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## "Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?

Craig S. Lerner

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# “Accommodations” for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?

*Craig S. Lerner\**

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## I. INTRODUCTION

For several decades, college-bound students could have themselves certified “disabled” and then receive miscellaneous “accommodations” on the SATs. Most commonly, these accommodations would include extra time, stretching from an hour to a day, and the right to take the exam in a special location away from the distractions, auditory and visual, that other test takers would encounter in a crowded room. There was, however, an incalculable cost attached to the “disabled” certification: The Educational Testing Service (ETS) would place an asterisk, or “flag,” next to all test scores obtained under nonstandard conditions. How much college admissions officers discounted such flagged scores, if at all, was unknown.

All this recently changed. Starting October 1, 2003, the ETS and College Board discontinued the practice of flagging nonstandard test scores.<sup>1</sup> College admissions offices will no longer be able to distinguish between a 1500 (3 hours) and a 1500 (6 hours).<sup>2</sup>

From 1987 to 2000, the number of students receiving accommodations on the SATs quadrupled,<sup>3</sup> and approximately 90 percent of the test takers who qualified for accommodations were diagnosed with a “learning disability” or “LD.”<sup>4</sup> Originating just a few decades ago, the LD diagnosis now subsumes dozens of ailments and imperfections, such as dyslexia (reading difficulties), dyscalculia

1. Press Release, The College Board, The College Board and Disabilities Rights Advocates Announce Agreement to Drop Flagging from Standardized Tests (July 17, 2002), <http://www.collegeboard.com/press/article/0,1443,11360,00.html>.

2. As a clarification for older readers, I note that a 1500 in 2003 is not the same as a 1500 in 1993. In 1994, the College Board “recentered” the SATs. The effect was particularly pronounced on the right tail of the distribution. Any score of 730 or above on the pre-1994 verbal SATs would be recorded now as 800. Only about 0-20 points were added to math scores. The upshot is that there now are over a thousand “perfect” 1600s each year, whereas there may have been only a dozen or so each year a decade ago. *See generally* NEIL J. DORANS, THE COLLEGE BOARD, THE RECENTERING OF THE SAT SCALES AND ITS EFFECTS ON SCORE DISTRIBUTIONS AND SCORE INTERPRETATIONS, COLLEGE BOARD RESEARCH REPORT NO. 2002-11 (2002), <http://www.ets.org/research/dload/RR-02-04.pdf>.

3. *See* Samuel J. Abrams, *The Demand for Special Accommodations*, EDUC. NEXT, Fall 2003, at 40, 40, <http://www.educationnext.org/20034/pdf/36.pdf>.

4. *See* THE COLLEGE BOARD, RESEARCH NOTES: TESTING WITH EXTENDED TIME ON THE SAT I: EFFECTS FOR STUDENTS WITH LEARNING DISABILITIES (Jan. 2000), at 1 [hereinafter TESTING WITH EXTENDED TIME], [http://www.collegeboard.com/repository/testing\\_with\\_extended\\_10509.pdf](http://www.collegeboard.com/repository/testing_with_extended_10509.pdf).

(computing difficulties), dysgraphia (writing difficulties), dysrationalia (thinking difficulties), cognitive processing deficit (remembering difficulties), and Attention-Deficit/Hyperactivity Disorder (ADHD) (concentration difficulties).<sup>5</sup> An entire industry has arisen dedicated to the diagnosis and medication of any student falling short of Einsteinian mental prowess combined with Ghandian spiritual calmness. And, needless to say, there are the armies of lawyers who are prepared to do battle on behalf of the “learning disabled,” and who have likened such efforts to earlier struggles for equality on behalf of disadvantaged groups such as African Americans, women, gays and lesbians, and the elderly.

This Article evaluates the legal and political efforts to accommodate the learning disabled in American higher education generally, and in particular on the mental aptitude exams, such as the SATs, which are used by universities to select students. “Accommodations” are said to level the playing field among test takers, allowing bright students to demonstrate their true academic potential.<sup>6</sup> This argument has an intuitive appeal, for there are intelligent, often brilliant, people with handicaps that render specific tasks, such as reading or computing, more problematic for them than one might expect, given their generally high level of intelligence. Yet insofar as the “LD” diagnosis has lost much of its scientific rigor in recent years, large and growing segments of the population, or at least those with the wherewithal and initiative to consult psychologists and lobby school administrators, have sought LD diagnoses, either for themselves or for their children. Recognizing that a disproportionate number of students obtaining accommodations on the SATs have hailed from affluent neighborhoods, some wags have likened this phenomenon to affirmative action for the rich and sophisticated, our homegrown American elites.<sup>7</sup> Others have suggested that the LD lobby is propelling us along “the road to universal disability,” our ultimate destination being a world in which virtually all Americans

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5. Technically, ADHD is not a learning disability, but it is often lumped together with learning disabilities as a condition allegedly entitling one to accommodations under the Americans with Disabilities Act. See *infra* at Part III.B.

6. See, e.g., Beth Azar, *Fairness Challenge When Designing Special Needs Tests*, APA MONITOR ONLINE, Dec. 11, 1999 (“When special-needs students are granted more time to take the SAT, does that give them an unfair advantage over other students? Or does it merely level the playing field, allowing the students’ true abilities to shine through their disabilities?”), at <http://www.apa.org/monitor/dec99/in2.html>.

7. Jonathan I. Katz, *Learning Disabilities at Universities*, at <http://www.physics.wustl.edu/~katz/LD.html> (last visited May 18, 2004); see also Ruth Shalit, *Defining Disabilities Down*, THE NEW REPUBLIC, Aug. 25, 1997, at 16, 22.

are diagnosed as learning disabled.<sup>8</sup> Such rhetoric has, inevitably, set off angry charges of insensitivity and worse.<sup>9</sup>

The core of this Article challenges the premise of the LD lobby that the Americans with Disabilities Act (ADA) necessarily entitles the learning disabled to any accommodations. The ADA defines "disability" as an impairment that "substantially limits" a "major life activity."<sup>10</sup> Whether one is substantially limited is determined with reference not to one's innate abilities, but to the skills of the average citizen.<sup>11</sup> Thus, a learning disabled student who reads slower than one would expect given his general mental aptitude, but who nonetheless reads at a level comparable to the average citizen, is not disabled as a matter of law. Legal requirements aside, it may still be appropriate to accommodate the learning disabled in some cases, but an acknowledgment of the potential costs should guide educators in determining the appropriate parameters of the accommodations. Yet educators may not have sufficient personal incentives to scrutinize requests for accommodations or to tailor those accommodations narrowly to a student's claimed learning disability. Drawing upon the concept of "agency costs," this Article explores the tension between the interests of administrators of nonprofit educational entities and the interests of the entities themselves. On the one hand, individual administrators may prefer to avoid the controversy stirred up by the denial of a request for accommodations by a learning disabled student. On the other hand, the educational entities themselves are committed, at least in theory, to academic integrity, and therefore should be prepared to examine such requests carefully to ensure that students do not exploit a "learning disabled" diagnosis to gain an unfair advantage.

One caveat before beginning: This Article focuses on the issues surrounding accommodations for the learning disabled in the higher education context; I will not address the question of accommodations for the learning disabled in the K-12 setting.<sup>12</sup> It is important that learning disabled children be identified at an early age and that resources be expended to ensure that they are allowed to overcome

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8. Walter Olson, *Standard Accommodations: The Road to Universal Disability*, REASON ONLINE, Feb. 1999, at <http://www.reason.com/9902/co.wo.reasonable.shtml>.

9. See, e.g., Ruth Colker, *Perpetuation of Stereotypes Unfair to the Disabled*, COLUMBUS DISPATCH, Sept. 13, 1997, at 11A (criticizing Shalit, *supra* note 7).

10. 42 U.S.C. § 12102(2)(A) (2000).

11. See *infra* text accompanying notes 176-190.

12. For an outstanding treatment of these issues focused on the K-12 context, see generally MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1997).

their handicaps. An 8-year-old dyslexic should be assisted in surmounting her reading difficulties, and to that extent she should, of course, be accommodated. But it does not necessarily follow that the 18-year-old dyslexic should be accommodated on the SATs; or that the 28-year-old law school graduate should be accommodated on the bar exam; or that the 38-year-old lawyer should be accommodated in her legal practice.

Part II of the Article begins by questioning the extension of anti-discrimination principles to the disability context. Private parties value ability and in that sense regularly—and rationally—discriminate against the disabled. Legislation “protecting” the disabled is premised on the claim that many people have an irrational taste for discriminating against otherwise qualified disabled persons. To the extent, however, that anti-discrimination laws penalize *rational* discrimination against the disabled (the one-armed piano mover or the innumerate accountant, for example), they interfere with the ordinary working of the market and, bluntly put, effect a wealth transfer from able members of the population to the disabled. Whether such a wealth transfer is, or is not, desirable is beyond the scope of this paper. My point is simply that laws such as the ADA reward those persons whose particular handicap is legally defined as a “disability,” and one should predict that interest groups will lobby to expand the definition of disability to encompass wider realms of handicaps. Indeed, one should expect people who are not handicapped at all to “spoof” disabilities in order to obtain favorable legal treatment.

As evidence supporting this prediction, Part III considers the dramatic growth in the number of people deemed learning disabled and thus eligible for myriad benefits under the law. In theory, being diagnosed as learning disabled does not mean that a student is “slow” or unintelligent; the idea is that there is a “substantial discrepancy” between a student’s innate intelligence and his or her academic performance, either generally or in a specific field.<sup>13</sup> Although all human beings have varying strengths in different mental tasks, a *substantial* discrepancy is in fact quite uncommon, especially for those within the normal range of intelligence.<sup>14</sup> Yet psychologists and educators, apparently throwing scientific rigor to the winds, have stamped ever-growing numbers of students learning disabled, therefore qualifying them for legal accommodations.

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13. See *infra* text accompanying notes 68-70.

14. See *infra* text accompanying notes 68-70.

Part IV questions the assumption that the ADA entitles most learning disabled students to accommodations. The case law construing the ADA's definition of "disability" has dramatically limited the law's scope. Applying these interpretive principles, one must conclude that many learning disabled students do not qualify for ADA protections.

Part V considers the collision of two industries: the LD industry and the mental aptitude testing industry. What started at the turn of the century as science, or some would claim pseudoscience, has blossomed since World War II into a big business—the business of measuring and sorting Americans by intelligence. The ETS, which administers the SATs, and the College Board, which owns and designs the exam, have been the most notable drivers and beneficiaries of this development. In response to a legal challenge, but before any court order, the ETS agreed to stop flagging nonstandard scores on all exams it administers. This decision severely undermines the ETS's stated commitment to scientifically valid testing; and, as more students qualify for accommodations, the ETS and College Board will be obliged to alter the SATs, possibly making the exam shorter and less time-sensitive and thereby a less accurate measure of intelligence.

Finally, in Part VI, I consider the incentives introduced by affording accommodations to those classified as learning disabled, in particular on the SATs. With respect to students and parents, there are obviously powerful incentives, especially with the removal of the flag for accommodated test takers, to have oneself designated as learning disabled. With respect to educational administrators, there are robust personal disincentives to challenge students seeking accommodations.

## II. THE NEXT CIVIL LIBERTIES FRONTIER: AMERICANS WITH DISABILITIES

Touted as a "second-generation civil rights statute,"<sup>15</sup> the Americans with Disabilities Act of 1991 dramatically expanded American anti-discrimination law. It is unclear, however, how anti-discrimination principles, developed in the context of race, translate to the context of the disabled. First, a preference for ability (in employees or students) is often quite rational and cannot necessarily be said to arise from animus or stereotype. Second, the indeterminacy of the

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15. See Robert J. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

very idea of “disability” gives rise to significant risks of spoofing. Indeed, insofar as the ADA subsidizes certain kinds of disability, and implicitly penalizes complementary kinds of ability, one should expect growing numbers seeking to define themselves as disabled.

### A. *Discrimination and the Disabled*

The word “discriminate” is nowadays so larded with pejorative connotations that we may forget that for much of the history of the English language the word was intended in a favorable sense. To be “discriminating” or to “discriminate” meant to exercise fine judgment. In *Persuasion*, for example, Jane Austen notes of the hero that his opinions are “just and discriminating.”<sup>16</sup> Only recently has the word “discriminate” become tantamount to an accusation that the guilty person has acted not only irrationally, but unethically, in a way that penalizes another simply because that person is a member of a disfavored group. As President George H.W. Bush wrote in 1990, “Discrimination, whether on the basis of race, national origin, sex, religion, or disability, is worse than wrong. It is a fundamental evil that tears at the fabric of our society.”<sup>17</sup>

Yet a moment’s reflection suggests that the issue is more complicated than that, at least when the judgment is extended to discrimination against the disabled. Suppose a law firm is considering applicants for a job.<sup>18</sup> Two equally qualified candidates are under consideration, and one is blind. Let us assume that if the blind applicant were hired, the firm would have to hire a reader assistant or make some other accommodations to enable him to perform the job. A profit-maximizing company would likely hire the other candidate, assuming that the salary offered to the blind person would not reflect the additional cost of accommodating his disability.<sup>19</sup> When an enterprise in such a situation “discriminates” against the handicapped, it does not necessarily signify prejudice, stereotype, or

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16. JANE AUSTEN, *PERSUASION* 169 (Limited Editions Club 1977) (1817).

17. Veto Message on S.2104, reprinted at 136 CONG. REC. S16457-02 (daily ed. Oct. 22, 1990) (emphasis added). These words were part of President Bush’s veto message of the proposed 1990 Civil Rights Act. Bush would later sign an amended law.

18. The hypothetical is posed in KELMAN & LESTER, *supra* note 12, at 166.

19. Indeed, a heartless economist would likely dispute the premise of the hypothetical—that the two candidates are equally qualified. Given that one of the applicants is blind, and therefore will require costly accommodations to perform his job, one could question that he is in fact equally qualified.



animus, but may simply be the result, admittedly heartless, of an economically rational cost-benefit calculus.<sup>20</sup>

It is entirely possible that employers and others overestimate the costs of employing the disabled. Indeed, there are grounds for suspicion that large segments of society harbor an irrational animus towards, or squeamishness about, disabled persons, with authorities on this point stretching from Nietzsche<sup>21</sup> to Woody Allen.<sup>22</sup> According to one observer, "For most of American history, disabled citizens have been the 'hidden minority' in our society. The breadth of discrimination against the disabled is staggering in America."<sup>23</sup> In this view, many people prefer not to surround themselves with the disabled, perceived somehow as "sick," and will, as a result, refuse to hire a disabled person who would be more productive than another person, even factoring in the additional costs of accommodating the disability.

Over the past several decades, Congress has enacted various laws on behalf of the disabled.<sup>24</sup> Although advocates for the disabled are apt to cite such legislation as evidence of a revolution in sensitivity to the plight of the disabled,<sup>25</sup> this may overstate the case. Charitable and even government-directed assistance for the disabled is almost as old as the American republic. For example, in 1823, Kentucky established the first state school for the deaf, and a number of other

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20. For an elaborate rejection of this position, see Samuel R. Bagentos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 852-59 (2003), in which the author argues that even "rational discrimination" may arise from feelings of "animus" towards certain groups and that there are thus "powerful reason[s] to prohibit rational discrimination."

21. Nietzsche's works are littered with disparaging references to the "sick" and "crippled," who are portrayed as dangers to the strong and healthy segments of the population. See, e.g., FRIEDRICH NIETZSCHE, *THUS SPAKE ZARTHUSTRA* 80 (Thomas Common trans., Dover Publications 1999) (1911) ("Verily, I have often laughed at the weaklings, who think themselves good because they have crippled paws.").

22. See ANNIE HALL (MGM/United Artists Studios 1977) ("I feel that life is divided up into the horrible and the miserable. . . . That's the two categories. . . . The horrible would be like, I don't know, terminal cases, you know. . . . And blind people, crippled. . . . I don't know how they get through life. It's amazing to me. . . . You know, and the miserable is everyone else.").

23. Jeffrey Scott Ranen, *Was Blind But Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 392 (2002).

24. The principal examples are the Rehabilitation Act of 1973, Pub. L. No. 93-112, and the Americans with Disabilities Act of 1990, Pub. L. No. 101-476. Others include the Education of the Handicapped Act, Pub. L. No. 91-230 (1973); the Education of All Handicapped Children Act, Pub. L. No. 94-142 (1975); and the Individuals with Disabilities Education Act, Pub. L. No. 101-476 (1990).

25. See, e.g., DORIS Z. FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 211-15 (2001).

states soon did the same.<sup>26</sup> And in 1864, the federal government followed suit, with Abraham Lincoln signing legislation creating Gallaudet College.<sup>27</sup>

Yet there is something to the argument that recent federal legislation reflects a revolution in thinking as to the appropriate duties owed the disabled. Whereas early legislation seemed to arise from religious sentiments about what is owed the less fortunate, more modern legislation has explicitly borrowed from the rhetoric of “civil rights.” In fact, much of the language in the Rehabilitation Act of 1973 was drawn straight from the Civil Rights Act of 1964.<sup>28</sup> And, among the congressional “findings” that prefaced the ADA is that,

individuals with disabilities are a discrete and insular minority who have faced restrictions and limitations, subjected to a history of purposeful and unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society.<sup>29</sup>

The language, “discrete and insular minority,” is borrowed from the “most celebrated footnote” in Supreme Court history,<sup>30</sup> footnote four from *United States v. Carolene Products Co.*,<sup>31</sup> and is presumably intended to identify the disabled, no less than racial and ethnic subgroups, as a protected class under American law. In this vein, Senator Tom Harkin proclaimed, “the ADA has taken its place among the great civil rights laws in our country’s history.”<sup>32</sup>

Although the announced purpose of the ADA was thus “to provide a clear and comprehensive national mandate for the

26. See Frederick J. Weintraub & Joseph Ballard, *Introduction: Bridging the Decades*, in SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS 1, 1 (Joseph Ballard et al. eds., 1982).

27. *Id.*

28. See *Alexander v. Choate*, 469 U.S. 287, 294 n.11 (1985) (noting that Congress in part used “virtually the same language” in the Rehabilitation Act of 1973 and the Civil Rights Act of 1964).

29. 42 U.S.C. § 12101(a)(7) (2000).

30. Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).

31. 304 U.S. 144, 153 n.4 (1938).

32. See Senator Tom Harkin, *The Americans with Disabilities Act Ten Years Later: A Framework for the Future*, 85 IOWA L. REV. 1575, 1575 (2000); see also 136 CONG. REC. 17,369 (1990) (statement of Sen. Harkin describing the ADA as the “Emancipation Proclamation” for the disabled). Senator Harkin also stated “history is going to show that in 1990, 26 years after the Civil Rights Act of 1964, 43 million Americans with disabilities gained freedom, dignity and opportunity—their civil rights.” *Id.* at 17,366; see also *id.* at 17,730 (statement of Sen. Metzenbaum) (“The ADA ensures that the great civil rights advances of this century no longer exclude Americans with disabilities.”); *id.* at 17,371 (statement of Sen. Simon) (stating that the ADA represents a “‘declaration of independence’ for the citizens with disabilities of this Nation.”).

elimination of discrimination against individuals with disabilities,"<sup>33</sup> it is unclear what Congress intended by such grandiloquent language. A more modest view would be that the law simply intended to bring the machinery of the government to bear against those who would act out of an irrational prejudice against the disabled. In this view, the ADA would, for example, prohibit a company from refusing to hire a disabled person who, even taking into account his disability, would be a more valuable employee than the person hired in his place. One might wonder whether legislation would be necessary to eliminate this species of discrimination, as a functioning market would punish those indulging in such irrational prejudices.<sup>34</sup>

A broader view of the ADA would prohibit the employer from taking into account the cost of accommodating a disability at all when making a hiring decision. In this view, the ADA prohibits both irrational and rational discrimination. To return to the two lawyers applying for a job: The law firm could not prefer the equally qualified applicant over the blind applicant simply because the latter would be, as a result of his disability and the cost of accommodating it, a less profitable employee. Alternatively put, wholly rational cost-benefit calculations would be foreclosed as a defense to an accusation of illegal discrimination, at least to the extent that such calculations included the cost of accommodating a disability.

The Congress that enacted the ADA found that disabled persons are discriminated against because of "stereotypical assumptions not truly indicative of the individual ability of such individuals."<sup>35</sup> It is unclear how Congress reached this conclusion—which is, of course, simply an accusation that the same American people who elected persons like Senator Bob Dole (with a withered arm) and House Majority Whip Tony Coelho (who suffered from epilepsy) somehow had benighted views of the abilities of disabled persons. But even assuming that society at large, as opposed to the

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33. 42 U.S.C. § 12101(b)(1).

34. Various scholars have argued that government intervention to correct irrational discrimination is unnecessary; for the market will penalize those indulging an irrational preference taste for racial or other discrimination. *See, e.g.*, GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971); THOMAS SOWELL, *MARKETS AND MINORITIES* (1981); Harold Demsetz, *Minorities in the Market Place*, 43 N.C. L. REV. 271 (1965). *But see* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 127 (2003) ("[C]ontrary to the neoclassical labor market account, empirical studies conducted before and after the passage of the ADA clearly demonstrate the persistence of employment discrimination as an obstacle to labor market opportunities for workers with disabilities.").

35. 42 U.S.C. § 12101(a)(7).

morally more refined society that inhabits the halls of Congress,<sup>36</sup> truly has a taste for stigmatizing the disabled, it is surely often rational, in the sense of profit maximizing, for a company to prefer able rather than disabled employees. This being said, it may *still* be the case that society should interfere with the profit-driven judgments of private actors. Society may decide that it is appropriate to cushion the inequalities meted out by nature or fortune. In effect, then, laws designed to “protect” disabled persons are only partly designed to guard against irrational discrimination. They are also in part intended to transfer wealth from the able segment of the population to the disabled.<sup>37</sup>

For many Americans, even in the academy, “wealth transfer” is a relatively derogatory term, perhaps not rising to the level of “discrimination” in malodorous connotations, but nonetheless a phrase not wholly free of noxious fumes. From the earliest days of the American republic, politicians recognized the dangers of countenancing the transfer of wealth, invariably from the rich or few to the poor and many, as an indication of a declining respect for property rights and as a harbinger of tyranny.<sup>38</sup> More recently, scholars, particularly of the “public choice” school, have explored the manifold costs of empowering government to extract “rents” from one disfavored interest group and to award those rents to another group which has been more successful in ingratiating itself with political actors.<sup>39</sup> These insights have permeated American academic and political discourse, and an interesting result is the need to euphemize wealth transfers, generally in the overworked language of rights. Thus it is that legislation on behalf of disabled persons is advertised and

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36. I have elsewhere expressed doubts about such an implicit claim to moral superiority on Congress’s part. See Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. (forthcoming 2004).

37. See Sherwin Rosen, *Disability Accommodation and the Labor Market*, in *DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES* 18, 21 (Carolyn L. Weaver ed., 1991) (“By forcing employers to pay for work site and other job accommodations that might allow workers with impairing conditions defined by the law to compete on equal terms, it would require firms to treat unequal people equally, thus discriminating in favor of the disabled.”). In *Law and Economics of Disability Accommodations*, *supra* note 34, Professor Stein challenges this view, arguing that some accommodations are defensible as “semi-efficient,” in that both workers and employers benefit, and other accommodations, which impose costs on an employer, are nonetheless appropriate because they are “socially beneficial.” *Id.* at 168-77.

38. THE FEDERALIST NO. 10 (James Madison) (making essentially this argument).

39. See, e.g., JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 284-86 (Michigan 1962); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 141-48 (Harvard 1965).

promoted not as a naked wealth transfer, but as a vindication of the rights of a disfavored minority.

As is often the case with euphemisms, however, their usage muddles, rather than clarifies, thought.<sup>40</sup> Consider, for example, a recent article in the Wall Street Journal about the allegedly growing corporate practice of firing employees who have become disabled in order to minimize health care costs.<sup>41</sup> Although such a practice is doubtless uncharitable and perhaps even cruel, it is probably not actionable under ordinary contract and employment law principles.<sup>42</sup> Nor is it clear that such a practice is irrational, again at least if we equate rationality with profit maximizing. Yet it is possible that such a practice will give rise to claims under state or federal laws protecting the disabled. Assuming such claims prevail, it is difficult to see how this result can be construed as anything but a wealth transfer from the able to the disabled. All employers are charged with certain duties to their disabled employees, which results in higher costs, which are then passed through, at least partially, to consumers. One might also characterize such a regime as a state-mandated insurance scheme that benefits everyone in the sense that we all might someday be disabled and are willing to pay premiums now to guard against that contingency. In the short term, however, the able are assisting the disabled.

This may be entirely defensible. It is possible that the able members of society, the undeserving winners in nature's genetic lottery, owe a moral duty to the disabled.<sup>43</sup> Yet laws prohibiting discrimination against the disabled mask this point. Such laws and their advocates suggest that disabled persons are the victims of irrational discrimination, when the reality is that disabled persons are "disadvantaged . . . economically" not necessarily because people harbor animus towards them, or are consumed by "stereotypic assumptions."<sup>44</sup> To the contrary, people may well be charitably disposed towards the disabled, but may still discriminate against them when doing so is economically rational. Laws such as the ADA only make sense if premised on the view that the naturally occurring

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40. See George Orwell, *Politics and the English Language*, in 4 THE COLLECTED ESSAYS, JOURNALISM AND LECTURES OF GEORGE ORWELL 127, 136-37 (Sonia Orwell & Ian Angus eds., 1968) (criticizing the use of euphemisms).

41. Joseph Pereira, *Left Behind*, WALL ST. J., July 14, 2003, at A1.

42. *Id.*

43. The most famous contemporary articulation of this view can be found in JOHN RAWLS, A THEORY OF JUSTICE (1971). For an application of Rawls to the ADA, see *Elizabeth A. Pendo, Substantially Limited Justice?: The Possibilities and Limits of a New Rawlsian Analysis of Disability-Based Discrimination*, 77 ST. JOHN'S L. REV. 225 (2003).

44. 42 U.S.C. § 12101(a)(7) (2000).

charitable impulses towards the disabled are insufficient, and the power of government should be used to compel the able to assist the disabled.

