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# CANCER AND THE ADA: RETHINKING DISABILITY

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## I. INTRODUCTION

When Phyllis Ellison learned that she had breast cancer, she immediately had a lumpectomy.<sup>1</sup> She then received radiation treatment daily for about six weeks. During this period she worked a modified work schedule, going in late and working through lunch and breaks to make up the time. She managed not to miss any days of work. However, a few months later, she received a lower than usual evaluation, was told that her job was eliminated, and was informed that she was about to be demoted. Ms. Ellison filed suit, alleging, among other things, that she had been discriminated against because of a disability. The Fifth Circuit Court of Appeals held that Ms. Ellison's breast cancer was not a disability within the meaning of the Americans with Disabilities Act ("Act" or "ADA").<sup>2</sup> Ms. Ellison is not alone: Numerous other courts have held that cancer survivors<sup>3</sup> are not disabled within the meaning of the Act.<sup>4</sup>

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1. A lumpectomy is surgery to remove the lump along with a small border of surrounding tissue. SUSAN M. LOVE, M.D., DR. SUSAN LOVE'S BREAST BOOK 607 (2d ed. 1995).

2. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996). *See* 42 U.S.C. § 12102(2) (1994). Prior to the passage of the Americans with Disabilities Act, discrimination against people with disabilities was prohibited, if at all, by either state statutes or the Vocational Rehabilitation Act of 1973, which had limited application and primarily covered federal employees. 29 U.S.C. § 795 (1994).

3. I use the term cancer survivor although not all people who have had breast cancer use this term. One former cancer patient believes that using the term "survivor" indicates that the person has defined herself in terms of the breast cancer. ELAINE RATNER, THE FEISTY WOMAN'S BREAST CANCER BOOK 221 (1999).

4. *See, e.g.*, *Gordon v. E.L. Hamm & Assocs.*, 100 F.3d 907 (11th Cir. 1996) (holding lymphoma is not a disability); *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351 (9th Cir. 1996) (holding cancer-related psychological impairment is not a disability); *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347 (S.D. Fla. 1999) (holding breast cancer is not a disability); *Barger v. Owens-*

What happened to Phyllis Ellison is surprising for at least three reasons. First, some people are amazed to hear that cancer survivors face employment discrimination. Other people believe that because cancer is life threatening,<sup>5</sup> it must be a disability. Third, many believe that Congress intended to prohibit discrimination against cancer survivors when it enacted the ADA.<sup>6</sup> Thus, the decision that a breast cancer survivor is not disabled under the definition of the ADA is troubling.

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Brockway Glass Container, Inc., 1999 WL 51797 (N.D. Cal. Feb. 1, 1999) (holding cancer of the mandible is not a disability); Madjlessi v. Macy's West, Inc., 993 F. Supp. 736 (N.D. Cal. 1997) (holding breast cancer is not a disability); Michios v. Rooms To Go Miami, Corp., 1997 WL 813004 (S.D. Fla. Nov. 13, 1997) (holding cancerous tumor is not a disability); Cook v. Robert G. Waters, Inc., 980 F. Supp. 1463 (M.D. Fla. 1997) (holding brain tumor is not a disability); Nave v. Wooldridge Constr., Inc., 1997 WL 379174 (E.D. Pa. June 30, 1997) (holding Hodgkin's disease is not a disability); E.E.O.C. v. R.J. Gallagher Co., 959 F. Supp. 405 (S.D. Tex. 1997) (holding leukemia is not a disability), *aff'd in part, vacated in part*, 181 F.3d 645 (5th Cir. 1999); Farmer v. Nat'l City Corp., 1996 WL 887478 (S.D. Ohio Apr. 5, 1996) (holding prostate cancer is not a disability). *See also* Bruce Guthrie, Gabrielle Saveri & Chris Coats, *Kayoed By Mary Kay?*, PEOPLE MAG., Aug. 10, 1998, at 129 (discussing sales representative Claudine Woolf's claim that Mary Kay Cosmetics fired her after her diagnosis of breast cancer). *But see* Wilson v. Md.-Nat'l Capital Park & Planning Comm'n, 178 F.3d 1289 (4th Cir. 1999) (accepting district court assumption that bladder cancer is a disability); Berk v. Bates Adver. USA, Inc., 25 F. Supp. 2d 265 (S.D.N.Y. 1998) (holding breast cancer is a disability); Olbrot v. Denny's, Inc., 1998 WL 525174 (N.D. Ill. Aug. 19, 1998) (holding issue of whether breast cancer is a disability is a question of fact); Bizelli v. Amchem, 981 F. Supp. 1254 (E.D. Mo. 1997) (holding testicular cancer is a disability); Mark v. Burke Rehab. Hosp., 1997 WL 189124 (S.D.N.Y. Apr. 17, 1997) (holding lymphoma is a disability); Wojciechowski v. Emergency Technical Servs. Corp., 1997 WL 164004 (N.D. Ill. Mar. 27, 1997) (holding breast cancer in deceased plaintiff was a disability); Milton v. Bob Maddox Chrysler Plymouth, Inc., 868 F. Supp. 320 (S.D. Ga. 1994) (finding summary judgment inappropriate in case involving bronchial cancer); Braverman v. Penobscot Shoe Co., 859 F. Supp. 596 (D. Me. 1994) (finding summary judgment inappropriate in case alleging prostate cancer as a disability). For an interesting analysis of many cancer-based discrimination cases, see Barbara Hoffman, *Between a Disability and a Hard Place: The Cancer Survivors' Catch-22 of Proving Disability Status Under the Americans with Disabilities Act*, 59 MD. L. REV. 352 (2000).

5. The American Cancer Society estimated that 43,300 women would die from breast cancer in 1999 and that 175,000 new cases of breast cancer would be diagnosed that year. Am. Cancer Soc'y, *Breast Cancer Facts & Figures*, at <http://www.cancer.org/statistics/99bcff.who.html> (last visited Jan. 24, 2001) [hereinafter *Facts & Figures*]. Only lung cancer surpasses breast cancer as the leading cause of cancer-related death for women. *Id.*

6. *See* Poindexter v. Atchison, Topeka & Santa Fe Ry. Co., 168 F.3d 1228, 1231 (10th Cir. 1999) ("[T]he commentary accompanying the Rehabilitation Act regulations 'contains a representative list of disorders and conditions constituting physical impairments, including 'such diseases as . . . cancer . . .'" (quoting 42 Fed. Reg. 22,685 (1977), reprinted in 45 C.F.R. pt. 84, app. A at 334 (1997))); H.R. REP. NO. 101-485, pt. 2, at 51-54 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 332-35; Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the 'Disability' Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1434 (1999) (citing legislative history). *See also* Susan M. Gibson, Note, *The Americans with Disabilities Act Protects Individuals with a History of Cancer From Employment Discrimination: Myth or Reality?*, 16 HOFSTRA LAB. & EMP. L.J. 167 (1998) (discussing congressional intent to include cancer within the coverage of the ADA).

On the other hand, some would agree with the Fifth Circuit's decision that Ms. Ellison was not disabled. The court's decision recognizes that a diagnosis of breast cancer is not synonymous with either death or disability. Some cancer survivors might be disabled, but not all are. Others approve of the decision as a sensible brake on a potentially limitless extension of statutory rights against employers.

While discrimination against people with disabilities<sup>7</sup> is widespread,<sup>8</sup> no one knows exactly how many cancer survivors are discriminated against.<sup>9</sup> Conservative estimates are that about 25% of all cancer survivors experience some form of discrimination in the workplace.<sup>10</sup> Studies conducted between 1976 and 1982 indicate that more than half of white-collar cancer survivors and more than 80% of blue-collar workers experienced on-the-job discrimination because of their cancer.<sup>11</sup> Other studies estimate that 90% of cancer survivors will suffer discrimination in the workplace.<sup>12</sup> The forms of discrimination include outright dismissal,

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7. I will use the term "people with disabilities." For a discussion of naming, see PAUL C. HIGGINS, MAKING DISABILITY, EXPLORING THE SOCIAL TRANSFORMATION OF HUMAN VARIATION 20–21 (1992); SIMI LINTON, CLAIMING DISABILITY, KNOWLEDGE AND IDENTITY 9–13 (1990). See also Emma Stone, *Modern Slogan, Ancient Script: Impairment and Disability in the Chinese Language*, in DISABILITY DISCOURSE 136 (Mairian Corker & Sally French eds., 1999) (discussing different Chinese terms denoting disability).

8. The preamble to the ADA indicates that prior to its enactment there was widespread discrimination against the forty-three million disabled Americans. 42 U.S.C. § 12101(a)(1) (1994).

9. One study indicates that 18% of workers believe that while undergoing treatment for cancer, cancer survivors are unable to work and that 27% of workers believe that they will have to pick up the extra work of the cancer survivor. Katherine Arnold, *Americans With Disabilities Act: Do Cancer Patients Qualify as Disabled?*, 91 J. NAT'L CANCER INST. 822, 824 (1999). This study reveals that, in contrast to the perception of their coworkers, 81% of cancer survivors want to work and say that working during treatment was beneficial. *Id.* at 825. This same survey indicates that cancer survivors are discharged or laid off five times more often than other employees. *Id.* See also Barbara Hoffman, *Is the Americans with Disabilities Act Protecting Cancer Survivors from Employment Discrimination?*, CANCER PRAC., Mar./Apr. 1997, at 119; Susan Mellette & Patricia Franco, *Psychosocial Barriers to Employment of the Cancer Survivor*, 5 J. PSYCHOSOCIAL ONCOLOGY 97 (1987); Mark Rothstein, Kathryn Kennedy, Karen Ritchie & Kirsten Pyle, *Are Cancer Patients Subject to Employment Discrimination?*, 9 ONCOLOGY 1303 (1995).

10. SUSAN NESSIM & JUDITH ELLIS, *CANCERVIVE: THE CHALLENGE OF LIFE AFTER CANCER* 151 (1991).

11. *Id.* This figure does not reflect the fact that not all victims of discrimination actually file a claim of discrimination. Cancer survivors may not file claims because they do not know there is a legal remedy; they may not feel well enough to file a claim; they may be more concerned with staying alive than with fighting discrimination; they may be more concerned about quality of life than redress; or, by the time treatment is over and they are well enough to address their employment situation, the statute of limitations may have run.

12. Katherine J. Streicher, Note, *Cancer-Based Employment Discrimination: Whether the Proposed Amendment to Title VII Will Provide an Effective Anti-Discrimination Remedy*, 62 IND. L.J. 827, 828 (1987).

demotion, failure to promote, unequal compensation, and ostracism by coworkers.<sup>13</sup>

There are numerous reasons why cancer survivors may become the victims of discrimination. One theory is that employers treat cancer survivors differently because they assume that people with cancer are going to die.<sup>14</sup> While cancer can be fatal, however, it is not necessarily so. Employers may believe that cancer survivors will not have long-term careers, but cancer is responsible for only about 20% of deaths in the United States; heart disease kills twice as many people.<sup>15</sup> Others theorize that employers do not want to hire cancer survivors because they believe that they will be unproductive.<sup>16</sup> Studies reveal, however, that cancer survivors are no less productive than those who have never experienced cancer are.<sup>17</sup> Third, there remains a fear that despite all scientific evidence to the contrary, cancer is somehow contagious.<sup>18</sup> It is unclear why people may still believe that cancer is “catching” other than the fact that it is difficult to predict who will develop cancer and that incidences of cancer sometimes cluster in certain geographical areas.<sup>19</sup> It may also be that cancer survivors are avoided not because of actual fears of contagion, but because cancer makes other people uncomfortable. Finally, there is a fear that insurance and other medical costs will rise for the employer. While this fear may be legitimate in some cases, it certainly does not account for all of the discrimination against people who have been diagnosed with cancer. Not all cancer survivors cost their employers more money than their counterparts who have never had cancer. Moreover, many adverse employment decisions are made by mid- or low-level management without reference to the bottom line.

This Article examines employment discrimination against cancer survivors and considers whether cancer should be considered a disability

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13. See *Barger v. Owens-Brockway Glass Container, Inc.*, 1999 WL 51797, at \*1, \*4 (N.D. Cal. Feb. 1, 1999) (discussing plaintiff’s argument that jokes by a coworker created a hostile work environment under the ADA); Streicher, *supra* note 12, at 828.

14. See Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMP. L.Q. 1, 4 (1986).

15. NESSIM & ELLIS, *supra* note 10, at 155.

16. *Id.*; Gibson, *supra* note 6, at 173–75.

17. Hoffman, *supra* note 14, at 4 n.16 (citing studies by the Metropolitan Life Insurance Company and Bell Telephone System).

18. NESSIM & ELLIS, *supra* note 10, at 156; Gibson, *supra* note 6, at 173–75.

19. See, e.g., Susan S. Devesa, Dan J. Grauman, William J. Blot & Joseph F. Fraumeni, Jr., *Cancer Surveillance Series: Changing Geographic Patterns of Lung Cancer Mortality in the United States, 1950 Through 1994*, 91 J. NAT’L CANCER INST. 1040 (1999); Susan Sachs, *Public Clamor Puts Focus on ‘Clusters’ in Cancer Research*, N.Y. TIMES, Sept. 21, 1998, at A1.

under the ADA. Underlying this question is the broader question of what constitutes a disability. Using cancer as an example highlights the difficulties with our current approach to defining a disability under the ADA.<sup>20</sup> This Article focuses on breast cancer, because it presents some unique issues. Breast cancer survivors may be particularly susceptible to discrimination because 99% of people with breast cancer are women,<sup>21</sup> and therefore, less likely to be in powerful positions. Moreover, because the cancer involves the breast, “survivors face discrimination that has a sexual component that is not necessarily faced by lung cancer survivors.”<sup>22</sup> Breast cancer may also make it more difficult for women to exist in a culture that glorifies an attractive body but ignores or disdains a body that is viewed as disfigured.<sup>23</sup> Moreover, no one questions the seriousness of breast cancer. Women fear getting breast cancer and with good reason—one in eight women will be diagnosed with breast cancer<sup>24</sup>—and it is estimated that 46,000 women will die each year from breast cancer.<sup>25</sup> Breast cancer accounts for one out of three diagnoses of cancer in women.<sup>26</sup> A common misconception is that it is a disease contracted only by older women who are no longer of working age. However, because about 20% of the cases diagnosed are in women under age fifty,<sup>27</sup> breast cancer does affect women

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20. This Article could have been written about almost any life-threatening illness, and the arguments may apply to other serious conditions such as heart disease. It should be noted that disease is not the same as disability. A person who is blind may be disabled but may need no medical treatment; he or she is not ill. A person with a disease may require medical intervention and may or may not be disabled. ANITA SILVERS, DAVID WASSERMAN & MARY B. MAHOLWALD, *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 77–78 (1998).

21. Christine Dinsmore, *First the Knife, Then the Axe*, Ms., June/July 1999, at 21, 21. Male breast cancer accounts for no more than one percent of all breast cancers. Beryl Sandler, M.D., Claire Carman, M.D. & Roger R. Perry, M.D., *Cancer of the Male Breast*, 60 AM. SURGEON 816, 816 (1994). Thus, when I talk about hypothetical breast cancer survivors, I will use feminine pronouns.

22. Dinsmore, *supra* note 21, at 21. Other health conditions experienced predominantly by women may present similar issues. See SILVERS ET AL., *supra* note 20, at 19–20.

23. See Anita Silvers, *Reprising Women's Disability: Feminist Identity Strategy and Disability Rights*, 13 BERK. WOMEN'S L.J. 81, 97 (1998).

24. LESLIE LAURENCE & BETH WEINHOUSE, *OUTRAGEOUS PRACTICES: THE ALARMING TRUTH ABOUT HOW MEDICINE MISTREATS WOMEN* 112 (1994).

25. *Id.* at 113. By the year 2000, almost two million women will have been diagnosed with breast cancer. While many believe that only older women get breast cancer, this is not true. See *infra* note 27 and accompanying text. Further, breast cancer in younger women is generally thought to be more aggressive. LOVE, *supra* note 1, at 348.

26. Dinsmore, *supra* note 21, at 21; *Facts & Figures*, *supra* note 5. See also LOVE, *supra* note 1, at 183.

27. LOVE, *supra* note 1, at 183. The chance of being diagnosed with breast cancer increases with age. It is, however, a myth that young women do not get breast cancer. See Susan G. Komen Breast Cancer Found., *Breast Health: Risk Factors & Prevention*, at <http://www.breastcancerinfo.com/bhealth/RiskFactorsAndPrevention/BreastCancerRiskFactors.asp> (last visited Jan. 24, 2001); *Facts & Figures*, *supra* note 5.

