Cir. 1996).

74. *Id.* at 189.

75. *See id.* at 191 (finding that the plaintiff was not substantially limited in her ability to work).

76. *See, e.g.*, Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) (ruling that plaintiff's diabetes was not an actual disability because he failed to show it limited a major life activity); Beaulieu v. Northrop Grumman Corp., 23 Fed. Appx. 811, 811-12 (9th Cir. 2001) (determining that diabetes did not substantially limit an employee in a major life activity and thus he was not disabled under the ADA); Berg v. Norand Corp., 169 F.3d 1140, 1145 (8th Cir. 1999) (holding that Berg's diabetes, which limited her to forty to fifty hours of work per week, was not a disability under the ADA).

77. *See, e.g.*, EEOC v. Sara Lee Corp., 237 F.3d 349, 352-53 (4th Cir. 2001) (finding that an employee who suffered from epileptic seizures was not disabled under the ADA); Arnold v. City of Appleton, 97 F. Supp. 2d 937, 947 (E.D. Wis. 2000) (holding that a firefighter with epilepsy failed to establish that he was disabled because his affliction did not substantially limit a major life activity).

78. Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 805-06 (5th Cir. 1997) (ruling that appellant did not offer evidence upon which the jury could determine that his heart condition limited his ability to work); Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311, 1319 (8th Cir. 1996) (finding that a man with high blood pressure and coronary artery disease was not disabled).

79. For case summaries relating to a large number of disabilities see AMERICANS WITH DISABILITIES ACT MANUAL (BNA) § 100 (1992).

80. 42 U.S.C. § 12102(2) (2000) (emphasis added).

person with a disability.[81] In a speech to business lawyers on March 14, 2002, Supreme Court Justice Sandra Day O'Connor explicitly criticized the ADA for failing to specify the intent of Congress.[82] She stated that the statute exemplifies what occurs when a bill's "sponsors are so eager to get something passed that what passes hasn't been as carefully written as what a group of law professors might put together."[83]

Textual vagueness is sometimes an unavoidable or incurable defect. Thus, a primary duty of the courts is to interpret statutory language, and they routinely do so in the course of deciding cases.[84] To carry out that duty, courts, at times, turn to legislative history, utilize "canons of construction" that have been developed as interpretive tools, or grapple with the plain text of the law.[85]

Statutory language is often the product of political compromise, and therefore, is frequently imprecise.[86] In the process of

81. For articles criticizing the ADA's definition of "disability" see Chai 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. 91 (2000); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000); Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83 (2000); 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); 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).

82. *See* Charles Lane, *O'Connor Criticizes Disabilities Law as Too Vague*, WASH. POST, Mar. 15, 2002, at A2 (stating that the Act left "uncertainties as to what Congress had in mind").

83. *Id.*

84. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 35 (1997) (stating that "[w]hatever Congress has not *itself* prescribed is left to be resolved by the executive or (ultimately) the judicial branch"); *see also* Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken A Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 208 (1996) (discussing statutory construction, and in particular, the employment of the "remedial purpose canon" and its history).

85. *See, e.g.*, SCALIA, *supra* note 84, at 14-37 (reviewing the "science of statutory construction," including canons of construction); Watson, *supra* note 84, at 208-25 (discussing canons of construction historically and contextually); Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1949-50) (stating that canons of construction are needed tools for arguing statutory meaning and, thereafter, listing the various canons employed by courts and attorneys).

86. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 350 (1949) (stating that "[e]verything that emerges from the legislative forum is tainted by its journey through the lobby"); Feldblum, *supra* note 81, at 126-34 (discussing the politics of the ADA's passage); Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 640 (2002) (discussing how ambiguity of statutory language may be the result of a need to compromise in order to get legislation passed); SCALIA, *supra* note 84, at 34 (discussing the role of lawyer-lobbyists and arguing that because of their involvement, legislative history is not an

negotiation, various parties agree to relinquish strong language that they had advocated in order to make the bill palatable to a sufficient number of legislators to win its passage, but the cost of the process may amount to the abandonment of wording that would have provided greater clarity.[87]

In other instances, terminology is left deliberately vague for ideological reasons. For example, Title VII, which prohibits discrimination based on religion, among other categories, defines "religion" as including "all aspects of religious observance and practice, as well as belief."[88] The definition is circular, referring to the term "religious" within its text and failing to instruct the courts precisely as to what activity or group is protected. Courts, however, are committed to a long tradition of being very liberal in determining which beliefs are considered "religious" so that they will not be placed in the position of judging the legitimacy of various belief systems. In the words of one court deciding a Title VII case, "[s]incere beliefs, meaningful to the believer, need not be confined in either source or content to traditional or parochial concepts of religion."[89]

One should note that the definition of "individual with a disability" under the Rehabilitation Act of 1973[90] is identical to the definition later adopted by the ADA.[91] Professor Chai Feldblum, one of the authors of the ADA, explains the decision to incorporate the Rehabilitation Act's definition into the newer statute as follows:

> Political advocates for people with disabilities in Washington preferred . . . [this] 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

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appropriate tool for statutory interpretation).

87. Grundfest & Pritchard, *supra* note 86, at 640.

88. 42 U.S.C. § 2000e(j) (2000).

89. *See* Ali v. S.E. Neighborhood House, 519 F. Supp. 489, 490 (1981) (citing Welsh v. United States, 398 U.S. 333 (1970), and United States v. Seeger, 380 U.S. 163, 165 (1965)).

90. 29 U.S.C. § 701 (2000). The Rehabilitation Act, which was enacted seventeen years before the ADA, prohibits disability discrimination by any program or activity receiving federal funds or being conducted by an executive agency or the U.S. Postal Service. *Id.* § 794 (2000).

91. *Compare* 29 U.S.C. § 705(20)(B) (2002), *with* 42 U.S.C. § 12102(2) (incorporating the same language). The Rehabilitation Act originally 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 . . . ." Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 361 (1973). Because the definition was perceived as problematic and excessively narrow, the law was amended in 1974 to supplement the current language. Feldblum, *supra* note 81, at 102-03.

> Congress to adopt a new, untested definition. 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.[92]

Feldblum further notes that under the Rehabilitation Act, the courts typically understood the definition to encompass any person with a medical condition that was not inconsequential, and thus, the courts seldom parsed the language of the definition to critically assess whether a person falls into the category of a "handicapped individual."[93]

Professor Ruth Colker has confirmed this analysis. In a study of case outcomes under the Rehabilitation Act, Colker found that before 1994 the defendant success rates at the appellate level under the statute averaged only 64.9%.[94] Notably, since 1994, the defendant win rates have risen to 87.5%, a figure comparable to the defendants' appellate success rate under the ADA, which is 86.5%.[95] Colker suggests that the change may be attributable to judicial hostility towards ADA plaintiffs, which is spilling over to Rehabilitation Act cases.[96]

One might ask why the courts have changed their approach to the definitional language of the term "disability." If they rarely questioned plaintiffs' disability status during the early years of the Rehabilitation Act, why do they scrutinize it so carefully under the ADA? The answer most likely is rooted in the fact that the ADA extended the anti-discrimination mandate to private employers,[97]

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92. Feldblum, *supra* note 81, at 128.

93. *Id.* at 92. There is nothing inherent in the definition of "disability" that requires the courts to interpret it restrictively or to engage in skeptical scrutiny of plaintiffs' claims concerning the extent of their disabilities. Instead, the courts could construe the definition liberally, accepting plaintiffs' testimony that their impairments are substantially limiting and allowing all conditions that are not so minor as to be trivial to be included within the statutory scope. *See* Feldblum, *supra* note 81, at 92 (discussing judicial attitudes towards the definition of "disability" under the Rehabilitation Act of 1973). As a civil rights act, the ADA is a remedial statute, and such statutes traditionally are liberally construed. *See* NORMAN J. SINGER, STATUTORY CONSTRUCTION 3A § 74.05 (5th ed. 1992) (remarking that remedial laws provide previously non-existent rights and remedies to individuals, and they are generally interpreted to be broad and inclusive so that their "objectives may be realized to the fullest extent possible.").

94. Ruth Colker, *The Death of Section 504*, 35 U. MICH. J.L. REFORM 219, 224-26 (2002) [hereinafter *Death of Section 504*].

95. *Id.* at 224-25.

96. *See id.* at 226-27 (suggesting additionally that defense lawyers may have improved their litigation skills and that inexperienced plaintiffs' lawyers may have litigated poorly).

97. *See* 42 U.S.C. § 12111(5) (2000) (defining "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working

whereas the Rehabilitation Act applies only to programs or activities receiving federal funds or being conducted by an executive agency or the U.S. Postal Service.[98] Under the Rehabilitation Act, the cost of compliance falls on the taxpayers, and thus, has a dispersed impact that generates comparatively little opposition. By contrast, private sector employers that bear the burden of statutory compliance seem far more likely to hire resourceful, aggressive law firms to defend their cases and to pursue every potential avenue of attack, including each plaintiff's status as a member of the protected class.[99]

Textual vagueness is at times unavoidable. However, excessively vague statutes failing to provide any certainty as to what conduct is prohibited, can be declared void for vagueness.[100] A statute is voidable if a person of ordinary intelligence could not determine from its language that her conduct is prohibited, or if it does not provide the courts and the jury with sufficient guidance as to its standard of liability.[101] One might argue that the ADA's failure to more clearly delineate its protected class and to inform employers and the courts as to whom the anti-discrimination mandate binds is a serious flaw that leaves the law vulnerable to vagueness challenges.

2. Individualized assessment of the plaintiff's level of functioning

Even more problematic than the textual vagueness of the statute is the requirement of individualized assessment and the focus on each plaintiff's level of functioning. The ADA instructs courts to evaluate whether each plaintiff has "a physical or mental impairment that substantially limits one or more of . . . [her] major life activities."[102]

Potentially, this standard could constitute a sophisticated and sensitive approach. Judges are to review each individual's personal circumstances carefully and use their discretion in determining plaintiffs' disability status. Such inclusiveness might be particularly appropriate because diseases manifest themselves differently in different individuals, and the degree to which they are disabling can vary over time. Arguably, therefore, plaintiffs should not be excluded

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day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of such person").

98. 29 U.S.C. § 794 (1999).

99. *See* Feldblum, *supra* note 81, at 140 (referring to the "sophisticated management bar trained in seminars to carefully parse the statutory text of the definition").

100. SINGER, *supra* note 93, at 1A § 32A:4.

101. *Id.*

102. 42 U.S.C. § 12102(2) (2000) (defining "disability" as an actual "physical or mental impairment that substantially limits" a "major life" activity or "a record of such impairment" or "being regarded as having such an impairment").

from ADA protection based on rigid disease categories. In reality, however, the individualized assessment mandate makes the ADA's definition of disability unworkable, and therefore, must be abandoned.

First, the requirement of individualized assessment leads to inconsistent and unpredictable court decisions. One court assessing a plaintiff with a particular condition might find that the individual has a disability, while a second court assessing someone with the very same condition or a slight variation thereof could find that the person is not substantially limited with respect to a major life activity, and therefore, not entitled to statutory protection.[103] In the words of one of the statute's authors, "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 . . . to the spirit of the ADA as envisioned by its advocates," but this approach has been "cemented . . . in the courts."[104] Such divergent findings seem fundamentally unfair. They also make it difficult for parties to evaluate the strengths of their cases for purposes of litigation and settlement and for courts to find reliable precedent.

Second, the emphasis on individualized assessment and functionality levels leads the courts to examine the daily, private activities of plaintiffs in invasive and even humiliating ways. In *Williams*, the Supreme Court ruled against the plaintiff because it found that "she could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house."[105] Another plaintiff had to convince the court that her HIV substantially limited her ability to have sexual relations and to procreate,[106] and yet another was required to describe in detail how her colitis affected her digestive and voiding functions.[107] Sadly, in order to prevail in Title I cases, plaintiffs at times must compromise their privacy and dignity.[108]

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103. *See* Feldblum, *supra* note 81, at 152 (noting the varied results that individualized assessments yield).
104. *Id.*
105. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 202 (2002).
106. Bragdon v. Abbott, 524 U.S. 624, 640-41 (1998).
107. Ryan v. Grae & Rybicki, P.C., 135 F.3d 867, 871 (2d Cir. 1998).
108. *See* Paula E. Berg, *Ill/legal: Interrogating the Meaning and Function of the Category of Disability in Anti-discrimination Law*, 18 YALE L. & POL'Y REV. 1, 37-39 (1999) (noting that "[w]ithin the structure of disability determinations, the plaintiff's body is an object to be investigated by lawyers, doctors, and vocational experts, and ultimately codified by a judge").

Most problematic, perhaps, is the fact that the focus on functionality levels creates a "Catch-22" for plaintiffs. If an individual has a condition that is controlled by medication or is not extremely severe, the individual is unlikely to be deemed to have a disability under the courts' contemporary interpretations.[109] Yet, if a person has a severe condition that is impervious to medication, she may not be considered "qualified" for the job.[110] Thus, the window of opportunity for a plaintiff to be both disabled and qualified is quite narrow.[111]

Additionally, the "regarded as" prong of the definition[112] does not meaningfully broaden the scope of the protected class. To prevail under the "regarded as" standard, a plaintiff must prove that the employer wrongly regarded her as having an actual disability, that is, an impairment that substantially limits a major life activity.[113] While it is very difficult to prove that a condition truly constitutes a disability under the ADA, it is even more difficult to prove that a decision-maker considered a condition to be a disability in his own mind. This requires hypothesizing about the inner thoughts of another person, and the employer can easily claim that it considered the plaintiff's condition to be an impairment that was not severe enough to rise to the level of a disability, thus avoiding ADA liability.[114]

3. Cost concerns

Unlike other federal anti-discrimination laws, the ADA imposes potentially significant direct costs upon employers. Uncertainty concerning the scope or identity of the protected class that is to benefit from these expenditures is thus particularly disconcerting to courts and to employers.

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109. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-83 (1999) (holding that when a person's impairment, physical or mental, is corrected by medication, that person "does not have an impairment that presently 'substantially limits' a major life activity").

110. *See* 42 U.S.C. §§ 12111(8) & 12112(a) (2000) (defining "qualified individual with a disability" and prohibiting discrimination only against those who are "qualified").

111. *See* Feldblum, *supra* note 81, at 145-46 (explaining that it is difficult to argue that an individual's disability limits his "ability to perform a *range* of jobs," but the individual "is nonetheless *fully* qualified for the position").

112. 42 U.S.C. § 12102(2)(C) (2000).

113. *Id.* § 12102(2)(A), (C).

114. *See* Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 276 (2000) (explaining how the EEOC's and the court's interpretation of the "regarded as disabled" prong effectively insulates employers from liability under that provision).

Title VII,[115] the Equal Pay Act ("EPA"),[116] and the ADEA[117] prohibit discrimination based on race, national origin, gender, religion, and age on the theory that members of minority groups can perform work as well as non-minority employees, and therefore, should be given equal opportunities in the workplace.[118] These statutes, consequently, target largely irrational employer conduct that is based on unfounded assumptions and prejudice, and they do not generally impose direct, out-of-pocket costs on employers.[119]

The ADA similarly addresses irrational employer behavior in that it prohibits discrimination against qualified employees with disabilities because of their disabilities.[120] For example, employers cannot decline to hire competent paralyzed individuals simply because they do not like having wheelchairs in the workplace. Those with disabilities who can be productive workers cannot be excluded because of baseless fears concerning their possible limitations.

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115. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

116. 29 U.S.C. § 206(d) (1998).

117. *Id.* §§ 621-634 (1999).

118. *See* Nancy R. Mudrick, *Employment Discrimination Laws for Disability: Utilization and Outcome*, 549 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 53, 55 (1997) (explaining that civil rights law is based on the notion that sex, national origin, religion, color, and race do not make people intrinsically different). The statutes, in fact, provide employers with defenses to insure that they are not required to compromise standards to achieve compliance. For example, Title VII and the ADEA allow employers to discriminate against individuals based on religion, sex, national origin, or age, when membership in a particular religion, sex, national group, or age group is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (2000); 29 U.S.C. § 623(f)(1) (1999). The Equal Pay Act allows employers to pay men and women doing the same job different salaries in order to maintain a seniority system, a merit system, or a system that determines earnings by "quantity or quality of production." 29 U.S.C. § 206(d)(1) (1998).

119. One clear exception is Title VII's mandate that employers reasonably accommodate employees' religious beliefs. 42 U.S.C. § 2000e(j) (2000). The Supreme Court, however, has determined that employers have only a *de minimis* duty to accommodate workers' religious needs, and they are not required to absorb significant costs. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (stating that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship"). The ADA's legislative history states that Congress rejected the minimal *Hardison* standard for ADA accommodations. *See* H.R. REP. NO. 101-485, pt. 1, at 68 (1998) (explaining that the principles outlined in *Trans World Airlines, Inc. v. Hardison* do not apply to the ADA legislation); *see also* 29 C.F.R. § 1630.15(d) (2001) (explaining that the undue hardship defense embodied in the ADA and in Section 504 of the Rehabilitation Act requires employers to demonstrate that accommodations would impose significantly greater expense or burden than needed to meet the *de minimis* standard employed by Title VII). *But see* Christine Jolls, *Antidiscrimination and Accommodation*, Discussion Paper No. 344, 35 (2001), *available at* http://www.law.harvard.edu/programs/olin_center/ (last modified Mar. 27, 2002) (arguing that the other civil rights statutes generate costs for employers as well, for example, in the form of loss of customers who do not wish to do business with minority employees).

120. 42 U.S.C. § 12112(a) (2000).

The statute, however, goes further and requires employers to absorb the costs of providing reasonable accommodations to qualified individuals whose disabilities might in fact adversely affect job performance.[121] These costs can include not only the expense of providing assistive devices or other accommodations, but also diminished productivity, attendance problems, and increased health insurance and workers' compensation insurance costs.[122]

Further, the ADA imposes costs unevenly upon the business community.[123] Some employers have multiple applicants and employees with disabilities, while others have none.[124] How burdensome ADA compliance will be for any given employer thus depends entirely on the makeup of the employer's applicant and employee populations.

The reasonable accommodation requirement addresses the need for distributive justice. However, justice cannot be promoted if policy-makers do not have a clear vision of the category of people who should constitute the beneficiaries of the law and receive societal resources. Additionally, the lack of a well-defined protected class hinders the ability of employers to plan for necessary expenditures. It is in this regard that the concept of corrective justice can be enlightening, because it requires the identification of the specific minority group that is to benefit from governmental intervention.[125]

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121. *Id.* § 12112(b)(5)(A); *see* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 480-94 (1992) (attributing a variety of costs to the ADA, including business loss because of customer preference for associating with non-disabled persons, reasonable accommodation, and administrative expenses for state enforcement of the law). While employers also bear the burden of accommodating employees' religious beliefs under Title VII, this duty is minimal. *See supra* note 119 (discussing religion and the *de minimis* duty of accommodation).

122. *See* Christopher J. Willis, *Title I of the Americans with Disabilities Act: Disabling the Disabled*, 25 CUMB. L. REV. 715, 725-28 (1994-95) (detailing the financial burden that ADA compliance imposes on employers).

123. *See* discussion *infra* Part III.B.3 (surveying the costs of accommodation to businesses). Accommodation costs are also unevenly distributed within society because only employers bear the burden of compliance under Title I of the ADA, even though they generally are not responsible for causing disability. *See id.* Arguably, it is society at large that should bear this burden through taxation and social service programs. *See id.*

124. *See* Arneson, *supra* note 22, at 29 (noting that the ADA is problematic in that it allocates the burden of assisting disabled job applicants to employers and ultimately shifts it to consumers who pay higher prices to finance the cost of accommodations).

