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Civil Rights - The Liberal Paradigm and the Rehabilitation Act: A Need for Linkage - School Board of Nassau County v. Arline

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COMMENT

CIVIL RIGHTS—THE LIBERAL PARADIGM AND THE REHABILITATION ACT: A NEED FOR LINKAGE

School Board of Nassau County v. Arline,

480 U.S. 273 (1987)

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I. INTRODUCTION

Legislation reflects the dominant political ideology of the period of its enactment.[1] However, when ideology is in a state of flux or is undergoing internal differentiation, the articulation of the values underlying legislation may be more challenging for legislators than during times of ideological stability. Bad interpretive case law is often the ultimate result when judges are placed in a position of having to divine legislative value preferences. This comment first explores

1. This paper adopts the position that law serves to institutionalize ideological structures formed in the context of societal interactions, and that legislators are the political instruments through whom this is done. However, this does not imply that legislators serve only to reproduce passively the ideological mosaic of the larger society. Rather, notwithstanding their subordinate, mirroring function, the manner in which they perform their socially determined role is dialectically linked to the course of ideological development in society. For a thoughtful discussion of law as social ideology, see Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985). This is only one among several competing models of the underpinnings of legislative behavior. For a discussion of other models, see Farber and Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

differentiation in liberal ideology[2] and its manifestation in one major piece of liberal legislation, the Rehabilitation Act of 1973 (the "Act").[3] It then focuses on one case, *School Board of Nassau County v. Arline*.[4] This case potentially removes most AIDS victims from the protections of the Rehabilitation Act. It is significant as an illustration of how the failure of Congress to define clearly the values underlying the Rehabilitation Act and its intended beneficiary classes has led to a case outcome that is fundamentally incompatible with liberal values. The comment concludes with some thoughts on how sound policy analysis prior to the enactment of the Act could have averted the ambiguous result of *Arline* insofar as AIDS victims are concerned.

II. THE CORE VALUES OF LIBERALISM

Liberalism, as manifested in legislative action, has sought to implement one of three distinct values. These values are fairness, social utility and compassion.[5]

A. Fairness

"Fairness legislation," as used here, is procedural in its effect and intent, not substantive.[6] A commitment to fairness implies only a belief in the desirability of providing a level, competitive field for all relevant political players. The focus of legislative initiatives motivated by considerations of fairness is

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2. For the purposes of this comment, "liberalism" is broadly defined to include all philosophical traditions that are traceable, however tangentially, to classical Lockean philosophy. Thus the definition includes formalist, communitarian, libertarian, utilitarian, pre-Leninist Marxian and Critical Legal Studies traditions. For a recent exposition of formalism, see Westen, *The Concept of Equal Opportunity*, 95 ETHICS 837 (1985). For an exposition of communitarian perspectives, see A. MACINTYRE, AFTER VIRTUE (1981); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); M. WALZER, SPHERES OF JUSTICE (1983). For libertarian perspectives, see R. NOZICK, ANARCHY, STATE AND UTOPIA (1974). For utilitarian perspectives, see R. POSNER, ECONOMIC ANALYSIS OF THE LAW (3d ed. 1986). For non-Leninist Marxian and Critical Legal Studies perspectives, see D. KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (1982); R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

3. 29 U.S.C. §§ 701-96 (1973).

4. 480 U.S. 273 (1987).

5. *See infra* notes 6-10.

6. A conceptualization that is similar in connotation is that of "negative freedom" as defined by Isaiah Berlin. *See generally* I. BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY (1969). Berlin defines negative freedom as simply the area within which a man can act unobstructed by others. Positive freedom, on the other hand, requires that Government provide the individual with certain necessities. Another conceptualization that is similar to "fairness" is "formalism" as defined by J. Rawls. *See generally* J. RAWLS, A THEORY OF JUSTICE (1971). Compare his definition of "pure procedural justice" ("pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed." *Id.* at 86.) with our definition of "fairness." Also note the identity between "fairness" as defined in this comment and "formal equality of opportunity" as defined by R. Fullinwider (there is formal equality of opportunity when X and Y have opportunity in regard to A so long as neither faces a legal or quasi-legal barrier to achieving A the other does not face). *See* R. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY 101 (1980). For explication of similar philosophical positions, see generally J. ELY, DEMOCRACY AND DISTRUST (1980). For a critique of the formal model of liberalism, see M. Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CALIF. L. REV. 1687 (1986).