### B. Taxes and Subsidies

Although we may applaud the ADA as a benevolently inspired measure to equalize the inequities meted out by nature, we cannot leave it at that. It is a basic economic principle that when something is taxed there will be less of it and when something is subsidized there will be more of it.<sup>45</sup> Stripping away the morally charged rhetoric that enshrouds the issue of disability rights and speaking in purely economic terms, the ADA and the panoply of similar state and federal legislation tax ability and subsidize disability. We may conclude that this policy is entirely appropriate, either because it spreads the cost of being disabled over all of society, or because it is a sort of insurance scheme that contingently benefits us all. Nonetheless, any government scheme that rewards disabilities inevitably creates incentives for people to define themselves as disabled.

There is already some awareness that a potential difficulty with racial affirmative action regimes is the ambiguity of the concept of race.<sup>46</sup> Given that most affirmative action programs are dependent upon self-reporting, there is the possibility that persons, recognizing an advantage in defining themselves as one race or another, will self-identify as the race perceived to be the beneficiary of a social program.<sup>47</sup> Nor is it clear why such behavior can truly be called “fraud” if race is, as it is now commonly argued, merely a “social construct.”<sup>48</sup> Assuming that race is not a biologically valid category, there would seem to be little, if anything, constraining people from choosing the race or ethnicity with which they feel most intellectually or emotionally aligned.

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45. Although generally true, there may be exceptions to this principle. See Terrence R. Chorvat, *Apologia for the Double Taxation of Corporate Income*, 38 WAKE FOREST L. REV. 239, 242 (2003) (“[I]mposing a higher tax on a risky asset actually results in more capital being allocated to the asset than would have been if no tax were assessed.”).

46. See generally Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994).

47. See *Malone v. Haley*, No. 88-339 (Sup. Jud. Ct. Suffolk County, Mass. July 25, 1989) (addressing the claims of two Irish Americans claimed to be African Americans when applying for positions with the Boston Fire Department and were later dismissed).

48. Cf. Robert S. Chang, *Critiquing “Race” and Its Uses: Critical Race Theory’s Uncompleted Argument*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 87, 90 (Francisco Valdes et al. eds., 2002) (referring to the “consensus among contemporary thinkers that race is socially constructed” and arguing that “to talk of ‘race’ as biological is to participate in a fiction”).

This problem would seem to be all the graver with respect to the often indeterminate distinction between the able and disabled. If one were to list the one hundred most important human qualities that determine this-worldly success, virtually all human beings are above average in a few, approximately average in most, and below average in some. Precisely why some qualities, and not others, merit special importance and protection is not immediately clear.

Let me offer a somewhat fanciful example. Bob Dole laid claim to the "disability" mantle because of a particular deficiency—to wit, one of his arms had withered as the result of a war injury. This was doubtless the source of great pain throughout his life, but the fact remains that he rose to the heights of political power. In his personal life, he had the good fortune to marry not one, but two intelligent and attractive women. By contrast, someone who was born grotesquely ugly would probably not be covered by the ADA. How does this make sense? There is an abundance of evidence that ugliness, in both men and women, impairs one's employment opportunities and poses grave problems for one's conjugal prospects.<sup>49</sup> Indeed, I will speculate here that many people would prefer to have one withered arm than to be born grotesquely ugly. Yet the Congress that enacted the ADA apparently thought a withered arm, but not ugliness, constituted a "disability." Indeed, in the findings that preface the ADA, Congress asserted that the persons it regarded as "disabled" were "political[ly] powerless."<sup>50</sup> In fact, at the time the ADA was enacted the Senate Majority Leader (Dole) and the House Majority Whip (Tony Coelho, who had epilepsy) would have likely qualified as disabled under the ADA. Yet ugly people truly are underrepresented in Congress, and they are left to fend for themselves, without the protections of the ADA.<sup>51</sup>

Laws such as the ADA reward those persons whose handicaps are legally defined as a "disability," and one should expect interest groups to lobby government and other institutions to expand the definition of disability to encompass wider and wider realms of handicaps. Given that the identification as "disabled" creates special

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49. Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1174, 1192 (1994).

50. 42 U.S.C. § 12101(a)(7) (2000).

51. See *Talanda v. KFC Nat'l Mgmt. Co.*, No. 94-C-1668, 1996 WL 413477, at \*6 (N.D. Ill. June 3, 1996) (rejecting in dicta the claim that having "ugly teeth" is a disability under the ADA); see also Gerald Panaro, *Is Hiring on the Basis of Appearance Illegal?*, BANKERSONLINE.COM, Sept. 22, 2003 ("[T]here are no cases holding that being 'plain,' 'unattractive' or downright 'ugly' is a disability within the meaning of ADA, protecting job applicants in those categories."), at [http://www.bankersonline.com/operations/gp\\_appearance.html](http://www.bankersonline.com/operations/gp_appearance.html).

entitlements for oneself and imposes duties on others, such as one’s school or employer, it would therefore seem to be necessary to ensure that there be clear guidelines separating the truly disabled, whatever that might mean, from those seeking merely to free-ride on a disability label. An important question, therefore, is what limiting principle exists to check the growth of disability?

### III. THE RISE OF LEARNING DISABILITIES

We turn to a particular species of disabilities—those associated with learning. We first need to get a handle on precisely what we’re talking about. As shown below, this is an almost impossible task: The basic definition of learning disability—referring to a “substantial discrepancy” between mental aptitude and academic performance—is almost hopelessly indeterminate. And the malleability of this definition has allowed swelling numbers to seek a diagnosis that is construed as entitling one to legal accommodations.

#### A. “*Learning Disabled*”: A Diagnosis in Search of a Disease

Although the term “learning disabilities” may be only four decades old,<sup>52</sup> the general phenomenon has been observed for centuries. In the late nineteenth century, for example, a British medical journal reported that a 14-year-old boy suffered from “congenital word blindness,” but was, according to his teacher, “the smartest lad in the school if instructions were entirely oral.”<sup>53</sup> The boy, who likely suffered from what would today be called dyslexia, displayed one of the trademarks of a learning disability—a discrepancy between his innate mental aptitude and his ability to

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52. The term dates to a 1963 academic conference on handicapped children. Dr. Samuel Kirk, *Proceedings of the Conference on the Exploration into the Problems of the Perceptually Handicapped Child* (1963), *quoted in* Nancy Larson & David Majsterek, *What are Learning Disabilities*, Council for Learning Disabilities, at <http://www.cldinternational.org/c/@NHp24qoYo1NCw/Pages/scienceP2.html> (last visited May 18, 2004). Larson and Majsterek quote Dr. Kirk as stating:

I have used the term “learning disabilities” to describe a group of children who have disorders in development in language, speech, reading, and associated communication skills needed for social interaction. In this group I do not include children who have sensory handicaps such as blindness or deafness, because we have methods of managing and training the deaf and the blind. I also exclude from this group children who have generalized mental retardation.

*Id.*

53. British Dyslexia Association, *Dyslexia Research Information* (quoting THE DYSLEXIA HANDBOOK 11-14 (1996) (quoting W. Pringle Morgan & M.B Seaford, *A Case of Congenital Word Blindness*, BRIT. MED. J., Nov. 7, 1896)) at <http://www.bdadyslexia.org.uk/main/information/extras/x02stats.asp> (last visited May 18, 2004).



marshal that intelligence in the performance of some discrete academic task, such as reading or writing.

The impetus for coining the technical term in 1963 and popularizing it soon thereafter was to lend scientific credibility to what was at its core a political movement.<sup>54</sup> As one psychiatrist notes, the term “learning disability” “originate[d] from advocacy movements rather than objective, scientifically researched hypotheses.”<sup>55</sup> Dr. Ross-Kidder explains:

Parents and educators were dealing with the unmet educational needs of seemingly intelligent children who had pronounced deficits in writing, reading, or other academic tasks mandated services. These academic deficits seemed to put the children at risk for school failure. . . . Yet if the children were not identified as significantly emotionally disturbed or mentally retarded they could not receive special education services.<sup>56</sup>

Thus, when Samuel Kirk, a psychologist in the field of special education, invented the term “learning disability” at an academic conference in 1963,<sup>57</sup> thereby expanding the medical diagnosis of a “disability,” the intent was to widen the circle of students entitled to special federal protection and funding. Success was soon achieved. The phrase “learning disabilities” entered the United States Code a little more than a decade later, in 1975, with the enactment of the Education for All Handicapped Act (EAHA).<sup>58</sup> The EAHA created a special education category for students whose ailments could be styled as “specific learning disabilities.”

The successor to the EAHA, the Individual with Disabilities Education Act<sup>59</sup> (a law dubiously touted by the acronym “IDEA”) contains the current standard legislative definition of a learning

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54. See Kenneth A. Kavale & Steven R. Forness, *The Politics of Learning Disabilities*, 21 LEARNING DISABILITY Q. 245, 245 (1998) (“The field of learning disabilities (LD) is inherently political. That politics is integral to the LD field should not be surprising since LD was, to a significant extent, a political creation.”).

55. Kathleen Ross-Kidder, *Interventions with Comorbid Emotional/Behavioral Disordered Children*, in CONTEMPORARY INTERDISCIPLINARY INTERVENTIONS FOR CHILDREN WITH EMOTIONAL/BEHAVIORAL DISORDERS 559, 560 (David A. Sabatino & Benjamin L. Brooks eds., 1998).

56. *Id.* at 560-61; see also DANIEL P. HALLAHAN & CECIL D. MERCER, LEARNING DISABILITIES: HISTORICAL PERSPECTIVES (2001), at 3 (arguing that after Kirk coined the term “learning disabilities,” “[p]arents and advocates then used this term as a central theme in their efforts to organize and gain services for LD students”), at <http://www.air.org/ldsummit/download/Hallahan%20Final%2008-10-01.pdf>; G. Reid Lyon et al., *Rethinking Learning Disabilities*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 259, 261 (2001) (“The term *learning disability* gained acceptance in the 1960s and 1970s because it addressed a critical need of concerned parents and professionals.”).

57. See *supra* note 52.

58. Pub. L. No. 94-142 (1975).

59. Pub. L. No. 101-476 (1990).

disability.<sup>60</sup> As a threshold matter, the IDEA teaches that a “learning disability” is “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.”<sup>61</sup> Yes, one initial indicator of a learning disability is an “imperfect ability to . . . think.”<sup>62</sup> Which raises the question: Who is the perfectly able and unimpaired citizen against whom others are to be judged? Compared with a Plato or a Bach, who among us is not imperfect and impaired?

Suffice it to say, some clarification is in order, and the IDEA rises to the challenge, or in any event tries to. The law excludes from any definition of learning disabilities those “problem[s] that [are] primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.”<sup>63</sup> Learning disabilities embrace only “such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.”<sup>64</sup>

Some readers may be seeking even further clarification. “This is all well and good,” you are saying to yourselves, “but what do ‘such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia’ have in common that merit their being lumped together and disaggregated from the broader set of cognitive imperfections?” The answer, at least traditionally, ran along the following lines: When a student suffers from a learning disability, he or she manifests a level of academic performance, either in one subject or several, that is unexpected because it is inconsistent with an observed level of intelligence.<sup>65</sup> By contrast, it is not unexpected for a mentally retarded child to have difficulty in mathematics, or for a hearing impaired child to have trouble reading aloud. The crux of a learning disability, then, is the

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60. Several federal agencies have borrowed definitional language from the IDEA. See 32 C.F.R. § 80.3zz (2003) (Department of Defense regulation defining “specific learning disabilities”); 34 C.F.R. § 300.7(c)(10) (2003) (Department of Education regulation defining “specific learning disabilities”); 45 C.F.R. § 1308.14 (2003) (Health and Human Services regulation defining “specific learning disabilities”).

61. 20 U.S.C. § 1401(26)(A) (2000).

62. *Id.*

63. 20 U.S.C. § 1401(26)(C).

64. 20 U.S.C. § 1401(26)(B).

65. See Lyon et al., *supra* note 56, at 261 (“The term *learning disability* (LD) is traditionally synonymous with the concept of *unexpected underachievement*—specifically, students who do not listen, speak, read, write, or develop mathematical skills commensurate with their potential, even though there has been an adequate opportunity to learn.”).

existence of an unexplained learning discrepancy—academic underachievement that cannot be explained by an observable physical or mental handicap.<sup>66</sup> Along these lines, one federal regulation defines a learning disability as a “severe discrepancy between achievement of developmental milestones and intellectual ability in one or more of these areas: oral expression, listening comprehension, pre-reading, pre-writing and pre-mathematics.”<sup>67</sup> In other words, if an otherwise bright child reads slowly, writes illegibly, or computes inaccurately, one speculates that the cause is a hidden brain abnormality. Like a planet whose gravitational effect is detected before it is actually seen, a brain abnormality is posited as the cause of a perceived academic deficiency in the absence of direct evidence that any abnormality exists.

The traditional approach in diagnosing a student with an LD has been to identify a discrepancy between mental aptitude, measured by an IQ test, and academic achievement, measured either by school performance or by an achievement exam. Alternatively, students with discrepancies in their Verbal and Performance IQ “subtest” scores compared with their overall score might be diagnosed with some form of learning disability.<sup>68</sup> But the difficulty with either approach is readily apparent: Many perfectly “normal” human beings have

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66. Generally speaking, of course, teachers or parents make such a diagnosis, but a successful young lawyer related his own amusing story to me. When he was in second grade, he noticed that an unintelligent classmate was reading a more advanced story than he was. Puzzled, and recognizing that something was amiss, he went home and announced to his mother, “Something’s wrong with me. You’ve got to have me tested.” Within a month, he was diagnosed with dyslexia. Incidentally, he was never accommodated on any standardized exam. In fact, he soon came to believe that reading only about one-third as quickly as his peers was an advantage, for it forced him to focus on, and closely consider, what an author is saying, rather than simply skimming for the “gist.” As he notes, such habits are particularly valuable for a lawyer.

67. 45 C.F.R. § 1308.14 (2003).

68. See, e.g., Linda Elksnin et al., Council for Learning Disabilities, Learning Disabilities Roundtable: Seeking Common Ground Priority Issues Responses (2001) (“[C]hildren with suspected learning disabilities . . . frequently exhibit intracognitive differences that can obscure overall abilities.”), at <http://www.cldinternational.org/c/@eiQATcwEhWQAU/Pages/whitepaper.html>; Disability Resource Center, California Polytechnic State University, Guidelines for Assessment and Accommodation of Students with Learning Disabilities (noting that a diagnostic report must include “[c]learly described intracognitive and/or aptitude-achievement discrepancies”), at <http://drc.calpoly.edu/assessment/ld.html> (last visited May 18, 2004). Yet another discrepancy-based approach has been to determine whether a student’s achievement substantially diverges from the achievement expected of students at his or her school grade level. Such an approach is embraced by a dwindling minority of states. See KELMAN & LESTER, *supra* note 12, at 20 (“The use of grade-expectation inclusionary definitions are decidedly on the wane; only two states defined discrepancies in this fashion in 1989-90, while seven states so defined them in 1980.”). The grade-expectation approach fundamentally conflicts with the essential idea of learning disabilities; for if a not especially bright student reads or writes not particularly well, there is nothing unexpected in this academic deficit.

considerable disparities in their mental abilities.<sup>69</sup> There is nothing abnormal about such variations.<sup>70</sup> If *any* discrepancy qualified as a learning disability, a majority of Americans could sign up for special treatment.

Thus, to limit the definition of “learning disability” in some meaningful way, the ability-achievement disparity must be significant, or, as the federal regulation puts it, “severe.”<sup>71</sup> Psychologists and educators, on a similar note, traditionally insist that the discrepancy must be “substantial” to qualify as a learning disability, and define “substantial” as an ability-achievement discrepancy in excess of 1.5 standard deviations.<sup>72</sup> For example, a student who scored a 145 on an IQ test, which is 3 standard deviations above the mean,<sup>73</sup> but whose academic achievement is simply average, consistent with an IQ of 100, would be a prime candidate for an LD diagnosis.<sup>74</sup> But once one insists on a “substantial” or “severe” discrepancy, LD would appear to be a truly unusual diagnosis, and, somewhat ironically, it would be disproportionately an ailment

69. On average, people reading this Article would be expected to do better on verbal components of mental aptitude tests than on the visual-spatial and nonverbal components. By contrast, architects and automobile mechanics are likely better at visual-spatial tests than at verbal tests. My assumption is that people gravitate towards what they are good (or better) at.

70. One set of researchers concluded that 9-point discrepancies in mental aptitude subtests were relatively common, and did not necessarily indicate any learning disability. Cecil R. Reynolds & Alan S. Kaufman, *Clinical Assessment of Children's Intelligence with the Wechsler Scales*, in HANDBOOK OF INTELLIGENCE 601, 601-33 (Benjamin B. Wolman ed., 1985).

71. 45 C.F.R. § 1308.14.

72. See New Mexico Board of Bar Examiners, Form C: Reasonable Testing Accommodations; Supplemental Documentation for Learning Disabilities (“An applicant with a specific learning disability must . . . identify an aptitude-achievement discrepancy of 1.5 standard deviations.”), <http://www.nmexam.org/forms/adaformC.htm> (last visited May 18, 2004); Hampden-Sydney College, Learning Disability Policy (“Normally, the difference between the student's IQ and his achievement must be at least 1.5 standard deviations and his achievement must fall below the average range of ability.”), <http://www.hsc.edu/academics/success/LDPolicy.html> (last visited May 18, 2004); University of Baltimore School of Law, Rules and Procedures: Policy on Documentation of Physical, Mental, and Learning Disabilities (noting that one of the four requirements for diagnosis of a learning disability is “the presen[ce] of a cognitive-achievement discrepancy or an intra-cognitive discrepancy indicated by a score on a standardized test of achievement which is 1.5 standard deviations or more below the level corresponding to a student's sub-scale of full-scale IQ”), <http://law.ubalt.edu/rules/disability2.html> (last visited May 18, 2004).

73. IQ tests are normed to have 100 as the mean, with one standard deviation equal to 15-16 points. See DEBORAH L. RUF, STANFORD-BINET INTELLIGENCE SCALES, FIFTH EDITION ASSESSMENT SERVICES BULLETIN NUMBER 3, *Use of the SB5 in the Assessment of High Abilities*, 3-5 (2003), [http://www.riverpub.com/products/clinical/sbis5/SB5\\_ASB\\_3.pdf](http://www.riverpub.com/products/clinical/sbis5/SB5_ASB_3.pdf).

74. Of course, it is also possible that a gifted student is bored by teachers less intelligent than he is. Especially in lower school grades, or before “honors” or AP classes are offered to excite his interest, such a student may be perceived by teachers as “oppositional and underachieving.” *Id.* at 16.

afflicting people with high IQs.<sup>75</sup> For students within the normal IQ range (90-110), it is unlikely that any discrepancy will stretch to 1.5 standard deviations.<sup>76</sup> Even for relatively gifted students, as Professors Kelman and Lester argue, the phenomenon of “regression to the mean” makes it quite rare that a genuinely unexpected discrepancy of 1.5 standard deviations will exist.<sup>77</sup> As one moves farther and farther along the right tail of the human intelligence curve, however, large discrepancies are more common.<sup>78</sup> It would not be surprising if a person whose overall IQ was 175 (extreme genius level) has a verbal IQ (VIQ) of 160 and a nonverbal IQ (NVIQ) of

75. See, e.g., Mary Washington College, *Disabilities Services: A Handbook for Instructors* (“Students with learning disabilities have average to superior intellectual ability.”), [http://www.mwc.edu/ods/InstructorResources/Appendix\\_C.htm](http://www.mwc.edu/ods/InstructorResources/Appendix_C.htm) (last visited May 18, 2004).

76. Consider a student whose IQ is 100, or perfectly normal. For her to qualify as learning disabled, her achievement scores must be consistent with a student whose IQ is 78. See UCLA/Wallis Foundation Learning Disabilities, *Learning Disabilities—Diagnoses* (noting that in California, a discrepancy of 1.5 standard deviations is required for a finding of a learning disability, and that therefore “[i]f a child has an average IQ of 100, then he or she must have a standard score on reading, math, or written expression of 78 or below to qualify as LD in California public schools”), at [http://www.mentalhealth.ucla.edu/projects/ld/dev/ld\\_diagnosis.html](http://www.mentalhealth.ucla.edu/projects/ld/dev/ld_diagnosis.html) (last visited May 18, 2004). But the difference between a 100 and a 78 is enormous, at least when one considers those scores as percentiles of human performance: A 100 IQ is 50th percentile; a 78 IQ is about 7th percentile. See *IQ Percentile and Rarity Chart*, at <http://members.shaw.ca/delajara/IQtable.html> (last visited May 18, 2004).

77. KELMAN & LESTER, *supra* note 12, at 21. Keep in mind that *ordinarily* having an IQ of 130 (or 2 standard deviations above the mean) does not mean that one’s performance on an achievement test will also be 2 standard deviations above the mean. Assuming a concurrent validity coefficient of .7, the student’s expected achievement score would be 1.4 (or  $2 \times .7$ ) standard deviations above the mean, corresponding to a test score of about 121. *Id.* The Learning Disabilities Association of Ontario provides the following table:

<i>IQ Score</i>	<i>Predicted Score on Achievement Test</i>
140	128
130	121
120	114
110	107
100	100

Learning Disabilities Ass’n of Ontario, *Recommended Practices for Assessment, Diagnosis, and Documentation of Learning Disabilities*, [http://www.ldao.on.ca/ldao\\_projects/pei/assessment/supporting.htm](http://www.ldao.on.ca/ldao_projects/pei/assessment/supporting.htm) (last visited May 18, 2004). Thus, a student with an IQ of 130 would only evidence a truly unexpected “substantial discrepancy” if his achievement score plummeted all the way to a 97 to 99 (which would be 1.5 standard deviations below 121). See KELMAN & LESTER, *supra* note 12, at 21; see also State of Tennessee, *Resource Packet, Assessment of Specific Learning Disabilities*, at 4 (noting that the expected achievement level of a student with an IQ of 130 is 121), at <http://www.state.tn.us/education/speced/sesldformspkt.pdf> (last visited May 18, 2004).

78. A recent Stanford-Binet publication on the assessment of students with high abilities offered the IQ subtest breakouts for four gifted children. With respect to three of the four children, there were wide gaps (between one and two standard deviations) in their performance on the verbal IQ (VIQ) and the nonverbal IQ (NVIQ) components. See Ruf, *supra* note 73, at 19 (test breakouts of “Albert,” “Vanessa,” and “Sally”).

190.<sup>79</sup> The bizarre conclusion is that extraordinarily gifted people would seem to have a far better chance of qualifying as “learning disabled,” and therefore eligible for special federal protection, than the ordinary run of people.<sup>80</sup>

Starting around 1990, dissatisfaction with the ability-achievement discrepancy model motivated some psychologists to consider adopting another approach to detecting learning disabilities.<sup>81</sup> A few psychologists argued that students suffering from learning disabilities will have suppressed IQ scores, “thus concealing an IQ-performance disparity even when it is present.”<sup>82</sup> Others criticized the core idea that an IQ test measures mental aptitude, questioning its use to establish a student’s baseline academic ability.<sup>83</sup> Focusing on reading disabilities, researchers argued that some students who did not evidence an ability-achievement discrepancy nonetheless suffered from the sorts of ailments, involving word decoding and phonological processes, that characterize dyslexia.<sup>84</sup> Yet if one were to abandon the quasi-scientific rigor of the ability-

79. The difference between a 160 and a 190, measured as percentiles, is minute. A 160 is 99.9968313965th percentile; a 190 is 99.9999999010th percentile. See IQ Percentile and Rarity Chart, *supra* note 76.

80. There are a slew of recent hooks addressing the “needs” of simultaneously gifted and learning disabled children. See, e.g., MARLENE BIRELY, CROSSOVER CHILDREN: A SOURCEBOOK FOR HELPING CHILDREN WHO ARE GIFTED AND LEARNING DISABLED (2d ed. 1995); see also Learning Disabilities Association, Advocacy Memo: For Your Information # 1-96 (“[A] student cannot be excluded from consideration of eligibility for special education services solely on the basis of a high IQ; no child’s IQ can be too high for that child to be considered for eligibility for special education services—even an intellectually gifted student may be considered for eligibility for special education.”), at [http://www.ldonline.org/ld\\_indepth/gt\\_ld/lda\\_advocacymemo.html](http://www.ldonline.org/ld_indepth/gt_ld/lda_advocacymemo.html) (last visited May 18, 2004).

81. Linda Siegel, a professor in the Department of Educational Psychology and Special Education at the University of British Columbia, has been one of the leaders of this trend. See, e.g., Linda S. Siegel, *Evidence that IQ Scores Are Irrelevant to the Definition and Analysis of Reading Disability*, 42 CANADIAN J. PSYCHOL. 201 (1988); Linda S. Siegel, *IQ Is Irrelevant to the Definition of Learning Disabilities*, 22 J. LEARNING DISABILITIES 469 (1989); Keith E. Stanovich & Linda S. Siegel, *Discrepancy Definitions of Reading Disability: Has Intelligence Led Us Astray?*, 26 READING RES. Q. 7 (1991).

82. KELMAN & LESTER, *supra* note 12, at 21 (summarizing criticisms of the discrepancy model of LD).

83. See, e.g., Linda S. Siegel, *Issues in the Definition and Diagnosis of Learning Disabilities: A Perspective on Guckenberger v. Boston University*, 32 J. LEARNING DISABILITIES 304, 311 (1999) (criticizing the use of IQ tests in the assessment of learning disabilities and arguing that IQ tests “measure, for the most part, what a person has learned, not what he is capable of doing in the future”); see also STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 199-212 (criticizing IQ tests as unreliable).

84. See Louise Spear-Swerling, *The Trouble with Reading Disability* (“Researchers have shown many similarities between poor readers who have discrepancies and poor readers who lack discrepancies . . . Both groups appear to have reading problems that center on word decoding and phonological processes.”), at [http://www.ldonline.org/ld\\_indepth/reading/swerling.html](http://www.ldonline.org/ld_indepth/reading/swerling.html) (last visited May 18, 2004).

achievement model, it is unclear whether LD would have any claim to being a scientific, as opposed to a merely political, category.

