

# Redefining “Disability” Discrimination:

## A Proposal to Restore Civil Rights Protections for All Workers

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In 1990, when Congress enacted the Americans with Disabilities Act (ADA), it adopted a definition of the term “disability” that had been used under Title V of the Rehabilitation Act since the 1970s. The definition included individuals with a physical or mental impairment that substantially limits at least one major life activity, individuals with a history of such an impairment, and people who are regarded by others or perceived as having such an impairment. In the legislative history of the ADA, Congress indicated its intention that this definition protect people with epilepsy,<sup>1</sup> diabetes,<sup>2</sup> mental health conditions,<sup>3</sup> HIV/AIDS, including asymptomatic HIV,<sup>4</sup> amputees, rehabilitated addicts,<sup>5</sup> and others who

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<sup>1</sup> For references to epilepsy in the legislative history, see for example, 136 CONG. REC. S7422-03, \*S7441 (June 6, 1990) (letter from the Consortium for Citizens with Disabilities) (“[T]he fear of epilepsy was once so great that people with this disease were believed to be possessed by the devil and were shut out of schools and the workforce. . . . For people with disabilities, . . . the ADA offers promise that they will no longer be shunned and isolated because of the ignorance of others.”); 136 CONG. REC. H2421, \*H2427 (May 17, 1990) (statement of Rep. Hoyer) (“As we all know, Tony [Coelho]’s original career plans were stalled because of discrimination against persons with epilepsy. In the end, this was a blessing to the Nation and this House, for he might not have ended up here. But no one in this Nation has proven more than Tony Coelho that someone with a disability can be one of the most able people our Nation has ever seen.”); 135 CONG. REC. E1575 (May 9, 1989) (statement of Rep. Coelho) (“[T]oday the overwhelming majority of people with epilepsy have their physical conditions under control through medication.”).

<sup>2</sup> For references to diabetes, see for example, 135 CONG. REC. S10765, \*S10779 (Sept. 8, 1989) (statement of Sen. Domenici) (“[T]here may have been a time in history when if you had diabetes somebody asked you, do you have diabetes and they could have said to you, we cannot hire you. Certainly that is not the case today.”).

<sup>3</sup> For references to psychiatric conditions, see for example, *id.* at \*S10766 (statement of Sen. Harkin) (“I am sure there are plenty of manic-depressives in this country—I know some. I have met some who are completely controlled under doctors’ orders as long as they are on prescription drugs.”); *id.* (“[If the disability] would affect the performance of that person’s job . . . then the employer could say this person was not qualified. If, however, the disability in question, whether schizophrenia, manic-depressive or whatever it might be is, let us say, controlled by drugs, the person is under a doctor’s care, and the person is qualified for the job . . . the employee then would be able to go to the EEOC and file a complaint . . .”).

<sup>4</sup> For references to HIV, see for example, 136 CONG. REC. S9684, \*S9696 (July 13, 1990) (statement of Sen. Kennedy) (“People with HIV disease are individuals who have any condition along the full spectrum of HIV infection—asymptomatic HIV infection, symptomatic HIV infection or full-blown AIDS. These individuals are covered under the first prong of the definition

are able to mitigate the effects of their impairments<sup>6</sup> but nonetheless encounter discrimination in the workplace and other settings because of fears, myths, and stereotypes of individual employers and other covered entities.<sup>7</sup>

In the years since the ADA's enactment, the federal courts have chipped away at the law's protected class by adopting overly narrow rules for the analysis of who meets the statutory definition of "disability." As a result of a string of Supreme Court decisions and hundreds of cases in the lower federal courts, it has become very difficult for individuals with certain health conditions to establish that they have a disability for purposes of the ADA.<sup>8</sup> People with epilepsy, diabetes, psychiatric diagnoses, and other conditions that are well controlled with medications or other disease management strategies are routinely dismissed as outside the protection of the statute. With the definition of disability dramatically contracted, millions of Americans who continue to experience disability discrimination are barred from challenging these abuses in the courts. Further, win or lose, many employment discrimination victims are now subjected to irrelevant questions about their personal lives and private health information that have nothing to do with the merits of their discrimination case.

Thus, when a plaintiff with epilepsy attempts to challenge his or her job termination under the ADA, the most likely scenario is that the person will be found not impaired enough to satisfy the new "disability" standard established by the courts.<sup>9</sup> This is so regardless of the merits of the individual's discriminatory treatment claim: Even if the worker were fired because the employer irrationally feared seizures, or because the employer refused to permit a minor scheduling adjustment related to epilepsy, the plaintiff is denied the opportunity to prove discrimination in a court of law. In those rare instances where the plaintiff can produce adequate evidence to establish the existence of a disability for purposes of the ADA, the employer will often use this same evidence of impaired functioning to support its claim that the plaintiff is not qualified for the position in question. This Catch-22 was not intended by Congress and has had the perverse effect that individuals with disabilities who are clearly capable of working have become unable to rely on the ADA for protection against disability discrimination.

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of disability in the ADA . . ."). For references to the importance of workplace accommodations to people with HIV, see 136 CONG. REC. H4614, \*H4623, \*H4626 (July 12, 1990) (statements of Rep. Owens and Rep. Waxman).

<sup>5</sup> For references to alcohol and drug addiction, see for example, 135 CONG. REC. S10765, \*S10795 (statement of Sen. Moynihan) ("To turn away from individuals who have recognized their addiction to drugs and alcohol and who have sought, successfully, treatment would indeed be a cruel hoax."); see also 42 U.S.C. §§ 12114, 12210 (1995).

<sup>6</sup> See, e.g., H.R. REP. NO. 101-485, pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."); H.R. REP. NO. 101-485, pt. 3, at 28-29 (1990) ("The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."); S. REP. NO. 116, at 23 (1989).

<sup>7</sup> H.R. REP. NO. 101-485, pt. 3, at 53 (endorsing *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), stating: "The [*Arline*] Court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was about its effect on the individual. . . . The Court explained: 'Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.'" (citation omitted); *id.* ("A person who is . . . discriminated against because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability.").

<sup>8</sup> See, e.g., American Bar Association, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (May-June 1998); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Chai Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (Fall 2000).

<sup>9</sup> Conversation with Sandy Finucane, Epilepsy Foundation (Mar. 11, 2003); see also *Chenoweth v. Hillsborough County*, 250 F.3d 1328 (11th Cir. 2001); *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001); *Todd v. Acad. Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999); *Rutlin v. Prime Succession, Inc.*, 75 F. Supp. 2d 735 (W.D. Mich. 1999); articles cited *supra* note 8; *cf.* *Otting v. J.C. Penney Co.*, 223 F.3d 704 (8th Cir. 2000); *Rowles v. Automated Prod. Sys., Inc.*, 92 F. Supp. 2d 424 (M.D. Pa. 2000).

## REDEFINING “DISABILITY” DISCRIMINATION

In her opinion for the majority in the key case interpreting the definition, *Sutton v. United Air Lines, Inc.*,<sup>10</sup> Justice Sandra Day O’Connor describes two conceptual frameworks for thinking about disability. She contrasts the “work disability” approach, which focuses on the individual’s reported ability to work, with the “health conditions” approach, which looks at all conditions that impair the health or typical functional abilities of an individual. Then, citing the ADA’s introductory finding that “some 43,000,000 Americans have one or more physical or mental disabilities,”<sup>11</sup> and reviewing an analogous finding of thirty-six million contained in the ADA of 1988, Justice O’Connor and her colleagues in the majority conclude that the original number “clearly reflects an approach to defining disabilities that is closer to the work disabilities approach than the health conditions approach.”<sup>12</sup>

The “work disabilities” approach is inappropriate in the context of the ADA. A good example of a federal disability law that takes a “work disabilities” approach to determining eligibility is the Social Security Act. To be eligible for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits under this law, an individual must show an “inability to engage in any substantial gainful activity by reason of any . . . physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”<sup>13</sup> By analogizing the disability definition in the ADA to a “work disability” definition like the one in the Social Security Act, the *Sutton* majority completely missed a critical distinction between a narrow statutory definition appropriate for a program providing retirement benefits to support someone who can no longer work, and a broad definition appropriate for a civil rights law aimed at preventing acts of disability-based discrimination against people who can work.<sup>14</sup>

As Justice John Paul Stevens observes in his *Sutton* dissent, a broad definition of the protected class does not guarantee a job to unqualified job applicants with correctable impairments.<sup>15</sup> The question is simply whether people who function well despite an impairment because of mitigating measures should be permitted to challenge any disability discrimination they encounter. As a policy matter, what is the downside of letting people with correctable conditions “in the door” of civil rights protection? As Justice Stevens notes, “[i]nside that door is nothing more than basic protection from irrational and unjustified discrimination because of a characteristic that is beyond a person’s control.”<sup>16</sup>

In light of the unwillingness of the U.S. Supreme Court and the lower federal courts to interpret the ADA’s definition of disability in an inclusive manner, consistent with the intent of the law’s drafters in Congress, it is time to rewrite the ADA’s definition of disability and restore civil rights protections to the millions of Americans who experience disability-based discrimination. Our proposal responds directly to Justice O’Connor’s questions about the “health conditions” approach, and in the process restores the law to what we believe its drafters originally intended. We propose a new statutory definition of “discrimination on the basis of disability” for the ADA that does not require proof of “substantial limitations” in “major life activities.” To make it crystal clear that Congress does not take a “work disabilities” approach for purposes of the ADA, we suggest a new definition of disability that allows a person who demonstrates an impairment or health condition, or a record or perception of such an impairment or health condition, to reach the real issue of whether she was treated fairly or discriminated

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<sup>10</sup> 527 U.S. 471 (1999).

<sup>11</sup> 42 U.S.C. § 12101(a)(1) (1995).

<sup>12</sup> *Sutton*, 527 U.S. at 485. For an analysis of why the “work disabilities” approach is problematic for the ADA, see Andrew J. Imparato, *A Miserly Approach to Disability Rights*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* (H. Schwartz ed., 2002).

<sup>13</sup> 42 U.S.C. § 423(d)(1)(A) (2003).

<sup>14</sup> *Cf. Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 801 (Breyer, J.) (noting for a unanimous court that the “Social Security Act and the ADA both help individuals with disabilities, but in different ways”).

<sup>15</sup> *See Sutton*, 527 U.S. at 503-04 (Stevens, J., dissenting).

<sup>16</sup> *Id.* at 504. The equal opportunity “door” can be contrasted with other “doors” of eligibility that enable a person to retire at age eighteen (the Social Security Act) or enable a person to park in a specially-designated space for people with mobility impairments (handicapped parking ordinances). In the former case, there is no downside to opening the door widely. In the latter cases, there are good reasons carefully to limit who gets in the door. *See also infra* Part IV.

against because of the impairment or health condition. Also, we propose an alternative way for people to describe the nature of the discrimination they seek to challenge, one that would focus on barriers in that person's environment and not on the nature or extent of the person's impairments.

Our proposed statutory language would put disability civil rights protections on equal footing with the protections afforded other protected classes under Title VII of the Civil Rights Act. Title VII does not require claimants to make cumbersome evidentiary showings to establish that they fall within a protected class. Similarly, under our proposed analysis, an ADA plaintiff could focus on his or her qualifications for a particular position and would not be required to emphasize the irrelevant medical details about the impairment in order to state a claim. In any employment discrimination case, the issue should be whether the plaintiff was treated fairly based on her qualifications, or whether she was treated unfairly because of personal characteristics outside her control. By moving from "substantially limiting" impairments to all impairments or health conditions, we hope to refocus the courts on how employees and job applicants are treated. If they are treated unfairly because of a real or perceived impairment, they have experienced discrimination "on the basis of disability" and should be protected by the ADA.

Part I of this Article provides an overview of the origins of the statutory language found in the ADA definition of disability and describes the unexpected crisis that the U.S. Supreme Court and the lower federal courts have created by narrowly interpreting that definition. The Article will argue that this outcome is devastating, unjust, untenable, and contrary to the original intent of the sponsors of the ADA. Part II proposes new statutory language that would restore civil rights protections to individuals who have been left out by the court decisions interpreting the existing definition of disability in the ADA. Part III reviews sources that have influenced the authors' proposed changes to the ADA definition, including federal sources that predated the ADA, state law approaches before and after the ADA, and international approaches. Finally, the Conclusion touches upon some of the broader policy changes that will need to be enacted alongside the proposed changes to the ADA in order to more fully realize the law's vision of equal opportunity, full participation, independent living, and economic self-sufficiency for all children and adults with disabilities.