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during their working lives. Finally, I focus on breast cancer because it is most familiar to me; I am a breast cancer survivor.

Part II explores why people discriminate against breast cancer survivors and individuals with other disabilities. Part III examines the Americans with Disabilities Act and its application to cancer survivors. I argue that the ADA is quite different from other antidiscrimination statutes and that this difference works to the disadvantage of people with disabilities. The difference has two main components: People with disabilities must prove that they are members of the protected class by meeting statutory definitions while members of other protected groups largely self-identify; and people with disabilities, unlike members of other protected classes, may not be entitled to the job of their choice if an employer will consider them for some other position. These two aspects of the ADA substantially limit the protection afforded to disabled individuals.

For cancer survivors, the problems are compounded because our society generally, and our legal system in particular, is not prepared to discuss the issues presented by a disease like cancer. We tend to view disabilities in set patterns, but cancer does not fit these patterns. Disabilities are perceived as static physical problems, such as blindness or paraplegia. We believe that a person with a disability will either be medically “cured” or their condition will remain the same. We think of cancer in a similarly dichotomous way—a person with cancer is either “cured” or will die. We have no intermediate way to envision the cancer survivor. This distorted vision of cancer survivors impacts the way we are treated in the legal system. This section concludes with a discussion of short-term solutions to the issues implicated in defining a disability such as cancer.

In Part IV, after demonstrating that the current definitions are inadequate, I explore the reasons why. This Part posits that the difficulties in defining a disability stem from the way in which disabilities are viewed. In this Part, I argue that society views a disability only as a condition that affects a person’s functioning as compared to the “average able-bodied” person. This construction of disability compares people with disabilities to people without disabilities, with the able-bodied person as the norm. Disability must not be defined solely as a measure of the function of one group of people as compared to some other group of people. The use of ability to function as the primary view of a disability does not work because it fails to capture what it means to be disabled. Finally, I propose a long-term solution to the problem, redirecting our thinking about what

constitutes a disability, including cancer, and I suggest a revamping of the way we envision a disability.

## II. WHY DO PEOPLE DISCRIMINATE AGAINST PEOPLE WITH DISABILITIES?

### A. STIGMATIZATION

Reactions to people with disabilities are complex. The nondisabled may react to people with disabilities with “pity, admiration, fear, bigotry, and stigmatization.”<sup>28</sup> People with disabilities may also be stereotyped as inferior, needy and dependent.<sup>29</sup> Stigmatization serves the purpose of separating people with an undesirable difference.<sup>30</sup> Historically, people with disabilities have been segregated from the rest of society, viewed as weak, nonproductive members of society while also feared as possessing supernatural powers.<sup>31</sup> While people who have “overcome” some disabilities are admired and viewed as inspirational,<sup>32</sup> other disabilities make us uncomfortable and we still often segregate and isolate people with these disabilities.<sup>33</sup>

Some scholars suggest that people are afraid of the disabled. This fear stems from old religious beliefs that considered disabilities to be signs of evil.<sup>34</sup> More “modern” beliefs may still equate disability with social deviance.<sup>35</sup> Recently, there has been a suggestion that some of the fear may be due to people understanding, on some level, that one day they may be disabled.<sup>36</sup> “[D]isability activists use the term ‘temporarily able-bodied’ to refer to non-disabled people in an effort to expose these fears and to

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28. Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1003 (1998).

29. JEROME E. BICKENBACH, *PHYSICAL DISABILITY AND SOCIAL POLICY* 143 (1993).

30. *Id.* at 142.

31. Jonathan C. Drimmer, Comment, *Cripples, Overcomers and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1359 (1993).

32. One scholar argues that no one can overcome a disability. A person can only overcome the stigma associated with the disability by exceeding society’s expectations. LINTON, *supra* note 7, at 17–18.

33. See Adrienne L. Hiegel, Note, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451 (1994).

34. Eichhorn, *supra* note 6, at 1415.

35. *Id.*

36. *Id.*

make non-disabled people realize that disabled people are not so different after all.”<sup>37</sup>

Cancer survivors are subject to the same kinds of reactions as are people with other disabling conditions. As one writer puts it:

Stigmatization, the process by which cancer victims adopt the status of the untouchable, is a . . . battle which needs taking on—not only because such disparagement is a matter of basic human rights, but because the stigmas themselves push cancer out of the visible world and deeper into obliterating silence and isolation.<sup>38</sup>

Cancer makes people uncomfortable. When a friend, acquaintance, or coworker is diagnosed with cancer, people often do not know what to say or do. As one breast cancer survivor wrote, “[A]t first, I felt abandoned or shunned because I had this disease.”<sup>39</sup>

For many years, people used to avoid saying the word “cancer” to avoid being struck by the disease.<sup>40</sup> While medical understanding of cancer has eroded this superstition, myths about cancer are still prevalent. These myths include that cancer is a death sentence, that cancer survivors are unproductive, and that cancer is somehow contagious.<sup>41</sup> Attitudes about cancer are still based on irrational fears.<sup>42</sup>

There are specific stigmas associated with breast cancer. Many view a mastectomy as an amputation or disfigurement of a woman’s body. Losing a breast may cause a woman to question her identity as a woman.<sup>43</sup> Because a mastectomy involves the breast, many are reluctant to talk about the surgery and steps are taken to camouflage the loss of a breast.<sup>44</sup>

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37. *Id.* (citations omitted). Another author refers to the able-bodied as “contingently able-bodied,” expressing the possibility, as opposed to the inevitability, of a disability. DEBORAH MARKS, *DISABILITY: CONTROVERSIAL DEBATES AND PSYCHOSOCIAL PERSPECTIVES* 18 (1999).

38. Sandra Steingraber, *We All Live Downwind*, in 1 IN 3: *WOMEN WITH CANCER CONFRONT AN EPIDEMIC* 36, 43 (Judith Brady ed., 1991). See also Mark A. Rothstein, Kathryn Kennedy, Karen J. Ritchie & Kirsten Pyle, *Are Cancer Patients Subject to Employment Discrimination?*, 9 *ONCOLOGY* 1303 (1995) (noting stigma associated with cancer).

39. ALICE F. CHANG, PH.D., *A SURVIVOR’S GUIDE TO BREAST CANCER* 121 (2000).

40. MARISA WEISS & ELLEN WEISS, *LIVING BEYOND BREAST CANCER* 8 (1998).

41. NESSIM & ELLIS, *supra* note 10, at 154. See also Hoffman, *supra* note 14, at 4; Jan Zeigler, *When Cancer Comes to Work*, *BUS. & HEALTH*, July 1, 1998, at 34 (discussing fear that cancer is contagious).

42. See NESSIM & ELLIS, *supra* note 10, at 154.

43. LOVE, *supra* note 1, at 459; BECKY ZUCKWEILER, *LIVING IN THE POSTMASTECTOMY BODY* 47 (1998).

44. A woman considering mastectomy as a treatment for breast cancer can have immediate reconstructive surgery, postpone reconstructive surgery, wear a prosthesis, or opt to do nothing to camouflage the fact that her breast has been surgically removed. ZUCKWEILER, *supra* note 43, at 126 (discussing choosing a prosthesis), 196 (discussing reconstructive surgery options).

According to Audre Lorde's "now well-known and controversial analysis":<sup>45</sup>

[P]ost-mastectomy women are kept silent and separated from each other through the socially sanctioned prosthesis. . . . This process is self-perpetuating as women come to be ashamed of their altered bodies and hide them behind lumps of wool, cotton, or silicone, effectively and literally rendering breast cancer publicly invisible, confined to the realm of the secretive and stigmatized.<sup>46</sup>

There are some who reject the contention that bias against people with disabilities exists. One commentator argues that people have no stereotypes about controlled or correctable disabilities.<sup>47</sup> My breast cancer might be considered a controlled impairment, i.e., I have finished treatment and it has no obvious effect on my daily life. But others may still make assumptions about me because of the breast cancer—assumptions based not on knowledge but on what they think of my life expectancy. Discrimination and bias are the result of misconceptions, not reality. Social stigmas therefore attach to most impairments, regardless of whether they are controlled.<sup>48</sup>

One explanation of the aversion to people with disabilities is that negative attitudes form due to the functional limitations of people who happen to have a disability. Nondisabled people fear that they might, someday, be unable to function in some way. Others, however, argue that differences in physical appearance are responsible for the stigma and disadvantage suffered by people with disabilities.<sup>49</sup> Finally, some posit that rather than being regarded by our society as repugnant, people with disabilities are invisible to us and we perpetually disregard their existence.<sup>50</sup>

Whatever the reason behind negative attitudes toward people with disabilities, studies have shown that these attitudes are strong. The

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45. Steingraber, *supra* note 38, at 44.

46. *Id.*

47. Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability"*, 73 WASH. L. REV. 575, 594 (1998) (arguing that there are no stereotypes about people with controlled impairments).

48. See Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 131–34 (1998).

49. See Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 666 (1999). Note that this argument only applies to visible disabilities—it does not explain the stigma in a hidden disability such as cancer.

50. Silvers, *supra* note 23, at 95 (suggesting that women with disabilities are isolated and invisible).

stigmatization of people with disabilities is not isolated or confined to a few, particular persons; studies indicate that it is systemic.<sup>51</sup> The stereotypes about people with disabilities are quite negative and in that respect are similar to those about ethnic minorities, the elderly, and ex-convicts.<sup>52</sup>

#### B. DISCRIMINATION—ALIKE YET DIFFERENT

Although discrimination on the basis of a disability is somewhat like discrimination on the basis of race or gender, it differs from those bases of discrimination in several significant respects.<sup>53</sup> In race or gender discrimination cases, people are often discriminated against because of their membership in the protected class. An employer might refuse to hire all women because they are women. But discrimination on the basis of disability is different. Because “people with disabilities” is not a readily identifiable class,<sup>54</sup> discrimination on this basis is premised on a person’s particular physical condition. In other words, a breast cancer survivor is discriminated against not because she belongs to a group labeled “disabled” that is joined together by some cohesive factor, but because she has the particular disability of breast cancer. While an employer might discriminate against a breast cancer survivor, that same employer might treat someone with heart disease or diabetes or a different kind of cancer quite differently. Because of the individualized nature of discrimination against people with disabilities, as opposed to the group-directed nature of

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51. For examples, see BICKENBACH, *supra* note 29, at 148 and studies cited therein. See also Susan M. Squier, *Narrating Genetic Disabilities: Social Constructs, Medical Treatment, and Public Policy*, 15 ISSUES L. & MED. 141, 145 (1999) (“[T]he physically disabled are produced by way of legal, medical, political, cultural, and literary narratives that comprise an exclusionary discourse. Constructed as the embodiment of corporeal insufficiency and deviance, the physically disabled body becomes a repository for social anxieties about . . . vulnerability, control and identity.” (quoting ROSEMARIE GARLAND THOMSON, *EXTRAORDINARY BODIES: FIGURING PHYSICAL DISABILITY IN AMERICAN CULTURE AND LITERATURE* 6 (1997) (alteration in original))).

52. Weber, *supra* note 48, at 131.

53. See Leonard J. Augustine, Jr., *Disabling the Relationship Between Intentional Discrimination and Compensatory Damages Under Title II of the American with Disabilities Act*, 66 GEO. WASH. L. REV. 592, 606 (1998). For a comparison of discrimination against people with disabilities and historic discriminatory views of women, see Silvers, *supra* note 23, at 94. See also Kevin W. Williams, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act*, 18 BERK. J. EMP & LAB. L. 98, 151–59 (1997) (arguing that although there are structural differences between the ADA and Title VII, courts nevertheless impose the burden shifting framework on ADA cases).

54. See, e.g., Michelle Friedland, *Not Disabled Enough: The ADA’s “Major Life Activity” Definition of Disability*, 52 STAN. L. REV. 171, 186–87 (1999).

other types of discrimination, we are less likely to notice that disability-based discrimination may be motivated by invidious stereotypes.<sup>55</sup>

Discrimination on the basis of disability is like race discrimination in that both forms of discrimination are due to social bias or neutral standards that have an adverse impact. However, if we removed all bias on account of race, there would be no disadvantage on the basis of race. Yet, even if we removed all of the socially constructed aspects of disability,<sup>56</sup> a disabled person would still be left with her impairment.<sup>57</sup> Under this view, it is possible to distinguish between the two types of discrimination.

Due to concerns about widespread discrimination against people with disabilities, Congress enacted the Americans with Disabilities Act in 1990.<sup>58</sup> Although the Act prohibits discrimination on the basis of disability, the ADA differs from other antidiscrimination statutes such as those that prohibit, for example, race discrimination. In order to establish membership in the protected class, plaintiffs claiming to be disabled must prove that they meet the statutory definition of disabled, which has proven quite difficult.<sup>59</sup> Moreover, not all persons with disabilities are protected, even if they can prove membership in the protected class. Although the ADA requires an employer to provide reasonable accommodation to a qualified individual with a disability, if the accommodation is too expensive it need not be made.<sup>60</sup> Thus, the more disabled a person is, the less protection she may get. This has been viewed as something less than an equal right, setting it apart from race discrimination.<sup>61</sup>

There is some debate about whether the discrimination that occurs against people with disabilities is the result of intentional conduct or

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55. See Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMP. 511, 519–21 (1998).

56. An example of a socially constructed problem occurs when a vision-impaired person who uses a cane walks across a street more slowly than the able-bodied persons who set the duration of the walk signal. David Orentlicher, *Destructuring Disability: Rationing of Health Care and Unfair Discrimination Against the Sick*, 31 HARV. C.R.-C.L. L. REV. 49, 64 (1996). Another example would be that in a society in which most people cannot read, dyslexia would not be a problem. In our society, however, dyslexia can be disabling. Weber, *supra* note 48, at 123. See generally Silvers, *supra* note 23; *infra* Part IV.A (discussing the social construction of disability).

57. BICKENBACH, *supra* note 29, at 254.

58. Pub. L. No. 101-336, § 2, 104 Stat. 328 (1990) (codified at 42 U.S.C. § 12101 (1994)).

59. See discussion *infra* Part IV.

60. 42 U.S.C. § 12111(10) (1994) (requiring reasonable accommodation unless to do so would be an undue hardship). A prior version of the ADA would have required employers to provide reasonable accommodation until the brink of bankruptcy. Drimmer, *supra* note 31, at 1402.

61. Drimmer, *supra* note 31, at 1400 (arguing that the ADA provides less than equal rights for persons with disabilities).

thoughtlessness.<sup>62</sup> According to one scholar, Congress refused to amend Title VII<sup>63</sup> to prohibit discrimination on the basis of a disability due to widespread indifference to the problems of people with disabilities.<sup>64</sup> The United States Supreme Court has opined that discrimination against people with disabilities is usually the product of benign neglect rather than invidious discrimination.<sup>65</sup> By invidious discrimination, the Court meant discrimination that is the result of arbitrary and irrational conduct, with no link to ability to perform the job.<sup>66</sup> The ADA was hailed by some because it arguably recognizes that some discrimination against people with disabilities is purposeful.<sup>67</sup>

The truth is probably somewhere in the middle. Discrimination against people with disabilities can be thoughtless or invidious. If someone designs a building that lacks wheelchair access, it is probably not due to animus toward people who use wheelchairs. A designer who creates a line of women's bathing suits without including any designed for women who have had mastectomies<sup>68</sup> is probably not thinking about this issue or has a business/profit-related reason as opposed to animus toward breast cancer survivors. Other behavior toward people with disabilities may be much more invidious.<sup>69</sup> An employer may decide<sup>70</sup> not to hire a person who uses

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62. See *Helen L. v. DiDario*, 46 F.3d 325, 334–35 (3d Cir. 1995) (discussing the difference between benign neglect and invidious discrimination). A plaintiff in a race or gender discrimination suit must prove that the discrimination is intentional. 42 U.S.C. § 2000e (1994). For example, while not all discrimination against women is intentional, in order for it to be actionable as a disparate treatment case under Title VII, intent must be proven.

63. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994).

64. See Michael D. Moberly, *Letting Katz Out of the Bag: The Employer's Duty to Accommodate Perceived Disabilities*, 30 AZ. ST. L.J. 603, 606 (1998). See also Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 WILLAMETTE L. REV. 1, 14–15 (1997) (noting indifference to people with disabilities).

65. See *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

66. See *id.* at 297. Invidiousness in a disparate treatment claim is that which is “arbitrary, irrational, and not reasonably related to a legitimate purpose.” *Eaton v. State*, 363 A.2d 440, 441 n.2 (Del. 1976) (citing *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964)). See also BLACK'S LAW DICTIONARY 826 (6th ed. 1990).

