

Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio

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I.

INTRODUCTION

"Wait 'til you see how that law is being outrageously abused."¹

"We're going to take a closer look at whether the definition of disabled has been stretched too far."²

"A victory for the disabled, or compassionate law run amok?"³

"Is the disabilities act being applied as intended? Is it protection or extortion?"⁴

Unfortunately, statements of this kind are not uncommon in television and radio coverage of the Americans with Disabilities Act (ADA). A few years after the ADA went into effect, one author suggested that the absence of an extended public debate before the ADA was passed has created problems for the disability rights movement, in part because there wasn't a sufficient opportunity for the disability rights community to educate the media.⁵ A review of TV and radio coverage of the ADA certainly supports the notion that the media doesn't "get" the ADA. Given the power of the media not just to reflect but to shape public opinion, this is a serious problem for the disability rights movement.

In this article I attempt to identify some of the common themes in the

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1. *20/20: How Americans with Disabilities Law Can Backfire* (ABC television broadcast, Aug. 15, 1997) (John Stossel, reporting).

2. *World News Tonight: A Closer Look Gray Area* (ABC television broadcast, Feb. 12, 1998) [hereinafter *Gray Area*] (Peter Jennings, host; John Cochran, reporting).

3. *Crossfire: Casey Martin Wins Big in Court with ADA But Some Claim the Law is Abused and Overused* (CNN television broadcast, Feb. 13, 1998) [hereinafter *Casey Martin Wins Big*] (Bill Press & Pat Buchanan, hosts).

4. *World News Tonight with Peter Jennings: Is Disabilities Act Being Applied as Intended?* (ABC television broadcast, Feb. 12, 1998) (Peter Jennings, host; John Cochran, reporting).

5. See Joseph P. Shapiro, *Disability Policy and the Media: A Stealth Civil Rights Movement Bypasses the Press and Defies Conventional Wisdom*, 22 POL'Y STUD. J. 123 (1994).

television and radio coverage to examine what they reveal about media and public assumptions about disability rights and the ADA. In an effort to be as constructive as possible, the article makes a number of suggestions for a media counter-strategy and identifies some of the difficult conceptual and strategic issues the disability rights community needs to consider in planning a media counter-strategy. Data for the article was obtained from the Westlaw TRANSCRIPT database, which includes scripts from over 80 television and radio programs, mostly news or "news magazine" programs. The review focuses on television and radio stories from 1998, some of the legendary television pieces on the ADA that aired before 1998, and coverage of the recent Supreme Court opinions. The review also includes non-news television programs that referred directly or indirectly to the ADA.

II.

TRENDS IN THE TELEVISION COVERAGE

A. The Media Focuses on Lawsuits and on the Question of Whether People Have Disabilities At All.

Most of the television and radio coverage about the ADA is about litigation. The stories have focused on the ADA decisions in the Supreme Court such as *Pennsylvania Department of Corrections v. Yesky*,⁶ *Bragdon v. Abbott*,⁷ and more recently, *Sutton v. United Airlines, Inc.*,⁸ the Casey Martin lawsuit,⁹ and a handful

6. 524 U.S. 206 (1998). *Yeskey* addressed the question of whether Title II of the ADA applied to prisons and prisoners. The Court held that it does. *Id.* at 213. For media coverage of the case, see, e.g., *World News Tonight* (ABC television broadcast, June 15, 1998) (Charles Gibson, reporting) and *The Osgood File: Supreme Court Decides Whether Americans with Disabilities Act Applies to Prisoners* (CBS television broadcast, Apr. 27, 1998).

7. 524 U.S. 624 (1998). In *Bragdon*, a plaintiff who was denied dental treatment after she disclosed that she had HIV sued under the ADA. The dentist argued that the plaintiff was not a person with a disability protected by the ADA because her HIV was asymptomatic. The Supreme Court held that HIV is an impairment from the moment of infection and that reproduction is a major life activity in which the plaintiff was substantially limited due to her decision not to have children because of the risk of infecting a child. *Id.* at 641. The Court also held that a defendant's good faith belief that an individual with a disability poses a "direct threat" to the health and safety of others does not relieve a defendant of liability for discrimination if the plaintiff did not in fact pose a direct threat based on objective medical evidence. *Id.* at 649-650. For media television and radio coverage of the case see, e.g., *Evening News: Supreme Court Rules That HIV-Infected People are Now Protected From Discrimination Under the Americans with Disabilities Act* (CBS television broadcast, June 25, 1998) (Dan Rather, host; Jim Stewart, reporting); *Burden of Proof: Supreme Court Rules on Four Key Cases* (CNN television broadcast, June 25, 1998) (Greta Van Susteren, host); *In The Game: Supreme Court Issues* (CNN television broadcast, June 25, 1998) (Kitty Pilgrim, host; Charles Bierbauer, reporting); *All Things Considered* (National Public Radio broadcast, Mar. 30, 1998) (Robert Siegel, host; Ruth Colker, guest); *World News Morning* (ABC television broadcast, Mar. 30, 1998) (Mark Mullen, host); *World News Tonight: Supreme Court Addresses AIDS & Discrimination: HIV Positive Woman Sues Dentist Under ADA* (ABC television broadcast, Mar. 30, 1998) (Peter Jennings, host; Tim O'Brien, reporting); *Today* (NBC television broadcast, Mar. 30, 1998) (Sara James, host); *Morning Edition* (National Public Radio broadcast, Mar. 30, 1998) (Bob Edwards, host; Nina Totenberg, reporting); *Evening News: Issue of Who is Covered Under the Americans with Disabilities Act* (CBS television broadcast, Mar. 30, 1998) (Dan Rather, host; Sheryl Attkisson, reporting).

8. 527 U.S. ___, 119 S. Ct. 2139 (1999). *Sutton* involved twin pilots with severe myopia who were denied employment at a major airline. When they sued under the ADA, the defendant moved to dismiss on the basis that plaintiffs were not protected under the ADA because with the use of glasses, a "mitigating measure," they were not substantially limited in the major life activity of seeing. The Supreme Court affirmed the dismissal, holding that when

of other cases.¹⁰ The fact that the media focuses on lawsuits may seem self-evident; after all, the ADA is a statute and statutes are enforced through legal action. But laws also change behavior, attitudes, and people's lives. There are plenty of other possible stories that could be told: stories about voluntary compliance and how the law has changed the practices of employers, businesses, and state and local government agencies; stories about how the ADA has altered people's lives by enabling them to work, complete school, and participate in public life; and even stories about the persistence of barriers to access and other forms of discrimination despite the ADA. In addition, television and radio coverage of ADA litigation rarely strays beyond the parameters of the lawsuit to explore the nature of the problem that gave rise to the litigation or profile the people who will be affected by the court decision. A story related to *Bragdon v. Abbott*, for example, could have examined the broader issue of discrimination by health care providers against people with HIV and AIDS, or more broadly, access to health care for people with disabilities or could have examined the position taken by the American Dental Association in the case or the attitudes of its members towards treating people with HIV and AIDS.

There are a number of reasons for the media focus on litigation. Lawsuits are easy for the press to learn about, and are ready-made stories that do not require much work because the players and the nature of the dispute are obvious. In addition, the disability rights community has often sought media coverage for lawsuits but not other kinds of stories.

The media focus on litigation is a problem for the disability rights community and contributes to backlash against the ADA because it sends a message that all the disability community does is sue. Moreover, the disability rights community has limited control over the agenda and content of these stories. Many of the lawsuits are brought by private attorneys, and thus the disability rights community doesn't

determining whether an individual is substantially limited in a major life activity, the limitation should take mitigating measures into account. *Id.* at 2149. The Court also held that plaintiffs could not sue under the theory that they were "regarded as" substantially limited in working, because the Airline did not view them as limited in a sufficiently broad spectrum of jobs. *Id.* at 2151. For television and radio coverage of the case, see *infra* notes 52-54 and 58-65 and *World Morning News* (ABC television broadcast, June 23, 1999) (Juju Chang, host; Jackie Judd, reporting).