## I. THE UNEXPECTED DEFINITION OF DISABILITY CRISIS

In 1989, the sponsors of the ADA chose to mirror the definition of disability found in the amended Rehabilitation Act of 1973. This decision was pragmatic: A statute that reiterates existing standards is far more likely to succeed politically. Equally important, the judicial interpretations of the definition in the Rehabilitation Act in the 1980s had been broad and inclusive, consistent with the remedial purposes of the legislation. At the time of the ADA hearings, existing Rehabilitation Act case law extended civil rights protections to numerous groups of persons with disabilities that were either wholly or partially mitigated through treatment and other measures. For example, insulin-controlled diabetes was held to be covered under section 504 of the Rehabilitation Act prior to the passage of the ADA.<sup>17</sup> Similarly, epilepsy and seizure disorders were repeatedly deemed disabilities.<sup>18</sup> Courts also recognized that diseases

<sup>17</sup> *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 623 (9th Cir. 1982); *Davis v. Meese*, 692 F. Supp. 505, 513, 517 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989) ("Some insulin-dependent diabetics never experience a severe hypoglycemic occurrence, and are able to control their blood sugar levels at nearly normal levels throughout their working careers. . . . [A]n insulin dependent diabetic is clearly a 'handicapped person.'").

<sup>18</sup> *See, e.g., Reynolds v. Brock*, 815 F.2d 571, 573-74 (9th Cir. 1987) (holding that a plaintiff with infrequent seizures could be disabled because persons with epilepsy face policies restricting employment opportunities); *Mantolete v. Bolger*, 767 F.2d 1416, 1420, 1424 (9th Cir. 1985) (holding that a person with condition under "complete control" was disabled and potentially entitled to accommodation); *Akers v. Bolton*, 531 F. Supp. 300, 315 (D. Kan. 1981) ("Section 504 . . . doubtless encompasses the class of epileptic school children."); *Drennon v. Phila. Gen. Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977) ("That persons with epilepsy are considered handicapped is too self-evident to be contested.").

such as HIV, even in their "asymptomatic" phases, may be disabilities.<sup>19</sup> The pre-ADA courts also held that recovered alcoholics and drug users were protected by section 504.<sup>20</sup>

Additionally, the "regarded as" prong of the Rehabilitation Act had been broadly interpreted by the U.S. Supreme Court in *School Board of Nassau County v. Arline* to protect persons who were limited and discriminated against because of the "prejudice, stereotype, or unfounded fear" of others.<sup>21</sup> In *Arline*, the Court declared that "[b]y . . . includ[ing] not only those who are actually physically impaired, but also those who are regarded as impaired . . . Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."<sup>22</sup> Further, according to the Supreme Court in *Arline*, "a broad definition, one not limited to so-called 'traditional handicaps,' is inherent in the statutory definition."<sup>23</sup> The lower courts employed similarly broad interpretations.<sup>24</sup> By incorporating into the ADA virtually the same definition of disability contained in section 504, Congress intended to adopt and ratify that case law.<sup>25</sup>

From the relatively rosy vantage point of 1989, it would have been difficult to predict the onslaught of miserly decisions that have greeted the ADA's definition of disability. Beginning in the mid-1990s, numerous federal courts applying an overly restrictive reading of the federal definition have dismissed claims brought by persons facing egregious discrimination on the basis of significant mental and physical

<sup>19</sup> See, e.g., *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990) ("[I]t is well established that infection with AIDS constitutes a handicap . . ."); *Ray v. Sch. Dist. of DeSoto County*, 666 F. Supp. 1524, 1527-28, 1536 (M.D. Fla. 1987) (finding HIV positive children to be disabled and granting them the right to attend school); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 383 (C.D. Cal. 1987) (same); see also *Robertson v. Granite City Com. Unit Sch. Dist. No. 9*, 684 F. Supp. 1002, 1007 (S.D. Ill. 1988) (same as to child with AIDS-related complex).

<sup>20</sup> See, e.g., *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 182 (3d Cir. 1987) (finding recovering alcoholics to be disabled under the Rehabilitation Act); *Tinch v. Walters*, 765 F.2d 599, 603 (6th Cir. 1985) (finding alcoholism to be a disability under the Rehabilitation Act); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 761 (D. Kan. 1988) (same as to past drug addiction); *Burka v. N.Y. City Transit Auth.*, 680 F. Supp. 590, 600 (S.D.N.Y. 1988) (finding rehabilitated or rehabilitating drug users to be disabled under the Rehabilitation Act); *Traynor v. Walters*, 606 F. Supp. 391, 399-400 (S.D.N.Y. 1985) (finding that alcoholic who had been sober ten years was "handicapped individual"); *Davis v. Bucher*, 451 F. Supp. 791, 796 (E.D. Pa. 1978) (finding persons with history of drug use to be disabled). Indeed, the issue was considered so well settled that the Court simply assumed that recovered alcoholics were disabled in *Traynor v. Turnage*, 485 U.S. 535, 548-49 (1988).

<sup>21</sup> 480 U.S. 273, 287 (1987).

<sup>22</sup> *Id.* at 284.

<sup>23</sup> See also *Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991) ("The Act and the regulations promulgated under it are to be interpreted broadly."); *Doe v. N.Y. Univ.*, 666 F.2d 761, 775 (2d Cir. 1981) ("[D]efinition is not to be construed in a niggardly fashion.")

<sup>24</sup> See, e.g., *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) (holding that recovered drug addicts excluded from an apartment complex were "handicapped" because they were denied "benefits integral to a person's ability to function generally in society . . ." on the basis of their status as recovered addicts). The *Southern Management Corp.* court noted that in *Arline* "the Supreme Court rejected the argument that only an impairment, that results in diminished physical or mental capabilities could be considered a handicap under § 504 of the Rehabilitation Act. The Court reasoned that the negative reactions of others to the impairment could limit a person's ability to work regardless of the absence of an actual limitation on that person's mental or physical capabilities." *Id.*; *Harris v. Thigpen*, 941 F.2d 1495, 1523-24 (11th Cir. 1991) (holding that HIV-positive prisoners were "regarded as" handicapped regardless of their actual condition where prison excluded them from programs); *Thornhill v. Marsh*, 866 F.2d 1182, 1184 (9th Cir. 1989) (holding that an applicant denied job due to abnormal back X-ray could pursue claim: "Thornhill's 'handicap' . . . is the congenital deformity of his spine which the Corps perceived as imposing a disqualifying limitation on his ability to lift weight."); *Reynolds v. Brock*, 815 F.2d 571, 573-74 (9th Cir. 1987) (holding that a plaintiff with infrequent seizures was disabled due to policies restricting the employment opportunities of people with epilepsy); *Doe v. Centinela Hosp.*, 1988 U.S. Dist. LEXIS 8401 (C.D. Cal. 1988) (regarding as handicapped as a matter of law an asymptomatic HIV-positive person excluded on that basis from a residential drug rehabilitation program); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1102-03 (D. Haw. 1980) (regarding as handicapped a job applicant rejected due to back X-ray showing congenital back anomaly believed by employer to signify increased risk of future injury).

<sup>25</sup> 42 U.S.C. § 12201(a) ("[N]othing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973."); *Bragdon v. Abbott*, 524 U.S. 624, 644-46 (1998) (holding that Congress is presumed to know the state of the law when it passes legislation, and its use of terms that have been previously construed indicates an intent to ratify such interpretations). Congress expressly endorsed the reasoning of *Arline* in all three major committee reports. H.R. REP. NO. 101-485, pt. 2, at 53 (1990); H.R. REP. NO. 101-485, pt. 3, at 30 (1990); S. REP. NO. 101-116, at 23 (1989); see also *supra* note 7.

conditions. Indeed, a widely circulated study conducted by the American Bar Association and published in 1998 found that in ADA employment cases filed since 1992 and resulting in final case decisions, employers won 92% of the time, often due to the restrictive application of the federal definition.<sup>26</sup>

The culmination of this devastating trend was the “*Sutton* trilogy,” three Supreme Court cases decided in the summer of 1999.<sup>27</sup> In *Sutton v. United Air Lines, Inc.*, the Supreme Court ruled that individuals with successfully treated medical conditions—persons who are currently functioning well due to mitigating measures such as medications or prosthetic devices—are not protected as “persons with disabilities” under the ADA.<sup>28</sup> Boldly narrowing the protected class in a manner opposed by the federal agencies Congress entrusted to enforce the statute,<sup>29</sup> this ruling erased protections for millions of persons with stabilized diabetes, seizures disorders, heart disease, and psychiatric conditions.

The *Sutton* Court also narrowly construed the “regarded as” prong to virtually eliminate most “failure-to-hire” claims, in which rejected applicants claim that they were unfairly excluded by medical screening despite their actual ability to perform the job. Accepting the “class of jobs” rule<sup>30</sup> contained in the Equal Employment Opportunity Commission (EEOC) regulations, the Court concluded that two applicants rejected on the basis of their vision impairment were not regarded as substantially limited in working, as there was no perception regarding their ability to perform a broad class of jobs. The Court’s narrow construction was bluntly articulated:

An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one’s height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.<sup>31</sup>

The latest Supreme Court ruling on this issue, 2002’s unanimous *Toyota Motor Manufacturing v. Williams*,<sup>32</sup> took the already battered statutory language and imposed still additional barriers to coverage. Under *Williams*, the phrase “substantially limited” is restricted further to “prevent[ed] or severely restrict[ed].”<sup>33</sup> Additionally, the major life activity of “performing manual tasks” was limited to manual tasks that are “central . . . to most people’s daily lives.”<sup>34</sup> Further, contrary to the usual rule of statutory

<sup>26</sup> See American Bar Association, *supra* note 8; see also Robert L. Burgdorf, Jr., “*Substantially Limited*” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997).

<sup>27</sup> The cases that make up the *Sutton* trilogy are *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (finding that persons must be considered in the “mitigated” state to determine whether they are “disabled” under the ADA, in context of rejected applicants with severe myopia who sought pilot jobs); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (finding that a person with high blood pressure that was treated with medication was not disabled); and *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (finding that an individual with monocular vision who was able to subconsciously correct his visual impairment was not disabled).

<sup>28</sup> *Sutton*, 527 U.S. at 488.

<sup>29</sup> *Id.* at 479-80 (citing 29 C.F.R. pt. 1630, app. § 1630.2(j)); see also 28 C.F.R. pt. 35, app. A § 35.104 (definitions); EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, EEOC Order No. 915.002, § 902, at 6-7 (Mar. 25, 1997); EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL: SECTION 902: DEFINITION OF THE TERM “DISABILITY” (Mar. 14, 1995).

<sup>30</sup> Under this rule, in order to show that she is substantially limited in the major life activity of working, a plaintiff needs to demonstrate that she is “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes . . . .” 29 C.F.R. § 1630.2(j)(3)(i). “The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” *Id.*; see also *Sutton*, 527 U.S. at 492. This standard, as construed by the courts, becomes extremely difficult to meet in the context of an employee or applicant seeking to demonstrate a perceived disability, as the plaintiff must show that the employer had a specific perception—as opposed to a generally negative view of the person’s impairment—about the plaintiff’s inability to perform a class of jobs or a broad range of jobs.

<sup>31</sup> *Sutton*, 527 U.S. at 490-91.

<sup>32</sup> *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002).

<sup>33</sup> *Id.* at 198.

<sup>34</sup> *Id.*

construction in the context of civil rights legislation, the Court announced that the definitional phrase “substantially limited in a major life activity” must be “interpreted strictly to create a demanding standard for qualifying as disabled. . . .”<sup>35</sup>

In the hundreds of federal cases finding that ADA plaintiffs are not disabled, certain patterns emerge. In “actual” or prong one disability cases, hostile court rulings frequently turn on whether the individual is “substantially limited.” Many opinions hold that while the plaintiff has certain documented limitations as a result of a mental or physical impairment, these limitations are not great enough to constitute *substantial* limitations. Persons with mental disabilities have been particularly hard hit by the federal judiciary’s miserly reading of the definition of disability.<sup>36</sup> However, persons with significant physical disabilities have also been excluded.<sup>37</sup> Persons with orthopedic impairments are highly likely to be excluded from protection because they cannot show a “substantial limitation” in a broad enough range of jobs or manual tasks.<sup>38</sup> These individuals have often acquired their repetitive stress injuries or back injuries on the job while performing services for the defendant who wins on summary judgment. Additional obstacles are associated with the term “major life activity,” particularly in the context of psychiatric disabilities, and the major life activities of working and of performing manual tasks.<sup>39</sup> A few ADA plaintiffs have faltered on the requirement of a mental or physical “impairment,” including cases in which the worker is discriminated against on the basis of obesity or size.<sup>40</sup>

<sup>35</sup> *Id.* at 197.