67. 42 U.S.C. § 12101(a)(7) (1994) (people with disabilities have been “subjected to a history of purposeful unequal treatment”).

68. For a discussion of fitting into clothing after breast cancer surgery, see ZUCKWEILER, *supra* note 43, at 148.

69. One commentator suggests that there are two types of discrimination against people who are disabled. He notes that people with disabilities are singled out because of their disability and excluded from equal participation. This type of discrimination is like race or gender discrimination. In addition, some discrimination against people who are disabled is the result of “simple thoughtlessness” which may cause people to overlook issues such as access to buildings. 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, 516–18 (1997).

70. This decision can be conscious or unconscious.

a wheelchair because it is afraid that its health insurance costs will go up or because it believes that its customers will not want to be served by someone who uses a wheelchair. Similarly, an employer may decide not to hire a breast cancer survivor because it believes that she will be too sick to work, will die soon, will not be productive, or because cancer survivors make the employer uncomfortable. This invidious discrimination is much like race or gender discrimination. Whether the cause of the discrimination against people with disabilities is due to revulsion, pity, discomfort, thoughtlessness, or animus, the result is the same.<sup>71</sup>

### III. THE ADA

#### A. DEFINITIONS

Title I of the Americans with Disabilities Act,<sup>72</sup> prohibits discrimination in employment on the basis of a disability.<sup>73</sup> In order to proceed with a claim of discrimination based on a disability, a plaintiff must first prove that she is a member of the protected class as defined by the statute.

The ADA defines “disability” as follows:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.<sup>74</sup>

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71. See Drimmer, *supra* note 31, at 1374 (arguing that the civil rights movement led to the conclusion that people with disabilities had a right to be included in society).

72. 42 U.S.C. §§ 12101–12213 (1994).

73. The ADA provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) (1994). Title II of the Act applies to public services. 42 U.S.C. § 12131 (1994). Title III prohibits discrimination in places of public accommodations. 42 U.S.C. § 12182 (1994).

74. 42 U.S.C. § 12102(2) (1994). This definition was taken from the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988). For a history of this definition, see, for example, Drimmer, *supra* note 31, at 1384–85. For a discussion of the interpretation of this provision, see generally Arlene B. Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997).

This has been interpreted to mean that a plaintiff must establish that he or she has an impairment and that such impairment substantially limits a major life activity.<sup>75</sup>

The ADA does not define an impairment. Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) provide that an impairment is “any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin . . . .”<sup>76</sup> In order to meet the definition of disabled, a plaintiff must prove that the impairment substantially limits a major life activity. Major life activities include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>77</sup> This list is not exclusive and activities outside the list, such as reproduction, can be considered a major life activity.<sup>78</sup>

“Substantially limits” means unable to perform the major life activity that an average person can perform, or significantly restricted in the ability to perform the major life activity.<sup>79</sup> If a plaintiff can convince the court that she has an impairment that substantially limits a major life activity, she will meet the definition of disabled and will be considered a member of the protected class.

Alternatively, a plaintiff could gain entry into the protected class by establishing that she has a record of an impairment that substantially limits

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75. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 480 (1999).

76. 29 C.F.R. § 1630.2(h)(1) (2000).

77. 29 C.F.R. § 1630.2(i) (2000).

78. *Bragdon v. Abbott*, 524 U.S. 624 (1998) (holding that patient with asymptomatic HIV was disabled because the ability to reproduce and bear children was a major life activity within the meaning of the ADA).

79. 29 C.F.R. § 1630.2(j)(1) (2000). The ADA does not define “substantially limits.” In determining whether an impairment substantially limits a major life activity, courts are to consider: “(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. § 1630.2(j)(2) (2000). If the substantial limitation is on the major life activity of working, an individual must be unable to perform a range of jobs, not just one specific job. 29 C.F.R. § 1630.2(j)(3) (2000). Other factors may also be considered. If the substantial limitation is on the major life activity of working, courts may also consider: (1) the geographical area; (2) the job from which the individual is disqualified compared to other jobs with similar training, knowledge, skills, etc. from which the plaintiff would also be disqualified; and (3) a comparison of the job from which the plaintiff is disqualified with other jobs requiring different training, skills, and abilities from which the individual is also disqualified. 29 C.F.R. § 1630.2(j)(3)(ii) (2000). See, e.g., *Gordon v. E.L. Hamm & Assocs.*, 100 F.3d 907, 911 (11th Cir. 1996).

one or more major life activities.<sup>80</sup> In addition, if the plaintiff does not feel that she is disabled, she may try to establish that the employer regarded her as disabled. If she cannot meet any of the definitions, the case is dismissed.<sup>81</sup>

In some cases brought by cancer survivors, employers have argued that the plaintiff was not even impaired.<sup>82</sup> More often, however, employers argue that even though the plaintiff was impaired, she was not disabled because there was no substantial limitation of a major life activity. In Ms. Ellison's case, for example, no one questioned whether her breast cancer was an impairment; the contested issue was whether she was disabled.<sup>83</sup> The court of appeals upheld the district court's grant of the employer's motion for summary judgment, finding that Phyllis Ellison was not disabled because there was no issue whether "her cancer and treatment 'substantially limited' her major life activity of working."<sup>84</sup> Although the court noted that her ability to work was affected, it held that "far more is required" to trigger the statute.<sup>85</sup> Similarly, the accompanying side effects of prostate cancer, incontinence and impotence, have been held to be physical impairments. But because the plaintiff, a prostate cancer survivor, failed to establish that incontinence and impotence substantially interfered with a major life activity, the plaintiff was not disabled and the case was dismissed.<sup>86</sup> The question asked, but inadequately answered, is why cancer on its own is not enough to trigger the protection of the statute.

#### B. MEETING THE STATUTORY DEFINITIONS—PROVING MEMBERSHIP IN THE PROTECTED CLASS

Disability-based discrimination is set apart from discrimination based on race or gender by the requirement that each plaintiff alleging discrimination on the basis of disability must first prove membership in the

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80. For example, in *EEOC v. R.J. Gallagher Co.*, the court held that a history of cancer did not satisfy this prong; the plaintiff would need to establish that he had a history of cancer that substantially limited a major life activity. 181 F.3d 645, 655 (5th Cir. 1999).

81. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487–94 (1999).

82. In *Gordon v. E.L. Hamm & Associates*, the plaintiff was diagnosed with malignant lymphoma and was treated with chemotherapy. *Gordon*, 100 F.3d at 907. This chemotherapy caused numerous side effects, including weakness, dizziness, swelling of feet and hands, numbness, loss of body hair, and vomiting. While the court noted that these side effects might constitute physical impairments, it held that such impairments did not substantially limit Mr. Gordon in a major life activity. *Id.* at 915.

83. See *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 190 (5th Cir. 1996).

84. *Id.* at 191.

85. *Id.*

86. *Farmer v. Nat'l City Corp.*, 1996 WL 887478 (S.D. Ohio Apr. 5, 1996).

protected class as defined by statute.<sup>87</sup> While plaintiffs in Title VII cases must establish membership in a protected class as part of their prima facie case,<sup>88</sup> actual membership in the protected class is only an issue in ADA cases.<sup>89</sup> The ADA and relevant regulations define disability in great detail. In some ways, this distinction may seem understandable and warranted because disabilities are not always self-evident. People with disabilities are not a readily identifiable group with common characteristics. Although we lump people with disabilities together under the label of “the disabled,” people with disabilities “do not constitute a coherent group sharing common physical, psychological, or cultural characteristics.”<sup>90</sup> Recently, however, much more attention has been paid to the fact that someone’s gender or race also may not be self-evident. Moreover, our ideas about and definitions of race and gender have varied over time.<sup>91</sup>

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87. See, e.g., Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 442 (1991); Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 HARV. L. REV. 1560, 1561 (1998).

88. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

89. Title VII does not define any of its protected classes. National origin discrimination is defined in the regulations “broadly as including, but not limited to, the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.” 29 C.F.R. § 1606.1 (2000). The “emphasis should be on the plaintiff’s objective appearance to others, not necessarily on his ancestry or birthplace.” *Harel v. Rutgers State Univ.*, 5 F. Supp. 2d 249, 269 (D.N.J. 1998). Race is defined neither by the statute nor by the regulations and the line between discrimination on the basis of national origin and race can be blurry. See, e.g., *Pavon v. Swift Transp. Co.*, 192 F.3d 902 (9th Cir. 1999) (holding that discrimination against Hispanic plaintiff was race discrimination); *Chandoke v. Anheuser-Busch, Inc.*, 843 F. Supp. 16, 20 (D.N.J. 1994) (person born in India may state claim of racial discrimination). Membership in a particular tribe can be national origin discrimination as opposed to racial discrimination. See *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1117 (9th Cir. 1998). Title VII also does not define “religious.” The regulations provide:

In most cases whether or not a practice of belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.

29 C.F.R. § 1605.1 (2000).

90. See Michael Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1438 (1986). People with disabilities may, however, have a “common social and political experience.” LINTON, *supra* note 7, at 12.

91. See Katherine M. Franke, *What Does a White Woman Look Like? Racing and Erasing in Law*, 74 TEX. L. REV. 1231 (1996) (discussing definition of race in *Sunseri v. Cassagne*, 196 So. 7 (La. 1940)). See also Michael Elliott, *Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy*, 24 LAW & SOC. INQUIRY 611 (1999) (discussing categorizing people as white and non-white); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 10 LA RAZA L.J. 499 (1998) (discussing how race-theory scholarship often utilizes that which it is critiquing); Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385 (1999).

In most nondisability cases brought under antidiscrimination statutes,<sup>92</sup> the plaintiff alleges that he or she is a member of the protected class.<sup>93</sup> This is rarely disputed. For example, what proof is necessary for someone to claim that she is African-American?<sup>94</sup> No proof of race is usually presented and the statute and regulations do not provide any definitions.<sup>95</sup> Religion is treated in much the same way.<sup>96</sup> While an employer may dispute that it had knowledge that the plaintiff was a member of a protected class, it rarely disputes that the plaintiff actually *is* a member of that protected class.<sup>97</sup>

Plaintiffs alleging discrimination on the basis of a disability, however, must prove that they are disabled as defined by the statute. This issue is frequently litigated.<sup>98</sup> The statute and regulations go to great lengths to define impairment and disability<sup>99</sup> and while the definitions of the ADA may appear to define “disability” broadly,<sup>100</sup> proving membership in this

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92. For example, the federal antidiscrimination statute in employment is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994).

93. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

94. See *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (discussing how Congress intended to protect at least people who are discriminated against because of their ancestry or ethnic characteristics when it prohibited racial discrimination).

95. This should be distinguished from an employer defending on the grounds that it did not know that the plaintiff was African-American and therefore could not have discriminated on that basis. In other contexts, however, proof of being a Native American is required. The Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (1994), defines an Indian child as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4). One scholar has noted that “most tribes adhere to a relatively finite blood-quantum test to determine membership eligibility in order to protect the tribe as an entity. A few tribes, most markedly the Cherokee Nation of Oklahoma, have taken a more inclusive approach that broadens the tribal base.” Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power*, 83 MINN. L. REV. 927, 967–68 (1999) (footnotes omitted).

96. Although the regulations define a religion, they do so broadly to include “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” 29 C.F.R. § 1605.1 (2000).

97. Employers do occasionally dispute that the plaintiff is a member of the protected class. See, e.g., *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 171 (3d Cir. 1991) (employer disputed plaintiff’s claim that he was Hispanic).

98. Crossley, *supra* note 49, at 623. See also Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 352 (1997) (arguing that the definition of disability is one of the “most contentious aspects of disability law”).

99. See 42 U.S.C. § 12102(2) (1994); 29 C.F.R. §§ 1630.2(g), 1630.2(h)(1), 1630.3 (2000).

100. See, e.g., *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir., 1999); *Gorman v. Barch*, 152 F.3d 907, 912 (8th Cir. 1998); *Arnold v. UPS, Inc.*, 136 F.3d 854, 862 (1st Cir. 1998); *Penny v. UPS, Inc.*, 128 F.3d 408, 414 (6th Cir. 1997); *Wheaton v. Ogden Newspapers*, 66 F. Supp. 2d 1053, 1059 (N.D. Iowa 1999). See also Orentlicher, *supra* note 56, at 55 (arguing that the ADA broadly defines a disability).

particular protected class is actually quite difficult. Of the 110 cases brought under the ADA that were reported in 1995 and 1996 and that raised the question whether the plaintiff was a member of the protected class, the court found that the plaintiff was disabled in only six of the cases.<sup>101</sup> Moreover, another survey revealed that defendants won 92% of the cases.<sup>102</sup> It has been estimated that the question whether the plaintiff was in fact disabled was litigated in over half of the ADA cases brought in 1998.<sup>103</sup> If a plaintiff cannot prove membership in the protected class, the case is dismissed; the actions of the defendant are irrelevant. In theory, therefore, a defendant could admit that it did not want to hire the plaintiff because of her breast cancer but argue that breast cancer is not a disability. If this argument prevailed, the case would be dismissed, the defendant's admission notwithstanding.

One wonders why only the disabled have to prove that they meet the statutory definition of disabled and thus are members of the protected class when no other antidiscrimination statute today has this difficult preliminary obstacle. Think about how you would define race.<sup>104</sup> By DNA?<sup>105</sup> By pointing at parents or grandparents? This is an inquiry which should not be restarted, both because of the history of this nation,<sup>106</sup> and because it is unlikely to yield any answers.<sup>107</sup> We cannot and will not define race in race discrimination cases, yet we believe that we can define disability.

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101. Lawrence O. Gostin, Chai Feldblum & David W. Webber, *Disability Discrimination in America: HIV/AIDS and Other Health Conditions*, JAMA, Feb. 24, 1999, at 8.

102. Eichhorn, *supra* note 6, at 1408.

103. Crossley, *supra* note 49, at 621. Another survey revealed that defendants have prevailed in 93% of the cases at the trial court level and 84% at the appellate level. "These results are worse than results found in comparable areas of the law; only prisoner-rights cases fare as poorly." Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999).

104. See, e.g., Elliott, *supra* note 91 (exploring two opinions and what they reveal about racial taxonomy); Espinoza & Harris, *supra* note 91, at 499; Franke, *supra* note 91 (discussing *Sunseri v. Cassagne*, 196 So. 7 (La. 1940), and its definition of race); Carrie Lynn H. Okizaki, "What are You?": *Hapa-Girl and Multiracial Identity*, 71 U. COLO. L. REV. 463 (2000) (discussing the problem of racial identity for mixed-race individuals). See also Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1429 (1999) (arguing that racial terminology does not apply to biological variations).

105. See Braman, *supra* note 104, at 1381 (arguing that race cannot be biologically determined; it is a construct of social and political institutions).

106. Racial definitions in statutes have been driven by racism. For example, in 1940, Alabama defined "Negro" as follows: "The word 'negro' includes mulatto. The word 'mulatto' or the term 'person of color' means a person of mixed blood descended on the part of the father or mother from negro ancestors, without reference to or limit of time or number of generations." STATES' LAWS ON RACE AND COLOR 22 (Pauli Murray ed., 1950) (citation omitted).

107. Scholars are recognizing that race is a cultural or social construct as opposed to biologically determined. See, e.g., Braman, *supra* note 104, at 1381.

Sometimes, categories and definitions serve legitimate social purposes.<sup>108</sup> However, defining disability allows the nondisabled to keep themselves segregated from the disabled.<sup>109</sup> If we look at the groups protected by other antidiscrimination statutes, everyone falls into one category. We are protected either because we are female or male, or because we are African-American or Asian-American. We all have a gender and we all belong to at least one racial category.<sup>110</sup> We do not all have a disability, however, and the attempt to establish boundaries may be a way of dividing the world into “them” and “us.”<sup>111</sup>

It is also possible that Congress required proof of membership in the protected class of people with disabilities to prevent an avalanche of litigation by plaintiffs claiming to be disabled. This explanation is unlikely and, on closer examination, unsatisfactory. Everyone has a gender, but not everyone brings a claim of gender discrimination. Everyone belongs to a race but not everyone brings a race claim. The troubling, underlying question is why Congress would be more concerned about unwarranted claims based on disability than for race or gender.

Requiring proof of membership in the statutorily defined class of the “disabled” while not requiring it for the other protected classes also suggests that Congress believed that someone might pretend to be disabled, but did not believe that someone would pretend to be a member of some other protected group such as female or African-American. Alternatively, it may reflect a fear that a healthy person could successfully claim to be disabled.