125. *See supra* Part I.A (discussing the concept of corrective justice and its application to the ADA); *see also infra* Part III.A.

D. The ADA Deviates from the Traditional Civil Rights Model of Protecting a Discrete and Insular Minority

The civil rights tradition advances the protection of "discrete and insular minorities," a term first coined in the 1938 Supreme Court case, *United States v. Carolene Products Co.*[126] In a footnote, Justice Story speculated about "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[127] This language initiated the idea of heightened scrutiny for some minority groups.[128] Traditionally, courts consider several factors in determining whether a group constitutes a discrete and insular minority deserving the benefit of heightened scrutiny. These factors include:

> Whether the group's defining characteristic is immutable; whether the group has suffered a history of discrimination; whether the group is in a position of political powerlessness; whether the group's defining characteristic relates in any way to the individual's ability to participate in, and contribute to, society; and whether the characteristic is beyond the control of the individual group member.[129]

This approach is consistent with the scholar Louis Wirth's definition of a minority. Wirth defines "minority" as a "group of people who because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and unequal treatment and who therefore regard themselves as objects of collective discrimination."[130]

In its introductory "Findings and Purposes" section, the ADA explicitly asserts that it is protecting a "discrete and insular minority."[131] It also affirms that individuals with disabilities have all of the qualities that characterize a discrete and insular minority, as

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126. 304 U.S. 144 (1938).

127. *Id.* at 153 n.4. For a discussion of the footnote, see generally Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

128. *See* Kyle C. Velte, *Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation*, 6 WM. & MARY J. WOMEN & L. 323, 359 (2000) (discussing the concept of a "discreet and insular minority").

129. *Id.* at 326-27 (citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441-44 (1985); Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976); Frontiero v. Richardson, 411 U.S. 677, 686 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

130. Louis Wirth, *The Problem of Minority Groups, in* THE SCIENCE OF MAN IN THE WORLD CRISIS 347, 347 (Ralph Linton ed., 1945).

131. 42 U.S.C. § 12101(a)(7) (2000).

described above.[132] Specifically, it states that those with disabilities "have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals."[133] The "Findings and Purposes" section, in fact, opens with a specific estimate of the number of individuals included in the category of individuals with disabilities: forty-three million.[134]

In truth, however, the concept of a discrete and insular minority remains elusive.[135] No "discrete and insular minority" has an essentialist, universal definition.[136] It is impossible to characterize real human beings, with their multitude of variations, as belonging to distinct categories with inflexible boundaries.[137] Most classifications are likely to be under-inclusive, over-inclusive, or both.[138]

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132. *Id.*

133. *Id.*

134. *Id.* § 12101(a)(1). Chai Feldblum, one of the authors of the ADA, relates the following concerning the forty-three million figure:

> 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.

Feldblum, *supra* note 81, at 154.

135. *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1074 (1980) (contending that society cannot be "objectively subdivided" into groups solely for the purpose of discernment and that "people draw lines, attribute differences, as a way of ordering social existence—of deciding who may occupy what place, play what role, engage in what activity"); *see also* Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 813-14 (1999) (observing that deciding which groups will be categorized as "discrete and insular" is not an easy task).

136. *See* KATHERINE T. BARTLETT & ANGELA HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 1007-09 (2d ed. 1998) (pointing out that essentialism has many problems, most of which relate to "overgeneralizations" and an attempt to "attribute to all members of a group the characteristics of a dominant subset of that group").

137. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 95 (1990) (explaining that we use language to simplify the world because we have a limited capacity to comprehend the complexity of life and stating that "[w]e do not know how to describe individuals as unique except by reference to traits that actually draw them into membership in groups of people sharing those traits"). *Id.*; *see* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 19-53 (2000); *see also* BARTLETT & HARRIS, *supra* note 136, at 1008 (noting that human cognition involves continuously placing people into mental categories). Inevitably, these categories are either under- or over-inclusive, and consequently, are useful only for some purposes. *Id.*

138. *See* Tussman & tenBroek, *supra* note 86, at 352-53. The authors discuss "the classification of American citizens of Japanese ancestry" who were subjected to restrictions during World War II (citing Hirabayashi v. United States, 320 U.S. 81, 83

Nevertheless, in order to provide protection or benefits to those with particular needs, legislatures must describe and categorize the intended beneficiaries.[139]

Federal anti-discrimination laws identify "discrete and insular minorities" through a variety of mechanisms. In the case of the ADEA, an arbitrary age restriction of forty and above designates the protected class.[140] In the case of sex discrimination under Title VII and the EPA, biological characteristics determine the protected class.[141] With respect to race, religion, and national origin, the categories are arguably socially constructed.[142]

The challenges inherent in delineating protected classes can be illustrated by several clear examples. Women, who are traditionally considered a minority for civil rights purposes, are not statistically a minority.[143] Similarly, race has no essentialist definition, but rather is perceived by many as a social construct.[144] In *Plessy v. Ferguson*,[145] for example, the Supreme Court acknowledged that whether one is considered white or black in a given state depends on how the state

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(1943)). *Id.* The category was under-inclusive because Americans of German or Italian ancestry might also have felt divided loyalties, and it was over-inclusive because it lamentably assumed that all Japanese Americans were disloyal. *Id.*

139. *See id.* at 343-44 (stating that classification establishes the group of people who will either benefit from or be burdened by a law "which does not apply to 'all persons'").

140. 29 U.S.C. § 631(a) (1999).

141. *See* 42 U.S.C. § 2000e-2(a) (2000), 29 U.S.C. § 206(d)(1) (1998) (prohibiting sex-based discrimination).

142. *See, e.g.*, Linda A. Lacewell & Paula Shelowitz, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 41 U. MIAMI L. REV. 823, 834-35 (1987) (discussing race as a social construct); *see also* Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281, 302 (2002) (citing Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213, 262 (1995), and arguing against the distinction between biological and social groups); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 495-96 (1998) (discussing controversy over whether race, sex, and national origin are biological or socially constructed categories).

143. *See* Angela D. Hooton, *Constitutional Review of Affirmative Action Policies for Women of Color: A Hopeless Paradox*, 15 WIS. WOMEN'S L.J. 391, 419 (2000) (questioning whether women can constitute a "suspect class" for purposes of Equal Protection analysis given that they constitute a majority of the electorate).

144. *See* Lacewell & Shelowitz, *supra* note 142, at 834-35 (explaining that race is a concept with social meaning rather than any taxonomic purpose); Michael Omi & Howard Winant, *Racial Formation*, *in* RACE CRITICAL THEORIES 123, 123 (Philomena Essed & David T. Goldberg eds., 2002) (describing race as a concept invoking biologically based human characteristics as a means of signifying and symbolizing social conflicts); CLAUDE LEVI-STRAUSS, THE VIEW FROM AFAR 3-6 (Univ. of Chicago Press 1992) (rejecting biological theories of race in favor of an anthropological approach to cultural constructions of racial diversity).

145. 163 U.S. 537 (1896).

in question has chosen to define racial status.[146] Thus, a person of mixed blood could be considered white in one state and black in another.[147] The definition of "religion" is similarly ambiguous, since the judiciary has broadly defined it to include any body of "[s]incere beliefs, meaningful to the believer, [and it] need not be confined in either source or content to traditional or parochial concepts of religion."[148]

The problem of discerning a "discrete and insular minority" is particularly acute in the case of individuals with disabilities. Not only is it unclear what constitutes a "discrete and insular minority," it is also unclear who, in particular, has a disability. When one claims discrimination on the basis of race, gender, religion, national origin, or age, little proof is needed to determine membership in the asserted protected class, and little, if any, litigation revolves around such questions.[149] By contrast, in the case of the ADA, the protected class has fluidity, and membership in it is often far from obvious.

Individuals with disabilities do not uniformly possess the qualities that courts have come to evaluate in determining the existence of a "discrete and insular minority." Disabilities do not always constitute immutable characteristics that are beyond human control. All people possess certain mental or physical limitations. Few excel as Olympic athletes or math geniuses. Whether or not our limitations constitute disabilities remains a matter of degree.[150] Notably, unlike other characteristics protected by the civil rights statutes, some disabilities are caused by one's own negligence or risk-taking behavior, such as smoking or car racing. In addition, one's disability status can change over time. Those individuals born healthy may become disabled, and those individuals with disabilities can improve in health and functionality if they receive appropriate therapy.[151] Furthermore, advances in medicine can render previously disabling conditions non-

146. *Id.* at 552 (noting "a difference of opinion" among states regarding the determination of race).

147. *Id.*

148. *See* Malnak v. Yogi, 592 F.2d 197, 214 (3d Cir. 1979) (holding that although the Science of Creative Intelligence—Transcendental Meditation—is not a theistic religion, it is nonetheless protected by the Free Exercise Clause of the First Amendment of the Constitution); *see also* Ali v. S.E. Neighborhood House, 519 F. Supp. 489, 490 (D.D.C. 1981) (citing Welsh v. United States, 398 U.S. 333 (1970), and United States v. Seeger, 380 U.S. 163, 165 (1965)).

149. *See* Yoshino, *supra* note 142, at 495 (asserting that courts agree that race, sex and national origin are immutable characteristics).

150. *See* 42 U.S.C. § 12102(2)(A) (requiring *substantial* limitation of a person's major life activity to constitute a disability for statutory purposes) (emphasis added).

151. *See* Rulli, *supra* note 5, at 394 (calling individuals with disabilities an "open minority" because "almost everyone will become disabled at some point in his or her life").

disabling.[152] Advances in social science or popular attitudes can also change prevailing perceptions concerning whether particular conditions are disabilities.[153] Mental illness and drug addiction are now considered disabilities,[154] whereas previously they were considered to be the moral faults of the persons they afflicted.[155]

Furthermore, it is impossible to assert that as a group, all those who are substantially limited in a major life activity have been subjected to a history of discrimination. To be sure, there is a history of discrimination against people with certain disabilities.[156] State statutes allowed for the involuntary sterilization of the "insane, idiotic, imbecile, feebleminded or epileptic."[157] Some states established jury service criteria that excluded those "afflicted with permanent disease or physical weakness."[158] Another shocking example of discrimination is a Chicago "ugly law" that was repealed only in 1974, providing that

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152. For example, many cardiovascular problems are currently effectively controlled by medication and are not disabling to patients.

153. *See, e.g.*, Maggie D. Gold, *Must Insurers Treat All Illnesses Equally? Mental vs. Physical Illness: Congressional and Administrative Failure to End Limitations to and Exclusions from Coverage for Mental Illness in Employer-Provided Health Benefits Under the Mental Health Parity Act and the Americans With Disabilities Act*, 4 CONN. INS. L.J. 767, 778-86 (1997-1998) (chronicling the development of state and federal recognition of mental illness as a form of disability for insurance and disability law purposes).

154. *See* 42 U.S.C. § 12102(2)(A) (2000) (including mental impairments in the definition of "disability"); *see also id.* § 12114(b) (2000) (prohibiting discrimination against those enrolled in drug rehabilitation programs or those who have successfully completed such programs). However, employers may terminate or refuse to hire individuals who are currently engaged in the use of illegal drugs. *See id.* § 12114(a).

155. *See, e.g.*, Matthew Antinossi, Note, *Respect for the Law Is No Excuse: Drug Addiction History & Public Safety Officer Qualifications . . . Are Public Employers Breaking the Law?*, 60 OHIO ST. L.J. 711, 716-17 (1999) (pointing out that drug addiction has been recognized as a disease for decades); Nathaniel S. Currall, Note, *The Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease Within the Profession*, 12 GEO. J. LEGAL ETHICS 739, 739 (1989) (lauding the move away from the perception of alcoholism as a personal failing and towards the view of alcoholism as a disease); Karin A. Guiduli, Comment, *Challenges for the Mentally Ill: The "Threat to Safety" Defense Standard and the Use of Psychotropic Medication under Title I of the Americans with Disabilities Act of 1990*, 144 U. PA. L. REV. 1149, 1157 (1996) (noting the historical association of mental illness with "sin, evil, God's punishment, crime, and demons").

156. *See* Anita Silvers, *Formal Justice*, *in* DISABILITY, DIFFERENCE, DISCRIMINATION 13, 13-14 (Silvers et al. eds., 1998) (describing how courts in the past barred children with physical disabilities from schools and banned deformed individuals from public thoroughfares).

157. *E.g.*, Title H.R.J. Res. 299, 2002 Leg., Reg. Sess. (Va. 2002) (acknowledging Virginia's history of sterilizing those deemed to be "feebleminded"); *see* Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding one such law). In a now infamous passage upholding Virginia's sterilization law, Justice Holmes wrote that "[I]t is better for all the world, if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." *Id.*

158. *See, e.g.*, ALA. CODE § 12-16-43 (1975), *repealed by* 1978 ALA. ACTS 594, at 712 § 11 (1978); *see also* GA. CODE ANN. § 59-804 ¶ 3 (1965) (barring anyone who "is an idiot or lunatic, or intoxicated," without defining those terms).

> [n]o person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.[159]

Nevertheless, not all individuals with "disabilities," as they are currently defined, have been subjected to a history of discrimination, nor are they consistently singled out for negative treatment by contemporary society.[160] For example, people with arthritis or cardiovascular disease, conditions that can significantly limit several major life activities, are generally viewed positively.[161] Thus, while one of the statutory goals purports to include those subjected to societal exclusion,[162] the potential members of the protected class have not been marginalized uniformly.

Individuals with disabilities, as currently defined, do not constitute a discrete and insular minority, to the extent that there is any common understanding of the term. One approach to revising the statute is to focus on the goal of corrective justice and to reformulate the protected class so that it more closely resembles a discrete and insular minority. This option is explored in a later section of this Article.[163]

II. EMPIRICAL AND OTHER EVIDENCE CONCERNING THE ADA'S EFFICACY

A careful reading of the statutory definition of the term "disability" makes it clear that the definition is flawed, and the statute requires revision. One might still question, however, whether empirical evidence supports the conclusion that the ADA is failing in its mission to provide corrective justice for deserving individuals with disabilities. Unfortunately, only a limited body of empirical data currently exists, and in some cases, it leads to no clear conclusions.[164] Nevertheless, a

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159. CHICAGO, ILL., MUN. CODE § 36-34 (1966) (repealed 1974). *See generally* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 408-09 (1991) (noting that persons with disabilities were excluded from hospitals, theaters, restaurants, bookstores, and auction houses for many years).

160. *See* Marjorie L. Baldwin, *Can the ADA Achieve Its Employment Goals?*, 349 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 44 (1997) (observing that the intensity of prejudice towards persons with disabilities varies according to the nature of the impairment).

161. *See id.* (reporting no necessary correlation between social prejudice and severity of functional limitation).

162. *See* discussion *supra* Part I.A.

163. *See* discussion *infra* Part III.A.

164. *See* discussion *infra* Part II.A.

number of indicators suggest that we are falling short of fulfilling the ADA's goals.

A. Employment Rates of Individuals with Disabilities

Several studies have compiled data concerning the employment of individuals with disabilities since the enactment of the ADA, and the news is not encouraging. According to one article, data from the Current Population Survey suggested that in 1998 only 26.6% of people with work disabilities had employment, and of these, only 63.9% were employed full time.[165] By comparison, 78.4% of nondisabled individuals were employed, and 81.5% of those were in full-time jobs.[166] A relatively small 2000 survey of 535 people with disabilities and 614 without disabilities indicated that 32% of those with disabilities (ages sixteen to sixty-four) were employed in full time or part time jobs, compared with 81% of able-bodied people in the same age group.[167]

A study conducted by MIT economists Daron Acemoglu and Joshua Angrist appears to show that the ADA has resulted in an overall reduction in the rate of employment of individuals with disabilities.[168] The authors found that on average, disabled men between the ages of twenty-one and thirty-nine worked fewer weeks in 1992 through 1995 than they did before the ADA's enactment.[169] Men in the age range of forty to fifty-eight also exhibited a decrease in the number of weeks worked in 1992 and 1993.[170] Acemoglu and

165. Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271, 272 (2000) (citing U.S. Census Bureau, *Current Population Survey (1998), available at* http://www.census.gov/hhes/www/disable/disabcps.html (last modified Oct. 1, 2002)).

166. *Id.* The authors further note that the mean earnings of individuals with work disabilities holding full-time, year-round jobs were a scant $29,513 compared to the $37,961 earned by nondisabled individuals. *See id.* (attributing this disparity in part to the fact that nearly 31% of people with work disabilities never completed high school, while only 17.5% of nondisabled persons failed to graduate).

167. The survey was conducted by Harris Interactive and the National Organization on Disability. Harris Interactive & the Nat'l Org. on Disability, *2000 N.O.D./Harris Survey of Americans with Disabilities, available at* http://www.nod.org/content/cfm?id=1076 (last visited Apr. 12, 2003) [hereinafter *2000 N.O.D./Harris Survey*] (finding that 29% of disabled households lived in poverty compared with 10% of nondisabled households). The survey does not necessarily indicate improvement in employment rates for disabled people between 1998 and 2000. Rather, the discrepancy might be due to the relatively small sample size in the second survey.

168. DARON ACEMOGLU & JOSHUA ANGRIST, THE CASE OF THE AMERICANS WITH DISABILITIES ACT 11 (Nat'l Bureau of Econ. Research, Working Paper No. 6670, 1998).

169. *Id.*

170. *Id.* at 12.

Angrist found no effect on the employment rates of disabled women aged forty to fifty-eight or on wage rates.[171] Women under forty, however, suffered a decrease in their levels of employment after the ADA became effective.[172]

Another researcher, Thomas DeLeire, confirmed these findings. His research revealed that the ADA led to a 7.2% decrease in the relative employment of individuals with disabilities, but to no change in relative wages.[173] It is possible, therefore, that the ADA's reasonable accommodation requirement has created additional incentives for employers to avoid employing individuals with disabilities. Employers might calculate that the risk of detection of an unlawful hiring decision appears far smaller than the risk of employing disabled workers and incurring high accommodation costs.

Several commentators, however, have offered explanations for these trends that are not related to the existence of the ADA or discrimination on the part of employers. Possible explanations are increases in the receipt of federal disability payments, which disabled individuals do not wish to relinquish for the sake of working,[174] and the 1990-91 recession.[175] It is also plausible that the downward employment trend began before 1990 and continued thereafter without any link to the ADA's passage.[176] Another factor that might account for the findings is the difficulty of defining the category of

171. *Id.*

172. *Id.* at 11. Schwochau and Blanck paint these findings in a more positive light. *See* Schwochau & Blanck, *supra* note 165, at 297. The authors assert that Acemoglu and Angrist's results actually suggest that due to the ADA, the number of weeks disabled women aged forty to fifty-eight worked increased relative to those worked by nondisabled women over the 1993-96 period, once relevant employment trends at the time of the study's data collection are considered. *Id.* As for DeLeire's findings, Schwochau and Blanck relate that individuals with disabilities resulting from injury have fared better since the passage of the ADA, and in particular, "disabled minorities [have seen] an increase in their probability of employment as did those with high school or college diplomas." *Id.* In addition, they note encouraging data from the Survey of Income and Program Participation ("SIPP"), which notes a 2.9% increase in employment among individuals with severe disabilities between the ages of twenty-one and sixty-four from 1991-92 to 1994-95. *See id.* at 272 (citing this study as evidence against a "dismal picture" of the ADA as an abject failure).

173. Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUMAN RES. 693, 704-05 (2000).

174. *See* Schwochau & Blanck, *supra* note 165, at 296 (noting that these factors were taken into account in both the DeLeire and the Acemoglu and Angrist studies).

175. *Id.*; *see also* ACEMOGLU & ANGRIST, *supra* note 168, at 13; DeLeire, *supra* note 173, at 708-10 (rejecting these possibilities because their respective studies were designed to account for these factors).

176. Schwochau & Blanck, *supra* note 165, at 303 (pointing out that DeLeire presents a figure based on one of his models that reflects a downward trend in employment, which apparently began before the enactment of the ADA).

disabled workers.[177] The studies discussed above relied on responses to a question in a government survey concerning the respondent's disability status.[178] Thus, some of those who identified themselves as having a disability might not have one under the ADA's definition, whereas some of those who responded in the negative might actually have a disability under the ADA.[179]

Some disability advocates emphasize the positive psychological effects of the ADA, a phenomenon that also tends to refute the argument that the statute's enactment is directly linked to a decrease in employment rates among individuals with disabilities.[180] David M. Engel and Frank W. Munger list five ways in which the law has impacted individuals with disabilities: (1) by changing their self-image and allowing them to envision more accomplished careers;[181] (2) by changing the way others perceive them and incorporating the language of ADA rights into daily-life discourse;[182] (3) by encouraging employers to implement rights voluntarily, without legal challenge;[183] (4) by inducing institutions to make changes consistent with the ADA even if no individual requests these transformations;[184] and (5) by educating children and adults to feel entitled to certain rights in society.[185] Another scholar, Bonnie Poitras Tucker, asserts that the

177. *See id.* at 298 (discussing the complexity and ambiguities associated with the definition of disability).

178. *E.g.*, DeLeire, *supra* note 173, at 697-98; ACEMOGLU & ANGRIST, *supra* note 168, at 9; Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 280 (2000). The question was: "Does [the individual] have a health problem or a disability which prevents him/her from working or which limits the kind or amount of work he/she can do?" ACEMOGLU & ANGRIST, *supra* note 168, at 9.

179. A more far-fetched suggestion is that the drop in employment levels, if it exists, is ironically attributable to an enhanced sense of self-worth felt within the disability community since the enactment of the ADA, which causes some to refuse certain types of work. *See* Jolls, *supra* note 119, at 280 (suggesting that the drop in employment levels might reflect an increased sense of self-worth which in turn would induce disabled persons to invest in education rather than in the workforce and to be more selective in the jobs they accept).

180. *See generally* David M. Engel & Frank W. Munger, *Re-Interpreting the Effect of Rights: Career Narratives and the Americans with Disabilities Act*, 62 OHIO ST. L.J. 285, 329 (2001) (discussing the impact of the ADA on various disabled persons according to the different socioeconomic and psychological conditions of those individuals).

181. *See id.* (arguing that the availability of rights provided by the ADA might inspire persons with disabilities to "perceive many obstacles as the product of unfair treatment rather than personal shortcomings").

182. *See id.* (explaining that this "discourse of rights" derives from many sources, including media coverage and what little enforcement of the Act that actually exists).

183. *See id.* (chronicling two instances in which accommodations were voluntarily provided).

184. *See id.* (using the example of colleges providing accommodations for disabled persons as evidence of this phenomenon).

185. *See id.* at 329-30, 332-33 (analogizing the impact of the ADA on the self-esteem of disabled persons to the impact of the Individuals with Disabilities Act ("IDEA") on the self-esteem of children in special education programs).

ADA has led people with disabilities to feel justified in requesting accommodations and to expect that their requests will be fulfilled.[186] Furthermore, Tucker notes that "the ADA has made society-at-large aware of the issue of disability, and has required the public to devise means of making society more accessible for people with disabilities in the future."[187]

It is difficult to judge whether those actually covered by the ADA have experienced lower rates of employment since the statute's enactment.[188] In light of the factors discussed above, one may fairly say that the "attribution of disemployment results to the ADA is premature."[189] Nevertheless, it is quite clear that the ADA has not resulted in the hoped-for dramatic increase in employment rates for individuals with disabilities, and two-thirds to three-quarters of this population remains outside the workforce.[190]

B. Monetary Relief and Other Statutory Benefits

It is extremely difficult to evaluate the extent to which the ADA is providing relief to those who actually suffer discrimination. The only clear fact is that in the minority of cases that generate a decision on the merits in federal court, plaintiffs have an abysmal success rate. Little is known about the relief obtained by employees in other forums or through other avenues.

1. Data gaps: settlements, informal resolutions, and state court actions

It has been reported that at least 90% of all filed cases settle before trial.[191] Moreover, the overall proportion of filed-to-tried lawsuits may be as low as 2%.[192] A study by the Bureau of Justice Statistics of civil

186. *See* Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 383 (2001) (asserting that this feeling of justification is "a necessary step toward changing societal values").

187. *Id.* at 384.

188. *See supra* notes 177-78 and accompanying text.

189. Schwochau & Blanck, *supra* note 165, at 303.

190. *Id.* at 272.

191. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 28 (1983) (stating that approximately 88% of the civil cases that went to ten courts studied by the Civil Litigation Research Project terminated in an outcome agreed upon by the parties); *see also* Anne Thérése Béchamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 129 (1990) (discussing the emphasis placed on encouraging settlements in the American judicial system); Rulli, *supra* note 5, at 371 (discussing the importance of settlements for the effective functioning of the judicial system).

192. *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 63 (1996) (noting that the main functions of trials is not to resolve disputes, but to deter other trials and encourage settlements, and stating that only 2% of civil filings go to jury trial); Laurie Kratky Doré, *Secrecy By*

rights complaints filed in United States District Courts between 1990 and 1998 revealed that in 1998, over 70% were dismissed before judgment, of which 35.2% were settled and 12.5% were voluntarily dismissed.[193] A study of age discrimination suits filed under the ADEA[194] revealed that approximately 58% of those cases settled.[195] A survey of 4,310 employment discrimination cases filed in the Northern District of Illinois during the years 1972-1987 found that 80% of those cases produced no district court opinion and that 40-60% of all filed cases were resolved through settlement.[196] No study or report has focused specifically on settlements in ADA cases, and this information is impossible to derive from publicly available materials.[197] Consequently, employees with ADA complaints may have gained significant benefits and monetary recoveries through settlements.[198]

Another unknown is the number of disputes resolved informally between employers and employees before litigation commences. Employers, for example, might provide many employees with reasonable accommodations at their request without challenging their status as disabled and without claiming that the accommodation is unduly burdensome.[199] Employers might often wish to avert

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Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, 74 NOTRE DAME L. REV. 283, 288 n.11 (1999) (noting that approximately 4% of the filed civil cases in 1990 resulted in trials); Rulli, *supra* note 5, at 371 (noting that recent studies indicate that the percentage of filed-to-tried civil cases has recently fallen from 4% to 2%).

193. Marika F.X. Litras, *Civil Rights Complaints in U.S. District Courts, 1990-98*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (2000) (focusing on civil rights complaints related to employment, housing, welfare, voting, and other civil rights issues, excluding prisoner petitions).

194. 29 U.S.C. §§ 621-634 (1999).

195. Rutherglen, *supra* note 13, at 513.

196. *See* Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1137, 1146 (1990) (using a broad definition of "published").

197. *See* Rulli, *supra* note 5, at 372 (stating that information concerning settlements of suits filed under Title I of the ADA remains difficult, if not impossible, to obtain); *see also* Scott Burris et al., *Disputing Under the Americans with Disabilities Act: Empirical Answers, and Some Questions*, 9 TEMP. POL. & CIV. RTS. L. REV. 237, 251 (2000) (noting that statistics exist for the percentage of civil cases that settle, but no statistics exist for cases filed under the ADA); Martha Neil, *Confidential Settlements Scrutinized*, 88 A.B.A. J. 20 (2002) (noting that "[c]onfidential settlements are a mainstay of civil litigation in the United States").

198. Professor Rulli reports that his study of the Eastern District of Pennsylvania revealed that in that district, between 47.1 and 62.6% of Title I cases settled. *See* Rulli, *supra* note 5, at 372. Rulli further suggests that ADA cases may settle less frequently than other types of cases for a variety of reasons, including the ADA's complexity, plaintiffs' moral convictions, and defendants' desire to create disincentives for future litigation. *Id.* No comprehensive information is available concerning ADA settlements in other regions.

199. *See* 42 U.S.C. § 12112(b)(5)(A) (2000) (establishing that the term "discrimination" includes failure to make a reasonable accommodation for the known limitations of an employee with a disability); *see also* Tucker, *supra* note 186, at

litigation to save costs and avoid negative publicity or erosion of employee morale. Employees, therefore, are likely to be frequently benefiting from employers' voluntary cooperation even in cases in which the employee's disability status is uncertain.

An additional data gap is the lack of information concerning plaintiff success rates in state courts under the ADA and state laws that prohibit disability discrimination. Many of the states have adopted a definition of "disability" that is identical or very similar to that found in the ADA.[200] In 1996 the Bureau of Justice Statistics

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383 (stating that "some people and entities are voluntarily providing the accommodations required by the ADA").

200. State statutes that contain definitions identical to the ADA's are: Discrimination in Employment: ARIZ. REV. STAT. ANN. § 41-1461(2) (West 1999); COLO. REV. STAT. § 24-34-301(2.5) (2001); DEL. CODE ANN. tit. 19, § 722(4) (1995); D.C. CODE ANN. § 2-1401.02(5A) (1999 & Supp. 2001); HAW. REV. STAT. ANN. § 378-1 (Michie. 1993); IND. CODE ANN. § 22-9-5-6(a) (Michie 1997); IOWA CODE ANN. § 225C.46(1)(a) (West 2000); KAN. STAT. ANN. § 44-1002(j) (2000); KY. REV. STAT. ANN. § 344.010(4) (Michie 1997); LA. REV. STAT. ANN. § 51: 2232(11) (West 1999); MASS. GEN. LAWS ANN. ch. 151B, § 1(17) (West 1996 & Supp. 2002); MICH. COMP. LAWS ANN. § 37.1103(d) (West 2001); MO. ANN. STAT. § 213.010(4) (West Supp. 2002); MONT. CODE ANN. § 49-2-101(19)(a) (2001); NEB. REV. STAT. § 48-1102(9) (1998); NEV. REV. STAT. ANN. § 613.310(1) (Michie 2000 & Supp. 2001); N.H. REV. STAT. ANN. § 354-A: 2(IV) (1995 & Supp. 2001); N.M. STAT. ANN. § 28-1-2(M) (Michie Supp. 2001); N.C. GEN. STAT. § 168A-3(7a) (2001); N.D. CENT. CODE § 14-02.4-02(4) (Supp. 2001); OHIO REV. CODE ANN. § 4112.01(13) (West 2001); OKLA. STAT. ANN. tit. 25, § 1301(4) (West 1987 & Supp. 2002); OR. REV. STAT. § 659A.100(1) (2001); 43 PA. CONS. STAT. ANN. § 954 (West Supp. 2002); R.I. GEN. LAWS § 28-5-6(4) (2000 & Supp. 2001); S.D. CODIFIED LAWS § 20-13-1(4) (Michie 1995); TENN. CODE ANN. § 4-21-102(9) (1998); TEX. LAB. CODE ANN. § 21.002(6) (Vernon 1996 & Supp. 2002); UTAH CODE ANN. § 34A-5-102(5) (2001); VT. STAT. ANN. tit. 21, § 495d(5) (1987 & Supp. 2001); W. VA. CODE ANN. § 5-11-3(M) (Michie 2002).

Some jurisdictions have adopted the ADA's language in areas other than typical civil rights or employment legislation. The Virgin Islands' code has no law protecting the disabled in employment, yet it mirrors the ADA's "substantially limits one or more of a person's major life activities" language when defining disability in tax notification laws. V.I. CODE ANN. § 2498(a)(2) (1994). Florida uses the ADA's definition in its Fair Housing Act. FLA. STAT. ANN. § 760.22(7) (West 1997 & Supp. 2002).

Alabama and Mississippi have no comprehensive definitions of "disability."

The following state statutes define "disability" differently from the ADA: ALASKA STAT. § 18.80.300(12) (Michie 2000); ARK. CODE ANN. § 16-123-102(3) (Michie Supp. 2001); CONN. GEN. STAT. ANN. § 46a-51(15) (West 1995 & Supp. 2002); IDAHO CODE § 67-5902(15) (Michie 1995); 775 ILL. COMP. STAT. ANN. 5/1-103(I) (West 2001); ME. REV. STAT. ANN. tit. 5 § 4553(7-A) (West 2002); MD. CODE ANN., LAB. & EMPL. § 11-503(f) (1998 & Supp. 2001); N.J. STAT. ANN. § 10: 5-5(q) (West 1993 & Supp. 2002); N.Y. EXEC. § 292(21) (McKinney 2001); P.R. LAWS ANN. § 501(d) (1999); S.C. CODE ANN. § 43-33-560 (Law. Co-op. 1985 & Supp. 2001); WASH. REV. CODE ANN. § 74.29.010 (West 2001); WIS. STAT. ANN. § 111.32(8) (West 1997 & Supp. 2001).

Some states have language that is similar to the ADA's, yet they lack key elements in their definitions: CAL. GOV'T CODE § 12926(i) (West Supp. 2002) (omitting "substantially"); GA. CODE ANN. § 34-6A-2(3) (1998) (omitting "being regarded as having such an impairment"); MINN. STAT. ANN. § 363.01(Subd. 13) (West 1991 & Supp. 2002) (substituting "materially" for "substantially"); VA. CODE ANN. § 51.5-3 (Michie 1998) (omitting "being regarded as having such an impairment"); WYO. STAT. ANN. § 35-13-205(a)(ii) (Michie 2001) (omitting "record of such an

published a Civil Justice Survey of State Courts that found that employment discrimination plaintiffs in the seventy-five largest counties in the United States won forty percent of cases.[201] The survey, however, did not distinguish among the different types of discrimination claims and thus provided no data specific to disability discrimination allegations.[202] Extensive research revealed no other study or report concerning the outcomes of disability discrimination cases in state court.

One might believe that the 1996 survey's forty percent figure proves that disability discrimination plaintiffs enjoy greater success in state court than in federal court, but this is not necessarily the case. Studies of case outcomes filed under federal anti-discrimination statutes other than the ADA have shown that plaintiffs achieve a greater number of positive outcomes under those statutes even in federal court.[203]

By extension, it stands to reason that plaintiffs might be winning forty percent of all employment discrimination cases filed in state court because of success in cases involving claims relating to race, gender, age, and other protected categories, while still experiencing significant judicial hostility to disability discrimination claims. Nevertheless, disability advocates have not, thus far, alleged that disability plaintiffs find state courts to be an inhospitable forum, and thus, plaintiffs may achieve more favorable results in state courts than they do in the federal forum. To eliminate this uncertainty, studies should be conducted to determine the rates at which employers and plaintiffs prevail in disability discrimination cases filed in state court.

2. EEOC charge processing

The EEOC charge data serves as one source of specific information concerning ADA case outcomes outside of the judicial forum.[204] The

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impairment" and "being regarded as having such an impairment").

201. Lea S. Gifford et al., *Contract Trials and Verdicts in Large Counties, 1996, at* http://www.ojp.usdoj.gov/bjs/ (last modified Oct. 25, 2002). Presumably, the cases surveyed included those asserting federal civil rights claims, state civil rights claims, and a combination of both.

202. *Id.*

203. *See* Colker, *Winning and Losing, supra* note 4, at 248, 253 (finding that judicial outcomes under Title VII appear to be more pro-plaintiff than those under the ADA); Juliano & Schwab, *supra* note 10, at 570 (showing that over fifty percent of sexual harassment cases filed in federal district court result in a win for the plaintiff).

204. Under the ADA, individuals must file a charge of discrimination with the EEOC and exhaust their administrative remedies before proceeding to file suit in federal court. *See* 42 U.S.C. § 12117(a) (2000) (stating that the "powers, remedies and procedures" for enforcement of the ADA shall be identical to those established for enforcement of Title VII). Title VII provides private parties with a private cause of action, which can be pursued after they have received a right to sue from the

EEOC is the federal agency that enforces Title I of the ADA.[205] Between 1992 and 2002, the EEOC resolved 187,503 ADA charges, 17.5% of which were resolved in the employees' favor.[206] These "merit resolutions" included negotiated settlements, withdrawal of charges after the charging party received the benefits she desired, successful conciliation of charges,[207] and EEOC determinations that a charge had merit in cases where it could not be successfully conciliated.[208] In its 32,742 merit resolutions, the EEOC obtained $436 million in monetary benefits for charging parties without litigation, averaging about $13,316 per resolution.[209]

In recent years, the EEOC appears to have obtained less per claim under the ADA than it has under some of the other statutes that it enforces. In fiscal year 2002, 4,123 ADA merit resolutions were reached, and the EEOC obtained $50 million for those charging parties, or, on average, approximately $12,127 per charge.[210] By comparison, in fiscal year 2002, the EEOC had 11,930 merit resolutions in Title VII cases, for which it obtained $141.7 million (on average $11,877 per charge),[211] 2,694 merit resolutions under the ADEA for which it recovered $55.7 million in monetary damages (on average $20,675 per charge),[212] and 290 merit resolutions under the

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EEOC. *Id.* § 2000e-5(f)(1).

205. *Id.* § 12117(a).

206. U.S. Equal Employment Opportunity Comm'n, *Americans with Disabilities Act of 1990 (ADA) Charges FY 1992-FY 2002, available at* http://www.eeoc.gov/stats/ada-charges.html (last modified Feb. 6, 2003) [hereinafter *ADA Charges FY 1992-FY 2002*]. Although the 17.5% figure might seem low, it should be noted that 28.8% of charges were administratively closed without any decision on the merits of the case. *Id.* Administrative closures occur because there is a failure to locate or establish contact with the charging party, the outcome of related litigation renders further processing of the charge inappropriate, there is lack of EEOC jurisdiction, or the charging party requests a right to sue in court before resolution of the issue. Allbright, *supra* note 3, at 406.

207. Under the ADA, the EEOC must attempt to conciliate discrimination charges that are found to be meritorious to avoid litigation. *See* 42 U.S.C. § 12117(a) (2000). The provision states that the "powers, remedies and procedures" for enforcement of the ADA shall be identical to those established for enforcement of Title VII. Title VII establishes that if the EEOC determines that the allegations in a charge of discrimination are true, it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* § 2000e-5(b).

208. *See ADA Charges FY 1992-FY 2002, supra* note 217.

209. *Id.*

210. *Id.* In 2000 the EEOC had 4,835 ADA merit resolutions for which it obtained $47.9 million in relief, averaging $9,907 per charge. *Id.*

211. U.S. Equal Employment Opportunity Comm'n, *Title VII of the Civil Rights Act of 1964 Charges FY 1992-FY 2002, available at* http://www.eeoc.gov/stats/vii.html (last modified Feb. 6, 2003).

212. U.S. Equal Employment Opportunity Comm'n, *Age Discrimination in Employment Act Charges FY 1992-FY 2002, available at* http://www.eeoc.gov/stats/adea.html (last modified Feb. 6, 2003).