<sup>36</sup> *See, e.g.,* Kellogg v. Union Pac. R.R. Co., 233 F.3d 1083 (8th Cir. 2000) (holding that a railroad manager with major depression and anxiety was not substantially limited); Schneiker v. Fortis Ins. Co., 200 F.3d 1055 (7th Cir. 2000) (holding that a benefits analyst with depression and alcoholism requiring hospitalizations, medication, outpatient care, and AA meetings was not substantially limited); Spades v. City of Walnut Ridge, 186 F.3d 897, 900 (8th Cir. 1999) (holding that a police officer with depression who attempted suicide was not substantially limited because the court found his depression was “corrected” with medication and counseling); Scherer v. G.E. Capital Corp., 59 F. Supp. 2d 1132, 1135 (D. Kan. 1999) (holding that a fraud investigator with bipolar disorder and obsessive compulsive disorder was not disabled where his medication “generally controlled the symptoms”).

<sup>37</sup> *See, e.g.,* EEOC v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001) (holding that a machine operator with epilepsy causing seizures, bedwetting on one occasion, bruises, and periods of “zoning out” was not substantially limited); Bowen v. Income Producing Mgmt. of Okla., 202 F.3d 1282 (10th Cir. 2000) (holding that a fast food manager who as a result of brain surgery suffered short-term memory loss, inability to concentrate, and difficulty doing simple math was not substantially limited); Sorensen v. Univ. of Utah, 194 F.3d 1084 (10th Cir. 1999) (holding that a nurse with MS, forcibly reassigned immediately after five-day hospitalization, not disabled); Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999) (holding that a sales manager with heart disease, heart attack, hypertension, and multiple hospitalizations was not disabled); Lorubbio v. Ohio Dep’t of Transp., 181 F.3d 102 (6th Cir. 1999) (holding that transportation worker with spinal injury was not substantially limited); Ivy v. Jones, 192 F.3d 514 (5th Cir. 1999) (holding that a hearing-impaired clerical worker using hearing aids was not substantially limited); Tone v. U.S. Postal Serv., 68 F. Supp. 2d 147 (N.D.N.Y. 1999) (holding that a tractor trailer operator who lost left eye to cancer was not disabled).

<sup>38</sup> *See, e.g.,* Toyota, 534 U.S. at 198 (finding that a diagnosis of carpal tunnel syndrome alone does not render one disabled under the ADA); Pollard v. High’s of Balt., Inc., 281 F.3d 462, 471 (4th Cir. 2002) (finding that an employee with a back injury was not substantially limited in working when she immediately obtained a new job); Mahon v. Crowell, 295 F.3d 585, 590, 591-92 (6th Cir. 2002) (holding that an employee with a back injury was not substantially limited in working when he suffered a 47% loss of access to the job market); Wooten v. Farmland Foods, 58 F.3d 382, 385-86 (8th Cir. 1995) (finding plaintiff with carpal tunnel syndrome and a lifting restriction was not regarded as substantially limited in the major life activity of working).

<sup>39</sup> *See, e.g.,* Toyota, 534 U.S. at 198 (holding that to be “substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”); Mahon v. Crowell, 295 F.3d 585, 590, 591-92 (6th Cir. 2002) (stating that working was “problematic” as a major life activity); Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (finding that interacting with others was not a major life activity for plaintiff with depression).

<sup>40</sup> *See, e.g.,* Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) (stating that weight is generally not an impairment); Coleman v. Ga. Power Co., 81 F. Supp. 2d 1365, 1370 (N.D. Ga. 2000) (finding plaintiff’s “morbid obesity” was not a physical impairment); *see also* Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57, 84 (2002). Other cases have also found no impairment when psychological screening tests found plaintiffs unfit for jobs in law enforcement. *See, e.g.,* Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (finding no impairment when plaintiff’s “poor judgment, irresponsible behavior and poor impulse control” were at issue); Santiago v. City of Vineland, 107 F. Supp. 2d 512, 550 (D.N.J. 2000) (finding no impairment when the plaintiff’s “personality traits and emotional health” were at issue); Greenberg v. N.Y. State, 919 F. Supp. 637, 643 (E.D.N.Y. 1996) (stating that the psychological report did not demonstrate an impairment).

To reach the conclusion that plaintiffs' impairments are not substantially limiting, courts often note how capable the particular individual is in various activities—an analysis from the vocational rehabilitation model of disability—and/or how incompetent the average person in society is by comparison.<sup>41</sup> In many of these cases, the plaintiff deemed non-disabled required only modest accommodations related to the impairment in order to retain employment. For example, a person whose mental health condition is well controlled might still need a reasonable accommodation to attend therapy appointments or go for lab tests to ensure proper medication levels. In an outcome turning statutory purpose on its head, a worker whose condition is well controlled can be denied the very accommodations that enable her to maintain stability and good health.

In cases relying upon the “regarded as” or third prong—the provision intended by Congress to ensure the broadest possible standard to combat myths and stereotypes<sup>42</sup>—plaintiffs face an even more onerous challenge: Not only must they demonstrate the elusive “substantial limitation,” but they must situate this construct in the theoretical mind of the employer.<sup>43</sup> In other words, to prevail on a third prong case, the plaintiff must show that her employer perceived her as substantially limited. The “class of jobs” regulation endorsed by the *Sutton* Court makes this difficult task virtually impossible.<sup>44</sup> In failure-to-hire cases, employers routinely convince courts that they only “regarded” the applicant as unable to perform a single job rather than an entire class of jobs (as required by the EEOC regulation) in order to avoid a finding that plaintiff was regarded as disabled. With the ADA thus judicially recast as a statute protecting only individuals with the most severe impairments, most workers facing discrimination can no longer obtain a federal remedy.

To date, the second or “record of disability” prong has been the subject of less litigation than the “actual disability” and “record of disability” prongs. In light of the limitations now faced by persons seeking to challenge disability discrimination under the first and third prongs, the role of the “record of disability” prong may become more prominent in disability discrimination litigation. However, the second prong by its own terms requires a substantially limiting impairment, with all of the same hurdles associated with that requirement and detailed in case law analyzing the first and third prongs.<sup>45</sup> Further, some appellate courts have limited the “record of disability” prong to cases in which the individual’s

<sup>41</sup> For example, in *Olson v. General Electric Aerospace*, 101 F.3d 947 (3d Cir. 1996), the Third Circuit concluded that a senior technical staffer with depression requiring a four-month hospital stay was not “disabled” because he was highly qualified: “[T]he evidence that was apparently offered to demonstrate [plaintiff’s] fitness as an employee ironically establishes that he was not substantially limited in a major life activity. Therefore he can not establish that he is disabled, or that he has a history of being disabled.” *Id.* at 17. Similarly, in *Sarko v. Penn-Del Directory Co.*, 968 F. Supp. 1026 (E.D. Pa. 1997), the district court rejected the idea that a top performing sales representative with depression and anxiety could have a disability, stating, “Plaintiff admits that she was able to work long hours and perform quite successfully as a salesperson while at Penn-Del.” *Id.* at 1035; see also *Hatfield v. Quantum Chem. Corp.*, 920 F. Supp. 108, 110 (S.D. Tex. 1996) (holding that a process technician returning from leave with diagnosis of recurrent major depression and post-traumatic stress disorder was not disabled: “It is logically inconsistent for Hatfield to say he is so impaired that he cannot care for himself; while at the same time saying that he can go to work and perform his job.”). Thus, there is a “Catch-22” facing a plaintiff who must show that she is “disabled” and that she is “qualified.”

<sup>42</sup> See *supra* notes 7 and 22.

<sup>43</sup> See, e.g., *Lessard v. Osram-Sylvania, Inc.*, 175 F.3d 193 (1st Cir. 1999) (holding that a Vietnam veteran with shrapnel-scarred hand could not prove his employer regarded him as disabled even if he could show that the employer’s decision was based on stereotypes). The *Lessard* court reasoned that a negative employment action taken by an employer, even if myth-driven, did not establish liability under the ADA unless the employer regards the employee as substantially limited. *Id.* at 199.

<sup>44</sup> See *supra* note 30.

<sup>45</sup> As the Fifth Circuit has noted, “it is not enough for an ADA plaintiff to simply show that he has a record of a cancer diagnosis; in order to establish the existence of a ‘disability’ under § 12102(2)(B), there must be a record of an impairment that substantially limits one or more of the ADA plaintiff’s major life activities.” *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir. 1999); see also *Sorenson v. Univ. of Utah Hosp.*, 194 F.3d 1084, 1087-88 (10th Cir. 1999) (holding that a nurse with multiple sclerosis, forcibly reassigned immediately after five-day hospitalization, did not have record of substantially limiting impairment); *Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635, 645-46 (2d Cir. 1998) (police officer with past cerebral hemorrhage requiring thirty-day hospitalization, seven-month leave of absence, and permanent work restrictions did not have record of substantially limiting impairment); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 317 (5th Cir. 1997) (alcoholism requiring hospitalization was not record of disability, as record did not demonstrate substantial limitation in major life activity).



medical documentation (i.e. actual papers as opposed to life history) shows a substantially limiting impairment.<sup>46</sup> In other words, employees experiencing disability discrimination who do not possess such medical or other actual documentation may not find protection under the ADA. Courts also require that a plaintiff demonstrate that the employer possessed detailed knowledge about the employee’s record or history of substantial limitation before permitting a disability discrimination suit to go forward,<sup>47</sup> importing many of the same problems faced by plaintiffs seeking protection under the third or “perceived disability” prong.

## II. PROPOSED CHANGES TO ADA DEFINITION

In light of the case law interpreting the definition of “disability” under the ADA, now is the time to reconsider the statutory framework for alleging disability discrimination, to propose alternatives, and to spur discussion on these matters.<sup>48</sup> Our goal is to restore civil rights protections to the millions of workers who experience discrimination based on fears, myths, and stereotypes that many in American society continue to associate with certain impairments, diagnoses, or characteristics. Deeply concerned about the aggressive narrowing of the ADA’s protected class by the federal courts, we propose a new framework that will unambiguously reassert the breadth and inclusiveness intended by the ADA’s protections. Our proposal, as we will show below, is well grounded in the historical antecedents of the ADA, in state law approaches to disability discrimination, and in international models.

We propose a new formulation of disability discrimination that will put disability civil rights protections on more equal footing with other civil rights protections under federal law. We propose that the revised ADA prohibit discrimination “on the basis of disability,” and that “on the basis of disability” be defined as follows:

- (A) Because of
  - (1) a physical or mental impairment or health condition;
  - (2) a record of physical or mental impairment or health condition; or
  - (3) a perceived physical or mental impairment or health condition; or
- (B) Because of a physical, cultural or social barrier arising from the interaction between a person’s physical or mental impairment or health condition and his or her environment which inhibits the person from participating in the activities regulated by this Act at an equal level with other members of society.

We also propose the following definitions of related statutory terms:

- (A) **PHYSICAL OR MENTAL IMPAIRMENT OR HEALTH CONDITION.** The term “physical or mental impairment or health condition” means:
  - (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense

<sup>46</sup> *Weber v. Strippit, Inc.*, 186 F.3d 907, 915 (8th Cir. 2000) (“In order to have a record of disability under the ADA, a plaintiff’s medical documentation must show that he has a history of, or has been misclassified as having, a physical or mental impairment that substantially limits one or more major life activities.”); *Taylor v. Nimock’s Oil Co.*, 214 F.3d 957, 961 (8th Cir. 2000) (“In order to have a record of a disability, an employee’s ‘documentation must show’ that she has a history of or has been subject to misclassification as disabled.”) (citation omitted); *see also* 29 C.F.R. § 1630, app. § 1630.2(k) (“This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. . . . There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.”).