9. See *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320 (D. Or. 1998) (granting plaintiff's motion for summary judgment in part and denying defendant's motion for summary judgment); *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242 (D. Or. 1998) (resolving remaining issues in trial on the merits). Casey Martin is a professional golfer with a disability that makes walking difficult who sued the Professional Golf Association (PGA) Tour after it refused his request to use a golf cart during the third round of a professional golf tournament. The district court granted a preliminary injunction, which was extended to cover both rounds of another professional golf tour, and later held that the PGA Tour was a place of public accommodation covered by the ADA. At trial, the court held that allowing Martin to use a cart was not a fundamental alteration, in part because the PGA Tour allows carts in some of its other tournaments. For television and radio coverage of the case, see *infra* notes 40-48.

10. For television and radio coverage of other cases, see *Headline News* (CNN television broadcast, Sept. 16, 1998); *Headline News* (CNN television broadcast, Aug. 31, 1998); *All Things Considered* (National Public Radio broadcast, June 26, 1998) (Noah Adams & Linda Wertheimer, hosts; Ingrid Becker, reporting); *Morning Edition* (National Public Radio broadcast, Jan. 14, 1998) (Bob Edwards, host; Margot Adler, reporting); *Gray Area*, *supra* note 2; *The Osgood File: People Inventing New Disabilities in Order to be Covered by the Americans with Disabilities Act* (CBS television broadcast, July 8, 1997).

choose the parties, legal theories, venue, or decisions to appeal and seek certiorari in these cases. Even they disability rights cases, the disability rights community does not control the content of the court decisions.

Another problem with the media's focus on litigation is that it increases the likelihood that the media will frame the debate in the same way the courts do. Given the approach taken by the overwhelming majority of courts in ADA cases, this is a serious problem. The courts have focused heavily on the question of who comes within the ambit of the ADA instead of on the nature of the discriminatory treatment experienced by people with disabilities, which has had a devastating effect on the outcome of litigation.¹¹ A 1998 study by the American Bar Association's Commission on Mental and Physical Disability found that in ADA employment cases in which one party prevailed, plaintiffs have lost more than ninety percent of all the cases.¹² A large percentage of those losses have been on the basis that plaintiffs do not meet the standard necessary to qualify for protection under the law.¹³ Likewise, most of the television and other media coverage has focused on the *who* rather than the *what* of disability discrimination. As with the approach taken by the courts, the result has been devastating to us. It has made it difficult to get our message across and it has put us on the defensive.

Media coverage of the gay rights movement provides a striking contrast to that of disability rights and the ADA. Over the past few years, the media has focused on a wide variety of gay rights issues, including gays in the military; domestic partnership benefits; hate crimes; gay marriage; parenting and child custody issues; discrimination against people with HIV and AIDS; funding for HIV and AIDS policy and research; to name only a few. The gay rights movement also uses a variety of strategies to achieve its goals, including litigation, lobbying, political demonstrations, and boycotts. This diversity of issues and activities gives the media a range of events and issues to cover and keeps the media interested. One significant difference between the gay rights and disability rights movements is there is currently no federal civil rights law prohibiting discrimination on the basis of sexual orientation. Thus, from the media's perspective, the struggle for gay rights is still unfolding, whereas the battle for disability rights was won with the passage of the ADA. It is this very perception that must be challenged.

11. See Robert L. Burgdorf, Jr., "Substantially Limited" Protection From the Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997).

12. See Equal Employment Opportunity Commission, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENT. & PHYS. DISAB. L. REP. 403, 403-407 (1998).

13. Among the six major reasons why plaintiffs lost their cases, three relate to the question of whether plaintiffs are protected by the statute: specifically, they involved the question of whether a plaintiff is substantially limited, whether the plaintiff was a qualified individual with a disability, and whether plaintiffs who have applied for or received various types of disability benefits are otherwise qualified individuals protected by the ADA. *Id.* at 405.

B. There is a Heavy Focus in the Media Coverage on Disabilities Widely Perceived to be “Undeserving” and a Focus on Difficult Cases and Cases Lacking Merit.

Welfare policy experts have long noted the concept of the “undeserving poor” that is at the heart of much social policy and political and public attitudes towards some groups of people in poverty.¹⁴ The disability rights movement has its own variation of this phenomenon. In the mind of the public and the media, there are “legitimate” and “worthy” disabilities, usually those visible to the naked eye, such as mobility impairments and blindness. At the other end of the spectrum, there are the “undeserving disabled,” people who are thought to be to blame for their conditions; those with hard-to-verify or easy-to-fake conditions; or with conditions many view as medicalized descriptions of lifestyle choices and behaviors.¹⁵ In addition, those with hidden disabilities who did not reveal their conditions in the past but choose to do so when they invoke the ADA are regarded with strong suspicion, and the media coverage often suggests or implies that the only plausible explanation for this is fraud, and a desire to avoid work.¹⁶ The fact that many people with disabilities fear discrimination and stereotyping is not raised as a possible alternative explanation.

Six types of disabilities are commonly portrayed in the media as “undeserving”: obesity; substance abuse & alcoholism; psychiatric disabilities; multiple chemical sensitivities; learning disabilities; and chronic fatigue syndrome. It is probably no coincidence that these same disabilities also receive media coverage that for the most part is widely disproportionate to the number of legal claims filed by people with these conditions.¹⁷

14. See, e.g., MICHAEL B. KATZ, *THE UNDESERVING POOR* (1989).

15. In one television story, Barbara Walters referred to the “truly disabled,” implicitly contrasting these individuals with the undeserving group. *20/20: How Americans with Disabilities Law Can Backfire* (ABC television broadcast, Aug. 15, 1997) (John Stossel, reporting).

16. See, e.g., *ABC News Special: The Blame Game* (ABC television broadcast, Aug. 17, 1995) [hereinafter *The Blame Game*] (John Stossel, reporting).

17. To use one rough measure of the types of disabilities involved in ADA claims, of all the Title I ADA charges filed with the U.S. Equal Employment Opportunity Commission from July 26, 1992 through Sept. 30, 1998, four of the conditions listed above (obesity, learning disabilities, multiple chemical sensitivity and chronic fatigue syndrome) were not among the 14 most common conditions of those who filed administrative complaints; and substance abuse disorders comprised only 2.3% of the charges. Psychiatric disabilities, however, were among the more common disabilities involved in ADA Title I charges, comprising 15.3% of the charges filed in that period. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES FY 1992-FY 1999 (last modified Jan. 12, 2000), available at <<http://www.eeoc.gov/stats/ada-charges.html>>. For television and radio coverage of these disabilities, see, e.g., *Morning Edition* (National Public Radio broadcast, Nov. 25, 1998) (Bob Edwards, host; Barbara Bradley, reporting); *News* (WIOD radio broadcast, Sept. 16, 1998); *Dateline: Driven to Madness: Connecticut Teacher Who is Stalked Plants Evidence of Threats Against Her Life* (NBC television broadcast, July 31, 1998) (Stone Philips, host; Dawn Fratangelo, reporting); *All Things Considered* (National Public Radio broadcast, Mar. 30, 1998) (Robert Siegal, host; Ruth Colker, guest); *Impact* (CNN television broadcast, Mar. 22, 1998) (Stephen Frazier, host); *Talk of the Nation* (National Public Radio broadcast, Feb. 26, 1998) (Ray Suarez, host); *20/20: Allergic to the World: People Who Claim Multiple Chemical Sensitivity* (ABC television broadcast, Aug. 22, 1997) (Barbara Walters, host; John Stossel, reporting); *20/20: How Americans with Disabilities Law Can Backfire* (ABC television broadcast, Aug. 15, 1997) (Barbara Walters, host; John Stossel, reporting); *The Osgood File* (CBS television broadcast, July 8, 1997); *The Blame Game*, supra note 16; *All Things Considered*

Further, the cases brought by people with these disabilities that receive the most publicity are often those with weak claims or claims that lack merit. Thus, the message conveyed is that people claim to have these particular conditions to cheat the system, get special treatment, or evade personal responsibility for their own conduct. Indeed, some of the cases with weak claims or claims lacking in merit that have received extensive media coverage have taken on a legendary, even folkloric, status.¹⁸ One case, for example, involved a man who brought a loaded gun to work and claimed he was protected by a psychiatric disability.¹⁹ Another was brought by a woman with obesity who sued a movie theater because she couldn't fit into the seats.²⁰ A third was brought by an obese transit worker who sued for discrimination after he failed a stress test and was therefore denied a promotion.²¹ Although all of these cases were dismissed at the administrative level or in court,²² this was not mentioned in the media coverage and the press often failed to do follow-up stories.

