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Gimp Theory and the ADA's "Feedback Loop"

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GIMP THEORY AND THE ADA'S "FEEDBACK LOOP"

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As a young employment attorney beginning her practice in 1994, it was inevitable that I would one day inherit The Notebook. The Notebook was a thin binder— perhaps two inches thick— containing a meager assortment of documents designed to make its possessor the firm's "expert" on the Americans with Disabilities Act (ADA).[1] Because the ADA had been signed into law a scant four years before, none of the firm's partners could offer much guidance on what it meant or how it worked. Instead, the designated associate would take possession of The Notebook and try her best when one of the partners called with a question about disability discrimination.

The truth is that I didn't know what to make of The Notebook's contents. As far as I can recall, it contained only some photocopies of the regulations interpreting Title I of the ADA[2] and perhaps some EEOC Interpretive Guidance on those regulations.[3] I had neglected to take Administrative Law in law school, so I must confess that I didn't see the importance of these materials. Instead, I relied on my knowledge of Title VII of the Civil Rights Act of 1964[4] as my primary guidance in interpreting and applying Title I of the ADA.[5]

* Visiting Assistant Professor of Law, Whittier Law School. My thanks to the members of the *St. Louis University Law Journal* and to my former colleagues at the St. Louis University School of Law for welcoming me back to participate in this rich discussion of the Civil Rights Act of 1964 forty years later. I am truly flattered to be in the company of such important contributors to the continuing struggle for equality.

1. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–213 (2000)).

2. 29 C.F.R. §§ 1630.1–1630.16 (2001).

3. 29 C.F.R. § 1630 App. (2001).

4. 42 U.S.C. §§ 2000e–2000e-17 (2000).

5. Title I of the ADA, 42 U.S.C. §§ 12111–17 (2000), covers employment discrimination, a practice area at my firm. Title II, *id.* at §§ 12131–34, 12141–50, applies to public entities (state and local governments and their agencies), and Title III, *id.* at §§ 12181–89, applies to public accommodations.

My method was not as naive as it may sound. The ADA was, after all, largely modeled on the Civil Rights Act of 1964.[6] It was only later, when I entered academia and began thinking more critically about the ADA, that I began to consider the profound differences between disability discrimination and race discrimination and how those differences might affect implementation of the ADA. As I set out to employ critical theory to unpack the limitations of the law, I realized that Critical Race Theory, while highly useful in explaining why the Civil Rights Act of 1964 has fallen short of its goal,[7] fails to similarly explain why the ADA has had limited success in fighting disability discrimination.[8]

Instead, I began to use what I call "Gimp Theory,"[9] a post-structuralist approach to disability that draws greatly upon Queer Theory.[10] In Gimp Theory, the same issues of physiognomy, conduct, and closeting that inform Queer Theory help to explain both how society perceives and creates the concept of disability and, equally importantly, how the ADA as interpreted and applied in fact guarantees the continued subordination of people with disabilities. In particular, I noted how the same distinction between status—which receives legal protection—and conduct—which does not—that characterizes the legal treatment of lesbians and gay men likewise explains the legal treatment of people with disabilities under the ADA.[11]

It was with great interest, then, that I read the Supreme Court's decision in *Lawrence v. Texas*,[12] wherein the Court abandoned the status/conduct distinction between legal protection and lack of it for gay men and lesbians.

6. Although the ADA explicitly references the regulatory and case law history of § 504 of the Rehabilitation Act of 1972, 29 U.S.C. § 794, Section 504 was patterned on Title VI of the Civil Rights Act of 1964. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 277 (1987).

7. *See, e.g.*, Derrick Bell, *Foreword: The Final Civil Rights Act*, 79 CAL. L. REV. 597 (1991); Patricia J. Williams, *Alchemical Notes: Reconstruction Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

8. I explored this difference in Melissa Cole, *The Mitigation Expectation and the* Sutton *Court's Closeting of Disabilities*, 43 HOW. L.J. 499, 512–18 (2000).

9. The artist Dan Keplenger, who has cerebral palsy, explains in the documentary film "King Gimp" that "[m]ost people think 'gimp' means someone with a lame walk. But 'gimp' also means a 'fighting spirit.'" KING GIMP (HBO Films 1999).

10. *See* Cole, *supra* note 8, at 518–31; Melissa Cole, *In/Ensuring Disability*, 77 TUL. L. REV. 839, 842–57 (2003).

11. *See* Cole, *supra* note 8, at 531–42 (examining how the Supreme Court's interpretation of the ADA in Sutton v. United Airlines, 527 U.S. 471 (1999), forced people who are able to do so to closet their disabilities and thus be treated as if they did not have such disabilities); *see also* Cole, *supra* note 10, at 868–83 (explaining how the courts' interpretation of the ADA's "safe harbor provision" for insurers and health insurance plans requires individuals with disabilities to cover their disabilities—that is, maintain their status as individuals with disabilities but hide important correlative behavior).

12. 539 U.S. 558 (2003).

Instead, the *Lawrence* Court drew a new distinction between private, intimate conduct that is legally protected and public conduct that is not.[13]

The private/public dichotomy is particularly intriguing when incorporated into Gimp Theory's critical examination of disability law. While the status/conduct framework produced some inconsistency in explaining the Court's ADA cases, the private/public framework provides a more complete, although no less troubling, picture of just how and why the Court has consistently limited the reach of the ADA and, in doing so, reinforced the subordinate position of people with disabilities.

In particular, while the ADA, like the Civil Rights Act of 1964, is designed to provide public protection against discrimination, implicit in the Court's reading of the ADA is the message that public conduct associated with disability is *not* protected. A critical examination of the Court's ADA cases employing the private/public framework shows that the Court views the ADA as protecting only private conduct; it thus simultaneously creates the appearance of supporting the civil rights of people with disabilities—as long as those rights are confined to private spaces—and in reality leaches those rights, which demand public expression, of any substance.

To be clear at the outset, in this piece I employ the status/conduct and private/public theoretical frameworks to understand the inherent flaws in the Court's ADA opinions. I do not claim to explain how the Justices *meant* to interpret the ADA; they all had legal bases (some more sound than others) for their opinions. The point of using theory to examine legal opinions is to uncover the often unintended biases that inform purportedly neutral applications of the law. Theory seeks to go beyond politics, which are at least semi-conscious. Instead, I use Gimp Theory to explain how disability as a category of subordination (and therefore, in legal terms, a class in need of civil rights protections) both informs and is reinforced by the very law meant to provide redress for such subordination. Without exposing and examining the biases inherent in the interpretation and application of the ADA, it is all too easy to assume that they do not exist, and our explanations for the flaws in the Court's understanding of the ADA remain inadequate.

I start in Part I of this piece by explaining the status/conduct distinction that, until *Lawrence*, informed both the legal treatment of lesbians and gay men and, as explained by Gimp Theory, the way the Court has interpreted the ADA. I show how the Court's ADA opinions reflect an approach that protects disability status without protecting the conduct that cannot be separated from disability status—much as the act of sodomy (which, until *Lawrence*, was not legally protected) cannot be meaningfully distinguished from gay and lesbian status (which did receive constitutional protection). In Part II, I provide a close reading of *Lawrence* to show that, although the Court recognized the

13. *See infra* Part II.A.

artificiality of its old status/conduct dichotomy, it merely imposed a new dichotomy of protection for private homosexual conduct and lack of legal protection for such public conduct. I explain how the same private/public distinction applies to disability—between private acts of caring for one's bodily disability and public conduct such as requiring reasonable accommodations. Finally, in Part III, I re-examine the ADA cases using the private/public framework and find it a more satisfying explanation for the Court's constricted interpretation of the ADA, as well as a troubling gutting of the civil rights protections that the ADA ought to guarantee.

I. GIMP THEORY AND THE OLD STATUS/CONDUCT DISTINCTION

Gimp Theory borrows from Queer Theory the use of paradigms of "closeting" and "covering" to illuminate the instability and inherent meaninglessness of the legal line drawn between people with disabilities and those without. In the context of homosexuality, these paradigms explain the Supreme Court's decisions in *Bowers v. Hardwick*[14] and *Romer v. Evans*.[15] Understanding these opinions as examples of "closeting" and "covering," respectively, also demonstrates how these theoretical constructs can be used to explain the Court's treatment of the ADA.

A. The Closeting Paradigm and the ADA

In *Bowers*, a majority of the court held that gay and lesbian conduct—specifically, sodomy—is not constitutionally protected and, therefore, may be criminalized by the states.[16] Traditionally, this legal imperative to hide one's identifying conduct was seen as "closeting,"[17] a silencing of certain conduct that thus assumes the mantle of the socially unacceptable and transforms those who engage in it into social deviants.[18]

The societal expectation that people who can keep their disability hidden will keep it hidden operates as a similar sort of "closeting." It assumes a false line between a state of disapproved disability—the characteristic of those who

14. 478 U.S. 186 (1986).

15. 517 U.S. 620 (1996).

16. *Bowers*, 478 U.S. at 192, 196.

17. *See, e.g.*, GEORGE CHAUNCEY, GAY NEW YORK 25 (1994) (chronicling the rise of the state-imposed closet which "literally codified the permissible speech patterns, dress, and demeanor of [gay] men and women who wished to socialize in public").

18. *See* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 8 (1990) ("[T]hese ignorances, far from being pieces of the originary dark, are produced by and correspond to particular knowledges and circulate as part of particular regimes of truth."); Iris Marion Young, *The Ideal of Community and the Politics of Difference*, *in* FEMINISM/POSTMODERNISM 300, 303 (Linda J. Nicholson ed., 1990) ("Any move to define an identity, a closed totality, always depends on excluding some elements, separating the pure from the impure.").

cannot hide their impairment [19]—and a state of "normal" able-bodiedness—the characteristic of people whose impairments are not noticeable—and reinforces this very socially created difference.[20] The Supreme Court has drawn this line between apparent and closeted disabilities to restrict the number of people considered to have disabilities and in this way has limited the ADA's protection against discrimination by removing countless people from its coverage. From its earliest ADA decisions, the Supreme Court has therefore sanctioned and furthered the unacknowledged construction of a disability closet.