Equal Pay Act (EPA),[213] for which it obtained $10.3 million in damages (on average $35,517 per charge).[214]

While the relatively low monetary recoveries under the ADA deserve attention, an explanation may rest in the probability that some ADA charging parties seek primarily non-monetary benefits. The parties may wish primarily to receive a reasonable accommodation at work or to retain their jobs after a leave of absence, and therefore, might be satisfied with relatively small damages awards. In addition, according to one study, the percentage of complainants obtaining favorable results with ADA charges is within the range of favorable results achieved under other statutes enforced by the EEOC.[215] Between 1992 and 2000, 12.4% of charging parties received benefits under the ADA, while 10.9% received benefits under Title VII, 10.2% received benefits under the ADEA, and 15.2% obtained benefits under the EPA.[216]

Many of the individuals who turn to the EEOC for redress of disability discrimination do not have conditions traditionally considered to be severe disabilities. By far, the most common type of charge filed with the agency is for "orthopedic and structural impairments of the back," as 15% of all ADA charges filed between 1992 and 2002 involved these conditions.[217] The EEOC reports that people with these impairments received $63,216,739 in dollar benefits during that time period, which far exceeds the relief obtained by the EEOC for those in any other disability category.[218] Likewise, individuals with allergies, chemical sensitivities, alcoholism

213. 29 U.S.C. § 206 (1998).

214. U.S. Equal Employment Opportunity Comm'n, *Equal Pay Act Charges (includes concurrent charges with Title VII, ADEA, and ADA) FY 1992-FY 2002, available at* http://www.eeoc.gov/stats/epa.html (last modified Feb. 6, 2003).

215. *See* Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 KAN. L. REV. 1, 44 (2001) (comparing the results of processing ADA charges by the EEOC with other types of charges filed by the EEOC, such as charges under Title VII and the ADEA).

216. *Id.* at 44. More specifically, the study's findings break down as follows:

Charging parties withdrawing charges with benefits: ADA—5.1%; Title VII—4.5%; ADEA—5.1%; EPA—6.2%;

Charging parties receiving settlements: ADA—5.5%; Title VII—5.3%; ADEA— 4.4%; EPA—7.4%; and

Successful conciliation: ADA—1.8%; Title VII—1.0%; ADEA—0.7%; EPA—1.5%.

217. U.S. Equal Employment Opportunity Comm'n, *ADA Charge Data by Impairments/Bases-Merit Factor Resolutions, available at* http://www.eeoc.gov/stats.ada-receipts.html (last modified Feb. 6, 2003).

218. U.S. Equal Employment Opportunity Comm'n, *ADA Charge Data—Monetary Benefits, available at* http://www.eeoc.gov/stats/ada-monetary.html (last modified Feb. 6, 2003).

and drug addiction received $11,499,864 in monetary relief.[219] Hearing impairments, vision impairments, paralysis, and non-paralytic orthopedic impairments, other than back problems, constituted only 15.3% of charges filed during the same period even though these are probably the conditions that are most commonly thought of as disabilities.[220] The 15.3% figure offers further evidence that many of the most seriously disabled do not attempt to enter the workforce, and those that do may not feel empowered to combat unlawful discrimination by seeking governmental intervention.

C. *What Is Known and What Is Not Known*

The available data indicate that the ADA has not achieved an increased employment rate for individuals with disabilities.[221] The evidence is far less conclusive in the area of dispute outcomes. Much remains unknown concerning settlements, informal dispute resolution in the workplace, and the outcomes of state court cases, which have not been comprehensively studied.

Nevertheless, the startlingly low plaintiff win rates in federal court reveal that the ADA rarely functions as an effective remedial mechanism when cases come before federal judges.[222] Furthermore, EEOC statistics divulge that many individuals who seek redress under the statute do not have what are traditionally thought of as severe disabilities, and thus a significant portion of those who obtain relief from employers may not be the most needy or deserving plaintiffs.[223]

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219. *Id.*

220. U.S. Equal Employment Opportunity Comm'n, *ADA Charge Data by Impairments/Bases—Receipts*, *available at* http://www.eeoc.gov/stats/ada-receipts.html (last modified Feb. 6, 2003). The EEOC obtained a total of $64,965,341 in monetary relief for individuals with these impairments. By category, the relief obtained is as follows: $9,771, 179 for the hearing impaired; $9,760,423 for the visually impaired; $3,254,882 for those with paralysis; and $42,178,857 for those with non-paralytic orthopedic impairments other than back problems. U.S. Equal Employment Opportunity Comm'n, *ADA Charge Data—Monetary Benefits*, *available at* http://www.eeoc.gov/stats/ada-monetary.html (last modified Feb. 6, 2003).

221. *See* Samuel R. Bagenstos, *The Americans With Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1019-20 (2003) (stating that the failure of the ADA to effectively increase the employment rate for individuals with disabilities is due to the restrictive judicial interpretation of the term "disability" within the Act); S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disabilities Law Claims Are Different*, 33 CONN. L. REV. 603, 606 (2001) (introducing some commentators' thoughts as to why the ADA has not increased the employment rates for individuals with disabilities); *see generally* Schwochau & Blanck, *supra* note 165 (stating that the ADA has not led to increased employment among disabled people).

222. *See* American Bar Association, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 403-04 (1998) (dispelling the myth that the ADA burdens employers by presenting results of a study of 1,248 ADA Title I cases that showed that the defendants won 92% of the time).

223. U.S. Equal Employment Opportunity Comm'n, *ADA Charge Data by*

While it might be premature to conclude that the ADA is fully a "windfall for defendants,"[224] the evidence makes it reasonable to deduce that the statute is falling short of satisfactorily meeting the goal of corrective justice.[225] Regardless of the empirical data, however, Title I of the ADA is flawed because of its definition of the term "disability," which hampers the promotion of the law's objectives. A variety of alternatives for amending the ADA's statutory definition will be explored in the remainder of this Article.[226]

III. AMENDING THE ADA: OPTIONS, RECOMMENDATIONS, AND ANALYSIS

A. The Recommendation: Redefining Individuals with Disabilities As Those with Mental or Physical Impairments that Have Been Subjected to A Pattern of Discrimination and Developing Specific Categories of Covered Impairments

1. The general principle

This Article argues for the jettisoning of the ADA's current definition of "disability" and the adoption of a new approach. Individuals with disabilities should be defined as those with mental or physical impairments that have been subjected to a pattern of discrimination by public policy or widespread private practice.[227] The ADA should further authorize the EEOC to determine which disabilities have been associated with systematic discrimination and to publish guidance listing the covered conditions or disability categories. Those with impairments that fit the listed criteria would be presumed disabled. Those whose conditions do not fit within any of the listed categories would be presumed non-disabled, though they would be free to submit to the EEOC a request, along with a supporting brief, arguing that their impairments be added to the list of covered conditions the next time the list is reviewed and updated.

Impairments/Bases—Receipts, available at http://www.eeoc.gov/stats/ada-receipts.html (last modified Feb. 6, 2003).

224. *See* Colker, *A Windfall for Defendants*, *supra* note 4, at 103-10 (arguing that suits filed under the ADA since its inception overwhelmingly result in a victory for defendants).

225. *See id.* at 126 (comparing the troubling statistics that indicate a 92% victory rate for defendants in ADA Title I cases with Congress' intent in passing the ADA, which was to eliminate discrimination for the forty-three million Americans with disabilities).

226. *See* discussion *infra* Part III (providing options, recommendations, and analysis for amending the definition of the term "disability" found within the ADA).

227. The "record of" and "regarded as" branches of the definition should be retained. *See infra* Part III.A.2.

The proposed amendment would address many of the problems that plague the current definition.[228] With clear guidance and a categorical list of covered impairments, courts are less likely to reach inconsistent decisions and will not need to make invasive inquiries concerning each plaintiff's daily life activities.[229] Furthermore, plaintiffs will no longer need to prove the severity of their disabilities to attain protected status, avoiding the conundrum of having to establish both substantial limitation and job qualification. In addition, those whose symptoms are controlled with medication will not be excluded from coverage so long as their underlying conditions meet a listed criteria.[230] Thus, employers who exclude persons with epilepsy or mental illness because they do not want such individuals in their workplaces will no longer be able to avoid liability simply by asserting that these plaintiffs' ailments are sufficiently controlled by mitigating measures.

In general, under the new definition, the ADA's protected class would become more easily discernible and would more readily resemble the traditional model of a discrete and insular minority. As a consequence, the courts would no longer struggle with the definition of disability in each case, and the goal of corrective justice could be more effectively promoted.[231]

2. *The mechanics: determining disability status under the proposed standard*

The task of establishing a mechanism by which to determine what constitutes a disability under the proposed definition is a complex and challenging one. The following is a suggested approach that would likely need to be adjusted and refined as the system is tested through time.

The EEOC should be assigned the task of developing a list of impairments and categories of conditions associated with a known pattern of discrimination. Establishing the list of disabilities that have been the targets of discrimination will initially be demanding and time-consuming, and it should be delegated to a special EEOC department with appropriate experts. This department should also periodically review and update the list in light of emerging

228. *See* discussion *supra* Part I.C.

229. *See infra* note 297 (discussing circumstances under which disputes and inconsistent decisions concerning disability status may still arise).

230. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (holding that the court should evaluate mitigating circumstances when determining whether an individual qualifies as a person with a disability under the ADA).

231. *See supra* Part III.A.4 (discussing the impact of the proposed revision on the ADA's current protected class).

information concerning contemporary discriminatory trends and medical developments or findings that might influence such trends.

The EEOC would have to turn to a variety of data sources to gather evidence concerning patterns of discrimination. First and perhaps foremost, it should turn to historical evidence. It is well known, for example, that individuals with mental disabilities and epilepsy have been subjected to extreme forms of discrimination. In the past, many state statutes allowed for the involuntary sterilization of the "insane, idiotic, imbecile, feebleminded or epileptic."[232] Approximately 60,000 Americans were involuntarily sterilized pursuant to state eugenics laws throughout the country.[233] Similarly, individuals with obvious disfigurements have often been marginalized.[234] There is convincing evidence that deaf individuals have traditionally been subjected to discrimination.[235] Likewise, individuals with contagious diseases have been subjected to widespread exclusionary practices.[236] The case of HIV is a contemporary example. HIV positive persons have been excluded by employers, educational institutions, and other segments of society.[237] Individuals with paralysis and blindness have also been

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232. *See, e.g.*, H.R. 299, 2002 Leg., Reg. Sess. (Va. 2002) (honoring the memory of Carrie Buck who was the first person sterilized under Virginia's 1924 Eugenical Sterilization Act).

233. *See, e.g., id.* (indicating that Virginia sterilized approximately 8,000 people, while 60,000 were sterilized throughout the United States). In 2001, the Virginia General Assembly issued a joint resolution expressing its regret for its former policy and noting that some of those affected had no mental impairment at all. H.R.J. Res. 607, 2001 Sess. (Va. 2000); *see* S.J. 79, 2002 Leg., Reg. Sess. (Va. 2002) (noting that Raymond Hudlow, who was sterilized after being committed to the Virginia Colony for Epileptics and Feebleminded because he had repeatedly run away from his abusive father, later had a distinguished military career during World War II).

234. *See, e.g., supra* note 159 and accompanying text.

235. *See* PAUL HIGGINS, OUTSIDERS IN A HEARING WORLD 25-27 (1980) (tracing the history of discrimination against deaf individuals). For example, in the 1800s, owners of all ships arriving in the United States were legally required to provide the names of all deaf persons on board and to pay bond to keep the deaf persons from becoming public charges. *Id.* at 25. Many states held deaf individuals incompetent to make contracts. *Id.* According to the author, hearing workers are still frequently promoted over deaf workers, even when the hearing employees were trained by those same deaf workers. *Id.* at 27. *See also* Randy Lee, *Equal Protection and A Deaf Person's Right to Serve As A Juror*, 17 N.Y.U. REV. L. & SOC. CHANGE 81, 96 (1989-90) (providing examples of "irrational restrictions" on deaf individuals in the twentieth century).

236. *See* Michael Adam Burger & Lourdes I. Reyes Rosa, *Your Money and Your Life! AIDS and Real Estate Disclosure Statutes*, 5 HOFSTRA PROP. L.J. 349, 368 (1993) (discussing a real estate agent's ability to disclose the HIV status of someone who died in a seller's house, indicating that "history demonstrates that fear and ignorance lead to discrimination, both inside and outside the context of contagious diseases"); *see also* Deborah Weinstein, *Employment Discrimination: AIDS Education and Compliance with the Law*, 1 TEMP. POL. & CIV. RTS. L. REV. 85, 103 (1992) (examining how the ADA will affect those with AIDS, stating that "[t]hroughout history and across cultures, the law has not protected people with contagious diseases from discrimination").

237. *See* Scott Burris, *Disease Stigma in U.S. Public Health Law*, 30 J.L. MED. & ETHICS,

marginalized by virtue of the fact that architectural and communication barriers have made many of mainstream society's goods and services inaccessible to people with those impairments.[238]

Admittedly, while discrimination against individuals with certain disabilities is already well known,[239] there is generally a dearth of scholarship in this area. To the extent possible, research would need to be conducted to develop comprehensive records of laws, regulations, policies, and practices that sanctioned discrimination against individuals with disabilities. It should also be noted that if the EEOC finds that a particular condition was targeted for discrimination in the past, but it is convinced that societal attitudes have changed and that no such discrimination occurs in the present, the impairment should not be included in the list of covered disabilities.

For purposes of determining which impairments fall within the ADA's scope, the EEOC should consider discrimination by both public and private entities that has been instituted by law, regulation, policy or common business conduct. The agency should also focus not only on discrimination in employment, but also on exclusionary policies in other realms, such as health care, education, and public life. For example, the practices of sterilizing individuals with mental disabilities and barring those with obvious disfigurements from appearing in certain public places[240] justifies inclusion of these impairments within the scope of the statute, even though these forms of discrimination occurred outside the workplace. The ADA's findings suggest the appropriateness of these criteria. They speak of a general history of "purposeful unequal treatment" and of individuals with disabilities being "relegated to a position of political

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179, 186 (2002) (arguing that "obscenity review rules, criminal exposure laws, immigration restrictions, and mandatory testing requirements" are types of structural discrimination that both authorize and even require discrimination against those with HIV).

238. *See* 42 U.S.C. § 12101(a)(5) (2000) (referring to the "discriminatory effects of architectural, transportation, and communication barriers . . . [and] failure to make modifications to existing facilities and practices").

239. *See, e.g.*, HIGGINS, *supra* note 235, at 23-29 (criticizing early scholars' assumptions about deaf individuals); JAMES W. TRENT, INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES (1994) (tracing the development of social programs and public treatment of individuals with mental disabilities from the 1840s to the 1980s); Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 851 (1966) (indicating that disabled persons have been turned away from places where, legally, the public is to be accommodated).

240. *See* Buck v. Bell, 274 U.S. 200 (1927) (allowing the sterilization of Carrie Buck after she gave birth to an allegedly "feeble-minded" child); *see also supra* note 159 and accompanying text.

powerlessness in our society."[241] The concern, therefore, is societal discrimination in all realms of life.

Where historical evidence is not available,[242] the EEOC could utilize census data, national polls, and studies that are conducted by either the agency or other institutions. These sources would be useful in determining which disabled individuals are currently excluded from the workplace and other segments of society. The ADA itself refers to the information in these sources as providing support for the passage of anti-discrimination legislation.[243]

The EEOC could also look at its own records of discrimination charges. If certain conditions are particularly prevalent in its inventory and if many of the charges of discrimination involving those conditions have generated merit-based resolutions, those conditions should be added to the list of covered impairments.[244] Thus, the EEOC might add cancer and carpal tunnel syndrome to its list, if its statistical data supports their inclusion.

The EEOC will continue to gather information about contemporary discriminatory practices. Since individuals can file EEOC charges without an attorney,[245] many charging parties are unlikely to know the contents of the categorical list and will, consequently, file charges of discrimination involving conditions that are not included. The EEOC could dismiss such charges without investigation because those individuals will be presumed non-disabled. However, the agency should periodically review its inventory, and if it becomes apparent that a large number of

241. 42 U.S.C. § 12101(a)(7) (2000).

242. It should be noted that it is not clear when evidence becomes "historical." There is no line of demarcation as to the passage from "contemporary trends" to "history." For example, is discrimination against those with HIV "historical" or "contemporary," given that it began only after the disease was first identified in 1981? *See* Carlos Del Rio & James W. Curran, *Epidemiology and Prevention of Acquired Immunodeficiency Syndrome and Human Immunodeficiency Virus Infection*, *in* 1 PRINCIPLES AND PRACTICE OF INFECTIOUS DISEASES 1340 (Gerald L. Mandell et al. eds., 2000) (emphasizing that while communicable disease law has historical roots, HIV does not have the same historical depths); *see also* Paul Cartledge, *What is Social History Now?*, *in* WHAT IS HISTORY NOW? 23-24 (David Cannadine ed., 2002) (exploring the notion of the "time of history" and indicating that historians need not necessarily think in terms of millennia or centuries rather than decades or years).

243. *See* 42 U.S.C. § 12101(a)(6) (2000) (observing that different sources such as national polls have shown that disabled individuals "occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally").

244. *See* U.S. Equal Employment Opportunity Comm'n, *ADA Charge Data by Impairment/Bases—Receipts* (providing charge statistics received from July 26, 1992 to September 30, 2002), *available at* http://www.eeoc.gov/stats/ada-receipts.html (last modified Feb. 6, 2003).

245. *See* 42 U.S.C. § 2000e-5(b) (2000) (stating that a charge may be filed under the EEOC by the person aggrieved or on behalf of the person aggrieved).

individuals with a particular non-covered condition are filing charges of discrimination, the EEOC should commence a study or inquiry to determine whether employers are commonly discriminating against qualified applicants and employees with the impairment.[246] Furthermore, individuals whose charges are dismissed because they do not meet the definition of "disability" could submit a request to the EEOC's reviewing department, along with a supporting brief, arguing that their conditions should be added to the list.

The rare instances in which impairments, such as HIV, are newly discovered could present a unique challenge for the EEOC. In many instances, discrimination against those with newly discovered conditions will be prohibited because the impairments will fall into one of the pre-existing categories on the list, such as mental impairment, disfigurement, or contagious disease. When this is not the case, the new conditions should be withheld from the list until proof exists of a pattern of discrimination against individuals with those ailments. Consequently, there would be a lag time between the initial appearance of discrimination and its prohibition with respect to the impairment in question.

Nevertheless, the lag time should be short and could be quite useful. The process would be expedited by the allowance of charging party petitions to the EEOC and by the mandate that charge inventories be periodically reviewed to discern emerging patterns of discrimination. A certain amount of time might, in fact, be necessary in some instances to allow medical professionals to determine whether it is safe for individuals with the new condition to work in particular environments and how they can best be accommodated. It might be unreasonable to require businesses to employ such individuals without reliable data providing assurance that their employment will not compromise their own welfare or that of others in the workplace[247] or significantly erode the integrity of the business.[248]

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246. The EEOC could initiate a Commissioner's charge concerning the condition. *See* 42 U.S.C. § 2000e-5 (2000) (discussing the ability of a member of the Commission to file a charge). It could then investigate the matter by interviewing some of the charging parties and employers in question and gathering available medical and employment documentation to evaluate the strengths of the discrimination claims.