<sup>47</sup> *See, e.g., Taylor*, 214 F.3d at 961 (“We do not believe that Nimock’s mere knowledge of Taylor’s heart attack, coupled with the sending of a get-well card and a note about her job duties, constitutes sufficient documentation that Taylor had a history of disability. . . .”); *Hilburn v. Murata Elec. N. Am., Inc.*, 181 F.3d 1220, 1229 (1999) (finding no error where trial court found that plaintiff failed to furnish evidence that the employer had obtained record of a substantially limiting impairment).

<sup>48</sup> Indeed, a serious discussion about what definitional provisions should be employed to further disability civil rights has not taken place within the disability community since the late 1980s.

organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

- (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; or
  - (3) any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, or any inherited characteristic, that is known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder.
- (B) RECORD OF PHYSICAL OR MENTAL IMPAIRMENT OR HEALTH CONDITION. The term “record of impairment or health condition” means having a history of, or having been misclassified as having, a mental or physical impairment or health condition.
- (C) PERCEIVED PHYSICAL OR MENTAL IMPAIRMENT OR HEALTH CONDITION. The term “perceived impairment” or “perceived health condition” means being regarded as or treated as having a physical or mental impairment or health condition.
- (D) MITIGATING MEASURES. The existence of a physical or mental impairment or health condition, or a record or perception of a physical or mental impairment or health condition, shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetic devices, auxiliary aids, or reasonable accommodations, unless the mitigating measure itself creates an impairment or health condition.
- (E) CONSTRUCTION. The provisions of this Act shall be broadly construed to advance its remedial purposes.

These changes would help to address coverage problems embedded in the “substantially limits” requirement of the ADA’s text, and certainly sharply aggravated by the *Sutton* trilogy.<sup>49</sup> Under our proposal, an employee with epilepsy controlled by seizure medication would be protected from discrimination based on that condition. An employee with diabetes who required periodic breaks to administer insulin shots would be entitled to such an accommodation, barring undue hardship. An employer that screens out an individual with asymptomatic HIV, asymptomatic multiple sclerosis, cancer in remission, or depression in remission, because of that trait, would be engaging in disability discrimination. Additionally, the proposed changes would help to avoid the requirement that a victim of disability discrimination invariably submit intimate and often unrelated evidence about her impairment and its limitations in order to reach the issue of whether she was treated unfairly.

This focus on whether discrimination based on an impairment or health condition occurred, rather than whether a “disability” may be shown, is rooted in several ultimately unsuccessful federal proposals, including a 1972 bill sponsored by Senator Hubert H. Humphrey Jr. (D-MN), and a 1988 bill sponsored by Senators Lowell Weicker (R-CT) and Tom Harkin (D-IA) and Representative Tony Coelho (D-CA).<sup>50</sup> The rejection of a stringent requirement of “disability” consisting of an “impairment” that “substantially limits” one or more major life activities is based on these federal sources, as well as the antidiscrimination laws of California, Connecticut, New Jersey, New York, Washington State, Minnesota, Massachusetts, Rhode Island, and West Virginia.<sup>51</sup> The inclusion of discrimination based on a “health condition” as well

<sup>49</sup> See *supra* Part I.

<sup>50</sup> Americans with Disabilities Act of 1988, H.R. 4498, 100th Cong. (1988) (introduced by Rep. Coelho); Americans with Disabilities Act of 1988, S. 2345, 100th Cong. (1988) (introduced by Sen. Weicker); H.R. 14033, 92d Cong. (1972) (introduced by Sen. Humphrey). Washington State’s regulation similarly focuses on discrimination by defining disability as existing where the adverse action occurs because of a physical or mental abnormality. WASH. ADMIN. CODE § 162-22-020(2) (2002) (“A condition is a ‘sensory, mental, or physical disability’ if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question, or was denied equal pay for equal work, or was discriminated against . . .”). See *infra* Part III.B.5.

<sup>51</sup> See, e.g., CAL. GOV’T CODE § 12926(i), (k) (2002); CONN. GEN. STAT. § 46a-51(15), (20) (2002); N.J. STAT. ANN. § 10:5-5(q) (2003); N.Y. EXEC. LAW § 292(21) (2002); WASH. ADMIN. CODE § 162-22-020(2) (2002).

as an “impairment” is rooted in the social model of disability as well as in recent changes to California’s law. The first two prongs of the definition of impairment or health condition are drawn from federal regulations defining “physical or mental impairment.”<sup>52</sup> The inclusion of genetic characteristics in the third prong of the definition of impairment or health condition is derived from California law as well as recently proposed federal legislation.<sup>53</sup> By adding the phrase “or treated as” in the perceived impairment definition, the proposal draws from California law,<sup>54</sup> and seeks to redirect courts to the employer’s actions, rather than its state of mind. The exclusion of “mitigating measures” is based on the legislative history of the ADA, and is supported by recent legislative changes made by California and Rhode Island, and by a recent ruling by the Massachusetts Supreme Court.<sup>55</sup>

In addition to the changes in the original three-prong definition of disability, we have included an alternative means by which to analyze whether discrimination on the basis of disability has occurred. This alternative formulation explicitly incorporates a social model of disability that emphasizes the importance of the role the environment plays in producing disability discrimination. For this part of our definition of “on the basis of disability,” we have borrowed from Zimbabwe’s notion that a person’s disability can give rise to barriers that inhibit full participation in public life, such as, in the context of the ADA, employment (Title I), the services, programs, and activities of state and local governments (Title II), and public accommodations (Title III). One could argue that disability discrimination *never* happens because of a person’s health condition or impairment, but that instead it always is a result of a barrier present in that person’s environment. When an employer refuses to hire a person because of his diagnosis of bipolar disorder, for example, the discrimination did not happen “because of” his mood disorder but because of the attitudinal barrier that the person making the hiring decision possessed and acted upon. Similarly, when a person in a wheelchair can’t get up a flight of stairs into a restaurant, or a deaf person can’t follow a video at a reception, these things do not happen because a person uses a wheelchair or is deaf. Instead, the exclusion occurs because the restaurant lacks accessibility or because the video is not captioned. In other words, a barrier in the person’s environment typically plays a causal role in producing disability discrimination.

### III. SOURCES OF PROPOSED CHANGES TO ADA DEFINITION

#### A. FEDERAL SOURCES – TITLE VII, THE HUMPHREY AMENDMENT, AND THE ADA OF 1988

Despite the persistence of the three-pronged definition of disability that has been part of federal disability discrimination law since 1974, other models of disability discrimination have appeared on the federal stage. In 1972, Senator Hubert H. Humphrey Jr. (D-MN) attempted to extend civil rights protections to disabled Americans by amending the Civil Rights Act of 1964 to insert the word “handicap” among the list of protected classes in Title VII of that law.<sup>56</sup> Title VII already outlawed discrimination “on the basis of” characteristics like race, color, national origin, sex, and religion.<sup>57</sup>

<sup>52</sup> 29 C.F.R. § 1630.2(h) (2002); 45 C.F.R. § 84.3(j)(2)(i) (1977).

<sup>53</sup> CAL. GOV’T CODE § 12926(h)(2) (2003); Genetic Information Nondiscrimination Act of 2002, S. 1995, 107th Cong. (2002); Genetic Nondiscrimination in Health Insurance and Employment Act, S. 318, 107th Cong. (2001). Consistent with our emphasis on fairness and barrier removal, rather than focus on the extent of limitations, we have excluded language contained in several genetic discrimination laws requiring that the genetic or inherited trait be “presently *not* associated with any symptoms of any disease or disorder.” CAL. GOV’T CODE § 12926(h)(2) (emphasis added).

<sup>54</sup> CAL. GOV’T CODE § 12926(i), (k) (2002).

<sup>55</sup> H.R. REP. NO. 101-485(II), at 52 (1990); H.R. REP. NO. 101-485(III), at 28-29 (1990); S. REP. NO. 101-116, at 23 (1989); CAL. GOV’T CODE § 12926(i)(1)(A), (k)(1)(B)(i); R.I. GEN. LAWS § 42-87-1; *Dahill v. Police Dep’t of Boston*, 434 Mass. 233, 241-44 (2001).

<sup>56</sup> H.R. 14033, 92d Cong. (1972); *see also* NAT’L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 12 (1997), at <http://www.ncd.gov/newsroom/publications/pdf/equality.pdf> [hereinafter EQUALITY OF OPPORTUNITY].

<sup>57</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 703 (1964) (codified at 42 U.S.C. § 2000e).

The Humphrey bill was unsuccessful. Instead, Congress added section 504 to the Rehabilitation Act of 1973,<sup>58</sup> and adopted the now-familiar three-pronged definition of disability in 1974.<sup>59</sup> Rather than prohibiting discrimination “on the basis of” handicap, section 504 applied only to “otherwise qualified handicapped individuals” who had encountered discrimination “solely by reason of” their “handicap” or disability. This distinction was important, because in order to satisfy section 504, a disabled person would need to establish his or her status as a “handicapped individual” before challenging an allegedly discriminatory act such as a refusal to hire. In contrast, under Title VII, a woman or man seeking to challenge a hiring decision as sex discrimination is assumed to be a member of the protected class and is able to focus on the evidence related to the alleged discrimination.<sup>60</sup>

In late 1986, the National Council on the Handicapped (NCH) began work on the first draft of what would become the ADA.<sup>61</sup> This body, which was created in the 1978 reauthorization of the Rehabilitation Act and had become an independent federal agency in that law’s 1984 reauthorization, is charged with advising the President and the Congress on public policy issues affecting people with disabilities. The Council was made up of fifteen members, all appointed by President Reagan and confirmed by the Senate. Under the leadership of Council chair Sandra Parrino and vice-chair Justin Dart Jr., NCH issued a 1986 report called *Toward Independence*, which called on Congress to “enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap.”<sup>62</sup> NCH went on to recommend that:

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<sup>58</sup> “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.” Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504 (1973). The 1973 Act relied upon a vocational rehabilitation model, defining a handicapped individual as a person who “has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment [and] can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . .” *Id.* § 7(6), 87 Stat. 355, 360.

<sup>59</sup> A handicapped individual is a “person who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.” Pub. L. No. 93-516, § 111, 88 Stat. 1617, 1619 (1974). Ironically, the intention behind the 1974 definitional changes was to broaden the scope of coverage to further the civil rights purposes of the nondiscrimination mandate. *See* H. REP. NO. 101-485, pt. 2, at 52-53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 334-35; S. REP. NO. 93-1297, at 38 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389.

<sup>60</sup> Embedded in the disability definition battles is the sense that categories such as race, color, national origin, sex, and religion, found in the Civil Rights Act of 1964, are “different” from disability, with the parameters somehow easier to define. This assumption is worthy of challenge. “Race,” for example, is a contested category, socially rather than scientifically constructed, and in many cases (e.g. persons of multi-racial descent) is dependent upon self-identification. “Sex” seems more scientifically or biologically knowable than “race,” but even this is not always so, particularly in the case of transgendered and intersexed persons. “Religion” is even more fluid than “race,” dependent upon the individual’s self-identification, and changeable over time. “National origin,” if defined literally as the nation of birth, is perhaps knowable in some definitive way, but the term is more often used to describe the complicated concepts of race or ethnicity. The inherently indefinite boundaries of at least some and perhaps all of the statuses protected by the Civil Rights Act of 1964 have not been cited as a reason for placing onerous burdens requiring cumbersome evidentiary showings on plaintiffs seeking to demonstrate membership in a protected class. Rather, the focus has remained on evidence related to the merits of the case. *See, e.g.,* Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1983); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The perceived difference with “disability” is perhaps found in the dual legal and social history of the word “disability” as a category entitling persons to various sorts of benefits, and “disability” as a category requiring civil rights protections. However, statutes regulating disability benefits and statutes ensuring disability civil rights should define “disability” very differently. *See supra* note 16 and accompanying text. The remaining difference is perhaps the requirement of reasonable accommodation found in most disability civil rights laws. Concerns associated with this requirement, which is based on the concept that equality sometimes requires different treatment, may be addressed without eviscerating disability civil rights. *See infra* Part IV.

<sup>61</sup> EQUALITY OF OPPORTUNITY, *supra* note 56, at 61.