Although the Court's first ADA decision, *Bragdon v. Abbott*, quite correctly held that the ADA provides protection against discrimination for people with asymptomatic HIV infection,[21] it is notable that Sidney Abbott's asymptomatic HIV was a quintessentially hidden disability, one that others would not be aware of absent her disclosure.[22] Because Sidney Abbott's HIV was asymptomatic, she fit the paradigm of the closet. In arguing exclusively that her impairment substantially limited her major life activity of reproduction,[23] Abbott most likely was conceding that it did not affect her in any of her other major life activities.[24] In other words, had she not revealed

19. I do not necessarily mean being able to render a disability physically invisible, but rather socially invisible. For example, even a prototypical disability like blindness can be "hidden" if one tries to erase any differences that could provoke anxiety in another person. *See* Jean Campbell & Caroline L. Kaufmann, *Equality and Difference in the ADA: Unintended Consequences for Employment of People with Mental Health Disabilities*, *in* MENTAL DISORDER, WORK DISABILITY, AND THE LAW 221, 230 (Richard J. Bonnie & John Monahan eds., 1997) ("People frequently say, 'I don't consider you disabled.' That's because I make accommodations to my [blindness]. . . . I'm accommodating all the time, but they don't know or realize it.").

20. *See* Robert Murphy, *Encounters: The Body Silent in America*, *in* DISABILITY AND CULTURE 140, 146 (Benedicte Ingstad & Susan Reynolds Whyte eds., 1995) ("Most Americans . . . carry around inside their heads a set of notions about the social position of the handicapped. . . . [T]his attitude places the disabled not in the social mainstream but on the periphery, pensioned off and largely out of sight.").

21. Bragdon v. Abbott, 524 U.S. 624, 641 (1998). The Court specifically held that Sidney Abbott's HIV infection rendered her an individual with a disability within the Act's definition. It did "not address . . . whether HIV infection is a *per se* disability under the ADA." *Id.* at 641–42. The Court's opinion, however, makes it clear that HIV infection inevitably substantially limits major life activities as required by the statute. *Id.* at 637 (noting *amici* arguments "about HIV's profound impact on almost every phase of the infected person's life").

22. The only reason Dr. Bragdon knew about her HIV status was because she disclosed it on a patient form. *Id.* at 628–29.

23. *Id.* at 638.

24. The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [the] individual," or as having "a record of such an impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(2) (2000).

her disability to Dr. Bragdon, he would never have known about it.[25] She did not announce herself as a person with a disability.

The *Bragdon* Court's opinion focuses on the hidden nature of HIV infection, describing its internal manifestations over several pages of text.[26] Abbott's claim that her infection substantially limited her ability to reproduce allowed the Court to confront a disability that affected no one but Abbott herself and perhaps her potential sexual partners;[27] certainly, her HIV infection appeared to have no outward manifestations. She therefore could remain closeted, a person with a disability who appeared to be a person without a disability. Abbott did not require any accommodation of her disability; instead, she brought the suit because she wanted to be treated as all other patients by having a cavity filled in her dentist's office rather than at a hospital.[28] The Court's holding was arguably possible because it required nothing more of Dr. Bragdon than that he refrain from discriminating against a person whose status but not her conduct identified her as a person with a disability.[29]

The following year, the Court reinforced this preference for closeted disabilities in *Cleveland v. Policy Management Systems Corporation*.[30] In a unanimous opinion, the *Cleveland* Court held that a person who identifies herself on a Social Security application as having a disability that renders her unable to work—who "comes out," as it were—"will appear to negate an essential element of her ADA case,"[31] that she could "perform the essential functions" of the job "with or without reasonable accommodation."[32] Thus, any person who "comes out" by publicly identifying herself as a person with a disability on an application for Social Security must "proffer a sufficient explanation" to convince a court that she is entitled to the protections of the ADA.[33] Again, in accordance with the closet, the Court mandated protection for disability status at the expense of visible conduct.

25. *See Bragdon*, 524 U.S. at 628–29 ("She disclosed her HIV infection on the patient registration form.").

26. *Id.* at 633–36.

27. The Court noted the risk of transmission to a partner as one way in which Abbott was substantially limited in her ability to reproduce. *Id.* at 639–40. But the Court placed much more emphasis on the risk of perinatal transmission to the children she would not have. *Id.* at 640–41.

28. *Id.* at 629.

29. Even that holding was qualified; the Court acknowledged that Abbott might not be entitled to the equal treatment she sought when it remanded the case for consideration of Dr. Bragdon's direct threat defense. *Id.* at 654–55.

30. 526 U.S. 795 (1999).

31. *Id.* at 806.

32. *See* 42 U.S.C. § 12111(8) (2000) (defining "qualified individual with a disability").

33. *Cleveland*, 526 U.S. at 806. The *Cleveland* opinion applies directly only to Title I of the ADA because Title I is the only Title that requires one be able to work in order to qualify for protection. *See* 42 U.S.C. § 12112(a) (prohibiting discrimination against a "qualified individual

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[34] the Court directly stated a preference for closeting. There, Williams claimed that her carpal tunnel syndrome substantially limited her in performing manual tasks.[35] The Court held that to claim a disability, one must be substantially limited in her ability to perform tasks that are "central to daily life,"[36] not in her ability "to perform the tasks associated with her specific job."[37] The opinion explained that "the manual tasks unique to any particular job are not necessarily important parts of most people's lives. As a result, occupation-specific tasks may have only limited relevance to the manual task inquiry."[38]

Certainly, one could read the opinion as focusing on the "occupation-specific" nature of Williams's limitations. However, she worked on an assembly line,[39] and the manual tasks she performed at work were therefore not particularly unique. The line the Court drew was not between different types of tasks at the workplace but between those tasks performed at work and those at home, a difference between limitations that will be seen by others and therefore identify one as a person with a disability and limitations that one can keep hidden from public view.[40] In the same way it did in *Bragdon* and *Cleveland*, the *Williams* Court ensured that to receive the ADA's protection against disability discrimination, one should remain closeted.

The Court's closeting of disability took a different and apparently inconsistent turn in the 1999 "mitigation" trilogy: *Sutton v. United Air Lines, Inc.*,[41] *Albertson's, Inc. v. Kirkingburg*,[42] and *Murphy v. United Parcel Service, Inc.*[43] In these cases, the Court went beyond expressing a preference that

with a disability"); 42 U.S.C. § 12111(8) (defining "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"). The point, however, is not the narrow one that a statement made of inability to work on a Social Security application may remove one from ADA protection; rather, the use of the critical theory of the closet reveals the larger implication of this opinion that public statement as a person with a disability may deny one protection against disability discrimination.

34. 534 U.S. 184 (2002).

35. *Id.* at 190. The regulations relied upon by the Court, *id.* at 195, include performing manual tasks as an example of a "major life activity" in which one must be "substantially limited" in order to be considered a person with a disability entitled to the protections of the ADA. *See* 45 C.F.R. § 84.3(j)(2)(ii) (2001).

36. *Williams*, 534 U.S. at 197.

37. *Id.* at 200–01.

38. *Id.* at 201.

39. *Id.* at 187.

40. *See id.* at 201–02 (remanding to the Court of Appeals to consider evidence of the effect Williams's carpal tunnel syndrome had on her ability to perform her personal hygiene and household chores).

41. 527 U.S. 471 (1999).

42. 527 U.S. 555 (1999).

43. 527 U.S. 516 (1999).

people with disabilities remain closeted and held, ironically, that if they do so through the use of medications or other devices that alleviate disabling symptoms, they no longer have disabilities and are not entitled to the ADA's protection.[44]

In *Sutton*—the infamous case of the nearsighted twin sister commercial airline pilots[45]—the Court held that the plaintiffs' ability to correct their "severe myopia"[46] with the use of contact lenses or glasses removed them from the protection against discrimination that they received in their uncorrected state.[47] The majority based its holding largely on the Congressional findings in the ADA's preamble that "some 43,000,000 Americans have one or more physical or mental disabilities."[48] By recasting this finding as an outer limit for the number of people the Act should protect,[49] the Court closeted everyone beyond this limit and deemed them people who could not be legally treated as individuals with disabilities.[50]

Murphy and *Kirkingburg* reinforced and extended *Sutton*'s relegation of people with mitigable disabilities to the closet and therefore out of the protected status of people with disabilities.[51] Vaughn Murphy lost ADA protection for his hypertension as soon as he began taking medication to control it and thus render its presence invisible, placing him in the closet.[52] Even Hallie Kirkingburg's ability to compensate for his monocular vision without the use of corrective aids removed him from the ADA's ambit; he closeted himself so successfully that no one would perceive his "difference."[53]

44. *See Kirkingburg*, 527 U.S. at 565–66; *Murphy*, 527 U.S. at 521; *Sutton*, 527 U.S. at 482–83 ("A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity.").

45. *Sutton*, 527 U.S. at 475.

46. Each woman's vision was 20/200 in her right eye and 20/400 in her left eye. *Id.*

47. *Id.* at 488–89.

48. *Id.* at 484 (citing 42 U.S.C. § 12101(a)(1) (1994)).

49. *See id.* at 487 ("By contrast, nonfunctional approaches to defining disability produce significantly larger numbers.").

50. *Sutton*, 527 U.S. at 487 ("Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."); *see also id.* at 494 (Ginsburg, J., concurring) (relying on this Congressional finding as one of the "strongest clues" to the Act's coverage along with another provision's description of people with disabilities as "a discrete and insular minority" (citing 42 U.S.C. § 12101(a)(7) (1994))).