one of creating a system of procedural rules that are outcome-neutral and do not by their own operation provide competitive advantage to any particular social group. Its focus is not so much on the reallocation of scarce social resources as on the creation of conditions in which no social group is unfairly prevented from competing for access to these resources. Civil rights legislation is typical of legislation motivated by this norm.[7] Its targeted beneficiaries are individuals and social groups who are presumed to be able to function effectively in a competitive environment, provided that the state guarantees fair rules of competition.

B. Compassion

The values underlying "compassionate legislation" are significantly different from those of fairness legislation, although they have also been fundamental to the liberal perspective.[8] Unlike fairness legislation, compassionate legislation is primarily substantive rather than procedural. Its avowed purpose is the reallocation of societal resources from one sector of the population to another. It is premised on the idea that certain individuals and social groups are fundamentally limited in their ability to compete on equal terms and are thus in need of social assistance. Welfare legislation in all its multifarious forms belongs to this category.[9]

C. Social Utility

A third value cluster underlying liberal legislation is labelled "social utilitarianism."[10] Legislation motivated by utilitarian considerations is similar to compassion-based legislation in that it is also premised on the belief that the beneficiary class has innate limitations not shared by the rest of the populace. However, in this case the beneficiary class is seen as having countervailing strengths which, if tapped, could add to social productivity. Legislation motivated by utilitarian considerations reallocates societal resources, but with the expectation that society will receive a substantially greater pay-back in the form

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7. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2) (Supp. 1988), which imposes an obligation to provide *equal opportunity* in employment.

8. The concept of "positive freedom," *see supra* note 6, implies the politics of compassion. *See* C. MACPHERSON, DEMOCRACY THEORY: ESSAYS IN RETRIEVAL 105 (1973). Macpherson argues that positive freedom depends on the absence of impediments over and above simple coercion, and as such requires that the government provide some individuals with some necessities. *See also* D. RAPHAEL, JUSTICE AND LIBERTY 52-53 (1980) (positive liberty requires the development of individual capacities through aid and training provided by others).

9. *See, e.g.*, 42 U.S.C. § 290aa-3 (Supp. 1988), which authorizes federal funds for a National Institute of Mental Health.

10. For an example of the utilitarian standpoint as defined here, see R. DWORKIN, A MATTER OF PRINCIPAL (1985). Here Dworkin justifies preferential treatment of minority applicants at the expense of more qualified non-minority applicants to institutions of higher learning. His justification is that such affirmative action programs benefit the community as a whole by increasing the number of minorities in the profession, by *potentially* raising the level of medical care in minority neighborhoods, and by *potentially* reducing race consciousness in American society. *Id.* at 294-95. *See generally* Abramson, *Ronald Dworkin and the Convergence of Law and Political Philosophy* (Book Review), 65 TEX. L. REV. 1201 (1987).

of productive activity by the beneficiary class.[11] The classic example of legislation motivated by utilitarian considerations is that which requires employers to "accommodate" otherwise qualified handicapped employees.[12]

From a normative standpoint the three primal values of liberalism—fairness, social utility and compassion—are hierarchically ordered rather than co-equal.[13] A doctrinally pure liberal society must have a pre-eminent commitment to the fairness principle, not only because it is historically antecedent to the other two principles,[14] but also because while within liberalism there remains considerable room for debate on the place and scope of utilitarian and compassionate principles, there is a clear consensus that procedural fairness is central to the liberal perspective.[15]

Given the diversification of liberal ideology, there is no reason why liberal legislation should not reflect all combinations of the three value clusters delineated above. Problems arise, however, when the values underlying legislation are not clearly articulated, when the beneficiary classes are not clearly defined, and when logical links between articulated values and legislatively defined beneficiary classes are not established. Fairness and compassion, for example, are both venerable liberal values—but they do not mean the same thing. Likewise, racial minorities *and* retarded citizens deserve the protections of the liberal state, but no rational purpose is served by not recognizing that their claims for the protections of the liberal state are based on distinct values. A failure to distinguish between the variety of liberal values and the classes they are designed to benefit inevitably causes muddle-headed legislation which results in bizarre outcomes when interpreted in the context of litigation. The Rehabilitation Act[16]

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11. This "cost-benefit" perspective underlying some liberal legislation is illustrated by a statement by Congressman Vanik in favor of legislation on behalf of the handicapped:

> Education for the handicapped is one of the most cost-effective endeavors the American educational enterprise has ever undertaken. It costs the State $150,000 for the lifetime of a mentally handicapped person in an institution, but appropriate educational services for the handicapped can turn a negative societal contribution into a positive one for the individual and for the whole society.