<sup>62</sup> NAT’L COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 11 (1986), at <http://www.ncd.gov/newsroom/publications/pdf/toward.pdf>.

[The proposed law] should straightforwardly prohibit “discrimination on the basis of handicap,” without establishing any eligibility classification for the coverage of the statute. Discrimination on the basis of handicap should be broadly construed to apply the requirements of the statute to all situations in which a person is subjected to unfair or unnecessary exclusion or disadvantage because of some mental or physical impairment, perceived impairment, or history of impairment.<sup>63</sup>

NCH’s approach constituted an unambiguous endorsement of Hubert Humphrey’s original approach to federal disability nondiscrimination, and a rejection of the approach adopted in section 504 of the Rehabilitation Act and the regulations interpreting that definition. NCH asserted that the 504 approach was problematic because it forced a plaintiff to identify as an individual with a disability according to a medical model that emphasized the nature and scope of their “impairments” and “limitations.”<sup>64</sup> NCH noted at the time that the 504 approach did not provide comprehensive protection and allowed individuals to fall through the cracks.<sup>65</sup> It also noted the problem with evidence of the nature and scope of an individual’s impairment being used against that individual when his or her qualifications for a particular position are assessed.<sup>66</sup>

NCH’s influence was tangible in the first version of the ADA, introduced in April of 1988 by Senators Lowell Weicker (R-CT) and Tom Harkin (D-IA) and Representative Tony Coelho (D-CA).<sup>67</sup> In the Americans with Disabilities Act of 1988, as the bill was called, the 504 definitional approach was discarded in favor of the broader language developed by NCH. There was no definition of the word “handicap” (later versions of the bill replaced the word “handicap” with the word “disability”). Instead, the 1988 bill defined the term “on the basis of handicap” as: “because of a physical or mental impairment, perceived impairment, or record of impairment.”<sup>68</sup> The bill went on to define “physical or mental impairment” and explain perceived impairment as “not having a physical or mental impairment . . . , but being regarded as having or treated as having a physical or mental impairment.”<sup>69</sup>

When Senator Weicker lost to Joseph Lieberman (D-CT) in his Senate election in November of 1988, Senator Harkin became the chief sponsor of the ADA in the Senate.<sup>70</sup> Concerned that the 1988 version of the bill was too extreme to be enacted and signed by President Bush, Senator Harkin, working with Senator Edward M. Kennedy (D-MA) and in consultation with key disability leaders, set about rewriting the bill into a version that was more likely to pass.<sup>71</sup> This new version of the ADA, introduced in 1989, simply repeated the definitional language that had been used under section 504.<sup>72</sup> Although some in the disability advocacy community protested what they viewed as a weakening of the 1988 legislation with regard to the definition of disability,<sup>73</sup> the community came to rally behind the new bill as their best hope for a law that could actually garner bipartisan support in Congress and the endorsement of the Bush Administration. Also, in light of the case law interpreting the 504 language described above, few would have expected that the new language would lead to the narrow interpretations we have come to witness.

<sup>63</sup> *Id.* at 12.

<sup>64</sup> Jonathan M. Young, “Same Struggle, Different Difference”: The Americans with Disabilities Act and the Disability Rights Movement, 1964-1990, 191 (2002) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 192.

<sup>67</sup> Americans with Disabilities Act of 1988, H.R. 4498, 100th Cong. (1988) (introduced by Rep. Coelho); Americans with Disabilities Act of 1988, S. 2345, 100th Cong. (1988) (introduced by Sen. Weicker); *see also* EQUALITY OF OPPORTUNITY, *supra* note 56, at 63-67.

<sup>68</sup> 134 CONG. REC. H9600, § 3(1).

<sup>69</sup> *Id.* at § 3(2).

<sup>70</sup> EQUALITY OF OPPORTUNITY, *supra* note 56, at 95-96.

<sup>71</sup> *Id.* at 96-102.

<sup>72</sup> Americans with Disabilities Act of 1989, S. 933, 101st Cong. § 3(2) (1989); *see also* EQUALITY OF OPPORTUNITY, *supra* note 56, at 99-100.

<sup>73</sup> EQUALITY OF OPPORTUNITY, *supra* note 56, at 103.

**B. STATE LAW SOURCES – CALIFORNIA, RHODE ISLAND, CONNECTICUT, NEW JERSEY, NEW YORK, WASHINGTON, MINNESOTA, MASSACHUSETTS, AND WEST VIRGINIA**

As the U.S. Supreme Court noted in *Board of Trustees of University of Alabama v. Garrett*,

by the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that “this is probably one of the few times where the States are so far out in front of the Federal Government, it’s not funny.”<sup>74</sup>

Prior to the enactment of the ADA, state disability laws presented a diverse set of definitions for the terms “handicap” and “disability.” Some state statutes contained no definitions. Throughout the early 1990s, however, many of these statutes were amended to more closely reflect the federal ADA, which was then regarded as the “state of the art” in disability discrimination.<sup>75</sup> Today, the vast majority of the states—approximately forty-three—have adopted antidiscrimination laws that track the ADA definition of disability virtually verbatim.<sup>76</sup>

<sup>74</sup> *Bd. of Tr. v. Garrett*, 531 U.S. 356, 368 n.5 (2001) (citing *Hearing on Discrimination Against Cancer Victims and the Handicapped before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 100th Cong. 5 (1987)).

<sup>75</sup> For example, in 1974 California enacted a prohibition against discrimination on the basis of “physical handicap” and adopted a broad definition of “physical handicap”: “‘Physical handicap’ includes impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services.” CAL. GOV’T CODE § 12926(h) (1980). This definition—which included no requirement of a “substantial limitation of a major life activity”—was interpreted to bar discrimination against a broad range of physical impairments. *See, e.g., Am. Nat’l Ins. v. Fair Emp. & Hous. Comm’n*, 651 P.2d 1151 (Cal. 1982) (holding that high blood pressure thought to pose increased risk of future disability is covered); *Sanders v. City and County of S.F.*, 8 Cal. Rptr. 2d 170 (Cal. Ct. App. 1992) (holding that a chemical dependency is covered); *County of Fresno v. Fair Emp. & Hous. Comm’n*, 227 Cal. Rptr. 2d 557 (Cal. Ct. App. 1991) (holding that workers with respiratory disorders causing hypersensitivity to tobacco smoke were “physically handicapped” under the Fair Employment and Housing Act (FEHA)); *Raytheon v. Fair Emp. & Hous. Comm’n*, 261 Cal. Rptr. 197 (Cal. Ct. App. 1989) (holding that a person with AIDS is physically handicapped); *Johnson v. Civil Serv. Comm’n*, 200 Cal. Rptr. 289 (Cal. Ct. App. 1984) (holding that a spinal anomaly is protected by state law); *Sterling Transit Co. v. Fair Emp. Practice Comm’n*, 175 Cal. Rptr. 548 (Cal. Ct. App. 1981) (holding that lower back congenital problem of scoliosis was protected); *see also State Pers. Bd. v. Fair Emp. & Hous. Comm’n*, 703 P.2d 374 (Cal. 1985) (holding that three traffic officer cadets were permitted to pursue claims challenging disqualification from employment pursuant to “medical standards” on basis of colorblindness, osteoarthritis, and prior intestinal bypass surgery); *MacPhail v. Court of Appeal*, 39 Cal. 3d 454 (1985) (holding that rejected applicant was permitted to pursue claim challenging disqualification from California Highway Patrol based on anomaly found on back X-ray). In 1992, however, California amended the employment provisions of the Fair Employment and Housing Act in response to the enactment of the federal ADA, and changed its definition of physical handicap to more closely parallel the ADA definition by requiring a “limitation” (but not a “substantial limitation”) of a major life activity. At the same time, the legislature added definitions modeled on the federal language to certain other provisions of the California Code. 1992 Cal. Legis. Serv. 913 (West).

Similarly, at the time the ADA was being considered, the state of Michigan’s disability discrimination law defined “handicap” broadly as: “a determinable physical or mental characteristic of an individual or a history of the characteristic which may result from disease, injury, congenital condition of birth, or functional disorder which characteristic . . . is unrelated to the individual’s ability to perform the duties of a particular job . . . .” MICH. COMP. LAWS § 37.1103(b)(i) (1989); *see also Sanchez v. Kostas LaGoudakis*, 440 N.W.2d 657 (Mich. 1992) [hereinafter *Sanchez I*] (reviewing and applying 1989 definition to find that a person perceived to have HIV/AIDS could pursue her claim). In 1990, however, the Michigan statute was amended to require that the characteristic “substantially limit[] 1 or more of the major life activities of that individual. . . .” *Sanchez I*, 486 N.W.2d at 660. Michigan’s Supreme Court has construed the 1990 version of its statute narrowly, and consistently with *Sutton v. United Air Lines*, 527 U.S. 471 (1999), to exclude a plaintiff’s claims of “regarded as” disability discrimination on the basis of her multiple sclerosis. *Michalski v. Bar-Levav*, 625 N.W.2d 754, 759-60 (Mich. 2001) (noting that prior version “contained no requirement that the determinable physical or mental characteristic substantially limit a major life activity,” and concluding that the lower court’s reliance on *Sanchez I* was thus “misplaced”).

During the same era, the District of Columbia antidiscrimination statute defined handicap as “a bodily or mental disablement which may be the result of injury, illness or congenital condition and for which reasonable accommodation can be made.” D.C. CODE ANN. § 1-2512(a)(1) (1987). In 1994, this provision was repealed and replaced with the federal disability definition. *See Strass v. Kaiser Found. Health Plan*, 744 A.2d 1000, 1009 (D.C. 2000) (tracking history of definition and describing amended statute as “more restrictive”).

<sup>76</sup> ALA. CODE § 24-8-3(6) (2002); ALASKA STAT. § 18.80.300(12) (2001) (including “a condition that may require the use of a prosthesis, special equipment for mobility, or service animal”); ARIZ. REV. STAT. § 41-1461(2) (2001); ARK. CODE ANN. § 16-

Several states have taken their own paths, however. California and Rhode Island have recently amended their disability discrimination statutes to explicitly reject federal case law narrowing the scope of the protected class. Further, Connecticut, New Jersey, New York, and Washington never amended their statutes to reflect the ADA, and thus have never required a “limitation” or “substantial limitation” of a “major life activity” to demonstrate disability. A seemingly modest amendment to the definition of disability made by the Minnesota legislature more than ten years ago has been afforded increasing significance by the Minnesota Supreme Court. Finally, the state supreme courts of Massachusetts and West Virginia have recently rejected United States Supreme Court case law, despite disability definitions that track the federal language. These nine states provide important examples for consideration as we seek to redefine “disability” for purposes of the federal ADA.