Popular television programs have also focused disproportionately on the "undeserving" disabilities and cases lacking merit. The animated prime time series *The Simpsons* ran an episode entitled "*King-Size Homer*,"²³ in which Homer tries to eat himself up to 300 pounds so he can work from home and avoid a calisthenics program at work. Homer is seen paging through a book called "Am I Disabled?" and he is elated when he learns that "hyper-obesity" is one of the listed conditions. "All my life I've been an obese man trapped inside a fat man's body," he says in an effort to cast himself as someone within the protected class. Other conditions listed in the book are "achy breaky pelvis," "lumber lung" and "juggler's despair." The plot even references one of the legendary ADA lawsuits when Homer goes to the movies and finds he can't fit into the seats.²⁴

King of the Hill, another prime-time animated series, devoted an entire episode to the ADA and its application to illegal drug users. In the episode, entitled

(National Public Radio Broadcast, July 26, 1995) (Noah Adams & Linda Wertheimer, hosts).

18. ABC News correspondent John Hockenberry has referred to these cases as the "legends of the ADA." *Dateline: A Just Cause: Americans with Disabilities Act Has Helped People Get Fair Treatment, Despite Rumors of Frivolous Lawsuits* (ABC television broadcast, Aug. 24, 1998) [hereinafter *Dateline: A Just Cause*] (Jane Pauley, host; John Hockenberry, reporting).

19. See *The Blame Game*, *supra* note 16.

20. See *Casey Martin Wins Big*, *supra* note 3.

21. See *Headline News* (CNN television broadcast, Aug. 31, 1998); *Dateline: A Just Cause*, *supra* note 18; *20/20: How Americans with Disabilities Law Can Backfire* (ABC television broadcast, Aug. 15, 1997) (John Stossel, reporting).

22. See *Dateline: A Just Cause*, *supra* note 18.

23. *The Simpsons: King-Size Homer* (Fox television broadcast, Nov. 5, 1995).

24. Hollywood has also demonstrated a fascination with psychiatric disabilities. A study of films from 1928-1996 in which the film won best picture in the Academy Awards or in which an actor won an award for best actor/actress found that 17% of these awards were for films with a major character with a disability. Of those movies with disability themes, 54% involve psychiatric disabilities. Often, the characters with psychiatric disabilities are negatively portrayed (e.g., MISERY, SILENCE OF THE LAMBS). Stephen P. Safran, *Disability Portrayal in Film: Reflecting the Past, Directing the Future*, 64 EXCEPTIONAL CHILDREN 227, 230-231 (1998). There was a film in development a few years ago about a single father who decides to fake a psychiatric disability to stay home to care for his son. *DreamWorks in Pink*, DAILY VARIETY, Apr. 27, 1996.

"*Junkie Business*,"²⁵ Hank Hill, a manager of a propane sales business, needs to hire a new employee. He rejects Maria Montalvo, a highly qualified Hispanic woman, because he won't be able to talk to her about football or give her friendly swats on the back, in favor of Leon Petard, a young man whose chief qualification is that he's a Dallas Cowboys fan. Leon arrives at work several hours late on his first day, enters the bathroom and exits starry-eyed and mellow with slurred speech. He vomits and drools. At one point he empties a filing cabinet full of files onto the floor and is too overwhelmed to replace them, so he sits in a corner shaking. Though Hank is not savvy in such matters, his 11-year-old son Bobbie, who has heard major league athletes speak at his school, knows an illegal drug user when he sees one, and breaks the news to his father. Hank fires Leon, effective 5:00 the same day, explaining, "You're a drug user, and there's no place for you at Strickland Propane." But because Hank is a decent guy at heart, he gives Leon the rest of the afternoon off, tells him to get some help and even gives him the name of a treatment program.

The following day, Leon returns to Strickland Propane with Anthony Page, "Group Leader, One Last Chance House," to confront Hank.

Anthony: Are you aware that you hired a drug addict?

Hank: I am now. That's why I fired him.

Anthony: Oh yeah, you're in trouble all right. It's against the law to fire this man. He's a drug addict.

After Hank expresses his dismay at this news, Anthony continues:

Anthony: You have to rehire this man, Mr. Hill. Legally drug addiction is a disability and now that Leon is in rehab the law prohibits you from firing him.

Hank: Rehab? Since when?

Leon: Since 4:30 yesterday afternoon, and I wasn't officially fired til 5:00.

Anthony (while tacking a piece of paper on the office bulletin board): This is the Americans with Disabilities Act. It insures that no person, no matter how disadvantaged, how short or obese or blind or gay or even stoned can be discriminated against once the healing has begun.

Mr. Strickland: Well, right now I'd kill for a big fat blind gay guy if we could just get some work done around here!

Hank: I can't believe this. (To Leon): Well, I may be stuck with you but you're stuck with me too. And there are going to be some changes around here. You'll be here at 8:00 o'clock sharp from now on.

Leon: Eight? Uh, . . . Anthony?

Anthony: Uh-uh. Eight's not going to work for Leon. He's got withdrawal therapy until 11:00.

Leon: But then I take my methadone so I should be feeling pretty good by the time I

25. *King of the Hill: Junkie Business* (Fox television broadcast, Apr. 26, 1998).

get here.

Hank: What?? I'm not going to let you come in here all hopped up on goopenthal.

Anthony: And he'll need to have the lights dimmed. His pupils will be dilating pretty big by 11:30.

Hank: What mind kind of game are you trying to play here?

Anthony: It's not a game sir. It's the law, and we win.

Leon: Whoo whoo!²⁶

The next day Leon arrives at work at 11:00 and Hank dims the lights. Later, another employee asks why a third has a futon in his work station. Pointing at the paper tacked on the bulletin board, Hank explains: "Because he's disabled, Joe Jack. It's all there in the fine print." Hank asks Joe Jack to attend to a customer, but Joe Jack says explains he's too mad to drive, and "it's almost as if my anger is handicappin' me." Another employee refuses on the basis that he suffers from obsessive-compulsive disorder and if he gets out of his chair "Garth Brooks will die." A fourth is too bloated to help, a fifth has the "yuppie flu." Hank's wife Peggy visits him at work and when she sees what's going on, tells Hank he can't stand by while "these greedy pigs suck the life out of Strickland Propane. Anyone's disabled if you think hard enough."