Advocates insist, however, that LD is a scientific—and therefore testable and falsifiable—condition, which results from abnormal hard-wiring in the brains of those afflicted. As one LD advocate group tersely puts it, “Learning disabilities are neurobiological in nature.”<sup>85</sup> There is already an extensive literature considering whether one common LD, dyslexia, can be traced to observable brain abnormalities. Some studies, which have not escaped criticism, purport to show that autopsies, MRIs, and EEGs of the brains of patients with dyslexia reveal certain peculiarities.<sup>86</sup> What is striking, however, is that scholars advancing a neurobiological cause for dyslexia have apparently not conducted a double-blind experiment to prove their point: Perform MRIs on 100 normal persons and 100 persons diagnosed with dyslexia. Randomly present the MRIs to scientists and ask them to identify, on the basis of the MRI alone, who has dyslexia and who doesn’t. Simply put, MRIs and EEGs are not used to diagnose dyslexia; rather, they are sparingly performed post hoc to correlate an already performed diagnosis with an alleged brain abnormality.<sup>87</sup>

Moreover, dyslexia is only one of over a dozen conditions now lumped together under the umbrella term LD.<sup>88</sup> For the majority of these conditions, scientists have only tentatively, if at all, claimed to have discerned any related neuroanatomical peculiarities. Some of the better known LDs are dyslexia (“unexpected difficulty [in] learning to read despite intelligence, motivation and education”),<sup>89</sup> dysgraphia (difficulty in writing legibly),<sup>90</sup> dyspraxia (difficulty in articulating

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85. Christina Fiedorwicz, *Neurobiological Basis of Learning Disabilities: An Overview* (1999), <http://www.ldac-taac.ca/english/research/neurobio.htm>.

86. See Andrew Weis, *Jumping to Conclusions in “Jumping the Queue,”* 51 STAN. L. REV. 183, 189 n.29 (1998) (reviewing KELMAN & LESTER, *supra* note 12) (citing scientific studies purporting to show “distinct anatomical differences between the brains of individuals with and without LD”).

87. Curiously, if MRIs could pinpoint the cause of dyslexia, the very notion of learning disability would need to be reconsidered; for then LD would no longer be an “unexplained learning failure.” Thus, LD advocates walk a perilously thin line—insisting that LD is on the one hand an unexplained discrepancy in academic performance, and then pirouetting and claiming they *can* explain it, thus purportedly establishing the scientific nature of the diagnosis.

88. Lyon et al., *supra* note 56, at 264 (“LD is not a single disability but a general category of special education composed of disabilities in any one or a combination of seven skill domains: (1) listening; (2) speaking; (3) basic reading (decoding and word recognition); (4) reading comprehension; (5) arithmetic calculation; (6) mathematics reasoning; and (7) written expression.”).

89. See Sally E. Shaywitz, *Dyslexia*, SCI. AM., Nov. 1996, at 98, 99.

90. See Richard Cohen, *Cursive, Foiled Again*, WASH. POST, Nov. 7, 1993, at W5 (including autobiographical reflections of a newspaper columnist suffering from dysgraphia).

thoughts),<sup>91</sup> dyscalculia (difficulty in math),<sup>92</sup> dysrationalia (difficulty in thinking),<sup>93</sup> and Attention-Deficit/Hyperactivity Disorder (ADD/ADHD) (a condition characterized by inattention, impulsivity, or hyperactivity).<sup>94</sup> Then there are the disabilities that have yet to acquire a Latinate title or a medical acronym, such as “language-based disability”<sup>95</sup> and “auditory processing disability.”<sup>96</sup> It bears emphasizing that the above are only a sampling of the seemingly endless list of conditions now recognized by many educational institutions as learning disabilities that entitle students to special accommodations. Students at Stanford University for example, can seek accommodations for “attention deficits,” “memory deficits,” and “reasoning deficits.”<sup>97</sup>

Furthermore, virtually all major colleges have “offices” devoted to catering to the needs of the learning disabled, and their elaborate websites advertise for customers by identifying common “characteristics” of LD students. The lists typically stray well beyond simple and old-fashioned items such as “Johnny is bad at math,” to include deficits in such rare talents as “organizational and study skills.” The Office of Disability Services at the University of Buffalo,

91. See *Language Development Is Gene-Based, Study Says*, WASH. POST, Jan. 27, 1998, at A5 (quoting a geneticist as saying, “It’s a fancy word for not being able to get the words out and be intelligible”).

92. See AMERICAN PSYCHIATRIC ASSOCIATION: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 50 (4th ed. 1994) [hereinafter referred to as DSM-IV]. DSM-IV refers to this as “Mathematics Disorder.”

93. See Keith E. Stanovich, *Dysrationalia: A New Specific Learning Disability*, 26 J. LEARNING DISABILITIES 501 (1993).

94. See DSM-IV, *supra* note 92, at 78-82.

95. See *Monterey Peninsula Unified Sch. Dist. v. Giammanco*, No. C 94-20782 JW, 1995 WL 476610, at \*4 (N.D. Cal. Aug. 8, 1995).

96. See *Soignier v. Am. Bd. of Plastic Surgery*, 92 F.3d 547, 549 (7th Cir. 1996).

97. As Kelman and Lester note, quoting official Stanford guidelines, students can pick from a capacious LD menu:

Dyslexia (Reading): Difficulty with any task in which reading is an essential component

Dyscalculia (Math): Difficulty with calculations; difficulty with rapid processing of math facts.

Attention Deficits: Difficulty concentrating for long periods of time; easily distracted; difficulty organizing work and budgeting time; problems staying at a desk or task for long periods of time.

Memory deficits: Difficulty remembering problems retaining [sic] numerical information such as multiplication tables, dates, etc.; difficulty remembering rote facts.

Reasoning deficit: Trouble thinking in an orderly logical way; difficulty prioritizing and sequencing tasks; difficulty applying learned skill to a new task.



for example, suggests that any of the following may hint at a learning disability:

[1] Time management difficulties. [2] Slow to start and complete tasks. [3] Repeated inability, on a day-to-day basis, to recall what has been taught. [4] Difficulty following oral and written directions. [5] Lack of overall organization in written notes and compositions. [6] Demonstrates short attention span during lectures. [7] Inefficient use of library reference materials.<sup>98</sup>

If symptoms such as “slow to start and complete tasks,” “short attention span during lectures,” and “inefficient use of library reference materials” are tip-offs of a learning disability, then it may soon be appropriate to change the default position: Perhaps we should assume that all Americans are learning *disabled* in the absence of compelling evidence to the contrary.

At present, the field of study launched forty years ago when Samuel Kirk coined the phrase “learning disabilities” is in disarray.<sup>99</sup> Dissatisfaction with the ability-achievement discrepancy model<sup>100</sup> has yet to generate any attractive alternatives, and there is today nothing remotely approaching a consensus among educators in the business of diagnosing LD.<sup>101</sup> Indeed, some educators, still in the minority, have announced disgust with the growing fixation on LD, which since its inception has served as a “sociological sponge to wipe up the spills of general education.”<sup>102</sup> The core difficulty for the LD lobby may be that it was originally, and is still today, a political movement that only aspires to the dignity of a scientific enterprise. As two prominent figures in the LD field have conceded:

An objective assessment of the presence or absence of LD is replaced by the presumption of LD. The fact of LD, which should primarily be a scientific decision, becomes secondary

98. University of Buffalo, Services for Learning Disabled Students, at [http://codi.buffalo.edu/graph\\_based/colleges/ub/ldb.html](http://codi.buffalo.edu/graph_based/colleges/ub/ldb.html) (last visited May 18, 2004).

99. See generally Lyon et al., *supra* note 56.

100. See Hallahan & Mercer, *supra* note 56, at 6-7. Hallahan and Mercer summarize the criticism of the discrepancy model as follows:

Many researchers have begun to question the dependence on the discrepancy concept, suggesting the following: the studies leading to the discrepancy approach were flawed; the IQ scores of LD students with reading disabilities may be underestimated because of their reading disabilities; the discrepancy approach makes it very difficult to identify children early enough for preventive interventions; and researchers have been unable to discriminate between students with a discrepancy and students with low reading achievement who have no discrepancy.

*Id.*

101. For example, states vary widely in the percentages of students diagnosed with learning disabilities, strongly suggesting that different standards are being applied. See KELMAN & LESTER, *supra* note 12, at 23 (noting that in 1990, 1.69 percent of students were diagnosed with LD in Georgia, but 5.8 percent in Rhode Island).

102. Tyce Palmaffy, *The Evolution of the Federal Role, in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, *supra* note 56, at 2 (quoting Dr. G. Reid Lyon).

to the desire for providing services. Action begins at the point of proclaiming a student as LD, with limited attention directed at the validity of the designation.<sup>103</sup>

### B. Attention Deficit Disorders

An interlude on the congeries of conditions lumped together under such acronyms as ADD and ADHD is in order here. Such attention-deficit conditions are sometimes distinguished from learning disabilities.<sup>104</sup> To be sure, there is great degree of overlap—estimated at anywhere from 10 percent to 100 percent, or roughly the level of precision one comes to expect in this field of study<sup>105</sup>—and whichever diagnosis (LD or ADD/ADHD) applies, students may be eligible for educational accommodations administered by catch-all “Learning Disabilities” offices.<sup>106</sup>

Given the prevalence of “ADD/ADHD” in the contemporary discourse of professional educators, it is striking how new such conditions are, or at least how new they are as formal psychological conditions. In 1980, the DSM-III introduced the terms ADD/H (attention deficit disorder with hyperactivity) and ADD/W (attention deficit disorder without hyperactivity). Seven years later, in 1987, the DSM-III-R yoked the two under the banner ADHD. Another seven years later, in the DSM-IV, psychiatrists split ADHD into 3

103. See Kavale & Forness, *supra* note 54, at 247.

104. Attention Deficit Disorder: Frequently Asked Questions [hereinafter Frequently Asked Questions] (“Technically, an attention deficit disorder, by itself, is not considered a specific learning disability or other special education handicap as defined by Federal Special Education regulations.”), at [http://www.hopkins.k12.mn.us/pages/north/ld\\_research/add.htm](http://www.hopkins.k12.mn.us/pages/north/ld_research/add.htm) (last visited May 18, 2004); University of Delaware Academic Services Center, Learning Disabilities and AD/HD Services (“Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder (ADHD) are conditions that can interfere with learning, but they are not technically learning disabilities (unlike those with learning disabilities, people with ADD have achievement scores consistent with their IQ scores). It is possible, however, for a person to have both a learning disability and ADD/ADHD; both disabilities are covered by the ADA.”), at <http://www.udel.edu/ASC/Adhdsr2.htm> (last visited May 18, 2004).

105. See American Academy of Pediatrics, *Clinical Practice Guideline: Diagnosis and Evaluation of the Child with Attention Deficit/Hyperactivity Disorder*, 105 PEDIATRICS 1158, 1167 (2000) [hereinafter, *Diagnosis and Evaluation of the Child*] (“Rates of learning disabilities that coexist with ADHD in settings other than primary care have been reported to range from 12% to 60%.”), <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;105/5/1158.pdf>; DyslexiaOnline, Attention Deficit Disorder (“ADD symptoms occur in 90% of dyslexics characterized by only inner-ear neurological signs diagnostic of an inner-ear dysfunction.”), at <http://www.dyslexiaonline.com/information/add.html>; Frequently Asked Questions, *supra* note 104 (“[S]ince AD/HD students experience many, if not all of the same processing difficulties that are experienced by LD students, they often are found eligible for special education services under the SLD (specific learning disability) classification.”).

106. The two ailments are often considered together. See, e.g., SUZANNE H. STEVENS, *THE LD CHILD AND THE ADD CHILD: WAYS PARENTS AND PROFESSIONALS CAN HELP* (1996).

subtypes—with hyperactivity (ADHD/HI), with inattention (ADHD/I) and with both (ADHD/C).<sup>107</sup> As with LD, political motivations may have contributed to the creation of these formal medical conditions. In 1990, one decade after the DSM-III coined the acronym ADD, Congress enacted the aforementioned “IDEA,”<sup>108</sup> which makes children diagnosed with attention-deficit disorders eligible for special accommodations.

With respect to the miscellaneous attention-deficit conditions, common symptoms include difficulty concentrating, inattentiveness, impulsivity, and hyperactivity.<sup>109</sup> Yet for many adolescent students, especially boys,<sup>110</sup> with surging hormones interfering with ordinary thought processes, it is often hard to give all, or even any, of their attention to a teacher; and the very idea of “sitting still” is an agony. What is the difference, then, between the ordinary mix of mind-wandering, exuberance, and boredom that is part and parcel of “growing up,” and the abnormal inattentiveness and jitteriness that merits accommodation and even medication? The answer is opaque, and even the so-called experts in the field regularly concede that a precise definition of ADD/ADHD cannot be formulated.<sup>111</sup> Given that, how are diagnoses made? Consider the following:

Most children who are labeled ADD (with no mention of learning disabilities) have been diagnosed by a process that merely requires the teacher and the parents to fill out a

107. Ken Livingston, *Ritalin: Miracle Drug or Copout*, 1997 PUB. INT. 3, 10 (describing the genealogy of ADHD). Tracing the Byzantine relationships among the various medical acronyms bandied about effortlessly by the modern educator is truly a test of attentiveness. Consider this passage:

Another condition closely allied to LD [learning disabilities] with a sizable literature is HA [hyperactivity]. The diagnosis of HA is vague and spans a wide continuum of conditions and terminology, but such distinctions do not necessarily signify actual differences in the target populations. Consequently, MBD [minimal brain dysfunction] and ADD [attention deficit disorder] are subsumed here under the general rubric of HA, because most of the studies addressed subjects with this diagnosis, although the term preferred more recently is ADD. Ever since Clements' (1966) report, these conditions have been linked with LD, and primary correlative symptoms. Much like RD [reading disabilities], HA is common among LD students.

KENNETH A. KAVALE & STEVEN R. FORNESS, *THE NATURE OF LEARNING DISABILITIES* 307-08 (1995).

108. Pub. L. No. 101-476 (1990); see *supra* notes 59-64 and accompanying text.

109. See Suzanne Wilhelm, *Accommodating Learning Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 223 (2003) (“[C]ore symptoms of ADHD are inattention and impulsiveness, both of which are basic human characteristics.”).

110. Boys are anywhere from three to ten times more likely to be diagnosed with attention-deficit disorders than girls. See Joseph Biederman et al., *Clinical Correlates of ADHD in Females: Findings From a Large Group of Girls Ascertained from Pediatric and Psychiatric Referral Sources*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 966 (1999).

111. See *Diagnosis and Evaluation of the Child*, *supra* note 105, at 1158, 1162 (“Given the lack of methods to confirm the diagnosis through other means, it is important to recognize the limitations of the DSM-IV definition.”).

questionnaire based on their observations. This quick and reasonably priced type of evaluation is often initiated by the school. Once the survey questions have been answered, there is usually enough evidence of an attention deficit disorder to convince the family physician that a prescription for stimulant medication is called for. Teachers are usually greatly relieved when a youngster’s rambunctious behavior tones down in response to medication. *When the drugs have the desired effect, that is considered proof that the child does indeed have an attention deficit disorder.*<sup>112</sup>

It is hard to read this paragraph without a certain measure of horror, not least because the author of the passage, a long-time veteran in the ADD/LD trenches, is apparently oblivious of how horrific the current state of affairs is in LD diagnosis. The passage unwittingly reveals the incentives of overworked teachers to diagnose troublesome students as ADD/ADHD, and thereby medicate them into some preferred condition.<sup>113</sup> Furthermore, school districts, which stand to receive \$600 in federal funds per year for each learning disabled student, confront financial pressures to increase their LD numbers.<sup>114</sup>

The typical survey questions used to diagnose children with ADD/ADHD inquire into whether a child “is happy in school?,” “often does not seem to listen when spoken to directly,” “is often easily distracted by extraneous stimuli,” and “often has difficulty awaiting turn.”<sup>115</sup> Dimly aware that many, if not most, children would answer yes to such questions, the author of the above passage notes how ADD/ADHD diagnoses are generally confirmed “[w]hen the drugs [usually Ritalin] have the desired effect.”<sup>116</sup> The problem with this statement is that Ritalin (or methylphenidate), just like most amphetamines, has the “desired effect” on many people: It greatly enhances one’s energy level and dramatically promotes one’s ability to concentrate on specific tasks, regardless of whether one has any form of mental disorder.<sup>117</sup>

112. STEVENS, *supra* note 106, at 176-77 (emphasis added).

113. See Gary Null, *The Drugging of Our Children*, (“Another drawback of ratings questionnaires is that parents and teachers often have a vested interest in the results. Even with the best of intentions, they may, without realizing it, want a child put on Ritalin, believing that it will help, or that it will make their own lives easier.”), at <http://www.garynull.com/Documents/ADHD/DruggingOurChildren2.htm> (last visited May 18, 2004).

114. Behavioral drugs in schools: Questions and Answers: Hearing before the Subcomm. on Oversight & Investigations of the House Comm. on Educ. and the Workforce, 106th Cong. 13-14 (2000) (testimony of Patti Johnson, Colorado State Board of Education) (discussing the “financial incentives [that] exist for schools to label children” with ADHD).

115. *Diagnosis and Evaluation of the Child*, *supra* note 105, at 1160.

116. STEVENS, *supra* note 106, at 77.

117. In a 1995 background paper, the Drug Enforcement Agency prepared a background paper on the substance in 1995, and it concluded that “Methylphenidate is a Schedule II stimulant which is structurally and pharmacologically similar to the amphetamines. . . . Methylphenidate is a Schedule II central nervous system (CNS) stimulant and shares many of the pharmacologic effects of amphetamine, methamphetamine, and cocaine. Drug Enforcement Agency, Background Paper on Methylphenidate 6 (1995); see also Livingston, *supra* note 107, at

If ADD/ADHD was originally conceived as a childhood ailment, it has spread to (apparently previously undiagnosed) teenagers and adults.<sup>118</sup> The survey questions posed to adults to diagnose ADD/ADHD are as hackneyed as the questions posed to children, vaguely inquiring as to one's impulsivity and attentiveness.<sup>119</sup> Those diagnosed with adult ADD/ADHD are afforded access to performance-enhancing drugs such as Ritalin. The issue recently captured wider publicity when it emerged, in October 2003, that a doctor associated with the University of Washington athletic department had prescribed Ritalin and other performance-enhancing drugs to athletes who had not been formally diagnosed as ADD/ADHD.<sup>120</sup> In fact, students have for some time recognized that Ritalin stimulates the brain and promotes alertness more than substitutes such as caffeine and nicotine,<sup>121</sup> and the demand for Ritalin is reported to surge during

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9-10 ("[E]ven if you have never been diagnosed as having a problem paying attention, many of these drugs will improve your focus and performance. The fact that a child is more attentive while taking Ritalin doesn't then mean that he has a documentable mental disorder."). Numerous laboratory studies have already demonstrated the similarities between Ritalin, cocaine and amphetamines. See Mary Eberstadt, *Why Ritalin Rules*, POLY REV., Apr.-May 1999 ("[L]ab animals given the choice to self-administer comparative doses of cocaine and Ritalin do not favor one over another and [ ] a similar study showed monkeys would work in the same fashion for Ritalin as they would for cocaine."), <http://www.policyreview.org/apr99/eberstadt.html>. Ritalin is largely a North American drug. See Null, *supra* note 113 ("The use of Ritalin and similar prescriptions is overwhelmingly concentrated in the United States and Canada. In fact, these two countries account for 96 percent of their use throughout the world, and children in the U.S. have been estimated to be from 10 to 50 times more likely to be labeled as having ADD than their counterparts in Britain or France.").

118. Consider the proselytizing adult ADD website <http://www.adultadd.com/index.jsp>, funded by Eli Lilly, which includes a helpful questionnaire to self-diagnose ADD.

119. A typical 100-question survey for adults includes such probing questions as, "Do you feel that you fail to live up to your potential?," "Have you ever been described as needy or insatiable?" and my favorite, "Did you have trouble paying attention long enough to read this entire questionnaire?" See EDWARD M. HALLOWELL & JOHN J. RATEY, *DRIVEN TO DISTRACTION* 209-14 (1994).

120. See Angelo Bruscas, *UW Scandal Stuns NCAA Expert*, SEATTLE POST-INTELLIGENCER, Oct. 24, 2003, at A1. Ritalin is banned by the International Olympic Committee. Sharon Ginn, *Common Medicines Can Be Costly*, ST. PETERSBURG TIMES, Feb. 3, 2002, at 6C; see also Robyn Norwood, *So That's What They Mean by Speed Chess*, L.A. TIMES, Aug. 13, 2001, at 4-2 (noting that drug tests are now administered before chess tournaments to determine the presence of amphetamines and Ritalin). After initially following suit, the NCAA permitted students who have been diagnosed with ADHD to use Ritalin. See Eberstadt, *supra* note 117. In any event, the principal lesson likely drawn from the Washington scandal is that an athletic department should have students diagnosed with ADHD before dispensing the drug.

121. The phenomenon has not escaped the attention of campus newspapers. See, e.g., Christopher Tenant, *The Ritalin Racket*, STUDENT.COM, at <http://articles.student.com/article/ritalin> (last visited May 18, 2004); Ben Howard, *Ritalin Rampage*, COLLEGE 101, at <http://www.journalism.indiana.edu/gallery/student/j201spring02/rabeam/health/blieberm> (last visited May 18, 2004); Chris Harris, *Drug Cocktails Are the New Campus High*, HARTFORD ADVOCATE, at <http://old.hartfordadvocate.com/articles/pharming.html>. Studies suggest that at

exam periods.<sup>122</sup> To the extent that such accounts can be credited, the situation on American campuses may take on the character of an “arms race,” with students fearful that failing to secure an ADD/ADHD diagnosis (and thereby Ritalin) puts them at a disadvantage compared with other students. As the President’s Committee on Bioethics has written, “In a competitive society, where people ‘get ahead’ on the basis of their performance on tests of various kinds, one ethical concern is that use of Ritalin by some to improve their performance is ‘unfair’ to others who can’t or won’t obtain Ritalin under-the-counter. Perhaps we should have a free Ritalin pill supply at the door as students file into the testing room, so that all who wished to take it could do so, and we would know it was being properly administered.”<sup>123</sup> Such a suggestion is obviously not without drawbacks: “Even if the fairness issue were addressed by making Ritalin widely available, do we want a society more competitive than ours already is? Do we want a society where a non-medicated person can’t compete successfully?”<sup>124</sup>

### C. *Manufactured Epidemic?*<sup>125</sup>

Although precise statistics are elusive, this much is certain: the number of LD Americans is soaring. As recently as 1976, according to a prominent study, only 750,000 American children and teenagers were said to suffer from LD. Eight years later, that number had more

some schools about one in five students have misused Ritalin. Johnny Diaz, *Ritalin Abuse Growing on Campus*, MILWAUKEE JOURNAL SENTINEL, Nov. 4, 2001, at 14A.

122. Y. Peter Kang, *Ritalin Use Surges with Arrival of Finals*, DAILY CALIFORNIAN (May 14, 1998), <http://archive.dailyca.org/archive/1999/5/14/ritalin.html>.

123. President’s Council on Bioethics, *Human Flourishing, Performance Enhancement, and Ritalin* (Dec. 2002), at <http://www.bioethics.gov/background/humanflourish.html>.

124. *Id.*

125. One medical dictionary defines “epidemic” as “[t]he occurrence of more cases of a disease than would be expected in a community or region during a given time period.” See MedicineNet.com, <http://www.medterms.com/script/main/art.asp?ArticleKey=3273> (last visited May 18, 2004). It may not be entirely appropriate to characterize the surging numbers of Americans diagnosed as learning disabled as an “epidemic” because it unclear that the numbers exceed what one would normally expect. For example, it may be common to speak of a “breast cancer epidemic,” but this is technically inaccurate, unless one can show that the incidence of breast cancer in a given population significantly diverges from the norm. See California Cancer Registry, *Is There a Breast Cancer Epidemic in California?* (“[W]hile breast cancer is a serious concern, there is no evidence of an ongoing epidemic. Incidence rates did increase markedly during the 1980s, but have been stable since . . . 1988.”), at <http://www.ccrca.org/Spotlight/spotques1.html> (last visited May 18, 2004). I use “epidemic” here in a nontechnical sense—that is, to suggest that a significant and surging percentage of the population have been diagnosed with learning disabilities.

than doubled.<sup>126</sup> The Department of Education began tabulating figures for the learning disabled in 1985, and by 1997-1998, it concluded that 2.75 million school-age Americans suffer from LD.<sup>127</sup> But this is only one among many estimates.<sup>128</sup> The government-produced statistics, from the Census Bureau<sup>129</sup> and the Center for Disease Control,<sup>130</sup> and the estimates of others in the field,<sup>131</sup> place the number of LD/ADD/ADHD school-aged Americans at anywhere from 5 to 30 percent.

Learning disabilities, broadly defined to include ADD/ADHD, are overwhelming all other disabilities in the American education system. As of 1976, the year after the Education of All Handicapped Children Act was enacted, approximately one-quarter of the K-12 students identified as disabled, and therefore entitled to special education, suffered from learning disabilities; as of 2000,

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126. Eugene Edgar & Alice H. Hayden, *Who Are the Children Special Education Should Serve and How Many Children Are There?*, 18 J. SPECIAL EDUC. 523, 533 (1984) ("Since 1976-1977 . . . the percentage of all handicapped conditions has increased slightly (16%) and the category of LD has increased by 119%.").

127. U.S. DEPARTMENT OF EDUCATION, THIRTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (1991).

128. It is often difficult to compare the various statistics because the age groups considered often vary. Furthermore, it is not always clear whether "learning disabilities" are intended to include attention-deficit disorders, or whether those are broken out as a separate category.

129. In 1995, the Census Bureau concluded that for Americans aged 6 to 14 years, 1.6 million, or 4.5 percent suffer from a learning disability. JOHN M. MCNEIL, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: AMERICANS WITH DISABILITIES 1994-1995, at tbl. 1 (1995). A 2001 Census Bureau press release concluded that an additional 3.5 million Americans over the age of 15 suffered from a learning disability. See Press Release, U.S. Census Bureau, 11th Anniversary of Americans with Disabilities Act (July 11, 2001), at <http://www.census.gov/Press-Release/www/2001/cb01ff10.html>.

130. In May 2002, the Center for Disease Control estimated that, as of 1997-98, for children aged 6-11 years, 3.2 percent, or 784,000, have been diagnosed with ADHD, 1.0 million or 4.2 percent with LD, and another 839,000 or 3.5 percent with both. CENTERS FOR DISEASE CONTROL, ATTENTION-DEFICIT DISORDER AND LEARNING DISABILITY: UNITED STATES, 1997-1998 (May 2002), [http://www.cdc.gov/ncha/data/series/sr\\_10/sr10\\_206.pdf](http://www.cdc.gov/ncha/data/series/sr_10/sr10_206.pdf). Summing this up, this would mean that 2.63 million or 10.8 percent of Americans aged 6 to 11 have been diagnosed with ADHD, LD, or both.