### 1. California

California’s employment discrimination statute never has mirrored precisely the federal ADA’s definition of disability. In response to the increasingly narrow federal case law on definition, disability rights litigators began citing the differences between the federal and state statutes, and arguing that the state law is broader because it does *not* require a substantial limitation of a major life activity. These distinctions engendered significant legal debate in appellate court proceedings (which was ultimately resolved by the California Supreme Court in 2003).<sup>77</sup> In 2000, in response to this legal debate, as well as

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123-102(3) (2002) (first prong only); COLO. REV. STAT. § 24-34-301(2.5) (2002); DEL. CODE ANN. tit. 19, § 722(4) (2001) (“substantial limitation” must be related to employability); D.C. CODE ANN. § 2-1401.02(5A) (2002); FLA. STAT. ANN. § 760.22(7)(a) (2002) (including definition in housing but not employment provisions and including “developmental disability”); GA. CODE ANN. § 34-6A-2(3), (8) (2002) (indicating that “substantial limitation” must be related to employability and omitting the “regarded as” prong); HAW. REV. STAT. § 489-2 (2001); IDAHO CODE § 67-5902(15) (2002) (stating that disability must be “demonstrable by medically accepted clinical or laboratory diagnostic techniques,” and “substantial limitation” is “to that person,” rather than “of a major life activity”); IND. CODE ANN. § 22-9-5-6(a) (2002); IOWA CODE § 216.2(5) (2002) (“substantial disability”); IOWA ADMIN. CODE § 161-8.26(1)-(3) (2002) (defining “substantially handicapped person” using ADA definition); KAN. STAT. ANN. § 44-1002(j) (2001); KY. REV. STAT. ANN. § 12.450(1) (2002); LA. REV. STAT. ANN. § 23:322(3) (2002); ME. REV. STAT. ANN. tit. 5, § 4553(7A)-(7B) (2001) (including “substantial disability as determined by a physician or, in the case of mental disability, by a psychiatrist or psychologist”); CODE ME. R. § 94-348-003.02(C) (2002) (following ADA definition); MD. ANN. CODE art. 49B, § 15(g) (2002) (“any physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness” and “any mental impairment or deficiency”); MD. REGS. CODE tit. 14, § 03.02.03 (2002) (following ADA definition, and indicating that a condition must be “demonstrable by medically accepted clinical or laboratory diagnostic techniques”); MASS. ANN. LAWS ch. 151B, § 1(17) (2002); MICH. COMP. LAWS ANN. § 37.1103(d) (2002) (requiring “determinable physical or mental characteristic” that substantially limits one or more major life activity in the definition instead of impairment); CODE OF MISS. RULES 46-000-001, § 7.30 (Equal Employment Opportunity) (public employment only) (2003); MO. ANN. STAT. § 213.010(4) (2002); MONT. CODE ANN. § 49-2-101(19) (2001); NEB. REV. STAT. ANN. § 48-1102(9) (2002); NEV. REV. STAT. ANN. § 613.310(1) (2002); N.H. REV. STAT. ANN. § 354-A:2(IV) (2002); N.M. STAT. ANN. § 28-1-2(M) (2002); N.C. GEN. STAT. § 168A-3(7a) (2002); N.D. CENT. CODE § 14-02.4-02(4) (2001); OHIO REV. CODE ANN. § 4112.01(13) (2002); OKLA. STAT. tit. 25, § 1451(6) (2002); OR. REV. STAT. § 174.107(1) (2001); PA. STAT. ANN. tit. 43, § 954 p.1 (2002); S.C. CODE ANN. § 1-13-30(N) (2001); S.D. CODIFIED LAWS § 20-13-1(4) (2002); TENN. CODE ANN. § 4-21-102(9) (2001); TEX. LAB. CODE ANN. § 21.002(6) (2002); UTAH CODE ANN. § 34A-5-102(5) (2002) (“disability as defined and covered by the Americans with Disabilities Act”); VT. STAT. ANN. tit. 21, § 495d(5), (8) (2002) (“substantial limitation” must be related to employability); VA. CODE ANN. § 51.5-3 (2003) (omitting “regarded as” prong); W. VA. CODE ANN. § 5-11-3(m) (2002); WYO. STAT. ANN. § 27-9-105 (2002) (no definition); Rules of Practice and Procedure before the Wyoming Fair Employment Commission Concerning Handicap Discrimination Complaints filed pursuant to the Fair Employment Practices Act of 1965 as amended, Ch. V, § 3 (adopting federal definition), at [http://soswy.state.wy.us/cgi-win/sscgi\\_3.exe?4702](http://soswy.state.wy.us/cgi-win/sscgi_3.exe?4702); see also MINN. STAT. ANN. § 256.481 (2001); WIS. STAT. § 111.32 (2002) (for employment discrimination law, disability is mental or physical impairment “which makes achievement unusually difficult or limits the capacity,” or record or perception); WIS. STAT. § 106.50(g) (2001) (using ADA definition for housing discrimination law); cf. 75 Ill. L.C.S. 5/1-103 (no requirement of substantial limitation). *But see* ILL. ADMIN. CODE tit. 56, § 2500.20(b) (2002) (excluding from definition “conditions which are transitory and insubstantial,” and “conditions which are not significantly debilitating or disfiguring”).

<sup>77</sup> See, e.g., *Colmenares v. Braemar Country Club*, 107 Cal. Rptr. 2d 719, 720 (Cal. Ct. App. 2001) (holding that FEHA required substantial limitation of major life activity), *rev'd and remanded by* 63 P.3d 220 (Cal. 2003) (holding that FEHA required only that the employee show that the condition limited, not substantially limited, the employee’s ability to participate in life activities); *Wittkopf v. County of Los Angeles*, 109 Cal. Rptr. 2d 543, 549 (Cal. Ct. App. 2001) (holding that FEHA did not require substantial limitation of major life activity, and distinguishing California appellate court cases finding such a requirement as derived from misreading of California Supreme Court dicta), *review granted*, 33 P.3d 446 (Cal. 2001); *Swenson v. County of*

the worsening state of federal disability discrimination law, the California legislature amended its statute to make perfectly clear that an independent and broader definition of disability applies under state law, enacting the following definitions of mental and physical disability:

“Mental disability” includes . . . Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. . . . Having a record or history of a mental or psychological disorder or condition . . . which is known to the employer . . . . Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult. Being regarded or treated . . . as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability . . . .<sup>78</sup>

“Physical disability” includes . . . Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that . . . Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine [and] Limits a major life activity. . . . Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment . . . which is known to the employer . . . . Being regarded or treated . . . as having, or having had, any physical condition that makes achievement of a major life activity difficult. Being regarded or treated . . . as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability . . . .<sup>79</sup>

Notably, the revised provisions do not require an “impairment” or “disorder”; rather, a mental or physiological “condition” is sufficient.

Additionally, with the 1999 *Sutton* trilogy freshly decided—a dramatic demonstration of the often surprising results of statutory interpretation—the California legislature set forth explicit instructions on how these definitions were to be construed. These rules respond to a number of problems associated with the federal definition as interpreted, including the obstacles to claims brought under the “actual” disability prong created by the “mitigating measures” rule coupled with an extreme interpretation of the word “substantially,” as well as the barriers to failure-to-hire and other discrimination cases brought under the “regarded as” prong of disability caused by the “class of jobs” analysis. Thus, the legislature stated:

“Limits” shall be determined without regard to mitigating measures, such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.<sup>80</sup>

Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990.<sup>81</sup> Physical and

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Los Angeles, 89 Cal. Rptr. 2d 572 (Cal. Ct. App. 1999), *review dismissed*, 2001 Cal. LEXIS 428 (Jan. 24, 2001) (holding that broader definition of “mental disability” under FEHA is consistent with legislative intent to provide broader protection than ADA); *Jensen v. Wells Fargo Bank*, 85 Cal. App. 4th 245, 257 (2000) (“[T]he plain meaning of the language used in the FEHA’s definition of mental disability . . . require[s] us to follow the Legislature’s language and give a broader meaning to mental disability . . . .”); *Pensinger v. Bowsmith, Inc.*, 70 Cal. Rptr. 531, 538 (Cal. Ct. App. 1998) (“[T]here is no basis for us to impose a requirement that a mental disability limit a major life activity, when the Legislature saw fit not to do so. . . . Undoubtedly, the Legislature was aware of the definitions of mental and physical disability included in the ADA because it referred to it repeatedly in enacting the amendment to the FEHA. Undoubtedly, the Legislature also knew how to amend the FEHA to include a requirement that a mental disability effect must limit a major life activity, if it wished that result.” (citation omitted)); *Muller v. Auto. Club*, 71 Cal. Rptr. 2d 573, 578-79 (Cal. Ct. App. 1998) (holding that “mental disability” requires substantially limiting impairment, as legislature intended to adopt ADA definition).

<sup>78</sup> CAL. GOV’T CODE § 12926(i) (2003).

<sup>79</sup> *Id.* § 12926(k).

<sup>80</sup> *Id.* § 12926(k)(1)(B)(i); *see also id.* § 12926(i)(1)(A).

<sup>81</sup> *Id.* § 12926.1(c).



mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease.<sup>82</sup>

The Legislature has determined that the definitions of “physical disability” and “mental disability” under the law of this state require a “limitation” upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a “substantial limitation.” This distinction is intended to result in broader coverage under the law of this state than under that federal act.<sup>83</sup>

A mental or psychological disorder or condition [or a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss] limits a major life activity if it makes the achievement of the major life activity difficult.<sup>84</sup>

[U]nder the law of this state, “working” is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.<sup>85</sup>

Additionally, although the 2000 provisions were added prior to the Supreme Court’s opinion in *Williams*, the amendments include an explicit rejection of the strict construction advised by that opinion, and instead require broad interpretations of the terms “disability” and “major life activities”:

The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.<sup>86</sup>

“Major life activities” shall be broadly construed and shall include physical, mental, and social activities and working.<sup>87</sup>

The new provisions are plainly designed to shift the focus of trial courts away from coverage and toward the merits of particular cases.<sup>88</sup>

## 2. *Rhode Island*

In 2000, the Rhode Island legislature amended its ADA-modeled definition of disability to exclude consideration of mitigating measures:

“Disability” means any physical or mental impairment which substantially limits one or more major life activities, has a record of an impairment, or is regarded as having an impairment . . . ; provided, however, that whether a person has a disability shall be determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications, or auxiliary aids.<sup>89</sup>

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* § 12926(i)(1)(B), (k)(1)(B)(ii).

<sup>85</sup> *Id.* § 12926.1(c).

<sup>86</sup> *Id.* § 12926.1(b).

<sup>87</sup> *Id.* § 12926(i)(1)(C); *see also id.* § 12926(k)(1)(B)(iii).

<sup>88</sup> San Francisco’s civil rights ordinance similarly focuses upon the merits of discrimination on the basis of physical or mental traits, whether actual or perceived. Without restrictive definitions, San Francisco’s civil rights ordinance prohibits discrimination “because of an employee’s, independent contractor’s or an applicant for employment’s actual or perceived race, color, ancestry, national origin, place of birth, sex, age, religion, creed, disability, sexual orientation, gender identity, weight or height.” S.F. Police Code, art. 33, § 3301. Disability, along with weight and height, are simply included alongside the other protected statuses.

<sup>89</sup> 2000 R.I. Pub. Laws ch. 499 (codified at R.I. GEN. LAWS § 42-87-1 (2002)).

### 3. *Connecticut*

Connecticut's state law has long defined "physically disabled" as referring to "any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device."<sup>90</sup> Thus, while requiring an "impairment," the state law has never required a "limitation" or "substantial limitation" of a major life activity. Until recently, however, the state law did not include a prohibition on discrimination on the basis of mental disability. In 2001, the state legislature added this protection, and defined "mental disability" broadly—albeit medically—as follows:

"Mental disability" refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders."<sup>91</sup>

Despite its broad definitional provisions, Connecticut's state law may provide fewer substantive rights than does the ADA, as it does not clearly require that employers reasonably accommodate disabled employees.<sup>92</sup>

### 4. *New Jersey*

Unlike many states, New Jersey never amended its disability discrimination statute to conform to the ADA definition of disability. The New Jersey legislature first amended its civil rights statute to bar discrimination on the basis of "physical handicap" in 1972.<sup>93</sup> In 1978, the state expanded its protections to persons with "non-physical handicaps."<sup>94</sup> This definition remains virtually unchanged to the present day, and states:

"Handicapped" means suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Handicapped shall also mean suffering from AIDS or HIV infection.<sup>95</sup>

Thus, New Jersey's statute has never required a "limitation" or "substantial limitation" in a major life activity.

In 1982, the New Jersey Supreme Court endorsed a broad construction of this statute, ruling that the definition is not limited to "severe" disabilities:

We reject such an interpretation of the New Jersey statute. We need not limit this remedial legislation to the halt, the maimed or the blind. The law prohibits unlawful discrimination against those suffering from physical disability. As remedial legislation, the Law Against Discrimination

<sup>90</sup> CONN. GEN. STAT. § 46a-51(15) (2002).

<sup>91</sup> 2001 Conn. Pub. Acts No. 28 (codified at CONN. GEN. STAT. § 46a-51(20) (2002)).

<sup>92</sup> The Connecticut Supreme Court has expressly declined an opportunity to decide whether reasonable accommodation is implicitly required by Connecticut state law. *See Adriani v. Comm'n on Human Rights & Opportunities*, 596 A.2d 426, 436 n.12 (1991).

<sup>93</sup> 1972 N.J. Laws 114.

<sup>94</sup> 1978 N.J. Laws 137, § 3; *see also* *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 12-17 (2002) (reviewing history of statute).