Hank takes these words to heart, and summons Anthony himself, seeking help for "GWS—Good Worker Syndrome," a disability in which the sufferer gets sick too if everyone isn't giving 110 % on the job. Anthony responds that people like Hank "abuse the system and ruin it for the rest of us, the truly disabled." Anthony lifts up a bandaged wrist, presumably proof of carpal tunnel syndrome, to prove that he too is protected by the law. Hank becomes so fed up that he quits, reducing the company to fourteen employees, which, as Hank explains to Mr. Strickland, "makes this your business, not the government's." Eventually Leon is fired for failure to do his job and Hank is rehired (as a probationary employee). Maria Montalvo is hired after all, replacing Hank as manager, and when Hank congratulates her for getting the job, she throws her arms around him and touches him inappropriately on the buttocks.²⁷

The show makes at least eight misrepresentations about the ADA. The most significant misrepresentation is the episode's central premise, namely, that the ADA protects employees who have used illegal drugs on the same day they are fired. In fact, the ADA does not protect individuals "currently engaging in the illegal use of drugs" against an employer's action taken on the basis of such use.²⁸ "Currently engaging in illegal use of drugs" is defined in EEOC interpretations as "recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem" and "is not limited to the day of use, or recent weeks

26. *Id.*

27. *Id.*

28. 42 U.S.C. §12210(a) (1994).

or days, in terms of an employment action.”²⁹ Thus Anthony’s use of drugs the same day he was fired would certainly qualify as “current.” Individuals are protected under the ADA if they are in or have successfully completed supervised drug rehabilitation and are no longer engaging in illegal use of drugs,³⁰ but Leon would not meet this standard given his current use and the fact that he was not enrolled in treatment when he was fired. Current users of illegal drugs are protected by the ADA only from discrimination by health care and drug rehabilitation providers,³¹ an exception that does not apply to Leon’s job. Thus it is extremely unlikely that Leon would have a viable claim under the ADA.

In addition:

- Enrollment in drug treatment 15 minutes before a termination is effective would not bring Leon within the protection of the ADA because he was “currently engaging in the illegal use of drugs” at the time the decision was made.
- If an individual with a disability cannot perform the essential functions of the job with or without a reasonable accommodation, he is not a “qualified individual with a disability” protected by the ADA.³² Leon did not perform, and was apparently unable to perform, many of his job responsibilities, and thus would not be considered “qualified.”
- Coming to work 3 hours late each day is extremely unlikely to be considered a reasonable accommodation.
- The ADA does not cover people on the basis of sexual preference or general disadvantage.
- The ADA only protects people who are short or obese if those conditions substantially limit at least one major life activity.
- Anger and love sickness are not disabilities under the ADA.

More generally, the show endorses the sentiment that “anyone is disabled if you think hard enough.” This statement comes from Peggy Hill, frequently the show’s voice of reason. And, by contrasting the “bogus” ADA claim with sex discrimination in the workplace, which the show pokes fun at but treats as a legitimate problem, the show protects itself from the charge that it is as old fashioned as Hank. *King of the Hill* and *The Simpsons* may be the primary source of “information” about the ADA for many people who do not read newspapers or watch TV news programs. Their humor makes them all the more insidious.

*C. There’s a Myth That if it’s a Common Condition,
it Can’t Be a Disability.*

The more widespread a physical or mental condition, the more difficult it is for the media and the public to view it as a disability. The public and media

29. See UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL OF THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 8.3 (1992).

30. See 42 U.S.C. §12210(b) (1994).

31. See 42 U.S.C. §12210(c) (1994).

32. See 42 U.S.C. §12111(8) (1994).

skepticism towards the case about movie theater seats occurred not just because our society blames people with obesity for their condition, but also because obesity is so common in the United States that it is fast becoming the rule rather than the exception. According to the latest statistics, over one-half of all Americans are overweight and over one-third are obese.³³

The corollary of this phenomenon is that the more widespread a treatment for a condition, the more difficult it is for the media and the public to view it as an accommodation for a disability. Not long after the media coverage of the case involving movie theater seats, a number of stories appeared in the press about the fact that airplanes, concert halls, sports arenas, buses, churches, toilets and even movie theaters, are using wider seats to account for the expanding girth of the American public.³⁴ The once-laughable notion that people should be entitled to larger seats will soon become the norm, but the very prevalence of the need makes it impossible for the public to view it as an accommodation for a disability. The same technology that is initially regarded as an accommodation for a disability, and therefore an unreasonable luxury, often loses this status when its use spreads to the public at large. The typewriter, voice-activated computer software, computer scanners, close-captioned television and keyboard shortcuts for computer commands, were all originally developed for use by people with disabilities,³⁵ but almost no one thinks of them in that way now that they are a fact of modern life for many.

These cultural assumptions help to explain the reaction of the Supreme Court, media and public to *Sutton v. United Airlines, Inc.*³⁶ Before glasses were widely available, nearsightedness was undoubtedly regarded as a disability and glasses the treatment or corrective measure for that disability. Today, many people find this notion absurd.

Where do these assumptions come from? Deeper assumptions and beliefs. One is the assumption that being able-bodied is the norm and having a disability a deviation from the norm. Another is the notion that purpose of civil rights laws is to protect "minorities," and thus if they apply to many people it must either be because there are too many people taking advantage of them or because the laws

33. Sandra G. Boodman, *Study Links Women's Weight Gain to Adult Stamina*, CHI. SUN-TIMES, Dec. 13, 1999, at 54.

34. John Lang, *Wide-Bodied Citizens Posing Problems*, PITTSBURGH POST-GAZETTE, May 16, 1999, at A15; Judy Stark, *Innovative Toiletmakers Sitting Pretty*, ARIZONA REPUBLIC, May 15, 1999, at A26; Alan Samson, *Stadium Caters for Big Bottoms*, DOMINION (Wellington), Apr. 24, 1999, at 1; *Our Bulges are Putting Squeeze on Comfort: Big Accommodations Are Being Made as Americans Grow Wider and Seating Gets Tighter*, ORLANDO SENTINEL, Apr. 18, 1999, at A15; Rene Sanchez, *At Bottom, the Problem is Spreading: As Americans' Obesity Rises, the Seat Pinches*, INT'L HERALD TRIB., Apr. 16, 1999 at 1; Angela Newhart & Frederick Kunkle, *Venues Now in Tight Positions to Accommodate Wider Rumps*, HOUSTON CHRON., Oct. 18, 1998 at 4; Amitoj Marwaha, *A Look at the Great American Behind*, WASH. DAILY, Oct. 13, 1998.

35. Eric A. Taub, *The Blind Leading the Sighted: Technology for People with Disabilities Often Finds a Broader Market*, N.Y. TIMES, Oct. 28, 1999, at G1.

36. 527 U.S. ___, 119 S. Ct. 2139 (1999). At oral argument in *Sutton*, one of the Justices asked whether his own poor eyesight would make him a person with a disability under the ADA. See *The Crier Report: Americans with Disabilities Act* (Fox News television broadcast, May 5, 1999) (Catherine Crier, host).

themselves are ill-conceived. In one ABC News story, John Stossel surveyed passengers on a commuter train and noted that more than half would qualify as protected minorities under civil rights laws.³⁷ His point was that there must be something bogus about the laws or those claiming protection under them if this is so. A third factor relates to the human ability to tolerate “making exceptions” or granting “special treatment” to a few but not to many. As the percentage of people entitled to such treatment increases, the tendency to think, “if she can get special treatment, why can’t I?” seems to grow as well. The combined effect of all of these leads to tremendous public skepticism about whether common conditions constitute “valid” disabilities.

D. Some of the Most Negative Television Stories About the ADA Portray the ADA as an Example of a Larger Problem.

Some of the media coverage that is the most hostile to the ADA discusses the ADA in conjunction with other civil rights laws, personal injury and even public benefits laws.³⁸ The world portrayed in these pieces is one in which there are endless categories of people claiming entitlements and a culture of “victimology” that does not encourage or expect people to pull themselves up by their boot straps or tough it out.³⁹ Another common message is that this phenomenon stems from lawyers who are just out to make money.⁴⁰ By now these plots are so familiar to the public that their legitimacy is assumed, making them more difficult to challenge.

E. The Meaning of Fairness Assumed in the Media Coverage is One Particular Notion Among Many.

There is a lack of consensus in our society about what fairness means in the civil rights context and how far society should go to address historic and current disparities, particularly when this costs money. Not surprisingly, this lack of consensus manifests itself in media coverage and public attitudes towards the ADA, just as it does with other civil rights laws. Arguably, the ADA coverage has been even less favorable than coverage of other civil rights laws. This may be because the ADA is the new kid on the civil rights law block, and therefore the last straw for those already hostile to the broader concept of such laws.