131. See William Frankenberger & Christie Cannon, *Effects of Ritalin on Academic Achievement from First to Fifth Grade*, 46 J. DISABILITY, DEV. & EDUC. 199, 200 (1999) (concluding that estimates of the percentage of students suffering from ADD run from 3-5 percent); James C. O'Leary, *An Analysis of the Legal Issues Surrounding the Forced Use of Ritalin: Protecting a Child's Right to "Just Say No,"* 27 NEW ENG. L. REV. 1173, 1173 n.1 (1993) (concluding that over 10 percent of students suffer from ADHD); ADHDinfo, What is ADHD? (estimating that between 4 and 12% of "school-age children" have ADHD), at [http://www.adhdinfo.com/info/start/about/start\\_teen\\_what\\_is\\_adhd.jsp](http://www.adhdinfo.com/info/start/about/start_teen_what_is_adhd.jsp) (last visited May 14, 2004); Child Trends Data Bank, Learning Disabilities (estimating that 8 percent of all Americans aged 3-17 suffer from a learning disability, which is defined to exclude ADHD), at <http://www.childtrendsdatabank.org/indicators/65LearningDisabilities.cfm> (last visited May 18, 2004); *Diagnosis and Evaluation of the Child*, *supra* note 105, at 1159 (estimating prevalence of ADHD in the school-aged population at 8-10 percent).

approximately one-half of all special education students suffered from a learning disability.<sup>132</sup> The number of special education students with virtually all other forms of disability, such as mental retardation,<sup>133</sup> blindness and deafness, have remained constant, or decreased slightly, as the numbers of LD students have soared. This trend is even more pronounced among college students: In 1988, only 16.1 percent of “disabled” college freshmen identified themselves as “learning disabled”; by 2000, that percentage had grown to 40.1 percent.<sup>134</sup>

Table 1: Disabilities Reported By Full-Time College Freshmen<sup>135</sup>

Disability	1988	1991	1994	1996	1998	2000
By percentages						
Hearing	11.7	10.5	9.3	8.5	8.5	8.6
Speech	3.6	4.2	3.3	3.2	3.0	2.9
Orthopedic	13.2	12.2	9.7	9.0	8.1	7.1
Learning Disability	16.1	17.6	24.5	28.3	34.3	40.1
Health-Related	15.8	15.4	17.6	17.4	16.4	15.4
Partially Sighted/Blind	30.0	31.3	17.3	23.7	19.9	16.1
Other	19.1	18.9	17.7	18.6	17.8	16.9

In all, 27,000 college freshmen in 2000, or about 2.5 percent of the national total, claimed to suffer from a “learning disability.”<sup>136</sup>

132. See Avivah Dahbany, IDEA Learning Summit: An Overview, at [http://www.nasponline.org/advocacy/span\\_dec\\_summit.html](http://www.nasponline.org/advocacy/span_dec_summit.html) (May 18, 2004). In 1976-1977, 8.3 percent of K-12 students were identified as disabled and in need of special education; in 1998-1999, that figure had risen to 11.8 percent. Jay. P Greene, *The Myth of the Special Education Burden*, EDUC. WEEK, June 12, 2002. The entirety of that increase is attributable to learning disabled students. *Id.*

133. The number of mentally retarded children in school has declined, from 961,000 in 1976-77 to 597,000 in 1998-99. See Greene, *supra* note 132 (speculating that the “reduction [is] attributable to . . . improvements in medical and public health”).

134. AMERICAN COUNCIL ON EDUCATION, COLLEGE FRESHMEN WITH DISABILITIES: A BIENNIAL STATISTICAL PROFILE 7 tbl. 2 (2001). This study contains several provocative statistics. For example, despite numerous articles lamenting the low “self-esteem” of disabled students, there was little or no support for such claims in this study. Asked about their “self-perceptions,” disabled students reported identical or near-identical opinions of themselves when evaluating themselves as to such qualities as: drive to achieve; understanding of others; creative ability; leadership ability; self-understanding; public speaking ability; popularity; and artistic ability. See *id.* at 15 tbl. 8.

135. *Id.* at 7 tbl. 2.



Why is the number of learning disabled students growing? Although it is possible that changes in diet, exposure to certain chemicals, and changing lifestyles (including rampant television) have increased the incidence of learning disabilities in America, the supporting evidence for this theory is rather sketchy.<sup>137</sup> A simpler explanation may be that what doctors define as a "learning disability" has been expanding over recent decades, therefore subsuming more and more Americans. A cynic might note that doctors can enlarge the demand for their services by multiplying the number and breadth of "diseases," and followers of Michel Foucault and Thomas Szasz could add that every "disease" is a socio-political construct.<sup>138</sup> Taken to an extreme, this latter view is obviously absurd and enjoys currency only in philosophy seminar rooms. More modestly put, however, there is of course something to this disease-as-construct view. AIDS, for example, is plainly a "disease," in the sense that afflicted persons have scientifically testable characteristics (e.g., the presence of the HIV virus and health improvement when administered certain anti-viral drugs) that separate them from the rest of the population. Even so, the sharp divide between AIDS patients and the "normal" population is not always perfectly clear, and politics inevitably enters into any discussion of the numbers of AIDS patients.<sup>139</sup> My point is simply that along a continuum of diseases, for certain ones, such as pancreatic cancer, there is a sharp scientific demarcation between those afflicted and those not afflicted, whereas for others, such as LD, this demarcation is rather amorphous and therefore subject to, and perhaps governed by, political forces.

In 1975, the phrase "specific learning disabilities" encompassed deficiencies in a few specific tasks, such as reading or arithmetic; by 2000, below-average performance in dozens of qualities, stretching

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136. *Id.* at 3, 7.

137. Although some websites bandy around claims that television or nutrition may be responsible for LD or ADHD, and one recent study purports to link ADHD to a zinc deficiency, see *Zinc Helps Hyperactive Children*, BBC NEWS UK EDITION, Apr. 8, 2004, at <http://news.bbc.co.uk/1/hi/health/3608439.stm>, most physicians disclaim any causal relationship. See Medem, Learning Disabilities: Children's Health Update ("Studies have shown no evidence that LD/ADD are caused by diet, nutrition or other environmental factors."), Oct. 2000, at [http://www.medem.com/medlb/article\\_detailb\\_for\\_printer.cfm?article\\_ID=ZZZL4RHDUEC&sub\\_cat=474](http://www.medem.com/medlb/article_detailb_for_printer.cfm?article_ID=ZZZL4RHDUEC&sub_cat=474). A forthcoming government-funded study will track 100,000 children from the womb to age 21, intending to monitor how environmental conditions affect health, including susceptibility to LD. See Laura Neergaard, *US Study to Track Health, Womb to 21*, PHILA. ENQUIRER, April 6, 2004, at A17.

138. See MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Richard Howard trans., Vintage Books 1973) (1965); THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS* (5th prt. 1968) (arguing that mental illness is a social construct).

139. See, e.g., PETER H. DUESBERG, *INVENTING THE AIDS VIRUS* 4-7 (1996).

from memory to organization skills to “reasoning,” could all qualify one for an LD diagnosis. Even with respect to a condition such as dyslexia, long recognized as a learning disability, its meaning has swollen in recent years. It is as if doctors originally identified the bottom 2 percent in a normal distribution as abnormal, but have now redefined the abnormal range to include the bottom 5 or 10 percent of children. Attention deficit disorders seem to have particularly mushroomed. Again, there have always been a certain number of young people, especially boys, who are prone to hyperactivity and inattentiveness. Doctors may once have diagnosed the farthest tip of the tail of the hyperactivity/inattentiveness distribution as ADD/ADHD; now 10 percent or more are tagged with that label.

But the LD increase cannot simply be chalked up to a change in the medical definition. In many cases, students actively pursue an LD diagnosis. There is surely a social stigma attached to an LD diagnosis, particularly if classmates suspect that the student is “gaming the system” to gain preferential treatment.<sup>140</sup> On the other side of the ledger, however, an LD diagnosis can mean shortened homework assignments, additional and personalized assistance, exemptions from otherwise required classes, and accommodations on exams. These preferences can outweigh any social stigma attached to an LD diagnosis. Furthermore, parents who are puzzled by their child’s poor academic performance will likely be relieved and gratified by an LD diagnosis, which cements their view of their child’s innate intelligence as it simultaneously provides the wherewithal to enhance academic performance.<sup>141</sup> I explore the incentives of students and parents to secure LD diagnoses in the context of the SATs at length later in the Article.<sup>142</sup>

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140. Consider the animosity generated by one student, who was suspected by her classmates of gaming the system. See *infra* notes 296-298 and accompanying text (discussing Blair Hornstein).

141. See Kenneth R. Weiss, *The New Test-Taking Skill: Working the System*, L.A. TIMES, Jan. 9, 2000, at A1 (quoting parents who sought LD diagnoses for their children). Even more mercenary motives could be ascribed to parents in seeking an LD diagnosis for their child. Prior to an amendment to the Social Security law in 1996, parents of learning disabled students were eligible for additional federal benefits. Kelman & Lester, *supra* note 12, at 91. A Louisiana administrator reported the following: “In the one case I’m thinking of, the parent of the child told the child not to perform [on the assessment test], so the child could qualify [for benefits]. But the child told the [special ed] coordinator of the test.” *Id.* at 269 n.55. An administrator in a poor Mississippi district commented on the high number of parental requests for diagnostic testing of their children. One girl, when administered the test, ran around the room. When asked why, she said, “Well, because Mommy says I don’t get any Christmas [presents] if I don’t fail the test.” *Id.* (reporting these incidents).

142. See *infra* Part VI.A.

Furthermore, there are the psychologists, educators, lawyers, consultants, and disabilities rights activists that constitute a veritable LD industry. The leading national LD organization, the Learning Disabilities Association of America (LDA), claims to have 40,000 members,<sup>143</sup> and its website, and those of similar organizations, invariably try to rouse people to self-consciousness of their own (or their children's) learning disabilities.<sup>144</sup> To some extent, such advocacy groups represent the best of American traditions—that is, private individuals promoting self-help and lobbying government for reform. Their successes have not been limited to the legislative arena. Thanks in part to the advocacy efforts of groups like the LDA, and in part to the results of the perceived requirements of federal law, virtually every educational institution of any size in America today has at a minimum one administrator tasked with LD issues, and most institutions have entire LD bureaucracies. And like all bureaucracies,

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143. See Learning Disabilities Ass'n of America, About LDA, at <http://www.ldanatl.org/about/index.asp> (last visited May 18, 2004).

144. Many of these outreach efforts do not withstand scrutiny. For example, such websites claim that Winston Churchill and other luminaries (including Albert Einstein, Abraham Lincoln, Benjamin Franklin, Leonardo Da Vinci, and Agatha Christie) were learning disabled, their intent presumably being to mitigate the stigma associated with LD. See, e.g., Our Special Kids, Questions & Answers, at <http://www.ourspecialkids.org/qa4.html> (last visited May 18, 2004); see also Hilary Greer Fike, *Learning Disabilities in the Workplace: A Guide to ADA Compliance*, 20 SEATTLE U. L. REV. 489, 539-40 (1997); Laura E. Naistadt, *Understanding Learning Disabilities*, 42 S. TEX. L. REV. 97, 98 (2000). Yet the claim that Churchill, to take only one example, was learning disabled highlights the fact that the diagnosis is, at least when deployed by some, altogether lacking in scientific rigor. Churchill was a hopeless Latin scholar, to be sure, but the reason is suggested in the following charming passage in his youthful autobiography. Told at the age of ten to memorize the declension mensa or table (mensa, a table; mensae, of a table, . . . mensa, O table), Churchill reports what went through his head:

What on earth did it mean? Where was the sense of it? It seemed absolute rigamarole to me. However, there was one thing I could always do: I could learn by heart. And I thereupon proceeded, as far as my private sorrows would allow, to memorize the [declension of mensa]. In due course, the Master returned. "Have you learnt it?" he asked. "I think I can say it, sir," I replied; and I gabbled it off. He seemed so satisfied with this that I was emboldened to ask a question. "What does it mean, sir?" . . . "Mensa means a table," he answered. "Then why does mensa also mean O table," I inquired, "and what does O table mean?" "Mensa, O table, is the vocative case," he replied. "But why O table?" I persisted in genuine curiosity. "O table,— you would use that when addressing a table." . . . "But I never do," I blurted out in honest amazement. "If you are impertinent, you will be punished, and punished, let me tell you, very severely," was his conclusive rejoinder.

WINSTON S. CHURCHILL, *MY EARLY LIFE* 11 (1958). The most plausible reading of the above is not that Churchill had any neuroanatomical defects that prevented him from processing Latin or other subjects (such as mathematics, in which he was also relatively inept). Rather, what emerges is that Churchill was, from an early age, an independent thinker impelled to see for himself the necessity and accuracy of claims made by others, regardless of their power or authority. Such a disposition would prove beneficial to him and the rest of the world in later years. Indeed, it is not clear why a disposition to independent thinking, which inevitably puts one at odds with hopelessly conventional teachers, is a disability at all.

there is the preternatural urge to grow, and the simplest mechanism for growth is simply to expand the constituency. In addition, one must acknowledge the interests of those within the LD industry in expanding the definition of an LD—educators, who can obtain increased federal aid if more students are diagnosed as LD;<sup>145</sup> attorneys, who can win large judgments in ADA cases;<sup>146</sup> psychologists, who can charge thousands of dollars in fees for an LD diagnosis;<sup>147</sup> “researchers” in the area of learning disabilities, who are eligible for hefty federal grants;<sup>148</sup> and pharmaceutical companies, who have made billions of dollars administering to the needs of the learning disabled.<sup>149</sup>

Even without the legal advantages that attach to an LD diagnosis, it is likely that, given the vast publicity learning disabilities have garnered, more and more people would genuinely think of themselves as afflicted with LD. In the course of writing this Article, for example, I found myself pondering my intellectual shortcomings and wondering whether I suffered from any number of ailments, including ADHD, dyslexia, cognitive processing deficit, and an all-encompassing dysrationalia. In this context, consider a recent fascinating documentary, *Whole*, which sympathetically explores the condition of persons who describe themselves as “amputee wannabees.” Remarkable as it may sound, such persons genuinely long to remove one of their healthy limbs.<sup>150</sup> A distinguished

145. See KELMAN & LESTER, *supra* note 12, at 117-60 (discussing the incentives of educators to have students diagnosed as learning disabled).

146. For example, the lawyers for the plaintiffs in *Guckenberger v. Boston University* collected approximately \$1.25 million in attorneys’ fees. 8 F. Supp. 2d 91, 112 (D. Mass. 1998) (*Guckenberger IV*).

147. See Jane Gross, *Paying for a Disability Diagnosis to Gain Time on College Boards*, N.Y. TIMES, Sept. 26, 2002, at A1 (“Clients pay \$2,400 for a battery of tests and an evaluation, \$200 an hour for psychotherapy and \$250 an hour more if Dr. Luck or Dr. Mattis visit a high school or the Educational Testing Service to lobby for a learning-disabled student who is not getting the special services the law requires.”).

148. See, e.g., National Center for Learning Disabilities, U.S. Department of Education Funds Center for Learning Disabilities (noting that the Department of Education’s Office of Special Education and Rehabilitative Services awarded \$8.7 million in federal grants, including \$700,000 to establish a center on learning disabilities), at [http://www.ld.org/news/OWWinter2002/OWWinter2002\\_doefunds.cfm](http://www.ld.org/news/OWWinter2002/OWWinter2002_doefunds.cfm).

149. Pharmaceutical companies are busily selling their products. Consider, for example, that the “ADHDInfo” website is a creation of Novartis Pharmaceuticals Corporation. See Press Release, Novartis Pharmaceuticals Corporation, Novartis Announces New Educational ADHD Website (June 4, 2002) (“The Novartis ADHD product portfolio includes Ritalin® (methylphenidate), Ritalin SR, and Focalin™ (dexamethylphenidate HCl), a refined formulation of Ritalin.”), at <http://www.pharma.us.novartis.com/newsroom/pressReleases/releaseDetail.jsp?PRID=206&checked=y>.

150. *Whole*, directed by Melody Gilbert, premiered at the Los Angeles Film Festival in June 2003.

bioethicist, Carl Elliott, reviewing the movie, noted his hesitation in even discussing the phenomenon because he “worried that more people might start to identify themselves as wannabes and seek out amputation.”<sup>151</sup> As Elliott notes,

Conditions like social anxiety disorder, post-traumatic stress disorder, [and] attention deficit-hyperactivity disorder [ADHD] were once seen as rare or nonexistent, then suddenly they ballooned in popularity. This is not simply because people decided to ‘come out’ rather than suffer alone. It is because all mental disorders, even those with biological roots, have a social component.<sup>152</sup>

Elliott is to be commended for being one of the few doctors willing to recognize the way in which the medical profession can itself manufacture illnesses, such as ADD/ADHD.<sup>153</sup>

“Amputee wannabees” are extremely unusual, and regardless of the degree of publicity they garner, one doubts that doctors specializing in the condition have hit upon a growth industry. Yet the same cannot be said of the myriad conditions that coexist under the LD umbrella. The diagnosis has become mired hopelessly in indeterminacy, yet the concrete symptoms are experienced by any person with a smidgeon of self-doubt, which describes every well-adjusted and sane person in the world. Furthermore, there is the torrential publicity, funded by doctors, pharmaceutical companies, and the rest of the LD industry, reminding us that learning disabilities not only exist, but that there is “help.” Finally, and most significantly for our purposes, there are the legal advantages held out to those who secure an LD diagnosis. But is it really the case that the learning disabled are entitled to accommodations as a matter of law? We now turn to this question.

#### IV. ARE THE “LEARNING DISABLED” LEGALLY DISABLED?

A curious feature of much of the ADA literature is that the learning disabled are simply assumed to be legally disabled. Indeed, universities and other institutions of higher learning, when approached by the learning disabled in pursuit of accommodations, often decline to make the threshold challenge that the students are not, as a matter of law, “disabled,” and therefore not legally entitled to accommodations of any sort. What makes this puzzling is that in the

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151. Carl Elliott, *Costing An Arm and a Leg*, SLATE, July 10, 2003, at <http://slate.msn.com/id/2085402>.

152. *Id.*

153. As he notes, all of the ailments he discusses are similar in that, “[f]irst, the conditions are usually backed by a group of medical or psychological defenders whose careers or reputations depend on the existence of the disorder and who insist that the condition is real. Second, there is usually no hard data about the causes or the mechanism of the condition.” *Id.*

employment context courts have, at the defendants’ prompting, interpreted “disability” in a remarkably narrow manner. Hence the odd spectacle of a hemophiliac (someone who can easily bleed to death) being told he is not disabled in an employment case,<sup>154</sup> but a dyscalculiac (someone who has difficulty adding) being defined as disabled by an educational institution.<sup>155</sup> This section sketches how the ADA, as it is written and widely interpreted, cabins the scope of the disabled, and concludes that under these principles the learning disabled cannot be assumed to be legally disabled under the ADA.

### A. *Defining Disability: First Principles*

The ADA limits the protected class of the disabled to those suffering from “[1] a physical or mental impairment that [2] substantially limits [3] one or more of the major life activities of [an] individual.”<sup>156</sup> Although the first requirement does nothing to limit the meaning of disability, courts have construed the second and third requirements to substantially narrow the class of the legally disabled. Courts have emphasized that meeting these threefold requirements is “a significant threshold for [those] seeking redress under the ADA.”<sup>157</sup>

#### 1. “Physical or Mental Impairment”

We begin with “physical or mental impairment.” The EEOC has offered a clarifying interpretation that comes close to establishing a rule that any departure from Platonic perfection, up to and perhaps including Cindy Crawford’s legendary mole,<sup>158</sup> is sufficient to render one disabled. According to the EEOC, even a case of the flu or a sprained ankle qualifies as a physical impairment.<sup>159</sup> Diligent

154. See *Bridges v. City of Bossier*, 92 F.3d 329, 335-36 (5th Cir. 1996).

155. See *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 116 (D. Mass. 1997) (*Guckenberger II*).

156. 42 U.S.C. § 12102(2) (2000). The definition of impairment also includes “a record of such an impairment” and “being regarded as having such an impairment,” *id.*, although these terms are seldom applicable in learning disabilities cases. The definition of disability in the ADA was apparently borrowed from regulations construing the Rehabilitation Act.

157. *Felix v. New York City Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003).

158. The beauty mark adorning Ms. Crawford’s upper lip, although hailed as the “most beautiful mole in the world,” is a dermatological condition—that is, in theory at least, a “physical impairment.” See *The Most Beautiful Mole in the World*, at <http://www.users.cloud9.net/~bradmcc/cindyMole.html> (last visited May 18, 2004).

159. See 2 EEOC Compliance Manual, Interpretations (CCH) § 902.4, ¶ 6884, at 5319 (1995); 29 C.F.R. Pt. 1630, app. at 402 (giving examples of impairments that are “usually not disabilities” because they are “temporary,” “non-chronic,” and “of short duration, with little or no long term or permanent impact,” such as “broken limbs, sprained joints, concussions, appendicitis, and influenza”).

research has failed to uncover a single case in which a court rejected an ADA claim on the basis that the plaintiff was not physically or mentally impaired. In one case, for example, the court noted that a plaintiff whose departure from perfection consisted of a 6 percent limitation on the range of motion in his right arm was physically impaired.<sup>160</sup> Indeed, it is the rare case in which the defendant even bothers to challenge the plaintiff's claim to an impairment of some sort or another.<sup>161</sup>

## 2. "Major Life Activity"

The regulations construing the ADA emphasize the obvious—to wit, that the "major life activity" must be *major*, which "means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>162</sup> The test is an objective one. Even if, for example, I subjectively experienced my inability to learn the Japanese language as a "major" obstacle to self-fulfillment, I would still be out of luck, because the case law has long emphasized that "[t]he question is whether the life activity is 'major' as contemplated by the ADA, not whether the life activity is particularly important to the plaintiff."<sup>163</sup>

Illustrative is *Reeves v. Johnson Controls World Services, Inc.*<sup>164</sup> Diagnosed with "Panic Disorder With Agoraphobia,"<sup>165</sup> the plaintiff sued his employer, an airport operator, under the ADA. The defendant accepted plaintiff's claim to a "mental impairment," but argued that the impairment did not affect a "major life activity."<sup>166</sup> The plaintiff conceded that his panic disorder did not prevent him

160. *Robinson v. Neodata Servs., Inc.*, 94 F.3d 499, 502 (8th Cir. 1996).

161. The only case where the argument was even made is *Quint v. A.E. Staley Manufacturing Co.*, where the plaintiff alleged merely temporary nerve irritation. 172 F.3d 1, 9 n.5 (1st Cir. 1999). The court rejected the argument that the plaintiff did not suffer from a "physical impairment," although it agreed with the defendant that the impairment did not rise to the level of a disability because it did not substantially impair a major life activity. *Id.* at 11-13.

162. 28 C.F.R. § 35.104 (1999); see *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 151 (2d Cir. 1998) ("The term 'major life activity[y],' by its ordinary and natural meaning, directs us to distinguish between life activities of greater and lesser significance.").

163. See *Bartlett v. New York State Bd. of Law Exam'rs*, 226 F.3d 69, 79 (2d Cir. 2000); see also *Runnebaum v. Nationsbank of Md.*, 123 F.3d 156, 170 (4th Cir. 1997) ("[A]n activity qualifies under the statutory definition as one of the major life activities contemplated by the ADA if it is relatively more significant or important than other life activities."); *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997) (noting that dictionary definitions of the term "major" "strongly suggest that the touchstone for determining an activity's inclusion under the statutory rubric [of major life activity] is its significance").

164. 140 F.3d 144 (2d Cir. 1998).

165. See DSM-IV, *supra* note 92.

166. *Reeves*, 140 F.3d at 150.

from performing basic activities, like walking, but he argued that the disorder interfered with something he called “everyday mobility,” which was said to consist of “taking vacations or . . . going to a shopping mall alone.”<sup>167</sup> Judge Cabranes, writing for a unanimous Second Circuit panel, rejected the plaintiff’s attempt to “tailor his definition of the major life activity to fit the circumstances of his impairment.”<sup>168</sup> Judge Cabranes noted that the “major life activity” requirement in the ADA significantly restricted the legal definition of a disability: “For example, while it might be hard to show that a very mild cough substantially limits the major life activity of ‘breathing,’ it would be far easier to make an individualized showing of a substantial limitation if the major life activity were instead defined more narrowly as, say, the major life activity of ‘breathing atop Mount Everest.’”<sup>169</sup>

Although *Reeves* articulated the dominant position in the courts of appeal at the time, any ambiguities were conclusively resolved in 2002 by the Supreme Court’s decision in *Toyota Motor Manufacturing v. Williams*.<sup>170</sup> In *Toyota*, the question was whether the plaintiff, who claimed carpal tunnel syndrome left her unable to perform certain manual tasks associated with her job, was substantially limited in the major life activity of working. In reversing the Sixth Circuit, a unanimous Supreme Court articulated the appropriate test: “When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.”<sup>171</sup> In so holding, the Court merely fleshed out the EEOC regulations, which make it clear that “[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.”<sup>172</sup> Thus, a person whose impairment renders him completely unfit for one job is not disabled if he can still perform other related jobs.

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167. *Id.* at 149

168. *Id.* at 152.

169. *Id.*

170. 534 U.S. 184 (2002).

171. *Id.* at 200-01.

172. 29 C.F.R. § 1630.2(j)(3)(i) (2003). For example, the issue for plaintiffs alleging carpal tunnel syndrome is whether the impairment renders them unable to perform a “class of jobs” appropriate to their education and experience. See, e.g., *Gutridge v. Clure*, 153 F.3d 898, 900-01 (8th Cir. 1998) (holding that a trained computer technician’s carpal tunnel syndrome did not render him disabled under the ADA because he could “still function as a computer repair technician”).