<sup>95</sup> N.J. STAT. ANN. § 10:5-5(q) (2003).

should be construed “with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.”<sup>96</sup>

In 2002, the New Jersey Supreme Court reiterated *Andersen*’s central holding, stating:

The term “handicapped” in LAD [Law Against Discrimination] is not restricted to “severe” or “immutable” disabilities and has been interpreted as significantly broader than the analogous provision of the Americans with Disabilities Act (ADA).<sup>97</sup>

Indeed, the statute has been interpreted to cover a broad range of medical conditions. As a state appellate court recently stated:

Our courts have found a broad array of medical conditions to be handicaps under the LAD, including obesity, alcoholism, epilepsy, and drug addiction. By defining handicap broadly, the Legislature intends to focus scrutiny not on whether a particular employee’s limitations qualify for protection, but on the work-site actions taken in light of whatever physical or mental limitations the worker presents. Thus, the LAD seeks to ensure that distinctions between people are made on the basis of merit, rather than skin color, age, sex or gender, or any other measure that obscures a person’s individual humanity and worth.<sup>98</sup>

However, medical evidence—including an “accepted” medical diagnosis—is required.<sup>99</sup>

## 5. *New York*

New York’s antidiscrimination statute defines the term “disability” as follows:

(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment . . . .<sup>100</sup>

<sup>96</sup> *Andersen v. Exxon Co.*, 446 A.2d 486, 495 (N.J. 1982).

<sup>97</sup> *Viscik*, 173 N.J. at 16 (citing *Failla v. City of Passaic*, 146 F.3d 149, 154 (3d Cir. 1998)).

<sup>98</sup> *Tynan v. Vicinage 13*, 798 A.2d 648, 656 (N.J. Super. Ct. App. Div. 2002) (citations omitted) (holding that evidence of post-traumatic stress disorder, depression, irritable bowel syndrome, migraine headaches, hypertension, reflux esophagitis, and anxiety panic attacks is sufficient to create issue of fact); *see also Andersen*, 446 A.2d at 494 (spinal and lumbar disc ailments covered); *Viscik*, 173 N.J. at 17-18 (holding that woman with morbid obesity has physical handicap); *Harris v. Middlesex County Coll.*, 801 A.2d 397, 404-05 (N.J. Super. Ct. App. Div. 2002) (“We agree that a mastectomy qualifies as an ‘amputation,’ but the LAD’s protections are broader and may include a person with breast cancer even if she is treated with the less radical alternatives available to breast cancer patients. . . . The fact that she suffered no recurrence and that she had minimal limitations on her physical capabilities does not disqualify her from protection under the LAD.”); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 376, 380 (N.J. Super. Ct. App. Div. 2001), *certif. denied*, 785 A.2d 439 (2001) (holding that gender dysphoria qualifies as a “handicap”); *Blume v. Denville Township Bd. of Educ.*, 756 A.2d 1019, 1036 (N.J. Super. Ct. App. Div. 2000) (holding that plaintiff was “handicapped . . . as the result of the two mastectomies which she underwent as treatment for cancer”); *Gimello v. Agency Rent-A-Car-Systems, Inc.*, 594 A.2d 264, 277 (N.J. Super. Ct. App. Div. 1991) (holding that obese plaintiff satisfied definition); *Rogers v. Campbell Foundry, Co.*, 447 A.2d 589, 591 (N.J. Super. Ct. App. Div. 1982) (holding that a rejected applicant with nondisabling hilar shadow was covered under the LAD where the employer perceived condition as disabling); *Panettieri v. C.V. Hill Refrigeration*, 388 A.2d 630, 635 (N.J. Super. Ct. App. Div. 1978) (heart attack).

<sup>99</sup> *See, e.g., Clowes v. Terminix Int’l, Inc.*, 538 A.2d 794, 806 (N.J. 1988) (holding that plaintiff failed to present adequate medical proof of alcoholism: “Conspicuously absent from the record is any testimony from a treating or examining physician that Clowes had been diagnosed as an alcoholic. . . . Clowes’s admission that he was an alcoholic, along with his testimony regarding his drinking habits, is insufficient to prove that he suffered from this disease.”); *Enriquez*, 777 A.2d at 377 (holding that plaintiff is protected if she can demonstrate she was diagnosed with gender dysphoria using accepted techniques); *Heitzman v. Monmouth County*, 728 A.2d 297, 301 (N.J. Super. Ct. App. Div. 1999) (“Plaintiff failed to present any medical evidence that hypersensitivity to second-hand smoke is a recognized medical condition or that he suffers from a such [sic] a condition.”).

<sup>100</sup> N.Y. EXEC. LAW § 292(21) (2002). New York City’s antidiscrimination ordinance includes a similarly broad definition of disability: “The term ‘disability’ means any physical, medical, mental or psychological impairment, or a history or record of such impairment.” N.Y.C. ADMIN. CODE § 8-102 (2000).

Thus, while requiring an “impairment,” New York has never required a “limitation” or “substantial limitation” of a major life activity.<sup>101</sup> In *State Division of Human Rights v. Xerox Corp.*, the New York Court of Appeals upheld the trial court’s finding that obesity was a handicap within that state’s antidiscrimination statute.<sup>102</sup> The state’s highest court rejected the employer’s contention that the law covered only “immutable disabilities,” and found that “the statute protects all persons with disabilities and not just those with hopeless conditions.”<sup>103</sup> The court also found that the complainant’s obesity was a “medical condition” that was “clinically diagnosed” in accordance with the statutory definition.<sup>104</sup> Again, as with the New Jersey statute, medical evidence and a medical diagnosis is required.<sup>105</sup>

## 6. *Washington*

Washington State’s Law Against Discrimination prohibits discrimination on the basis of a “sensory, mental, or physical disability,” but provides no definition for this phrase.<sup>106</sup> However, the state’s Human Rights Commission issued regulations providing the following guidance:

“The presence of a sensory, mental, or physical disability” includes, but is not limited to, circumstances where a sensory, mental, or physical condition: (a) Is medically cognizable or diagnosable; (b) Exists as a record or history; (c) Is perceived to exist whether or not it exists in fact. A condition is a “sensory, mental, or physical disability” if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question, or was denied equal pay for equal work, or was discriminated against in other terms and conditions of employment, or was denied equal treatment in other areas covered by the statutes. In other words, for enforcement purposes a person will be considered to be disabled by a sensory, mental, or physical condition if he or she is discriminated against because of the condition and the condition is abnormal.<sup>107</sup>

Thus, echoing the social model of disability, Washington’s regulation finds “disability” where discrimination occurs on the basis of some abnormal physical or mental condition. Noting that the “Americans with Disability Act of 1990’s (ADA) definition of ‘disability’ is narrower” than the state law definition, the Washington Supreme Court has held that the state law is not limited to permanent disabilities, and thus requires employers to reasonably accommodate temporary disabilities.<sup>108</sup>

## 7. *Minnesota*

In 1989, the Minnesota legislature amended its federally modeled definition of disability in its antidiscrimination statute, changing the requirement of a “substantial limitation” of a major life activity to a “material limitation.”<sup>109</sup> This change “made the state law definition different from and less stringent

<sup>101</sup> Prior to 1998, New York’s disability discrimination law did not require employers to reasonably accommodate their disabled employees. The Legislature amended the statute to require reasonable accommodation in 1997. See 1997 N.Y. Laws, ch. 269, §§ 1, 5 (effective Jan 1, 1998).

<sup>102</sup> *State Div. of Human Rights v. Xerox Corp.*, 480 N.E.2d 695, 698 (N.Y. 1985).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 697-98; see also *McEniry v. Landi*, 644 N.E.2d 1019, 1021-22 (N.Y. 1994) (holding that alcoholism is a covered disability).

<sup>105</sup> A recent decision by the highest court ruled that experienced flight attendants excluded from employment pursuant to Delta Air Lines’ weight requirements could not bring claims under a perceived disability theory because they did not have (and, presumably, were not perceived to have) a medical impairment. *Delta Air Lines v. N.Y. State Div. of Human Rights*, 689 N.E.2d 898, 901-02 (N.Y. 1997) (“Appellants failed to establish that they are medically impaired members of a protected class defined under the New York Human Rights Law. Nothing in the record supports the proposition that appellants suffer from a legally defined or cognizable ‘medical impairment’ which restricts their ‘normal bodily function.’ . . . Appellants did not proffer evidence or make a record establishing that they are medically incapable of meeting Delta’s weight requirements due to some cognizable medical condition.”). The court in *Delta* did not specifically discuss the standards for a “perceived” disability.

<sup>106</sup> WASH. REV. CODE § 49.60.180 (2003).

<sup>107</sup> WASH. ADMIN. CODE § 162-22-020(2) (2002).

<sup>108</sup> *Pulcino v. Fed. Express Corp.*, 9 P.3d 787, 791 & n.3 (Wash. 2000) (plaintiff with lumbar strain and a broken foot that restricted her to light duty satisfied “disability” element of claim sufficiently to survive summary judgment).

<sup>109</sup> *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 543 & n.5 (Minn. 2001), citing 1989 Minn. Laws 1099, 1100, ch. 280 § 1; MINN. STAT. ANN. § 363.03 (2001).

than the federal definition of a disability.”<sup>110</sup> In 2001, rejecting a series of cases decided under the ADA dismissing claims brought by persons with fibromyalgia, the Minnesota Supreme Court ruled that a plaintiff created a triable issue of fact as to whether she was materially limited in the major life activity of working, and thus “disabled” under state law, where she presented evidence that her fibromyalgia caused headaches, sleeplessness, fatigue, chronic pain, a depression-like state, and difficulty concentrating and remembering.<sup>111</sup>

### 8. *Massachusetts*

Embracing virtually every argument advanced by disability rights advocates before the U.S. Supreme Court in *Sutton*, the Massachusetts Supreme Judicial Court ruled that “mitigating measures” should not be considered in determining whether an individual has a “handicap” under Massachusetts antidiscrimination law.<sup>112</sup> According to the *Dahill* court, the public policy underlying the antidiscrimination statute supported its interpretation that mitigating measures should be excluded. By contrast, embracing the *Sutton* standard would “exclude[] from the statute’s protection numerous persons who may mitigate serious physical or mental impairments to some degree, but who may nevertheless need reasonable accommodations to fulfill the essential functions of a job.”<sup>113</sup>

### 9. *West Virginia*

The West Virginia Supreme Court rejected another bulwark of the federal disability definition jurisprudence—the principle that a person excluded from employment on the basis of a physical or mental impairment cannot proceed on a “regarded as” theory if he cannot show a perceived limitation in a broad class of jobs, but can “only” show that the employer regarded him as limited in one job.<sup>114</sup> As that court noted, “[t]he ‘exclusion-from-only-one-job’ rationale . . . has been relied upon in some federal cases to deny threshold protected status as a matter of law to a range of persons with fairly substantial impairments.”<sup>115</sup> In rejecting this line of federal case law, the court noted that the West Virginia Human Rights Act “represents an independent approach to the law of disability discrimination that is not mechanically tied to federal disability discrimination jurisprudence,”<sup>116</sup> and stated:

[I]t should be remembered that if a person is prohibited from establishing threshold “protected status” as a person with a disability within the meaning of the law, an employer may inflict any sort of (otherwise legal) discriminatory conduct or acts on the person—no matter how unfair, arbitrary, stereotyped, bigoted, or unrelated to business necessity that those acts or conditions may be—and the person will have no standing to complain of or remedy the discrimination. And it should also be remembered that establishing the “protected person” status . . . in no way guarantees that a claim of disability discrimination will succeed. All other elements of a claim . . . must be shown before a person is entitled to any relief.<sup>117</sup>

## C. INTERNATIONAL MODELS

Just as state law approaches to disability civil rights laws vary, international approaches are even more diverse. Some countries emphasize inclusiveness and comprehensiveness, while others rely heavily on strict medical assessments. Many countries define disability discrimination in terms of the social model, emphasizing the intersection between the individual and the environment, where discrimination

<sup>110</sup> *Hoover*, 632 N.W.2d at 543 n.5.

<sup>111</sup> *Id.* at 543-44; *see also* *Sigurdson v. Carl Bolander & Sons*, 532 N.W.2d 225, 228 (Minn. 1995) (describing “materially limits” standard as “different from the applicable federal standard” and “less stringent,” but finding that plaintiff with insulin-dependent diabetes not “disabled” under state law).

<sup>112</sup> *Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956, 962-64 (Mass. 2001).

<sup>113</sup> *Id.* at 240 & n.10 (noting need of employees with controlled diabetes, epilepsy, or heart disease to take occasional time off for doctor’s appointments, to take medication, or to receive testing or therapy).