The notion of fairness assumed by most media coverage and commentary is

37. John Stossel, *The Blame Game*, *supra* note 16 (“Of the 237 people who answered our survey only 30— younger white men—turned out not to have special protection.”).

38. See, e.g., *News* (WRKO radio broadcast, Sept. 25, 1998); *Talk of the Nation: Discrimination in the Workplace* (National Public Radio broadcast, May 13, 1997) (Melinda Penkava, host); *News/Business Day* (Business News Radio Network broadcast, Apr. 24, 1997); *The Blame Game*, *supra* note 16; *Marketplace* (PRI Radio Network, Feb. 9, 1995) (David Brancaccio, host); *Crossfire: Too Many Lawyers?* (CNN television broadcast, Aug. 27, 1992) (Bob Beckel, host).

39. See *supra* note 34; *News/Business Day* (Business News Radio Network broadcast, Feb. 24, 1997); *Crossfire: Too Many Lawyers?* (CNN television broadcast, Aug. 27, 1992) (Bob Beckel, host).

40. See Boodman, *supra* note 33.

one particular notion of fairness, namely, that treating everyone the same is fair and not treating everyone the same isn't. In other words, it is the basic anti-affirmative action perspective. Moreover, the assumption is made that it is fair to treat people with disabilities the same as others or treat them differently, but not both. The entitlement to accommodations—which are portrayed as “special treatment”—in some instances and to equal treatment under others, is portrayed as having one's cake and eating it too.

The 1998 television coverage of golfer Casey Martin⁴¹ illustrates this well. Though it may seem inappropriate to draw general conclusions from a story about professional sports, the essence of which, as one commentator suggested, is “the simple premise that the people who are the most blessed physically win and it's just too bad if you didn't get the right body,”⁴² these stories lay bare attitudes about competition and fairness that pervade American perceptions of disability rights and other civil rights laws.

“But is it fair?” Forrest Sawyer asked about Casey Martin and his use of a golf cart. Later in the same Nightline program Sawyer referred to our “nation that cherishes fair play.”⁴³ The terms “fairness,” “level playing field,” and “playing by the same rules” were used in these pieces repeatedly.⁴⁴ Ironically, Sawyer began the show with the following question: “If this man could pitch a no-hitter in the majors missing one hand and this man played football with half a right foot, should the rules be changed to help this man with an atrophied leg play pro golf?” Though his point was that if other athletes with disabilities could play by the rules in professional sports Martin should too, both of the athletes referred to by Sawyer in fact received modifications for their disabilities.⁴⁵ Sawyer's selective memory suggests that the myth of the person with a disability who overcomes great odds to “win the game” without any assistance is a powerful one in our culture.

Hostility to the notion of providing both accommodations and equal treatment was evident in the commentators' views that if Martin wanted an accommodation, he should have competed in a separate competition for people with disabilities,⁴⁶ and that it would “cheapen the accomplishment” or “dumb down” professional golf

41. See description of the Casey Martin issue *supra* note 9.

42. *Morning Edition* (National Public Radio broadcast, Jan. 14, 1998) (Bob Edwards, host; Frank Deford, commentator).

43. *Nightline: Casey Martin's Triumph: Golfer Produces a Bold Stroke for the Disabled* (ABC television broadcast, Feb. 12, 1998) [hereinafter *Casey Martin's Triumph*] (Forrest Sawyer, reporting).

44. See e.g., *Casey Martin's Triumph*, *supra* note 43; *Talkback Live: Casey Martin Wants a Ticket to Ride* (CNN television broadcast, Feb. 5, 1998) [hereinafter *Ticket to Ride*] (Mercedes Woods & Steve Salvatore); *Osgood File* (CBS Radio Network broadcast, Feb. 5, 1998); *Morning Edition* (National Public Radio broadcast, Jan. 14, 1998) (Bob Edwards, host; Frank Deford, commentator); *Gray Area*, *supra* note 2.

45. The players referred to by Sawyer are the baseball pitcher Jim Abbott, who was allowed to hold the ball and blow on it to get a grip on it, which was a modification of the rules of major league baseball at the time (*Ticket to Ride*, *supra* note 44) and Tom Dempsey, football player born with a club foot who was allowed to wear a steel toe during games (*Weekend Saturday* (National Public Radio broadcast, Feb. 13, 1998) (Scott Simon, host; Ron Rappaport, commentator)).

46. See *Ticket to Ride*, *supra* note 44 (Diana Nyad, commentator).

if Martin received an accommodation.⁴⁷

In many respects the television coverage of Casey Martin was surprisingly favorable, given that it did involve professional competitive sports. Some possible reasons for this are the fact that Martin is a young, handsome, clean-cut all American kind of guy; no-one questioned the existence of his disability; he had a “golly gosh, I never meant to be a role model, I just love to play golf” attitude that was apolitical; and of all sports, it is easiest for people to grasp the notion that golf is a sport of mental concentration, not physical prowess. In addition, there was evidence that even with a golf cart Martin was still at a disadvantage because of his pain, so there was minimal possibility that his accommodation would actually give him an advantage over others. Finally, once the press declared the situation a “public relations nightmare”⁴⁸ for the PGA, it became one.

Even so, there was selective use of information in the press coverage of the issue. Many media stories did not mention that carts were already allowed under PGA rules in two other competition rounds and the Senior Tour.⁴⁹ In addition, although some hosts and commentators argued or implied that a canopy on the golf cart would give Martin an advantage by protecting him from the effects of the grueling sun,⁵⁰ almost none mentioned the fact that the canopy on Martin’s cart would be removed, and thus he would be exposed to the sun like all of the other competitors.

II.

TELEVISION AND RADIO COVERAGE OF THE RECENT SUPREME COURT CASES

After the initial work for this article was completed, the Supreme Court decided *Sutton v. United Airlines, Inc.*,⁵¹ *Murphy v. United Parcel Service, Inc.*,⁵²

47. See *id.* (“Chris,” caller).

48. See, e.g., *Casey Martin’s Triumph*, *supra* note 43; *Casey Martin Wins Lawsuit, Can Ride Cart on Pro Tour*, LAW STREET J. (Feb. 11, 1998), available at <<http://www.lawstreet.com/journal/art980218pga.html>>.

49. See, e.g., *Good Morning America: Casey Martin PGA Victory* (ABC television broadcast, Feb. 12, 1998) (Bill Ritter, host); *Casey Martin’s Triumph*, *supra* note 43; *CBS Morning News: Disabled Pro Golfer: Casey Martin Wins the Right to Use his Golf Cart at Tournaments* (CBS television broadcast, Feb. 12, 1998) (Cynthia Bowers, host; Vince Gonzales, reporting); *Today: Professional Golfer Casey Martin Wins Court Battle Allowing Him to Ride in Golf Cart on Pro Tour Because of Disability* (NBC television broadcast, Feb. 12, 1998) (Ann Curry, host; Dan Lothian, reporting); *World News Tonight: Casey Martin May Use Cart During PGA Events Magistrate Says Fatigue is Greater for Martin* (ABC television broadcast, Feb. 11, 1998) (Peter Jennings, host; Jon Frankel, reporting); *The World Today: Judge Rules Casey Martin Can Use Golf Cart in PGA Tournament* (CNN television broadcast, Feb. 11, 1998) (Joie Chen, host; Rusty Dornin, reporting); *All Things Considered* (National Public Radio broadcast, Feb. 10, 1998) (Bob Edwards, host; Allison Frost, reporting); *All Things Considered* (National Public Radio broadcast, Feb. 10, 1998) (Noah Adams, host; Allison Frost, reporting); *Morning Edition* (National Public Radio broadcast, Feb. 2, 1998) (Bob Edwards, host; Diana Nyad, commentator); *World News Tonight* (ABC television broadcast, Feb. 2, 1998) (Peter Jennings, host); *Gray Area*, *supra* note 2; *All Things Considered* (National Public Radio broadcast, Jan. 11, 1998) (Jackie Lyden & Robert Siegal, hosts); *SportsZone: Conversation with Casey Martin* (ESPN television broadcast, Feb. 12, 1998) (Jimmy Roberts, reporting).