51. Of course, gay/lesbian closeting operates as a mode of protection from legal persecution, while for people with disabilities the closet serves to *remove* the legal protections of the ADA. However, as the *Sutton* opinion demonstrates, closeting a disability, like closeting one's sexuality, removes it from view and thus creates what appears to be a larger normative "majority."

52. Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999).

53. Alberton's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999).

When he "came out" by disclosing his disability to his employer, they were free to fire him without legal sanctions. By creating this closet and then relegating countless numbers of people with disabilities to it by virtue of their ability to mitigate, the Court shrank the number of people who could claim disability status and thus limited protection for it.[54]

Finally, one of the Court's most recent ADA decisions, *Raytheon Company v. Hernandez*,[55] illustrates the Court's growing comfort with the closeting imperative of its construction of the ADA and also illustrates how this closeting continues to remove people from the Act's coverage and thus limits disability status protection. *Raytheon* involved Title I of the ADA's provisions on drug and alcohol addiction.[56] Under these provisions, alcoholics are covered by the Act, but only if they keep their alcoholism closeted. People with other drug addictions are expressly exempted from coverage, but recovering addicts—those who are able to hide or closet their addiction—are accorded disability status protection.[57] At the same time, employers are allowed to take action against recovering alcoholic or drug addicted employees for conduct that is "related to the drug use or alcoholism of such employee."[58]

54. *See Sutton*, 527 U.S. at 503 (Stevens, J., dissenting).

> If a narrow reading of the term "disability" were necessary in order to avoid the danger that the Act might otherwise force United to hire pilots who might endanger the lives of their passengers, it would make good sense to use the "43,000,000 Americans" finding to confine its coverage. There is, however, no such danger in this case.

Id. According to Justice Stevens, even if granted disability status, the Suttons would still have to prove that United's refusal to hire them was taken "because of" their disability, and "an employer may avoid liability if it shows that the criteri[on] . . . is 'job-related and consistent with business necessity' or . . . [the disability] would pose a health or safety hazard." *Id.*; *see also* Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 942–43 (2004) (noting that Albertson's argument that they fired Kirkingburg because DOT regulations presumably identified him as an unsafe driver due to his monocular vision was invalid because Kirkingburg received a waiver under a program that showed the government was "expressing uncertainty about whether that previous [regulatory] statement was true").

55. 540 U.S. 44 (2003).

56. *See* 42 U.S.C. § 12114 (2000).

57. *Id.* § 12114(a). Congress's determination that people with drug addictions are exempt from coverage unless they are currently undergoing or have completed rehabilitation, *id.* § 12114(b), while people with alcohol addiction need not be in recovery to receive ADA protection, *id.* § 12114(a), plainly reflects a social judgment about drug abuse versus alcoholism. Titles II and III do not address alcoholism at all, but the DOJ regulations interpreting them expressly exempt current drug users from coverage while allowing protection for people who are in or have completed drug addiction rehabilitation. 28 C.F.R. §§ 35.131(a)(2)(i)(ii), 36.209(a)(2)(i)(ii) (2001).

58. 42 U.S.C. § 12114(c)(4) (2000). The EEOC's Technical Assistance Manual explains:

> If an individual who has alcoholism often is late to work or is unable to perform the responsibilities of his/her job, an employer can take disciplinary action on the basis of the poor job performance and conduct. However, an employer may not discipline an

In other words, alcoholics or recovering addicts are protected as long as they remain closeted; if they reveal themselves as alcoholics or drug addicts by coming to work intoxicated or stoned, they are no longer protected against discrimination.

In *Raytheon*, Hernandez was fired when a company drug test came back positive for cocaine. Two years later, successfully in recovery, he applied for a new position with Raytheon. The company refused to hire him based on its policy against rehiring people who had previously been fired for workplace misconduct.[59] The district court granted Raytheon's motion for summary judgment, but the Court of Appeals reversed because it recognized that Raytheon's policy promoted discrimination against people with closeted disabilities. According to the Court of Appeals, "[m]aintaining a blanket policy against rehire of *all* former employees who violated company policy . . . screens out persons with a record of addiction who have successfully rehabilitated."[60]

The Supreme Court remanded the case on the purely legal basis that the Court of Appeals had improperly mixed the "disparate treatment" and "disparate impact" modes of discrimination analysis.[61] In doing so, however, it held that if Raytheon "did indeed apply a neutral, generally applicable no-rehire policy in rejecting [Hernandez's] application, [Raytheon's] decision not to rehire [him] can, in no way, be said to have been motivated by [his] disability" and therefore would fail under the disparate treatment (intentional discrimination) theory of the case.[62] In other words, if Hernandez was successfully in recovery, as necessary for him to fall within the Act's protections,[63] the very fact that he was thus closeted ensured that Raytheon could not be found to have intentionally discriminated against him for a disability they purportedly did not know he had.[64]

In these cases, the Court employed two modes of closeting that paradoxically limit the ADA's protection for disability status. In *Bragdon*, *Cleveland*, and *Williams* it expressed a preference for the closet, wherein

> alcoholic employee more severely than it does other employees for the same performance or conduct.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, TECHNICAL ASSISTANCE MANUAL FOR THE AMERICANS WITH DISABILITIES ACT, VIII-3 (1992).

59. *Raytheon*, 540 U.S. at 46.

60. *Id.* at 51 (quoting Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030, 1036–37 (9th Cir. 2002)).

61. *Id.* at 56.

62. *Id.* at 55.

63. *See* 42 U.S.C. § 12114(a)–(b)(2)(2000).

64. The person who made the determination that Hernandez was not eligible for reemployment testified "that she did not know that [he] was a former drug addict when she made the employment decision and did not see anything that would constitute a 'record of' addiction." *Raytheon*, 540 U.S. at 49.

disability status does not require extensive public protection. In *Sutton*, *Kirkingburg*, *Murphy*, and *Raytheon*, it removed legal protections for people in the closet on the basis that they no longer could claim disability status. The closet thus grew to enclose greater numbers of people with disabilities and then shrank out of sight.

B. The Covering Paradigm and the ADA

While "closeting" helps explain the larger implications of the Court's disability status cases, the Queer Theory concept of "covering" provides insight into the Court's disability conduct cases, those dealing with reasonable accommodations and choice of work. The concept of "covering" has been developed by Professor Kenji Yoshino to explain the social and legal effects of American society's growing tolerance of gay men and lesbians.[65] According to Yoshino, this growing tolerance has lessened the expectation that lesbians and gay men closet themselves but has replaced it with the expectation that they "cover," or refrain from publicly engaging in conduct that is closely associated with gayness and therefore serves as a reminder of a person's gay or lesbian status.[66] In other words, the closet door may be open, but people are expected to leave their gay/lesbian clothing inside.

This move from the closet to covering is reflected in the Supreme Court's opinion in *Romer v. Evans*.[67] There, the majority struck down as unconstitutional an amendment to the Colorado state constitution that prohibited any governmental legal protection for gay men and lesbians as a class.[68] The Court held the amendment in conflict with the Equal Protection Clause of the Constitution because it "singl[ed] out a certain class of citizens for disfavored legal status."[69] The difference between *Romer* and *Bowers* therefore revolved around the status/conduct distinction: *Romer* struck down a state constitutional amendment that discriminated on the basis of status, while *Bowers* approved of a state statute purporting to punish only conduct.[70]

Several of the Court's ADA cases follow a similar line of reasoning, protecting disability status but offering limited guarantees for people with disabilities to engage in conduct constitutive of that status. For example, in *US*

65. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 775 (2002).

66. *Id.* at 874–75.

67. 517 U.S. 620 (1996).

68. *Id.* at 623–24.

69. *Id.* at 633.

70. For another case involving the status/conduct distinction, see Boy Scouts of Am. v. Dale, 530 U.S. 640, 676 (2000) (Stevens, J., dissenting) (arguing that the majority incorrectly held the Boy Scouts of America's (BSA) action legal because they expelled Dale for engaging in gay conduct when "BSA said it did so because of his sexual orientation, not because of his sexual conduct").

Airways, Inc. v. Barnett,[71] the Court recognized that the ADA's "reasonable accommodation" obligation might require that people with disabilities be allowed to conduct themselves differently in order to maintain their status protection but defined this possibility very narrowly.[72] There, Barnett requested—as a reasonable accommodation required by the ADA[73]—that his employer allow him to maintain his position in the mail room after being injured in a cargo handling position, despite the fact that other employees with greater seniority had a prior right to the position.[74]

Although the Court recognized that a reasonable accommodation might require Barnett's employer to grant him the position in violation of the established seniority system, it suggested that his right to engage in such conduct—working in the mailroom—was unlikely. According to the Court, "ordinarily"[75] an employer would not be required to make such an accommodation because of the possible impact it might have on *other employees'* expectations.[76] The person with a disability bears the burden of demonstrating "special circumstances" that prove his conduct does not affect other employees.[77]

In other words, the Court expressed the expectation (both its own and that of other employees) that individuals with disabilities "cover" by refraining from engaging in conduct (such as requesting reasonable accommodations) that would require others to confront their disability status. By thus narrowing

71. 535 U.S. 391 (2002).

72. *Id.* at 397 ("The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy."). *See* Bagenstos, *supra* note 54, at 948 ("The centrality of 'reasonable accommodation' to the ADA's nondiscrimination scheme sends the message that disability is different from other forbidden classifications precisely because it is often relevant to one's ability to do the job.").

73. 42 U.S.C. § 12112(b)(5)(A) (2000).

74. *Barnett*, 535 U.S. at 393–94.

75. *Id.* at 403.

76. *Id.* at 404 ("Most important for present purposes, to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend.").

77. *Id.* at 405. The Court explained:

> The plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference.