117 CONG. REC. 45,974 (1971).

12. The Rehabilitation Act of 1973, 29 U.S.C. § 706(7)(B) (1982), and implementing regulations, 45 C.F.R. § 84.12(a)-(d) (1987) define accommodation. *See infra* note 48.

13. *See supra* notes 6, 8 and 10 and accompanying text for an explication of the concepts of fairness, utility and compassion.

14. Historically, the Lockean tradition, with its emphasis on the desirability of the minimal state that guaranteed *procedural* rights preceded the Benthamite utilitarian tradition, which advocated a *substantive* role for the state. The communitarian and critical legal studies traditions, which *programmatically* emphasize compassionate principles, even though from different philosophical vantage points, are of much more recent vintage. For exposition of the Lockean tradition, see generally C. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL (1973); for exposition of utilitarianism, see J. BENTHAM, THE THEORY OF LEGISLATION (R. Hildreth ed. 1911); for communitarian perspectives, see M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); for an exposition of the Critical Legal Studies Movement see R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

15. Thus, even the Critical Legal Studies Movement, which lives philosophically at the very outer edge of the liberal tradition, explicitly pays homage to the "constraints on power" and the "emancipatory" kernels of classical liberal doctrine. *See* R. UNGER, *supra* note 14, and Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505 (1987).

16. 29 U.S.C. §§ 701-796 (1973).

is a good illustration of the consequences of law-making that is not guided by disciplined ideological analysis.

III. The Rehabilitation Act of 1973

A. Congressional Policy

The critical element of the Rehabilitation Act, as presently written, provides that "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."[17] When the Act was first passed in 1973, "handicap" was defined as any physical or mental disability which constituted or resulted in a substantial handicap to employment, and a "handicapped individual" as one who could reasonably be expected to benefit from vocational rehabilitation services.[18] Thus, to qualify for the protections of the Act, one in fact had to be impaired. While there is no legislative history to guide us regarding Congressional intent in 1973, the statutory wording leads to the inference that utilitarian considerations primarily motivated this piece of legislation. The intended beneficiary class was recognized to be limited in its capacity to compete on equal terms. The linkage established between the Act's benefits and the potential for employability of the beneficiary class suggests that Congress believed that the effect of the Act would benefit society even as it helped the handicapped. However, in specifying the remedies for handicap discrimination, Congress in 1973 planted the seeds for future confusion. It provided that the "remedies, procedures and rights" of Title VI of the Civil Rights Act of 1964 would be available to Rehabilitation Act litigants.[19] Title VI prohibits discrimination in federally funded programs on the basis of race and nationality.[20] The difficulty with this linkage is that the underlying value consideration that motivated the Civil Rights Act was fairness, not social utility, in that its intended beneficiary class, unlike the handicapped, was presumed to be able to compete on equal terms if discriminatory obstacles were removed.[21]

The confusion regarding the values the Rehabilitation Act was intended to serve, only implicit in 1973, became quite explicit as a result of amendments

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17. *Id.* at § 794.

18. 87 Stat. 355, 361; *see also* S. Rep. No. 93-1297, 93d Cong., 2d Sess. 37-38 (1974).

19. 29 U.S.C. § 794(a)(2) (1982).