247. Employers need not hire or retain an individual who would pose a direct threat to herself or others. *See* 42 U.S.C. § 12113(b) (2000); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002) (finding that the ADA permits a regulation of the EEOC that authorizes employers to refuse to hire a person with a disability if job performance would endanger that person's own health).

248. Employers are not required to hire or retain an individual who is not qualified for the job or cannot be reasonably accommodated. 42 U.S.C. §§ 12112(a), 12112(b)(5)(A), 12112(b)(6) (2002) (providing exceptions for employers who can

An additional difficulty is created by the fact that some conditions, such as vision and hearing impairments, vary by degree from mild to severe. The EEOC would have to determine at what level of severity ADA coverage applies. For example, the agency could determine that statutory protection is triggered by a diagnosis of legal blindness and that those who merely need corrective lenses are not covered, because they are not routinely subject to societal discrimination. Similarly, those with hearing loss may not be covered unless they wear hearing aids, which are a visible indication of their impairment that could leave them vulnerable to discrimination.[249]

The list is unlikely to be extensive. While some conditions, such as epilepsy, HIV, deafness, and blindness would be named individually, others would be categorized in broader classifications, such as mental impairments,[250] contagious diseases, and disfigurements due to illness, injury, or medical procedures. The "record of" and "regarded as" prongs of the definition would still be useful under the new statutory definition.[251] To illustrate, if a disease such as HIV becomes curable, individuals might face discrimination because of their medical record of having suffered a life-threatening, contagious disease, even though they have been fully cured. Likewise, if an individual is wrongly perceived by an employer as having mental illness or a contagious disease and is consequently subjected to an adverse employment decision, she could be covered under the "regarded as" category.

Finally, the designation of specific categories of covered disabilities will not prevent each case from receiving individualized attention from the courts because the courts will still engage in an independent

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prove that accommodating the disabled worker would create an undue hardship for the employer or that the individual lacks the requisite job qualifications).

249. *See* HIGGINS, *supra* note 235, at 25-27 (emphasizing the obstacles faced by deaf persons in the workplace, particularly highlighting a civil service requirement that a worker be able to hear conversational speech for particular jobs); Lee, *supra* note 235, at 96 (discussing the history of discrimination against deaf individuals, including in the workplace).

250. This is a very broad category, but its breadth is justified by the history of discrimination suffered by individuals who were considered in any way mentally impaired. The sterilization laws, for example, applied to the "insane, idiotic, imbecile, feebleminded, or epileptic." *See* H.R. 299, 2002 Leg., Reg. Sess. (Va. 2002). Mental impairments should include learning disabilities, mental retardation, manic depressive disorder, anxiety disorder, brain-head injury, clinical depression, and other psychological disorders. If appropriate, the EEOC could, however, narrow this category to exclude conditions that are not associated with systematic discrimination, as might be true for certain phobias. The ADA already explicitly excludes from the definition of disability the following: transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs. 42 U.S.C. § 12211(b) (2000).

251. 42 U.S.C. §§ 12102(2)(B)-12102(C) (2000).

assessment of issues other than disability status. It will merely diminish litigation concerning the threshold question of membership in the protected class. When a plaintiff meets one of the listed criteria, the question of whether that plaintiff is disabled will be answered, but the court will have to evaluate several other issues, such as whether the employer acted with discriminatory animus, whether the plaintiff was qualified for the job in question,[252] whether requested accommodations were reasonable,[253] and whether the individual posed a direct threat in the workplace.[254]

3. Achieving corrective justice and other justifications for the proposed standard

In general, the classes protected by the federal anti-discrimination laws are groups that are known to have experienced systematic discrimination in this country.[255] Historical records provide strong justification for the need for government intervention to safeguard the rights of African-Americans, women, members of minority religions, those with certain national origins, and the elderly, since each of these groups has suffered discrimination both in the past and the present.[256] Corrective justice[257] is, therefore, the operative goal within the civil rights model.

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252. *See* 42 U.S.C. § 12112(a) (2000) (prohibiting an employer from discriminating against a qualified individual with a disability).

253. *See id.* § 12112(b)(5)(A) (requiring an employer to make reasonable accommodations for disabled individuals).

254. *See id.* § 12113(b) (granting the employer a defense for not hiring a disabled individual if the individual posed a direct threat to health or safety in the workplace); *see also infra* Part III.A.5 for a discussion of whether the proposed revision will generate cost savings.

255. *See id.* § 12101(a)(discussing the history of discrimination in the United States against individuals with disabilities).

256. *See* MINOW, *supra* note 137, at 47 (stating that "we confront historical practices giving particular significance to traits of difference along lines of race, ethnicity, disability, gender, and religion"). With respect to religious discrimination, see County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 590 (1989) (hypothesizing that when the Founders wrote the First Amendment, its protections were meant to extend only to the various Christian sects) and MORTON BORDEN, JEWS, TURKS, AND INFIDELS 11-14 (1984) (describing state constitutional provisions that prohibited non-Christians or non-Protestants from holding office). Concerning national origin discrimination against Hispanics, see Johnson v. DeGrady, 512 U.S. 997, 1013 (1994) (discussing historical discrimination against Hispanics with regards to voting). With respect to sex discrimination, see Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (providing insight into a history of "romantic paternalism" that has been rooted in the national consciousness of the United States). The history of discrimination against African Americans and Japanese Americans in this country is also well known. *See, e.g.*, 50 U.S.C. app. § 1989a(a) (2000) (providing that Congress recognizes the wrongs committed against those of "Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 552 (1989) (Marshall, J., dissenting) (discussing race discrimination in the United States); Korematsu v. United States,

Defining disability by reference to known patterns of discrimination would be consistent not only with the other federal anti-discrimination laws, but also with the language of the ADA itself. The ADA's "Findings and Purposes" section twice mentions the history of discrimination against individuals with disabilities. In its second paragraph, it asserts that "historically, society has tended to isolate and segregate individuals with disabilities,"[258] and in its seventh paragraph, it refers to the "history of purposeful unequal treatment"[259] to which this population has been subjected.

This article argues that historical records of discrimination should be utilized as a primary source of evidence for purposes of establishing the list of covered conditions. Historical evidence is a tool that is conventionally used by courts in analyzing discrimination and Equal Protection claims in order to determine whether particular groups should be granted statutory or constitutional protection. For example, in *Frontiero v. Richardson*,[260] which held that

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323 U.S. 214, 223-24 (1944) (affirming conviction of a Japanese American for remaining in a military area from which people of Japanese ancestry had been excluded). With respect to age discrimination, see 29 U.S.C. § 621 (2000) (discussing pervasive exclusion of older employees from the workplace in the ADEA's "Statement of Findings and Purpose"); Carroll L. Estes, *The Aging Enterprise Revisited, in* CRITICAL GERONTOLOGY: PERSPECTIVES FROM POLITICAL AND MORAL ECONOMY 135-38 (Meredith Minkler & Carroll L. Estes eds., 1998) (discussing social perceptions concerning the "problem of age" and discriminatory policies that create dependency); Anita Silvers, *Aging Fairly: Feminist and Disability Perspectives on Intergenerational Justice in* MOTHER TIME: WOMEN, ETHICS AND AGING 208 (Margaret Urban Walker ed., 1999) ("[U]ntil relatively recently . . . the declining capability imagined to accompany the biological changes associated with old age . . . mandated the exclusion of older individuals from the workplace.").

It should be noted that Title VII and the EPA protect anyone who has suffered discrimination on the basis of race, national origin, religion, or sex, including non-minorities. *See, e.g.*, 29 U.S.C. § 206(d)(1) (2000) (prohibiting any wage discrimination on the basis of sex); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682-84 (1983) (ruling that Title VII prohibits discriminatory conduct against male employees on the basis of sex); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281-83 (1976) (analyzing Title VII and holding that Title VII prohibits race discrimination against whites). The origin of these statutes, however, is rooted in concern about the disadvantaged status of particular groups, and the laws were designed to combat the long history of employment discrimination against minorities and women in this country. John Greenya, *Rites of Passage: The Civil Rights Act of 1964*, WASH. LAW., Mar.-Apr. 2000, at 35 (describing the history of the passage of the Civil Rights Act of 1964); *see* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 971-74 (4th ed. 1997) (discussing the historical background of the Equal Pay Act and Title VII, which were instrumental in narrowing the gap between men's and women's earnings).

257. *See supra* Part I.A (discussing the term).

258. 42 U.S.C. § 12101(a)(2) (2000).

259. *Id.* § 12101(a)(7).

260. 411 U.S. 677 (1973) (holding unconstitutional a statutory preference that deemed wives of male military personnel automatic dependents for purposes of obtaining greater housing allowances and medical and dental benefits, but denied husbands of female members of the armed forces such status unless they in fact

classifications based on sex are inherently suspect and subject to heightened scrutiny, the Supreme Court noted that "[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[261]

Similarly, in *Cleburne v. Cleburne*,[262] a case that found a city's requirement of a special use permit for the establishment of a group home for the mentally retarded to violate the Fourteenth Amendment, Justice Marshall argued that "the mentally retarded have been subject to a 'lengthy and tragic history' of segregation that can only be called grotesque."[263] The majority, however, found that mental retardation is not a quasi-suspect classification requiring heightened scrutiny, although it revoked the special permit requirement under a rational basis analysis.[264] An added advantage of developing scholarship concerning the history of discrimination suffered by individuals with disabilities is that it might bolster future attempts by disabled plaintiffs to win Fourteenth Amendment cases. Greater awareness of past discriminatory practices might convince the courts that those with particular disabilities in fact constitute a suspect class deserving of heightened scrutiny.

Within the ADA context, Justice Ginsburg, in her *Sutton v. United Air Lines* concurrence,[265] emphasized the ADA's legislative findings that individuals with disabilities are "persons 'subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.'"[266] She further observed that persons with poor eyesight are not among those who are "politically powerless, nor do they coalesce as historical victims of discrimination."[267] Consequently, Justice Ginsburg asserted that the

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depended on their spouses for over half of their support).

261. *Id.* at 684.

262. 473 U.S. 432 (1985).

263. *Id.* at 461 (Marshall, J., concurring in part and dissenting in part) (quoting Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)).

264. *See Cleburne*, 473 U.S. at 446 (stating that the refusal to treat mental retardation as a quasi-suspect class does not leave them entirely unprotected from discrimination because any legislation distinguishing between mental retardation and those without mental retardation must still be "rationally related to a legitimate governmental purpose"). Justice Marshall disagreed with the majority's rational basis analysis. *See id.* at 456 (Marshall, J., concurring in part and dissenting in part) (indicating that heightened scrutiny analysis should have been applied in this case).

265. 527 U.S. 471, 494 (1999) (Ginsburg, J., concurring).

266. *See id.* (quoting 42 U.S.C. § 12101(a)(7) (1995)).

267. *Id.*

petitioners' severe myopia did not serve to qualify them as members of the "discrete and insular minority" of individuals with disabilities.[268]

Within the civil rights realm, evidence concerning past and present patterns of discrimination has long been utilized to determine the scope and character of protected discrete and insular minorities. Similarly, the ADA should, in following the civil rights model, protect individuals who have been subjected to systematic marginalization, as evidenced by historical data.

One should acknowledge that disability discrimination may be distinguished from discrimination against other groups on several grounds. First, the adverse effects of disability discrimination do not always pass from one generation to another. Individuals with disabilities often have able-bodied children who do not face the same kind of marginalization. Still, disabled parents who are denied employment opportunities will not be able to provide well for their children, and thus their progeny may be disadvantaged in much the same way as are the younger generations of other minority groups.[269] Second, discrimination against individuals with disabilities is sometimes the result of an act of omission rather than the consequence of an intentionally committed wrong. People in wheelchairs, for example, were unable to gain entry to many public places, but this was more often the result of a failure by the proprietor, or another individual, to provide wheelchair access as opposed to an active prohibition barring disabled individuals from participating in mainstream activities. Nevertheless, discrimination, whether by acts of commission or omission, must be redressed.

Some scholars have suggested an alternative theory, arguing that the ADA be redefined to protect those who suffer stigma[270] or

268. *Id.* In her opinion, Justice Ginsburg concludes that Congress utilizes the phrase "discrete and insular" to denote its objective of limiting ADA coverage "to a confined, and historically disadvantaged, class." *Id.* at 494-95.

269. *See 2000 N.O.D./Harris Survey*, *supra* note 167 (finding that 29% of disabled households live in poverty whereas the same is true for only 10% of nondisabled households).

270. *See* Korn, *supra* note 72, at 448 (proposing that the classification of disability under the ADA be redefined as "any physical impairment that is associated with stigma"). Korn suggests that a stigma attaches to a disabled person when others perceive him or her as "disadvantaged," irrespective of the degree of success attained by such disabled person. *Id.* at 447. *See also* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 436 (2000) (aligning the concept of stigma with "systematic disadvantage" and elaborating a theory that "the very social practices that attach systematic disadvantage to particular impairments are what *create* the category of people with disabilities").

subordination.[271] In a thought-provoking piece, Samuel Bagenstos writes the following:

> The statutory "disability" category should embrace those actual, past, and perceived impairments that subject people to systematic disadvantages in society. And the concept of stigma should play an important evidentiary role. Impairments that are stigmatized—that type people who have them as "abnormal or defective in mind or body"—are particularly likely to meet the systematic disadvantage standard.[272]

This approach overlaps with the "patterns of discrimination" approach, but there are several important differences. The terms "stigma," "subordination," and "disadvantage" are far more vague than the concept of actual discrimination, which requires historical research and factual evidence. Bagenstos does not provide definitions for the terms "subordination" and "disadvantage." He does, however, discuss the concept of stigma at some length.[273] Stigma is a psychological concept that exists in the minds of those who negatively perceive people with disabilities.[274] Bagenstos refers to a definition provided by Erving Goffman, who describes stigma as an "'undesired differentness' from what society deems to be 'normal' or expected."[275] According to Goffman, stigmatization occurs "when prevailing social practices treat particular 'undesirable' traits as universally discrediting."[276]

Determining whether a particular characteristic is perceived as universally discrediting would require an assessment of people's inner psyche and could not be accurately accomplished by scientific or empirical means. The approach proposed in this Article carries the advantage of being centered upon proof of discriminatory actions, not attitudes, and actions can be more easily researched and documented. Moreover, the proposal articulated in this Article provides a mechanism for establishing a clear list of covered conditions or condition categories. Therefore, this approach, rather

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271. *See id.* at 401 (urging the courts to adjust their approach to interpreting the ADA's definition of "disability" in light of the fact that disability results in subordination).

272. *Id.* at 445 (citation omitted).

273. *See id.* at 436-45 (explaining that stigmatization arises from three "seemingly disparate" problems-societal prejudice, stereotyping, and neglect—but arguing that, in fact, the three problems are intertwined).

274. *See id.* at 437 n.154 (describing stigma as the "master status" or "the attribute that colors the perception of the entire person," and quoting Lerita M. Coleman, *Stigma: An Enigma Demystified, in* THE DILEMMA OF DIFFERENCE: A MULTIDISCIPLINARY VIEW OF STIGMA 211, 219 (Stephen C. Ainlay et al. eds., 1986)).

275. *Id.* at 437 (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963)).

276. *Id.*

than one focusing on the more intangible concept of stigma, should provide better guidance and prove more accessible to employers, litigants, and the courts.

Bagenstos himself recognizes one limitation of the stigma standard. At any given time "[a]ttitudes and practices may differ across subcultures and economic sectors."[277] Having acknowledged the limitation that different social attitudes, subcultures, economics, and/or other factors might have with respect to a finding of disability status under the stigma approach, Bagenstos clarifies that plaintiffs should not have to prove universal stigmatization of their specific condition or limitation.[278] Plaintiffs should, however, according to Bagenstos, demonstrate that they are being deprived of a "significant slice" of the opportunities available to them in general society; and furthermore, that such deprivation results from sufficiently widespread "prejudiced and stereotyped attitudes . . . [and] exclusionary practices."[279] Thus, while Bagenstos argues that the underlying issue to be proven for purposes of establishing disability status is stigma rather than actual discrimination, he relies at least partially on a similar body of evidence—specifically, data concerning widespread exclusionary practices—to prove membership in the protected class.

4. Effect on the existing protected class

Admittedly, some individuals, who may currently meet the technical definition of a disabled individual, might lose ADA protection under the proposed revision because their condition would no longer qualify under the new category of "disability"—one that is based on a known pattern of discriminatory practices and policies. This might be true, for example, for some people with heart disease or high blood pressure. It might also be true for people with very rare diseases, with respect to which little evidence of past or current discrimination might exist.[280] However, because federal courts are ruling in favor of so few plaintiffs,[281] these individuals will

277. *Id.* at 452.
278. *Id.*
279. *Id.* Regarding the level of stigmatization that plaintiffs must prove, Bagenstos would require prejudicial and stereotypic attitudes to be "widely enough held" and exclusionary practices "widely enough implemented." *Id.*
280. Many rare diseases will, however, fit into one of the broader categories of disability because they are contagious or cause disfigurement or mental impairment. In addition, individuals with rare conditions will retain the ability to petition the EEOC for inclusion of the impairment on an updated list and could be successful if they present evidence of discrimination suffered by other patients whom they met in treatment or support group settings.
281. *See* discussion *supra* Introduction.

be losing little in terms of potential for success in federal court. They will also retain the ability to sue under applicable state laws[282] and to assert common law causes of action.

In this country we have chosen to prohibit discrimination only on specific grounds.[283] Federal law does not forbid discrimination based on many categories, such as party affiliation, parental status, sexual preference,[284] or physical appearance.[285] Limiting the protected class of individuals with disabilities to those who have been excluded from, or marginalized within, mainstream American society would be consistent with our general legislative approach of allowing governmental meddling with employment decisions only in very restricted circumstances.[286]

In addition, many of the individuals who could lose their "disability" status under the proposed revision might find that their employers remain receptive to their requests for relatively inexpensive accommodations because many employers may wish to avoid potential litigation under the ADA or applicable state law. Employers might also desire to show good will through flexibility and accommodation to promote high morale and productivity in the workplace.

Moreover, contemporary workers enjoy the benefits of several relevant labor laws. For example, under state workers' compensation statutes, compensation is available to employees for injuries "arising

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282. *See supra* note 200 and accompanying text. Many states have adopted language that is identical to the ADA's, and these states may not choose to revise this language, even if revisions are made to the federal statute's definition.

283. By contrast, the South African Constitution prohibits governmental discrimination based on many more classifications. S. AFR. CONST. ch. 2 (Bill of Rights), § 9(3) (1996). Specifically, it provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." *Id.*

284. As of 2000, eleven states—California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin, as well as the District of Columbia, had laws prohibiting workplace discrimination based on sexual preference. Harvey Berkman, *Not Many Gays Filing Bias Suits*, NAT'L L.J., May 22, 2000, at B1, B3.

285. *See* Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035 n.2 (1987) (noting that physically unattractive people in our society face harsh forms of discrimination) (citation omitted).