Requiring proof of a disability rather than allowing the class to be self-defining may evidence a fear that people will pretend that they are disabled in order to get the protection of the ADA or that people will exaggerate the extent of their condition. There is a suspicion that people will be malingerers.<sup>112</sup> This fear reflects attitudes about the disabled as somehow untrustworthy and stems from stereotypes about people with

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108. MARKS, *supra* note 37, at 126–28 (discussing cultural importance of establishing categories). *But see* Okizaki, *supra* note 104, at 470 (discussing categorizing as way of perpetuating discrimination).

109. Statutes defining race by the “one drop rule” may have been a way to continue to segregate minorities and to allow for discrimination. Okizaki, *supra* note 104, at 473–77. Critical race scholars have also argued that the statutory definitions of race were used to prevent non-whites from “passing” as whites. *Id.* at 474.

110. Many people may, in fact, have more than “one race.” Leslie Espinoza, *A Vision Towards Liberation*, 19 CHICANO-LATINO L. REV. 193 (1998).

111. *See, e.g.*, Silvers, *supra* note 23, at 94 (1998).

112. Harris, *supra* note 47 (arguing that people with controlled disabilities will act as malingerers).

disabilities being evil or somehow morally inferior and suggests the belief that “if only you were stronger” or “better” or “more self-disciplined” you would not have this problem.<sup>113</sup> This belief that people with disabilities are more weak-willed than others is more prevalent with some conditions, such as obesity or mental illness, than with others such as cancer.<sup>114</sup>

The membership requirement also suggests that people who are not disabled are unable to discern who is disabled and who is not. There is a fear that people will be able to fool others about the existence or the extent of their disability—that people will fake it and that the “able-bodied” will not be able to discern it. This same fear does not, apparently, extend to groups protected by Title VII, at least not to the same degree.

Proof of membership in the protected class may also be required for people claiming disabilities because disabilities are sometimes mutable while race and gender are fixed. One cannot feign a race today and later claim that it is “cured” or “in remission.” People with “disabilities” can be in control of their status in a way that is impossible for people of a given race or gender.

Another possible explanation for why people who are disabled must prove that they fit within the statutory definition is that the claim of “disability” may be viewed by some as a claim for special, and not just equal, rights.<sup>115</sup> Moreover, some people view rights granted to people with disabilities as an act of charity rather than as a matter of basic civil rights.<sup>116</sup> In other words, the ADA may be viewed as a gift to people with disabilities rather than as an entitlement.

Finally, entry into the protected class may have been made difficult because some people believe that there usually is a correlation between a disability and ability to perform the job. Unlike race or gender, which can

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113. Eichhorn, *supra* note 6, at 1414. It may also extend from assumptions about the non-disabled—that they will fake an illness or disabling conditions to avoid responsibilities.

114. Although people may be less likely to blame those who have cancer than those who, for example, are obese, they nevertheless may blame cancer survivors. After I was diagnosed with cancer, I found questions like “When did you last go for a mammogram (or other diagnostic test)?” to suggest that some people believed that I was partly to blame. Implicit in such a question is the suggestion that I would not have cancer if I had gone for regular mammograms or somehow been more vigilant. Other questions about diet, smoking, doctor’s visits, and family history may all suggest similar ways to place the blame on something other than chance. The thinking seems to be that cancer may be avoided if one takes more precautions than the person diagnosed with cancer.

115. The label of special rights is frequently used in reference to a new protected class, one that has not previously been protected. Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 569–70 (1998).

116. Eichhorn, *supra* note 6, at 1418.

almost never be a legitimate basis for an employment decision,<sup>117</sup> disability may. Accordingly, the ADA and the regulations define disability and entry into the protected class in order to screen out people who cannot perform the job.<sup>118</sup> While in some cases, a disability may prevent the person from performing the job, membership in the protected class is not the way to ascertain this.<sup>119</sup> Under the ADA, a plaintiff must also prove that she is “otherwise qualified,” that is, able to perform the essential functions of the job.<sup>120</sup> This would screen out people who, because of a disability, were unable to perform a particular job. It need not be ascertained at the outset in defining the class of protected persons.

The requirement that people prove that they are members of the protected class prior to proceeding with a claim of discrimination based on disability reveals an underlying assumption that the world can be neatly divided into two discrete sections, the disabled and the nondisabled. The requirement assumes that we can define a disability and that people belong on one side of this dividing line or the other. While a bright-line rule may work well in gender and race cases,<sup>121</sup> especially if we allow the person to self-identify, it does not work well in cases based on disability. There is no clear line between being disabled and not being disabled—it is a continuum.<sup>122</sup>

The main argument *for* requiring proof of membership in the protected class is that the ADA requires an individualized approach that forces us to look at people as individuals, with varying levels of disability.<sup>123</sup> Unfortunately, deciding disability on a case-by-case basis also creates uncertainty for both employees and employers. This individualized approach, both for the determination of whether an individual is disabled

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117. See 42 U.S.C. § 2000e-2 (1994).

118. Moberly, *supra* note 64, at 605; Orentlicher, *supra* note 56, at 53 (arguing that sometimes discrimination can be justified because of the disability).

119. See Friedland, *supra* note 54, at 194–97 (arguing that we need more than one definition of a disability).

120. 42 U.S.C. § 12111(8) (1994); 29 C.F.R. § 1630.2(m) (2000).

121. For an argument that it does not work well in these instances, see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Desegregation of Sex from Gender*, 144 U. PA. L. REV. 1, 11–12 (1995).

122. See, e.g., Judy Singer, “Why Can’t You Be Normal for Once in Your Life? From a “Problem with No Name” to the Emergence of a New Category of Difference, in *DISABILITY DISCOURSE*, *supra* note 7, at 59.

123. For a critique of the individualized approach, see Catherine J. Lancot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of ‘Disability’ Undermines the ADA*, 42 VILL. L. REV. 327 (1997). Courts, however, have readily adopted this approach. See, e.g., *Jovanovic v. In-Sink-Erator*, 201 F.3d 894 (7th Cir. 2000); *Belk v. Southwestern Bell Tel. Co.*, 194 F.3d 946 (8th Cir. 1999).

and then what reasonable accommodation is necessary, also sets disability cases apart from those dealing with race or gender where “everyone is treated exactly the same.”<sup>124</sup> Unlike with other kinds of discrimination cases, talk of a level playing field may be inapposite for people with some severe disabilities.<sup>125</sup>

### C. PROBLEMS CAUSED BY THE DEFINITIONS

#### 1. “Substantially Limiting”

In order to fit into the protected class of people with disabilities, plaintiffs have to establish that they have an impairment that substantially limits a major life activity.<sup>126</sup> The “substantially limits” language was probably added to limit coverage of the ADA to the “truly disabled” and reflects congressional intent to exclude minor or trivial impairments. It may also, however, reflect a suspicion about people with disabilities—if someone is “truly disabled” we are not worried that she has been able to deceive us about the existence or extent of her physical condition. Whatever the reason behind the “substantially limits” language, the effect is to reduce the number of disabilities covered; there are some that society feels good about protecting and others it does not.<sup>127</sup> “Substantially limits” has been interpreted to mean:

- (i) [u]nable to perform a major life activity that the average person in the general population can perform; or
- (ii) [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.<sup>128</sup>

In addition, courts are to consider “(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and

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124. Miller, *supra* note 55, at 519.

125. Crossley, *supra* note 49, at 664.

126. There are three steps to a prima facie case. First, the plaintiff must prove that there is an impairment. Second, the plaintiff must prove that there is a major life activity involved; and third, the plaintiff must show that the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

127. Eichhorn, *supra* note 6, at 1426. See also *Lanctot*, *supra* note 123, at 334 (contrasting EEOC’s final regulations with earlier guidelines that included conditions “such as cancer, tuberculosis, HIV infection and epilepsy”).

128. 29 C.F.R. § 1630.2(j)(1)(i)–(ii) (2000).

(iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”<sup>129</sup>

The substantially limiting clause has been narrowly construed by the courts, and much has been written about this construction.<sup>130</sup> At least one commentator has suggested that the substantial limitation language should be eliminated.<sup>131</sup> One of the arguments against the narrow interpretation of the substantially limiting language is that it puts the emphasis on how the person claiming to be disabled performs some function compared to an “average” person in the “general” population, thus excluding people with disabilities from this normative group.<sup>132</sup> Moreover, the clause puts a premium on the ability to perform certain activities, whether or not they are related to the ability to perform the job.<sup>133</sup>

The usual scenario for a cancer survivor is as follows: A job applicant feels fine and does not have any outward symptoms but an employer nevertheless refuses to hire her because of her diagnosis of breast cancer. Because the applicant is not limited in any major life activity but for the fact that this employer will not hire her, she alleges that she is substantially limited in the major life activity of working.<sup>134</sup> Alternatively, a breast cancer survivor who wants to return to work following a diagnosis of breast cancer finds that she has been fired because of her cancer. After recovery from treatment, she may feel fine and not be limited in any major life activity except for the fact that her employer will not allow her to work. Therefore, she also alleges that she is substantially limited in the major life activity of working.

In both instances, in order to proceed with her claim, the cancer survivor must prove membership in the protected class by showing that she is “substantially limited in the major life activity of working.” In order to show this, she must demonstrate that she is foreclosed from a wide range of

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129. 29 C.F.R. § 1630.2(j)(2)(i)–(iii) (2000).

130. See, e.g., Burgdorf, *supra* note 69; Friedland, *supra* note 54; Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans With Disabilities Act*, 38 S. TEX. L. REV. 907, 910 (1997); Gibson, *supra* note 6, at 167.

131. Eichhorn, *supra* note 6, at 1473.

132. *Id.* at 1431–32.

133. The regulations provide that major life activities include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i) (2000).

134. The breast cancer survivor is alleging that she is disabled under the first prong of the definitions, i.e., that she has a “real” or “actual” disability. The second prong refers to those who have a record of an impairment. The third prong is used when a plaintiff does not feel that she has a “real” disability but the employer nevertheless “regards” her as disabled.

jobs, not just one job.<sup>135</sup> In *Nave v. Woodridge Construction, Inc.*,<sup>136</sup> the plaintiff had Hodgkin's disease, undergoing surgery and radiation treatment. When Mr. Nave returned to his job in the landscape department, he was troubled with fatigue and depression as a result of his cancer. His doctor testified that he should have been given reduced hours and light duties. The court found that Mr. Nave was not substantially limited in the major life activity of working and thus not disabled:

[He] presented no evidence that a class of jobs for which he is qualified—lighter jobs such as planting trees or shrubs—are not available in his geographical area or that horticultural positions in his geographical area are only offered on a full-time basis. The court must ask whether the particular impairment constitutes for the particular person a significant barrier to employment after considering such factors as the number and type of jobs from which the impaired individual is disqualified, [and] the geographical area to which the individual has reasonable access . . . .<sup>137</sup>

The court held it against the plaintiff that he found another job after he was discharged.<sup>138</sup> The fact that Mr. Nave found similar employment after being fired by the defendant helped the court support its holding that the plaintiff was not substantially limited in the major life activity of working.

Phyllis Ellison's employment status was also held against her. Because she was merely demoted and not fired after her diagnosis of breast cancer, she could not prove that she was substantially limited in the major life activity of working. In demoting her, the employer did not foreclose a wide range of jobs; it only foreclosed one.<sup>139</sup>

The courts' focus on the alternative employment of Mr. Nave and Ms. Ellison shielded the employers' actions from any scrutiny because the courts looked only at the plaintiffs' claims that they were disabled by cancer—the employers could have admitted that they just did not like to be around people with cancer. To say that because someone else employed the plaintiff and that, therefore, she is not substantially limited in the major life activity of working, forecloses the question of whether the employer

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135. See, e.g., *Cook v. Robert G. Waters, Inc.*, 980 F. Supp. 1463, 1468 (M.D. Fla. 1997). See also Burgdorf, *supra* note 69, at 570 (arguing that plaintiffs not only have to present detailed evidence of their medical conditions; they must also prove that they are precluded from performing a wide range of jobs while trying to find a job and be self-supporting).

136. 1997 WL 379174 (E.D. Pa. June 30, 1997).

137. *Id.* at \*7 (footnote omitted).

138. *Id.* ("Another factor which weights against plaintiff's arguments is plaintiff's current employment status.")

139. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 193 (5th Cir. 1996).

discriminated. It stands the ADA on its head. The ADA should not be interpreted to mean that “substantially limited” in the major life activity of working applies only if the plaintiff is unemployable. This “legal fig leaf”<sup>140</sup> excuses a defendant who thinks that hiring a breast cancer survivor is too awful, frightening, costly, and anxiety-producing for a high-paying, prestigious position, but that hiring a breast cancer survivor for a less demanding, more routine position is acceptable. This cannot be the interpretation that Congress intended.<sup>141</sup> The legislative history strongly suggests that Congress was concerned about discrimination against cancer survivors.<sup>142</sup> The court bolstered its belief that Ms. Ellison was not sick enough to be disabled by noting that Ms. Ellison was demoted, not discharged. In so doing, the court missed one of the major points of the ADA. While other definitions of disability, such as that of the Social Security Act,<sup>143</sup> demand that the person claiming disability be totally unable to work, the ADA presumes that many people with disabilities are perfectly able to work.<sup>144</sup>

Perhaps a plausible construction for the “substantially limited in the major life activity of working” language is that it means something more than a personal idiosyncrasy. For example, if a person had an allergy to a substance used in only one paint factory and this allergy foreclosed employment at only that one paint factory, it might be viewed as an impairment that is not disabling since it applied only to one particular job.<sup>145</sup> If a person has breast cancer, however, the discrimination is likely to be more widespread. It should not matter what other jobs the breast cancer survivor is able to find. What does matter is that an identified employer treated that person differently because of the breast cancer.<sup>146</sup>

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140. This term was used by the court in *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 657 (5th Cir. 1999).

141. Burgdorf, *supra* note 69, at 449–51 (discussing legislative history).

142. See H.R. REP. NO. 101-485, at 51 (1990), reprinted in 1990 U.S.C.A.N. 303, 333.

143. 42 U.S.C. § 423(d)(1)(A) (1994). For a discussion of the definition of disability in the Social Security Act, see Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 413 (2000).

144. See 42 U.S.C. § 12111(8) (1994) (defining an otherwise qualified individual as one who can, with or without reasonable accommodations, perform the essential functions of the job).

145. One could also argue that someone who is allergic to paint in one particular factory is disabled, but the employer need not hire that person because he or she is not “otherwise qualified.”

146. Some people have assumed that having a record of cancer that is now in remission would qualify as a record of a disability. Orentlicher, *supra* note 56, at 56. See also *Burkett v. United States Postal Serv.*, 32 F. Supp. 2d 877 (N.D. W. Va. 1999) (ordering a new trial to consider plaintiff’s claim that she had a record of disability); 29 C.F.R. § 1630.2(k) (2000) (EEOC regulations suggest that a person with history of cancer would be protected). This is far from clear, however, due to the “substantially limiting” language. Gibson, *supra* note 6, at 167. Courts have held that the record must

In enacting the ADA, Congress decided that some of the costs of trying fully to integrate people with disabilities into the workforce should be borne by employers. Accordingly, it is the employer who is responsible for providing a reasonable accommodation to people who are disabled, unless to do so would be an undue hardship.<sup>147</sup> One result, however, of the “substantially limited” language and its narrow construction is that it relieves employers from having to provide reasonable accommodations to too many people. If entry into the protected class is quite difficult, fewer people will be considered disabled and fewer still will need reasonable accommodation with its accompanying costs.

## 2. *Perceived Disabilities*<sup>148</sup>

Along with protecting people with disabilities, the ADA also prohibits discrimination against persons who are regarded as disabled.<sup>149</sup> The Act specifies that a person has been discriminated against if she is perceived to have a substantially limiting impairment. According to regulations promulgated by the EEOC, a plaintiff is regarded as disabled if (1) the individual has an impairment that is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment; (2) the individual has an impairment that is only substantially limiting because of the attitudes of others toward the impairment; or (3) the individual has no impairment at all but is regarded

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indicate that the disability, when the person had it, substantially limited a major life activity. Thus, it is unclear that cancer falls into this category given the narrow definition of “substantially limiting.” See *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999) (holding that a history of cancer is not enough, and that the record must indicate that the impairment substantially limited a major life activity). See also *Jenkins-Allen v. Powell Duffryn Terminals, Inc.*, 18 F. Supp. 2d 885, 892 (N.D. Ill. 1998) (holding a forklift operator was not substantially limited in a major life activity immediately following her discharge because she was able to find short-term work as a packer, machine operator, mold trimmer, inspector, and unloader).