20. 42 U.S.C. § 2000d (1982). Title VI provides: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

21. Although recognizing that civil rights statutes and handicap discrimination statutes have similarities, courts have recognized the crucial differences in underlying congressional motivation. *See* Wright v. Columbia Univ., 520 F. Supp. 789, 792 (E.D. Pa. 1981) (admitting some relationship between Title VI and § 504 of the Rehabilitation Act but cautioning against forcing "the kinship to an unwarranted degree of consanguinity").

to the Act in 1974.[22] In 1974, Congress redefined a handicapped person as anyone who (a) has a physical or mental impairment which substantially limits such person's major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment.[23] While the first section of the definition is not materially different from that provided in the original version of the Act, the second two sections target beneficiary classes whose social problems are more similar to those of ethnic minorities than to those of the handicapped. An enormous stretch in the meaning of words was required to place these classes within the Rehabilitation Act. Thus, in legislative debate, it was indicated that a person may be considered "handicapped" for the purposes of the Act even though his "handicap" *did not affect job performance* or did not even *exist.*[24] Further, the philosophy of the Rehabilitation Act was explicitly analogized to that of the Civil Rights Act of 1964.[25] The analogy is correct, but only in regard to those *perceived* as being impaired and those with a *record* of impairment. For instance, a fully recovered cancer patient (a person with a *record* of impairment) or an individual with one kidney (if he is *perceived* as being impaired) is in a status similar to that of a member of an ethnic minority who is denied employment solely because of an immutable characteristic irrelevant to employability. Because there is no rational basis to believe that such individuals are limited in regard to their employability solely as a result of their prior history of illness or present non-impairing physical condition, legislation on their behalf needs to be motivated by fairness considerations, as was legislation on behalf of ethnic minorities. But social utility and compassion, not fairness, are the primary value bases of legislation on behalf of those who are *in fact* impaired. Policy arguments alone create reason enough to deter discrimination against the physically impaired. But no interest is served by perpetuating the myth that social prejudice is the fundamental problem faced by the truly disabled in the employment context. To analogize ethnicity to disability at once perpetuates both racism and an insensitivity to the special job-related needs of the disabled. Sound policy analysis would have resulted in either an amendment to the Civil Rights Act so as to include those with a record of im-

22. 29 U.S.C. § 706(7)(B) (1982).

23. *Id.*

24. 120 CONG. REC. 30,531 (Sept. 10, 1974). Introducing the new definition, Senator Cranston stated: "The new definition in section 7(B) of the act is meant to include a broader group of handicapped persons who suffer from discrimination practices in employment, and participation in certain services and programs even though their handicap may not affect job performance or may even no longer exist."

25. S. REP. NO. 93-1297, 93d Cong., 2nd Sess. 6389-91 (1974). This stated in pertinent part:

> "The new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as Title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority."
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> *Id.*

pairment and those perceived as being impaired within its broader protection[26] or an explicit recognition within the Rehabilitation Act that these beneficiary classes were sociologically different from the handicapped and that different value considerations motivated the extension of Rehabilitation Act protection to them.

In 1978, Congress was faced with the issue of whether a practicing alcoholic was handicapped within the meaning of the Act and thus protected from employment discrimination. The Justice Department and the Department of Health, Education and Welfare had interpreted the term "handicapped person" to include practicing drug abusers and alcoholics.[27] Congress responded by further amending the Rehabilitation Act so as to specifically exclude practicing drug addicts from its coverage.[28] In fact, there was no technical reason for such an amendment, given the Act's requirement that in order to come under the coverage of the Act a handicapped person must be "otherwise qualified."[29] What then explains the amendment? The tenor of the legislative debate suggests that the amendment was a manifestation of the tension between the fairness and the utilitarian principles that were interlocked in the Act. Those that opposed the amendment were inclined to accentuate the fairness values implicit in the Act, while those who supported it were more inclined to view the Act as a piece of utilitarian or compassionate legislation.[30] While the amendment exposed the tension between the separate value nodes of the Act, it did not resolve it.

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26. In fact, there was an effort in Congress to amend the Civil Rights Act to include *all* the defined beneficiary classes of the Rehabilitation Act within the protection of the Civil Rights Act, which would probably have created more of the policy conflicts that are the subject of this paper. *See* H.R. 14,033, 92d Cong., 2d Sess., 118 CONG. REC. 9712 (1972) (introduced by Representative Vanik to "amend the Civil Rights Act of 1964 in order to make discrimination because of physical or mental handicap in employment an unlawful employment practice"); S. 3458, 92d Cong., 2d Sess., 118 CONG. REC. 11,788 (1972) (similar amendment introduced by Senators Humphrey and Percy). Humphrey insisted that the "civil rights" of handicapped persons should be affirmed, and that it was the "constitutional right" of the handicapped to be helped to help themselves. *Id.*

27. The agencies' interpretation was based on an opinion by the Attorney General in 1977. 43 Op. Att'y Gen. No. 12 (1977).