50. See, e.g., *Casey Martin Wins Big*, *supra* note 3; *Casey Martin’s Triumph*, *supra* note 43; *Ticket to Ride*, *supra* note 44; *Morning Edition* (National Public Radio broadcast, Feb. 2, 1998) (Bob Edwards & Diana Nyad, commentators).

51. See 527 U.S. ___, 119 S. Ct. 2139 (1999).

and *Albertsons, Inc. v. Kirkingburg*.⁵³ All three cases raised the question of whether the plaintiffs were individuals protected by the ADA. Although media coverage of these cases occurred after 1998, it is worth a brief discussion, as it illustrates many of the observations made above.

Given the issues before the Supreme Court in these cases, it was to be expected that media coverage would focus the question of whether the plaintiffs had disabilities. What is notable, however, is that the media often ignored the legal relevance of this question, which was whether the plaintiffs, who were denied or fired from jobs because of their physical conditions, had the right to sue to challenge these employment actions. One story, for example, explained *Sutton* this way: "It boils down to this—if glasses enable you to see, you're not disabled."⁵⁴ This statement, which sounds irrefutable to a public accustomed to thinking about disability as "unable to work" or "eligible for benefits," does not present an accurate picture of the legal issues in *Sutton*. If the story had asked: "Can an employer decide you're too disabled to work, but not disabled enough to sue to challenge the employer's decision?," the public would have gotten a far more accurate description of the legal issue before the Court, and the absurdity and injustice of these rulings might be apparent to a greater number of people.

Indeed, much of the coverage of these cases presented the decisions as victories for common sense.⁵⁵ One television story described a plaintiff's argument as "expanding" the law,⁵⁶ even though the legislative history of the ADA⁵⁷ and guidance issued by both the Department of Justice⁵⁸ and Equal Employment Opportunity Commission⁵⁹ state that the question of whether an individual has a disability should be determined without regard to mitigating measures. Another story described the opinions as narrowly defining "what's a true disability,"⁶⁰ a phrase that suggests that some people lie or fake their conditions to get special treatment.

Though the issue before the Court in these cases was whether the plaintiffs could bring ADA claims, the media also discussed the merits of these cases. *Sutton*,

52. See 527 U.S. ___, 119 S. Ct. 2133 (1999).

53. See 527 U.S. ___, 119 S. Ct. 2162 (1999).

54. See *World News Tonight: Supreme Court Gets Specific on Disabilities* (ABC television broadcast, June 22, 1999) (Peter Jennings, host; Jackie Judd, reporting).

55. See, e.g., *The Crier Report* (Fox television broadcast, June 25, 1999) (Catherine Crier, host); *CBS Evening News with Dan Rather* (CBS television broadcast, June 23, 1999) (John Roberts & Eric Engberg, reporting); *World News Tonight: Supreme Court Gets Specific on Disabilities* (NBC television broadcast, June 22, 1999) (Peter Jennings & Jackie Judd, reporting); *The Crier Report: Americans With Disabilities Act* (Fox television broadcast, May 5, 1999) (Catherine Crier, host); *CBS Evening News: Supreme Court Decides on Disabilities* (CBS television broadcast, Apr. 27, 1998) [hereinafter *Supreme Court Decides*] (Dan Rather, host; Jim Stewart, reporting).

56. *Supreme Court Decides*, supra note 55.

57. See S. Rep. No. 101-116 at 52 (1989); H. R. Rep. No. 485 (II) at 52, reprinted in 1990 U.S.C.C.A.N. 267, 334; H.R. Rep. No. 485 (III) at 28, reprinted in 1990 U.S.C.C.A.N. 267, 451.

58. See 28 C.F.R. pt. 36 App. B § 36.104.

59. See 29 C.F.R. pt. 1630 App. A § 1630.2(h) (West Supp. 1998).

60. See *Evening News with Dan Rather* (CBS television broadcast, June 23, 1999) (Dan Rather host; Eric Engleberg, reporting).

for example, was described as a case about “two severely nearsighted sisters who, with glasses, were able to work as pilots for a regional airline [and who] sued United Airlines because of their stricter vision requirements that the women couldn’t meet.”,⁶¹ and *Murphy* was described as a case about a “plaintiff who took medication for his hypertension, but his problem even when corrected kept him from trucking for a company who had high blood pressure requirements for its drivers.”⁶² By emphasizing the merits of plaintiffs’ discrimination claims and the potential safety issues involved, the media created the impression that the merits of the cases were before the Court and rulings for the plaintiffs would have compromised public safety.⁶³ With one exception,⁶⁴ none of the television and radio coverage pointed out that plaintiffs could have won their cases in the Supreme Court but still be found unqualified for their jobs, and therefore not entitled to those jobs under the ADA.⁶⁵

Most of the media stories did not make the point, either directly or through interviews, that these decisions will make it more difficult for people with disabilities to enter the workforce and leave public benefits,⁶⁶ and that they prevent those people with physical or mental conditions who are the most able to work from fighting for the right to do so. Nor did they mention that most people who wear glasses will never be discriminated against on that basis and thus will never have discrimination claims, thereby undermining the majority’s rationale that, if corrective measures are ignored in the “substantially limited” calculation, many more people would be covered by the law than Congress originally intended. Indeed, many stories made the opposite point, by including footage of a representative of the U.S. Chamber of Commerce who stated that Congress intended to cover 43 million, not the 160 million who would be covered under plaintiffs’ interpretation of the law.⁶⁷

The content and tenor of this coverage had a striking effect on the public’s perception of the ADA. Even people who are sympathetic to and knowledgeable about other civil rights laws did not understand what was at stake in these cases and were not sympathetic to the position of the disability rights community. If our

61. *The Crier Report* (Fox television broadcast, June 25, 1999) (Catherine Crier, host).

62. *Id.*

63. See, e.g., *The Crier Report* (Fox television broadcast, June 25, 1999) (Catherine Crier, host); *Nightly Business Report* (Public Television Network broadcast, June 22, 1999) [hereinafter *June 22 NBR*] (Paul Kangas & Linda O’Brien, hosts; Darren Gersh, reporting); *The Crier Report* (Fox television broadcast, May 5, 1999) (Catherine Crier, host).

64. *The Crier Report* (Fox television broadcast, May 5, 1999) (Catherine Crier, host; Chai Feldblum, guest).

65. See, e.g., *The Crier Report* (Fox television broadcast, June 25, 1999) (Catherine Crier, host); *World News Morning: Supreme Court Rules on Disabilities Act* (ABC television broadcast, June 23, 1999) (Juju Chang, host; Jackie Judd, reporting); *Supreme Court Decides*, *supra* note 55; *June 22 NBR*, *supra* note 63.

66. There was only reference to this issue in the television and radio coverage included in the WESTLAW TRANSCRIPT database, by Curt Decker, Executive Director of the National Association of Protection and Advocacy systems. See *June 22 NBR*, *supra* note 63.

67. See, e.g., *World News Morning: Supreme Court Rules on Disabilities Act* (ABC television broadcast, June 23, 1999) (Juju Chang, host; Jackie Judd, reporting); *June 22 NBR*, *supra* note 63; *ABC News: Supreme Court Gets Specific on Disabilities* (ABC news television broadcast, June 22, 1999) (Peter Jennings, host; Jackie Judd, reporting).

natural allies are not on our side, there is little hope of winning broader acceptance for our position. The disability community did not get its message out effectively. Nor have we kept the issue on the media and public radar screen by holding demonstrations, writing op ed pieces or undertaking other efforts.

III.

RECOMMENDATIONS

In light of these observations, what follows are a number of recommendations for an effective media strategy for the disability community.