147. 42 U.S.C. § 12112(b)(5)(A) (1994).

148. It is possible that perceived disabilities also includes people who are found to be genetically predisposed to a certain illness. See Mark Rothstein, *Genetic Discrimination and the Americans with Disabilities Act*, 29 HOUS. L. REV. 23 (1992) (arguing that some genetic diseases may be protected by the ADA). However, the Court’s decision in *Sutton v. United Air Lines*, 527 U.S. 471 (1999), probably precludes this approach: “[W]e think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. A ‘disability’ exists only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would’ . . .” *Id.* at 482.

149. Some believe the “regarded as” provision is evidence that Congress recognized that disability is largely socially constructed. The interpretation of this provision indicates, however, that the idea has not taken hold in the courts. See discussion *infra* Part IV.

by the employer or other covered entity as having a substantially limiting impairment.<sup>150</sup>

The classic example of a person who is perceived as disabled solely because of the attitudes of others is a person who is disfigured. This person is not substantially limited in any major life activity but is subject to discrimination because of negative reactions based on his or her appearance.<sup>151</sup> Similarly, breast cancer survivors may not be limited in any activity but are substantially limited by the negative reactions of employers. Employers may react with fear, they may be uncomfortable, they may not know what to say to someone who has had breast cancer, they may be fearful that the breast cancer survivor will not be productive or will die soon.<sup>152</sup> All of these reactions, while different in kind from those in response to someone who is facially disfigured, are no less disabling.

If a breast cancer survivor is not actually disabled by cancer, it would appear that the “regarded as” prong would be useful to prove that her employer has discriminated against her. For example, if a breast cancer survivor is not disabled yet feels she has been treated differently because of her diagnosis, she could allege that although she is now in remission, the employer regarded her as being disabled and treated her differently as a result. Unfortunately, however, because the courts have narrowly construed this provision as well,<sup>153</sup> it has not been particularly helpful to cancer survivors. According to one commentator, the “regarded as” provision raises two interrelated issues.<sup>154</sup> First, some courts require the plaintiff to prove that she had an *actual* substantial limitation even though she is proceeding under the “regarded as” prong.<sup>155</sup> Second, courts require the plaintiff to prove that the employer perceived her as disabled for a wide range of jobs rather than just the job in question,<sup>156</sup> just as in the actual disability prong of the ADA. Again, a plaintiff who was employed elsewhere, or who was demoted rather than discharged, would be unable to establish that her employer regarded her as disabled.

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150. 29 C.F.R. § 1630.2(i) (2000).

151. See, e.g., Moberly, *supra* note 64, at 611. In fact, in working to get the ADA passed, disability advocates “presumed that the attitudes of others, not the physical symptoms of the individual, were what counted most.” Wendy E. Parmet, *The Supreme Court Confronts HIV: Reflections on Bragdon v. Abbott*, 26 J.L. MED. & ETHICS 225, 227 (1998).

152. See discussion *supra* in text accompanying notes 28–52.

153. See Mayerson, *supra* note 74, at 589.

154. See *id.* at 590.

155. *Id.*

156. *Id.* at 590–91.

An additional reason why the “regarded as” language of the ADA has not been particularly helpful to cancer survivors is because they may not be regarded as having a limitation on any specific major life activity. For a cancer survivor, the problem may well be that the employer views her as likely to die, i.e., substantially limited in the major life activity of living. Unfortunately, the activity of staying alive is not on the list.

When a plaintiff in a disability-based case tries to prove that she was regarded as disabled, she may point to inappropriate comments made by her employer. In a race case, such comments would be used as evidence of discrimination.<sup>157</sup> However, a breast cancer survivor may not enjoy the same protection. In an effort to prove that her employer regarded her as disabled, Ms. Ellison relied on the following four comments made by her supervisor:

(1) When Ms. Ellison informed her supervisor that she was going to have a lumpectomy and daily radiation treatment and would therefore need a modified work schedule, her supervisor told her to get a mastectomy instead because her breasts were not worth saving.

(2) When Ellison told her supervisor that the treatment was making her nauseated, he responded that it had not affected her weight.

(3) When a power outage occurred at work and the employees could not work in the dark, the supervisor told them not to worry about it because Phyllis Ellison was glowing.

(4) When the department met to discuss a reduction in force, Ms. Ellison’s supervisor indicated, in response to a question whether anyone had any special circumstances, that Ms. Ellison had cancer.

According to the court, these four comments did not indicate that Phyllis Ellison was regarded as disabled.<sup>158</sup> The Fifth Circuit held that:

[A]n employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes she is incapable of performing a particular job; “the statutory reference to a substantial limitation indicates instead that an employer regards an employee as [substantially limited] in his or her ability to work by finding the employee’s impairment to foreclose generally the type of employment involved.”<sup>159</sup>

157. See, e.g., *Allen v. Mich. Dep’t of Corr.*, 165 F.3d 405, 410–11 (6th Cir. 1999); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 347 (6th Cir. 1988).

158. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 192–93 (5th Cir. 1996).

159. *Id.* at 192 (quoting *Forrisi v. Bowen*, 744 F.2d 931, 935 (4th Cir. 1986)) (alteration in original).

This construction is not an idiosyncratic view, and has been affirmed by the Supreme Court in *Sutton v. United Air Lines, Inc.*<sup>160</sup> The plaintiffs in *Sutton* claimed that United had discriminated on the basis of a disability when it refused to hire them as commercial pilots. The plaintiffs claimed not only that they were disabled by their myopia, but also that United regarded them as disabled. According to the plaintiffs, United regarded them as disabled because it believed that myopia substantially limited the plaintiffs in the major life activity of working. The Court rejected this argument because plaintiffs could only point to one job at United from which they were foreclosed:

To be substantially limited in the major life activity of working . . . one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs.<sup>161</sup>

This is an absurd result. If an employer is hiring attorneys, for example, and would not hire a breast cancer survivor because the survivor made him or her feel uncomfortable, the plaintiff could not prevail absent a showing that the employer would not hire her for a wide range of jobs. Assume that the employer would not hire the breast cancer survivor as an attorney because it felt that the survivor would not be as productive, might die, or would lose a lot of time due to illness. Assume also that this hypothetical employer would hire the survivor as a paralegal or in a clerical position that entailed less of an economic investment for the employer. Under the current construction of the ADA, this plaintiff would not qualify as a member of the protected class and the case would be dismissed. If a woman applied for a job as an attorney but an employer would only hire her as a paralegal because of her gender, it would be considered sex discrimination and the woman would very likely prevail in a sex discrimination claim. Yet *Sutton* holds that if a person claims discrimination on the basis of a disability under the same circumstances, she would *not* have a claim under the "regarded as" prong of the ADA. Why do the disabled have to prove more? As one commentator has said:

If the goal of the ADA is to allow those who are qualified to participate in society by working . . . there is no reason to let a single defendant prevent such participation because of his personal negative reaction to a

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160. 527 U.S. 471 (1999).

161. *Id.* at 492.

plaintiff's impairment—an impairment that may not prevent the plaintiff from being qualified to participate at all.<sup>162</sup>

### 3. *Mitigating Measures*

The question of mitigating measures highlights additional difficulties with the Act's definitions and their application to cancer survivors. In *Sutton*, the plaintiffs were extremely near-sighted, although their vision was corrected with eyeglasses.<sup>163</sup> The Supreme Court considered whether, in determining if someone is disabled, we should look at the mitigated/corrected or unmitigated/uncorrected state. Although both the EEOC and a majority of circuit courts that had considered the question had held that disabilities should be considered without regard to mitigating measures,<sup>164</sup> the Court held that mitigating measures must be considered.<sup>165</sup> Accordingly, although the plaintiffs were not hired because of their impaired vision, they were not disabled because their vision was corrected.<sup>166</sup> The Court considered two possible approaches: (1) a "health conditions approach" which would have included all conditions that "impair the health or normal abilities of an individual," and (2) a "work disability approach" which looks at an "individual's reported ability to work," i.e., compares the ability of someone labeled disabled with someone labeled able-bodied.<sup>167</sup> Although the former was over-inclusive and the latter was under-inclusive, the Court felt that Congress must have meant

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162. Eichhorn, *supra* note 6, at 1468.

163. The plaintiffs were severely myopic and, as a result, were not hired as pilots by United. They did not meet the vision requirements of United and filed suit, claiming that they were disabled. *Sutton*, 527 U.S. at 475–76. United argued that the applicants were not disabled because with eye glasses, their vision was fully correctable, thus, the plaintiffs were not substantially limited in any major life activity when they wore glasses. *Id.* at 481–82.

164. See *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 156 F.3d 321, 329 (2d Cir. 1998) (holding self-accommodations cannot be considered when determining a disability), *vacated by* 527 U.S. 1031 (1999); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629–30 (7th Cir. 1998) (holding disabilities should be determined without reference to mitigating measures); *Arnold v. UPS, Inc.*, 136 F.3d 854, 859–66 (1st Cir. 1998) (same); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937–38 (3d Cir. 1997) (same). See also *Washington v. HCA Health Servs., Inc.*, 152 F.3d 464, 470–71 (5th Cir. 1998) (holding that only some impairments should be evaluated in their uncorrected state), *vacated by* 527 U.S. 1032 (1999). The EEOC Guidelines provided that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt. 1630, app. § 1630.2(j), at 348 (1998).

165. *Sutton*, 527 U.S. at 482–83.

166. It should be noted, however, that despite the correction in the plaintiffs' vision, United still refused to hire them because of their vision. *Sutton*, 527 U.S. at 476.

167. *Id.* at 485–87.

the work disability approach.<sup>168</sup> Accordingly, the Court sees a disability in terms of work-function ability. One is disabled only if one's level of functioning is different from that of the "average" able-bodied person. If one's functioning is similar to that of the "average able-bodied person," one is not disabled, no matter what one's physical or mental condition.

Part of the concern in *Sutton* and related cases was that if the ADA were construed to cover correctable physical impairments, it would cover trivial complaints.<sup>169</sup> *Sutton*, however, sweeps many conditions that no one would believe are trivial, such as breast cancer or heart disease, under the statutory carpet. After *Sutton*, a diabetic whose diabetes is controlled by insulin and a breast cancer survivor in apparent remission are unlikely to be considered disabled by the courts.

*Sutton* thus suggests that post-treatment cancer survivors who have no evidence of disease will not be protected by the Act. They may have a physical impairment under the Act but not necessarily a "disability," i.e., no substantial limitation of a major life activity. Cancer survivors with present evidence of disease certainly have a physical impairment but they would not qualify as disabled unless the cancer substantially limited them in a major life activity. The Court rejected the view that the determination should be based on what would happen if the mitigating measure, such as chemotherapy for a cancer patient, were not taken.<sup>170</sup> It noted that "Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities. Those whose impairments are largely corrected by medication or other devices are not 'disabled.'"<sup>171</sup> For cancer survivors, this presents difficulty because it may often be unclear whether the treatment has "largely corrected" the impairment. Moreover, at least one critic of the opinion in *Sutton* has indicated that the holding puts some people in a Catch 22—a person may be disabled enough to be fired from a job, but not disabled enough to challenge that firing under the ADA.<sup>172</sup>

Because a disability must now be considered with regard to mitigating measures, the negative effects of treatment, if any, must also be

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168. *Id.* at 486–88.

169. See *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555, 577–78 (1999) (holding a person with monocular vision was not disabled); *Murphy v. UPS, Inc.*, 527 U.S. 516, 520–25 (1999) (holding a person with high blood pressure was not disabled because the impairment could be corrected with medication).

170. *Sutton*, 527 U.S. at 481–82.

171. *Id.* at 484.

172. Linda Greenhouse, *High Court Limits Who Is Protected by Disability Law*, N.Y. TIMES, June 23, 1999, at A1.

evaluated.<sup>173</sup> If chemotherapy is a mitigating measure, the side effects of treatment for cancer may be considered disabling. Some of the possible side effects of treatment for breast cancer include vomiting, loss of appetite, hair loss (head as well as body hair), numbness, weakness, and fatigue.<sup>174</sup> Lesser-known side effects may include a peculiar taste to food, sensitivity to odors, chemically induced menopause, infertility, mouth sores, conjunctivitis, runny eyes and nose, diarrhea and constipation, bleeding from the gums or nose, and headaches.<sup>175</sup> Moreover, the chemotherapy may be toxic to the heart.<sup>176</sup> These side effects do not disappear the minute treatment is over; they may remain up to a year after treatment.<sup>177</sup> Other side effects, such as heart damage, may not be apparent for years.<sup>178</sup> All of these are side effects of treatment for cancer and not the cancer itself. It may be a mistake, however, to focus on the side effects of cancer treatment because even if debilitating at the time, some of these side effects are temporary<sup>179</sup> and the ADA does not cover temporary disabilities.<sup>180</sup> Accordingly, short-term side effects of treatment would not be considered disabling under the ADA.<sup>181</sup>

The lingering effects of cancer treatment also raise the question of what is temporary and what is of sufficient duration to be considered disabling under the ADA. If, for example, a breast cancer survivor is experiencing disabling symptoms from chemically induced menopause, does this “temporary” side effect come under the ADA after six months, after a year, after two years, or more?<sup>182</sup> If a cancer survivor is

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173. *Sutton*, 527 U.S. at 482.

174. *LOVE*, *supra* note 1, at 424–28.

175. *Id.*

176. Adriamycin, among other drugs used in chemotherapy, may cause damage to the heart. *Id.* at 327.

177. *Id.* at 427–28.

178. *Id.* at 426–27.

179. Treatment for cancer may have some permanent effects. In breast cancer, for example, axillary node dissection (removal of lymph nodes) makes women subject to lymphedema, a swelling of the arm. *Id.* at 380. There are also recent suggestions that treatment for cancer can cause permanent fatigue. *Cancer Specialists Turn to Long-Ignored Side Effect: Fatigue*, N.Y. TIMES, Apr. 10, 1999, at A1.

180. *See, e.g.*, *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1360 (S.D. Fla. 1999).

181. *Id.* A cancer survivor may, in fact, be able to get time off from work for cancer treatment and recovery under the Family and Medical Leave Act. 29 U.S.C. §§ 2601–2619 (1994).

182. In *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), the court held that the plaintiff’s alcoholism was not a disability. Although the court conceded that the alcoholism might be permanent, there was no evidence of any substantially limiting impairment: “But where, as here, an alcoholic’s only proffered impairments are the primary result of temporary inebriation, such proof is insufficient.” *Id.* at 316 n.9.

experiencing fatigue one year after the end of chemotherapy or other treatment, is it then a permanent condition? A breast cancer survivor may develop lymphedema, a swelling of the arm caused by removal of the lymph nodes.<sup>183</sup> Lymphedema, which has an occurrence rate of about 10%, can be slight or severe, setting in immediately after surgery or years later.<sup>184</sup> Is this a temporary side effect of treatment for breast cancer or is it an impairment that is disabling and, if it waxes and wanes, is it permanent or temporary? The Court's approach in *Sutton* raised more questions than it answers.

#### D. SHORT-TERM SOLUTIONS

##### 1. *Per Se* Disabilities

Most courts that have considered the question have held that the ADA requires an individualized determination of whether a person is disabled.<sup>185</sup> A case-by-case determination seems to reflect the language of the statute with its focus on the individual<sup>186</sup> but creates great uncertainty for potential litigants.

One possible solution is to establish, by statute or regulation, per se disabilities.<sup>187</sup> We know that some impairments are usually disabling. Examples include AIDS, profound vision impairments, and profound hearing impairments. A per se approach might also include conditions that are per se not disabilities.<sup>188</sup> Examples of what are not disabilities could

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183. LOVE, *supra* note 1, at 380.

184. *Id.* at 381.

185. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484 (1999) (mandating individualized determination); *Burch*, 119 F.3d at 322–23 (rejecting alcoholism as a per se disability); *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59 (4th Cir. 1995) (holding that a finding of disability should be made on an individual basis); *Schwertfager*, 42 F. Supp. 2d at 1358–59 (holding even a life-threatening condition is not a per se disability). But see *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 776–77 (E.D. Tex. 1996) (holding that while some conditions are per se disabilities, others require a case-by-case approach).

186. In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court held that the ADA requires an individualized inquiry. The concurrence noted that “[s]ection 12102(2) states explicitly that the disability determination must be made ‘with respect to an individual.’ Were this not sufficiently clear, the Act goes on to provide that the ‘major life activities’ allegedly limited by an impairment must be those ‘of such individual.’” *Id.* at 657.