### 3. "Substantially Limits"

When read in tandem with the "major life activity" requirement, the substantial limitation requirement has proven to be the graveyard of countless ADA claims. For starters, "substantial" and "major," as contrasted with "insubstantial" and "minor," have plain meanings that rule out most of the irksome ailments that are a daily torment to all of us. In belaboring the obvious, the Senate Committee on Labor and Human Resources, the congressional committee generally credited for developing the ADA's structure, found that substantially limiting impairments cannot be "minor" or "trivial."<sup>173</sup>

Yet there is still a possible source of ambiguity: What is the appropriate benchmark in determining whether an impairment substantially limits a major life activity? Consider a world-class marathoner who suffers an injury and is then able to jog only a few miles. He is still more mobile and in better shape than most citizens his age, but he is substantially limited compared with his former self and his innate potential. Congress nonetheless clarified that he is not substantially limited as the ADA uses the term. The Senate committee stated that to qualify as disabilities, impairments must restrict an individual's major life activity as to the "conditions, manner, or duration under which [the activity] can be performed in comparison to most people."<sup>174</sup> For example: "A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort."<sup>175</sup>

Borrowing from the ADA's legislative history, DOJ and EEOC regulations emphasize that "substantially limit" must be understood in relation to the abilities of "most people"<sup>176</sup> or "the average person."<sup>177</sup> Similarly, the case law has repeatedly held that

173. S. REP. NO. 101-116, at 23 (1989); *see also* H.R. REP. NO. 101-485, at 52(II) (1990).

174. S. REP. NO. 101-116, at 23.

175. *Id.*

176. *See* 28 C.F.R. pt. 36, app. B (2003) ("when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people").

177. *See* 29 C.F.R. § 1630.2(j)(3)(i) ("The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."). EEOC regulations further state:

The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

“[i]mpairment is to be measured in relation to normalcy, or, in any event, to what the average person does.”<sup>178</sup> In case after case, courts have held that a plaintiff suffering from a major impairment is not disabled when the practical effect of the impairment, judged in relation to the average citizen, is not substantial. In *Lyons v. Louisiana Pacific Corp.*, for example, the plaintiff, whose right leg was one inch shorter than his left, walked with a permanent limp.<sup>179</sup> Although he plainly suffered from a physical impairment, the district court concluded that it did not substantially affect the major life activity of walking.<sup>180</sup> The plaintiff might find it difficult to climb a local mountain, the court noted, but “[m]any individuals in Maine find it difficult to walk, let alone run, up and down Mount Katahdin. [Plaintiff] must produce evidence that his inability to walk long distances was worse than the general populations’ inability to walk long distances.”<sup>181</sup>

*Lyons* is hardly aberrational. Indeed, cases involving plaintiffs with far graver impairments have been found to be not disabled. In *Wood v. Crown Redi-Mix*, the plaintiff could walk only a quarter mile without needing rest, parts of his toes and legs were often numb, his left knee was prone to collapse, and he walked occasionally with a cane.<sup>182</sup> According to a unanimous Eighth Circuit panel, “Wood’s ability to walk is limited, but . . . we do not believe the evidence demonstrates a severe walking restriction.”<sup>183</sup>

Furthermore, the Supreme Court’s recent ADA case law has even further narrowed the range of what constitutes a substantial limitation by emphasizing that the question turns on the abilities of the claimant after remedial self-help measures have mitigated the disability. Thus, in *Sutton v. United Airlines*,<sup>184</sup> the Court held that severely myopic twin sisters were not disabled because, wearing corrective lenses, their vision was 20-20, or roughly that of an ordinary citizen.<sup>185</sup> Courts have generally, to the chagrin of much of

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(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

See *id.* § 1630.2(j)(2).

178. See *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15-16 (1st Cir. 1997).

179. 217 F. Supp. 2d 171, 174, 177 (D. Me. 2002).

180. *Id.* at 177-78.

181. *Id.* at 178.

182. 339 F.3d 682, 685 (8th Cir. 2003).

183. *Id.*

184. 527 U.S. 471 (1999).

185. *Id.* at 483. The Court noted that a contrary approach would mean that all diabetics could “almost certainly be disabled, because if they failed to monitor their blood sugar levels and

the academic commentary, applied this rationale rigorously, and have held that persons afflicted with severe handicaps are not disabled if remedial measures have sufficiently mitigated the severity of the impairment.<sup>186</sup>

In sum, courts have repeatedly held that plaintiffs with indisputably serious impairments failed to demonstrate that they were substantially limited in relation to the average (which is to say averagely and ordinarily impaired) citizen.<sup>187</sup> To be sure, the case law is hardly monolithic, and some courts have proven somewhat more

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administer insulin, they would almost certainly be substantially limited in one or more major life activities." *Id.*

186. For example, in *Tangires v. John Hopkins Hospital*, the court rejected a severe asthmatic's ADA claim, noting that the condition was easily treatable by cortisone-based medication. 79 F. Supp. 2d 587, 595 (D. Md. 2000). The plaintiff's refusal to take such medication, because it might complicate her pituitary cancer, was mocked. *Id.* at 596. For a criticism of the *Sutton* line of cases, see Amy Maes, *The Americans with Disabilities Act—Time to Measure the Efficacy of This Legislation*, 79 MICH. B.J. 1664, 1664-65 (2000) (arguing that *Sutton* "may force out of the courtroom discussion any consideration of how medications themselves affect major life activities"). *But see* Samuel R. Bagentos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 400 (2000) (arguing that criticism of *Sutton* and other ADA cases "is overblown").

187. *See, e.g.,* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 186-87 (3rd Cir. 1999) (holding that plaintiff's "ability to walk and stand is not significantly less than that of an average person" just because he requires ten-minute hourly breaks and walks with a slight limp); Talk v. Delta Airlines, Inc., 165 F.3d 1021, 1025 (5th Cir. 1999) (holding that as a result of one leg being shorter than the other and her foot being permanently flexed, the plaintiff "walk[s] with a limp and move[s] at a significantly slower pace than the average person," but this does not reach "the level of a substantial impairment"); Penny v. United Parcel Serv., 128 F.3d 408, 415 (6th Cir. 1997) (holding that walking with "moderate difficulty or pain . . . does not rise to the level of a disability") (collecting cases); Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996) (holding that a plaintiff with "visible and apparent" limp who could not walk more than a mile, could not jog, and had difficulty climbing stairs was not substantially limited in a major life activity); Brower v. Cont'l Airlines, Inc., 62 F. Supp. 2d 896, 904 (E.D.N.Y. 1999) (holding that an expert's report stating that the plaintiff's foot bunions prevented "any extended walking or standing" demonstrated that the plaintiff experienced difficulty with walking but did not prove she was "disabled" under the ADA); Miller v. Airborne Express, No. 3:98-CV-0217-R, 1999 WL 47242, at \*5 (N.D. Tex. Jan. 22, 1999) (holding that following knee injury and surgery, the plaintiff was not substantially limited in his ability to stand even though he preferred to lean on a rail and could stand only thirty minutes without resting); Bochenek v. Walgreen Co., 18 F. Supp. 2d 965, 970 (N.D. Ind. 1998) (holding that knee problems after replacement surgery that caused numbness with prolonged sitting, that restricted walking to a few blocks without resting, and that resulted in occasional pain did not constitute a substantial limitation on the activity of walking); Ingles v. Neiman Marcus Group, 974 F. Supp. 996, 1002-03 (S.D. Tex. 1997) (holding that a plaintiff was not disabled from walking despite numerous surgeries on both feet, the need to wear special types of footwear, and a restriction against extensive walking on hard surfaces); Graver v. National Eng'g Co., No. 94-C-1228, 1995 WL 443944, at \*9-11 (N.D. Ill. Jul. 25, 1995) (holding that although he walked with a pronounced limp because of pain and stiffness in his ankles, the plaintiff was not significantly restricted in his ability to walk, care for himself, or work); Richardson v. William Powell Co., No. C-1-93-528, 1994 WL 760695, at \*3, \*7 (S.D. Ohio Nov. 10, 1994) (holding that although degenerative arthritis in hip caused plaintiff to limp and to struggle climbing stairs, it did not interfere with a major life activity).

receptive to ADA claims by articulating a broader view of what constitutes a substantial limitation. But this scattering of cases have proven of limited precedential value, as the courts have emphasized, following Supreme Court guidance, that there is no “per se disability under the ADA, no matter how serious the impairment”<sup>188</sup> and that ADA plaintiffs must make a case-by-case showing of substantial limitation. As a consequence, although the Supreme Court held in *Bragdon v. Abbott*<sup>189</sup> that a particular HIV-positive plaintiff was disabled because the virus substantially limited the major life activity of reproduction, other courts have rejected the claims of HIV-positive plaintiffs on the particular facts presented.<sup>190</sup>

To a rather startling degree, at least to those whose familiarity with the ADA is exclusively from the horror/comedy stories popularized on web sites like Walter Olson’s *Overlawyered*,<sup>191</sup> courts have repeatedly excluded obvious impairments from the scope of the ADA. Examples include plaintiffs who can see with only one eye;<sup>192</sup> or walk with a cane;<sup>193</sup> or who suffer from coronary artery disease;<sup>194</sup> kidney disease;<sup>195</sup> hemophilia;<sup>196</sup> depression;<sup>197</sup> diabetes;<sup>198</sup> pancreatitis;<sup>199</sup> cancer;<sup>200</sup> asbestosis;<sup>201</sup> or alcoholism.<sup>202</sup> Even plaintiffs who allege “collective disabilities,” such as “diabetes, leg impairment and brain cyst”<sup>203</sup> or “degenerative joint disease of the low back, spondylolisthesis and bilateral carpal tunnel syndrome”<sup>204</sup> often fail to make the threshold showing of an ADA disability.

188. *Waldrup v. Gen. Elec. Co.*, 325 F.3d 652, 656 (5th Cir. 2003).

189. 524 U.S. 620 (1998).

190. *See, e.g.*, *Blanks v. Southwestern Bell Communications, Inc.*, 310 F.3d 398, 401 (5th Cir. 2002) (rejecting the ADA claim of a HIV-positive plaintiff, noting that he had no present interest in reproducing and was not disqualified from seeking employment or training an broad class of jobs).

191. *See Overlawyered.com, Disabled-Rights Law Resources*, <http://overlawyered.com/topics/disab.html> (last visited May 18, 2004).

192. *E.E.O.C. v. United Parcel Serv., Inc.*, 306 F.3d 794, 799 (9th Cir. 2002); *Still v. Freeport McMoran*, 120 F.3d 50, 52 (5th Cir. 1999).

193. *Wood v. Crown Redi-Mix*, 339 F.3d 682, 685 (8th Cir. 2003).

194. *Aucutt v. Six Flags over Mid-Am., Inc.*, 869 F. Supp. 736, 744 (E.D. Mo. 1994).

195. *Roush v. Weastec, Inc.*, 96 F.3d 840, 844 (6th Cir. 1996).

196. *Bridges v. City of Bossier*, 92 F.3d 329, 331 (5th Cir. 1996).

197. *Heisler v. Metro. Council*, 339 F.3d 622, 625 (8th Cir. 2003).

198. *Chandler v. City of Dallas*, 2 F.3d 1385, 1388 (5th Cir. 1993).

199. *Waldrup v. Gen. Elec. Co.*, 325 F.3d 652, 656 (5th Cir. 2003).

200. *E.E.O.C. v. R.J. Gallagher Co.*, 181 F.3d 645, 653-54 (5th Cir. 1999).

201. *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996).

202. *Bailey v. Georgia-Pac. Corp.*, 306 F.3d 1162, 1164 (1st Cir. 2002).

203. *Whitney v. Sweetwater Sound, Inc.*, No. IP 99-519 C-M/S, 2000 WL 3330983, at \*1 (S.D. Ind. Apr. 6, 2000).

204. *Philip v. Ford Motor Co.*, 328 F.3d 1020, 1022 (8th Cir. 2003).

*B. First Principles Applied: The Learning Disabled*

We turn now to the “learning disabled.” Some observers seem to assume that the learning disabled are disabled as a matter of law. Perhaps this arises from an assumption about what federal disabilities law prescribes. Or perhaps it is little more than a question of semantics: surely, it is assumed, the “learning disabled” are disabled. Yet “learning disabled” is a medical diagnosis, just as the diagnosis of cancer, pancreatitis, or degenerative joint disease is a medical diagnosis. As noted above, these medical diagnoses do not automatically qualify one for the advantageous legal diagnosis of a disability. For obvious reasons, a medical diagnosis is not binding on courts. The DSM-IV itself admonishes that because of the “imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis[,] in most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a ‘mental disorder,’ ‘mental disability,’ ‘mental disease,’ or ‘mental defect.’”<sup>205</sup> Only with “additional information . . . beyond that contained in the DSM-IV diagnosis” can we determine whether an individual meets any particular legal standard.<sup>206</sup>

With these cautionary words in mind, we pose the commonly unasked question, is a learning disabled person disabled as a matter of law? The answer to this question must begin with an awareness that there can be no universal answer. What constitutes a learning disability runs an incredibly wide gamut.<sup>207</sup> Thus, the following caution in the DSM-IV would seem to have particular relevance in the context of an LD diagnosis: “It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.”<sup>208</sup> Such caution would seem to have even further relevance in light of the Supreme Court’s reminder that “whether a person has a disability under the ADA is an individualized inquiry.”<sup>209</sup>

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205. DSM-IV, *supra* note 92, at xxiii, quoted in *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 155 n.18 (1st Cir. 1998). In *Bercovitch*, the First Circuit held that Attention Deficit Hyperactivity Disorder (ADHD) qualified as a mental disability under the DSM-IV, but rejected claim that a teenager suffering from ADHD suffered from a disability under the ADA. 133 F.3d at 155-56.

206. *Bercovitch*, 133 F.3d at 155 n.18.

207. See *supra* text accompanying notes 88-94.

208. DSM-IV, *supra* note 92, at xxiii.

209. *Sutton v. United Air Lines*, 527 U.S. 471, 483 (1999); see also 29 C.F.R. pt. 1630, app. § 1630.2(j) (2003) (“The determination of whether an individual has a disability is not necessarily

Sufficiently wary of our ability to issue any wide-ranging conclusions, we commence our analysis. The first requirement under the ADA for a finding of disability is the presence of a “physical or mental impairment.” As suggested above,<sup>210</sup> this requirement is entirely toothless in practice, as all of us fall short of some postulated ideal physical and mental specimen.

But it is the second and third parts of the disability requirement that have the real bite: To what extent are learning disabled individuals “substantially limited” in a “major life activity?” To begin, courts have emphasized that “major life activity” must be understood in broad terms, such as “working” or “learning”; hence the question in the employment context is whether a particular impairment affects a person’s ability to perform a “class of jobs,” not any one particular job. When confronted by ADA claims by employees with learning disabilities, employers have repeatedly, and often with success, argued that although the learning disability interfered with plaintiff’s performance in a particular job, she was still able to work in the general sense. In *Bice v. Lennox Industries, Inc.*,<sup>211</sup> for example, the plaintiff’s ADHD proved troublesome in her job as Product and Supply Manager, but the court nonetheless held that “[s]he simply is not substantially impaired in the major life activity of working as evidenced by the fact that she sent out resumes seeking employment elsewhere.”<sup>212</sup>

The principles gleaned from the employment context should provide important guidance in the educational context.<sup>213</sup> When a student alleges that a learning disability interferes with the major life activity of learning, the question would seem to be whether learning in a broad sense is affected, not whether any particular subject or aspect of learning is affected. For reasons that are not transparent,<sup>214</sup>

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based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.”).

210. See *supra* text accompanying notes 158-161.

211. No. Civ.A. 02-342, 2003 WL 21018638 (E.D. La. May 5, 2003).

212. *Id.* at \*4; see also *McCrary v. Aurora Pub. Sch.*, No. 02-1098, 2003 WL 191433, at \*6 (10th Cir. Jan. 29, 2003) (rejecting teacher’s ADA claim because she failed to show that her learning disability “limited her ability to perform either a class of jobs or a broad range of jobs in various classes”); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 506 (7th Cir. 1998) (“At most, the evidence in this case suggests as a result of ADD, Davidson was unable to perform her job at Midelfort. Davidson has come forward with no evidence from which one might reasonably infer that ADD precluded her even from holding other comparable positions as a therapist.”).

213. See *McPherson v. Mich. High Sch. Athletic Ass’n*, 119 F.3d 453, 460 (6th Cir. 1997) (“[M]ost of the law that has been made in ADA cases has arisen in the context of employment discrimination claims, but we have no doubt that the decisional principles of these cases may be applied to [the educational context].”).

214. See *infra* Part VI.B.

educational institutions generally decline to make this argument, yet when made, it has proven fruitful in defeating ADA claims. Consider *McGinness v. University of New Mexico School of Medicine*,<sup>215</sup> in which the plaintiff alleged that he was prone to academic anxiety, which reached a fevered pitch in connection with chemistry and mathematics.<sup>216</sup> The Tenth Circuit rejected the claim, relying on case law from the employment context and holding that "Mr. McGinness must demonstrate that his anxiety impedes his performance in a wide variety of disciplines, not just chemistry and physics."<sup>217</sup>

Even more damaging to many ADA claims is the requirement that the learning disability substantially limit an activity such as working or learning. In this respect, the benchmark in determining a substantial limitation is not a plaintiff's potential, but the abilities of an ordinary or average citizen.<sup>218</sup> In the employment context, allegedly learning disabled plaintiffs cannot establish their legal disability with reference to their hypothesized ability absent the impairment; rather, as one court noted, "[t]he effects of ADD on a claimant . . . must be measured in relation to the performance of an average person having comparable training, skills and abilities."<sup>219</sup>

It is vital to see that the legal definition of disability dramatically differs from the medical diagnosis of "learning disability." A student who performs adequately on most learning tasks can be "learning disabled," for the question is whether there is a substantial departure from the student's abilities—that is, whether a mental impairment prevents that student from reaching his innate potential.<sup>220</sup> For legal purposes, however, it is of absolutely no consequence whether a student has the innate verbal abilities of a Shakespeare or a Yogi Berra. A garden-variety B-student cannot be legally disabled even if, absent the impairment, the student would excel.

When defendants choose to make this point, they generally prevail. In this respect, the National Board of Medical Bar Examiners (NBME) has proven an indefatigable litigation opponent in ADA cases. In *Price v. National Board of Medical Examiners*,<sup>221</sup> for

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215. See *McGinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998).

216. *Id.* at 977. Those not trained in the complexities of the law might wonder why the plaintiff chose to attend medical school given his debilitating anxiety about chemistry or whether potential patients would like to know about his vulnerability to such anxiety attacks before choosing McGinness as their doctor.

217. *Id.* at 978.

218. See *supra* text accompanying notes 173-204.

219. See, e.g., *Kohn v. AT&T*, 58 F. Supp. 2d 393, 414 (D.N.J. 1999).

220. See *supra* text accompanying notes 174-175.

221. 966 F. Supp. 419 (S.D. W.Va. 1997).

example, a trio of learning disabled plaintiffs sued the NBME, seeking extra time on the medical bar exam.<sup>222</sup> All three plaintiffs submitted massive psychological documentation certifying that they had difficulty concentrating and reading. These shortcomings aside, all three plaintiffs had managed to graduate from respectable medical colleges with passing grades. The district court cut to the heart of the matter by offering the following hypothetical:

Student A has average intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore, Student A has a disability for purposes of the ADA. By contrast, Student B has superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not substantially limit the major life function of learning, because it does not restrict her ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.<sup>223</sup>

The court noted that “the ‘comparison to most people’ approach” is obviously far easier for courts to administer, and added that plaintiffs’ experts, who were medical doctors, labored under the misunderstanding that “[t]he law says that you must look at the discrepancies between their ability and their achievement.”<sup>224</sup> In fact, the law says no such thing, and the court in *Price* held that the plaintiffs in the case were all, like the hypothetical “Student B,” able to perform at a roughly average level and therefore were not legally disabled.<sup>225</sup>

The NBME is apparently far more prepared to argue all possible defenses under the ADA than is the typical educational institution. The NBME has repeatedly succeeded in arguing, as in *Price*, that, virtually by definition, any student who made it to graduate school without special accommodations in high school or college cannot be substantially limited in the activity of learning, at least in comparison with the average citizen.<sup>226</sup> When other defendants raise similar arguments they often prevail, although the

222. *Id.* at 421.

223. *Id.* at 427.

224. *Id.* at 427 n.5 (quoting plaintiffs’ experts).

225. *Id.* at 427.

226. See *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d 620, 627-29 (6th Cir. 2000) (noting that although plaintiffs had significant disparities in his scores on various intelligence measures, suggesting a learning disability, on none of the measures did he score below average, that is, IQ=100); *Biank v. Nat’l Bd. of Med. Exam’rs*, 130 F. Supp. 2d 986, 991 (N.D. Ill. 2000).



New York State Board of Law Examiners, after years of litigation, failed to persuade a district court of the soundness of this view.<sup>227</sup>

Furthermore, one should recall that the question of whether one is disabled or not turns on one's abilities *after* self-help and remedial measures have mitigated the disability.<sup>228</sup> Millions of learning disabled children and adults have developed strategies to cope with their particular impairment.<sup>229</sup> In addition, persons suffering from certain learning disabilities, in particular those falling under the general heading of ADD/ADHD, are now widely medicated with Ritalin. Thus, in determining whether a plaintiff with ADD/ADHD is substantially limited in her ability to learn or work, one would need to make an assessment of the plaintiff in her medicated state. On this point, the case law is monolithic.<sup>230</sup> *Calef v. Gillette* is an illustrative case, in which a plaintiff claimed that ADD rendered him unable to think and talk in stressful situations.<sup>231</sup> Yet in his medicated state, the plaintiff hardly seemed different from the ordinary citizen:

Very few people find handling stress to be easy. Many people do not think well in stressful situations and find it harder to speak well. There was no evidence in this record that plaintiff could not perform some usual activity compared with the general population, or that he had a continuing inability to handle stress at all times, rather than only episodically.<sup>232</sup>

For Calef and many others, psychotherapy and medication so substantially mitigate the effect of their impairment that they can no longer be considered legally disabled.

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227. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 CIV. 4986(SS), 2001 WL 930792, at \*51 (S.D.N.Y. Aug. 15, 2001).

228. See *supra* text accompanying notes 184-186.

229. For example, Washington Post columnist Richard Cohen over the years developed various strategies to overcome his dysgraphia. See Cohen, *supra* note 90.

230. See, e.g., *Calef v. Gillette Co.*, 322 F.3d 75, 85 (1st Cir. 2003) ("At most, Calef's evidence was that, despite taking Ritalin, he still had some difficulty in concentrating at work and would blurt out or interrupt people in conversation. There is no evidence at all that he was substantially limited in speaking outside of work. This is not enough to show a speaking disability under the ADA."); *Barber v. Hood River County Sch. Dist.*, No. Civ. 97-1820-HA, 2000 WL 1132115, at \*2 (D. Or. July 31, 2000) (noting that defendant "presented evidence that the plaintiff's ADD symptoms were controlled by medication and did not limit her from engaging in a broad range of normal work activities"); *Blackston v. Warner-Lambert Co.*, No. CV-98-P-2974-S, 2000 WL 122109, at \*4 (N.D. Ala. Jan. 26, 2000) ("Blackston's testimony at his deposition that 'as long as I'm on my medication, I'm okay' belies any argument that he was substantially limited by his ADD."); *Jones v. Men's Wearhouse*, No. Civ.A. 3:97-CV-1891-R, 1999 WL 134210, at \*4-5 (N.D. Tex. Mar. 10, 1999) (rejecting ADA claim where defendant was forced by various ailments (ADD, anxiety and panic disorder, obsessive-compulsive behavior, dyscalculia, sequential processing disorder, etc.) to take various drugs (Ritalin, Norpramin, Xanax), but who was not substantially limited in his medicated state).

231. *Calef*, 322 F.3d at 86.

232. *Id.*

As stated at the outset, it is impossible to render any sweeping pronouncements on the question of whether the learning disabled are disabled as a matter of law, for such judgments under the ADA must be case-specific. That being said, there is at the core of the medical and legal definitions of disability a conflict, with the former focusing on the hypothesized potential of the afflicted person and the latter more simply and concretely conducting a comparison with the abilities of the ordinary person. It is entirely possible, and indeed would seem logically inexorable, that these two definitions work together to whipsaw the vast majority of ADA claims. One cannot be “learning disabled” unless there is a substantial discrepancy between one’s tested and one’s performance IQ.<sup>233</sup> This definition would exclude persons who have low academic potential and whose performance fulfills those low expectations. In other words, people who read slowly or process information poorly because they have a general difficulty processing information are not learning disabled; they are simply not intelligent. Indeed, the medical definition of “learning disability” is skewed in favor of high IQ individuals whose academic performance is merely average.<sup>234</sup>

Yet one cannot be legally disabled unless one’s performance IQ is substantially different from the average citizen’s performance IQ. Accordingly, a relatively high IQ individual whose academic performance is average would be, as a medical matter, learning disabled but would not be, as a legal matter, disabled. The upshot is inescapable: Virtually any person who graduates from high school and who demonstrates some meaningful measure of literacy and numeracy cannot be considered legally disabled because his or her performance approximates that of the typical American.

### C. *Misunderstanding the Law*

Little research has been conducted to determine whether the case law defining “disability” has filtered down into the consciousness of psychologists and the educational elite. What evidence there is suggests that it has not, and at the current time there is a widespread misunderstanding of the ADA among those who deal with LD on a daily basis.

In 1999, researchers mailed surveys to all 371 clinicians who had submitted documentation to the Law School Admissions Council

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233. See *supra* text accompanying notes 68-70.