Id.

the scope of the ADA's reasonable accommodations provision, the Court broadened the scope of expected covering by people with disabilities.[78]

Notably, Justice Scalia would have restricted the reasonable accommodation obligation even more severely. In his *Barnett* dissent, he argued that no reasonable accommodation would *ever* require any change to any workplace rule that does not pose a "*distinctive* obstacle to the disabled."[79] Justice Scalia thus wholeheartedly embraced covering by claiming that the ADA might protect disability status but does not allow employees with disabilities to engage in any conduct that disturbs a status quo that is not facially discriminatory.

In its other accommodation decision, *PGA Tour, Inc. v. Martin*,[80] the Court shifted its attention from the individual with a disability's request for reasonable accommodation to the defense that the accommodation, even if reasonable, would impose a "fundamental alteration" on the defendant's programs.[81] The *Martin* Court held that professional golfer Casey Martin's request that he be allowed to use a golf cart during the last stage of a qualifying tournament for the PGA Tour would not fundamentally alter the tournament, despite the fact that other players are required to walk the course.[82] The majority found the no-golf-cart rule "peripheral" and, therefore, held that waiving the requirement for Martin would not fundamentally alter the tournament.[83]

The unusual facts in *Martin* made the opinion possible within the covering paradigm. The majority plainly viewed Martin as exceptional. According to the Court, "Congress intended that an entity like the PGA . . . give individualized attention to the handful of requests that it might receive from talented but disabled athletes."[84] Allowing Martin to use a golf cart was therefore unlikely to expand the range of protected conduct in general since it

78. *See id.* at 420 (Souter, J., dissenting) (pointing out that Title I of the ADA expressly includes "reassignment to a vacant position" as one type of reasonable accommodation, 42 U.S.C. § 12111(9) (1994), and that "[n]othing in the ADA insulates seniority rules from the 'reasonable accommodation' requirement, in marked contrast to Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, each of which has an explicit protection for seniority." (citing 42 U.S.C. § 2000e-2(h) (1994); 29 U.S.C. § 623(f) (1994))).

79. *Barnett*, 535 U.S. at 412 (Scalia, J., dissenting).

80. 532 U.S. 661 (2001).

81. *See* 42 U.S.C. § 12182(b)(2)(A)(ii) (Title III, at issue in *Martin*); *see also* 28 C.F.R. § 35.130(b)(7) (2004) (regulations implementing Title II of the ADA). Title I provides a defense of "undue hardship" instead of "fundamental alteration." 42 U.S.C. §§ 12112(b)(5)(A), 12111(10). The *Martin* opinion also considered whether the PGA Tour is a "public accommodation" covered by Title III of the ADA, an issue not relevant to this discussion. *Martin*, 532 U.S. at 674–77.

82. *Martin*, 532 U.S. at 690.

83. *Id.*

84. *Id.* at 691.

seemed unlikely that there would be many other professional athletes with physical disabilities requiring a change in the rules.[85]

Furthermore, in contrast to *Barnett*, Martin's accommodation would have no effect on other players. According to the district court findings relied upon by the majority, Martin suffered far greater fatigue even when using a golf cart than other players did when walking.[86] The accommodation therefore more closely resembled covering. Martin's disability status was accepted and his conduct acceptable because it did not disturb others.

Perhaps most important, the majority opinion, written by Justice Stevens, a lifelong golfer, paid great attention to the ways in which Martin covered his disability. The opinion included a lengthy discussion of the pain Martin endures when walking even the short distance from the cart to the hole,[87] along with a catalogue of what he has achieved despite his disability.[88] Relying heavily on the district court's finding that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking,"[89] the Court was able to present Martin's request for a waiver of the no-golf-cart rule as minor because he was already covering. Indeed, in the first two rounds of the qualifying tournament, anyone was allowed to use a golf cart;[90] at that point, Martin "looked" like a person without a disability. Disallowing golf carts in the final round thus did not define how golfers act because many had used carts in the previous rounds (and in all rounds prior to 1997, when the no-golf-cart rule was initiated).[91] Martin therefore conducted himself like a golfer, even using a cart, not like a golfer with a disability.

Dissenting once again, Justice Scalia advocated a much broader range of covering, claiming that the ADA requires only that "disabled individuals must

85. Oddly enough, while Martin's suit was pending, another professional golfer, Ford Olinger, unsuccessfully sued the U.S. Golf Association in the Seventh Circuit for its refusal to provide him with a golf cart as an accommodation of his disability as well. The Supreme Court granted certiorari but, without an opinion after deciding *Martin*, vacated the judgment against Olinger. Olinger v. U.S. Golf Ass'n, 205 F.3d 1001 (7th Cir. 2000), *cert. granted, judgment vacated*, 532 U.S. 1064 (2001).

86. *Martin*, 532 U.S. at 690.

87. *Id.* at 668 (noting that because of his condition, for Martin "[w]alking not only caused him pain, fatigue, and anxiety, but also created a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required"). The district court found that

> plaintiff is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at risk of fracturing his tibia and hemorrhaging. . . . As he put it, he would gladly trade the cart for a good leg. To perceive that the cart puts him—with his condition—at a competitive advantage is a gross distortion of reality.

Id. at 672 (quoting the district court).

88. *Id.* at 667–68.

89. *Id.* at 690.

90. *Id.* at 666.

91. *Martin*, 532 U.S. at 666.

be given *access* to the same goods, services, and privileges that others enjoy."[92] Under this formulation, the PGA could enact any rules it chose, as long as it imposed them equally on all players.[93] "The PGA Tour cannot deny respondent *access* to that game because of his disability, but it need not provide him a game different (whether in its essentials or in its details) from that offered to everyone else."[94] Justice Scalia therefore apparently reads the ADA's reasonable accommodation requirement as providing absolutely no conduct protection.[95]

In *Chevron U.S.A. Inc. v. Echazabal*,[96] a unanimous Court acknowledged that its covering expectation is in fact much broader than it may have appeared in the *Martin* decision. In *Echazabal*, the Court determined that, although on its face the ADA creates an affirmative defense for employer-imposed job qualifications requiring that an individual with a disability not pose a direct threat to the health or safety of "other individuals in the workplace,"[97] an employer could also successfully defend an employment decision made

92. *Id*. at 698 (Scalia, J., dissenting).

93. *Id.* at 699 ("If a shoe store wishes to sell shoes only in pairs it may; and if a golf tour (or a golf course) wishes to provide only walk-around golf, it may.").

94. *Id.*

95. The "access" argument, of course, completely ignores the reasonable accommodation mandate of the ADA, which plainly recognizes that access alone will not allow individuals with disabilities the equal opportunity that is the Act's goal. *See* Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 955 (2004) ("The most important principle of disability discrimination law, namely, that of reasonable accommodation, . . . operates under a difference model of equality, one which acknowledges differential treatment of disabled individuals is often necessary in order to provide them with equal opportunity in the workplace."). The same access limitation has consistently been used by lower courts to exempt the terms of health insurance plans from the ADA. For example, the Seventh Circuit, in an opinion bearing a striking resemblance to Justice Scalia's argument that "[i]f a shoe store wishes to sell shoes only in pairs, it may," *Martin*, 532 U.S. at 699 (Scalia, J., dissenting), stated that "a store is not required to alter its inventory in order to stock goods such as Braille books that are especially designed for disabled people." Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999). By the same token, as long as all plan beneficiaries are offered a health plan, they cannot claim discrimination under the ADA, even if the plan exempts coverage for treatments necessary for their disability—thus enacting a legal regime of covering by exempting from their rights the ability to demand insurance coverage necessary for them to engage in acts constitutive of their disability status. *See id.* at 560; Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997) (en banc); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1041 (7th Cir. 1996); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 678 (8th Cir. 1996); Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557, 566 (D. Minn. 1998); Anderson v. Gus Mayer Boston Store of Del., 924 F. Supp. 763 (E.D. Tex. 1996). For a more complete discussion of how the legal treatment of health insurance under the ADA creates a regime of covering, see generally Cole, *supra* note 10.

96. 536 U.S. 73 (2002).

97. 42 U.S.C. § 12113(b) (2000).

because it believed the individual posed a threat only to *his own* health or safety.[98]

The "threat-to-self" language appeared in EEOC regulations interpreting the ADA;[99] the Court's opinion therefore focused on whether the regulation constituted a permissible interpretation of the statutory directive that the direct threat defense applies to threats to others.[100] The interpretive arguments, however, mask a much greater concern—threat to personal autonomy and the very choice of how to conduct oneself as a person with a disability. In holding that an employer can fire an employee with a disability because that person chooses to engage in conduct that might threaten *her own* health or safety, the Court required the very essence of covering. Choosing how to live with one's disability is plainly central to one's autonomy and status as a person with a disability; by framing the issue only as one of allowing someone else to curb conduct, the Court missed this very point.[101] *Echazabal* is not about limiting

98. *Echazabal*, 536 U.S. at 76.

99. 29 C.F.R. § 1630.15(b)(2) (2004).

100. The Court considered the fact that the EEOC had promulgated an identical regulation interpreting the provisions of Section 504 of the Rehabilitation Act, the precursor to the ADA. Echazabal argued that because Congress was aware of the EEOC's Rehabilitation Act regulatory language and chose not to include the threat to self clause, it plainly intended that threat-to-self not be an affirmative defense under the ADA. *Echazabal*, 536 U.S. at 79–80. Professor Samuel Bagenstos has taken issue with the Court's claim that, because the ADA is to be construed consistently with the Rehabilitation Act, 42 U.S.C. § 12201(a) (2000), and because the regulations interpreting the Rehabilitation Act include threat-to-self language, Congress must have intended to incorporate that regulation as well. He argues that:

> the Court was simply wrong to assert that the EEOC's threat-to-self regulation under the Rehabilitation Act represented an interpretation of the "direct threat" language in that earlier statute. To the contrary, that regulation expressly purported to interpret the Rehabilitation Act's requirement that the plaintiff be "qualified" for the position he or she seeks—while the statutory "direct threat" provisions appeared in a portion of the statute that defined the term "handicapped person."