187. Cf. *Barger v. Owens-Brockway Glass Container, Inc.*, 1999 WL 51797, at \*3–\*5 (N.D. Cal. Feb. 1, 1999) (rejecting plaintiff's argument that cancer is a per se disability).

188. The statute or regulations could specifically include some disabilities and specifically exclude others. Those conditions not specifically excluded could be construed to be excluded by implication.

include trivial complaints such as an infected finger<sup>189</sup> and temporary disabilities such as a broken leg. It is unclear what others might be included.<sup>190</sup>

If a per se approach is adopted, we must determine on which side of the line cancer belongs. We know that cancer is not a trivial complaint; it is a serious and life-threatening disease. It is not temporary in the sense that a broken leg is, and it is sometimes treatable. It can, unlike a broken leg, however, have significant and long-lasting effects and it can recur. For cancer survivors and their employers, a per se approach would bring certainty,<sup>191</sup> because everyone would know that cancer survivors are members of the protected class. Cancer survivors would not have to worry about the court getting it wrong, or about the court focusing on the treatment rather than the disease. Yet this approach ignores that some cancers are not disabling and that some cancer survivors do not want to be labeled disabled, and it could conceivably serve to strengthen stereotypes about cancer. This approach, however, would eliminate the possibility that an employer could discharge someone because she has breast cancer and argue in court that although she is sick enough for the employer to want to remove her from the workforce, she is not sick enough to be considered disabled.

## 2. *Presumptive Disabilities*

If we want to continue making individualized determinations, another approach may be preferable. Congress could deem all life-threatening illnesses, including cancer, presumptively disabling.<sup>192</sup> If an employer wants to argue that cancer, for example, is not disabling in a particular case, it would bear the burden of rebutting the presumption. Questions concerning ability to perform the job would then be made for the purpose of ascertaining whether the individual was “otherwise qualified” rather than whether the plaintiff was a member of the protected class.<sup>193</sup>

This approach would make membership in the protected class of disabled individuals similar to membership in other protected classes. Title

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189. See H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

190. See, e.g., *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995); Karen Dill Danforth, *Reading Reasonableness Out of the ADA: Responding to Threats by Employees with Mental Illness Following Palmer*, 85 VA. L. REV. 661, 666 (1999).

191. Some state statutes provide that cancer is a disability. See, e.g., California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900, 12926(h) (West 2000).

192. *But see Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347 (S.D. Fla. 1999) (rejecting argument that cancer, a life-threatening illness, was a per se disability).

193. 42 U.S.C. § 12111(8) (1994).

VII does not define Hispanic, for example;<sup>194</sup> plaintiffs largely self-identify. If a person brings a discrimination suit under Title VII and alleges that she is Hispanic, the defendant can challenge this and argue that the plaintiff is not a member of the protected class. A presumptive rule has other distinct advantages. The focus would more properly be on the defendant's behavior rather than on the plaintiff's medical condition. If the ADA was passed, at least in part, to eliminate stereotypes, this prejudice is not dependent on a person's particular set of symptoms.<sup>195</sup> A presumption of disability would refocus attention on a person's qualifications rather than on misperceptions about present or future abilities.<sup>196</sup>

The presumptive approach would allow someone who felt she was disabled or perceived as disabled to bring a cause of action more easily. The statute could include a list of presumptively disabling conditions such as life-threatening illnesses. The law could include a presumption, for example, that persons with certain levels of uncorrectable vision and hearing, or whose primary means of locomotion is the use of a wheelchair, are disabled. Other health conditions would be covered but not presumptively. This would provide more certainty for at least those persons with conditions that are presumptively disabling.

This is, however, a band-aid approach. While it could result in a comprehensive list, it gets us no closer to answering the question of what it means to be disabled. As with a *per se* approach, it may also reinforce existing stereotypes about disability, and could even add a few new ones.

#### IV. RETHINKING DISABILITY

The current approach is not working. While tinkering with the statutory definitions by creating *per se* or presumptive disabilities would eliminate uncertainty, it would not resolve the underlying problem that our current definitions do not adequately capture what it means to be disabled. Our current approach does not work for breast cancer survivors (and for many others) for three interrelated reasons: 1) cancer does not fit the stereotypes that underlie our current definitions of disability; 2) the definitions mistakenly put an emphasis on function, but functional ability does not fully reflect what it means to be disabled; and 3) by putting our

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194. Title VII does not define race or national origin; the regulations broadly define national origin. *Supra* note 89.

195. Lanctot, *supra* note 123, at 337.

196. Blanck & Marti, *supra* note 98, at 359–60.

emphasis on functional ability, we have ignored the social construction of disability, even in the “regarded as” prong of the ADA.

Part of the problem in answering the question whether cancer is a disability under the ADA is that cancer does not, in many ways, fit the model of a disability envisioned by those who passed the Act. This is not surprising because cancer does not fall cleanly into society’s vision of a disability.<sup>197</sup> Our view of a disability is limited to those conditions which impair functioning. As one scholar has noted, “[i]n popular imagery disability continues to be perceived as being about specific impairments (such as blindness and paralysis) or forms of assistance and technologies (such as guide-dogs and wheelchairs).”<sup>198</sup> Moreover, this stereotype is reflected in the statute, the regulations, and Supreme Court decisions, all of which take an approach to disability that looks at an individual’s ability to function in order to determine whether she is disabled. Although some have argued that the ADA adopted a view of disability as largely socially constructed, as evidenced by the inclusion of the section protecting persons who are “regarded as” disabled, the regulations belie this.<sup>199</sup> In fact, the regulations equate disability with inability to function and do so by comparing how a person performs compared to the “average able-bodied person.”<sup>200</sup> The emphasis on ability to function appears in numerous sections of the regulations and is at the core of what “substantially limits” a “major life activity” means.<sup>201</sup> To determine whether there is a substantial limitation of a major life activity, the regulations provide that a person must be “[u]nable to perform a major life activity that the average person in the general population can perform” or “[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform.”<sup>202</sup> While ability to function may be one aspect of a disability for some people, it is not the only way we can define a disability. Equating the inability to function with a disability is a stereotype that underlies our thinking about disability and highlights the need to redirect our thinking.

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197. See MARKS, *supra* note 37, at ix.

198. *Id.*

199. See 29 C.F.R. §§ 1630.2(j), (m)–(o), 1630.9(d) (2000) (requiring comparison of functioning between a person claiming a disability and the “average person in the general population”).

200. See discussion *infra* Part IV.B.

201. See, e.g., 29 C.F.R. §§ 1630.2(j), (m)–(o), 1630.9(d) (2000).

202. 29 C.F.R. § 1630.2(j)(i)–(ii) (2000).

A. THE STEREOTYPES THAT UNDERLIE OUR THINKING AND THE  
SOCIAL CONSTRUCTION OF DISABILITY, OR  
WHY CANCER MAY NOT BE SEEN AS A DISABILITY

The problems with the Act's definition of disability are exacerbated by the fact that we try to fit many things into that definition—physical and mental conditions, such as blindness or learning disabilities, as well as diseases such as cancer. While either may be disabling, they are not the same. We are a society that views a disability or a disease as something that should be cured.<sup>203</sup> However, some people who are labeled as disabled would say that they do not wish to be cured,<sup>204</sup> that there is nothing wrong with them.<sup>205</sup> In contrast, someone with a disease, especially a disease like cancer, is hoping for a cure. We may also have difficulty understanding what it means to be “cured.” People who have not had cancer tend to view cancer as something you have, then you have surgery and treatment, and then it is gone. But a breast cancer survivor will tell you that she can never be sure that the cancer is gone, given that it can metastasize years after excision of a primary and apparently nonmetastatic tumor, and given that there currently is no cure for metastatic disease, only treatment.<sup>206</sup> Those who are “cured” cannot be certain of this, because there is no test that can determine, with complete accuracy, whether the cancer has spread. Cancer, unfortunately, does not come with an on/off switch. The law, however, views disability as an all-or-nothing proposition, rather than as a continuum.<sup>207</sup>

Generally, when we think of a disability, we think of some manifestation of an underlying condition. Someone who uses a wheelchair may have some underlying spinal cord injury or neurological disorder. Someone who is considered blind may have an ophthalmologic condition. The impairment is the underlying physical condition but there may also be some outward manifestation of this condition. Breast cancer, on the other hand, is hidden—the cancer is not seen although some of the side effects may be visible.<sup>208</sup> Someone with cancer does not necessarily fit the image of disability because there is no wheelchair, no seeing eye dog, no artifact

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203. See BICKENBACH, *supra* note 29, at 64–65 (discussing the medicalization of disability).

204. People who are deaf may not want to have their hearing “corrected.” See HIGGINS, *supra* note 7, at 238–40.

205. Eichhorn, *supra* note 6, at 1411.

206. See LOVE, *supra* note 1, at 486.

207. Crossley, *supra* note 49, at 667.

208. Visible side effects can include hair loss and loss of a breast without reconstruction or the wearing of a prosthesis.

of disability—no discernible accoutrements of an impairment that signal to the rest of the world that the person is disabled. Cancer survivors do not look “disabled.”

Cancer survivors may also fail to fit into the stereotype of disease. Under this view, cancer survivors have an illness and, therefore, should look sick. But cancer survivors may or may not look sick. People who do not look ill have a hard time convincing a court that they are, in fact, disabled. Because the effects of cancer are hidden, it is easy, although wrong, to think of cancer survivors as perfectly healthy.

Phyllis Ellison lost her case, at least in part, because she was not sick enough; she did not fit the court’s stereotypical view of disabled because she was functioning in another job. She therefore was denied the protections of the Act. She did not fit the stereotype of disease, moreover, because she did not look sick. She had cancer and experienced nausea and fatigue from radiation therapy, but the court noted that she was “back to normal”<sup>209</sup> in three or four months. By back to normal, the court meant normal functioning. But ability to function was not at the core of Ms. Ellison’s problems. While she might have been functioning normally, she was not back to “normal,”<sup>210</sup> even assuming that we can arrive at a definition of “normal.” Since her diagnosis of breast cancer, Phyllis Ellison probably has never been the same; the cancer follows her and shapes how she views the world and how people view her.<sup>211</sup>

In defining disability, we also fall prey to stereotypes about how people with disabilities should act. According to one commentator, society has two views of the disabled: poor cripples or cheerful overcomers.<sup>212</sup>

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209. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996).

210. As one breast cancer survivor put it: “Cancer has changed my body and my life.” ALICE CHANG, *A SURVIVOR’S GUIDE TO BREAST CANCER* 99 (2000). Other commentators elaborate: Normal is never what it used to be. You’ve got to face it, accept it, and work it through. You can’t go back. The only thing is to go forward, one step at a time. It’s time to move on, time to get on with the rest of your life. What choice do you have?”

WEISS & WEISS, *supra* note 40, at 3.

211. Even assuming the cancer did not return and that Ms. Ellison had no long-term physical effects from her breast cancer, cancer survivors, even those in remission, may have significant psychological issues with which to cope. These include feelings of isolation, separation, and the stress of dealing with a life-threatening illness. Marc A. Musick, Harold G. Koenig, Judith C. Hays & Harvey Jay Cohen, *Religious Activity and Depression Among Community-Dwelling Elderly Persons with Cancer: The Moderating Effect of Race*, 53B J. GERONTOLOGY S218, S218 (1998) (citing a 1991 study of women with breast cancer). Even cancer survivors in remission must deal with the uncertainty of prognosis. *Id.* See also WEISS & WEISS, *supra* note 40, at 3–12 (discussing returning to “normal” life).

212. Drimmer, *supra* note 31, at 1347–49. Another commentator notes that the term “super cripp” has been coined to note the exaggerated heroism attributed to some people with disabilities. Eichhorn, *supra* note 6, at 1416. The cheerful overcomer has also been called “Tiny Tim.” *Id.* at 1417.

People with disabilities can sink into their disability and be unable to work, unable to socialize, and be a marginalized outcast—a “poor cripple.” Alternatively, they can pretend they are not disabled, cheerfully overcoming obstacles and disdaining accommodations so that we do not notice that they are disabled—a “cheerful overcomer.” These present two very limited choices. For a breast cancer survivor, one “choice” is to be extremely ill with cancer and/or cancer treatment and be an outcast. In terms of our statutory emphasis on function, this means unable to perform or function like the “average able-bodied” person. As the other “choice,” a breast cancer survivor could pretend, at least to the rest of the world, that her cancer does not exist or has no negative physical or psychological consequences. These two views reflect the dichotomous picture that we have of cancer—either the person is severely ill, or is cured. For many cancer survivors, however, neither alternative reflects reality.

Phyllis Ellison did such a good job of cheerfully overcoming that she could not convince the court that her breast cancer was a disability. In the court’s view, in order to be disabled from breast cancer, survivors must fit into the first category, the helpless cripple. Because Phyllis Ellison did not fit the court’s stereotype of how a breast cancer survivor should behave, she must not really have cancer, i.e., she was cured. As evidence of her cure, the court noted that Ms. Ellison was functioning well in a different job. Phyllis Ellison was not fired—she was simply demoted. It may well be that the court believed that as long as Ms. Ellison was employed and earning a living, it did not matter that she was not at her job of choice.<sup>213</sup>

This suggests that the court believed, as many of us do, that any residual problems that Ms. Ellison might have would flow from the disability itself, not from any discrimination. Under this view, called the medical or biomedical model, the physical condition causes all the problems of someone who is disabled.<sup>214</sup> Thus, disabilities are a medical issue, not a civil rights or other legally redressable issue. The medical view has great appeal: The prestige of the medical field helped it gain

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213. The view that if you are disabled, it is acceptable if you are employed in *some* job, but not necessarily the job of your choice, has existed for quite some time. See Drimmer, *supra* note 31, at 1366–67 (arguing that Congress, in enacting the Randolph-Sheppard Vending Act of 1936 to provide special employment opportunities for blind persons, justified its view that “economic self-support was the paramount social consideration; so long as the individual with a disability was employed, it mattered not that the job was menial and without opportunity for promotion or use of skills”).

214. For a description of the biomedical model, see BICKENBACH, *supra* note 29, at 12. Two problems with the biomedical model are that it ignores the social construction of disability and that it contains an evaluative element thus making people with disabilities inferior to those without. *Id.* at 61–62.

credibility;<sup>215</sup> the alleged neutrality of doctors was seen as a safeguard against fraudulent claims of disability;<sup>216</sup> and it provides a level of certainty. Moreover, there is, for some, an intuitive appeal to the idea. For example, no matter how much we do to accommodate someone who is deaf, that person still is unable to hear and, accordingly, there is something “wrong” with that person.<sup>217</sup> Employers did not create the problem and, therefore, neither they nor the law nor any other social entity is responsible. When constructed this way, disability is a problem that lies within the person—something to be fixed or cured by that person or their physician. In this view, no one else is responsible for an environment that may make it more difficult for a person with a disability.<sup>218</sup>

What this approach ignores, and what the courts fail to consider, however, is how often an impairment is not the source of an employment problem. In the case of Phyllis Ellison, the problem lies in the employer’s *reaction* to her diagnosis and not in the condition itself. In other words, Ms. Ellison’s employment problems were constructed socially, precisely as numerous social theorists and other commentators have begun to argue.

We understand disability as a trait within individuals that limits them. Our focus is primarily the particular “flaw” that disables them. Recently, [some commentators] have emphasized that disability is a *social phenomenon*. It is not merely, not even primarily, an individual condition. Instead, disability develops out of the interaction among people with varying physical, emotional, and mental characteristics and their circumstances.<sup>219</sup>

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215. *Id.* at 63

216. *Id.* at 72.

217. *But see* Anthony Hogan, *Carving Out a Space To Act: Acquired Impairment and Contested Identity*, in *DISABILITY DISCOURSE*, *supra* note 7, at 79.

218. Moreover, the medical view may cause some nondisabled people to view people with disabilities as the objects of great misfortune and therefore deserving of pity and charity as opposed to human beings entitled to equal civil rights. BICKENBACH, *supra* note 29, at 61–62. Other theorists have developed the economic model for disability. *Id.* at 12–13. The economic model of disability, which started as a spin-off of the medical model, explicitly looks at a disability through level-of-functioning lenses. This model looks at the impact of the medical condition on society. *Id.* at 93–103. “What was required was an assessment of the individual’s capabilities with respect to those activities that are required of a member of a specified sector of the labour market.” *Id.* at 96. Under this view, the rationale for the disablement policy is distribution and reduction of costs imposed by people with disabilities. *Id.* at 101. Finally, other theorists suggest a civil rights model of disability. *See, e.g.*, Crossley, *supra* note 49, at 659. This model treats people with disabilities like members of other protected classes; rights for people with disabilities are seen as basic, civil rights. *Id.* at 659–60.