234. See *supra* text accompanying notes 75-80.

requesting accommodations for students taking the LSAT.<sup>235</sup> Forty percent of the clinicians responded, and their answers suggest serious misunderstandings of the law. For example, the survey posed the following statement, to be judged true or false: "Under the ADA, an individual with a measured Full Scale IQ of 135 and a reading standard score of 100 could, because of the discrepancy in scores, qualify for accommodations for a reading disability."<sup>236</sup> Although the correct answer is false,<sup>237</sup> 54 percent of the clinicians responded in the affirmative.<sup>238</sup> Other questions on the survey confirmed that about half the clinicians failed to appreciate that the ADA's requirement that an impairment substantially limit a major life activity is measured in comparison with the average citizen, not the average peer.<sup>239</sup> Consider this question on the survey: "Under the ADA, clinicians should determine impairment by comparing a patient's scores with norms at similar educational levels."<sup>240</sup> If the answer to this question were true, then a graduate student in physics with an IQ of 120 could prevail in his dyscalculia claim if his peers in graduate school had an average IQ of 140. One might think this state of affairs absurd, but 43 percent of the clinicians thought that this result was what the ADA required.<sup>241</sup>

Virtually every major university has a bureaucracy devoted to serving the needs of learning disabled students, and their websites likewise suggest misunderstandings of the law. Consider the University of Massachusetts site, which poses the question, "Who is covered under the ADA?" and answers as follows:

A "disability" is defined as a physical or mental impairment that substantially limits one or more major life activities . . . "Disability" covers a wide range of conditions and includes mobility, vision, hearing, or speech impairments, learning disabilities, chronic health conditions, emotional illnesses, AIDS, HIV positive, and a history of alcoholism or prior substance abuse.<sup>242</sup>

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235. Michael Gordon et al., *ADA-Based Accommodations in Higher Education: A Survey of Clinicians About Documentation Requirements and Diagnostic Standards*, 35 J. LEARNING DISABILITIES 357, 358 (2002).

236. *Id.* at 361.

237. *Id.* Any person whose reading achievement score is 100 (or average) is by definition not substantially limited in relation to the average citizen.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Office of Equal Opportunity and Diversity, Univ. of Massachusetts, Amherst, The Americans with Disabilities Act: Questions and Answers, at <http://www.umass.edu/eod/americans.html> (last updated Aug. 10, 2002).

The answer is at best imprecise, for it appears to suggest that learning disabilities are necessarily a legal disability covered by the ADA. Many other websites are equally misleading.<sup>243</sup> The failure to distinguish between “learning disability” as a medical diagnosis and “disability” as a legal conclusion is reflected on the website of the Catholic University’s Office of the General Counsel. The site states that “[d]isabilities that are afforded protection under the ADA include learning disabilities” and then continues:

Definition of a Learning Disability: A student or applicant must have the following to qualify as learning disabled: average or above average intelligence as measured by a standardized intelligence test which includes assessment of verbal and non-verbal abilities; [and] the presence of a cognitive-achievement discrepancy or an intra-cognitive discrepancy indicated by a score on a standardized test of achievement which is 1.5 standard deviations or more below the level corresponding to a student’s sub-scale or full-scale IQ.<sup>244</sup>

What is remarkable, especially given that the above appeared on a general counsel’s website, is that there is no apparent awareness of the fact that a student meeting the above criteria might well be “learning disabled” as a medical diagnosis, but not disabled as a matter of law. The lawyers at Catholic University, like many of the clinicians surveyed by the LSAC, seem to think that a bright student whose achievement is substantially discrepant with his aptitude would be legally disabled. This is, to repeat, not the case, assuming the student’s achievement is roughly on par with that of an average citizen.

Of course, even if universities do not have a legal obligation to accommodate certain students, it may be appropriate to afford accommodations of one sort or another anyways. Determining whether or not there is a legal duty to accommodate and then calibrating the appropriate accommodation to the disability, whether legally mandated or not, are thorny problems that confront educational institutions daily. In this respect, no educational institution has

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243. The Virginia Tech website, for example, begins its definition of disability, “A person with a disability is anyone with a physical or mental impairment that substantially limits one or more major activities.” Virginia Polytechnic Institute and State University, Policy 4075: Accommodations of Employees and Applicants with Disabilities (Feb. 18, 1999), at <http://www.policies.vt.edu/4075.html>. But it continues, “the definition includes people with a whole range of invisible disabilities. These include psychological problems, learning disabilities, or some chronic health impairment such as epilepsy, diabetes, arthritis, cancer, cardiac problems, HIV/AIDS, and more.” *Id.* But this is misleading: all of these ailments may, or may not, constitute a legal disability.

244. Office of General Counsel, Catholic University of America, ADA Guidelines: Self-Audit Checklist, at <http://counsel.cua.edu/ada/resources/selfaudit/determin.cfm> (last visited Apr. 1, 2004).

proven to be more exposed to demands for accommodations than has the Educational Testing Service, to which we turn.

## V. THE RISE OF THE SATS

The twentieth century has been, in the words of a noted psychologist, “the first century of [mental] ability testing,”<sup>245</sup> and no institution has been more prominent in this development than the Educational Testing Service. Tests such as the SATs are used at various stages in American life to weed out some persons and promote others. Although this sorting process is defended by some as objective and fair, it has manifold critics, including the learning disabled and their lobby. This Part first explores the controversial justification for modern mental aptitude testing, and it then considers the criticisms levied against such testing by the learning disabled.

### A. *Intelligence Testing: From Science to Business*

The idea of “intelligence” is probably as old as the human species itself. The question therefore arises, what is so new about twentieth century intelligence testing? The short answer is that modern intelligence testing is premised on two claims: first, that each person possesses a specific level of mental aptitude or general intelligence—“g”—that is innate and to a significant degree independent of social class or education; and second, that “g” can be tested. Both claims are highly controversial.<sup>246</sup> But it is sufficient to see how mental *aptitude* testing is in theory distinct from the far more common form of academic testing, which may be called *achievement* testing. The latter measures mastery of some specific subject matter (*Hamlet*, Torts), and is obviously significantly dependent on whether one read a specific book or took a certain class, the quality of one’s teacher, the degree of one’s diligence, etc. Thus, a student’s score on a Torts exam is highly dependent on any number of variables, and no one would claim that such a score measured “general intelligence.”

There are countless obstacles to measuring general intelligence, or “g,” in a way that permits comparisons across cultures and time. Shakespeare would fail a calculus test, and had he been

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245. Susan E. Embretson, *The Second Century of Ability Testing: Some Predictions and Speculations*, 7th Annual William H. Angoff Memorial Lecture 6 (Jan. 11, 2001).

246. Arthur Jensen is perhaps the most famous contemporary scholar trying to define and describe the “g-factor,” that is, a measure of general intelligence. See ARTHUR R. JENSEN, *THE g FACTOR: THE SCIENCE OF MENTAL ABILITY* (1998). Such efforts have inspired a raft of highly critical reviews. See, e.g., STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 347-50 (1996).

born in Africa or Asia, his mastery of the English language would never have soared to such stratospheric heights.<sup>247</sup> Sensing that any measurement of intelligence must reach beyond contingencies such as place and time of birth, the nineteenth century scientist Paul Broca measured the head sizes of thousands of people and tried to correlate the findings with educational achievement. But his results proved disappointing,<sup>248</sup> as did the efforts at the turn of century by Francis Galton and James McKeen Cattell to generate “mental tests.”<sup>249</sup>

The early twentieth century witnessed an increasing interest in mental aptitude tests,<sup>250</sup> but it was not until the 1930s that such exams entered (and some would say infected) the mainstream of American educational life.<sup>251</sup> Upon becoming President of Harvard in 1933, James Bryant Conant commissioned the use of a test, known as the SAT (or Scholastic Aptitude Test), to select scholarship students

247. See ROBERT MCCRUM ET AL., *THE STORY OF ENGLISH* 102 (1986) (noting that Shakespeare used a staggering 30,000 words).

248. This effort did not amount to much in part because of imprecision in measurement techniques. Although Broca’s experiments are often mocked, there is some evidence, thanks to more advanced techniques such as the MRI, that brain size is positively correlated with IQ, albeit to a small degree. See P. Tom Schoenemann, Note (finding correlation between IQ and head size of between .1 and .3), at <http://pubpages.unh.edu/~jel/brainIQ.html> (last visited May 18, 2004). Disclosure: I have a proportionately small head, as does my 2-year-old daughter, who is widely acknowledged to be a genius. See Anna Leigh Lerner Birth Report (90th percentile in height and weight, but only 50th percentile in head size) (on file with author for posterity).

249. See Ian J. Deary et al., *Testing Versus Understanding Human Intelligence*, 6 PSYCHOL. PUB. POLY & L. 180, 181-83 (2000).

250. In 1904, a test commissioned by the French Ministry of Education achieved some success in the early identification of mentally retarded children, and a decade later, intelligence measurement crossed the Atlantic in World War I, when Robert Yerkes, a Harvard psychologist, tested nearly two million U.S. army recruits, to identify those with officer capabilities. To this point, intelligence testing, while already widespread, was nonetheless of relatively limited usefulness—that is, to identify the least and most intelligent, but not to calibrate all those in between. See Allen Calvin, *Use of Standardized Tests in Admissions in Postsecondary Institutions of Higher Education*, 6 PSYCHOL. PUB. POLY & L. 20, 23 (2000); see also Sheldon H. White, *Conceptual Foundations of IQ Testing*, 6 PSYCHOL. PUB. POLY & L. 33, 37-40 (2000);

251. Of course, there had long been tests, even standardized tests, but they could almost exclusively be characterized as “achievement tests.” Achievement tests have a relatively long history in the American educational system, with the New York Regents exam of 1879 widely recognized as the first state-wide exam. See Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory To Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1121 n.28 (2002). Such tests were intended not to measure intellectual potential, but mastery of some specific subject matter. Even college entrance examinations in the early twentieth century, which only a few elite universities used at all, consisted of achievement, not aptitude, tests. In 1900, twelve elite colleges (consisting mostly of the Ivy League) formed the College Entrance Examination Board (known as the College Board) to standardize the admissions process, and force the feeder boarding schools to adopt a uniform curriculum that covered materials like Latin and physics. NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 28-29 (1999).

from outside the Northeast.<sup>252</sup> Given the criticism lately directed at the SAT, the test's origins are worth emphasizing. Conant recognized that achievement tests, generally used for selecting Harvard students, penalized bright students who failed to attend top boarding schools with the best teachers and most demanding programs.<sup>253</sup> A Harvard professor named Henry Chauncey became the director of the College Board in 1947, and through the SATs he aspired to "depose the existing, undemocratic American elite and replace it with a new one made up of brainy, elaborately trained, public-spirited people drawn from every section and every background."<sup>254</sup>

In 1948, several testing offices joined together to create the Educational Testing Service, a nonprofit company that administered the SAT with the nominal mission of conducting educational research.<sup>255</sup> (The ETS and the College Board at this time emerged as distinct entities, with the College Board developing the SATs and other standardized exams, and the ETS acting as the College Board's vendor in administering those exams.) Sweeping ahead four decades, in 2001, the nonprofit ETS generated revenues of over \$700 million, a 40 percent increase from 1998 revenues and a 350 percent increase from 1981 figures.<sup>256</sup> The ETS's chief executive officer earned nearly \$1 million that year, and when questioned about the substantial bonuses (in the tens and hundreds of thousands of dollars) that he and other executives received, he responded that "[t]his is a billion-dollar commercial entity."<sup>257</sup> He quickly added, perhaps remembering the ETS's nonprofit, tax-exempt status, that "[w]e're an organization with a very strong social mission."<sup>258</sup>

What began a century and a half ago in Paul Broca's laboratory is now an odd mix of science and business. As Nicolas Lemann argues in his book *The Big Test*, few other organizations have wielded as much influence over the shape of American life in the second half of

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252. LEMANN, *supra* note 251, at 28-40. Those students included a future Nobel Prize winner and Secretary of Defense Casper Weinberger.

253. *Id.* at 38.

254. *Id.* at 5.

255. See The College Board, The Formation of the ETS, at <http://www.collegeboard.com/faithfulmirror/expansion/ets.html> (last visited May 18, 2004).

256. Tamar Lewin, *Corporate Culture and Big Pay Come to Nonprofit Testing Service*, N.Y. TIMES, Nov. 23, 2002, at A1; see Marguerite Clarke et al., *The Marketplace for Educational Testing* (Apr. 2001), at <http://www.bc.edu/research/nbetpp/publications/v2n3.html>.

257. See Lewin, *supra* note 256.

258. *Id.* Recent evidence on this score was the ETS's decision to join an amicus brief filed by 52 other educational institutions in support of Michigan's race-conscious admission policy in the *Grutter v. Bollinger* lawsuit that reached the United States Supreme Court. See Brief of Amici Curiae American Council on Education et al., at \*30, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399069.

the twentieth century as the ETS, and yet even fewer are as shrouded in mystery. Were the ETS a federal agency, FOIA requests and notice-and-comment procedures would provide some transparency; or were the ETS a for-profit corporation, there would be the ordinary mechanisms of shareholder governance. But the ETS exists in a twilight zone—a nonprofit, tax-exempt, allegedly scientific/educational institution marketing a profitable product and guarding that product with all the vigor, or nearly so, of a Fortune 500 company. As an essay commissioned by the ETS itself admits, “[t]he ceaseless expansion of ETS after 1948 invited controversy. Skeptics claimed that its pursuit of new markets and its cultivation of old ones were inappropriate, even hypocritical, for a nonprofit organization supposedly devoted to research.”<sup>259</sup>

### B. *Flagging and the Challenge from the Disabled*

Virtually since the exam’s inception, the SATs have had more detractors than the College Board and Educational Testing Service would care to count. Critics have argued that the SATs are unfair to women<sup>260</sup> and minorities,<sup>261</sup> and that they do not accurately predict college performance,<sup>262</sup> all charges the College Board and ETS have labored indefatigably to refute.<sup>263</sup> Critics have also argued that tutors

259. Robert L. Hampel, *The Origins of the Educational Testing Service*, in A FAITHFUL MIRROR: REFLECTIONS ON THE COLLEGE BOARD AND EDUCATION IN AMERICA 247, 247 (Michael C. Johaneck ed., 2001).

260. See, e.g., PHYLLIS ROSSER, THE SAT GENDER GAP: IDENTIFYING THE CAUSES 21 (1989). But see REBECCA ZWICK, FAIR GAME?: THE USE OF STANDARDIZED ADMISSIONS TESTS IN HIGHER EDUCATION 143-57 (2002).

261. See, e.g., Richard Delgado, *Official Elitism or Institutional Self Interest: 10 Reasons Why UC Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 595-96 & n.11 (arguing that the SATs’ founders were racist); see also Expert Report of Claude M. Steele, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), reprinted in 5 MICH. J. RACE & L. 439, 444 (1999) (advancing the view that minority underperformance on the SATs arises from a “stereotype threat”). But see ZWICK, *supra* note 260, at 109-42.

262. See, e.g., CHARLES ROONEY, FAIRTEST, TEST SCORES DO NOT EQUAL MERIT: ENHANCING EQUITY & EXCELLENCE IN COLLEGE ADMISSIONS BY DEEMPHASIZING SAT AND ACT RESULTS 2 (1998), at <http://www.fairtest.org/optrept.pdf>.

263. For example, in Wayne J. Camara & Amy Elizabeth Schmidt, *Group Differences in Standardized Testing and Social Stratification*, COLLEGE BOARD REPORT NO. 99-5, at 13 (1999), the authors emphasize “the inequities minorities have suffered through inadequate academic preparation, poverty, and discrimination.” The implicit message—or at least the one I inferred—is that society, not the College Board, should be faulted for the SAT scores of minorities. The body of the report labors to show that the average performance of blacks and Hispanics on the SATs (combined 860 and 916, compared with an average for whites of 1053) is consistent with differential undergraduate performance (average freshman GPA of blacks, 2.14, Hispanics, 2.37, and whites, 2.60). See *id.* at 2, 5; see also Nancy Burton & Leonard Ramist, *Predicting Success in College: SAT Studies of Classes Graduating Since 1980*, COLLEGE BOARD REPORT NO. 2001-2,



can “coach” students to improve their SAT scores, which, if true, would undercut the claim that the SATs are in fact a “scholastic *aptitude* test”—a test of natural or innate mental ability.<sup>264</sup> And critics have said that the SATs distort the educational system, with teachers preparing students for the seemingly bizarre and useless aspects of the exam (avaricious: greed :: choleric: anger), rather than genuinely educating students.<sup>265</sup> With respect to the last two criticisms, the College Board has never quite conceded defeat in its pronouncements, although its deeds are tantamount to a confession of error. In 1993, the College Board expunged the word “aptitude” from its files; now, if pressed, officials insist that “SAT” is a meaningless acronym, and that the exam does not purport to measure “aptitude.”<sup>266</sup> And beginning in March 2005, the College Board will replace the dreaded analogy section with more reading comprehension questions, and make other changes that have the combined effect of making the exam more like an achievement test and less like an aptitude test.<sup>267</sup>

One of the most recent challenges to the SATs has come from the disabled. Even before the enactment of the ADA, the ETS accommodated disabled test takers in various ways. Prior to 1990, for example, the ETS allowed blind students to take the exam in Braille or with a reader.<sup>268</sup> The ADA extended the protection of federal disabilities law to testing services such as the ETS, formally requiring “accommodations” for the “disabled.”<sup>269</sup> The ETS requires physically and mentally disabled students to provide certification of a disability from an expert (picked by the student), which the ETS then evaluates, and acts upon on a case-by case basis.

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at 25 (2001) (“[S]tudies of substantial size . . . support[ ] the ability of SAT scores to predict cumulative college grades for women and African Americans and students with disabilities.”).

264. See Interview by PBS’s *Frontline* with John Katzman, President of Princeton Review, at <http://www.pbs.org/wgbh/pages/frontline/shows/sats/interviews/katzman.html> (last visited May 18, 2004).

265. See, e.g., PETER SACKS, *STANDARDIZED MINDS* 9 (1999).

266. The College Board, *Frequently Asked Questions* (“Originally, SAT was an acronym for the Scholastic Aptitude Test. In 1993, the test was renamed the SAT I: Reasoning Test. At the same time, the former Achievement Tests were renamed the SAT II: Subject Tests. SAT has become a simple way of referring to the SAT I: Reasoning Test.”), at <http://www.collegeboard.com/student/testing/sat/about/aboutFAQ.html#quest01> (last visited May 18, 2004).

267. The change has been applauded by some, see John W. Harper, *The New, Improved SAT*, WKLY. STANDARD, Aug. 26, 2002, at 19, and questioned by others, see John Cloud, *Inside the New SATs*, TIME, Oct. 27, 2003, at 48, 50 (quoting the former chair of the College Board’s SAT Committee as saying, “There’s a danger that making it too curriculum-dependent will actually increase overall score gaps for some minority groups.”).

268. WARREN W. WILLINGHAM ET AL., *TESTING HANDICAPPED PEOPLE* 3-4 (1988).

269. Section 309 of the ADA applies Title III of the law to “any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education . . .” 42 U.S.C. § 12189 (2000).

Until October 1, 2003, however, the ETS placed an asterisk, or “flag,” next to test scores obtained under nonstandard conditions, thereby indicating to colleges that the student had taken the exam in some way departing from the norm. It is important to note that flagging was hardly idiosyncratic behavior on the ETS’s part: flagging nonstandard scores has long been, and is still, almost universally regarded as an essential feature of an accurate, or *valid*, test. Simply put, a 1200 obtained in 3 hours does not necessarily mean the same as a 1200 obtained in 6 hours. In this respect, psychometricians speak of a test’s *validity*, which is its power to measure whatever the test purports to measure.<sup>270</sup> In the case of the SATs, the exam purports to predict undergraduate academic performance, and the plainly intuitive idea is that a 1200 obtained in 6 hours may not predict the same level of performance as a 1200 obtained in 3 hours. Everything else being equal, the first student would not be expected to do as well in college as the second student. Hence the need to give the consumers of the scores—the universities—a sign that the first score was obtained under nonstandard conditions.

As long ago as 1978, the Office of Civil Rights (OCR) of the Department of Health and Human Services, in construing the Rehabilitation Act of 1974, gave a tentative stamp of approval to flagged scores, noting that “[u]ntil such time as a more viable policy can be worked out, the testing services will be allowed to continue to notify their users that tests were taken under non-standard conditions.”<sup>271</sup> Since the enactment of the ADA, the OCR has considered numerous challenges to flagged scores, and in a string of opinion letters it has repeatedly held that universities and other institutions do not violate the ADA when they receive flagged scores from testing entities.<sup>272</sup> However, one puzzling opinion letter concluded that a medical school had acted in a discriminatory manner when it “weighed [flagged scores] in a different and lesser manner than other [scores].”<sup>273</sup> Taken together, then, the OCR letters suggest that flagged scores are legal only insofar as they are treated

270. See ZWICK, *supra* note 260, at 79-89.

271. See Diana C. Pullin & Kevin J. Heaney, *The Use of Flagged Test Scores in College and University Admissions: Implications and Issues Under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act*, 23 J.C. & U.L. 797, 811 (1997) (quoting AM. ASS’N OF COLLEGIATE REGISTRARS AND ADMISSIONS OFFICERS & AM. COUNCIL ON EDUC., RECRUITMENT, ADMISSIONS, AND HANDICAPPED STUDENTS, A GUIDE FOR COMPLIANCE WITH SECTION 504 OF THE REHABILITATION ACT OF 1973, at 22 (1978)).

272. See Adam A. Milani, *Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law*, 22 J.C. & U.L. 989, 1006 (1996) (citing OCR letters).

273. SUNY Health Sci. Ctr. at Brooklyn, Complaint No. 02-92-2004, 5 Nat’l Disability L. Rep. (Lab. Rel. Press) ¶ 77 (Aug. 18, 1993).

identically to non-flagged scores. Of course, the reason for the flag is precisely so that an institution may choose to weigh the scores differently. Alternatively put, the flag does not declare the score invalid, but it simply allows a university, when considering an applicant with a flagged SAT, to choose to place greater emphasis on grades or some other criterion.

Disabilities rights groups had for several years argued that the flag stigmatizes the disabled. As one student note suggested, "the testing services have adopted a practice [flagging] that opens the door to bias and the stigma of being identified as disabled."<sup>274</sup> At first blush, the claim seems odd. It is not the testing services who have "opened the door" to bias, but the student who has voluntarily identified himself as disabled; and it was precisely this self-identification that entitled the student to preferential treatment. In any event, the issue of flagging and bias made its way to the courts when Mark Breimhorst, joined by the Californians for Disability Rights and the International Dyslexia Association, filed suit against the ETS.

Born without hands, Breimhorst took the GMAT on January 31, 1998, with a Kensington Track Ball and a 25 percent extra time accommodation (less extra time, by the way, than is often afforded a student suffering from ADHD).<sup>275</sup> His official ETS score report included a mark stating, "Scores Obtained Under Special Conditions."<sup>276</sup> The GMAT Information Bulletin at the time explained its "flagging" policy as follows: "ETS recognizes that when standardized tests such as the GMAT are taken under nonstandard conditions, the scores may not accurately reflect the test taker's educational ability."<sup>277</sup> Breimhorst asked the ETS to remove the flag on his scoring report before it was distributed to business schools, but the ETS refused.<sup>278</sup> He then filed suit against the ETS in August 1999, bringing claims under the ADA, the Rehabilitation Act, and California civil rights and business practices laws. Before the case was finally resolved, but after a preliminary court opinion deemed

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274. Kristan S. Mayer, Note, *Flagging Nonstandard Test Scores in Admissions to Institutions of Higher Education*, 50 STAN. L. REV. 469, 493 (1998). By contrast, a recent student note defends the flagging procedure, at least in the context of the LSATs and MCATs. Michael Edward Slipsky, *Flagging Accommodated Testing on the LSAT and MCAT: Necessary Protections of the Academic Standards of the Legal and Medical Communities*, 82 N.C. L. REV. 811 (2004).

275. Complaint ¶¶ 6, 31, *Breimhorst v. Educ. Testing Serv.*, No. C-99-3387 (N.D. Cal. Aug. 1999).

276. *Id.* ¶ 32.

277. *Id.* ¶ 33.

278. *Id.* ¶ 41-42.

favorable to plaintiffs, the ETS settled the case with Breimhorst by agreeing not to flag GMAT scores.

Purely as a legal matter, the claim that the flagging procedure violated the ADA is tenuous. The ADA speaks to standardized admissions tests in only one section, section 309, worth quoting in full:

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.<sup>279</sup>

The central requirement of this section is that testing entities make their examinations “accessible” to the disabled, which on its face hardly proscribes the flagging of scores obtained under nonstandard conditions. A Department of Justice regulation construing the ADA is somewhat more elaborate in sketching what might fall under the rubric of “accessible.” The regulation lists nearly a dozen “required modifications to an examination,” which include “changes in the length of time” and “auxiliary aids and services,” such as “Brailled or large print examinations.”<sup>280</sup> Again, none of this would seem to prohibit the testing entity from noting that the examination was conducted in nonstandard conditions.

The legal argument against flagging is largely based on the following subsection of the regulation:

The examination [should be] selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure).<sup>281</sup>

Precisely what this provision means, and whether it calls into question the flagging procedure, has been the subject of only two court opinions.

In *Doe v. National Board of Medical Examiners*,<sup>282</sup> a medical student with multiple sclerosis received extra time on a certification exam, and his score was flagged.<sup>283</sup> He argued that the flag was illegal because it denied him the opportunity to take the exam “in a

279. 42 U.S.C. § 12189.

280. 28 C.F.R. § 36.309(b)(2)-(3) (2003).

281. 28 C.F.R. § 36.309(b)(1)(i) (*italics added*).

282. 199 F.3d 146 (3d Cir. 1999)

283. *Id.* at 150. Doe’s score including the phrase “Testing Accommodations” on the front and a comment on the back: “Following review and approval of a request from the examinee, testing accommodations were provided in the administration of the examination.” *Id.*

place and manner accessible” to him.<sup>284</sup> The Third Circuit rejected the argument:

The term “accessible” is not best understood to mean “exactly comparable.” The notion of accessibility, or best ensuring that examination results accurately reflect “aptitude or achievement level,” does not mandate that the NBME provide examinations to the disabled that yield technically equal results; it mandates changes to examinations—“alternative accessible arrangements,” so that disabled people who are disadvantaged by certain features of standardized examinations may take the examinations without those features that disadvantage them.<sup>285</sup>

As the court proceeded to note, the flag does not indicate that a score is invalid, but simply that scores obtained in nonstandard conditions are not comparable to scores of examinees who took the test without accommodations.<sup>286</sup>

However, critics of flagging received support in the early stages of the *Breimhorst* lawsuit, when Judge Orrick denied most of the ETS’s motion to dismiss in an opinion highly skeptical of the flagging procedure. Judge Orrick focused on the requirement in the regulation that the examination be “selected and administered so as to best ensure that the examination results accurately reflect” the individual’s ability rather than his disability. According to Judge Orrick, this regulation, read against the backdrop of the ADA, “require[s] the test provider to provide accommodations for disabled test takers *and* to select and administer the test to best ensure that the test results for disabled test takers reflect their actual abilities.”<sup>287</sup> Indeed, “regardless of the burden it causes the test provider,” Judge Orrick concluded, the test provider must administer tests that “equally measure the abilities of disabled and nondisabled test takers.”<sup>288</sup> Yet if the test were administered in such a manner, with the accommodation perfectly calibrated to the disability, “then there would be no reason to flag the test results of disabled test takers who receive accommodations.”<sup>289</sup> In other words, if it could be shown that scores obtained by test takers with multiple sclerosis, who received time and a half, were equally predictive of undergraduate performance as scores obtained under standard conditions by nondisabled test takers, then there would be no reason to flag the first scores. The district judge allowed that there may be “no way to ensure that the test results are precisely equivalent,” in which case flags might be

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284. *Id.* at 156.