A. The Disability Community Should Make a Concerted Effort to Publicize Issues Other Than Litigation.

We should encourage the press to cover issues earlier in the process, by suggesting investigative stories where we have reason to believe that discrimination will be uncovered.⁶⁸ We should publicize discrimination issues before cases and charges are filed so that we can embarrass potential defendants into settlements and avoid legal action. Both types of stories are attractive to the media because they cast the media in the role of hero and problem solver.

B. We Must Try to Shift the Media Focus to the Discriminatory and Exclusionary Treatment Faced by People with Disabilities and Away from the Question of Whether Particular Plaintiffs Deserve Legal Protection.

This approach should be taken in tandem with a focus on issues other than litigation, because stories about litigation frequently focus on the individuals involved. Stories about government buildings and services that are physically inaccessible to people with mobility impairments, inaccessible public transportation, and the discriminatory policies of employers, public accommodations and public entities are good places to start because these problems unquestionably affect large numbers of people. Thus the question of whether a particular individual should be protected by the law is far less likely to arise.

C. We Must Grapple with How Broadly or Narrowly We Want the Public to Define the Category of People with Disabilities.

Because we will never be able to completely shift the focus away from the question of who is protected under the law, we must come to grips with the difficult issue of how we want the public to define disability. In doing so, we face a contradiction that is not easy to resolve. One of the things that changes people's prejudices and fears is knowing someone with the characteristic or difference that is the object of fear or prejudice. In addition, regardless of how disability is

68. See, e.g., *Dateline: No Way In: Hidden Camera Sent into Job Interviews of Handicapped And Able-Bodied Job Seekers to See if Americans Are Following the Americans with Disabilities Act* (NBC television broadcast, Sept. 9, 1997) (Jane Pauley, host; John Hockenberry, reporting).

defined, disabilities are extremely common. Roughly speaking, every extended family in America has at least one person with a condition that may qualify as a disability. Since everyone has a family member with a condition that might qualify as a disability, one might therefore expect that most people would be sympathetic to the concept of disability rights. But this isn't so. In part it may be because most people don't think of their grandmother's arthritis or cousin's diabetes as disabilities. This would suggest that we need to personalize the issue for people and emphasize that when we talking about disability rights, we are talking about their own grandmothers and cousins—people they know and love. Doing so, however, runs the risk of fostering the very skepticism that is at the heart of so much of the negative media coverage.

One possible approach would be to simultaneously personalize the issue and shift the focus of the debate. If ask we ask people whether it would be wrong for an employer to fire a cousin who has diabetes because she needs breaks to take her medication, test her blood sugar or eat, most people would say yes. When people answer yes, we can then ask whether they think the answer should depend on how sick their cousin is, or whether that shouldn't matter because the employer's conduct is the unreasonable and unfair either way. If we personalize the issue and get people to focus on conduct, perhaps we can move the debate away from the question of whether someone is "disabled enough" to be protected by the ADA.

A larger issue that requires examination is whether it is wise to point out that disabilities and accommodations are, to some extent, culturally constructed, or whether that will only reinforce the notion that no-one should be protected, because lines are difficult to draw and shift over time.

D. A Multi-Faceted Approach is Necessary to Combat the Media's Focus on Disabilities Portrayed as "Undeserving."

While there is no simple solution to the "undeserving disability" concept and the media's focus on disabilities portrayed in this way, a number of different measures may help. First, we need to generate stories that focus media attention on people with other kinds of disabilities. Second, we must counteract negative views about people with these particular disabilities. One possible approach is to make use of our culture's fixation with celebrity. Celebrities and politicians have come out of the woodwork over the last several years to reveal their own depression, alcoholism, and prescription medication and illegal drug use, or that of their children. Can we make greater use of this phenomenon to de-stigmatize these conditions and humanize the people who have them? Or does most of the public view the problems and confessions of the rich and famous to be a form of self-indulgence, whining or weakness? One question we need to answer is why our current culture of confession hasn't already had a broader destigmatizing effect.

In addition, we should use the opportunity created by existing media coverage to point out why it was that the individuals involved chose not to reveal their hidden disabilities earlier. We should point out whenever we see media coverage of

discriminatory policies or practices that this type of discrimination is the very reason that many people with hidden disabilities might choose not to reveal them.

E. We May Want to Point Out that Concepts of Blame and Responsibility are Selectively Applied.

Many people blame those with substance abuse problems, obesity and AIDS for their conditions. What about all of the people who smoke or eat high-fat diets and get cancer or heart disease, two of the largest killers in the United States? The public generally doesn't blame people for these conditions even though most people with these conditions have made a conscious decision to engage in behavior we all know increases risks. The question is whether we can we make this point without alienating those we need to win over.

F. We Have to Ground Discussions About the ADA in Specifics.

As Lani Guinier has noted about affirmative action, we have to root the conversation in specifics.⁶⁹ This will help stem the view that the ADA and the definition of disability are boundless. The disability community should not shy away from acknowledging that some things are not disabilities under the law and that not everything that is unpleasant or unfair is illegal discrimination. If we are not willing to say this we lose credibility. We have to be prepared to answer specific questions about what the law covers, and we have to start asking specific questions of ADA opponents to show where they are weakest. When Walter Olsen was asked on Crossfire whether he thought a jury should have awarded damages to a wheelchair user employed as a receptionist for a large chain of beauty salons, when the salon wouldn't make its bathroom accessible and told the man to use a diaper on the floor of the supply closet, his response was that the ADA shouldn't have anything to say about what beauty salons do.⁷⁰ His answer revealed the true implications of his position. We have to start asking similar questions to ADA opponents whenever we can.

Media stories comparing the ADA to other civil rights laws may not be as damaging as they first appear. The wider a story's net of criticism about the legal system, tort law and civil rights, the greater the chance that viewers will be offended by something that's said. And the wider the net, the more numerous our options are for responding to such arguments. In fact, the disability community should compare disability rights to other civil rights issues more often and use terminology to make these analogies explicit. When school systems separate children with disabilities into separate classes and schools, we need to call it segregation. When businesses, workplaces and government agencies and services are not accessible to people with physical disabilities, we need to point out that people with physical disabilities have been relegated to separate entrances, water

69. See Lani Guinier, *Race Isn't a 'Yes' or 'No' Issue*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 18, 1997, at A23.

70. See *Casey Martin Wins Big*, *supra* note 3.

fountains, bathrooms and public transportation. These formulations will ring bells for many people. When Walter Olsen says that Congress and the courts don't have any place telling businesses what they can and can't do,⁷¹ we need to compare this to what people in the South said during the civil rights movement. And, when commentators say that the world as we know it will come to an end if a rule is changed to accommodate someone with a disability, we need to say: "That's what people said about integration; that's what people always say whenever someone is trying to change the status quo."

G. We Need to Broaden the Media's Notion of Fairness.

One way to address the assumption that fairness always requires identical treatment is to point out that concepts of fairness are selectively applied. It's not fair that buildings were built and furnished and arranged as if people with disabilities do not exist.

H. We Need Our Own Colin Powell.

When President Clinton held the town meeting in Ohio on race he asked "Do you favor the Army abolishing the affirmative action program that produced Colin Powell? Yes or no?"⁷² By using a revered war hero as an example of someone who has benefitted from affirmative action, he made it more difficult for people to oppose the program, or at least reminded them of the consequence of such opposition. In our culture of celebrity, we need our own Colin Powells: people who received accommodations in school, or vocational rehabilitation services and have gone on to successful lives and careers. We must make these people more visible, without succumbing to "super-crip" stereotypes.⁷³

I. We Have to Seize the Moment.

In January 1998, the eyes of the world were on Charles Ruff, the President's counsel, at the impeachment hearings. Ruff is a wheelchair user. Though he has no interest in serving as the "Colin Powell" of the disability rights movement, that doesn't prevent the disability community from seizing the opportunity his visibility created. One day during the hearings, the *New York Times* ran a photograph of Ruff entering the Capitol on the front page.⁷⁴ A few pages later was a photograph of a Congressman running up the steps of the Capitol after a lunch break to return to the hearing. There are a lot of steps up to the Capitol, and steps filled the photograph. The Capitol is wheelchair accessible, but there may be people who saw those photographs who don't know that. A lot of people saw those photographs,

71. *See id.*

72. Robert A. Jordan, *Bridging Our Racial Chasm: A Character Test Clinton Passes*, BOSTON GLOBE, July 12, 1998, at D4.

73. *See Shapiro, supra* note 5 (discussing the stereotype of the person with a disability who is an over-achiever and can "do everything," and outlining the evidence of this stereotype in media stories about people with disabilities).