219. HIGGINS, *supra* note 7, at 25. *See also* BICKENBACH, *supra* note 29, at 135–37; LINTON, *supra* note 7, at 11 (arguing that the medicalization of disability makes disability a personal problem for the medical establishment to treat rather than “treating” social practices that disable people).

According to this construction of disability, many of the problems of people who are labeled disabled are caused by their interaction with society. The idea that disability is socially constructed puts great responsibility on able-bodied people, responsibility that they may not want to accept.<sup>220</sup>

An example of a socially constructed problem is a building without ramps. A person who, because of a physical impairment, cannot gain access to this building is disabled not by the impairment, but by the action of the architect who designed a building that is not wheelchair accessible. Put more broadly, the world is designed for able-bodied people. For a breast cancer survivor, this means that although she considers her cancer to be in remission, an employer who refuses to hire her may also do so based on an unsubstantiated fear that she will not be a productive worker.<sup>221</sup> The view that disabilities are largely socially constructed does not deny that there are physical limitations for some people with disabilities. It suggests that we may assume that the limitations are inherent in the physical condition when, in fact, many are imposed by the able-bodied world.<sup>222</sup>

The social construction of disabilities is much like the social construction of gender. There is nothing about being a woman that makes one less able to be an accountant, but an employer's social construction of an accountant as male may make it impossible for a woman to be an accountant, at least in that place of employment. It is this similarity to other kinds of discrimination that many courts, in addressing claims by cancer survivors, have missed. Numerous courts have not realized that many of the problems for people with disabilities are socially constructed. These courts have required that a plaintiff be really sick, significantly impaired, and unable to function at all in order to qualify as disabled.<sup>223</sup>

Cancer does not fit many of the stereotypes of disability—there are often no visible signs of a disabling condition and the breast cancer survivor does not look sick. Our society has limited roles for disabled people and cancer survivors may not fit readily into any of these roles. Finally, courts have failed to realize that many of the problems facing cancer survivors do not flow from the cancer itself but rather from the employers' reaction to the breast cancer, i.e., they are socially constructed.

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220. Sandy Slack, *I Am More Than My Wheels*, in *DISABILITY DISCOURSE*, *supra* note 7, at 28.

221. *See, e.g.*, WEISS & WEISS, *supra* note 40, at 416 (1998) (listing reasons why an employer may be reluctant to hire a breast cancer survivor).

222. *See* HIGGINS, *supra* note 7, at 16.

223. SILVERS ET AL., *supra* note 20, at 103.

All of these issues are compounded by the current definition of disability, which emphasizes ability to function.

## B. THE CURRENT FUNCTIONAL APPROACH IS DYSFUNCTIONAL

Although it is clear that we have taken a functional approach to defining disability, why we have done so is less clear. The ADA was, in large part, taken from the Rehabilitation Act of 1973, which took a functional approach.<sup>224</sup> It is unclear, however, why the functional approach was used in the Rehabilitation Act. The choice may have been influenced by stereotypes of a disabled person as so sick or so impaired as to be different from the “average” person and, accordingly, unable to function. It may have been a way to deal with fraud—if someone’s function is substantially limited, we can be assured that she is not faking or exaggerating her impairment. The statute simply may have equated disability with inability to function because our society is so accustomed to this approach that some may have thought there was no other way to frame a disability.

### 1. *The Problems with the Functional Approach*

By putting emphasis on the ability to function, the law places the definition of a disability completely within the person claiming to be disabled and negates the role of social construction. Therefore, others have no responsibility for creating the disability, only for making accommodations in the workplace. Moreover, limiting the protected class to those who are functionally disabled assures that reasonable accommodations will need to be made less frequently.

Defining disability in terms of functional ability has numerous other problems. In order to be disabled, a person must be at least partially unable to work, or only able to work with accommodation. Attention to ability to work may make sense when determining disability under a disability insurance plan or social security, but the ADA was enacted to protect people who are disabled but who can work.<sup>225</sup>

Defining disability as a level of functioning entails comparing the person claiming a disability against a pool of people made up of all able-bodied people. This causes problems because conclusions may be drawn

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224. See, e.g., Arlene Mayerson, *Title I—Employment Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 499, 502 (1991).

225. Gostin et al., *supra* note 101, at 8.

based both on stereotypes about what the average person can do as well as stereotypes about what the person who is disabled can and cannot do.<sup>226</sup> Such a definition suggests a resurrection of the hypothetical reasonable man in able-bodied clothing.<sup>227</sup>

Placing the emphasis on how a person with a disability functions compared to an able-bodied person focuses on the differences between the able-bodied and people with disabilities. It makes some of the world normal, and some of it abnormal.<sup>228</sup> The able-bodied are the norm, and those less so are some deviation from the norm. One writer has noted that “[w]e should . . . be wary of the effects on people with disabilities of the inflation in the importance of health as an end in itself. Like the compulsive pursuit of cosmetic beauty, this can only devalue the lives of those who will never be completely healthy, whole, or vigorous.”<sup>229</sup>

Is level of functioning really what distinguishes the “normals” from people with disabilities? While the functional approach may work well in some cases, it does not work at all in others. Yet the law has designated it as the exclusive way that it appraises disability. While a person who is obese may not have diminished functioning, we know from common, everyday experience that people who weigh twice what weight tables say they should weigh are the victims of discrimination.<sup>230</sup> Is such a person disabled? What about an extremely short person whose functioning is not affected? When I was diagnosed with breast cancer, I know people viewed me differently. It had nothing to do with my ability to work and nothing to do with my ability to function at other tasks—it had everything to do with the way people saw me as being at risk of dying, as somehow tainted by cancer, as being outside the norm.

What is needed is a change in perspective—disability should be approached from the point of view of people who experience it. If we assume for the moment that most of the problems encountered by people who are disabled are due to social construction, then changing the social construction of disability would make much of the disability disappear.<sup>231</sup>

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226. Slack, *supra* note 220, at 28.

227. The reasonable man was described as “the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves.” GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 23, 139 n.94 (1985) (quoting *Hall v. Brooklands Auto Racing Club*, 1 K.B. 205, 224 (1933) (Greer, L.J., quoting unnamed “American author”).

228. If you are blind, blindness is normal. See GEORGINA KLEEGER, SIGHT UNSEEN 4 (1999).

229. BICKENBACH, *supra* note 29, at 83.

230. See Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25 (1997) (exploring whether obesity should be considered a disability under the Americans with Disabilities Act).

231. See BICKENBACH, *supra* note 29, at 138–39.

Although a person would still be blind, still use a wheelchair, still be living with HIV or breast cancer, the disabling nature of the impairment would cease to exist.

If we change the social construction of disability, we change the behavior of people toward those seen as disabled. We do not change the physical condition of anyone now labeled disabled. While we cannot change the physical or mental condition, by changing the lens through which we view a person with a disability, we can assure that the disability does not become the defining characteristic of that person.<sup>232</sup>

The Court's functional approach to disability also reveals that the Court views disability as a static concept. A functional definition has little room for variance in condition. A functional approach, which determines whether someone is able to work at a specific point in time, cannot take a realistic view of many physical conditions that vary from month to month, week to week, day to day, hour to hour, or perhaps, moment to moment.<sup>233</sup> One such condition is rheumatoid arthritis, a degenerative autoimmune disease in which the immune system attacks the joints. Someone with rheumatoid arthritis may take medication to alleviate the symptoms, but the cessation of symptoms is not the same as cessation of disease. Moreover, the symptoms of disease may vary—some days the employee with rheumatoid arthritis can work, some days he or she cannot. In our society, a disability is something you have or do not have. There is no in-between. This view is arbitrary and based on social construction.<sup>234</sup> It is also a distorted view of many disabilities. While some disabilities such as hearing loss may be static, other disabilities are not.

## 2. *Asymptomatic Disease*

Both the existence of and the problems with the functional approach become apparent when we question whether asymptomatic disease is a disability. A person can have an impairment that is life threatening but that has little present effect on functional ability.<sup>235</sup> It is quite possible that someone who has a life-threatening health condition will be the victim of discrimination even though her ability to function may not, at that moment, be affected. Is this person disabled?

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232. Squier, *supra* note 51, at 144.

233. MARKS, *supra* note 37, at 124.

234. See Eichhorn, *supra* note 6, at 1410–12.

235. Crossley, *supra* note 49, at 701.

The question whether asymptomatic disease is disabling has arisen in both AIDS and cancer cases. Although at present, AIDS is a fatal and incurable disease, many who are HIV positive will not develop outward symptoms or degenerative effects for twelve years or more.<sup>236</sup> Because there are no outward manifestations of asymptomatic HIV, there was some disagreement in the federal courts as to whether it constituted a disability under the ADA.<sup>237</sup> In *Bragdon v. Abbott*, the Supreme Court held that asymptomatic HIV was a disability, although the Court had to stretch to fit it within the confines of its functional view of a disability.<sup>238</sup> The Court initially asked whether asymptomatic HIV was an impairment and held that HIV infection is a physical impairment from the moment of infection:

[I]nfection with HIV causes immediate abnormalities in a person's blood, and the infected person's white cell count continues to drop throughout the course of the disease, even when the attack is concentrated in the lymph nodes. In light of these facts, HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection.<sup>239</sup>

The Court then considered whether asymptomatic HIV substantially limits a major life activity. Although not included in the regulations as an example of a major life activity,<sup>240</sup> Sydney Abbott, the plaintiff in *Bragdon*, argued that asymptomatic HIV substantially limited her major life activity of reproduction. The Court held that reproduction was a major life activity.<sup>241</sup> Although reproduction was possible, the Court noted that being infected with HIV substantially limited the plaintiff's ability to reproduce in two ways: Her sexual partner was put at risk, and a child would also be at risk.<sup>242</sup> Accordingly, the plaintiff could not function, in a reproductive capacity, like the "average" person without HIV.

By arguing that her reproductive functioning was substantially limited, the plaintiff in *Bragdon* molded her asymptomatic condition into the functional approach. While this tactic was successful for this plaintiff, it is

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236. Elizabeth C. Chambers, Note, *Asymptomatic HIV as a Disability Under the Americans with Disabilities Act*, 73 WASH. L. REV. 403, 403 (1998). HIV infection is regarded as AIDS when blood counts reach a medically defined point. See *Bragdon v. Abbott*, 524 U.S. 624, 633 (1998).

237. Compare *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 167-74 (4th Cir. 1997) (holding asymptomatic AIDS is not a disability), with *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1084 (W.D. Wis. 1998) (holding asymptomatic AIDS may be a disability).

238. *Bragdon*, 524 U.S. at 631-42.

239. *Id.* at 637.

240. See 29 C.F.R. § 1630.2(i) (2000).

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

242. *Id.* at 639-40.

not clear that the Court will always find that reproduction is a major life activity that is substantially limited in other HIV cases. *Bragdon* does not answer the question whether HIV would be disabling for someone who was not going to reproduce, such as a postmenopausal woman, or for a child who was not going to reproduce for many years.

It was unlikely in *Bragdon* that the Court would find that an invariably fatal disease was not a disability. The Court stretched to fit asymptomatic HIV within its functional approach. Yet if one asks oneself why one would not want to have AIDS, the answer probably has more to do with the incurable nature of the disease and the stigma associated with it. Thus, the use of reproductive capacity seems disingenuous at best and fails to capture what truly is disabling about HIV/AIDS. However, the approach is understandable, given the definitions of the ADA. Although Sidney Abbott was going to die, she still had to fit her problem into the functional ability standard of the statute. She had to come up with a major life activity and she chose reproduction. What really was substantially limited for Sidney Abbott was the major life activity of staying alive. But, being alive is not on the list of major life activities and does not fall into a category of functioning.

The problem with the functional approach is also highlighted when we try to apply *Bragdon* to cases involving cancer. We know from *Bragdon* that, in theory, a disability need not have any outward manifestations;<sup>243</sup> a person may be disabled as long as something is happening inside the body at a cellular level. This rationale supports the argument that cancer survivors are disabled.<sup>244</sup> However, cancer survivors still have to characterize their cancer as an impaired level of functioning, which is problematic.

Using *Bragdon*, cancer survivors can argue that their diagnosis affects the major life activity of reproduction. A diagnosis of breast cancer may

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243. *See id.*, at 632–37. From a public health standpoint, the lack of symptoms should be unimportant to a finding of disability. According to this argument, we are better off finding out about AIDS in the early stages. By legally protecting persons with early stage or asymptomatic HIV, we may encourage early detection. This same argument holds true for cancer survivors. We want to encourage early detection and protecting people from discrimination may help somewhat in that effort.

244. Parmet, *supra* note 151, at 236 (arguing that the holding in *Bragdon* may be used by cancer survivors because “[j]ust because someone with cancer may look well and be able to appear at work does not mean that she does not have a disability”). *See also* Joanne L. Wisner, Note, *Asymptomatic HIV Disease as a Disability Under the Americans With Disabilities Act: A Contrast Between Bragdon v. Abbott and Runnebaum v. NationsBank of Maryland*, 33 NEW ENG. L. REV. 217, 261 (1998) (arguing that *Bragdon* may be used by persons with cancer in remission, controlled epilepsy, Huntington’s disease, and diabetes).

affect a woman's decision regarding pregnancy.<sup>245</sup> For a long time, the common wisdom has been that breast cancer survivors should not become pregnant because many breast cancers thrive on estrogen, a hormone in abundance during pregnancy.<sup>246</sup> Furthermore, women with cancer may chose not to reproduce out of fear that they may not survive to see their children grow up.<sup>247</sup>

In addition, the plaintiff in *Bragdon* argued that HIV restricted sexual intimacy.<sup>248</sup> Again, an analogy may be made for breast cancer survivors because sexual relations may become an issue. On a physical level, surgical treatment for breast cancer can cause a lack of sensation in the breast area.<sup>249</sup> In addition, treatment may cause premature menopause.<sup>250</sup> Finally, a woman may feel uncomfortable about the way her body looks and feels after treatment for breast cancer, causing some level of discomfort regarding sexual intimacy.<sup>251</sup>

On the other hand, because of the differences between HIV and cancer, *Bragdon* may not help cancer survivors fit within the Act's definitions. Although asymptomatic HIV<sup>252</sup> and cancer<sup>253</sup> might both be treated as chronic illnesses, perhaps the most significant distinction between HIV and cancer is that HIV, when it turns into AIDS, is invariably

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245. Patricia Ganz, M.D., *Advocating for the Woman with Breast Cancer*, 45 CAL. CANCER J. FOR CLINICIANS 114, 121 (1995).

246. See LOVE, *supra* note 1, at 464 (discussing general risks of pregnancy with cancer). See also WEISS & WEISS, *supra* note 40, at 231 (discussing drug therapies that cannot be used while a woman is trying to become pregnant).

247. Reproduction does not have to be impossible for women with life-threatening illnesses in order to qualify as a substantial impairment. See *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) (explaining that HIV does not necessarily preclude a woman from conception and childbirth, but it substantially limits her option to reproduce).

248. *Id.* at 638 (noting the sexual dynamics surrounding reproduction are central to the life process itself).

249. See LOVE, *supra* note 1, at 460-64.

250. *Id.* at 462. Premature menopause may, in turn, result in changes in feelings about sexual relations. WEISS & WEISS, *supra* note 40, at 157.

251. LOVE, *supra* note 1, at 462. See also WEISS & WEISS, *supra* note 40, at 153; ZUCKWEILER, *supra* note 43, at 175.

252. See Daniel Callahan, *Transforming Mortality: Technology and the Allocation of Resources*, 65 S. CAL. L. REV. 205, 213-15 (1991) (discussing the change in AIDS from acute to chronic illness); Linda Fentimen, *AIDS as a Chronic Illness: A Cautionary Tale for the End of the Twentieth Century*, 61 ALB. L. REV. 989, 990 (1998). But see Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7 (1997) (exploring the legal ramifications of viewing HIV as a chronic as opposed to an acute illness).