285. *Id.* at 156 (citations omitted).

286. *Id.* at 156-57.

287. Opinion at 9, *Breimhorst v. Educ. Testing Serv.*, No. C-99-3387 (N.D. Cal. Aug. 1999).

288. *Id.* at 9-10.

289. *Id.* at 10.

appropriate, but the burden would be on the ETS to show that it had taken steps "to best ensure that the results are equal."<sup>290</sup>

Judge Orrick's decision placed the ETS in a difficult position. If a score achieved by a student receiving an accommodation was comparable (that is, equally predictive) of academic performance to a score obtained by nondisabled students under standard conditions, then obviously there would be no need to flag. Only if the scores were not comparable would the flag be required. Judge Orrick held that the ETS had the burden of showing that, whatever the cost,<sup>291</sup> it could not guarantee that nonstandard scores were comparable to standard scores.

In fact, the College Board and ETS had, over the past decade, conducted several studies of the SATs, and they had concluded that college grades of learning disabled students were overpredicted by nonstandard SAT scores, hence confirming the need for the flag. Yet for reasons that can only be guessed,<sup>292</sup> the ETS declined to press the issue, instead settling with Breimhorst in the narrow case that he, as an individual, presented. Beyond that, the College Board agreed to commission a study by six academics, grandiosely dubbed a "blue-ribbon panel," to consider the issue of flagging on all the College Board exams. The expert report that issued, weighing in at a spare eight pages, is riddled with flaws and is a superficial treatment of an incredibly complicated issue, especially when compared with the rigorous studies historically generated by the College Board and ETS.<sup>293</sup>

290. *Id.*

291. *Id.* (holding that "regardless of the burden it causes the test provider," the test provider must administer tests that "equally measure the abilities of disabled and nondisabled test takers").

292. See *infra* Part VI.B.1 (speculating as to the reasons for the ETS's decision).

293. NOEL GREGG ET AL., THE FLAGGING TEST SCORES OF INDIVIDUALS WITH DISABILITIES WHO ARE GRANTED THE ACCOMMODATION OF EXTENDED TIME: A REPORT OF THE MAJORITY OPINION OF THE BLUE RIBBON PANEL ON FLAGGING 4 (2002), <http://www.drlegal.org/cases/breimhorst/majority-report.pdf>. The main question presented to the blue ribbon panel was whether the scores of learning disabled students taking ETS exams under nonstandard conditions (usually extra time) are comparable to the scores of nondisabled students taking the exams under standard conditions. Alternatively put, are the ordinary time (nondisabled students) and extra time (disabled students) scores equally predictive of undergraduate performance? The majority report noted that the College Board purportedly does not regard the SATs "to be a measure of speed." *Id.* If this were correct, "then inferences drawn from both timed and untimed administrations [would] be similar." *Id.* at 4-5. The majority then cited studies that allegedly showed that nondisabled students gained little advantage from extra time, whereas disabled students did substantially better. *Id.* at 5. The panel wrote:

This finding is consistent with the argument that students with disabilities need more time to demonstrate their knowledge, skills, and abilities than the non-disabled student, and suggests that the scores of these students taken under the condition of

Nonetheless, acquiescing in the recommendation of the panel, the College Board agreed to discontinue flags not just on the GREs, but on the SATs (starting October 2003) and the Advanced Placement exams (starting in May 2004) as well, and not just for the physically disabled, like Breimhorst, but for the learning disabled too. This was a startlingly global settlement, given that the named plaintiff in the lawsuit had a peculiarly grave physical disability and was registered to take only one of the College Board's tests, the GMATs. How can Breimhorst possibly be typical of all the disabled students, including LD test takers, who stand to benefit from the settlement? As discussed earlier, the conclusion that a person is legally disabled is a highly individualized inquiry.<sup>294</sup> It strains credulity that Breimhorst, with no hands, was representative of dyscalculiacs, who have difficulty adding. Even if the latter are to be credited as legally disabled, it could only be based on an individualized inquiry. For that matter, any student sufficiently math savvy to make it through an AP Calculus class is far more mathematically advanced than the average American and cannot be credited as disabled. And even if her dyscalculia might be so grave as to render her "disabled" and eligible for an accommodation like double time on an AP Calculus exam, such an accommodation would be grossly inappropriate in the context of an AP English exam. (And similarly it is hard to see why a dyslexic should need extra time on a calculus exam.)

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extended time are more representative of their true performance than are the scores they would obtain from a standard administration.

*Id.* There was little or no evidence to support this claim. A 1998 College Board study relied upon by the majority noted that disabled students gain approximately 83 points when taking the SATs first with the standard time allotment and second with extra time; "by contrast," nondisabled students "who took the test twice *under standard time allotment limits*," that is first in their junior year of high school and then in their senior year, gained only 25 points. The majority concludes that "[t]hese results indicate that students with disabilities make substantially larger gains when taking the test with extended time, relative to non-disabled students." *Id.* The logic evinced by this statement is quite deficient: *The 1998 study never compared scores of nondisabled students who had taken the SATs first with ordinary time and then with extra time, so in fact we have no idea how many points they would have gained.* Of the three psychometricians on the panel, two dissented from the panel's decision, cutting to the heart of the matter as follows: "Crucial evidence from prediction studies does *not* support a conclusion that scores on College Board standardized tests administered with extra time to disabled students are comparable to scores on the same tests administered to nondisabled without extra time." Miriam Kurtzig Freedman, *Disabling the SAT*, EDUC. NEXT, Fall 2003, at 37, 41-42 (citing Minority Report of Robert Brennan, at 2), available at <http://www.educationnext.org/20034/pdf/36.pdf>. As one observer astutely noted: "By removing the 'Nonstandard Administration flag,' the College Board deprives college admissions officers of a valid criterion for considering whether a student is likely to succeed at the university. . . . And of course, if the College Board truly believes that time doesn't matter on the SAT, then why does it continue to time it for most students?" *Id.* at 43.

294. See *supra* text accompanying note 209.

When we consider the learning disabled, furthermore, Judge Orrick’s insistence that an exam measure a student’s ability, but not his disability, is hard to fathom. Of course, ability and disability are terms of relation. It would be absurd to say that a doctor should measure how tall I am without measuring how short I am. Likewise, how is it possible to construct a test in reading comprehension (which of course includes how quickly and accurately one assimilates written information) without simultaneously measuring how slowly and incompetently one reads? To say that a reading or a mathematics test should test how well one reads or adds without testing how badly one reads or adds is, when one drills down, the idea at the core of Judge Orrick’s opinion, at least when applied to the learning disabled. In any event, it is important to recall that Judge Orrick’s order was simply a denial of the ETS’s motion to dismiss the Breimhorst suit. Prior to entering into its settlement agreement, the ETS and College Board were under no legal obligation to discontinue flagging. Why, then, did they agree to do so?

## VI. A QUESTION OF INCENTIVES

My method in this section is to consider the flagging issue, and more generally the issue of accommodations for the learning disabled, through an economic lens. Let us assume that people respond to incentives, and further that there is a market in accommodations for the learning disabled. On the demand side, a diagnosis as “learning disabled” generates accommodations, or benefits, and it would be naive *not* to expect a demand for this advantageous appellation. If the accommodated student’s score is flagged, the value of the accommodation is diluted, since it is possible that a performance achieved under special considerations will be discounted. Thus, with the removal of the flag, the demand for LD diagnoses should be expected to increase. On the supply side, administrators in educational institutions, such as the ETS and universities, are unlikely to strenuously resist requests for accommodations. The overall fairness of the educational process may be jeopardized if growing numbers of students are granted accommodations, especially if special treatment is disproportionately conferred upon “elites”—that is, the affluent, connected, and litigious. Yet the personal incentives of educational executives and professors, to avoid controversy by providing easy access to accommodations, are not perfectly aligned with the interests of the institution as a whole.



### A. Parents and Students

In recent years there has been a scattering of articles in national publications about ambitious parents and students gaming the system, securing LD diagnoses in order to win accommodations in their academic work.<sup>295</sup> Last year, this phenomenon attracted national attention thanks to 17-year-old Blair Hornstine, high school senior and Harvard-admittee. Hornstine, possibly egged on by an ambitious father, himself a state judge, sued in federal court to become the sole valedictorian of her high school. She prevailed in the suit, but set off a tsunami of resentment in the process, especially when it emerged that she had received accommodations in her schoolwork.<sup>296</sup> Why did this highly intelligent young woman (SATs of 1570) need such help? Because she claimed to suffer from a medical ailment, variously defined as “chronic fatigue” and “immune system disorder.”<sup>297</sup>

Hornstine’s story was precisely the sort to generate long strings of comments on the Internet. Amidst the jeremiads and condemnations, an anonymous posting by one parent, whose son had also received advantageous accommodations on examinations, was striking in its defense of Hornstine for cleverly gaming the educational and legal system:

My son has a “disability,” too. He was given 50% more time to complete the [SAT] a second time, and with this time was able to score substantially higher when he could slow down, take his time, recheck work. He was given an unfair advantage, since his disability did not relate to “test taking” but fell under the all encompassing disabilities umbrella. And he will reap the rewards of working the system.

[Hornstine] is working the system and reaping the benefits . . . I am smiling while reading all the news. And I truly understand any bitterness the other students feel. However, they, their parents, classmates, teachers and administrators all bought into this system with unforeseen circumstances. *She follow[ed] the rules of the game and she outsmarted you all.*<sup>298</sup>

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295. See *supra* note 7 and accompanying text.

296. See John Sutherland, *Inside Story: Blair Hornstine Was the Pride of Moorestown High—But Her Brilliant Career Was Too Good to Be True*, GUARDIAN (London), July 21, 2003, at 7 (describing some of the less flattering epithets directed at Hornstine); The Blair Hornstine Project (collecting some of the unkind things people are apt to say), at [http://www.tow.com/photogallery/20030607\\_blair](http://www.tow.com/photogallery/20030607_blair) (last updated Nov. 19, 2003).

297. Loathing for Hornstine mobilized the ordinarily apathetic men and women of Harvard, who initiated an online petition to have her admission revoked. *Id.* The effort bore fruit when muckrakers discovered that Hornstine had plagiarized material in articles she had written for a local newspaper. *Id.*

298. See Internet posting of Ken K. to *Hit & Run: The Blair Witch*, REASON ONLINE (May 9, 2003) (emphasis added; spelling and grammar corrected), at <http://reason.com/hitandrun/001512.shtml>.

It is hard to know whether to be appalled by the author's shameless defense of injustice, worthy of Socrates' famous interlocutor Thrasymachus,<sup>299</sup> or to applaud the author for clearly articulating an understanding of one's moral duties consistent with what is often taught in a Legal Ethics class: Legal rules define the outermost boundaries of a lawyer's duties to nonclients.<sup>300</sup> If you seek nearly every advantage for your clients,<sup>301</sup> are not your duties to your own children equally extensive? The rules permit students to be diagnosed as disabled, and once so diagnosed, the disabled student can lay claim to a variety of advantageous accommodations, including extra time on standardized tests like the SATs. Why shouldn't one seize this opportunity?

From 1992 to 1997, the number of students claiming accommodations on the SATs because of a disability more than doubled, and 90 percent of that increase is attributed to the learning disabled.<sup>302</sup> Overall, the percentage of students receiving accommodations on the SATs leveled in 2000 at approximately 2 percent of the total test takers.<sup>303</sup> It is difficult to say how many of those students fraudulently obtained an LD diagnosis; for, as discussed earlier, what constitutes a learning disability is so hopelessly murky that it is conceivable that most students receiving accommodations genuinely think that they have, and could be diagnosed as suffering from, a learning disability.<sup>304</sup> For several years, the ETS and the College Board imposed documentation requirements for students seeking accommodation on the basis of learning disabilities, attention-deficit disorders, and “psychiatric disabilities.”<sup>305</sup> In practice, until recently,<sup>306</sup> very little was done to

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299. See PLATO, THE REPUBLIC, bk. I (Benjamin Jowett trans., Colonial Press 1901) (360 B.C.), available at [http://www.ilt.columbia.edu/publications/plato\\_republic.htm](http://www.ilt.columbia.edu/publications/plato_republic.htm).

300. At least this is the gist of what I was taught. There are several legal ethics professors, however, such as my colleague Michael Krauss, who emphasize that lawyers have broad moral responsibilities. See generally Michael I. Krauss, *The Lawyer as Limo: A Brief History of the Hired Gun*, 8 U. CHI. L. SCH. ROUNDTABLE 325 (2001).

301. Precisely what the ethics rules require of American lawyers in the representation of their clients is a topic well beyond the scope of this Article. Compare MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1986) (“A lawyer should represent a client zealously within the bounds of law.”), with MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1999) (“A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client.”).

302. Testing with Extended Time, *supra* note 4, at 1.

303. See *id.* at 6.

304. See *supra* Part III.C.

305. The College Board, Documentation Guidelines, at <http://www.collegeboard.com/disable/students/html/document.html> (last visited May 18, 2004).

306. See *infra* text accompanying notes 337-343.

screen diagnoses; the College Board largely deferred to letters from high school and other state-licensed psychologists or psychiatrists.<sup>307</sup> Responding to a *Los Angeles Times* article chronicling dubious LD diagnoses in wealthy, suburban high schools, Gaston Caperton, the President of the College Board, tried to deflect criticism by claiming that only .2 percent of California test takers had unfairly received accommodations.<sup>308</sup> Yet as Caperton noted, only 1.2 percent of all California test takers received accommodations, which would mean, even accepting his estimate, that one out of every six students receiving accommodations on the SATs had done so fraudulently.

To what extent students benefit from having extra time to complete the SATs is a subject of debate, with estimates ranging anywhere from twenty-five to several hundred points.<sup>309</sup> By the ETS's own admission, the beneficial effects of extra time are not evenly distributed across the full range of abilities; such accommodations are most likely to substantially help bright students, or precisely the kind prone and pressured to seek every possible advantage in the hypercompetitive world of college admissions.<sup>310</sup> Students on pace to receive a 1400 and desperate to attend Duke or Vanderbilt are precisely the kind most likely to benefit from an extra hour or two; and who is to say that an added 50 points won't make the difference?

Furthermore, recent studies have demonstrated that students requesting and receiving an LD diagnosis are disproportionately from affluent communities.<sup>311</sup> In Connecticut, for example, "moving from Simsbury to neighboring Granby would more than double the likelihood that a student would be labeled as learning disabled."<sup>312</sup> The most detailed analysis has been conducted in southern California, and the results could hardly have been more dramatic. In prosperous regions such as Beverly Hills and La Jolla, nearly 10 percent of students taking the SATs received extra time; by contrast, of the 1,439 students taking the SATs in inner-city regions including Roosevelt,

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307. See Weiss, *supra* note 141.

308. Gaston Caperton, Letter to the Editor, *SAT: Give Extra Time to Qualified Students*, L.A. TIMES, Dec. 15, 2000, at B8.

309. See Weiss, *supra* note 141 (paraphrasing a College Board researcher who estimated the benefits of extra time to be as little as 25 points, and quoting a Princeton Review executive who stated that "[i]f you give me a smart kid and 10 extra minutes a section, there's 100 points").

310. See BRENT BRIDGEMAN ET AL., COLLEGE BOARD RESEARCH REPORT NO. 2003-2: EFFECT OF FEWER QUESTIONS PER SECTION ON SAT I SCORES 8 (2003) ("If a student lacks the skills to approach a problem, providing extra time will not help. Extra time is beneficial only if a student has a solution strategy, but does not have time to fully implement that strategy.").

311. See Rick Green, *Learning Disabled? It Depends Where You Live*, HARTFORD COURANT, Apr. 19, 1998, at A1; see also Weiss, *supra* note 141.

312. See Green, *supra* note 311.

Garfield, and Inglewood, not a single one received any accommodations.<sup>313</sup>

The 10 percent figure in Beverly Hills and La Jolla may understate the percentage of students receiving accommodations at the toniest of American prep schools. A recent study by the College Board revealed that, as of 2003, 142 high schools in America—43 private and 99 public—are responsible for 24 percent of all accommodated test takers, though they comprise considerably less than 1 percent of the nation’s high schools.<sup>314</sup> The schools in question all have affluent student bodies; for example, one of the Pennsylvania schools cited in the College Board study, in Unionville, was last year found to be the state’s wealthiest. In several of these schools, the percentage of students receiving accommodations far exceeded 10 percent. In one school, an incredible 46 percent of all students taking the SATs received accommodations.<sup>315</sup>

Advocates for the learning disabled, when confronted with this sort of data, argue that LD is not overdiagnosed in wealthy areas, but underdiagnosed in poorer areas. If taken seriously, this claim would mean that the percentage of students nationwide being diagnosed as LD, and receiving accommodations, will rise to 10 percent or higher. But what does it mean to say that 10 percent or a third or a half of American students are “learning disabled?” The original core idea of learning disability—a *substantial* discrepancy in academic performance and tested mental aptitude—is now in tatters, and virtually any American student whose academic performance falls short of his own or his parents’ bloated expectations can demand and receive accommodations. As Robert Sternberg, a Yale psychology professor skeptical of the entire field of learning disabilities, has noted: “If your kid is not achieving at the level you want you can get the kid labeled, and that opens up benefits to which the kid is legally entitled.”<sup>316</sup> The phenomenon has attracted some critics,<sup>317</sup> but fewer than one might think. In part, the problem may be that advocates for the learning disabled have successfully wrapped their efforts in the garb of civil liberties.<sup>318</sup> One might question whether the noble logic of *Brown v. Board of Education* inexorably culminates in widespread

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313. See Weiss, *supra* note 141.

314. Tamar Lewin, *Disability Requests Reflect Changes in SAT Procedure*, N.Y. TIMES, Nov. 8, 2003, at A10 (discussing the College Board study).

315. *Id.*

316. See Green, *supra* note 311 (quoting Prof. Sternberg).

317. See Olson, *supra* note 8; Sbalit, *supra* note 7.

318. See, e.g., JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING NEW CIVIL RIGHTS MOVEMENT 338 (1994).

accommodations for the learning disabled,<sup>319</sup> but those who have asked this question have excited vitriolic denunciations on the part of some in the learning disabled community.<sup>320</sup>

The consequences of accommodating the learning disabled are seen throughout the educational system, where LD students can receive course exemptions, extra time, shortened homework assignments, and the like. Furthermore, students are not blind to the actions of other students. To the contrary, they quickly appreciate the absence of one or a few of their classmates in the standard examination room and deduce what it means. Principles drawn from behavioral economics suggest, moreover, that people are apt in such circumstances to overstate the number of "cheaters."<sup>321</sup> In other words, even if the number of people gaming the system rises from 1 to 5 percent, there will be an impression that the total numbers of cheaters has soared well beyond that. The felt pressure to cheat, or otherwise risk falling behind, will become acute. Indeed, one can easily see how a cascading effect could quickly transform a wealthy suburban school from one in which only 2 percent obtain extra time to one in which a third do so.

### B. Educational Institutions

Why students would want extra time on the SATs does not strain the imagination. The hard question is why the ETS and College Board, and educational institutions generally, have acquiesced in demands for accommodations that they were not legally required to provide.

#### 1. The ETS and College Board

In the *Breimhorst* case discussed earlier,<sup>322</sup> the district court had not ordered the ETS to remove its flags on the scores of students who had received accommodations. Yet in the face of an adverse pre-

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319. See *supra* Part II.A For a more elaborate consideration of the issue, see KELMAN & LESTER, *supra* note 12, at 194-226; Anne Proffitt Dupre, Book Review, 49 J. LEGAL EDUC. 301, 302 (1999) (reviewing KELMAN & LESTER, *supra* note 12) (noting Kelman and Lester's criticism of the trend to treat learning disabilities as a civil rights matter). *But see* Weis, *supra* note 86, at 183, 198-219 (arguing that the learning disabled should be treated as a protected class under civil rights law).

320. See, e.g., Colker, *supra* note 9.

321. See generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1483-84 (1998); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990); Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115, 131-35 (1999).

322. See *supra* text accompanying notes 275-294

trial order, the ETS, and eventually the College Board, capitulated. The legal case for flagging was strong, and leaving aside the law, psychometricians throughout the world have concluded that examination scores taken under nonstandard conditions should be flagged in order to alert consumers that such scores may not have the same predictive meaning of identical scores taken under standard conditions.<sup>323</sup> Ironically, while the ETS's and College Board's lawyers and administrators were agreeing as part of the settlement to suspend flagging, the organizations' researchers and psychometricians were continuing to express the view that flags were necessary. As Dr. Willingham put it in a College Board-sponsored study in 1998, “the nonstandard version of the SAT is seriously biased *in favor* of [learning-disabled] students.”<sup>324</sup>

Since the settlement decision, the College Board has experimented with an SAT format with fewer questions in the hope that such an exam will decrease the need for, and benefits derived from, extra time.<sup>325</sup> To be sure, a well-designed shorter exam can come close to matching the predictive validity of a longer one, especially if tailored to each test taker,<sup>326</sup> but common sense suggests that a longer exam (with a greater variety of questions) is a better predictor of mental aptitude or academic achievement than a shorter one, especially if one is trying to distinguish among bright and brilliant students.<sup>327</sup> Moreover, some information is lost when one decreases the length of an exam—to wit, information about the test taker's cognitive processing *speed*. In our current human condition, as finite beings sadly beset at virtually every turn with time pressures,

323. The Guidelines adopted by the International Test Commission clarify that flags are appropriate whenever tests are taken under nonstandard conditions. See INT'L TEST COMM'N, INTERNATIONAL GUIDELINES FOR TEST USE § 2.3.18 (2000) (“When tests are to be used with people with disabilities, competent test users will make all reasonable efforts to ensure that: . . . Information regarding the nature of any modifications made to a test or testing procedure is provided to those who interpret or act upon the test scores whenever the withholding of such information might otherwise result in biased interpretation or an unfair decision.”), [http://www.intestcom.org/itc\\_projects.htm](http://www.intestcom.org/itc_projects.htm).

324. See Shalit, *supra* note 7, at 21 (quoting study conducted by Dr. Willingham).

325. BRIDGEMAN ET AL., *supra* note 310, at 11 (“[A] less speeded test is desirable now that scores of disabled students who are granted extra time will no longer be flagged . . . . If time limits were sufficient so that extended time provided a trivial impact on scores for nondisabled students, there would not be a reason to flag scores of extended-time administrations.”).

326. One can overcome the benefits of a longer test through “computer adaptive testing,” in which a computer responds to one's answers and caters the test to one's abilities. See *generally* Embretson, *supra* note 245. The ETS has, however, been slow to take advantage of the possibility of computer adaptive testing.

327. The recentering of the SATs has made the drawing of distinctions harder at the right tail of the distribution. See *supra* note 2. If the College Board were to shorten the test, this would likely compound this problem.

there is an advantage to being quick, in mind and body. The National Football League, in fact, administers a highly speeded mental aptitude exam to all college players at its annual draft combine.<sup>328</sup> If mental quickness is valuable in a football player, surely it is also to one's advantage as a lawyer or doctor.<sup>329</sup>

The decision by ETS and College Board administrators to stop flagging is therefore a puzzle, and if they were for-profit companies one might be flummoxed by their decision to sabotage their products. Of course, even for-profit companies occasionally act in ways contrary to their genuine interests. In any corporation, the interests of the owners (the principals) are imperfectly aligned with the interests of the officers (the agents), which is the core of the idea conveyed by the concept of "agency costs." Agency costs arise because agents are prone to "shirk," or pursue their own interests to the detriment of the interests of the principals, those they are purportedly advancing. To minimize shirking, principals incur monitoring and bonding costs. Those costs, plus any residual loss due to ineradicable shirking, together constitute "agency costs."<sup>330</sup>

How agency costs manifest themselves in the nonprofit sector is an increasingly explored issue in the academic literature.<sup>331</sup> This is hardly a surprising development given the dramatic growth in the number and size of tax-exempt, nonprofit institutions over the past

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328. This test, called the Wonderlic Test, consists of 50 questions that must be answered in only 12 minutes. See Wonderlic, <http://www.wonderlic.com> (last visited May 18, 2004). The Wonderlic scores of all players at the 2003 NFL draft combine can be found at <http://mb6.theinsiders.com/fbrownsinsiderfrm35.showMessage?topicID=1908.topic>. It is interesting to note that, contrary to stereotype, offensive guards had the highest average score (a Wonderlic of 26.6, which converts to an IQ of about 115), with quarterbacks coming in second (Wonderlic of 25.8 or IQ of 113). *Id.* Furthermore, contrary to stereotype, the overall Wonderlic (and IQ) scores of NFL players is approximately the average of the overall American population. *Id.*

329. Of course, deliberate and profound thinkers are preferable to quick and shallow ones, but everything else equal, one would prefer to be quick than slow.

330. There is a vast literature on agency costs. See, e.g., Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983); Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323 (1986).

331. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976) ("The problem of inducing an 'agent' to behave as if he were maximizing the 'principal's' welfare is quite general. It exists in all organizations and in all cooperative efforts . . ."); see also James A. Brickley & R. Lawrence van Horn, *Managerial Incentives in Nonprofit Organizations: Evidence from Hospitals*, 45 J.L. & ECON. 227 (2002); Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457 (1996).

few decades, as well as their penchant for scandal.<sup>332</sup> “Agency costs” prove to be especially problematic in the nonprofit world for at least two reasons. First, there is often no class of principals who are well positioned to monitor the agents. One ordinarily would say that large donors and philanthropists might at least try to play such a role,<sup>333</sup> but in the case of the ETS there is no such class of potential monitors. The ETS makes its millions by selling a product as if it were—and one might wonder why it is not—an ordinary, for-profit company.