Bagenstos, *supra* note 54, at 933–34.

101. The Court's analogy to Typhoid Mary illustrates just how far off the mark it was in considering the threat-to-self defense as consistent with the ADA's goal of status protection. The Court asked rhetorically, "[i]f Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?" *Echazabal*, 536 U.S. at 84. Their point was that an employer ought to be able to protect more people than just the "others in the workplace" specified by the statutory language. *See id.* The example, however, is simply not analogous; while Typhoid Mary plainly posed a serious risk to the health of many other people, it is unlikely that the hypothetical employer turned her away because of the risk she posed to her own health. Limiting conduct that threatens the health or safety of other people may be justifiable; requiring people with disabilities to cease conduct when it poses no such risks to others has no reason other than the regulation of the self, requiring covering that amounts to status discrimination.

an insignificant act; it casts into doubt the very status protection that is considered uncontroversial.[102]

The Court's covering cases thus take the limited status protections recognized in the closeting cases and circumscribe the conduct in which those people who still fall within the ADA's protections can engage. The status/conduct distinction created by *Bowers* and *Romer* in the context of sexual orientation discrimination explains the ways in which the Court has restricted the reach of the ADA and entrenched the limited societal acceptance of people with disabilities.

Yet the inconsistency between these two sets of cases—those announcing a preference for the closet and those denying coverage to people with disabilities in the closet—demands explanation. Just as the Court announced its abandonment of the status/conduct dichotomy for lesbians and gay men in *Lawrence*, so *Lawrence* presents an opportunity to consider a new way to examine the Court's ADA cases. The private/public dichotomy with which the *Lawrence* Court replaced the status/conduct one presents an appropriate framework for similarly re-examining the ADA cases and in fact provides a more intellectually satisfying explanation of the Court's apparent inconsistency in its creation of the disability closet.

II. *LAWRENCE V. TEXAS* AND CONSTRUCTING DISABILITY STATUS AS A PRIVATE ACT

The Court recognized the artificiality of the status/conduct legal distinction in *Lawrence v. Texas*.[103] As the *Lawrence* Court put it, "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[104] Rather, the Court declared, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."[105] *Lawrence* thus changed the legal landscape but not as significantly as it might appear on a surface reading of the opinion.[106] In place of the limiting status/conduct

102. *See* Ball, *supra* note 95, at 960 (contrasting nondiscrimination/equal treatment approach to discrimination with the reasonable accommodation mandate of the ADA, which has met with greater resistance).

103. 539 U.S. 558 (2003).

104. *Id.* at 567.

105. *Id.* at 575.

106. *See* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1401 (2004) (calling *Lawrence* "an about-face in the Supreme Court's interpretation of the Constitution's application to the lives and practices of gay men and lesbians" but going on to question the limits of the decision).

dichotomy, it erected a regime of private-conduct protection and public-conduct discrimination.

A. Lawrence *and the Private Contours of Sexual Orientation Protection*

The first sentence of the *Lawrence* opinion makes the Court's intention clear: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."[107] The majority similarly begins its legal analysis "by determining whether the petitioners were free as adults to engage in the private conduct [of same-sex sodomy] in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."[108]

Indeed, in overruling *Bowers*, the *Lawrence* Court revisited the historical record that had convinced the *Bowers* majority that "[p]roscriptions against [sodomy] have ancient roots"[109] and concluded that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private."[110] The Court ultimately found Lawrence's act of sodomy constitutionally protected, in large part, because it did not "involve public conduct."[111] It thus unmistakably limited the reach of its protection only as far as the walls that hide protected conduct from public view.

But the *Lawrence* Court did not seek to protect *all* private acts. It quite deliberately based its decision on the right to privacy of the Due Process Clause,[112] despite the fact that Lawrence had made only an Equal Protection

107. *Lawrence*, 539 U.S. at 562.

108. *Id.* at 564.

109. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

110. *Lawrence*, 539 U.S. at 569; *see also id.* at 570 ("The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. . . . [A] significant number [of prosecutions] involved conduct in a public place.").

111. *Id.* at 578. Professor Carlos A. Ball has argued forcefully that, such language notwithstanding, *Lawrence* is not about spatial privacy but about "decisional freedom." Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1210–11 (2004). The decisional freedom granted, however, seems very much limited to the private sphere, as the Court makes clear in distinguishing the right to engage in consensual sodomy at issue in *Lawrence* from the much more public act of state-sanctioned same-sex marriage. *See Lawrence*, 539 U.S. at 578; *see also* Franke, *supra* note 106, at 1403 ("[W]hile '[f]reedom extends beyond spatial bounds,' the liberty interest at stake is one that is tethered to the domestic private." (second alteration in original)).

112. *Lawrence*, 539 U.S. at 564, 575 (declining to proceed under the Equal Protection Clause). *See also id.* at 579 (O'Connor, J., concurring) ("Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.").

argument in trial court and the Court of Appeals had decided the issue under both the Equal Protection and Due Process Clauses.[113]

This due process right to privacy was first announced in *Griswold v. Connecticut*,[114] which the *Lawrence* Court read as "plac[ing] emphasis on the marriage relation and the protected space of the marital bedroom."[115] Subsequently, the *Lawrence* Court observed *Eisenstadt v. Baird*[116] "established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship" to private relationships between unmarried people.[117] The right to privacy, then, according to the *Lawrence* Court, requires that the protected conduct occur not only in a private space but also within the confines of a private relationship.

B. Lawrence *and the Private Contours of Disability Protection*

This characterization extends easily to disability as well. Just as *Bowers* and *Romer* created legal regimes that explained disability subordination as well as subordination of gay men and lesbians, so *Lawrence* provides a new framework for understanding how people with disabilities continue to face legally sanctioned discrimination in the face of and with the approval of the ADA.

First, the protected conduct recognized by the *Lawrence* Court is far broader than the sexual conduct on which the Court originally based the right to privacy. Drawing on the *Eisenstadt* Court's characterization of the right to use contraceptives "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,"[118] the *Lawrence* Court read the *Roe v. Wade* decision as being about more than childbearing choices, including "the right of a woman to make certain fundamental decisions affecting her destiny."[119] Thus, the *Lawrence* Court concluded, it has recognized the right to privacy as protecting "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[120]

113. *Id.* at 563; *see also id.* at 564 (petition for certiorari including whether the statute violated the Equal Protection Clause).

114. 381 U.S. 479 (1965).

115. *Lawrence*, 539 U.S. at 564–65.

116. 405 U.S. 438 (1972).

117. *Lawrence*, 539 U.S. at 565, 567 ("The [challenged statutes] . . . touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home."); *see also* Ball, *supra* note 111, at 1212 ("The Court in *Lawrence* understood that the Texas sodomy statute implicated liberty interests associated with personal relationships as much as liberty interests associated with sexual conduct.").

118. *Eisenstadt*, 405 U.S. at 453.

119. *Lawrence*, 539 U.S. at 565.

120. *Id.* at 573–74 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

Such personal and frequently bodily private decisions certainly extend to choices about how to care for one's disability. While the due process cases cited in *Lawrence* concern controlling one's ability to procreate,[121] as the Court observed in the context of the ADA in *Bragdon v. Abbott*, "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself."[122] If sexual conduct is protected, then so, surely, are such acts as decisions about whether to take medication,[123] whether to undergo a medical procedure,[124] or even how to ambulate.[125] In short, just as *Lawrence* protects gay men and lesbians in their private sexual conduct, so its concept of legally protected private conduct provides a means of considering how far the ADA's protection of one's right to treat one's own bodily disability extends.[126]

The *Lawrence* decision's limitation of protection for private conduct to that which is engaged in within a private relationship also applies to disability protection under the ADA. While the first right to privacy cases concerned sexual conduct within a relationship with another person—a spouse in *Griswold*[127] and a sexual partner to whom one is not married in *Eisenstadt*[128]—the Court in *Roe v. Wade* recognized that the privacy right is grounded primarily in personal decisions undertaken in one's relationship with oneself.[129]

The *Lawrence* Court further considered the importance of how one's personal choices affect one's relationship with people beyond the personal and private as well. In discussing the stigma that attaches to a person convicted of

121. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973); *Eisenstadt*, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

122. Bragdon v. Abbot, 524 U.S. 624, 638 (1998).

123. *See* Washington v. Harper, 494 U.S. 210, 221–22 (1990).

124. *See* Vitek v. Jones, 445 U.S. 480, 494 (1980).

125. *See* Tennessee v. Lane, 124 S. Ct. 1978, 1982–84 (2004) (finding right of private citizens to sue under the ADA where state courthouse did not have wheelchair access and the only way wheelchair-bound plaintiffs could enter was by crawling up the stairs).

126. *Cf.* Ball, *supra* note 111, at 1211 (reading *Lawrence* broadly as protecting the "decisional freedom of lesbians and gay men").

127. Griswold v. Connecticut, 381 U.S. 479 (1965).

128. Eisenstadt v. Baird, 405 U.S. 438 (1972).

129. Roe v. Wade, 410 U.S. 113, 153 (1973).

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. . . . [T]he additional difficulties and continuing stigma of unwed motherhood may be involved.

Id. at 153; *see also* Lawrence v. Texas, 539 U.S. 558, 565 (2003) (reading *Roe* as being about the right of the woman to make personal choices).

a felony,[130] the Court acknowledged that private conduct within a private relationship has effects beyond that private relationship and the private space within which it occurs.[131] According to Professor Katherine Franke, Lawrence and his partner Garner "might have just been tricking with each other" because "none of the briefing in the case indicated that they were in a relationship." Rather, "the Court took it as given that Lawrence and Garner were in a relationship, and the fact of that relationship does important normative work in the opinion." [132]

So too, conduct that a person undertakes related to her disability involves, like *Roe*, primarily a relationship with oneself, a need to balance one's own possibly competing ideas about autonomy, morality, and self. At the same time, these private decisions very much affect one's relationships with other people. For example, a person's decision to employ a hook rather than a prosthetic designed to look like a forearm and hand because a hook provides greater ease in picking up objects will be judged by many people with whom one comes into contact, who may be disturbed, concerned, or simply curious about the choice.