28. 29 U.S.C. § 706(7)(B) (1982). This provides:

> For purposes of sections 793 and 794 of this title as such sections relate to employment, such term [handicapped] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse would constitute a direct threat to property or the safety of others.

29. *See supra* note 17.

30. Those who opposed the amendment focused primarily on the *unfairness* of the legislation to the beneficiary class. *E.g.*, Statement of Senator Randolph, 124 CONG. REC. 30,322 (Sept. 20, 1978) ("it is unfortunate that any group of handicapped persons should be singled out for special treatment under the non-discrimination provisions of the act"). Those in favor of the amendment, however, based their stance on the need to *balance* safety concerns against the needs of the handicapped. *See* H.R. 12467 (1978).

B. Statute and Implementing Regulations

The implementing regulations of the Rehabilitation Act serve primarily to provide detailed definitions of some of the key terms in the Act and to provide concrete examples of who is within its coverage. In doing so, the regulations reproduce the awkward fit between the values and the defined beneficiary classes of the Act. It should be recalled that in the three-part definition of "handicapped," the first category includes those who have physical or mental impairments which *substantially limit* their *major life* activities.[31] On its face, this language suggests that those who have physical and mental impairments which do not *substantially limit* their life activities are entirely unprotected by the Act and may be discriminated against by an employer with impunity. Those who are substantially limited, but only with respect to *minor* life activities would seem to be similarly unprotected. The regulations underscore this result.[32] Thus, notwithstanding the civil rights-oriented fairness values articulated in the legislative history and the Act, the statute seems to exclude from its protection those who are least limited in their capacity to work and therefore against whom discriminatory employment action would be least defensible.

It was noted above that the statute also protects those who are "regarded as having an impairment."[33] At first blush this component of the definition seems to protect those who are not handicapped at all but who are at risk of prejudicial employment actions because of erroneous negative images of them. The regulations, however, belie such a broad interpretation by defining an individual "regarded as having an impairment" as one who: a) has a physical or mental impairment that does not limit major life activities but is treated as having such an impairment; or b) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others towards such impairment.[34] A careful reading of the regulation will reveal that this "anti-prejudice" provision cannot be utilized by one discriminated against who has *no* impairment whatsoever or is not *perceived* as having an impairment. Some past or present impairment or a social perception of impairment

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31. *See supra* note 23 and accompanying text.

32. In the regulations, "physical and mental impairments" are defined as:

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

34 C.F.R. § 104.3(j)(i) (1987). "Major Life Activities" are defined as: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 34 C.F.R. Section 104.3(j)(ii) (1987). "Substantially Limits" has been defined as: "likely to experience difficulty in securing, retaining, or advancing in employment." *See* 41 C.F.R. App. Part 60-1.3 (1987).

33. *See supra* note 23 and accompanying text.

34. *See* 28 C.F.R. § 41.31(b)(4)(1987).

remains the absolute precondition for statutory protection.[35]

C. An Illustration

An illustration may help to clarify the practical inequities that result from the logic of the Rehabilitation Act. Assume that three individuals—Small, Deaf and Nimble—apply for a job in a large company that receives federal financial assistance. Small is a dwarf, Deaf is hard of hearing but can read lips, and Nimble has a knee ligament injury that prevents him from pursuing his hobby of running ten miles a day. All three are denied employment solely because of the physical characteristics outlined above, and they initiate a section 504 action. It is stipulated that the physical characteristics of Small and Nimble are entirely irrelevant to their capacity to perform the jobs for which they applied and that Deaf can do a good job provided she is placed in an available job slot that does not require high levels of oral communication. Small will probably not have a remedy at law. She is not impaired within the meaning of the Rehabilitation Act, nor does she have a record of impairment. It is also unlikely that she can establish that she is perceived as being impaired because an employer could credibly claim that he refused to hire Small not because he believed that diminutive size was an impairment, but only because he felt that small people on the job created a bad public impression. Nimble is in a slightly more viable position. Because of his knee ligament injury, he could make a colorable claim that he had become the victim of discrimination against his impairment. However, the employer could reasonably defend on the alternative grounds that a weak knee ligament does not *substantially limit* a major life activity or that it limits only a *minor* life activity. In either case, it would not be considered an impairment at all within the Rehabilitation Act. If this defense is successful, Nimble could make an alternative claim that, while his impairment is concededly so minor that it does not constitute an impairment within the meaning of the Rehabilitation Act, it is *perceived* as a major impairment by the employer and as such is a protected characteristic. On this basis, Nimble could at the very least avoid a summary judgment. Deaf is the only one in this trio who has a substantial likelihood of winning. She clearly has an impairment which sub-