Second, with respect to for-profit companies, shirking is defined as a failure on the part of the agent to pursue the company’s mission of making a profit. But in the case of a nonprofit company, the mission is far more nebulous, and therefore departures from that mission less easily discerned.<sup>334</sup> The ETS’s own website notes:

Traditionally, ETS’s primary purpose has been the development of tests and other assessment tools to provide information (including test scores and interpretative tools) to test takers, educational institutions, and others who require this information. *ETS is now poised to broaden its scope beyond the U.S. measurement space into the worldwide education and training space.*<sup>335</sup>

The ETS is apparently eager to occupy a vast “space,” but what it intends to do there is anybody’s guess. Its website includes an “ETS: On the Issues” site, which includes postings on issues from the No Child Left Behind Act (for), terrorism (against), teachers (for), and illiteracy (against).<sup>336</sup> Yet who can say that the photogenic Karl Landgraf, the President and CEO of the ETS whose smiling countenance graces each of these informative articles, is “shirking,” because who is to say that each of the above activities does not

332. Denise Ping Lee, *The Business Judgment Rule: Should It Protect Nonprofit Directors?*, 103 COLUM. L. REV. 925, 925-26 (2003) (describing scandals afflicting the American Red Cross and the United Way).

333. See Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227, 234.

334. A similar problem arises in evaluating the success of government bureaucrats. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 197 (1989) (“The head of a public agency is judged and rewarded on the basis of the *appearance* of success, when success can mean reputation, influence, charm, the absence of criticism, personal ideology or victory in policy debates . . . . [M]any agencies have goals so vague, controversial, or difficult to achieve that progress towards their realization is hard to assess.”).

335. Educational Testing Service, *About ETS: What We Do* (emphasis added), at <http://www.ets.org/aboutets/wedo.html> (last visited May 18, 2004).

336. The articles are of breathtaking banality. See, e.g., Kurt M. Landgraf, *International Education: The Best Defense Against Terrorism*, at <http://www.ets.org/aboutets/issues13.html> (last modified Feb. 24, 2004); Kurt M. Landgraf, *Literacy is the Key to Unlocking Potential*, at <http://www.ets.org/aboutets/issues9.html> (last modified Feb. 24, 2004). The ETS probably squanders money in such inane ventures because, as a nonprofit, tax-exempt entity, it cannot distribute residual profits to any “owners.” See Brickley & van Horn, *supra* note 331, at 233 & n.19 (discussing the “nondistribution constraint”).



somehow propel the ETS through the “worldwide education . . . space,” wherever that might be. However, if the ETS were restricted to its self-identified primary mission, which was more modestly the “development of tests,” then its executives’ decision to discontinue the flagging of nonstandard scores *would* seem to constitute shirking, in the sense that the agents have failed to promote the interests of the principal. To the extent that the ETS, as an institution, has an interest in scientifically valid tests, then the flags should plainly be preserved. To the extent that the ETS’s executives prefer to avoid controversy and burnish their individual reputations as socially-conscious individuals, sensitive to the plight of the disabled, they will capitulate to the LD lobby and acquiesce in the end of flagging. Ultimately, such a practice threatens to inflict untold damage to the ETS’s products, including the SATs.

And yet predictions of the SATs’ demise have proven, at least for the time being, premature. After having capitulated to the critics of flagging in 2001, the ETS and College Board have recently shown a perplexing resolve in scrutinizing requests for accommodations by those diagnosed as learning disabled.<sup>337</sup> This is a turn of events that one could not have anticipated. As of a year ago, the College Board almost invariably acquiesced in requests for accommodations. When asked in 2000 whether the College Board intended to require more elaborate documentation of those diagnosed as LD, an official dismissed the suggestion with the comment, “It would raise holy hell.”<sup>338</sup>

However, in January 2003, the College Board sent letters to 17,000 high schools in America notifying them that it was revising its procedures to confirm a student’s eligibility for accommodations.<sup>339</sup> In general terms, the College Board now requires more up-to-date and elaborate documentation demonstrating that a prospective test taker both suffers from a learning disability and has been receiving accommodations from his or her high school.<sup>340</sup> The College Board followed up its mass mailing to all high schools with an April mailing directed to the 142 high schools in America (or .8 percent of the nation’s high schools) that accounted for 24 percent of all the students nationwide receiving accommodations on the SATs last year. The Board asked those schools to disclose their files on the students who had received accommodations in order to confirm that the schools had

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337. See Lewin, *supra* note 314.

338. Weiss, *supra* note 141 (quoting College Board official Beth Robinson).

339. See Lewin, *supra* note 314.

340. *Id.*

conducted adequate due diligence. The letters ignited the fury of the National Association of Independent Schools and National Catholic Educational Association, who responded with letters of their own, complaining that the new College Board policies taxed the schools’ resources and needlessly complicated efforts to assist “children who have learning disabilities.”<sup>341</sup> Apparently undeterred, the College Board followed up its April mailing with a letter in August 2003 to nearly half of the 142 schools, notifying them that their documentation had not been sufficient in the past, and that improvements were expected in the future.<sup>342</sup> The effect of the barrage of College Board letters was to deter modestly those seeking accommodations: the number of students requesting accommodations declined from 19,970 in the summer of 2002 to 17,920 in the summer of 2003, a drop of about 10 percent.<sup>343</sup>

One can speculate on the College Board’s motives for tightening up its eligibility requirements. Perhaps the psychometricians within the College Board, who had all along expressed reservations about the removal of the flag on nonstandard scores, persuaded the administrators that the predictive validity of the SATs would be jeopardized if the floodgates to accommodations were opened. It is thus possible that some lingering sense of mission—an ideological commitment to mental aptitude testing—motivated the individuals within the College Board and the ETS to take steps to curtail the dilution of the test’s accuracy and fairness. It is also possible that the administrators were aware that an increase in the number of accommodated test takers would dilute the SATs’ predictive validity and could thereby place the product at a disadvantage in the increasingly competitive testing marketplace. Although the SATs have long enjoyed first-mover advantages in this field, the ACT has for decades exerted some market pressure, and for-profit companies, such as McGraw Hill, are lurking in the wings waiting for any opportunity to topple the SAT off its pedestal in the testing world.<sup>344</sup> Indeed, the College Board’s decision to tighten up its eligibility requirements may

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341. See Letter from Michael Guerra, President, National Catholic Educational Association, to Gaston Caperton, President, The College Board (Jul. 28, 2003) (“[T]he new College Board procedures for verifying how we do this present a hardship for many schools and parents.”), at <http://www.ncea.org/departments/secondary/ssd-eligibility-form-letter.htm>.

342. Lewin, *supra* note 314.

343. *Id.* It is worth noting that in the sixty-two schools deemed not to have complied with the Board’s procedures in the past, students filed 414 fewer requests for accommodations. *Id.* Thus, these schools account for 20 percent of the 2050 (19,970-17,920) fewer applications nationwide.

344. See Clarke et al., *supra* note 256.

simply be a somewhat belated response to the ACT's steps in this direction a few years ago.<sup>345</sup>

Yet another explanation for the College Board's recent decision may simply be that its administrators feared that a public relations debacle awaited them, as attention focused on the disproportionate number of students receiving accommodations from the affluent suburbs of America. Indeed, the spokespersons for the College Board quoted in recent articles have not lamented the costs of unflagged scores in diluting the SATs' predictive validity, nor more fundamentally have they raised doubts about the impulse to accommodate some learning disabled students at all. Rather, the recurring theme is the need to reach out to the kids in the inner cities who are not taking full advantage of the College Board's generosity in accommodating the learning disabled. To be sure, if a slow reader from Beverly Hills gets extra time, and his resulting scores are not even flagged, fairness requires that the slow reader from Compton is treated with similar kindness. But it is the premise—why are slow readers getting extra time at all?—that needs scrutiny. And the College Board and ETS has shown little interest in this discussion. As a consequence, they appear to be fiddling away at trivial issues; meanwhile, the entire edifice of mental aptitude testing is in flames.<sup>346</sup>

Good riddance, some might say. I do not propose, however, to enter that debate: Weighing the fundamental merits and demerits of the SATs would take us well beyond the scope of this Article. My point is simply that, assuming that the SATs exist and weigh so heavily in the allocation of places in elite universities, they should be administered fairly. Of course, blind persons should be allowed to take the exam in nonstandard form (with a reader or in Braille). Beyond obvious physical handicaps, however, the argument for accommodations is unconvincing. Yes, dyslexics will not perform as well as they might if they had more time, but the same could be said about most people.<sup>347</sup> Furthermore, one should consider the costs of

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345. See Weiss, *supra* note 141 (comparing the relatively stringent requirements for certification as learning disabled by the ACT with the lax standards of the ETS, as of 2001).

346. See Lewin, *supra* note 314 ("There is an increasing buzz in the education world that the whole system of obtaining accommodations has become so expensive, cumbersome and inequitable that the College Board should scrap it, and either make all tests untimed or give students the choice of taking them in three hours, four hours, or more.").

347. Even if it is true, as is sometimes claimed, that on average disabled students benefit from extra time more than nondisabled students, the fact remains that all students, especially relatively bright students, benefit from extra time to some degree. See BRIDGEMAN ET AL., *supra* note 310, at 8 (finding that students in the 1200+ range improved their scores by forty-three points when given extra time). The Bridgeman study likely understated the benefits students derived from the extra time because students were not alerted beforehand that they would have extra time to complete the section. See *id.* at 11 ("A possible limitation of the current studies is

affording extra time to any segment of the population when the enabling criterion is so easily mimicked, at least if one has the wherewithal. Given the possibility of fraud, even if one were to conclude that the learning disabled should be given accommodations, flags are appropriate, both to deter the marginal test taker from gaming the system and to allow consumers to evaluate and compare scores among applicants.

The College Board's and the ETS's decision to cave on the flagging issue was an error. Slightly tightening up the eligibility requirements for accommodations is unlikely to significantly curtail the problem of spoofing: the lesson to be drawn, at least by well-heeled elites, is simply to "paper the record" at an earlier age. I have already heard pathetic stories about parents having their kids diagnosed by psychologists with some disability *before* entering first grade, so that they will be afforded accommodations throughout K-12 and that it will then be impossible, down the road, to challenge the diagnosis. Other parents are wondering whether they should take similar measures, or risk falling behind. The atmosphere is poisonous in many secondary schools, and it's unclear what the College Board and the ETS could do at this point, assuming either has the will, to improve the situation. As one observer has persuasively argued, if the College Board and ETS were genuinely interested in fairness, they would have two principal options at this point: Offer untimed SATs for everyone or void the *Breimhorst* settlement and meaningfully "defend the SATs."<sup>348</sup> The latter may not be a realistic possibility. Like French aristocrats on the eve of the Revolution,<sup>349</sup> the ETS and College Board appear to have lost any confidence in their original mission.

## 2. Universities

The vast majority of American universities, as nonprofit entities, experience the same agency costs issues as the College Board and ETS.<sup>350</sup> The incentives of those within a university of course vary,

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that students had no advance notice that they would be taking a section with more generous time limits, so that they never had the opportunity to practice at the more relaxed pace permitted by the shorter sections."). Indeed, most persons in the test-coaching business argue that the benefits of extra time can far exceed forty points. See Weiss, *supra* note 141.

348. See Freedman, *supra* note 293, at 38-39.

349. See ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* 135 (Stuart Gilbert trans., Doubleday Anchor Books 1955) (1856) ("[A] curious internal malady attacked [the French nobility], whose effect was, so to speak, to make them gradually crumple up, though no external pressure of any kind was brought to bear.").

350. Unlike ETS and College Board executives, university administrators will sometimes be monitored and corralled by large donors. But even in these instances, the monitoring is at a very high level, and often on rather tangential issues.

but many administrators and professors likely feel constrained by a desire to avoid any controversy that might tarnish their reputation and therefore diminish their prospects for advancement. An honorable and diligent administrator might have doubts about a student's claim to being learning disabled, but the costs of challenging a student, which include a lawsuit, are potentially high to any individual issuing the challenge. In contrast, the benefits of challenging the student, in preserving fairness and educational standards, are speculative and in any event will not be reaped by the administrator personally. Furthermore, in many universities, decisions to designate someone as disabled and to afford accommodations are centralized and therefore removed from the discretion of individual professors.<sup>351</sup> It is mildly surprising that professors, usually so zealous in protecting their turf from any encroachments, have generally acquiesced in this development without protest.<sup>352</sup> Yet professors, although occasionally troubled by requests for accommodations by the learning disabled,<sup>353</sup>

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351. Office of Equal Opportunity and Affirmative Action, University of Utah, Americans with Disabilities Act (ADA): Guidelines for Faculty, at <http://www.hr.utah.edu/oeo/ada/guide/faculty> (last visited May 18, 2004). The Guidelines state:

The [University of Utah] Center for Disability Services (CDS) is the only department that is authorized to determine whether or not a student is qualified for accommodation either based upon law or upon University policy.

....

All course syllabi should contain the following paragraphs:

The University of Utah seeks to provide equal access to its programs, services and activities for people with disabilities. If you will need accommodations in this class, reasonable prior notice needs to be given to the instructor and to the Center for Disability Services, 162 Olpin Union Building, 581-5020 (V/TDD) to make arrangements for accommodations.

*Id.*

352. An exception occurred at Washington University in St. Louis, where a physics professor, Jonathan Katz, resisted demands by administrators and the disabilities office to provide specified accommodations to learning disabled students. Katz circulated a letter to all Washington University professors, which stated:

We were surprised in part because this was an invasion of our traditional right of faculty autonomy, and in part because of the nature of the demand itself. When I began teaching I was told, and accepted because it is so obviously right, that we must treat all our students equally and without favor, regardless of our personal feelings towards them. As professors we, at times, must act as judges, and a fair judge judges without favor or prejudice. A faculty member who violates this rule has committed a breach of academic integrity.

Katz, *supra* note 7. Katz proposed to the Washington University faculty that the exam results of students who had received extra time on exams be noted with a "flag" or asterisk. His proposal was rejected by the Faculty Senate. See *id.*; E-mail from Jonathan Katz to Craig S. Lerner (Apr. 22, 2004) (on file with author).

353. For a thoughtful account of one university professor's attempt to sort through the issue, see Perry A. Zirkel, *Sorting Out Which Students Have Learning Disabilities*, CHRON. HIGHER EDUC., Dec. 8, 2000, at B15.

have a particularly hard time saying “no” because of concerns that they are ignorant of the law and may face personal exposure.

Perhaps the only noteworthy effort taken at a major university to significantly rethink its LD policy occurred at Boston University (B.U.).<sup>354</sup> In the early 1990s, B.U. acquired a reputation as a supportive place for the learning disabled. Accommodations afforded the learning disabled included in-class notetakers, extra time on examinations, and the right to substitute out of required mathematics and foreign language classes.<sup>355</sup>

In 1995, however, Jon Westling, then-Provost and soon to become President, reviewed the files of LD students and found what he regarded as vague diagnoses and a dearth of scientific evidence supporting individual claims. In December 1995, he sent letters to the 490 learning disabled students at B.U., informing many of them that updated and more elaborate documentation was required. Westling further announced that he would be the final arbiter of who qualified as learning disabled, rather than the office of the Learning Disabilities Support Services (LDSS), whom Westling regarded as a captured bureaucracy. Westling delivered a series of speeches across the country lamenting the increasing number of LD students, whom he caricatured as a fictional character, “Somnolent Samantha.”<sup>356</sup> Several members of the LDSS staff resigned to protest Westling’s deeds and words, and learning disabled students brought a class action against B.U. The case dragged on, predictably, for a few years, with both sides, also predictably, claiming victory, with the only certain winners being the lawyers, particularly for the plaintiffs, who pocketed \$1.3 million in fees.<sup>357</sup> Although the district court eventually upheld B.U.’s refusal to allow LD students to opt out of certain required mathematics and foreign language classes, it concluded that the original policy instituted by Westling, in requiring more stringent documentation of an LD, violated the ADA.

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354. *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82, 85-87 (D. Mass. 1998) (*Guckenberger III*) (recounting the facts surrounding the change in B.U.’s policies regarding learning disabled students that precipitated this lawsuit); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 114-23 (D. Mass. 1997) (*Guckenberger II*) (same); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 311-12 (D. Mass. 1997) (*Guckenberger I*) (same).

355. *Guckenberger II*, 974 F. Supp. at 116.

356. *Id.* at 118. In one speech Westling said, “the learning disabled movement is the great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence, and also for genuinely humane social order.” *Id.*

357. See *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 91, 112 (D. Mass. 1998) (*Guckenberger IV*) (concluding that plaintiffs were the prevailing party and that therefore their lawyers were entitled to fees under the ADA).

The opinion is puzzling, in that the litigation was apparently framed in a way that deprived B.U. of its most powerful argument—that the plaintiffs were not disabled as a matter of law. This argument could have destroyed the case at the inception, for it is probable that the plaintiffs could not have survived a motion to decertify the class.<sup>358</sup> The Federal Rules of Civil Procedure require that named plaintiffs in a class action be “typical” of all plaintiffs.<sup>359</sup> Yet the determination that a plaintiff is legally disabled under the ADA is necessarily an individualized inquiry. To be sure, there have been a few successful ADA class actions, but such cases generally have been brought by plaintiffs who suffer impairments that are not only identical, but which also rise almost of necessity to the level of a legal disability (e.g., deafness, paraplegia).<sup>360</sup> By contrast, when the plaintiffs seeking class certification have impairments of varying severity, courts have been receptive to decertification motions.<sup>361</sup>

Even leaving aside the class certification issue, it is hardly clear that each of the named plaintiffs was disabled as a matter of law. For example, Elizabeth Guckenberger, a B.U. law student, was

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358. B.U. did bring a half-hearted decertification motion, but it failed to argue that either named plaintiffs, or the represented class, were not disabled as a matter of law, focusing instead on the claim that the appropriate accommodations would vary from student to student. *Guckenberger I*, 957 F. Supp. at 325-27. The district court rejected the claim: “[T]he plaintiffs assert that BU’s blanket accommodations policy . . . is itself discriminatory . . . . As current students with learning disabilities who are subject to the university’s allegedly discriminatory new policy, the named representatives’ claims are typical of those of the class.” *Id.* at 326. The district court never considered the possibility that some students might be learning disabled, but not disabled as a matter of law, although the court may be excused as B.U. failed to make the argument.

359. FED. R. CIV. P. 23(a)(3). This requirement has been given an increasingly strict reading in recent Supreme Court cases. See *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 854-55 (1999); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 627-28 (1997).

360. See *Col. Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 363 (D. Colo. 1999) (certifying class of persons who use wheelchairs and scooters in an action against a fast food chain for failing to comply with ADA Accessibility Guidelines and tracking Colorado state law); *Civic Ass’n of the Deaf, Inc. v. Giuliani*, 915 F. Supp. 622, 639 (S.D.N.Y. 1996) (certifying a class consisting of persons with disabilities who were deaf or hearing-impaired that brought suit under the ADA to prevent the defendants from replacing fire alarm boxes on New York City streets with notification alternatives that were not accessible to deaf or hearing-impaired persons); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 460 (N.D. Cal. 1994), *modified*, 159 F.R.D. 439, 460 (N.D. Cal. 1994) (certifying a class of disabled persons who used wheelchairs or who walked using aids that sought removal of architectural barriers in theaters pursuant to the ADA and tracking California state law).

361. *Chandler v. City of Dallas*, 2 F.3d 1385, 1396 (5th Cir. 1993) (“The question of whether an impairment constitutes a substantial limitation to a major life activity is best suited to a case-by-case determination.” (quoting *Elstner v. Southwestern Bell Tel. Co.*, 659 F. Supp. 1328, 1342 (S.D. Tex. 1987); *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986)); see also *Forrisi*, F.2d at 933 (“The inquiry is, of necessity, an individualized one—whether the particular impairment constitutes for the particular person a significant barrier to employment.”).

not diagnosed with dyslexia until her freshman year at Carleton College, when she began receiving various “accommodations” (extra time on exams, exemptions from required classes, notetakers, etc.).<sup>362</sup> On its face, the diagnosis raises doubts, as dyslexia is generally diagnosed in children.<sup>363</sup> But in any event, the fact remains that a highly competitive college (average SATs of almost 1400) accepted Guckenberger.<sup>364</sup> In fact, 99 percent of Carleton students graduated in the top half of their high school.<sup>365</sup> Given that it is virtually certain that Guckenberger was an above-average high school student without receiving any accommodations, she could not be considered disabled as a matter of law. Case dismissed.

It is difficult to speak with equal certainty about the four other named plaintiffs, B.U. undergraduates, because they were all diagnosed with various LD ailments in elementary school or high school, and therefore began receiving accommodations at earlier ages. Ordinarily, one would say that any student admitted to B.U. is “above average,” and therefore not disabled as a matter of law, as she obviously was able to do quite well (or at least above the national average) in high school and on the college admissions exams. But these students could at least claim that their performance was average or above average in high school thanks to their accommodations; and that, without the accommodations, their performance would have been below average.

Even assuming this to be case, there would seem to be little evidence that the plaintiffs suffered from a learning disability. Consider Avery LaBrecque, who was diagnosed in first grade with a “language-based learning disability . . . which impairs her ability to process, memorize, and understand the mechanics of languages, [and] prevented [her] from being successful at reading, mathematics, and spelling.”<sup>366</sup> Recalling that the core of any learning disability diagnosis is a substantial discrepancy in mental abilities, one notes that LaBrecque seems to have had problems in every academic endeavor: where’s the internal *discrepancy*? At least as portrayed in

362. *Guckenberger II*, 974 F. Supp. at 123.

363. See Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 225 (2003) (“Some forms of mental impairment, notably dyslexia and ADHD, become apparent in early childhood and remain relatively consistent throughout adulthood.”).

364. See Princeton Review Profile of Carleton College, at <http://www.princetonreview.com/college/research/profiles/admissions.asp?listing=1023199&LTID=1> (noting that for the SAT I-Verbal, the 25-75th percentile range at Carleton is 650-750 and for the SAT I-Math, the 25-75th percentile range is 650-730).

365. *Id.*

366. *Guckenberger II*, 974 F. Supp. at 125.



the court opinion, LaBrecque was a poor student in first grade, and it is surely to her great credit that she was willing to undergo a "twelve-year odyssey of private tutoring,"<sup>367</sup> but how this translated into a "legal disability" was opaque.

This brings us to the nub of the problem faced by B.U. and Provost Westling. Once having admitted a "learning disabled" student who has received accommodations for years, a university may find it problematic to withhold accommodations. And once having afforded accommodations themselves, it becomes especially problematic to discontinue them. In part, such caution may be born of a concern about possible litigation. Of course, if a university accommodates a learning disabled student as a freshman, it is almost surely not formally estopped from challenging a student's disability status as a sophomore, but its legal position is at a minimum rather more muddled, as Boston University discovered. Indeed, universities that have resisted pleas for accommodations when first made have generally fared better in litigation than those who have accommodated and accommodated and accommodated . . . and late in the game refused the umpteenth accommodation. The late resisters, such as B.U., have generally pitched their ADA legal battles on legal grounds that have proven less fertile (the requested accommodation is unreasonable or the student is not "otherwise qualified"), but they have forfeited the direct challenge to the ADA claim on the ground that the plaintiff is not legally disabled.

Although it is quite common for university officials to announce that their hands are tied, citing the ADA, when they afford accommodations to certain students, this Article has shown that their hands are not nearly as tied as they either think or pretend. Even if certain university students have been labeled "learning disabled" and received accommodations in primary school, universities could conduct their own inquiry into whether the students actually qualify as legally disabled. Yet the incentives to conduct such an inquiry are negligible. In sum, considering the issue simply as a question of incentives, one sees on the one hand an organized lobby seeking accommodations for the learning disabled and on the other hand nonprofit educational institutions offering little resistance to those demands.

## VII. CONCLUSION

In a class-action federal suit filed in California in 2001, students suffering from learning disabilities challenged high school

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367. *Id.*

graduation achievement tests.<sup>368</sup> As one parent observed, asking a learning disabled student to take such tests is like “asking a kid in a wheelchair to get up and run 11 laps.”<sup>369</sup> In a sense, of course, the parent is right. It is not fair to ask a child with cerebral palsy to run, and it is not fair to ask a child who is not good at math to take a math test. It is indeed hard to reflect upon the inequalities meted out by Nature, and not to be moved to ameliorate those injustices in some way.

Yet this Article has cast a critical eye on the phenomenon of accommodating the learning disabled. As a legal matter, it is simply not the case that most learning disabled students, or at least those in institutions of higher education, are disabled as a matter of law. Therefore, they are not legally entitled to accommodations. What is at first glance puzzling is how seldom institutions of higher education have raised this threshold legal challenge. This puzzle is resolved when one introduces the concept of “agency costs,” and considers the divergence of interests between educational administrators and educational institutions.

As this Article has shown, once educational institutions afford advantageous accommodations to the learning disabled, one should expect more people to seek an LD diagnosis, which is so malleable it can encompass virtually everyone. But whatever the short-term benefits of accommodations, they are not necessarily beneficial for the students in the long run. I know, as do most readers of this Article, persons who have struggled with and overcome learning disabilities. In many of the cases with which I am personally familiar, the learning disabled individuals (or their parents) spurned accommodations in part because they thought it would be unfair to other students, but mostly because they thought such accommodations would interfere with their own (or their children’s) educational development. In the long run, it probably does not benefit the 18-year-old with reading problems to be given extra time on the SATs. We can, after all, insulate people from the shocks of the real world only so long.

As noted earlier,<sup>370</sup> advocates for the learning disabled often count illustrious men and women, such as Churchill and Einstein, among their own. Yet assuming these individuals were afflicted with LD, they nonetheless had relatively successful careers despite never receiving a single accommodation on any exam at any point in their

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368. Martha Groves, *Suit Claims High School Exit Exam Is Biased*, L.A. TIMES, May 9, 2001, at B1.

369. *Id.*

370. *See supra* note 144.

lives. Might this suggest that learning disabled people would benefit from being held to the same standards as nondisabled people, rather than being “accommodated”? Even, or perhaps especially, for those of us falling short of the extraordinary gifts of a Churchill or an Einstein, perhaps it is better to learn to cope with one’s shortcomings and, correlatively, to emphasize one’s strengths, than to demand that society tilt the playing field to one’s advantage.