74. N.Y. TIMES, Jan. 17, 1999, at A1.

and maybe some of them wondered—or we could have made them wonder—how Ruff gets into the Capitol if it has so many steps, or how he gets around in general, or how other people who use wheelchairs get around. We didn't seize this moment to raise these issues. Doing so did not require Charles Ruff's participation or even assent. We could have written op ed pieces, or letters to the editor, or even staged public events to call attention to the issue and how common barriers to access are. There will be other opportunities, but we must be ready for them and we must act quickly.

J. We Have to Make Use of Our Natural Allies.

Any parent who has tried to get around a city with a stroller can speak at length about how inaccessible many things are. There are many more parents with kids in strollers than there are people in wheelchairs. We must use the opportunity this presents us.

The aging of the baby boom generation presents another opportunity for us. Given the numbers of people affected and the fact that many people in the media are themselves baby boomers, the media will have an increased interest in disability issues. We will begin to see more stories about new devices to assist people in daily living and other "human interest" pieces of this kind. We have to be ready for this interest and make the most of it. We have to generate and build on this interest.

K. We Have to Use Lemons to Make Lemonade.

We should treat the recent Supreme Court decisions as an opportunity to educate the media and the public about our issues by publicizing post-*Sutton* discrimination and court decisions against disabled plaintiffs that demonstrate the true implications of those rulings. And we must point out that even the most overt, intentional and cruel discrimination about conditions that have nothing whatsoever to do with job ability may now take place with impunity. Ask people the following question: Is an employer allowed to fire an employee for the following reason: "We don't want you here because it would upset other employees to see you give yourself an injection"? Or "We hate people who look different"? Or "We don't like looking at someone with one hand"? Most people will be surprised to learn that these statements can probably now be made without any legal repercussions under the ADA,⁷⁵ even if the individual can do the job, as long as he or she is not substantially limited, or regarded as substantially limited, in a major life activity.

L. We Have to Talk About Our History.

The disability community has not made effective use of an important tool to persuade people about why disability rights matters: our history. Most people know that women weren't allowed to vote, own property or hold particular jobs,

75. Of course, some states and municipalities have human rights laws that prohibit discrimination on the basis of disability.

and they know about slavery and Jim Crow laws, but know little or nothing about the history of discrimination against people with disabilities. Many people who might be sympathetic to disability rights are not aware of the nature and breadth of the mistreatment that people with disabilities have faced, or if they have some idea, are not aware that this abominable treatment is recent, not ancient, history. Most people don't know that only a decade or two ago, parents were routinely told by medical professionals to put their children with disabilities in institutions and not look back. And that many parents were told by the public school system: we don't want your children with disabilities here, take them home, they can't learn anything. Or that licensed teachers who use wheelchairs were told they could not teach. The ADA hearing testimony may be familiar to many of us, but it has not made its way into the consciousness of the broader public. We have to change that.

Moreover, most people have no concept of the magnitude of the problems people with disabilities still face every day. They don't know that people with disabilities are still asked to leave restaurants because they might offend other customers, and that day programs for people with developmental disabilities located in large commercial buildings still have separate entrances because landlords are afraid that their presence will deter other tenants from renting space. They don't know about the daily indignities: that some people with disabilities are treated as if they don't exist or can't speak for themselves; that many people with disabilities are treated as if they have no right to privacy and should answer the most personal questions by complete strangers. They don't know what it feels like to live in a society in which adjectives such as "retarded," "lame," "blind" and "crazy," are metaphors for anything bad or undesirable.

We must tell our collective story and, to the extent that we are comfortable doing so, our personal stories. Moreover, unlike most of the media coverage to date, we must begin these stories before 1992, when the ADA went into effect. The starting place of a story, and the nature of the story that ends up being told, are inextricably connected.⁷⁶ If a disability rights story begins in 1990 or 1992, as many media stories about the ADA implicitly or explicitly do, that story is likely to focus on the effect of the ADA on employers and businesses from the law and the added burden and uncertainty that the law imposes on these individuals. In other words, the ADA becomes the problem in the story. If, however, the story starts at an earlier point in time, and describes what the world was like for people with disabilities before the ADA was passed, the focus is more likely to be on the

76. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW: CULTURE, COGNITION AND THE COURT* (Harvard University Press, forthcoming 2000), which contains an eloquent discussion of the Supreme Court's choice of a starting point for its factual accounts in recent school desegregation decisions limiting the power of the federal courts to remain involved in this area. Amsterdam and Bruner note that by choosing to begin the story with the federal courts' intervention into the public school system, the story told in these Supreme Court opinions is a story about the duration of federal court involvement. Several possible alternative starting points, including a finding of state non-compliance with the Constitution, the Emancipation proclamation, and the importation of slaves into the United States are mentioned to illustrate that the starting place of a story is not a given, but a part of the "hidden cargo" that defines what is the "problem" and what is the "solution" in the story.

improvements brought about by the law. Narratively speaking, the ADA becomes a resolution to the problem.

One particular story we should tell is that of the hidden costs of failing to accommodate people with disabilities. We need to talk about the people who have to sell their homes when they get older because their houses are inaccessible, and the people who can't get to work because of inaccessible public transportation.

M. We Have to Take Advantage of the Fact that Disabilities Cut Across Gender, Ethnic, Religious, Class and Political Lines.

We live in a culture of celebrity, and yet we don't take sufficient advantage of the fact that many well-known people have been touched by disability. We should keep files of magazine and newspaper articles with the names of famous politicians, athletes, television personalities, movie stars, beauty pageant contestants and others who have disabilities or relatives with disabilities. We need to make use of the opportunities these people present. Moreover, we should not all flock to the same few celebrities.

iv. We May Want to Look at the Ways In Which Others Have Tried to Overcome the Unpopularity of Their Causes.

Disability rights is not the only issue that has suffered from lack of popularity, and we should pay closer attention to the ways in which others have addressed similar problems. Gay rights is the most obvious place to look, but it not the only one. The majority of Americans favor the death penalty, but death penalty opponents have developed a variety of creative strategies to change popular opinion, from recasting the death penalty as an international human rights issue to holding a conference at Northwestern University Law School last year at which more than 20 individuals who had been on death row for crimes they did not commit who won their appeals gathered to tell their stories and dramatically illustrate the consequences of our current system.⁷⁷ The "War on Drugs" has also been extremely popular in this country, but opponents of our current approach have made enormous inroads over the past few years on issues such as needle exchange programs and medical marijuana use. Recent opinion polls now show that a majority of the public surveyed support both,⁷⁸ and initiatives have been passed in several states to permit medical use without the risk of criminal prosecution.⁷⁹ These causes have a far more difficult road to travel than disability rights, yet creative strategies were developed to make these issues compelling and sympathetic, in part by making the human cost of policy choices as concrete as possible for the public. We should do the same.

77. Don Terry, *Survivors Make the Case Against Death Row*, N.Y. TIMES, Nov. 16, 1998, at A14.

78. Robert J. Blendon & John T. Young, *The Public and the War on Illicit Drugs*, 279 JAMA 287 (1998).

79. Mark Helm, *McCaffrey Says Pot Initiatives are Wrong: Drug Advisor Urges Voters to Just Say No*, SAN DIEGO TRIB., Oct. 28, 1998, at A2.

III.
CONCLUSION

We have our work cut out for us.