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35. In fact, the idea that individuals with minor or no impairments are not worthy of statutory protection was suggested in one Congressional report. *See* SENATE COMM. ON LABOR AND HUMAN RESOURCES, EQUAL EMPLOYMENT OPPORTUNITY FOR HANDICAPPED INDIVIDUALS ACT OF 1979, S. REP. NO. 316, 96th Cong., 1st Sess. 7 (1979). This reads in pertinent part:

> An individual with a minor physical or mental condition. . . will not necessarily be within the protection of the definition. Thus, for example, a person with ordinary near-sightedness whose vision is fully correctable with glasses will not be within the term "handicap", even if an employer incorrectly regards him as handicapped. . . .

Court cases have similarly made short shrift of litigants who were dismissed on account of minor impairments. *See* Jasany v. United States Postal Serv., 755 F.2d 1244 (1985) (strabismus [cross-eyed] is not a protected characteristic); E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980) (impairment which does not affect *general* employability is not a protected characteristic).

stantially limits a major life activity. Given that there are jobs available in the company which do not require high levels of oral communication, the employer has an affirmative obligation to accommodate her in one of these positions. The fundamental inequity of this configuration of outcomes is this: Small, whose physical characteristic is least likely to affect job performance at present or in the future, is also the least protected from employment discrimination, while Deaf, whose physical disability is at least arguably of such a nature as to pose some possible impediment to job performance, has a relatively high level of statutory protection. The point is not that Deaf should not have protection, but that the fundamental question in an employment discrimination context should be whether or not a person is being denied employment for reasons unrelated to his competence to do the job that he seeks. If the answer to this question is in the affirmative, it makes little sense to deny him some relief merely because he cannot establish that he is also impaired.

In sum, one who neither suffers from a significant impairment, nor is perceived as being impaired, but has a nonimpairing physical or mental condition that is the object of public fear or prejudice and that results in employment discrimination, has no statutory protection. Since he is not within the protected classes of the Civil Rights Act, he cannot sue under its provisions.[36] Moreover, since he does not meet the threshold requirement of actual or perceived impairment, he cannot base a claim on the Rehabilitation Act—or so it would seem. Does any identifiable social group fall into this legal no-man's land? This question had the coloration of an abstract law school hypothetical—until *Arline*[37] rather concretely pointed to the AIDS victim.

IV. SCHOOL BOARD OF NASSAU COUNTY V. ARLINE

The message of *Arline* is that both healthy AIDS virus carriers whose employment-related problems are rooted solely in social prejudice and severely impaired AIDS victims who have lost all productive capacity have no federal statutory protection. In order to fall within the magic circle of the Rehabilitation Act, it is necessary to be a moderately impaired AIDS victim.

Arline involved a plaintiff who was dismissed from employment as a school

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36. *See supra* note 20 and accompanying text. The Civil Rights Act only protects narrowly defined statutory groups.

37. School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987).

teacher because she was infected with tuberculosis.[38] The central holding of the case is that an individual infected with tuberculosis is "handicapped" within the meaning of the Rehabilitation Act *if he is also substantially impaired or perceived as being substantially impaired* as a result of his disease.[39] The Court found to be irrelevant for purposes of defining a handicap the issue of whether the impairment was contagious.[40] However, the characteristic of contagion may, in the Court's view, be considered in determining whether a tuberculosis victim was "otherwise qualified" for a job.[41]