Most importantly, however, the *Lawrence* Court's reliance on the fact that the conduct took place in private leaves the spectrum of the closet in place and undercuts any significance its abolition of the status/conduct distinction might seem to have.[133] The majority is careful to close with the assurance that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[134] In other words, whatever Lawrence may choose to do in private, he should not expect public recognition; in fact, it is entirely possible that he would still face criminal charges if he engaged in certain conduct associated with gay men in public.[135] If acts of physical affection are conduct constitutive of Lawrence's status as a gay man,[136] and that conduct is protected only when hidden from the public,

130. *Lawrence*, 539 U.S. at 575–76.

131. *See* Franke, *supra* note 106, at 1403–04 ("But even the Court's privacy jurisprudence has evolved from addressing the disclosure of matters of private concern and governmental intrusion into private spaces to a less situated or territorial notion of protecting a zone of personal autonomy and decisional privacy.").

132. *Id.* at 1408. Indeed, it is not at all clear that Lawrence had a close personal relationship with the sexual partner with whom he was arrested.

133. *Cf.* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1790–92 (1996) (discussing "the epistemological privilege of unknowing" in which even the *Bowers* dissent managed to avoid addressing Bowers's homosexuality finding it "just another way of keeping homosexuals at arms length").

134. *Lawrence*, 539 U.S. at 578.

135. *See* Ball, *supra* note 111, at 1215–16 (recognizing that *Lawrence* must somehow be read as extending rights beyond spatial privacy in order to support an argument for same-sex marriage).

136. Yoshino, *supra* note 65, at 874–75.

then, at best, the *Lawrence* Court is simply sanctioning a regime of covering.[137] Lawrence's status as a gay man is protected, but to maintain protection for the conduct he engages in as a gay man, he must keep it hidden from the public.[138]

The lesson is instructive for an understanding of disability rights. Using *Lawrence* as a framework, one might predict that the ADA protects the rights of people with disabilities to make private, personal choices about how to deal with their disabilities. The strong caution of the *Lawrence* Court that conduct protection for gay men and lesbians applies only in a private setting, however, helps explain the harsh restrictions that the Court has placed on the ADA's protections as well.[139] Rereading the Court's ADA opinions with an eye to the private/public dichotomy illuminates why the ADA—a civil rights statute designed to provide public protections—in fact provides surprisingly little in this regard.

III. THE LEGAL IMPACT OF A PRIVATE-CONDUCT-PROTECTION APPROACH TO DISABILITY

The private/public framework of *Lawrence* reveals the severe limits the Court has placed on the ADA's purportedly public protections against discrimination. In particular, the *Lawrence* dichotomy helps show how the Court's reading of the ADA limits protection against disability discrimination to those people whose status-related conduct is confined to the private sphere. In the status cases, the Court focuses on private conduct to determine whether the individual is entitled to the public protections of the ADA. The reasonable accommodation cases illustrate the Court's reluctance to use the ADA to protect public conduct, much as the *Lawrence* Court was careful to confine its opinion to the very private acts at issue there.

137. *See* Franke, *supra* note 106, at 1407 ("[T]he privatized liberty of *Lawrence* leave[s] lower courts free to cabin protection of, and thus interpret, nonnormative sexualities. . . . Kennedy's privatized liberty leaves a wide range of homosexual and heterosexual behaviors and 'lifestyles' subject to criminalization."). *But see* Ball, *supra* note 111, at 1209 ("One of the interesting areas to watch after *Lawrence* will be what effect it has on other criminal laws . . . that have a public component to them and that have been used in the past to harass gay men.").

138. *See* William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004) ("*Lawrence* only sets a new floor for gay people, and not the same floor that straight Americans can take for granted. *Lawrence* gives us nothing less than, but also nothing more than, a jurisprudence of tolerance.").

139. *See id.* at 1065 ("The results in *Romer* and *Lawrence* are consistent with the norm that homosexuality is a tolerable sexual variation, and their reasoning is more consistent with this norm than with the more gay-friendly idea that homosexuality is a benign sexual variation."); Franke, *supra* note 106, at 1415 ("*Lawrence* is a slam-dunk victory for a politics that is exclusively devoted to creating safe zones for homo- and hetero-sex/intimacy, while at the same time rendering all other zones more dangerous for nonnormative sex."); Yoshino, *supra* note 133, at 1799 ("The symbol of the closet is analogous to the body in that both are loci of entrapment.").

A. The Private Conduct Protections of the ADA

Read through the prism of *Lawrence*, *Bragdon v. Abbott*, as the Court's first ADA decision, signals a greater concern with protecting the private conduct of people with disabilities than the sort of public protection associated with the Civil Rights Act of 1964. Like *Lawrence*, *Bragdon* turned on an issue of sexuality—there, HIV status[140]—a distinction that in *Lawrence* assumed particular importance, as it fit comfortably within the contours of the Court's substantive due process privacy cases.[141]

Yet the very private nature of sexual matters presents a more complicated legal issue in ADA cases, as the parties and the Justices in *Bragdon* recognized. In a matter consistent with the accepted concept of civil rights statutes as prohibiting public acts of discrimination, Dr. Bragdon argued that the ADA covers only "those aspects of a person's life which have a public, economic, or daily character."[142] The Court rejected this argument because the applicable regulations[143] state that a disability may be defined by its impact on activities "such as caring for one's self [and] performing manual tasks."[144] Therefore, a covered disability need not affect activities of "a public or economic character."[145]

In their dissents, both Justice Rehnquist and Justice O'Connor heatedly disagreed with the notion that the ADA protects the very sorts of intimate sexual matters that lie at the heart of the *Lawrence* decision.[146] Their disagreement highlights the majority's implicit conclusion that disability and the care of one's body is inherently a private matter. In other words, *Bragdon* suggested that the ADA is about protecting private conduct, not the public acts associated with civil rights statutes.

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140. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

141. *See supra* notes 107–40 and accompanying text.

142. *Bragdon*, 524 U.S. at 638.

143. The *Bragdon* Court relied on regulations implementing the Rehabilitation Act because of Congress's direction that the ADA was to be construed consistently with such regulations. *Id.* at 631–32.

144. 28 C.F.R. § 41.31(b)(2) (2004); 45 C.F.R. § 84.3(j)(2)(ii) (2004).

145. *Bragdon*, 524 U.S. at 639 (finding "no credible basis for confining major life activities to those with a public, economic, or daily aspect").

146. Justice Rehnquist made the distinction clear in his protest that, while "[n]o one can deny that reproductive decisions are important in a person's life . . . so are decisions as to who to marry, where to live, and how to earn one's living," activities he assumed were not covered by the ADA. *Id.* at 660 (Rehnquist, C.J., dissenting). So, too, Justice O'Connor wrote that

> the act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons . . . listed in regulations relevant to the Americans with Disabilities Act of 1990. Based on that conclusion, there is no need to address whether other aspects of intimate or family relationships not raised in this case could constitute major life activities.

Id. at 664–65 (O'Connor, J., dissenting) (citation omitted).

This approach garnered unanimity on the Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[147] where the private conduct preference created a limitation on the Act's coverage. There, the Court held that Williams did not qualify for protection under the ADA as an "individual with a disability" if she claimed physical limitations only at the workplace.[148] According to the Court, if one claims that her disability limits her ability to perform manual tasks, she "must have an impairment that prevents or severely restricts [her] from doing activities that are of central importance to most people's daily lives."[149] Such tasks, the Court explained, must be of the same nature as "walking, seeing, and hearing,"[150] all actions that are part of the same private bodily conduct as sexual activity, reproduction, and making other decisions about how to care for one's body.[151]

By contrast, when viewed through the lens of the private/public framework, *Cleveland v. Policy Management Systems Corporation*[152] can be read as holding that a public act may remove one from ADA protection. In *Cleveland* the Court concluded that because Cleveland stated on an application for Social Security benefits that she was unable to work it became incumbent upon her to explain why she remained entitled to ADA protection against employment discrimination.[153] Just as the Court has considered the mere public statement of one's homosexuality a public act that is not constitutionally protected,[154] so Cleveland's statement of her disability can be viewed as a public act, and the Court's imposition of an additional burden on her to show entitlement to ADA coverage suggests that they view the ADA as more protective of private than public conduct.[155]

This approach also provides a more satisfying explanation of *Sutton*, *Kirkingburg*, and *Murphy* than does the status/conduct dichotomy. The *Sutton*

147. 534 U.S. 184 (2002).

148. *Id.* at 201.

149. *Id.* at 198.

150. *Id.* at 197.

151. Indeed, the Court remanded the case to the Court of Appeals because the lower court had erred in disregarding evidence about Williams's limitations in carrying out personal hygiene and household chores. *Id.* at 201–02.

152. 526 U.S. 795 (1999).

153. *Id.* at 806.

154. *See generally* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

155. The *Cleveland* Court based its determination that such a statement should not trigger a legal presumption that the individual cannot claim Title I protection on the fact that Title I allows an individual to claim she is qualified for a position because she can perform the job's essential functions with reasonable accommodation. 526 U.S. at 803. The ADA's guarantee that individuals with disabilities be given reasonable accommodations can be read as an act of public protection—allowing a reading of *Cleveland* that recognizes the ADA as protecting public conduct. As explained in Part III.B., *infra*, however, this public conduct protection has little substance.