286. As one court stated, "[f]ederal courts 'do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior.'" Chapman v. AI Trans., 229 F.3d 1012, 1030 (11th Cir. 2000) (citing Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991)).

out of and in the course of employment."[287] The Black Lung Benefits Act[288] provides compensation for American coal miners who develop pneumoconiosis associated with work in coal mines.[289] Under the Family and Medical Leave Act ("FMLA"),[290] individuals with serious health conditions[291] can receive up to twelve weeks, annually, of leave from work to care for themselves.[292] The FMLA establishes that employers with fifty or more employees,[293] must provide scheduling accommodations for seriously ill individuals even if these persons do not have "disabilities" for purposes of the ADA. In 2002, California passed its own, more generous version of the FMLA.[294] The California statute, entitled the Paid Family Care Leave Act,[295] applies to all employers and provides employees with a right to six weeks of paid leave.[296]

Arguably, if American society wishes to provide further workplace benefits and protections to people with a very broad range of mental and physical limitations, it should do so through expansion of labor laws, such as the FMLA and workers' compensation statutes. The civil rights model is an inappropriate avenue for such endeavors, as civil

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287. Matthew B. Duckworth, Comment, *The Need for Workers' Compensation in the Age of Telecommuters*, 5 J. SMALL & EMERGING BUS. L. 403, 409 (2001) (citing directly the language used by forty-two states and the District of Columbia to define "compensable injury" under the various workers' compensation statutes); *see* Mark A. Rothstein et al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 278 (2002) (noting that while variations occur in each state's workers' compensation system, many similarities also exist, such as reimbursement for medical bills and a percentage of lost wages for employees suffering from injuries and illnesses "occurr[ing] during the course and scope of their employment"). In addition, over fifty percent of states include in their workers' compensation statutes a "heart and lung" provision, which creates "'an irrebutable [sic] presumption that any cardiovascular or respiratory impairment suffered by a firefighter [(and depending on the jurisdiction, police officers and other public employees)] is work-related.'" *Id.* at 280 (citing Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940, 952 (1987)).

288. 30 U.S.C. §§ 901-945 (2000).

289. *Id.* § 901(a).

290. 29 U.S.C. §§ 2601-2654 (2000).

291. *See id.* § 2611(11) (defining a "serious health condition" as "an illness, injury, impairment, or physical or mental condition" that involves either "inpatient" medical care or "continuing treatment" by a specified medical service provider).

292. *See id.* § 2612(a)(1)(D). When medically necessary, an employee suffering from a "serious health condition" may take leave on an intermittent basis. *Id.* § 2612(b)(1).

293. *See id.* § 2611(4)(A)(i) (providing that the term "employer" under the FMLA refers to any person "engaged in commerce" with fifty or more employees, thus applying the provisions of the FMLA to such employers).

294. S.B. 1661, 2001-02 Leg., 2001-02 Sess. (Ca. 2002).

295. CAL. UNEMP. INS. CODE §§ 3300-3305 (West 2003).

296. *Id.* § 3301(a). Employers can require employees to use two weeks of paid vacation during the leave. *Id.* § 3303(g). The program is fully funded by employee contributions to the State Disability Insurance system. *Id.* § 3300(f).

rights laws are traditionally limited by design to constitute anti-discrimination mandates that provide corrective justice, protecting discrete and insular minorities that have suffered exclusion and marginalization. Those with eyeglasses and high blood pressure might, in fact, deserve special treatment or attention, however, this should be granted outside of the civil rights context.

5. Cost savings and judicial sympathy

The statutory revision this Article proposes is likely to reduce the administrative costs of litigation and statutory enforcement. Given clear guidance, competent attorneys will not file suit on behalf of plaintiffs whose impairments are not included within the list, and courts, in most cases, will easily make determinations concerning whether particular plaintiffs are protected by the ADA.[297] The proposed standard will eliminate many of the suits filed by plaintiffs with trivial impairments that now burden court dockets and will substantially reduce prolonged litigation over disability status.[298] These reductions should save significant costs for plaintiffs who otherwise file futile cases, for employers, and for the taxpaying public.

Because those with impairments that are included within the list will be presumed disabled, some cases that are currently filtered out through an analysis of disability status will survive this threshold inquiry. For these cases, the efficiency gained through the categorical approach to disability determinations might be offset by prolonged litigation concerning other issues that now never reach the courts because plaintiffs do not survive the disability inquiry. For example, courts might more frequently be called upon to make determinations concerning whether the employer acted with

297. There may still be disputes concerning certain plaintiffs' conditions that fall within the broad categories of impairments, which are necessarily more vague than specific illnesses, such as cancer or HIV. For example, the categories of mental impairments and disfiguring conditions due to illness, injury, or medical procedure are meant to be very broad and inclusive. Consequently, employers might challenge a plaintiff's disability status, alleging that she is simply a poor performer rather than mentally impaired or that she is physically unattractive rather than disfigured. It will then be up to the plaintiff to prove a diagnosis of a mental ailment or of an illness, injury or procedure that caused disfigurement. Furthermore, there may be some disputes concerning the accuracy or validity of a plaintiff's diagnosis. Nevertheless, the disputes concerning disability status should be far less frequent and less complicated than those prevalent under the current definition of disability.

298. The EEOC will also be spared the task of conducting lengthy investigations to determine each charging party's disability status. However, its cost-savings in this regard will be offset by the need to compose the initial list of covered conditions and impairment categories, to review petitions for addition of conditions to the list, and to update the list periodically.

discriminatory animus, whether the plaintiff was qualified for the job in question,[299] whether requested accommodations were reasonable,[300] and whether an individual posed a direct threat in the workplace.[301]

From a policy standpoint, however, these should be the issues upon which the courts center their attention in disability discrimination cases. Rather than focusing the inquiry solely upon the plaintiffs and scrutinizing their daily and private life activities in an effort to determine whether they are disabled enough, courts should expend their energies on analyzing whether discrimination actually occurred.

The other federal employment discrimination laws provide a model for this methodology because they generate little debate over protected status. Title VII and the EPA cover all individuals, because everyone has a race, national origin, religion, and sex, as understood by these statutes.[302] The ADEA protects all individuals who are forty years of age and older.[303] When one claims discrimination on the basis of race, gender, religion, national origin, or age, one needs little proof to establish membership in the asserted protected class.

In addition, employers who know they will likely triumph in challenging a plaintiff's disability status might have little incentive to hire individuals with impairments or to conduct dialogues with employees concerning their need for reasonable accommodations. Employers might risk litigation concerning adverse hiring or accommodation decisions, knowing that if challenged, they will likely prevail by convincing the court that the plaintiff is not entitled to ADA protection. The proposed revised definition could provide more powerful incentives for employers to be receptive to employees with disabilities because all those with listed conditions will be presumptively covered under the ADA. It might also encourage parties to engage in early, serious settlement discussions to avoid the costs and risks of litigating the many complexities of their cases beyond the disability status issue.

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299. *See* 42 U.S.C. § 12112(a) (2000) (prohibiting employment discrimination on the basis of disability against otherwise qualified individuals).

300. *See id.* § 12112(b)(5)(A) (providing that prohibited employment discrimination includes an employer's "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless the employer shows that the reasonable accommodation would in fact subject the employer's business operation to "undue hardship").

301. *See id.* § 12113(b) (allowing employers to screen out individuals posing a "direct threat to the health or safety of other individuals in the workplace").

302. *See id.* § 2000e-2(a) (2000) (outlawing employment practices that discriminate on the basis of race, color, religion, sex, or national origin); *see also* 29 U.S.C. § 206(d)(1) (2000) (prohibiting sex discrimination in the workplace).

303. *See* 29 U.S.C. § 631(a) (2000).

To the extent that some believe that the federal judiciary is biased against ADA plaintiffs,[304] the proposed standard might also foster judicial sympathy towards members of the protected class. No definitive study has been conducted concerning the role of judicial sympathy in case decisions. This area is ripe for further research, especially with respect to ADA and other civil rights cases, which are often emotionally and ideologically charged. The little evidence that does exist, however, suggests that judges' personal responses to plaintiffs factor into their decisions, and thus, consideration of judicial sympathy is important.[305]

Several informative studies relate to issues other than the ADA. Neal Feigenson found that the level of judicial sympathy and desire to assist the victim in tort cases is determined to some degree by the extent of the victim's suffering. Furthermore, the greatest compassion is felt for those whose accidents occurred under exceptional circumstances.[306] By extension, it follows that judges would be most sympathetic towards those with severe disabilities and those with exceptional hardships due to systematic marginalization. A study of the courts' application of the federal sentencing guidelines noted that the tendency of judges in particular regions to depart downward in cases of drug couriers, female white-collar criminals, and firearm offenders, suggests that judges are occasionally motivated by their own sympathies and political views, even when sentencing convicted criminals.[307]

Studies of the influence of various factors on judicial decisions found that female circuit court judges tended to vote more frequently than their male colleagues in favor of female plaintiffs who brought

304. *See, e.g.*, Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 22 (2000) (exploring the various hypotheses suggested to explain why plaintiffs under the ADA consistently lose in the courts, and referring specifically to the "backlash" thesis, which theorizes that "judges are not simply confused by the ADA [but] rather, they are resistant to it"). Diller qualifies his remarks about the backlash theory, however, by stating that judicial backlash against ADA plaintiffs does not necessarily stem from a "deliberate or intentional campaign." *Id.* Instead, Diller argues that apparent judicial resistance to the ADA could have arisen due to a general lack of judicial comprehension of the ADA statute, which subsequently would have led to a failure to "accept the premises underpinning" the ADA. *Id.*

305. *See supra* notes 267-68 and accompanying text.

306. *See* Neal R. Feigenson, Essay, *Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law*, 27 FORDHAM URB. L.J. 1633, 1637-38 (2000); Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 50 (1997).

307. *See* Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 364 (1996) (suggesting that judicial sympathy, rather than the presence of atypical or extraordinary factors, may be the cause for consistent departures from the federal sentencing guidelines for a particular offense in a particular geographic region).

Title VII gender discrimination suits.[308] This is most likely because they were better able to identify with the female plaintiffs. Similarly, one study of courts of appeals cases concluded that black circuit court judges were more responsive to employment discrimination claims than were their white colleagues.[309]

Based on this very limited evidence and the extremely low ADA plaintiff win rate,[310] it is reasonable to argue that the segment of individuals bringing ADA claims apparently fails to win the sympathy of the courts and fosters an impression that ADA plaintiffs do not deserve governmental protection.[311] Some judges have clearly articulated their frustration with ADA claims brought by plaintiffs whom they consider unworthy.

In *Fussel v. Georgia*,[312] the court decried the fact that current interpretations of the ADA may lead it to become "the greatest generator of litigation ever."[313] The court expressed grave concern that the statute would not assist its intended beneficiaries, but rather, would be distorted by greedy trial attorneys who will force federal judges to become "little more than glorified worker's compensation referees."[314]

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308. *See* Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 20-21 & n.42 (2001) (discussing studies showing that female appellate judges are more receptive to female plaintiffs claiming gender discrimination suits, but not necessarily to female plaintiffs claiming race discrimination) (citing Nancy E. Crowe, The Effects of Judges' Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981-1996 (1999) (unpublished Ph.D. dissertation, Univ. of Chicago) (on file with author)). George notes, however, that "[f]ederal district court studies have repeatedly failed to find a gender effect in any issue area, including sex discrimination." *Id.* at 21; *see also* Sue Davis et al., *Voting behavior and gender on the U.S. courts of appeals*, 77 JUDICATURE 129, 130-32 (1993) (analyzing a study concerning voting patterns of women circuit court judges in the areas of employment discrimination, search and seizure, and obscenity, and finding that "statistically significant differences" exist between male and female judges in employment discrimination and search and seizure cases).

309. *See* George, *supra* note 308, at 24 (citing Crowe, *supra* note 308, at 84). The author notes, however, that other studies discerned no racial differences in the judging of employment discrimination cases. *Id.*

310. *See* discussion *supra* Introduction.

311. *See 'Judicial Hostility' Limiting Reach of the ADA: Decisions Focus on Coverage, Panelists Say*, 19 Emp. Discrimination Rep. (BNA) No. 2, at 59 (July 10, 2002) (reporting on the proceedings of the Industrial Relations Research Association's National Policy Forum in which speakers noted that ADA claims face "significant judicial hostility").

312. 906 F. Supp. 1561 (S.D. Ga. 1994).

313. *See id.* at 1577 (holding that a discharged police officer with a benign essential tremor did not have a disability and emphasizing that "Congress, in its wildest dreams or wildest nightmares" did not intend "to turn every garden variety worker's compensation claim into a federal case") (quoting Pedigo v. P.A.M. Transp., 891 F. Supp. 482, 485 (W.D. Ark. 1994)).

314. *See id.* at 1577 (quoting *Pedigo*, 891 F. Supp. at 486).

In her study, Ruth Colker confirmed that the type of disability alleged is a statistically significant factor in determining the outcome of ADA cases on appeal.[315] Individuals alleging that they suffered from diabetes or extremity impairments were more likely to succeed than other plaintiffs.[316] Colker speculates that the plaintiffs' cases may have "seemed like more sympathetic cases to judges on appeal."[317]

The Supreme Court's ADA decisions further highlight the importance of the nature of the disability to the Court's determination. While most rulings on the definition of disability have been adverse to plaintiffs,[318] *Bragdon v. Abbott*,[319] which involved a plaintiff who was HIV positive,[320] is an exception to the general trend. Although Ms. Abbott did not suffer any symptoms, the Supreme Court strained to characterize her "dread and fatal disease" as a disability.[321] The opinion acknowledged that HIV does not physically prevent a woman from reproducing.[322] For example, artificial insemination could eliminate the risk of transmission to the woman's partner.[323] Further, the Court acknowledged that the risk of transmitting the disease to one's child can be as low as eight percent with antiretroviral therapy.[324] Nevertheless, the Court categorized Ms.

315. *See* Colker, *Winning and Losing*, *supra* note 4, at 273 (indicating that plaintiffs with substance abuse disabilities did not do as well as plaintiffs with extremities impairments).

316. *See id.* at n.77 (noting that "[e]xtremities impairments included missing limbs or digits; hand, arm, or shoulder impairments and arthritis"). Colker devised separate categories for back impairments and paralysis. *Id.* However, one should note that Colker conducted the study before the Court in *Sutton* ruled that mitigating measures, such as effective medication, must be considered in determining whether an individual has a disability. *Id.* Because diabetes is often well controlled by medication, plaintiffs with diabetes are far less likely to prevail in a post-*Sutton* case. *See, e.g.*, Berg v. Norand Corp., 169 F.3d 1140 (8th Cir. 1999) (holding that a diabetic employee who could not work a forty to fifty hour week was not disabled); Beaulieu v. Northrop Grumman Corp., 23 Fed. Appx. 811 (9th Cir. 2001) (holding that an employee's diabetes did not substantially limit his major life activities, and he did not have a disability for purposes of the ADA); Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) (holding similarly).

317. Colker, *Winning and Losing*, *supra* note 4, at 273.

318. *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 184-85 (2002) (finding that the plaintiff's inability to perform repetitive manual task did not fit within the definition of disability under the ADA); Sutton v. United Air Lines, 527 U.S. 471, 472 (1999) (refusing to find the plaintiffs disabled within the meaning of the ADA).

319. 524 U.S. 624 (1998).

320. *Id.* at 628.

321. *Id.* at 641.

322. *See id.* at 641 (noting that HIV does not render conception and childbirth impossible but does pose a public health risk).

323. *Id.*

324. *Id.* at 640.

Abbott's HIV as a disability that substantially limited her major life activity of reproduction.[325]

Courts that primarily hear cases involving conditions commonly targeted for discrimination, such as deafness or HIV, will likely find disability discrimination cases emotionally powerful and will tend to rule more readily for plaintiffs on pre-trial motions.[326] Further, under the proposed standard, the way in which cases are presented will become more compelling for the courts.[327] Proof of a history of abuse and marginalization associated with a particular condition would likely elicit a more sympathetic response from the court than that which is evoked when the court skeptically analyzes plaintiffs' levels of functionality by focusing on questions such as whether they can garden or brush their teeth.[328]

B. Other Options Are Inferior to the Proposed Revision

1. The definition of disability should not be left as is

An alternative option to the proposed revision is to leave the ADA unaltered. The fact that a small minority of plaintiffs prevail in federal courts under Title I of the ADA may not in itself be troubling.[329] Many individuals may actually benefit from Title I of the ADA through cases resolved by settlement.[330] Perhaps most cases with strong claims settle at an early stage of litigation, and the cases left for adjudication are weak cases brought by unreasonable plaintiffs.

Some commentators argue that poor lawyering, more than any other factor, accounts for the unbalanced case outcomes.[331] They contend that weak advocates fail to consider numerous factors necessary to survive summary judgment in ADA cases.[332] This

325. *Id.* at 641-42.
326. *See* discussion *supra* Part III.A.4.
327. *See* discussion *supra* Part III.A.1.
328. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 202 (2002) (analyzing the inability of the plaintiff to perform manual tasks and refusing to recognize her carpal tunnel syndrome as a disability under the ADA).
329. *See supra* notes 3-6 and accompanying text (discussing studies revealing the very low win rates of ADA plaintiffs in federal courts).
330. *See* discussion *supra* Part II.B.1 (noting that ADA plaintiffs may be gaining significant benefits through settlements).
331. *See, e.g.*, Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 515 (2000) (arguing that poor lawyering skills, rather than restrictive judicial interpretation, is the primary cause for the number of ADA summary judgment losses).
332. *See id.* at 574-75 (noting specifically that the problem appears to arise from lawyering that fails to account for important regulations and to plan for effectively presenting a strong case theory and convincing evidence).

argument suggests that the only needed change with respect to ADA litigation is that lawyers become better-trained and more skilled in crafting ADA claims to win their cases.[333]

Leaving the statutory definition unchanged, however, would be misguided. First, the vagueness and other defects of the definition of "disability" necessitate revision regardless of case outcome statistics.[334] It is necessary to find an alternative that will not require courts to engage in the burdensome and arbitrary task of individually assessing each plaintiff's functionality level.[335] The current standard often leads to invasive and humiliating inquiries as well as to inconsistent court decisions in which the court must find that the plaintiff is both sufficiently disabled and qualified for the job in question.[336] A plaintiff's disability status should not depend on his or her precise level of functioning.[337] Instead, a more workable mechanism for characterizing disability must be found.

Second, this writer finds unconvincing the argument that ninety-five percent of ADA plaintiffs lose in federal court because their cases are uniformly weak.[338] It remains unclear why plaintiffs would bring weaker cases under the ADA than under the other anti-discrimination statutes.[339] Moreover, plaintiffs' attorneys have a strong economic incentive to filter out cases likely to produce no financial gain.[340] Additionally, because the ADA's enactment occurred in 1990,[341] it seems unlikely that the vast majority of attorneys taking ADA cases remain inexperienced and unskilled in litigating these statutory claims.[342]

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333. *See id.* at 576 (explaining that lawyers for ADA plaintiffs must increase their knowledge and skills with respect to the ADA to ensure successful private enforcement of the ADA).

334. *See* discussion *supra* Part I.C.1 (discussing the complications created by the current vague language of the statute).

335. *See* Feldblum, *supra* note 81, at 146 (stating that individual assessment creates difficulties for both the courts and for the attorneys arguing the cases).

336. *See* discussion *supra* Part I.C.2.

337. *See supra* notes 228-30 and accompanying text.

338. *See* Van Detta & Gallipeau, *supra* note 331, at 517 (stating that the majority of ADA cases fail because the lawyers have not adequately prepared or presented sufficient evidence to support their clients' cases under the ADA).

339. *See* discussion *supra* Introduction (comparing plaintiffs' win rates under the ADA to their success rates under other anti-discrimination statutes).

340. *See* Colker, *Winning and Losing*, *supra* note 4, at 258 n.54 (stating that if lawyers frequently do not prevail under the ADA then they will not receive significant compensation).