Tuberculosis and AIDS are similar diseases in several significant respects.[42] First, both diseases are contagious. With both diseases, the risks of infection are subject to conscious human control—through the avoidance of high risk sexual and other activities in the case of AIDS and through the minimization of exposure to the infected individual at certain critical times in the case of tuberculosis. Second, both diseases are generally misunderstood and are the objects of irrational social fears and prejudices. Third, there are wide variations in the levels of impairment in both the AIDS and tuberculosis victim population. In the case of tuberculosis, symptoms range from those that are barely perceptible, even to the victim, to severe impairment characterized by fatigue, weight loss and fever. Similarly, AIDS victims include those who are merely seropositive and suffer no impairment, those who suffer from AIDS-Related-Complex (ARC) and from intermediate levels of impairment, and victims of full-blown AIDS, who are severely debilitated. Absent a particularized inquiry, no determination

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38. Arline v. School Bd. of Nassau County, 772 F.2d 759, 760 (11th Cir. 1985). Arline taught elementary school in Nassau County, Florida. She was discharged from her job in 1979, after her third relapse of tuberculosis. She brought suit against the Nassau County School Board and against the school superintendent on grounds that the dismissal was a violation of section 504 of the Rehabilitation Act of 1973. Arline's basic contention was that her susceptibility to tuberculosis made her a handicapped individual within the meaning of section 504. The district court found for the School Board, reasoning that Congress did not intend the term "handicap" to include contagious diseases. On appeal, the circuit court reversed, holding that persons with contagious diseases are within the coverage of 504. The Supreme Court granted certiorari, to consider the question of whether tuberculosis, a contagious disease, may be considered a handicap under section 504. 480 U.S. 275-77.

39. 480 U.S. 273, 280-86 (1987). Given the facts of this case, the Court found that Arline was actually impaired, since she had a physiological or respiratory disorder affecting her respiratory system. But the result would have been the same if Arline had been *regarded* as having such an impairment.

40. *Id.* at 282. The qualification is found in footnote 7 of the opinion, which expressly states that the case does *not* hold that contagiousness alone is a protected characteristic.

41. *Id.* at 288. The Court holds that in determining whether an individual handicapped as a result of a contagious disease is "otherwise qualified", the inquiry should include:

> [findings of fact], based on reasonable medical judgments given the state of medical knowledge, about, a) the nature of the risk (how the disease is transmitted), b) the duration of the risk (how long is the carrier infectious), c) the severity of the risk (what is the potential harm to third parties) and d) the probabilities that the disease will be transmitted and will cause varying degrees of harm.

Id.

42. Brief of the American Medical Association as Amicus Curae in Support of Petitioners at 4-8, School Bd. of Nassau County v. Arline, 480 U.S. 273 (No. 85-1277) (1987) provides a succinct summary of the pertinent medical facts of tuberculosis. For a good summary of the medical facts relating to AIDS, see N.Y. DEPARTMENT OF HEALTH, ACQUIRED IMMUNE DEFICIENCY SYNDROME: 100 QUESTIONS AND ANSWERS (1985).

can be made regarding whether one infected with either AIDS or tuberculosis is capable of functioning effectively in the employment context. Given these fundamental similarities between the diseases, it is a fair inference that the logic of *Arline* is as applicable to AIDS victims as it is to tuberculosis victims.

Until *Arline*, the most significant opinion on whether AIDS was a handicap was a memorandum issued by the Department of Justice.[43] The memorandum was in response to an inquiry by the Department of Health and Human Services. It distinguished between the disabling effects of AIDS and the capacity of an individual to transmit the disease. The memorandum conceded that the disabling effects of the disease constituted an impairment and therefore could come within the protections of the Rehabilitation Act. However, it was argued that the capacity to transmit the disease was not in itself an *impairment* and that as such this capacity was not a protected characteristic. Based on this reasoning, the memorandum concluded that an employer would not run afoul of the Rehabilitation Act if he decided not to hire an AIDS victim on the basis of a belief that the worker may be contagious, even if such a belief was unfounded.

Arline undermines, but does not demolish, the thesis of the Department of Justice. In the body of its opinion, the Court announces that "the contagious effects of a disease can[not] be meaningfully distinguished from [the disease's] physical effects. . . ."[44] In a footnote, however, the Court expressly reserves for another day the issue of whether a carrier of the AIDS virus with *no* impairment associated with the disease can also be "handicapped."[45] Thus, while there is little doubt that after *Arline* an impaired AIDS victim qualifies for protection under the Rehabilitation Act, symptom-free AIDS victims have no such protection.