253. See CHANG, *supra* note 210, at 135 (addressing breast cancer as a chronic illness); LOVE, *supra* note 1, at 271 (arguing that breast cancer can be seen as similar to chronic conditions such as high blood pressure or diabetes).

fatal.<sup>254</sup> This is not true of cancer. In addition, if there is no trace of the cancer left after treatment, the person may be considered “NED” (“no evidence of disease”). No evidence of disease is not the same, however, as no disease. Thus, another major difference between AIDS and cancer is that while we know when someone has AIDS, we may be unsure whether someone has cancer. Once the cancer has been surgically removed and all adjuvant treatment administered,<sup>255</sup> we assume that the person does not still have cancer. However, this is a medical uncertainty. Breast cancer is generally a slow-growing cancer. A woman could have a lumpectomy and radiation, only to have the breast cancer return either locally or in another part of her body. The cancer can spread to other parts of the body and not be detected for up to twenty years.<sup>256</sup> A breast cancer survivor may die before the person with AIDS, or she may outlive the person with AIDS. The only way to know for sure that a woman is not going to die of breast cancer is if she dies of something else.<sup>257</sup>

In most cases brought by cancer patients, the patient’s prognosis has not been discussed by the court.<sup>258</sup> Focusing on the long-term prospects for the cancer survivor is not suggested because statistics may not be relevant in a particular case. Even though we know, for example, that 20% of women with a particular type of breast cancer will die of the disease within five years, we are unable to predict whether any particular person is within that group.

As in *Bragdon*, it seems disingenuous to focus on a breast cancer survivor’s ability to function in a reproductive capacity. Losing one’s ability to reproduce is probably not what women fear most about breast cancer.<sup>259</sup> Women fear losing a breast and the resulting disfigurement.

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254. HIV infection wears down the immune system and almost invariably turns into AIDS. HIV is considered AIDS when HIV-infected people have fewer than 200 CD4+ T cells and one of twenty-six clinical conditions, usually an opportunistic infection. See JAMA HIV/AIDS Information Center, at <http://www.ama-assn.org/special/hiv/treatment/guide/rr4813/rr4813a1.htm> (Dec. 10, 1999). While treatment for HIV infection may now greatly reduce symptoms for some patients and slow down the progression of the disease, it is not a cure. Moreover, we still do not know if these drugs will continue to be effective or whether the virus will become drug resistant. See generally Parmet, *supra* note 151 (discussing the problems of the “new social construction of HIV”).

255. Adjuvant treatment is treatment in conjunction with surgery, such as drugs or radiation, used to treat cancer. LOVE, *supra* note 1, at 603.

256. *Id.* at 271.

257. See *id.*

258. See, e.g., *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 189 (5th Cir. 1996) (holding that the plaintiff’s breast cancer was not a disability); *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1327 (S.D. Fla. 1999) (same).

259. Infertility may, however, be a dreaded side effect. See WEISS & WEISS, *supra* note 40, at 229.

Women fear that they will die of breast cancer. When we react to someone who has had breast cancer, these same fears are in our minds—that the woman may be disfigured and that she may die. These are the reasons, along with fears that she will need time off from work and have reduced productivity, that she is not hired, even though they have nothing to do with her actual functioning. But if we try to fit breast cancer into our current scheme, we have to link it to some major life activity and some level of functioning. This requires an artificial approach to the question of what is a disability, an approach which fails to assess what is really disabling about breast cancer.

### C. LONG-TERM SOLUTIONS

Congress and the courts have been so worried about trying to prevent undeserving people from seeking the protections of the ADA that all of their time, energy, and attention has been focused on ferreting out fraud. Congress and the courts have lost sight of what the law was intended to accomplish in the first place. I contend that the Americans with Disabilities Act was intended to do much the same as the Civil Rights Act of 1964. It was intended to lessen the economic difference between being able-bodied and being disabled.<sup>260</sup> It was intended to provide a relatively equal playing field to people seen as disabled. It is trying to combat the stereotyping of people seen as disabled. But these goals have been thwarted by of a narrow vision of what it means to be disabled, a vision that does not adequately reflect the reality of the lives of many people with disabilities. Congress went to great lengths to keep people from misusing the statute. But it did not focus adequately on what it means to be disabled or on whether the functional approach to disability is the right one. The ability to function—to hear or see—certainly has value. But how much? Is it truly what distinguishes “normals” from people with disabilities?

One is disabled if one is seen as disadvantaged regardless of how much success one achieves.<sup>261</sup> This is the heart of the difference between someone seen as disabled and someone seen as able-bodied. There is little that we as a society can do to deal with someone’s impairment. But we can ensure that we do not disable the person with an impairment. If most aspects of a disability are socially constructed, then the law needs to address the social construction of disability head-on. This leads me to two proposals for long-term solutions to defining a disability. First, we should

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260. See 42 U.S.C. § 12101(a)–(b) (1994).

261. SILVERS ET AL., *supra* note 20, at 54.

do away with the distinction between “actual” disabilities (the first prong of the ADA’s definition) and “regarded as” disabilities (the third prong). Second, we need to rethink the definition of disability and look at something other than functioning. I propose that we define a disability to be any physical impairment<sup>262</sup> that is associated with stigma.<sup>263</sup>

1. *Eliminating the Distinctions Between “Actual” and “Regarded As” Disabilities*

If we accept the premise that most of the difficulties experienced by people with disabilities are socially constructed, the distinction between a “real” disability and a “perceived” disability breaks down. If disability is socially constructed, then disability is no more “real” than it is “perceived.” Disability is the result of people’s reactions to someone’s health condition, whether that health condition actually exists or exists only in the mind of the beholder.

Eliminating the distinction between “real” and “perceived” would make discrimination on the basis of a disability more analogous to discrimination on the basis of race or gender. People discriminate on the basis of race not because there is anything wrong with the victim but rather because of something going on in the mind of the discriminator. We do not talk in terms of “real” racial discrimination versus “perceived” racial discrimination. Someone is discriminated against on the basis of race if she is treated differently because of race—it does not matter whether the victim is actually that race or whether the discriminator mistakenly believed that

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262. I leave for another article or for other authors, the problems of defining mental impairment.

263. At least one other commentator, in writing about the problems of disability, has suggested the connection between disability and stigma. See Bagenstos, *supra* note 143. However, we take different approaches to this definitional problem. Professor Bagenstos argues that the problem with the definition of disability contained in the Act is that disability is defined ambiguously. *Id.* at 406. I, however, take the position that the problem is not so much that the definition is ambiguous but that it has, as its core, an emphasis on functional ability due to stereotypes about what it means to be disabled. Because he believes that the definition is ambiguous, Professor Bagenstos would maintain the current definitions and “develop a mediating principle that will give content to the statutory definition.” *Id.* at 417. The mediating principle suggested is that the definition of a disability “should embrace those actual, past and perceived impairments that subject people to systematic disadvantage in society.” *Id.* at 445. I would not retain the current statutory and regulatory definitions but would replace them. See *infra* text accompanying notes 264–69. Moreover, the approach taken by Professor Bagenstos maintains the distinction between “actual” and “perceived” disabilities, which I believe should be eliminated. See *infra* text accompanying note 264. It is my position that the statutory changes are necessary not only to achieve the goal of remedying discrimination against people with disabilities but also to send a clear message that disability is, to a large extent, socially constructed, and that the ADA stands on the same legal basis as other antidiscrimination statutes. People with disabilities should not be singled out for differential treatment, especially in the statute prohibiting such treatment.

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the victim was a particular race. Both are instances of racial discrimination and no distinction is made between “real” or “perceived.” If an employer refuses to hire an applicant thinking that the applicant is African-American, that person has a claim under Title VII even if the employer was mistaken in its belief about the race of the applicant. If no distinction exists between “real” and “perceived” cases of discrimination in race claims, there is no need for it in disability-based claims.<sup>264</sup>

If the distinction between “real” and “perceived” disabilities were eliminated, and an employer refused to hire someone because that person was a paraplegic but was otherwise qualified for the job, that person would have been discriminated against on the basis of a disability. Similarly, if an employer refused to hire someone because it mistakenly believed that the applicant had AIDS when, in fact, the applicant did not have AIDS, that person also would have been discriminated against on the basis of a disability.

When we recognize that we are concerned with what is going on in the employer’s mind, the difference between real and perceived becomes artificial. We would then only have to deal with any limitations imposed by the impairment when it came time to decide 1) if the person was “otherwise qualified,” and 2) in determining what, if any, reasonable accommodation was needed. By eliminating the current distinction between “real” and “regarded as” disabilities, the law would acknowledge that most of the problems for people with impairments are socially constructed.

## 2. *Redefining Disability*

The current definition of a disability is not working. It puts the emphasis in the wrong place, it is under-inclusive, and it is not achieving the intended goals. Rather than devote time and energy to people who might try to misuse the statute, the law should focus on assuring that those whom the statute was designed to protect are actually protected, and that the actions that the statute was designed to prohibit are, in fact, prohibited.

One possible solution to this problem would be to do away with any definition of a disability. This has much to recommend it, including ease of application. This is what happens, *de facto*, in most Title VII cases.

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264. There may be a meaningful distinction between real and perceived disabilities when it comes to reasonable accommodations. A real disability will need one; someone who is disabled only in the mind of the employer will not. This distinction does not need to be drawn, however, to establish membership in the protected class.

Plaintiffs are not asked for any evidence proving that they are members of the protected class; Title VII does not define race and the EEOC regulations broadly define national origin. If a similar approach were adopted in disability-based discrimination, anyone claiming to be disabled would be protected from employment discrimination on that basis. This non-definition, however, would be over-inclusive. It could cover the situation in which an employer refuses to hire people with blue eyes based on an irrational belief that people with blue eyes are inferior workers compared to people who have eyes of another color. We might choose not to cover this situation on the grounds that it does not really capture what it means to be disabled.

Another possible solution would be to define a disability as including, but not limited to, any physical impairment that is stigmatized.<sup>265</sup> By stigmatized, I mean discredited,<sup>266</sup> being held to a lower standard, being the subject of negative assumptions, and being viewed as if one's identity is somehow spoiled or tainted.<sup>267</sup> As one commentator has noted, "By definition . . . we believe that the person with a stigma is not quite human.' The relationship between stigma and inequality is also clear: while not all inequalities stigmatize, the essence of any stigma lies in the fact that the affected individual is regarded as an unequal in some respect."<sup>268</sup>

By redefining a disability to be a physical impairment associated with stigma, the law acknowledges what is disabling about an impairment. This definition is relatively simple to apply and serves congressional intent.<sup>269</sup>

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265. See generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 41-43 (1963).

266. Goffman distinguishes between stigma that is discrediting and stigma that is discreditable. Stigma that is discrediting is associated with a condition that is known, that is evident. Discreditable stigma is when it is associated with a circumstance that is not evident but stigma would attach if the circumstance were known. *Id.* at 4, 42. Physical disability could fall into either category. Being a paraplegic would be associated with a stigma that is discrediting while having cancer is associated with a stigma that is discreditable.

267. Defining a disability in this way is not, however, a perfect solution. Some rare conditions may not be associated with any particular stigma, thus, proving stigma could be difficult or impossible. This concern could be addressed, however, by retaining the present definitions as alternative ones for those rare conditions.

268. Kenneth Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under The Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977) (quoting GOFFMAN, *supra* note 265, at 5) (alteration in original).

269. See 42 U.S.C. § 12101 (1994) (findings and purpose of the ADA). For example, Congress found that "society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." § 12101(a)(1). Moreover, "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self sufficiency." § 12101(a)(8). The purposes of the Act include providing a "clear and

For example, if an applicant is not hired and alleges that it is because she uses a wheelchair, the question is: Did the employer discriminate on the basis of a disability? The only question to answer regarding whether it is a disability is whether the person was treated differently because of a physical impairment that is stigmatized. It no longer matters, for membership in the protected class, whether the plaintiff actually uses a wheelchair or the employer mistakenly believes that she does. Similarly, if an applicant is not hired and alleges it is because she is a breast cancer survivor, we do not have to look at her prognosis, how “sick” we think she should be from her treatment, or how well she functions. The key element in determining whether someone is a member of the protected class is whether the impairment is the object of stigma.<sup>270</sup> We would only ask if breast cancer is an impairment associated with stigma and if the plaintiff was treated differently because of her breast cancer. If the answers are both yes, and the plaintiff is otherwise qualified, she could prevail. Instead of emphasizing the ability to function, attention is turned to the social construction of disability. This new definition shifts the focus from whether the plaintiff belongs in a protected class—asking whether he or she is sick enough, is faking, or is deserving enough—to what we can do to stop disabling people.

This definition would also eliminate from protection those minor or other complaints that we would not want protected or defined as a disability. If an employer decided that it did not want to hire people with blue eyes because it believed that people with blue eyes are sick more often than people with other eye colors, this would not be prohibited by the statute because having blue eyes is not associated with stigma. On the other hand, breast cancer survivors would be protected. People with AIDS and many other life-threatening diseases would be protected regardless of the applicant or employee’s level of functioning at the moment. We would

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comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and providing “clear, strong, consistent, enforceable standards addressing discrimination.” § 12101(b)(1).

270. There are various definitions of stigma. The most frequently cited in legal periodicals appears to be that of Goffman, *supra* note 265, at 3. Goffman defines “stigma” as “an attribute that is deeply discrediting.” *Id.* Stigma can arise from different sources, such as “abominations of the body,” i.e., physical deformities, “blemishes of individual character,” and “tribal stigma of race, nation, and religion.” *Id.* at 4. See also Lawrence Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public’s Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 92 (1999) (“A person who feels stigmatized shares others’ negative view of his condition to some degree.”). For an interesting discussion of stigma in another context, see Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027, 2038–40 (1998) (discussing the stigmatic effects of student performance measures at Harvard Law School).

look at the health condition in general, and at what limitations we as a society impose on a person with that health condition, instead of at the health of that person at that particular moment. The question of stigma would be proven by the plaintiff with expert testimony or statistical evidence. The plaintiff would not have to prove that she was the victim of stigma, just that her physical impairment is associated with stigma.

## V. CONCLUSIONS

While it may be hard to imagine a disease you would be more afraid of having than cancer, cancer survivors not only face a life threatening disease, but also may face employment discrimination. Although legislative history suggests that Congress was concerned about cancer survivors, cancer survivors have had a difficult time establishing that they are entitled to the protections of the ADA.

The problems cancer survivors encounter when they seek protection from discrimination is caused by both the ADA's definitions and courts' interpretation of those terms. Cancer survivors who seek redress for discrimination must first prove membership in the protected class, which has been a significant barrier. Although Title VII does not define race or gender, the ADA does define disability. This difference in treatment may well be due to stereotypes and misperceptions about people with disabilities. The difficulty cancer survivors face in trying to prove membership in the protected class is compounded by the narrow interpretation given to the statute and regulations by the courts. Accordingly, if a breast cancer survivor, despite a life-threatening illness, cannot prove that she is a member of the protected class, she will find herself too sick to be hired but not sick enough to be disabled.

In attempting to address employment discrimination against people with disabilities, the statute and the courts have made two mistakes. First, the law has failed fully to acknowledge the extent of the social construction of disability. While the statute gives a nod to this by including the "regarded as" prong, its distinction between "real" and "regarded as" disabilities eviscerates the inclusion. By distinguishing between "real" and "perceived" disabilities, the statute suggests that some disabilities are socially constructed and some are not. Moreover, the narrow interpretation given to the "regarded as" prong by courts has weakened whatever protections were to be afforded to people with "perceived" disabilities. We should eliminate the statutory distinctions between "real" and "regarded as" disabilities for purposes of membership in the protected class.

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Second, the statute, the regulations and the courts have taken a functional approach to the definition of a disability. One is disabled if one does not function like the average person. One is not disabled if one can function like the average person. This functional definition assumes that all problems in the workplace flow from the impairment and thus ignores the possibility that people are disabled by the reactions of society to their impairments. Among other problems with this approach, it fails to address the problems of many people who have serious and life threatening illnesses but are currently functioning as well as any other member of society.

We need to redefine “disability,” and there are various approaches we could take. We could eliminate all definitions and let people self-identify. We could have per se or presumptive disabilities. Both of these approaches would bring more certainty to both employees and employers, but establishing a class of per se or presumptive disabilities might create more stereotypes about the disabled. Alternatively, we could redefine disability as an impairment that is associated with stigma. If a breast cancer survivor, in remission, alleged that she was disabled, it would then be irrelevant whether she is ill from the breast cancer or treatment or whether the employer thinks that she is ill. The plaintiff would attempt to prove that breast cancer is an impairment that is associated with stigma. If she succeeded, she would belong in the protected class.

No matter how the law is changed, a deaf person will still be deaf and I will still be a breast cancer survivor. But the law can change how people are treated in the workplace and can acknowledge the role we play in the making of disability. Although the law cannot change someone’s impairment, it can help stop disabling people.