341. *See* 42 U.S.C. § 12116 (2000).

342. *See* Colker, *Winning and Losing*, *supra* note 4, at 258 n.54 (speculating that poor lawyering would self-correct over time and therefore could not be the cause for the current legal failures under the ADA).

Finally, once it becomes common knowledge that defendants will likely prevail in federal court, employers will become increasingly reluctant to settle.[343] In light of the highly publicized Supreme Court decisions of recent years[344] and the abundant commentary concerning these cases, many employers will realize that ADA plaintiffs have a low probability of prevailing in federal courts, which may discourage future settlements.[345] Assuming that the courts remain inclined to find that few individuals meet the "disability" criteria,[346] the ADA may become even more ineffective as a mechanism for redress of employment discrimination.

2. The scope of the definition should not simply be broadened by eliminating the definition's restrictive terminology

A second alternative is to revise the definition of disability to broaden its scope. The restrictive terms "substantially limits" and "major life activities" contained in the statute could be eliminated,[347] so that the statute would prohibit discrimination against all individuals who have a mental or physical impairment, have a record of such an impairment, or are perceived as having such an impairment.[348] The ADA's new definition could mandate that employers cannot make adverse employment decisions based on any physical or mental impairment, regardless of the degree to which the condition impairs the individual in question, unless the impairment renders the person unqualified without possible and reasonable accommodation or the person constitutes a direct threat in the workplace.[349] This approach would eliminate the requirement of

343. *Cf.* Tucker, *supra* note 186, at 353-54 (emphasizing that numerous negative judicial decisions have weakened the impact and authority of the ADA).

344. *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) (holding that the plaintiff's carpel tunnel syndrome did not qualify as a disability under the ADA because it did not substantially limit her major life activities); Murphy v. United Parcel Serv., 527 U.S. 516 (1999) (holding that the plaintiff's high blood pressure did not qualify as a disability under the ADA); Sutton v. United Air Lines, 527 U.S. 471 (1999) (holding that myopic twin sisters did not state a claim under the ADA because they could not show that they had a physical impairment substantially limiting them in any major life activity).

345. *See* Colker, *A Windfall for Defendants*, *supra* note 4, at 108 (citing figures showing that defendants prevailed in ninety-four percent of ADA cases).

346. *See* Tucker, *supra* note 186, at 354 (asserting that many courts have attempted to narrow the scope of the ADA).

347. *See* 42 U.S.C. § 12102(2) (defining a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] . . . individual").

348. Feldblum, *supra* note 81, at 163.

349. *See* 42 U.S.C. §§ 12112(a), (b)(5)(A), 12113(b) (2000) (establishing that the ADA proscribes the making of adverse employment decisions based on disabilities unless a disability renders the person unqualified, and no reasonable accommodation is possible or the person will pose a direct threat in the workplace).

individualized assessment of each plaintiff's precise level of functionality for purposes of determining disability status.[350]

Just as other civil rights laws prohibit consideration of race, national origin, religion, sex, and age in employment decisions in most instances,[351] the ADA could also prohibit consideration of all mental and physical impairments unless special circumstances exist.[352] In this sense, broadening the definition of disability would bring the ADA closer to the traditional civil rights model, which precludes decision-making based on clearly discernible characteristics.[353] The inclusion of more people within the ADA's protected class is consistent with the other federal anti-discrimination statutes.[354] Title VII and the EPA apply to all individuals because everyone possesses a race, national origin, religion, or sex as those terms are used in these statutes.[355] The ADEA also applies to a large segment of the American

350. *See* discussion *supra* Part I.C.2 (discussing the inefficiency of the current statute's method of inquiring into each plaintiff's daily activities).

351. *See* 42 U.S.C. § 2000e-2 (2000)(prohibiting consideration of race, national origin, religion and sex in employment decisions); 29 U.S.C. § 623 (2000) (prohibiting consideration of age in employment decisions for people forty years of age or older); *see also supra* note 118 and accompanying text (discussing exceptions to the general rules created by certain statutory defenses).

352. For additional articles recommending an expansion of the definition of disability, see Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 318 (2000) (suggesting that the ADA be amended to remove the "substantial limitation in a major life activity" language for cases that do not involve a request for accommodation); Anderson, *supra* note 81, at 129, 140 (asserting that the "substantially limits" requirement should be eliminated from the ADA and that "working" should not be considered as a separate major life activity); Eichhorn, *supra* note 81, at 1473-77 (recommending that the ADA be revised so that it prohibits discrimination "on the basis of disability" rather than covering a specific protected class, consisting of qualified individuals with disabilities); Miranda Oshige Mcgowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 137 (2000) (arguing for a broad definition of the "regarded as" prong of disability so that the ADA would protect any individual that an employer believes is less qualified for the position as a result of generalizations about the individual's perceived physical or mental impairment); 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, 131 (1997) (suggesting that an individual's ability to work should not be assessed in determining an individual's disability status); Tucker, *supra* note 186, at 373 (listing a number of possible revisions to the ADA but warning that if Congress revisits the ADA, it may reduce, rather than expand, the protections of the statute).

353. *See* Feldblum, *supra* note 81, at 163 (stating that if the ADA's definition of disability is broadened, the statute will closely mirror Title VII, which provides broad protections against discrimination).

354. *Cf.* 42 U.S.C. § 2000e-2 (2000) (applying Title VII to all individuals subjected to discrimination by employers because of their national origin, race, religion or sex).

355. *See id.* § 2000e-2(a) (establishing that it is unlawful for employers to discriminate on the basis of race, national origin, religion or sex); 29 U.S.C. § 206(d)(1) (1998) (prohibiting wage discrimination based on sex, with some exceptions).

population, since it protects all individuals who are forty years of age and older.[356]

Title VII, the EPA, and the ADEA, however, rely on the theory that minorities and non-minorities can perform work equally well because the immutable characteristics addressed in those statutes are irrelevant to job performance.[357] In general, these statutes only prohibit conduct based on irrational prejudice and assumptions.[358] The ADA, by contrast, forbids employers to exclude individuals because of mental and physical impairments that potentially affect their work performance, and it requires employers to accommodate those conditions in ways that may generate significant costs.[359] Expanding the population entitled to ADA protection to the point of including most Americans, and thus perhaps dramatically raising employers' compliance expenditures, may adversely impact the business community and, by extension, the American workforce.[360] It might also provide incentives for employers to avoid hiring individuals with any known impairment because the risk of unlawful hiring decisions may seem smaller than the risk of facing accommodation demands from an ever-growing number of workers.[361]

Furthermore, significantly expanding the scope of the protected class might encourage more plaintiffs with trivial impairments to assert ADA claims.[362] Elimination of the definition's restrictive language will not necessarily promote the statutory goals of participatory, distributive, and corrective justice.[363] It may not lead to increased employment opportunities for those who are actually marginalized or to a redistribution of resources to those who are most needy and deserving.[364]

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356. *See* 29 U.S.C. §§ 623(a), 631(a) (2000) (stating that it is unlawful to discriminate on the basis of age against individuals forty years of age or older).

357. *See supra* notes 111-15 and accompanying text (discussing the various theories underlying the civil rights statutes).

358. *See* discussion *supra* Part I.C.3 (analyzing the purpose of the civil rights statutes).

359. 42 U.S.C. § 12112(a) (2000); *see* discussion *supra* Part I.C.3 (discussing potential costs that may be incurred by employers attempting to accommodate workers' physical and mental impairments).

360. *See* discussion *supra* Part I.C.3 (noting that the current statute requires the employers to absorb the cost of providing reasonable accommodations).

361. *See supra* notes 121-25 and accompanying text (examining the financial burden on employers complying with ADA requirements).

362. *See* discussion *supra* Part III.A.5 (discussing the current problem of an excessive number of trivial ADA claims crowding court dockets).

363. *See supra* notes 20-24 and accompanying text (discussing the current statutory goals of the ADA and emphasizing the importance of obtaining corrective justice for disabled individuals).

364. *See supra* notes 283-86 and accompanying text (delineating the statutory goals

Finally, it is unrealistic to believe that Congress will be inclined to dramatically enlarge the class of individuals with disabilities, given the general climate of dissatisfaction with the ADA.[365] Several commentators have noted that criticism of the ADA extends beyond the realm of the courts.[366] The media's disparagement of the ADA through print, television news, and sitcoms, indicates that the American public may not support liberalizing the statutory terms to incorporate more individuals.[367] As Professor Bonnie Poitras Tucker notes, reopening discussions concerning the ADA will likely lead Congress to diminish the protections offered by the ADA rather than to expand its scope.[368]

The proposal this Article offers in some ways broadens the contours of the ADA's protected class.[369] Specifically, highly functional individuals who are disfigured or epileptic would be covered under the proposal even though they are not substantially limited in any major life activity.[370] However, the proposal also narrows the range of protected individuals by excluding any condition not associated with a known pattern of discrimination from the list, even if the condition is potentially disabling.[371] For example, conditions such as cardiovascular disease and arthritis are unlikely to be covered.[372] Consequently, one may reasonably believe that both Congress and the public would be receptive to the proposal.

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of the ADA).

365. *See* Tucker, *supra* note 186, at 338-39 (noting the country's failure to embrace the ADA's premises, and the current backlash against the statute).

366. *See* Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung, and Juggler's Despair, The Portrayal of the Americans with Disabilities Act on Television*, 21 BERKELEY J. EMP. & LAB. L. 223, 227 (2000) (stating that the media is increasingly critical of the ADA and seems to focus on allegedly fraudulent cases filed under the statute); *see also* Linda Hamilton Krieger, *Foreword-Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 9-10 (2000) (denoting the negative portrayal of the ADA by the media).

367. *See* LaCheen, *supra* note 366, at 228, 232 (explaining that the popular media is conveying the belief that people bringing cases under the ADA are attempting to cheat the system, thus encouraging intolerance of the ADA).

368. *See* Tucker, *supra* note 186, at 388 (asserting that the current political climate encourages antagonism towards civil rights statutes and that it would be unwise to amend the ADA at this time).

369. *See* discussion *supra* Part III.A.1 (describing the proposal in detail).

370. *See* 42 U.S.C. § 12102(2) (2000) (defining the term "disability" as any physical or mental impairment that "substantially limits" an individual's "major life activities").

371. *See* discussion *supra* Part III.A.4 (explaining that some individuals currently covered by the definition of disability may lose this protection under the proposed standard).

372. *See* Baldwin, *supra* note 160, at 44 (suggesting that negative attitudes towards persons with impairments vary, depending upon the condition in question, and stating that those with arthritis or cardiovascular disease are generally viewed positively in American society).

3. Funding the unfunded mandate

A more palatable option might be to eliminate the restrictive language of the disability definition as described above and to fund the cost of the ADA's non-discrimination mandate so that it is not absorbed by the business community. This could be done through tax credits, tax deductions, or a claims submission process by which employers could be reimbursed for out-of-pocket expenses. Expenditure of additional public dollars in this manner, however, does not seem justified at this time.

The current tax code already makes limited tax deductions available for costs associated with ADA compliance.[373] Employers who hire individuals with mental or physical disabilities can receive a maximum credit of $2,400 per qualified employee (forty percent of the individual's qualified first year wages up to $6,000) for those who begin work before December 31, 2003.[374] In addition, the tax code allows employers to receive credits or deductions for expenses associated with tangible personal property, such as special equipment or assistive listening devices provided to individuals with disabilities pursuant to Title I requirements.[375] For example, "eligible small businesses" can obtain a credit of up to $5,000 for improvements made in order to provide access to persons with disabilities.[376]

In spite of this, hiring individuals with disabilities might produce costs for which employers do not receive adequate tax relief through the above-described provisions. These costs might include high reasonable accommodation expenses, diminished productivity, absenteeism, and higher health insurance or workers' compensation expenses. These costs, however, are very difficult to quantify and predict and, therefore, cannot be fully addressed through the tax code.

In addition, the limited evidence that exists concerning reasonable accommodations suggests that often they may not require large out-of-pocket expenditures.[377] A number of studies were conducted at

373. *See* Ellen D. Cook, *Tax Breaks Cut the Cost of Americans with Disabilities Act Compliance*, 69 PRACTICAL TAX STRATEGIES, Sept. 2002, at 145, 145-52 (detailing tax relief available to employers providing reasonable accommodations in order to integrate disabled individuals into the work force).

374. 26 U.S.C. § 51 (2000).

375. *Id.* §§ 44, 179.

376. *Id.* § 44(a); Cook, *supra* note 373, at 147.

377. *See* Peter D. Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 902 (1997) [hereinafter Blanck, *Economics of Employment Provisions*] (analyzing various studies and concluding that the average cost for reasonable accommodations was minimal and that the changes made benefited employees with disabilities as well as employees without disabilities).

Sears, Roebuck and Co. from 1978 to 1996 concerning the accommodation of individuals with disabilities.[378] The studies revealed that during the years 1993 to 1996, the average direct cost of accommodating such workers was forty-five dollars.[379] Studies by the Job Accommodation Network ("JAN") found that over two-thirds of effective accommodations cost less than $500.[380] A 1990 GAO report revealed that fewer than one-quarter of workers with disabilities received accommodations.[381] The report also stated that when accommodations were provided, 51% did not require the employer to incur any direct cost, 30% cost less than $500, and only 8% cost more than $2000.[382] Other commentators have stated that the average cost of accommodations for disabled employees who require them is $200.[383] However, no major studies have been conducted since the mid-1990s, and none has addressed the indirect costs of accommodations, such as those associated with scheduling adjustments, added breaks, or acceptance of reduced productivity. Furthermore, the statistics might be skewed in that only one-quarter to one-third of individuals with serious disabilities have jobs,[384] and the reasonable accommodation figures might grow dramatically if many more of the disabled were employed.

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378. *See* Peter D. Blanck, *Communicating the Americans with Disabilities Act, Transcending Compliance: 1996 Follow-up Report on Sears, Roebuck and Co.*, ANNENBERG WASH. PROGRAM REP. at 18 (1996) [hereinafter Blanck, *Communicating*], *cited in* Blanck, *Economics of Employment Provisions*, *supra* note 377, at 902. Sears, Roebuck and Co. conducted a series of studies analyzing the economic implications of workplace accommodations between 1978 and 1996—before and after Title I's July 26, 1992 effective date. *Id.*

379. *Id.* As discussed in this section, "direct" costs or expenses are those associated with payment for devices, equipment or construction of mechanisms to assist people with disabilities. "Indirect" costs are those generated by scheduling adjustments, acceptance of reduced productivity or other accommodations that do not require actual payment on the part of the employer. *Id.*

380. President's Committee on Employment of People with Disabilities, *Job Accommodation Network (JAN) U.S. Quarterly Report*, Oct.-Dec. 1994, at 14, *cited in The Economics of the Employment Provisions*, *supra* note 377, at 902.

381. U.S. GENERAL ACCOUNTING OFFICE, PERSONS WITH DISABILITIES: REPORTS ON COSTS OF ACCOMMODATIONS 4, 19 (1990), *available at* http://archive.gao.gov/d27t7/140318.pdf. (citing Berkeley Planning Associates, *A Study of Accommodations Provided to Handicapped Employees by Federal Contractors*, 20, 29 (1982)).

382. *Id.* (citing Berkeley Planning Associates at ii, 28).

383. *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 8,578, 8,584 (1991) (noting that a "study projecting the impact of the 'Americans with Disabilities Act of 1989' estimated that the average cost of accommodations was $200") (citing Daniel Finnegan et al., *The Costs and Benefits Associated with the Americans with Disabilities Act*, 38 (1989)).

384. *See* Schwochau & Blanck, *supra* note 165, at 272 (reporting that the current population survey suggests only thirty percent of those with disabilities work); 2000 *N.O.D./Harris Survey*, *supra* note 167 (finding thirty percent as well).

Some commentators argue that ADA compliance can actually lead to significant cost savings for employers.[385] Programs designed to enhance workplace safety to accommodate those with disabilities can improve the productivity, job tenure, and absenteeism rates of all members of the workforce.[386] By reducing the number of accidents that occur in the workplace, safety programs and devices can diminish overall costs associated with job injuries.[387] In addition, employees with disabilities often have lower turnover rates than able-bodied workers, and their absenteeism and productivity have been found to be equivalent to those of their nondisabled counterparts.[388] Commentators further note that removing more individuals with disabilities from the ranks of the unemployed and impoverished would reduce welfare expenditures and thus would save significant costs for the public at large.[389]

The ADA is not unique in imposing financially burdensome requirements upon employers. While one might argue for a general diminishment of the public responsibilities placed upon employers, concern should not be focused particularly on the ADA. American law imposes countless unfunded mandates on American employers. For example, they must pay a minimum wage[390] and overtime

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385. *See The Economics of the Employment Provisions*, *supra* note 377, at 902 (reporting that according to JAN studies, almost two-thirds of accommodations resulted in company savings exceeding $5000, which were associated with "lower job training costs and insurance claims, increased worker productivity, and reduced rehabilitation costs after injury on the job").

386. *See id.* at 902-05 (recognizing that accommodations involving advanced technology have been shown to produce benefits for employees with and without disabilities in terms of increased work productivity, injury prevention, reduced workers' compensation and reduced worker absenteeism).

387. *See id.* at 902 (reporting that, according to JAN, companies realize approximately fifty dollars in benefits for every dollar spent on an effective accommodation).

388. *See* Michael Ashley Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 BERKELEY J. EMP. & LAB. L. 314, 323-26 (2000). The author reports that according to the U.S. Office of Vocational Rehabilitation, ninety-one percent of workers with disabilities were rated "average" or "better than average," while nondisabled employees were given approximately equivalent scores. *Id.* In addition, one study found "that sixty percent of disabled workers remained with their job placement as opposed to only forty percent of able-bodied workers, and that the average cost of each job turnover was $2,800." *See id.* at 325 (citing Peter D. Blanck, *The Emerging Role of the Staffing Industry in the Employment of Persons with Disabilities: A Case Report on Manpower Inc.* 7 (Annenberg Washington Program Publication, 1998)).

389. *See* Patricia Digh, *People with Disabilities Show What They Can Do*, HR MAG., June 1998, at 141, 144 (citing Rutgers economist Douglas Kruse). The article estimates that employing one million individuals with disabilities would lead to a "$21.2 billion annual increase in earned income; a $1.2 billion dollar decrease in means-tested income payments; a $286 million annual decrease in the use of food stamps; a $1.8 billion dollar decrease in Supplementary Security Income payments; 284,000 fewer people using Medicaid and 166,000 fewer people using Medicare."

390. 29 U.S.C. § 206(a)(1) (2000).

payments for some employees who work more than forty hours a week.[391] Employers must comply with the environmental and record-keeping requirements of the Occupational and Safety and Health Act ("OSHA") to ensure a safe working environment,[392] and for certain medical and family reasons, must allow employees to take unpaid leave under the FMLA.[393]

One scholar argues that other federal anti-discrimination laws also impose significant costs upon employers.[394] For example, Title VII prohibits employers from refusing to hire a member of a protected class because of customer or coworker attitudes about the group in question.[395] An employer who must hire a woman or a member of an ethnic minority in order to comply with Title VII, even though customers or other employees will feel uncomfortable working with the individual, may suffer financial loss in the form of lost income from sales to customers who go elsewhere or reduced productivity on the part of distressed employees.[396] Likewise, Title VII prohibits an employer from utilizing a facially neutral employment practice that has a disparate impact on members of a protected class unless the employer can demonstrate that the practice is job-related and consistent with business necessity.[397] Employers who must forego their chosen application processes or abandon other favored job criteria in order to comply with Title VII absorb the cost of substituting other practices that they deem less desirable.[398]

Finally, the ADA is quite balanced in that it provides employers with several powerful defenses. The ADA protects only *qualified* individuals with disabilities.[399] Employers are not required to consider

391. *Id.* § 207(a)(1).