Court's holding that one's use of mitigating measures may render one's disability invisible and therefore not protected may be seen as a concern with private acts to the exclusion of the public ones associated with civil rights protections. Mitigating measures—the ingestion of medication or use of personal aids—surely fall within the rubric of private conduct, for they constitute the sort of intimate decisions connected to one's bodily integrity protected by the right to privacy.

The legally pertinent question in *Sutton* was whether one is still protected by the ADA once one engages in the private out of mitigation.[156] According to the *Sutton* majority, such an act may remove one from the public protections of the ADA. Justice Stevens, in his dissent, highlighted this result as "the counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations."[157] In other words, the act of mitigation is protected because the person with a need to mitigate has a disability and is acting privately to take care of it; once that person steps into the public realm of employment, however, she may no longer claim protection by the ADA.

This counterintuitive conclusion is even more striking in *Kirkingburg*, where the Court held that even Kirkingburg's ability to compensate for his monocular vision through his own brain functions removed him from ADA coverage.[158] Just as *Lawrence* suggested that lesbians and gay men have a right to be treated just like everyone else, provided they confine their lesbian and gay conduct to the privacy of their homes, so *Kirkingburg* shows how the Court wishes to treat people with disabilities just like everyone else, provided they keep their disability-associated conduct private as well.[159] Being treated like everyone else, of course, means giving up the special protections of the ADA.

The difference, of course, is that the ADA was enacted to provide public protections against disability discrimination, a federal measure woefully lacking for protection against sexual orientation discrimination. While the private/public dichotomy in *Lawrence* is in part a reflection of the inadequacy

156. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (holding it "apparent that *if* a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures . . . . must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act" (emphasis added)).

157. *Id.* at 499 (Stevens, J., dissenting).

158. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565–66 (1999).

159. The possible exception lies in the Court's determination that an employer may discriminate against an employee with a disability if it feels that the employee poses a threat to her own health. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 87 (2002). That this decision runs counter to the Court's right-to-privacy cases is clouded by the way the opinion is steeped exclusively in matters of statutory interpretation and regulatory authority.

of legal protections for lesbians and gay men, the dichotomy has particularly troubling implications when applied to the ADA, which is intended to enact such public protections.

B. The Consequences of the Private Preference on the ADA's Treatment of Public Conduct

Applying the private/public framework to the Court's ADA cases focusing on public conduct finally provides an explanation for this inconsistency. The Court has recognized that the ADA, as a civil rights statute, is designed to prevent discrimination against people with disabilities "in major areas of public life."[160] Yet its understanding of public protection is perverted by its concept of the ADA as protecting private conduct of bodily integrity. It thus construes cases dealing with public conduct in a way that actually reflects a private conduct understanding of the ADA.

The Court's decision last term in *Tennessee v. Lane*[161] illustrates the limits of public conduct protection under the ADA. In *Lane*, the Court held that the states, as "public entities" covered by Title II of the Act, have a responsibility to provide reasonable accommodations to people with disabilities.[162] At the same time, it circumscribed the reasonable accommodation requirement in a way that comports with the private/public dichotomy. That it did so in the arena of *public* entities' ADA obligations highlights this irony.

The State in *Lane* raised an Eleventh Amendment challenge to Title II's authorization of private causes of action for money damages in defending itself against the plaintiffs' ADA claims that it failed to provide people with

160. PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001). *See also* Tennessee v. Lane, 124 S. Ct. 1978, 1984 (2004). Indeed, the Supreme Court has regularly turned to cases decided under the Civil Rights Act of 1964 for guidance in deciding ADA cases; *see Martin*, 532 U.S. at 681 ("Our conclusion is consistent with case law in the analogous context of Title II of the Civil Rights Act of 1964."); *see also* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 420 (2002) (Souter, J., dissenting) (comparing the ADA's silence on seniority systems with Title VII and the ADEA's "explicit protection for seniority"); Olmstead v. L.C. *ex rel*. Zimring, 527 U.S. 581, 616–17 (1999) (Thomas, J., dissenting) (using Title VII to determine whether the ADA prohibits discrimination between people with disabilities); *Sutton*, 527 U.S. at 504–06 (Stevens, J., dissenting) (comparing the ability of any person to bring suit under Title VII or the ADEA with the Court's severe limitation of protected individuals under the ADA and discussing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), a Title VII case, as an example of the need to construe remedial civil rights legislation broadly).

161. 124 S. Ct. 1978 (2004).

162. Three years earlier, in *Board of Trustees of the Univ. of Ala. v. Garrett*, the Court held that the Eleventh Amendment barred private suits for money damages brought against the states under Title I of the ADA, which prohibits discrimination in employment. 531 U.S. 356, 374 (2001). Although *Lane* appears to be a victory in that it did not similarly hold Title II suits barred, as discussed *infra*, it still reflects the Court's view of the ADA's public conduct protections as extremely limited.

ambulatory disabilities adequate wheelchair-accessible access to a number of public courthouses.[163] The Court held that there was a "congruence" and "proportionality" between states' discrimination in the provision of public services and the remedy of allowing private suits for money damages under Title II of the ADA.[164]

The Court went on, however, to address the scope of the States' reasonable accommodation obligation, an issue not necessary for its resolution of the Eleventh Amendment challenge before it. It cautioned that "Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities."[165] In fact, the Court viewed providing an elevator to allow wheelchair-bound people access to courtrooms as a remedy of last resort, necessary only if "a variety of less costly measures" are ineffective.[166] This discussion went far beyond the question of Congress's power to abrogate the states' sovereign immunity and strongly suggests that the Court was quite deliberately announcing that the reasonable accommodation obligation is a restrictive one, even when applied in the most public of arenas—States' provision of public services.[167]

163. *Lane*, 124 S.Ct. at 1982–83. The facts of the case were particularly sympathetic and, importantly, concerned the most obvious of non-hidden disabilities. One of the plaintiffs, George Lane, is paraplegic and uses a wheelchair. *Id*. at 1982.

> [H]e was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones [the other plaintiff, also paraplegic], a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process.

Id. at 1982–83.

164. *Id.* at 1993.

165. *Id*.

166. *Id.* at 1993–94.

167. In *Barnes v. Gorman*, the Court held that punitive damages are not available in private suits brought under Title II of the ADA. 536 U.S. 181, 189 (2002). The Court based its conclusion on the fact that Title II provides that its remedies are the same as those available for violations of § 504 of the Rehabilitation Act, which prohibits disability discrimination by recipients of federal funding. *Id*. at 189 n.3; *see also* 42 U.S.C.§ 12133 (2000). The Rehabilitation Act, in turn, incorporates the remedies available for violations of Title VI of the Civil Rights Act of 1964, which prohibits race discrimination by recipients of federal funding. *Barnes*, 536 U.S. at 189 n.3. The Court reasoned that, using contract principles, punitive damages are not available for violations of statutes enacted pursuant to Congress's power under the Spending Clause except for intentional violations of clear and unambiguous prohibitions. *Id*. at 182. Therefore, according to the *Barnes* Court, "[b]ecause punitive damages may not be awarded in private suits under Title VI [of the 1964 Civil Rights Act], it follows that they may not be awarded in suits under [Title II] of the ADA." *Id.* The fault in the Court's reasoning is that the ADA was not enacted pursuant to Congress's power under the Spending Clause but

The Court, in fact, took this approach as early as 1999, only the second term in which it heard any ADA cases. In *Olmstead v. L.C. ex rel. Zimring*, the question was whether Title II requires state programs to place people with mental disabilities in community settings for which they qualify rather than institutions.[168] In addressing the limits of the State's obligations, the Court held that the determination of a public entity's nondiscrimination obligation must be made in the context of the State's allocation of its resources.[169] "To maintain a range of facilities and to administer services with an even hand," the Court opined, "the State must have more leeway than the courts below understood."[170] The provision of public programs, according to the *Olmstead* Court, does not require the accommodation of any and all public conduct by people with disabilities; rather, the states are free to determine what kinds of status-related conduct to support.

The private/public dichotomy thus comes into full relief in *Olmstead*. The reasonable accommodation mandate of the ADA—Congress's express requirement that people with disabilities be protected beyond the right to engage in their own private conduct—is in fact limited by the very public nature of such accommodations.[171]

The private/public framework similarly helps explain the Court's decision in *Chevron U.S.A., Inc. v. Echazabal*, in which a unanimous Court held that an employer may discriminate against an employee with a disability if it believes the employee presents a risk to her own health or safety,[172] contrary to the plain language of the statute.[173] Certainly, one's choices about how to conduct oneself as a person with a disability—including what physical risks to expose oneself to[174]—seem to be the most private of actions. Yet, under the *Lawrence*

pursuant to the Fourteenth Amendment; the underlying reasoning that a recipient of federal funding accepts its terms when it accepts the funding simply does not apply to the ADA. *See* 42 U.S.C. § 12101(b)(4) (2000).

168. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 587 (1999).

169. *Id.* at 604.

170. *Id.* at 605. The specific legal issue in the opinion concerned the "fundamental-alteration" defense raised to thwart the obligation to provide a reasonable accommodation. *Id.* at 604.

171. *See id.* at 612 (Kennedy, J., concurring) ("No State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities. . . . The judgment, however, is a political one and not within the reach of the statute.").

172. Cheveron v. Echazabal, 536 U.S. 73, 76 (2002).

173. *See* 42 U.S.C. § 12113(b) (2000) (allowing the employer to use the defense of qualification standards, including the "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace").

174. Echazabal suffered from Hepatitis C; any number of activities could have exposed him to risk, yet he was free to ignore such risks everywhere but at his place of work. *Echazabal*, 536 U.S. at 76.