<sup>114</sup> *Stone v. St. Joseph’s Hosp.*, 538 S.E.2d 389 (W. Va. 2000).

<sup>115</sup> *Id.* at 401 & n.18 (citing examples collected in Burgdorf, Jr., *supra* note 26).

<sup>116</sup> *Id.* at 404.

<sup>117</sup> *Id.* at 402.

derives from the existence of barriers to full participation. Other countries focus on the medical model, assessing the extent of functional limitations experienced by the individual, with little consideration of how those limitations interact with the individual's environment. In the first model, the evidence that is most relevant would measure how a person's environment has artificially limited that person's opportunities to participate fully in the public arena, such as employment, public accommodations, and government programs and services. In the second model, the person alleging discrimination typically must begin with medical evidence of the existence of an impairment and documentation of how that impairment affects functioning.

### 1. *Zimbabwe*

One of the most intriguing international disability civil rights laws was enacted by Zimbabwe in 1992. Zimbabwe's Disabled Persons Act defines a disabled person as "a person with a physical, mental or sensory disability . . . which gives rise to physical, cultural or social barriers inhibiting him from participating at an equal level with other members of society in activities, undertakings or fields of employment that are open to other members of society."<sup>118</sup> This definition is somewhat circular, as it uses the term "disability" in the context of a definition of a "disabled" person. However, read in context, the term "disability" in the Zimbabwe law could be replaced with the word "impairment," with impairment defined along the lines of our proposed definition. This law does not emphasize the extent of a person's impairment, but instead looks at how that impairment "gives rise to" or results in "barriers" that inhibit "equal" participation as compared with society at large.

### 2. *Venezuela*

Similarly, Venezuela uses a social model approach in its 1994 Law of Integration of Persons with Disabilities. The Venezuela law defines persons with disabilities as "those whose opportunities for social integration are diminished due to a physical, sensory or intellectual impediment of differing levels or degrees that limit his or her ability to carry out any activity."<sup>119</sup> Like the Zimbabwe law, the Venezuela law focuses on how opportunities for social integration are limited by the person's disability, and does not emphasize the need to show a particular level of functional impairment for purposes of qualifying for protection under the statute.

### 3. *Hungary*

In 1998, Hungary passed its "Equalization Opportunity Law," which represents a bit of a hybrid approach, hinting at a social model but incorporating strong medical restrictions on who is protected. Section 4 of that law defines a "person living with disability" as "anyone who is to a significant extent or entirely not in possession of sensory—particularly sight, hearing—locomotor or intellectual functions, or who is substantially restricted in communication and is thereby placed at a permanent disadvantage regarding active participation in the life of society."<sup>120</sup> Although the law references a "disadvantage" with regard to participating "active[ly]" in "society," the only people who get to make such a showing are people who are "significant[ly]" "restricted" or impaired in their functioning.<sup>121</sup>

### 4. *World Health Organization Approach*

The World Health Organization published an International Classification of Impairments, Disabilities and Handicaps (ICIDH) in 1980.<sup>122</sup> This document has had a tangible impact on disability

<sup>118</sup> Disabled Persons Act, 1992 (Zimb.), available at <http://www.dredf.org/symposium/zimb1.html>.

<sup>119</sup> Ley para la integración de las personas incapacidades [Law of Integration of Persons With Disabilities] (ratified Aug. 15, 1993) (Venez.), available at <http://www.dredf.org/symposium/venez.html>.

<sup>120</sup> Equalization Opportunity Law (Act No. XXVI of 1998) (Hung.), available in English translation at <http://www.dredf.org/symposium/hungary2.html>.

<sup>121</sup> *Id.*

<sup>122</sup> WORLD HEALTH ORG., INTERNATIONAL CLASSIFICATION OF IMPAIRMENTS, DISABILITIES AND HANDICAPS: A MANUAL OF CLASSIFICATION RELATING TO THE CONSEQUENCES OF DISEASE (1980).

nondiscrimination laws in many countries. The ICIDH provides a conceptual framework for disability with three parts: First, an “impairment” is “any loss or abnormality of psychological, physiological or anatomical structure or function.”<sup>123</sup> Second, a “disability” is “any restriction or lack (resulting from an impairment) of an ability to perform an activity in the manner or within the range considered normal for a human being.”<sup>124</sup> Finally, “handicap” is defined as “a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the fulfillment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual.”<sup>125</sup> In this approach, the concept of “impairment” relies upon a medical model analysis (the WHO provides a list of health conditions in its International Classification of Diseases (ICD-10)), “disability” requires a functional analysis, and the concept of “handicap” incorporates a social model of disability.

In 2001, a new version of the ICIDH was published by the World Health Organization. The document, referred to as the ICIDH-2, is officially titled the “International Classification of Functioning and Disability,” or ICF.<sup>126</sup> Under this new system, which is intended for use in a wide variety of contexts, including rehabilitation, education, statistics, and policy, the three concepts of impairment, disability and handicap have been replaced by two concepts—(1) “body functions and structures” (replacing “impairment”); and (2) “activities and participation” (replacing “handicap”)—which are thought to extend the prior categories to permit the description of positive as well as negative experiences. The prior concept of “disability,” or “functional” abilities or inabilities, is now conceived of as an umbrella concept applicable to either the body perspective, or to the individual and society perspective. The new system explicitly contemplates an assessment of “environmental factors,” including the physical environment, the social environment, and the impact of attitudes, and of “personal factors,” which correspond to the personality and characteristic attributes of an individual.<sup>127</sup>

Although the ICIDH-2 is too complicated and nuanced to be used in an American law prohibiting disability discrimination—the document has thirty-nine chapters, and in English spans 299 pages—it does reflect evolving global views on the nature of disability and the complex interaction between a person, his or her body, and his or her environment that can result in a classification of “disability.” Although many countries still use disability definitions that are deeply rooted in the medical model and emphasize the extent of impaired functioning, there is a growing world consciousness that functional limitations are frequently the result of inaccessible environments and lack of access to assistive technology and other long-term services and supports, rather than attributable to medical diagnosis and disease pathology.

#### IV. REASONABLE ACCOMMODATION AS OBSTACLE?

Disability advocates frequently note that *everyone* is protected by Title VII from discrimination on the basis of race, ethnicity, sex, national origin, or sex. Whether man or woman, Catholic or atheist, Asian or black, anyone who alleges that they have experienced discrimination on one of these bases may bring a claim on the merits. Why, we ask, cannot federal disability discrimination law similarly provide broad protections? In response, opponents of expanding the definition of disability argue that the ADA is different: Rather than simply prohibiting disparate treatment and disparate impact, the ADA includes the affirmative mandate of providing reasonable accommodation. Without responding on a philosophical level to whether reasonable accommodation is “different,” we note that the statute already includes language that functions to restrict the scope of the accommodation mandate to persons with disability-related limitations. The act defines discrimination as including “not making reasonable accommodations to the *known physical or mental limitations* of an otherwise qualified individual.”<sup>128</sup> If necessary, this

<sup>123</sup> *Id.* at 14.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See ICIDH-2: INTERNATIONAL CLASSIFICATION OF FUNCTIONING AND DISABILITY, available at <http://www.deakin.edu.au/tedca/ncet/information/resources/icidh.html> (last visited Apr. 1, 2003).

<sup>127</sup> *Id.*

<sup>128</sup> 42 U.S.C. § 12112(b)(5)(A) (emphasis added).

phrase could be defined further in order to respond to the incorrect perception that our proposal endorses an unprincipled and open-ended accommodation mandate.<sup>129</sup> We further note that the broad definitions of disability contained in the laws of eight states—including laws requiring nondiscrimination and reasonable accommodations in employment within our nation’s two largest state economies, California and New York (first and second largest, respectively)<sup>130</sup>—belie the proposition that reforms to the federal definition are legally or socially unwieldy.

## V. CONCLUSION

Discrimination on the basis of disability is still a relatively new and evolving legal concept. Drawing from federal, state, and international approaches to defining a class of people that should receive protections against this kind of discrimination, and responding directly to what we see as a misguided effort by the United States Supreme Court to rein in the broad definition of disability in the ADA, we have opted for inclusive language describing what kinds of unfair treatment would qualify as discrimination “on the basis of disability.” We recognize that our proposed new formulation may not be easy to sell politically. Many employers have argued successfully to elected officials and courts that disability discrimination laws should only protect people with significant impairments that are uncorrected or uncorrectable. However, it is worth noting that the broader approaches adopted by a number of states have not led to an avalanche of frivolous claims or onerous hardships for employers in those states.

Familiar with the effects of the legislative and judicial creation of boundaries around who can and cannot use a disability nondiscrimination law, we fail to understand why prohibition of discrimination on the basis of disability should operate differently from prohibition of discrimination on the basis of race, national origin, sex, or religion. In all of these cases, Title VII provides federal civil rights protections regardless of the specifics of one’s particular profile. Yet, under the ADA as it currently stands, in order to come under the law’s protections, a person must establish that he or she is far enough outside the range of “normal” to deserve civil rights protections. If a person’s diagnosis produces discriminatory behavior, but the person has managed her condition successfully with medication or other strategies, the person is likely to lose when she challenges the discrimination under the ADA. This is bad policy. If disability is a normal or natural part of the human experience, and we believe that it is, then why not extend the protections of the ADA to everyone whose physical or mental impairment or health condition might give rise to unfair treatment? Under our proposed formulation, everyone is protected against discrimination on the basis of disability, just as everyone is protected on the basis of gender or race.

Some might argue that our proposal will detract from or somehow dilute the attention that should be paid to discrimination against individuals with the most significant impairments or disabilities. We disagree. Whereas there are good reasons to carefully circumscribe who may retire because of their disability and who may use specially designated parking because of their mobility impairment, there is no good reason to exclude people from the protections of the ADA. Fair treatment and barrier removal are good things that do not need to be doled out only to the “truly needy.” When we remove barriers to full participation in the name of disabled people, everyone benefits. Our proposed formulation of the ADA would simply codify the right policy, and enable victims of discrimination to focus on how they were treated, not how worthy they are of having civil rights protections.

<sup>129</sup> Additionally, it is generally accepted that an individual seeking accommodation must demonstrate, with medical documentation if requested, that he or she needs accommodation because of his or her disability. *See, e.g.*, EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, No. 915.002, at 12-17 (questions 6-8). It is further accepted that while the individual is entitled to an effective accommodation, he or she is not entitled to the “best” accommodation. 29 C.F.R. pt. 1630, app. § 1630.9 (2003). Finally, employers have always had, and continue to have, the “undue burden” defense to accommodation requests. 42 U.S.C. §§ 12112(b)(5)(A), 12111(10) (2003).

<sup>130</sup> *See* U.S. CENSUS BUREAU, STATE RANKINGS, GROSS STATE PRODUCT, available at <http://www.census.gov/statab/ranks/rank13.txt>.



## REDEFINING "DISABILITY" DISCRIMINATION

Redrafting the definition of disability used in our federal civil rights laws is critical to advancing equality and fair treatment, in our schools, workplaces, government offices, and places of public accommodation. But this effort is only one of many key components of the disability rights agenda. With staggeringly low employment rates among people with disabilities, the United States must redouble its efforts to advance the needs and interests of the entire community, from those with non-traditional disabilities, to those with the most severe disabilities, and everyone in between. Of particular note are efforts to advance the integration and employment of persons with significant disabilities, including Social Security reform, vocational rehabilitation reform, Medicaid and Medicare reform, private insurance reform, supported employment, wage supports, and investments in accessible, affordable housing and transportation. We hope that our proposal to refashion the ADA to broadly protect all Americans from disability discrimination, in the tradition of the Civil Rights Act of 1964, is understood as part of a much larger agenda that will help to make real the ADA's promise of full participation and integration. An effective federal nondiscrimination mandate can provide a floor, or solid foundation, of fairness. But we would never contend that such a floor is enough for people with disabilities, not when so many need education, transportation, housing, assistive technology, job training, health care, personal assistance, and other long-term community supports and services. By addressing serious problems in how the law has developed in defining the protected class, we will restore a solid foundation on which we can build inclusive policies. Once the floor of equal opportunity is reestablished, however, a host of reforms in our largest public programs must move forward for the ADA's goals to be realized.