392. *Id.* § 654(a)(2); *see id.* § 654(a)(1) (mandating that each covered employer must keep its workplace "free from recognized hazards . . . causing or . . . likely to cause death or serious physical harm to [its] employees"); *id.* § 657(c) (requiring the maintenance of accurate records and the filing of periodic reports concerning workplace injuries).

393. *Id.* §§ 2601-2554.

394. Jolls, *supra* note 119 (discussing the financial costs associated with employing a disfavored group of employees under different anti-discrimination laws).

395. *See* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (holding that employers cannot refuse to hire a female applicant because of customer preference for contact with a male employee).

396. Jolls, *supra* note 119, at 35.

397. 42 U.S.C. § 2000e-2(k)(1)(A) (2000); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971) (holding that employers could not use possession of a high school diploma and scores on general intelligence tests as requirements for successful applicants because these criteria disproportionately eliminated black candidates and were not clearly related to job performance).

398. *See* Jolls, *supra* note 119, at 8-20 (illustrating that the anti-discrimination laws' prohibition of practices with a disparate impact can translate into accommodation requirements).

399. 42 U.S.C. § 12112(a) (2000).

individuals with disabilities who do not have the requisite education and experience for the job and need not retain those who have demonstrated incompetence or performance problems.[400] Employers are obligated to provide only accommodations that are "reasonable" and are free to refuse to undertake accommodations that will pose an "undue hardship" on the operation of their businesses.[401] The ADA also provides employers with a "direct threat" defense.[402] Employers are not required to hire or retain qualified individuals with disabilities who pose risks to the health or safety of themselves or others in the workplace.[403] These defenses significantly diminish the liability exposure of employers and limit the dollars that they are likely to spend for purposes of ADA compliance.

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400. *See The Economics of the Employment Provisions*, *supra* note 377, at 888 (explaining that Title I requires employers to consider one's skills independent of the disability, but employers have the right to "determine legitimate essential job functions or production requirements").

401. 42 U.S.C. § 12112(b)(5)(A) (2000). The ADA provides the following details concerning the reasonable accommodation requirement:

> Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
>
> (i) the nature and cost of the accommodation needed under this Act;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id. § 12111(10)(B).

Like the definition of "disability," this standard suffers from vagueness because it provides no guidance as to how the four factors are to be balanced or prioritized. Perhaps not surprisingly, the courts have found many requested accommodations to be unreasonable. In *US Airways, Inc. v. Barnett*, 535 U.S. 391, 418-20 (2002), for example, the Supreme Court ruled that an employer ordinarily does not have to provide an accommodation that conflicts with the rules of an established seniority system.

402. 45 U.S.C. § 12113(b) (2000).

403. *Id.* The plain text of the statute allows for the direct threat defense only in cases where an employee with a disability would pose a risk to "*other* individuals in the workplace." *Id.* (emphasis added). In 2002, however, the Supreme Court, relying on an EEOC regulation, held that employers may also refuse to hire individuals whose *own* health would be endangered if they perform the job duties in question. *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 84-87 (2002). EEOC regulations provide the following guidance: in determining whether an individual would pose a direct threat, the factors to be considered include: "1) The duration of the risk; 2) The nature and severity of the potential harm; 3) The likelihood that the potential harm will occur; and 4) The imminence of the potential harm." 29 C.F.R. § 1630.2(r) (2002).

Further studies should be conducted to determine the full extent of the costs and benefits of Title I of the ADA, including expenses associated with hiring, retention, and accommodation of disabled workers, administrative compliance, and litigation.[404] However, neither the empirical evidence gathered to date nor a plain reading of the statutory text justifies deep anxiety about exorbitant expenses absorbed by the business community and not currently addressed through tax relief measures.

4. The definition of disability should not be retained and elucidated through extensive impairment-based lists or formulas

A different alternative for revising the ADA is to retain the current definition of disability but to elucidate it by creating an extensive impairment-based list or a formula to describe those encompassed within the protected class. Detailed specification would provide clearer guidance to the courts, to plaintiffs who must evaluate the viability of their claims, and to employers who must comply with the statutory obligations.

There are at least two ways in which the definition could be reformulated to achieve greater specificity. First, the definition could be retained but supplemented by a list of conditions that are covered by the ADA. During congressional debates, legislators considered specifying the conditions to be covered by the ADA and actually created a list of disorders.[405] The National Federation of Independent Business favored the creation of a list so that employers would have precise guidance as to which conditions must be accommodated, and it estimated that 900 types of disabilities would be included.[406] Theoretically, at least, a list would provide definitive guidance to employers and the courts, eliminating the need for extensive litigation concerning the question of whether or not the plaintiff has a disability.

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404. *The Economics of The Employment Provisions*, *supra* note 377, at 906-08 (urging that additional studies be conducted to examine the direct and indirect costs and benefits of Title I implementation, compliance and related litigation in order to accurately assess its economic impact).

405. H.R. REP. NO. 101-485, pt. 2, at 51 (1990); H.R. REP. NO. 101-485, pt. 3, at 28 (listing a number of conditions that would be covered including orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, HIV/AIDS, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, and drug and alcohol addiction).

406. *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 89-90 (1989) (statement of John J. Motley III, Nat'l Fed'n of Indep. Bus.); *see also* 136 CONG. REC. H-2599-01, 2621 (1990) (statement of Rep. McCollum) (estimating that approximately 900 disabilities could be covered by the ADA).

Use of a list to define the protected class would not be an unprecedented practice. In the field of employment law, lists are already utilized in several contexts. Workers' compensation laws in this country rely on lists of impairments.[407] These laws, which vary from state to state, provide for coverage of medical costs and a percentage of lost earnings for employees whose injuries or illnesses occur within the course and scope of employment.[408] Benefits are scheduled and listed by the extent of injury. For example, benefits are awarded for a varying number of weeks for loss of an arm, hand, thumb, first finger, second finger, third finger, fourth finger, leg, foot, great toe, other toes, one eye, hearing in one ear, and hearing in both ears.[409]

The Social Security Administration ("SSA") has also created a list of impairments for purposes of administering claims for Social Security Disability Insurance ("SSDI") benefits.[410] The listing of impairments, which is periodically amended and updated,[411] spans eighty-five pages in the Code of Federal Regulations, and includes numerous categories, such as the musculoskeletal, respiratory, cardiovascular, digestive, genito-urinary, hemic and lymphatic, endocrine, multiple body, and immune systems; special senses and speech; neurological; skin; mental disorders; neoplastic diseases and malignancies.[412] In part, the SSA asks each benefits applicant whether her impairment is identical or equal to an impairment on the list.[413] However, fulfilling this criterion accounts for only sixty percent of all awards. Those who do not have a listed condition may prove that they, nevertheless, are unable to "perform other jobs that exist in significant numbers in the national economy."[414] Allowing applicants who do not have a listed condition to receive benefits if they can prove that their ailments are

407. *See* ARTHUR LAWSON, WORKERS' COMPENSATION LAW § 62.10 (1984) (illustrating the variation of benefits available depending on the type of impairment).

408. *See id.* § 1.10 (noting that an employee is automatically entitled to benefits if injured in the course of employment).

409. *See id.* § 52.10 (providing a chart of disabilities and corresponding benefits).

410. *See* Social Security Administration, 20 C.F.R. § 404, Subpart P, App. 1 (providing list of impairments); *see also* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 804 (1999) (describing the Administration's handling of disability claims); *see generally* 46 AM. JUR. 2D *Extent of Disability under Social Security Act* § 7 (2002) (exploring the process used to determine whether to grant social security benefits to an allegedly disabled individual).

411. 20 C.F.R. § 404(p), App. 1 (2002).

412. *Id.*

413. 20 C.F.R. §§ 404.1525, 404.1526 (2001) (discussing the listing of impairments' purpose and use as well as the concept of "medical equivalence"); *see Cleveland*, 526 U.S. at 804 (noting that one step in the SSA's analysis is determining whether the applicant has an impairment included on the list).

414. *Cleveland*, 526 U.S. at 804; 20 C.F.R. §§ 404.1520(f), 404.1560(c) (2001).

"equivalent" to a listed impairment further complicates the process and reduces its efficiency.[415] Finally, in *Cleveland v. Policy Management Systems Corp.*,[416] the Supreme Court recognized that the SSA's list would be inappropriate for ADA purposes because it over-simplifies many complicated conditions, failing to take into account individual differences that might render people able to perform specific jobs with or without reasonable accommodations.[417] Thus, a different, more nuanced list would thus be necessary for ADA determinations.

Mark Rothstein and his colleagues propose the creation of such a list in a recently published article.[418] They suggest that the definition of "disability" be left intact, but that Congress should direct the EEOC "to publish medical standards for determining disability for the most common physical and mental impairments" so that "[a]n individual whose medical condition met the published criteria would be presumptively covered under the ADA."[419] The authors themselves, however, recognize the complexities and limitations of their proposal. They acknowledge that no list can be exclusive and include all medical conditions.[420] Furthermore, impairments affect various individuals to different degrees, and consequently, an individualized assessment of the degree of impairment would still be necessary.[421] A further obstacle arises from the fact that a moderate condition can become substantially limiting if it coexists with another moderate condition.[422] Consequently, individuals whose conditions do not meet the published criteria would not be barred from bringing suit. Rather, they would have to rebut the presumption of non-coverage by providing clear and convincing evidence that their impairments substantially limit a major life activity.[423]

Creating an exhaustive list of physical and mental conditions to be covered by the ADA would, in fact, be nearly impossible.[424] No list that attempts to capture all disabling conditions could be fully

415. *See* Floyd Skloot, *A Measure of Acceptance*, 19 CREATIVE NONFICTION 79, 79-91 (2002) (describing the lengthy and demeaning process of testing that the mentally disabled author was required to undergo when the Social Security Administration decided to re-evaluate his disability status eight years after its initial determination in his case).

416. 526 U.S. 795 (1999).

417. *Id.* at 803-04.

418. Rothstein, *supra* note 287, at 270-72.

419. *Id.* at 270-71.

420. *Id.* at 271.

421. *Id.*

422. *Id.*

423. *Id.*

424. *See* H.R. REP. NO. 101-485, pt. 3, at 27 (1990) (asserting that such a list would not ensure comprehensiveness, particularly because new disorders could develop in the future).

accurate and comprehensive. The objections identified by Professor Rothstein are all appropriate.[425] In addition, medical science perpetually achieves advances in disease identification and treatment, so that one's disability status associated with particular conditions might change over time.

While creation of a non-exclusive list of covered conditions will partially fill the vacuum of guidance that now exists, it is unlikely to dramatically reduce litigation concerning the question of what constitutes a disability. Individuals with conditions that are not specifically listed would bring suit claiming that their impairments are, nonetheless, substantially limiting and, thus, covered under the ADA. The courts would then be required to make those disability determinations. The proposal, therefore, would not eliminate the problems of inconsistent court decisions, invasive scrutiny of private activities, and the Catch-22 related to proving that an individual is both substantially limited and still qualified for the job in question.[426] It is for these reasons that the recommendations outlined in this Article offer a superior alternative. An exclusive list of impairments and impairment categories, based not on the extent to which they affect daily living, but on evidence of systematic discrimination against those with the covered conditions, would address the concerns described above and provide much clearer guidance to litigants and the courts.[427]

A second approach is one that has been adopted by some European countries.[428] These countries provide special benefits and rights to individuals who have a specific degree of disability. In Germany, for example, the determination of disability status is made by an independent welfare institution, and the "severely disabled" are defined as those with at least a fifty percent degree of disability.[429] In the Netherlands, there are seven categories of disability, determined

425. *See supra* notes 420-23 and accompanying text (noting the problems with the author's own suggestion to create a list of disabilities to be covered by the ADA).

426. *See* discussion *supra* Part I.C.2 (exploring problems raised by the individualized assessment approach).

427. *See* discussion *supra* Part III.A (arguing that the ADA should be amended to redefine individuals with disabilities as those with mental or physical impairments that have been subjected to a pattern of discrimination and by creating specific categories of covered impairments).

428. Patricia Thornton & Neil Lunt, *Employment Policies for Disabled People in Eighteen Countries: A Review*, University of York Printing Unit, *available at* http://gladnet.org/infobase/employment/Policies/emp_policies_18_countries.htm (describing the disability laws of various countries) (on file with the American University Law Review).

429. *Id.*

by the extent to which one's earning capacity is diminished.[430] The categories range from fifteen to one-hundred percent.[431]

Like an exhaustive list of disabilities, agency determinations of disability status based on a required percentage of limitation could theoretically provide clear guidance to the courts and diminish the volume of frivolous ADA litigation. So long as an individual obtained the necessary documentation proving that the disability was of a requisite degree, the courts would be bound to deem the individual disabled. The courts would be spared the task of grappling with the question of who is disabled and would not be faced with trivial cases brought by plaintiffs who have minor impairments.

Nevertheless, associating disability status with a percentage of incapacity would not be an ideal approach in the United States. Determining the precise percentage of disability that would count for ADA purposes would be a political nightmare for policy makers facing conflicting and passionate demands from a variety of interest groups. It is likely that there would be great resistance to the establishment of a single, inflexible bright-line to demarcate who is included within the protected class, excluding from protected status all who fall even slightly below the required percentage point. No matter what figure is chosen, it would be viewed as arbitrary and unjust by many opponents. Furthermore, once the standard is determined, a costly bureaucracy would have to be established to conduct medical examinations or review medical records for each claimant in order to ascertain whether the requisite percentage of disability exists.

While it may seem as though the process of determining each person's degree of limitation would be exact and scientific, it is unlikely to be so, especially with respect to mental disabilities. Procedures for testing and evaluation could be lengthy and controversial, causing delays in the resolution of cases.[432] Furthermore, it is probable that disability determinations would be frequently challenged as inaccurate, biased, or unreliable and, therefore, would spawn significant litigation. Consequently, adopting a percentage-based disability definition is unlikely to be an efficient, just, and greatly improved mechanism for determining who is an individual with a disability.

430. *Id.*
431. *Id.*
432. Skloot, *supra* note 415, at 79-91.

CONCLUSION

The introductory "Findings and Purposes" section of the ADA asserts that the statute aims to present an unambiguous and comprehensive national directive for the eradication "of discrimination against individuals with disabilities"[433] and thus to promote corrective justice. More specifically, the statute's aim is to provide its protected class with an equal opportunity to fully participate in society, live independently, and become economically self-sufficient[434] because individuals with disabilities have faced a history of intentional discrimination and have been "relegated to a position of political powerlessness in our society."[435] At this time it is very difficult to assess the efficacy of Title I of the ADA conclusively in light of the dearth of available empirical information.[436] The limited evidence that exists, however, suggests that these objectives are not being adequately fulfilled.[437] Moreover, a plain reading of the statutory text reveals that the definitional language of the ADA is severely flawed and requires amendment.[438]

It is arguable that no change in the ADA's definition of disability will enhance the law's efficacy. As some have noted, in "the current political climate . . . there is great dissatisfaction with civil rights laws in general."[439] Recently, the Supreme Court has eroded the relief available to ADA plaintiffs in decisions concerning reasonable accommodations,[440] the direct threat defense,[441] the ability of plaintiffs to sue state employers,[442] and the availability of punitive damages.[443]

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433. 42 U.S.C. § 12101(b)(1) (1995).
434. *Id.* § 12101(a)(8).
435. *Id.* § 12101(a)(7).
436. *See* discussion *supra* Part II (noting the limited availability of empirical evidence and the inconclusiveness of much of that data).
437. *See* discussion *supra* Part II (discussing evidence concerning employment rates of individuals with disabilities and relief obtained by victims of discrimination).
438. *See* discussion *supra* Part I (analyzing the ambiguity the definition of "disability").
439. Tucker, *supra* note 186, at 373; *see* Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 555 (2001) (discussing judicial hostility towards plaintiffs in employment discrimination cases).
440. *See* US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (holding that if an employer proves that a desired accommodation conflicts with an established seniority system, the employer is not required to provide the accommodation unless special circumstances exist).
441. *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002) (ruling that employers are authorized to refuse to hire an individual whose own health would be endangered by performance of job duties even if no direct threat is posed to anyone else in the workplace).
442. Bd. of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) (holding that private parties could not sue state employers for money damages under the ADA because of Eleventh Amendment immunity).
443. Barnes v. Gorman, 536 U.S. 181 (2002) (finding that punitive damages may

Similarly, the Supreme Court has issued several opinions that have limited the right of action available to employment discrimination plaintiffs in areas other than the ADA.[444] It is possible, consequently, that even if Congress amended the statute, the courts would continue to narrow the scope of ADA protection regardless of any changes in the statutory definition.

Nevertheless, amending the disability definition and establishing an exclusive list of covered impairments and condition categories associated with systematic discrimination would offer both fidelity to the statutory goal of corrective justice and workability as a legal instrument. It would promote inclusion of those who have been traditionally excluded and redistribution of resources to the most needy and deserving. It would provide more lucid guidance to plaintiffs who must decide whether they have viable discrimination claims, to employers who wish to avoid violations of the law and potential litigation, and to the courts. The new definition of disability would replace subjective assessment of the plaintiff's functionality level with a much more concrete and accessible proof mechanism.

As Congress explicitly recognized, strong judicial enforcement of the rights of those who are otherwise marginalized would also benefit the American economy.[445] The statute's Findings section decries the spending of "billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[446] If individuals with disabilities who have traditionally been excluded from the workplace knew they had strong advocates in the courts and could obtain meaningful relief if they faced discrimination, more might attempt to enter and remain in the workforce.[447] At the same time, if employers

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not be awarded in private suits brought against public entities under section 202 of the ADA).

444. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (ruling that the ADEA did not abrogate the states' Eleventh Amendment immunity and, therefore, private parties could not bring ADEA suits against state employers); *see also* Circuit City v. Adams, 532 U.S. 105 (2001) (holding that mandatory arbitration policies unilaterally imposed by employers on employees could be enforced under the Federal Arbitration Act, with the very narrow exception of policies that applied to transportation workers). Under *Circuit City*, those whose employers have implemented mandatory arbitration policies cannot bring their employment discrimination cases to federal court even if they were given no meaningful choice concerning acceptance of the policy. *Id.*

445. *See* 42 U.S.C. § 12101(a)(9) (1995).

446. *Id.*

447. *See* S. REP. NO. 101-116, at 16-17 (1989) (noting that "discrimination results in dependency on social welfare programs that costs the taxpayers unnecessary billions of dollars each year"); 135 CONG. REC. S10713 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) (stating that President Bush estimates that national spending on disability benefits and programs equals sixty billion dollars, money that will be saved

did not incur costs associated with disputes involving the many people whose impairments would not be listed as disabilities, they might be more willing to invest voluntarily in integrating individuals with disabilities into the workforce. It is only with a better conception of who constitutes an individual with a disability that the ADA will fulfill its mission of providing "clear, strong, consistent, enforceable standards"[448] and meaningful legal remedies for those subjected to disability discrimination.

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once the disabled are employed and become taxpayers and consumers).

448. 42 U.S.C. § 12101(b)(2) (1995).