Court's rubric of privacy as a spatial concept confined to a private space,[175] Echazabal's choice of a workplace and a specific job within that workplace is an unprotected public act. This approach would be consistent with Congress's directive in the ADA that an employer need not hire or retain an employee in a position in which she poses a "direct threat to the health or safety of other individuals in the workplace,"[176] for the risk posed to other people takes one's conduct beyond the realm of choosing how to act for oneself and presents possible harm to others.[177] In expanding the scope of the direct threat defense to the employee's threat to her own health or safety, however, the Court cut even more deeply into the realm of private conduct.

While the *Echazabal* opinion interferes with the most private of conduct, it does so by reposing the issue as one of public conduct. Ironically, far from the public aspect of the conduct lending it greater protection under a civil rights statute supposedly designed to do just that, the public dimension robbed Echazabal of even the right to engage in private conduct within a public space. This line of reasoning, followed far enough, could neuter every public protection the ADA purports to provide.

The best way to examine how far this proposition carries is by examining the Court's cases exclusively devoted to the reasonable accommodation requirement. In a covered entity's obligation to provide reasonable accommodation lies the confluence of public and private, Congress's recognition that the anti-discrimination mandate of the ADA is meaningless unless others engage in conduct related to that individual's disability.[178] In other words, if an individual's decisions about how to act as a person with a disability are the very nature of private conduct, the reasonable accommodation requirement, with its mandate that entities other than the individual herself take action to make it possible for her to conduct herself in public, seems destined to receive less than full expression in a legal regime ruled by the private/public dichotomy.

In *US Airways, Inc. v. Barnett*,[179] the Court considered whether a workplace seniority system trumps the ADA's requirement that an employer make reasonable accommodations to the needs of an employee with a disability. The Court began by explaining that neutral workplace rules are not

175. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

176. 42 U.S.C. § 12113(b) (2000).

177. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965) (distinguishing between a duty created by one's own acts and the rule that one has no duty to act affirmatively to prevent harm befalling others).

178. Ball, *supra* note 95, at 955 ("The most important principle of disability discrimination law, namely, that of reasonable accommodation . . . operates under a difference model of equality, one which acknowledges that differential treatment of disabled individuals is often necessary in order to provide them with equal opportunity in the workplace.").

179. 535 U.S. 391 (2002).

necessarily beyond the reach of the ADA;[180] hence, the ADA apparently does extend into the public realm of conduct that affects other people. The Court almost immediately dispelled this notion, however, by cautioning that "a demand for an effective accommodation could prove unreasonable [and therefore not required by the ADA] because of its impact . . . on fellow employees."[181] Therefore, the *Barnett* Court held, "ordinarily" it would not be "reasonable" to allow an employee with a disability to take a position that makes it possible for him to work if another employee has seniority rights to the same position.[182] The reason, the Court made clear, is because of the impact such an accommodation would have on other employees' expectations.[183]

Hence, according to the *Barnett* Court, the ADA does not protect public conduct that has an impact on other people. The Court thus described publicly protected rights that have no real substance. Apparently, the Court believed that the ADA requires a reasonable accommodation that will allow an employee to perform her job only if it does not at the same time disturb other employees.[184] In this sense, the accommodation is closer to the employee's own private conduct—the things she does to function with her disability that remain within the scope of her private autonomy—than to the sort of public conduct that the ADA should protect.

This reasoning applies equally to the *Martin* opinion,[185] despite the fact that the Court held that the PGA did in fact have to accommodate Martin by waiving its no-golf-cart rule and allowing him to use a cart during the final stage of the tournament's qualifying rounds. PGA did not contest the fact that the golf cart was a reasonable accommodation in that it was a necessary means of allowing Martin, afflicted with a disability that made it painful and dangerous for him to walk even the short distance from a golf cart to the green,[186] to play.[187] The Court's inquiry, therefore, focused on whether the

180. *Id.* at 398.

181. *Id.* at 400. Justice Scalia would apparently remove from ADA protection *any* public conduct, whether or not it actually or potentially impacts other individuals. In his *Barnett* dissent, he argued that "reasonable accommodations" include changes only to policies "that the employee's disability prevents him from observing." *Id.* at 412 (Scalia, J., dissenting) (emphasis omitted).

182. *Id.* at 403.

183. *Id.* at 404.

184. In a concurring opinion, Justice O'Connor highlighted this point, explaining that she believed the "relevant issue is whether the seniority system prevents the position in question from being vacant. . . . [A] vacant position is a position in which no employee currently works and to which no individual has a legal entitlement." *Barnett*, 535 U.S. at 409 (O'Connor, J., concurring).

185. PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

186. Martin has Klippel–Trenaunay–Weber Syndrome,

> a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart. . . . [I]t causes severe pain and has atrophied his right leg. . . . Walking not

golf cart constituted a "fundamental alteration" to the competition itself, in which case the PGA would not be required to provide it.[188]

The Court quickly dismissed the notion that a waiver of the no-golf-cart rule would fundamentally alter the game of golf, for "the use of carts is not itself inconsistent with the fundamental character of the game of golf"[189] and, indeed, the PGA allows the use of golf carts in many of its tournaments and in the first two of the three-round tournament in which Martin was playing.[190] As to the PGA's argument that the waiver would fundamentally alter the nature of the particular competition in which Martin was engaged, the Court held that the rule in fact did not have any substantial effect on the competition.[191]

Most important, however, the Court emphasized that allowing Martin to use a golf cart would have no appreciable effect on any of the other tournament participants. According to the district court, Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking."[192] In other words, the accommodation can be viewed as akin to private conduct—it allows Martin, as a person with a mobility impairment, to move around the golf course—and does not affect other people in a way that would require the Court to take a less restrictive public conduct protection stance.

The ADA cases dealing with public acts—reasonable accommodations and choice of workplace—illustrate how the Court's approach to the ADA has led to a limited reading based on an implicit assumption that the ADA really protects only private conduct of the sort associated with directly caring for

> only cause[s] him pain, fatigue, and anxiety, but also create[s] a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly than an amputation might be required.

Id. at 668.

187. *Id.* at 682.

188. Title III of the ADA (covering public accommodations), under which the *Martin* case was brought, includes in its definition of discrimination, "a failure to make reasonable modifications in policies, practices, or procedures . . . unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii) (2000). Title I (covering employment) contains a parallel provision in § 12112(b)(5)(A) (allowing a defense of "undue hardship"), as do the regulations implementing Title II (public entities). 28 C.F.R. § 35.130(b)(7) (2001).

189. *Martin*, 532 U.S. at 683.

190. *Id.* at 685–86.

191. *Id.* at 687–88 (citing district court's finding "that the fatigue from walking during one of petitioner's 4-day tournaments cannot be deemed significant"; that, according to one of Martin's expert witnesses, "the calories expended in walking a golf course (about five miles) [is] approximately 500 calories—'nutritionally less than a Big Mac,'" and "is expended over a 5-hour period, during which golfers have numerous intervals for rest and refreshment"; and that "the majority of golfers in petitioner's tournaments have chosen to walk, often to relieve stress or for other strategic reasons").

192. *Id.* at 690 (quoting Martin v. PGA Tour, Inc., 994 F.Supp. 1242, 1252 (D. Or. 1998)).

one's own disability. The feedback loop thus depends, not on the Civil Rights Act of 1964, despite the Court's express and conscious reliance on that statute, but rather on its unexamined treatment of gay men and lesbians. Just as lesbian/gay identity is unavoidably tied to conduct and therefore, under *Lawrence*, that conduct must be cabined to the private sphere, so disability status is intricately bound up in associated conduct. Although the ADA is designed to protect public conduct, the Court has approached it with the same assumption that private conduct is all that deserves legal protection. The public aspects of the Act thus lose their substance and people with disabilities, like gay men and lesbians, receive only protection from discrimination against them based on their very status. The civil rights protections of the ADA afford people with disabilities no significantly greater public conduct protection than that given to gay men and lesbians, who have no such declared civil rights.

CONCLUSION

One would ordinarily expect the ADA's feedback loop to be generated primarily by the Civil Rights Act of 1964, on which it was modeled in so many respects. Indeed, in his symposium piece, Professor Days gives thoughtful attention to the ways in which the relationship between the two has influenced the Civil Rights Act.[193] Yet the Supreme Court's crabbed interpretation of the ADA cannot be squared with the public anti-discrimination model of the Civil Rights Act. Despite language to the contrary, the Court's approach to the ADA must be explained by reference to something else.

The *Lawrence* decision provides that reference point. While rejecting the old status/conduct framework for defining the parameters of constitutional protections accorded to lesbians and gay men, *Lawrence* erected a new mode of circumscribing societal and legal acceptance of such individuals. The private/public dichotomy that underlies the *Lawrence* decision and brings to the surface the extreme limits of the civil rights protections announced by the Court provides a similar caution in approaching ADA protections for the civil rights of people with disabilities.

Certainly, the Court has never drawn on issues of constitutional protection for gay men and lesbians to interpret the ADA; that has never been my claim. Rather, the private/public dichotomy provides a paradigm—a framework that can be used to analyze the unspoken and often unthinking assumptions that inform what the members of the Court undoubtedly think is a strictly legal approach to interpreting the statute's reach. Through that framework, we can begin to understand both why the Court has so frequently disappointed the hopes of disability rights advocates and why even the victories ultimately ring hollow.

193. *See generally* Drew S. Days, III, *"Feedback Loop": The Civil Rights Act of 1964 and its Progeny*, 49 ST. LOUIS U. L.J. 981 (2005).

The ADA has a proud legacy in the Civil Rights Act of 1964, and I would still love to see the day forty years from now when we can look back and say that the ADA has accomplished far more good than it has provided disappointment. Yet the Court repeatedly departs from the ADA's civil rights legacy because of the inherent private nature of disability. By focusing on the private conduct associated with disability, the Court ends up with a skewed view of the public, and in the end perverts the meaning of civil rights for people with disabilities. In its ADA cases, the Court has accorded to people with disabilities a very separate kind of equal opportunity.