Thus, the Rehabilitation Act as interpreted in *Arline* leaves totally unprotected the largest and fastest growing sector of the AIDS population—those AIDS victims who are merely seropositive and suffer little or no impairment. Such a result is directly traceable to the failure of Congress to define clearly the values of the Act and its intended beneficiary classes. The Act seems to suggest that at least one of the values it is intended to serve is that of fairness. However, it defines the beneficiary class of the legislation in a way that tends to exclude precisely that category of the population in need of fairness legislation—the class that is *not* impaired in any way but is prevented from competing effectively because of prejudicial barriers erected by the larger community.

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43. Memorandum of Assistant Attorney General Cooper on Application of Section 504 of the Rehabilitation Act to Persons with AIDS (June 29, 1986), *reprinted in* Daily Lab. Rep. (BNA) No. 122, at D-1 (June 25, 1986). For a discussion of the memorandum see Carey, *The Developing Law of AIDS in the Workplace*, 46 MD. L. REV. 284, 289 (1987).

44. 480 U.S. 273 (1987).

45. *Id.* at 282 n. 7 ("This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.")

V. CONCLUSION

Rationalization of social legislation on behalf of the beneficiary classes discussed in this comment may be effected in two alternative ways. One option involves amendments to both the Rehabilitation Act and the Civil Rights Act.[46] Under this plan the Civil Rights Act would be amended so that its protections would not be limited to racial, ethnic and national minorities. That Act would be made to include language which would protect *all* individuals who can establish that they have been denied employment for *any* reason unrelated to bona fide job requirements. At the same time, language in the Rehabilitation Act referring to those "perceived as having an impairment" and those "with a record of impairment"[47] would be removed since individuals in these categories would be fully protected by the amended Civil Rights Act.

The second option would leave the language of the Civil Rights Act intact, in recognition of the particularly pernicious nature of discrimination based on race and nationality. The language of the Rehabilitation Act would also remain unchanged. Rationalization of statutory protections would occur through judicial interpretation of the Rehabilitation Act. Specifically, in the exercise of their inherent equity jurisdiction, courts would interpret the term "impairment"[48] in the Rehabilitation Act to include any *physical characteristics* other than those related to race, gender or national origin. Such a judicial interpretation of the term "impairment" is not conceptually elegant, but its practical effect would be to extend Rehabilitation Act protections to many classes in need of fairness legislation but not presently protected by the Civil Rights Act.

Either option would result in rational outcomes when applied to AIDS discrimination cases. Under the first option, AIDS victims who are merely seropositive would have available to them the protection of the amended Civil Rights Act to the same extent as racial, ethnic and national minorities. If the second option is implemented, AIDS victims who are merely seropositive would not have the burden of demonstrating that they are "impaired" in order to qualify for Rehabilitation Act protections. Their seropositivity is a "physical characteristic" and in itself would be sufficient to bring them under the umbrella of the Rehabilitation Act.

Under either alternative, if the AIDS victim is moderately impaired, the Court would make a determination regarding his employability solely within the framework of the Rehabilitation Act and on the basis of utilitarian considerations. While a detailed formulation for making utilitarian determinations in the context of AIDS is outside the scope of this comment, it is suggested that it need not depart materially from the balancing approach implicit in established

46. *See supra* note 20.
47. 29 U.S.C. § 706(7)(B) (1982).
48. *Id.*

"reasonable accommodation" doctrine articulated by the courts.[49] If the impairment is severe, the AIDS victim would not be eligible for the protections of either the Rehabilitation Act or the Civil Rights Act but would be eligible for public assistance provided in implementation of compassionate principles.

Mahesh Kumar Rao

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49. *E.g.* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979); ("An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."); *see* 45 C.F.R. § 84.12(c) (1987) (listing factors to consider in determining whether accommodation would cause undue hardship to an employer). When the handicapped person is not able to perform the essential functions of the job, the Court must also consider whether any "reasonable accommodation" by an employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes undue financial and administrative burdens on the grantee, or requires a fundamental alteration in the nature of the program.